

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American
Judges Association

American Judges Association

2018

Court Review 54:4 (2018)- Whole Issue

Follow this and additional works at: <https://digitalcommons.unl.edu/ajacourtreview>

"Court Review 54:4 (2018)- Whole Issue" (2018). *Court Review: The Journal of the American Judges Association*. 656.

<https://digitalcommons.unl.edu/ajacourtreview/656>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Court Review

Volume 54, Issue 4

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

T A B L E O F C O N T E N T S

EDITORS

Professor Eve Brank
University of Nebraska

Judge Julie Kunce Field
Colorado State District Court

Judge Devin Odell
Colorado State District Court

Judge David Prince
Colorado State District Court

MANAGING EDITOR

Charles F. Campbell
National Center for State Courts

GUEST ISSUE EDITOR

Judge Steve Leben
Kansas Court of Appeals

EDITORIAL BOARD

Kelly Lynn Anders
Kansas City, Missouri

Chief Judge Karen Arnold-Burger
Kansas Court of Appeals

Pamela Casey, Ph.D.
National Center for State Courts

Judge B. Michael Dann
National Institute of Justice

Judge Julie Kunce Field
Fort Collins, Colorado

Judge John Irwin
Nebraska Court of Appeals

Judge Leslie G. Johnson
American Institute for Justice

Steven Lubet
Northwestern University

Judge Gregory E. Mize
Washington, D.C.

Elizabeth Neeley, Ph.D.
University of Nebraska

David Rottman, Ph.D.
National Center for State Courts

Professor Alan Tomkins
University of Nebraska

ARTICLES

- 162** A Term in Turmoil: Select Criminal Cases from the 2017-18 Supreme Court Term

Juliana DeVries

- 168** Moving from Class to Chambers: Five Tips for Training New Clerks to Write for You

Sara B. Warf

- 172** Understanding Public Trust in the Courts: The Centrality of Vulnerability

Joseph A. Hamm

- 176** Decisions of the Supreme Court of Canada in Criminal Matters: January 1 to October 31, 2018

Wayne K. Gorman

ESSAYS

- 152** Helping Judges Look Before They Leap: Judicial Ethics Advisory Committees

Cynthia Gray

- 156** When Justice Behaves Unjustly: Addressing Sexual Harassment in the Judiciary

Jaime A. Santos

DEPARTMENTS

- 150** Editor's Note

- 151** President's Column

- 187** Crossword

- 188** The Resource Page

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
Volume 54, Issue 4

2019

EDITOR'S NOTE

This issue brings our annual review of recent criminal decisions of the United States Supreme Court. We're in a time of transition there. After doing the summaries for us for the past decade, Berkeley Law Prof. Chuck Weisselberg let us know that he would need to prioritize other projects going forward. Starting next year, we've signed up Michigan Law Prof. Eve Brensike Primus to take over the task. We're excited to have her; she is a coauthor for one of the leading criminal-procedure casebooks. But we were too late in asking to get her on board for this year.

Fortunately, Chuck Weisselberg was able to suggest someone who could provide an excellent review of the recent cases for us this year—Juliana DeVries, who works full-time as a federal appellate defender and who formerly served as a law clerk on the Ninth Circuit. She's on top of these cases as part of her work, and she has done a great job of covering the cases of most interest to state-court judges. She also highlights the key cases on tap for the current Term.

We're pleased that Canadian judge Wayne Gorman, who writes a regular column for us on Canadian law, has expanded his submission for this issue to provide a parallel review of recent criminal decisions of the Supreme Court of Canada.

The remainder of our issue covers several different topics of interest to judges:

- Prof. Sara Warf teaches legal writing at the University of North Carolina law school, and one of her courses prepares students for judicial clerkships. In working with current and former UNC law students, she has found that common problems can arise when students start writing for judges. She gives five tips for how judges can best train new law clerks to write for us.
- Prof. Joseph Hamm works on issues of public trust in courts, law enforcement, and other governmental entities. He tells us about the expanding view academics have about what goes into creating greater public trust, as well as what that might mean for judges in their daily work.
- Cynthia Gray, director of the Center for Judicial Ethics, writes for us now twice a year on current judicial-ethics topics. In this issue, she explains how the use of a judicial ethics advisory committee may keep you out of trouble. And she summarizes recent advisory opinions from around the United States that may be of interest.
- Attorney and former judicial law clerk Jaime Santos helped found a group (Law Clerks for Workplace Accountability) and testified before the United States Senate Judiciary Committee on recent issues involving sexual harassment of court staff. We asked her to write an essay for us that would familiarize judges with the issues being raised, suggest some possible steps to address those issues, and provide links to additional resources for those who would like to go further.

As always, we hope you enjoy the issue. If you have comments or suggestions, please write to Editors@CourtReview.org—SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 161 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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

The cover photo is the Santa Barbara County Courthouse in Santa Barbara, California. The courthouse, still in use, opened in 1929 and is listed as a National Historic Landmark. Cover photo by Lauren Clark Rad.

©2019, American Judges Association, printed in the United States. *Court Review* is published quarterly by the American Judges Association (AJA). AJA members receive a subscription to *Court Review*. Non-member subscriptions are available for \$35 per volume (four issues per volume). Subscriptions are terminable at the end of any volume upon notice given to the publisher. Prices are subject to change without notice. Second-class postage paid at Williamsburg, Virginia, and additional mailing offices. Address all correspondence about subscriptions, undeliverable copies, and change of address to Association Services, National Center for State Courts, Williamsburg, Virginia 23185-4147. Points of view or opinions expressed in *Court Review* are those of the authors and do not necessarily represent the positions of the National Center for State Courts or the American Judges Association. ISSN: 0011-0647.

Cite as: 54 Ct. Rev. ____ (2019).

President's Column

Robert J. Torres, Jr.

Hafa adai (greetings) colleagues and *Court Review* readers!

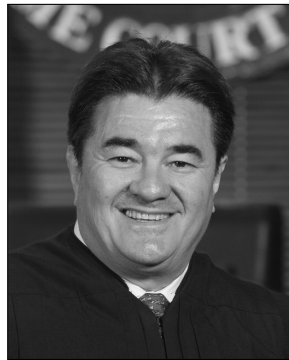
In this column, we celebrate Justice Sandra Day O'Connor, who was the first woman to serve on the United States Supreme Court after President Ronald Reagan nominated her in 1981. Often inhabiting the ideological center, O'Connor cast pivotal votes on controversial issues, was referred to in a 2001 *New York Times* article by Jeffrey Rosen "as the most powerful woman in America," and was awarded the highest civilian honor in the United States, the Presidential Medal of Freedom, by President Barack Obama in 2009. Sandra Day O'Connor, according to Chief Justice John Roberts, is "a towering figure in the history of the United States and indeed the world [and] is a role model not only for girls and women but for all those committed to equal justice under law."

Last fall, in a letter released by the Supreme Court's public information office, Justice O'Connor revealed that she was stepping away from the public life because she is at the beginning stages of dementia. Instead of simply disclosing her decision, she used the occasion to urge citizens to increase their commitment to civics education—a cause in which she strongly believes and has spent numerous years and unwavering energy to promote and sustain. In her letter, she explained how she saw firsthand the need for citizens to understand the Constitution and the nation's unique system of government because together, we can work within our communities to solve problems, learn from what has served us best over time, and work for the common good to hold our governmental institutions accountable.

Justice O'Connor founded iCivics, an online educational classroom that reimagines civics to cultivate a new generation of students for thoughtful and active citizenship. Aimed to expand the reach of civics education to every student in America by 2021, iCivics helps young people to "grow more informed, more curious, and more engaged in civic life." Justice O'Connor believes that "the practice of democracy is not passed down through the gene pool. It must be taught and learned anew by each generation of citizens." More information about iCivics can be found at <https://www.icivics.org/>.

Inspired by Justice O'Connor, more than a decade ago I ini-

tiated a program at the Judiciary of Guam centered around Law Day to promote a better understanding of law and civics. We engage students and the public through thought-provoking resources and learning experiences to broaden understanding of law and government. The program has been nationally recognized by the American Bar Association with the Law Day Outstanding Activity Award in 2008, 2009, 2012, 2015, 2016, and 2018. This program has seen enormous success in participation from the elementary school level all the way up to high school, and it continues to help students become effective citizens and leaders.



In line with Justice O'Connor's mission to create a nationwide civics education program, I urge each of you to make a commitment to civic learning and civic engagement. A mission of the American Judges Association is to "provide a forum for the continuing education of its members and the general public." As judicial officers, we can honor Justice O'Connor's lifelong mission to champion civics education within our own communities by creating and encouraging programs like iCivics. As Justice O'Connor aptly stated, "If we want our democracy to thrive, we must commit to educating our youth about civics and to helping young people understand their crucial role as informed, active citizens in their communities and in our nation." She challenges each of us to do something—do something in our communities to capture the interest of our youth and to help them learn about and appreciate civics and how our laws and government work. There are important lessons that we can learn as a community through increased civics education, and we can honor Justice O'Connor's vision by educating future generations of students to be active participants in their communities. Justice O'Connor believes that "civic knowledge is a prerequisite for civic participation," and with increased civic participation, our communities can be more informed, thrive for the good of all, and work toward a better world for this and future generations.

Among all her accomplishments, Justice O'Connor considered engaging the next generations of citizens to be her most important work and her legacy. Let us honor her by inspiring kids to want to stay involved in making a difference.

Helping Judges Look Before They Leap:

Judicial Ethics Advisory Committees

Cynthia Gray

Recently, in publicly reprimanding an appellate judge for using his judicial position to solicit paid speaking engagements, the Illinois Courts Commission stated that it was “frankly puzzled” that the judge had not sought guidance from “the excellent advisory opinions produced by the Illinois Judges Association’s committee on judicial ethics,” as well as the Commission’s prior decisions.¹ That case is a reminder to judges of the assistance available if they ask before they act.

Approximately 45 states, the District of Columbia, and the United States Judicial Conference have judicial ethics advisory committees to which judges can submit inquiries regarding the propriety of contemplated future action under the code of judicial conduct. The Center for Judicial Ethics website has a table with information on each committee² and links to advisory committee websites.³

Most committees post their opinions online, and some of the sites are searchable and have topic indices. Some committees, however, do not have a website, and others seem inactive as they have not posted an opinion in years. Perhaps those committees are relying on oral advice to respond quickly. But even a rapid answer can be later memorialized in writing and published to assist more judges, as some committees do.⁴

Occasionally, a judge may be faced with a unique issue. (For example, probably few courts have had any reason to ask whether to accept a \$1,000 bequest to fund a holiday party.⁵) However, most inquiries are about common quandaries, and opinions announce general rules that can be applied to specific

situations. An advisory committee is not doing the best it can for the state’s judges if it is not routinely making its guidance available online, where most people turn automatically for answers. Further, as an online resource, advisory opinions can be used to train new judges and provide a refresher course for more experienced judges. Finally, by posting opinions online, advisory committees advance the national conversation on judicial ethics.

In 2017, judicial ethics committees posted more than 325 advisory opinions online. Areas in which advice was frequently sought and obtained include acting as a reference; court staff issues; financial activities; the conduct of senior or part-time judges; teaching, writing, and speaking; and political and campaign conduct.

Not surprisingly, disqualification and disclosure are the most common subjects for inquiries as judges must consider in every case whether a past or present relationship, interest, or other circumstance raises reasonable questions about judicial impartiality, and a judge trying to apply that objective standard benefits from the advice of experienced colleagues. Committees will not necessarily rule whether a judge is disqualified from a specific case but will answer general questions about anticipated conflicts, such as, is a judge married to a public defender disqualified from cases in which other public defenders appear?⁶ Or can a judge hear matters involving a credit union where he holds an account?⁷ Or is a county magistrate who is dating the county sheriff disqualified from matters in which the sheriff’s employees appear as witnesses?⁸ Or is a judge required to disclose that a

Footnotes

1. In re Steigman (Illinois Courts Commission August 13, 2018), available at <https://tinyurl.com/y9u3gkxt>.
2. Center for Judicial Ethics, Judicial Ethics Advisory Committees by State, available at <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JudicialEthicsAdvisoryCommitteesbyState.ashx>.
3. Center for Judicial Ethics, Links to State Advisory Committees, available at <https://www.ncsc.org/Topics/Judicial-Officers/Ethics/State-Links.aspx?cat=Ethics%20Advisory%20Committees>.
4. See California Supreme Court Committee on Judicial Ethics Oral Advice Summaries, available at <http://judicialethicsopinions.ca.gov/oral-advice-summaries/>.
5. A town justice, on behalf of the justice court, may accept a \$1,000 testamentary bequest approved by the surrogate’s court to hold a holiday party at the courthouse and may invite lawyers by posting notices with the bar association and/or at the courthouse. New York Advisory Opinion 2018-124, available at (<http://www.nycourts.gov/ip/judicialethics/opinions/18-124.htm>).
6. See, e.g., Florida Advisory Opinion 2018-13 (a judge married to a public defender who supervises the public defenders assigned to diversion courts may not preside over cases in which her spouse is the attorney of record or cases that her spouse supervises but may preside over other criminal cases, may refer cases to a diversionary court presided over by another judge, and may accept cases returned to the trial division from a diversionary court), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2018/2018-13.html>.
7. New York Advisory Opinion 2018-44(A) (a judge is not disqualified from matters involving a credit union where he is a member and account holder), available at [http://www.nycourts.gov/ip/judicialethics/opinions/18-44\(A\).htm](http://www.nycourts.gov/ip/judicialethics/opinions/18-44(A).htm).
8. South Carolina Advisory Opinion 2-2018 (a county magistrate who has just began dating the county sheriff shall disqualify himself from any matters in which employees of the sheriff appear as witnesses), available at <http://www.sccourts.org/advisoryOpinions/html/02-2018.pdf>.

lawyer appearing before her is a former Facebook friend?⁹

Other recent advisory opinions related to judicial duties include:

- A magistrate may not hire as constable the son of another magistrate from the same county.¹⁰
- A court website may not include information promoting a district attorney's traffic diversion program but may include a link to the DA's website as a convenience to defendant motorists.¹¹
- A court may, with an appropriate disclaimer, allow a non-profit legal aid program to set up a table outside a courtroom to offer financially eligible parties free legal advice, pro se pleadings, and, in some cases, representation.¹² Judicial robes should be free of adornments.¹³
- A judge may ask state legislators for financial support for a problem-solving court that will address mental health issues.¹⁴
- A judge may make a public service television announcement to encourage persons to become foster parents.¹⁵

Judges also frequently ask advisory committees for help in resolving the tension between their desire to remain involved in their communities and their commitment to the rules that protect judicial impartiality and prohibit misuse of the prestige of office. Recent opinions on those issues have advised:

- A judge may allow his home to be featured in a tour that raises funds for the symphony provided his title is not used in publicizing the event.¹⁶

- A judge may accept a distinguished alumni award from the law school where she graduated at a ceremony that raises funds for scholarships.¹⁷
- A judicial officer may serve on the board of the Girl Scouts of Connecticut.¹⁸
- A judge who appoints CASA to provide information on cases may not serve on CASA's advisory board.¹⁹

Judicial ethics advisory committees also provide guidance on "hot topics" that reflect changes in society that affect the judiciary. For example, the Nebraska committee ensured that all judges in the state were on the same ethical page in 2015 when, just three days after the United States Supreme Court decision in *Obergefell v. Hodges*, it advised that a judge may not refuse to perform marriages for same-sex couples based on a personal or religious belief.²⁰ Other committees concurred,²¹ and those opinions not only answered the specific question but explained the governing ethical principles, not just to the judges, but to the public.

Similarly, as decriminalization of marijuana use spreads to more states, judges may wonder whether the new leniency applies to them. The answer is "no" according to the Colorado committee in 2014²² and the Alaska committee more recently,²³ both of which advised that, as long as marijuana use violates federal law, it also violates the code of judicial conduct.

As an example of the useful role advisory opinions can play, several advisory committees anticipated the problems inherent in judicial use of social media and issued opinions on numerous issues that also cautioned judges to be extremely careful.²⁴ In fact, given the increasing number of embarrassing headlines and judicial discipline cases involving Facebook, it is puzzling

9. Massachusetts Letter Opinion 2018-3 when a judge knows that a lawyer is a former Facebook friend, disclosure is not presumptively required, but the judge should consider whether disclosure is warranted based on relevant factors), available at <https://www.mass.gov/opinion/cje-opinion-no-2018-03>.
10. South Carolina Opinion 13-2018, available at <https://www.sccourts.org/advisoryOpinions/html/13-2018.pdf>.
11. New York Opinion 2018-101, available at <http://www.nycourts.gov/ip/judiciaethics/opinions/18-101.htm>.
12. New Mexico Advisory Opinion 2017-7, available at http://jec.unm.edu/manuals-resources/advisory-opinions/Advisory_Opinion_17-07.pdf.
13. Arizona Advisory Opinion 2018-3, available at <http://www.azcourts.gov/Portals/137/ethics%20opinion%2018-03.pdf>.
14. New York Advisory Opinion 2018-8, available at <http://www.nycourts.gov/ip/judiciaethics/opinions/18-08.htm>.
15. California Advisory Opinion 75 (2018), available at <https://www.caljudges.org/docs/Ethics%20Opinions/Op%2075%20Final.pdf>.
16. South Carolina Opinion 12-2018, available at <https://www.sccourts.org/advisoryOpinions/html/12-2018.pdf>.
17. Florida Advisory Opinion 2018-29, available at http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jea_copinions/2018/2018-29.html.
18. Connecticut Informal Opinion 2018-5, available at <http://jud.ct.gov/Committees/ethics/sum/2018-05.pdf>.
19. New York Opinion 2018-100, available at <http://www.nycourts.gov/ip/judiciaethics/opinions/18-100.htm>.

20. Nebraska Advisory Opinion 2015-1, available at <https://supreme-court.nebraska.gov/sites/supremecourt.ne.gov/files/ethics/judges/15-1.pdf>.
21. Arizona Advisory Opinion 2015-1, available at (http://www.azcourts.gov/Portals/137/ethics_opinions/2015/RevisedAdvisoryOpinion15-01.pdf); Louisiana Advisory Opinion 263 (2015); New York Advisory Opinion 2011-87, available at <http://www.nycourts.gov/ip/judiciaethics/opinions/11-87.htm>; Ohio Advisory Opinion 2015-1, available at http://www.sc.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf; Wisconsin Advisory Opinion 2015-1, available at <http://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=146878>.
22. Colorado Advisory Opinion 2014-1, available at https://www.courts.state.co.us/userfiles/file/Court_Probation/01st_Judicial_District/Pro_Se_Divorce_Information/2014-01.pdf.
23. Alaska Opinion 2018-1, available at <http://www.acjc.alaska.gov/advopinions.html#2018-01>.
24. See, e.g., Arizona Advisory Opinion 2014-1, available at http://www.azcourts.gov/LinkClick.aspx?fileticket=zNRP1_l8sck%3d&portalid=137; California Judges' Association Advisory Opinion 66 (2010), available at <http://www.caljudges.org/docs/Ethics%20Opinions/Op%2066%20Final.pdf>; Connecticut Advisory Opinion 2011-14, available at <http://jud.ct.gov/Committees/ethics/sum/2011-14.htm>; Massachusetts Letter Opinion 2016-1, available at <http://www.mass.gov/courts/case-legal-res/ethics-opinions/judicial-ethics-opinions/cje-2016-01.html>; Missouri Advisory Opinion 186 (2015); New Mexico Advisory Opinion Concerning Social Media (2016), available at

that more committees have not provided comprehensive guidance in an area that is very publicly tripping judges up.

Judicial ethics advisory committees provide a great service to judges who want to adhere to the highest possible ethical standards while balancing the competing interests that define their role as judges. Judiciaries have a responsibility to support a committee that is responsive, functional, and visible.



Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. (The CJE was part of the American Judicature Society before that organization's October 2014 dissolution.)

She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncscjudicialethicsblog.org), writes and edits the Judicial Conduct Reporter, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.

http://jec.unm.edu/manuals-resources/advisory-opinions/Advisory_Opinion_Social_Media.pdf; Ohio Advisory Opinion 2010-7, available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/default.asp; Utah Informal Advisory Opinion 2012-1, available at <http://www.utcourts.gov/resources/ethadv/index.asp>; U.S. Advisory Opinion 112 (2017), available at

<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02.pdf>; ABA Ethics Formal Opinion 462 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf.

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

2019 MIDYEAR MEETING

SAVANNAH, GEORGIA
Savannah Marriot Riverfront
April 11-13
\$189 single/double



Adobe Stock

2019 ANNUAL CONFERENCE

CHICAGO, ILLINOIS
The Drake Hotel
September 15-20
\$245 single/double



Adobe Stock

THE AJA ANNUAL CONFERENCE: THE BEST JUDICIAL EDUCATION AVAILABLE ANYWHERE
For more information, go to <http://amjudges.org/conferences>.

Effective Adjudication *of* Domestic Abuse Cases



Online Education



comprehensive curriculum

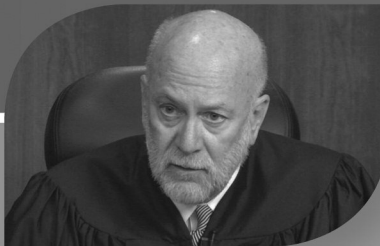
This new and innovative online resource for handling civil and criminal domestic violence cases explores the unique dynamics of domestic violence, including assessing lethality and dangerousness, custody and protective orders, special evidentiary issues, and effective sentencing.

prominent faculty

Each training module concentrates on key issues in domestic violence cases which allow both new and experienced judges to learn from some of the leading, and most prominent, national experts that judges might not otherwise have the time, opportunity or funding to experience and learn from in person.

innovative delivery

Using innovative and interactive educational delivery methods such as courtroom based scenarios, interactive exercises, dynamic panel discussions, and other interactive web-based content, this educational opportunity will both engage the user, and facilitate the absorption of knowledge.



education.amjudges.org

Now available!



When Justice Behaves Unjustly:

Addressing Sexual Harassment in the Judiciary

Jaime A. Santos

As the last 18 months have demonstrated, there is virtually no American workplace where female employees can rest assured that they can focus their energy on work without fear that they could be sexually harassed.¹ There is no industry or profession that “knows better,” even though there are a number of industries and professions that plainly should know better.

We have seen public reports of alleged sexual harassment involving members of the media (by some of the same individuals who break news about this very topic²), members of Congress (by individuals tasked with enacting legislative protections from harassment³), members of the legal profession (by partners at firms that specialize in harassment investigations and defense⁴), and countless other professions. The judiciary, unfortunately, is no different.

The issue of sexual harassment in the judiciary came to national public attention last year when the former Chief

Judge of the United States Court of Appeals for the Ninth Circuit, Alex Kozinski, was accused of sexual misconduct by more than a dozen women. The accusers included numerous former Ninth Circuit law clerks, judicial externs, lawyers, a former federal judge, and a law professor.⁵ But while Kozinski's misconduct is perhaps the most well-publicized, it is far from the only reported instance of alleged inappropriate sexual behavior within judicial chambers. Recent years have seen press reports of numerous allegations against state and federal judges, often accompanied by resignations or settlements of harassment claims, in Nebraska,⁶ New York,⁷ Montana,⁸ Pennsylvania,⁹ Kansas,¹⁰ and California,¹¹ just to name a few.

To be clear, sexual harassment in the judiciary is not limited to inappropriate behavior by judges. Over the past year that my colleagues and I¹² have been working collaboratively with the federal judiciary to study and address these issues, we have

Footnotes

1. Although women most commonly experience sexual harassment, men can likewise be the subject of unwanted sexual advances, sexual assault, and other harassing behavior in the workplace. Indeed, when men experience harassment, it can be particularly difficult for them to report it because they fear ridicule and retaliation. This essay, however, focuses primarily on women's experiences with harassment given the greater frequency with which women experience harassment because of their comparative lesser power and representation in many professional workplaces, including judicial employment. And women of color, members of the LGBT community, women who are disabled, and women from other historically marginalized groups are particularly vulnerable to workplace harassment in all of its invidious forms.
2. See, e.g., Paul Farhi, *Glenn Thrush Is Suspended and Reassigned by the New York Times, but not Fired*, WASH. POST (Dec. 20, 2017), <https://wapo.st/2PjROIFc>; Ellen Gabler et al., *NBC Fires Matt Lauer, the Face of 'Today'*, N.Y. TIMES (Nov. 29, 2017), <https://nyti.ms/2iiK9zQ>.
3. See, e.g., Jonathan Tamari, *Rep. Pat Meehan Will Not Seek Reelection after Sexual Harassment Furor*, INQUIRER (Jan. 26, 2018), <https://bit.ly/2UoBpXd>; John Bresnahan & Heather Cole, *Conyers Scandal Rocks House Democrats*, POLITICO (Nov. 21, 2017), <https://politi.co/2AZGfzA>; Rachael Bade, *Lawmaker Behind Secret \$84K Sexual Harassment Settlement Unmasked*, POLITICO (Dec. 1, 2017), <https://politi.co/2BAgoiC>.
4. See, e.g., Meredith Mandell & Hilary Rosenthal, *Proskauer, Law Firm known for Handling High-profile Sex Harassment Cases, Is Accused Itself*, NBC NEWS (May 15, 2018), <https://nbcnews.to/2KsuN4i>.
5. Katherine Ku, *Pressuring Harassers to Quit Can End Up Protecting Them*, WASH. POST (Jan. 5, 2018), <https://wapo.st/2B1xOPc>; Matt Zapatosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 15, 2017), <https://wapo.st/2Ef72gQ>; Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017), <https://bit.ly/2QDuk5N>; Matt Zapatosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), <https://wapo.st/2Qk8G7u>.
6. Todd Cooper & Joe Duggan, *Nebraska Supreme Court Judge Resigned after Ethics Complaint; Sexual Comments Emerge*, OMAHA WORLD-HERALD (Feb. 6, 2018), <https://bit.ly/2G4i2PQ>.
7. Colby Hamilton, *Former Law Clerk Claims State Judge Sexually Harassed Her*, N.Y. L.J. (Aug. 17, 2018), <https://bit.ly/2AVzkcq>.
8. Zach Benoit, *Forsyth Judge Accused of Sexual Harassment Plans Resignation Next Year*, BILLINGS GAZETTE (May 5, 2015), <https://bit.ly/2EiGmvE>.
9. Rich Cholodofsky, *State Agrees to Pay \$52,000 in Westmoreland Sexual Harassment Case*, TRIB LIVE (Apr. 24, 2012), <https://bit.ly/2RHqVjF>.
10. Tim Potter, *Sedgwick County Judge Accused of Sexual Harassment Is Reassigned*, WICHITA EAGLE (May 19, 2014), <https://bit.ly/2QhNjnd>; Tim Potter, *State Supreme Court Upholds Findings Against Former Judge*, WICHITA EAGLE (April 7, 2017), <https://bit.ly/2QxMvG0>.
11. Greg Moran, *State Court Agency Spent \$600,000 to Settle Sexual Harassment Claims Against Judges, Employees*, SAN DIEGO UNION-TRIB. (Mar. 24, 2018), <https://bit.ly/2L02PhD>.
12. The colleagues to which I am referring include Deeva Shah, Sara McDermott, Kendall Turner, Claire Madill, Priya Srinivasan, and Laura Ferguson. Earlier this year, we formalized our group and started an organization, Law Clerks for Workplace Accountability, whose mission is to ensure that the federal judiciary provides a safe workplace environment, free of harassment, for all employees and to assist the judiciary in reaching this goal. We have also received considerable support and assistance from countless other women, including Leah Litman, Emily Murphy, Kathy Ku, Dahlia Lithwick, and Heidi Bond, all of whom bravely came forward publicly about their own experiences with harassment in the judiciary.

spoken with numerous women who experienced or witnessed sexually inappropriate treatment by their co-clerks, by other chambers staff, or by court staff. The issue transcends job title and jurisdiction, and to find a solution (or at least to make progress), we must do so as well.

WHY DOES HARASSMENT OCCUR WITHIN THE JUDICIARY?

Individuals who work for the judiciary—and particularly judges—are vested with the solemn responsibility of ensuring equal justice under the law for all, including in harassment and discrimination cases. So why does harassment happen in the judiciary?

As it turns out, despite the stringent codes of conduct that bind judges and judicial employees, employment within the judiciary (and particularly within judicial chambers) has all of the hallmarks of a workplace environment that makes harassment *more* likely, and that makes speaking up against harassment nearly impossible:

- There is a massive power differential between judges and employees, and a strict hierarchical structure in which chambers employees have a single supervisor.
- Judicial chambers are almost entirely autonomous, and chambers employees are often isolated from others for most or all of the day. As retired federal judge Nancy Gertner described it, “It is as if each chambers is a fiefdom, with its own rules and norms.”¹³
- In many jurisdictions, there is significant turnover in chambers, with new clerks joining every year or two.
- Leadership is frequently male-dominated (certainly in the federal system, although some states are making significant inroads in the gender diversity of the bench¹⁴).
- Law clerks are typically employed at the beginning of their career, when they are most vulnerable and the risk of retaliation is perhaps most acute. They also reasonably expect and rely on mentorship by their judge and a supportive community of the judge’s law clerk family for their entire career.
- There are unique requirements of confidentiality, a culture of non-disclosure, and relationships between judges and employees “mostly built on worshipful silence.”¹⁵
- The judiciary generally has a strong desire to avoid any public disclosure of wrongdoing in the interests of maintaining public confidence.

We cannot change the nature or inherent qualities of judicial employment—nor should we. But what we can change are the policies that govern employment within the judiciary, the procedures for reporting misconduct, the training that members of the judiciary and judicial employees receive about workplace

conduct, and the culture of the judiciary. And that is what my colleagues and I have spent the last year trying to do.

DEVELOPMENTS AT THE FEDERAL AND STATE LEVELS

Numerous jurisdictions have begun to examine their own policies, procedures, and training programs related to harassment and workplace misconduct.

At the federal level, the first jurisdiction to take action was the District of Utah, in an effort spearheaded by former Chief Judge David Nuffer. Judge Nuffer began focusing on this issue in 2017, even *before* the public reports of sexual misconduct by Alex Kozinski. To determine the scope of any harassment concerns faced by employees, he and his staff sent a short survey to all court employees, including judges, asking about instances of sexual harassment that they had observed or experienced. Because of the significant number of responses to the survey (119 of 200 recipients completed it), Judge Nuffer engaged a management consultant to provide analysis and recommendations, and he convened a working group to develop and implement action items based on those recommendations. The working group has focused on strengthening the workplace by, among other things, educating employees on harassment and the consequences for misconduct, nurturing a culture of psychological and physical safety for all, building trust and respect, encouraging and promoting more women into leadership roles, reducing barriers for reporting, and providing additional training for staff responsible for fielding complaints and addressing employee disputes.

In 2018, other groups within the federal judiciary began to study and address these issues. The Federal Judicial Center (FJC) revamped its training programs and developed new ones, including computer-based modules for new law clerks to take before starting their clerkships. The FJC also has conducted training programs for countless groups of judges. The Chief Justice of the United States directed the Administrative Office of the U.S. Courts to convene a working group to study these issues and propose recommendations to address deficiencies in the federal judiciary’s current policies and reporting procedures.¹⁶ The Chief Justice recently highlighted the working group efforts in his year-end report on the federal judiciary.¹⁷ Based on the working group’s recommendations, the Judicial Conference of the United States has proposed revisions to the Judicial Code of Conduct and to the Rules Governing Judicial Conduct and Dis-

Law clerks are typically employed at the beginning of their career, when they are most vulnerable and the risk of retaliation is perhaps most acute.

13. Nancy Gertner, *Sexual Harassment and the Bench*, STANFORD L. REV. ONLINE (June 2018), <https://stanford.io/2zNz4fM>.

14. See, e.g., Gavin Lesnick, *State’s High Court Has Female Majority for First Time as Justices Sworn In*, ARK. DEMOCRAT GAZETTE (Jan. 6, 2015), <https://bit.ly/2Qj3n85>.

15. Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017), <https://bit.ly/2QDuk5N>.

16. Administrative Office of the U.S. Courts, *Federal Judiciary Workplace Conduct Working Group Formed* (Jan. 12, 2018), <https://bit.ly/2Qha3DS>.

17. John G. Roberts, Jr., *2018 Year-End Report on the Federal Judiciary* (Dec. 31, 2018), <https://www.supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf>.

[F]or an institution not historically known for turning on a dime, the progress that has been made thus far is impressive.

ability Proceedings.¹⁸ And the Administrative Office of the U.S. Courts has recently hired a Judicial Integrity Officer, who will be able to spearhead these efforts on a permanent basis.¹⁹

Several of the Circuits, including the Seventh, Ninth, and D.C. Circuits, have begun to take action as well by revising their policies governing confidentiality, procedures for reporting misconduct, and training for new employees and judges. Three particular innovative developments to note from these efforts:

First, the Ninth Circuit created a new position called a “Director of Workplace Relations,” who will be responsible for the court’s ongoing effort to prevent and resolve workplace harassment.²⁰ Second, the D.C. Circuit adopted one of the recommendations that my colleagues and I offered by creating a Law Clerk Advisory Group, an Employee Advisory Group, and an Employee Sounding Board, which will be able to serve as informal resources for court employees and provide input to the D.C. Circuit regarding future recommendations and initiatives. Third, the D.C. Circuit is also creating programs to protect employees who come forward to report misconduct by, for example, providing for a transfer or alternative work arrangement for that employee.²¹

Finally, California’s State Supreme Court Chief Justice Tani Cantil-Sakauye recently announced that she has formed a working group to study and address these issues to ensure that the court system is safe for all employees.²²

Because these developments are new—and many have not yet been implemented—it is not yet known what impact they will have on preventing harassment, increasing reporting when harassment occurs, or changing the culture of the judiciary. But for an institution not historically known for turning on a dime, the progress that has been made thus far is impressive.

By comparison, the United States Senate and House of Representatives were unable to muster up enough support for a modest bill that simply revises Congress’s own sexual harassment policies until nearly a year after legislation was introduced in the House and more than six months after both the

House and the Senate passed different bills to address harassment concerns.²³ Given the Senate Judiciary Chairman’s admonitions to the federal judiciary that it was not acting quickly enough to address harassment concerns and that the judiciary must “deal with” its harassment “problem . . . or Congress will have to do it for the courts,” Congress’s extended inability to take even modest action to address harassment in its own two houses was bewildering.²⁴

BARRIERS TO PROGRESS

Courts are starting to make progress in addressing harassment concerns, but there is much more work to be done and, thus far, progress only in particular pockets of the state and federal judicial system. The reasons for the lack of progress thus far are many. First, these issues are really, really difficult to address in any workplace, much less in a workplace that has the judiciary’s unique characteristics, such as strict confidentiality rules. They give rise to many complicated questions. For example: Should judges who are informed that their colleagues may have engaged in misconduct be required to report that misconduct through official channels (which could chill disclosure by employees), or should they have discretion whether to do so if confidentiality is requested of them (which could allow misconduct to continue unabated for years)? What types of concrete actions can be taken to actually prevent retaliation when an employee is brave enough to come forward to report misconduct? How can the judiciary structure its avenues for reporting misconduct to actually encourage reporting despite the significant power dynamics in play and employees’ fear of retaliation? Once adequate systems are in place, how does the judiciary convince employees that it really does want them to report misconduct?

Second, the working groups tasked with answering these difficult questions have, for the most part, been composed almost entirely of judges, who generally lack experience and expertise crafting these types of policies and procedures and who have not been on the low end of a significant power differential in many, many years. These groups have rarely brought in experts who do have such expertise or key stakeholders, such as the law clerks and other lower-level employees who are most vulnerable to becoming victims of harassment or sexual misconduct. Indeed, some judges have expressed vehement opposition to stakeholders who are not judges having any role in these initiatives: one sitting federal

18. The Judicial Conference held a hearing on the proposed changes in November 2018. The changes, a link to the hearing (at which I testified), and witness statements are available at <https://bit.ly/2OF2PrA>.

19. Debra Cassens Weiss, *Federal Judiciary Hires Its First ‘Judicial Integrity Officer’ to Handle Workplace Conduct Matters*, A.B.A.J. (Dec. 4, 2018), <https://bit.ly/2SAn4Fj>.

20. News Release, U.S. Courts for the Ninth Circuit, *Ninth Circuit Announces Appointment of First Director of Workplace Relations* (Nov. 13, 2018), <https://bit.ly/2QSanoN>.

21. Press Release, U.S. Courts, District of Columbia Circuit, *Chief Judges Announce Adoption of Workplace Conduct Policies* (Nov. 28, 2018), <https://bit.ly/2FQsBWG>.

22. *California Chief Justice Calls for Sexual Harassment Policy Review*, CBS Sacramento (Oct. 11, 2018), <https://cbsloc.al/2L0DIAM>.

23. Jackie Kucinich & Andrew Desiderio, *Congress Still Can’t Pass Its Own Sexual Harassment Bill*, DAILY BEAST (Sept. 26, 2018), <https://thebea.st/2RLrnOc>; Congressional Accountability Act of 1995 Reform Act, Pub. L. No. 115-397 (2018).

24. The Chairman made these comments at a Senate Judiciary Committee hearing in June 2018. See Senate Judiciary Committee, *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the Senate Committee on the Judiciary* (2018), <https://bit.ly/2Jq1Aqq>; see also Nina Totenberg, *Sen. Grassley Says Report on Sexual Harassment in Judiciary Simply Kicks the Can*, NPR (June 14, 2018), <https://n.pr/2MrRjT>.

judge publicly ridiculed the efforts of my colleagues and I as the “New Spanish Inquisition” and referred to us as “uninformed busybodies who should largely be ignored.”²⁵ When courts have invited the views of experts and stakeholders, they have done so only at the information-gathering phase and not when hammering out the details of any proposed changes. And as we all know, the devil is in the details.

Third, in many jurisdictions, there is a lack of interest in addressing this issue, animated by a belief that there is no real problem—just a couple of bad apples, at most—or that delving deeply into the issue may reveal information about misconduct that could reflect poorly upon the institution. At the same time, courts have largely (with the exception of the District of Utah and the D.C. Circuit) refused to conduct any comprehensive survey of current and former employees to determine the scope of the problem—a measure that the former Chair of the EEOC,²⁶ an ethics expert,²⁷ and my colleagues and I have all argued is essential to effectively tackle the issue. Such a head-in-the-sand approach not only virtually ensures that reform measures will be inadequate and ineffective, it also sends a strong message to employees that the judiciary says it wants employees to come forward to report misconduct but it has no *actual* interest in receiving that information.

Finally, perhaps the most necessary reform that must be made to have any hope of effectively addressing harassment by judges is also the most difficult: judges must hold each other accountable when they become aware of misconduct by their colleagues. This is an incredibly challenging thing to do. A culture of autonomy and independence is an integral part of our judicial system. Moreover, there are power dynamics *within* the judiciary—within each courthouse, within each jurisdiction, and within the judiciary as a whole—that make it daunting for judges to stand up to each other when they witness or learn about wrongdoing by their peers. My colleagues and I have heard time and time again that it is largely a pipe dream to expect judges to report misconduct by their colleagues—that a judge cannot realistically be expected to tell another judge how to run his chambers or treat his employees. But if judges cannot have the courage to do so, how can they possibly expect law clerks or other employees to? This culture of autonomy and independence must yield when it is important enough. The only question is whether we think a workplace in which women can focus on work without having to experience or fear sexual harassment is important enough.

WHAT YOU CAN DO TO HELP

Because of the autonomy and independence of most chambers, each individual judge has an opportunity to make a significant difference in addressing harassment concerns, irrespective of any systemic initiatives that may or may not be underway in your jurisdiction.

1. Talk about these issues with your clerks (both men and women).

It can be awkward to talk about harassment and other forms of workplace misconduct. But simply hoping that these issues will never arise has not, thus far, turned out to be an effective way to prevent or address them. And the more we talk about these issues, the less awkward they become. So ask your employees about their own experiences in past workplaces—what they’ve experienced and what they’ve witnessed—and make clear that your door is always open to talk about any concerns they may have about harassment or misconduct by any employee or judge, whether those concerns involve challenges that they are facing or that others in the courthouse are facing. Having these conversations will empower the employees you work with and demonstrate that you are an ally on these issues.

Even more importantly, you will learn something every time you have one of these discussions. Many of the judges who have engaged meaningfully on these issues have done so in part because they have experienced harassment themselves or because people they care for or respect have shared their own personal experiences with harassment; these conversations have helped them to develop a genuine understanding about

Having these conversations will empower the employees you work with and demonstrate that you are an ally on these issues.

ADDITIONAL RESOURCES

Law Clerks for Workplace Accountability
<http://clerksforaccountability.org/>

Equal Employment Opportunity Commission, Report of the Select Task Force on the Study of Harassment in the Workplace (June 2016).
<https://bit.ly/28IwmK5>

American Bar Association, Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession (2018) and Zero Tolerance Program Toolkit (2018).
<https://bit.ly/2C7zjCL>

Judicial Conference of the United States, Proposed Amendments to the Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules (2018).
<https://bit.ly/2UrYN5T>

Report of the Federal Judiciary Workplace Conduct Working Group (2018). <https://bit.ly/2PqJTt3>

25. Roberta Kaplan & Rachel Tuchman, *Time’s Up for Lawyers Too*, N.Y.L.J. (July 27, 2018), <https://bit.ly/2PpMp2x>. Luckily, for every judge who makes such negative and uninformed comments, there appear to be many more on both the state and federal bench who are supportive of our efforts to ensure that the judiciary’s initiatives are effective.

26. Testimony of Jenny R. Yang, *Confronting Sexual Harassment and*

Other Workplace Misconduct in the Federal Judiciary: Hearing Before the S. Comm. on the Judiciary (2018), <https://bit.ly/2SC53G1>.

27. Testimony of Renee Newman Knake, *Comments on the Proposed Changes to the Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules: Hearing before the Committee on Codes of Conduct and Committee on Judicial Conduct and Disability* (2018), <https://bit.ly/2BXOMWZ>.

**The judiciary . . .
has the
opportunity to
set an example
for the rest of
the profession
. . . .**

the long-term negative effects of harassment—both on individual victims and on the legal profession as a whole.

2. See what resources are available for employees in your jurisdiction.

Pretend for a moment that you are an employee who has just

experienced or witnessed harassment by a judge or a supervisor and you want to come forward to report the incident through the appropriate channels. Is information about the reporting avenues easy to find? Can you easily find the relevant policies that can help you determine whether the conduct you (pretend to have) experienced is prohibited? Can you tell from the resources available what an investigation will look like—who will investigate, who will adjudicate, what your rights will be during the process, and what remedial relief is available? Would you be able to find and understand all of this information if you were a staff member without a college degree? Without a high school degree? If you had limited English-language abilities?

If you cannot answer yes to each of these questions, you probably need to reform the policies and procedures—or at least explanatory materials—in your jurisdiction. And once you have done so, with the assistance of local experts in this area and with the input of key stakeholders (hint: law clerks and other employees), you will need to train all employees about the modified policies and procedures.

3. Learn how to receive complaints about inappropriate conduct.

Now that you have made clear that your door is open to employees who want to discuss or report any harassment concerns, it is imperative that you know how to field these questions and concerns effectively. The way in which a judge responds to reports of harassment—whether harassment by another judge or harassment by another employee—can have an enormous impact on how a victim decides to handle the situation. If an employee who reports harassment not only receives empathy, but also is thanked for her bravery in coming forward and is told that she is believed, that she is supported, that she can receive help in finding counsel, that considerable efforts will be taken to ensure she is not retaliated against, and that she should continue to come forward with any concerns, she will be much more likely to feel comfortable pursuing any reporting avenues.

Responding to harassment concerns is hardly intuitive. Just as it requires training to effectively respond to questions during oral argument in a way that will actually assist a judge in coming to the right answer, it likewise requires training to effectively respond to a complaint about harassment. Ensure that you have that training or partner with departments or organizations that can provide it to you.

4. Examine whether your court has studied this issue recently.

If it has been some time since your court has examined issues of harassment or workplace misconduct, establish a working group to study and address these issues. Partner with a local university to conduct workplace climate surveys to determine the scope of any problem. Contact other jurisdictions that have already begun to engage in these efforts to seek any resources or materials they can provide and any lessons learned. Invite law clerks and other lower-level employees as *formal members* of the group—members who do not simply provide ad hoc suggestions but who are part of the decision-making process. Invite respected diversity consultants and employment lawyers to join.

5. Don't recreate the wheel.

Develop innovative initiatives while taking advantage of the important work that others have already done to address harassment and workplace misconduct. Reach out to the Equal Employment Opportunity Commission, any state agencies that address or resolve harassment concerns, the Federal Judicial Center, and the National Center for State Courts to see if they might have resources that you can adapt to the needs of your court.

6. Publicize your efforts.

If your court undertakes efforts to study and address these issues, *please* brag about it—and if you prefer not to do so, contact Law Clerks for Workplace Accountability and we will be happy to do it for you. The more that courts study and address these issues, the more that other courts will be encouraged to do so. Publicizing your efforts will also strengthen public confidence in your court and send a strong message to employees that the court is committed to improvements in this area.

The legal profession as a whole is doing a fairly abysmal job of preventing and addressing harassment against women. The judiciary, however, has the opportunity to set an example for the rest of the profession about the changes that can be made when each member is committed to it. The judiciary is the initial stomping ground for many lawyers—it is where they received their initial legal training and where they learned how to treat colleagues and subordinates.

For first-generation professionals like myself and many of my Law Clerks for Workplace Accountability colleagues who did not enter the profession with the connections that are often the key to success in this field, the opportunity to work in the judiciary can provide a huge leg up and, indeed, be a great equalizer. But the converse of this is also true: if the judiciary does not act to prevent harassment, encourage reporting of harassment, and properly handle harassment complaints when they are reported, the lessons that men and women learn about the workplace will continue to reproduce within other workplaces when they leave the judiciary. Worse yet, women will simply leave the legal profession,²⁸ only exacer-

28. Amanda Taub, *The #MeToo Moment: How One Harasser Can Rob a Generation of Women*, N.Y. TIMES (Dec. 14, 2017),

<https://nyti.ms/2AMHgiW>.

bating the well-documented gender disparities within the profession.²⁹ Your commitment to change can have a huge impact on the profession.



Jaime A. Santos is an appellate litigation attorney at Goodwin Procter LLP in Washington, DC. She has worked with working groups established by the D.C. Circuit, Ninth Circuit, and Chief Justice of the United States to improve the federal judiciary's policies and processes governing inappropriate conduct in

the workplace, and she has testified before the Senate Judiciary Committee and the Judicial Conference of the United States regarding these issues. She clerked for Judge Raymond Fisher on the United States Court of Appeals for the Ninth Circuit and Judge George King, the former Chief Judge of the United States District Court for the Central District of California.

29. See, e.g., Jimmy Hoover, Amanda James & Annie Pancak, *Making Her Case: Will the Future of the Supreme Court Bar Be Female?*, Law360 (Oct. 15, 2018), <https://www.law360.com/articles/1087277>; Tony Mauro, *Supreme Court Clerks Are Overwhelm-*

ingly White and Male. Just like 20 Years Ago, USA TODAY (Jan. 8, 2018), <https://bit.ly/2E63XPr>; ABA, *A Current Glance at Women in the Law* (2018), available at <https://bit.ly/2xJvnX8>.

Court Review Author Submission Guidelines

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

Court Review is received by the 2,000 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

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

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

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

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

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

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

A Term in Turmoil:

Select Criminal Cases from the 2017-18 Supreme Court Term

Juliana DeVries

This was a tumultuous year for the United States Supreme Court. On June 21, 2018, Justice Anthony Kennedy announced his retirement after 30 years on the Court. And President Trump nominated Judge Brett Kavanaugh to fill the seat.

Judge Kavanaugh's confirmation hearings riveted and polarized the nation. Late in the proceedings, multiple women accused him of sexual misconduct. One of those women, Professor Christine Blasey Ford, testified before the Senate Judiciary Committee, detailing how Judge Kavanaugh allegedly sexually assaulted her when they were in high school. Judge Kavanaugh denied the allegations in emotional testimony that triggered a letter from over 2,400 law professors asserting that he "did not display the impartiality and judicial temperament requisite to sit on the highest court of our land."¹ The Senate nonetheless confirmed Justice Kavanaugh to the high court.

With Justice Kavanaugh's confirmation arriving just 14 months after Justice Neil Gorsuch began his tenure, this is a Court in transition, both in terms of its personnel and its jurisprudence. This year's criminal cases put that flux on display. The Court decided a high number of Fourth Amendment cases this Term. The justices disagreed starkly over the future of Fourth Amendment law, especially in the area of standing. The Court also issued split decisions interpreting the First, Fifth, and Sixth Amendments.

But before summarizing the Court's criminal law cases from 2017–18, it's worth pausing to remember Justice Kennedy's contributions to criminal law over the past three decades.

JUSTICE ANTHONY KENNEDY AND CRIMINAL LAW

In most criminal cases, Justice Kennedy voted with the conservative wing of the Court. He authored a number of significant criminal procedure decisions, including *Berghuis v. Thompkins*.² There the Court held that Thompkins's silence for two hours and forty-five minutes was insufficient to invoke his right to remain silent under *Miranda*. As one scholar put it, *Thompkins* gave "us an implied waiver doctrine on steroids."³

But Justice Kennedy's greatest impact on criminal law was in the death penalty area, where he commonly provided the

swing vote. Although never calling for complete abolishment, Justice Kennedy joined his more liberal colleagues in narrowing the penalty's scope.

Justice Kennedy joined the majority in *Atkins v. Virginia*,⁴ which held that executing persons with mental disabilities violates the Eighth Amendment. He then expanded on *Atkins* in *Roper v. Simmons*.⁵ He wrote for the 5–4 *Roper* majority that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."⁶ He pointed to the "comparative immaturity and irresponsibility of juveniles," to the fact that "juveniles have less control, or less experience with control, over their own environment," and that "the character of a juvenile is not as well formed as that of an adult."⁷

Justice Kennedy also wrote the majority opinion in *Graham v. Florida*,⁸ which expanded on *Roper*. *Graham* held that the Eighth Amendment prohibits life without parole for juveniles who commit nonhomicide crimes. *Roper* and *Graham* then led to *Miller v. Alabama*,⁹ where the Court held by 5–4 majority that a mandatory life sentence without parole for any juvenile offender violates the Eighth Amendment.

The swing vote again came from Justice Kennedy in *Kennedy v. Louisiana*.¹⁰ That case abolished the death penalty for crimes not involving murder. "Evolving standards of decency must embrace and express respect for the dignity of the person," Justice Kennedy wrote for the majority, "and the punishment of criminals must conform to that rule."¹¹

Justice Kennedy also advocated for human dignity within prisons. He wrote for the 5–4 majority in *Brown v. Plata*,¹² holding that California prison overcrowding violated the Eighth Amendment: "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in a civilized society."¹³ And in a recent concurrence in *Davis v. Ayala*,¹⁴ Justice Kennedy lamented the "terrible price"¹⁵ of the widespread use of solitary confinement in American prisons. He cited numerous studies showing the harmful effects of extended isolation and ended by quoting Dostoyevsky: "The degree of civilization in a society can be judged by entering its prisons."¹⁶

Footnotes

1. Susan Svrluga, 'Unfathomable': More than 2,400 Law Professors Sign Letter Opposing Kavanaugh's Confirmation, WASH. POST (Oct. 4, 2018), <https://www.washingtonpost.com/education/2018/10/04/unprecedented-unfathomable-more-than-law-professors-sign-letter-after-kavanaugh-hearing/>.
2. 560 U.S. 370 (2010).
3. Charles Weisselberg & Stephanos Bibas, *The Right to Remain Silent*, 159 U. PA. L. REV. 69, 73 (2010).
4. 536 U.S. 304 (2002).
5. 543 U.S. 551 (2005).
6. *Id.* at 578.

7. *Id.* at 569–70.
8. 560 U.S. 48 (2010).
9. 567 U.S. 460 (2012).
10. 554 U.S. 407 (2008).
11. *Id.* at 420.
12. 563 U.S. 493 (2011).
13. *Id.* at 511.
14. 135 S. Ct. 2187 (2015) (Kennedy, J., concurring).
15. *Id.* at 2210.
16. *Id.* (quoting THE YALE BOOK OF QUOTATIONS 210 (Fred R. Shapiro ed., 2006)).

Now on to the cases from the 2017–18 Term.

FOURTH AMENDMENT

This Term was chock-full of significant Fourth Amendment cases. The Court took particular interest in the concept of “standing”: what a person must show to have a cognizable Fourth Amendment interest allowing her to seek relief for an unconstitutional search. Perhaps the most groundbreaking Fourth Amendment opinion was *Carpenter v. United States*,¹⁷ where the Court held that a person has a reasonable expectation of privacy in her cell phone location information turned over to a third party. *Carpenter* limits the so-called “third party doctrine,” though it’s not clear how much. Another important standing case, *Byrd v. United States*,¹⁸ held that a person has a reasonable expectation of privacy in a rental car even if she’s not listed in the rental agreement. In *Collins v. Virginia*,¹⁹ the Court decided officers need a warrant to search a vehicle parked in the curtilage of a home. And in *District of Columbia v. Wesby*²⁰ the Court concluded that officers had probable cause to arrest a group of trespassing partygoers and that the court below erred by viewing facts in isolation.

In *Carpenter*, police arrested four men suspected of robbery, including Timothy Carpenter. Federal prosecutors obtained telecommunications records from Carpenter’s wireless carriers. Those records included cell-site location information (CSLI), time-stamped location data from each time Carpenter’s phone connected to one of the carrier’s cell sites. The government obtained 12,898 data points cataloging Carpenter’s movements over 127 days. These data points created a map of Carpenter’s location that placed him at the robbery. The Sixth Circuit held that Carpenter lacked a reasonable expectation of privacy in the CSLI because he had turned that information over to third parties: his wireless carriers.

The Supreme Court reversed in a majority opinion written by Chief Justice Roberts. “[A]n individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.”²¹ The government therefore needed a warrant, supported by probable cause, to obtain Carpenter’s CSLI.

This was significant because the Court has long held that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”²² This is the so-called third-party doctrine. The doctrine originated in *United States v. Miller*,²³ where the Court held that a person lacked an expectation of privacy in bank records turned over to the bank. In *Smith v. Maryland*, another foundational third-party doctrine case, the Court similarly held that a person didn’t have a reasonable expectation of privacy in outgoing phone numbers dialed on a landline telephone and conveyed to the phone company.

CSLI is, the Court held in *Carpenter*, “qualitatively differ-

ent.”²⁴ Unlike the information turned over to third parties in *Miller* and *Smith*, “cell phone location information is detailed, encyclopedic, and effortlessly compiled.”²⁵ The Court reasoned that, “when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person’s movements.”²⁶ And “CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers.”²⁷ So even though Carpenter conveyed his data to a third party, he could claim Fourth Amendment protection in it.

The Court also relied on *United States v. Jones*,²⁸ which held that attaching a GPS tracking device to a vehicle was a Fourth Amendment search. CSLI presents an even greater privacy concern than the GPS monitoring considered in *Jones* because individuals “compulsively carry cell phones with them all the time . . . into private residences, doctor’s offices, political headquarters, and other potentially revealing locales,”²⁹ allowing the government to achieve near-perfect, retroactive surveillance of almost anyone.

Cell phone users also take no affirmative steps to turn over CSLI to the third-party carrier. Because carrying a cell phone is indispensable to modern life, Carpenter “in no meaningful sense” voluntarily turned his information over to a third party.

No fewer than four dissenting opinions were filed in this case. Justice Kennedy argued that the majority unnecessarily departed from the Court’s third-party doctrine precedents. In a separate dissent, Justice Thomas argued that the CSLI wasn’t Carpenter’s property, so he did not have a reasonable expectation in it. He called the *Katz* reasonable expectation of privacy test “a failed experiment”³⁰ and would get rid of it entirely. Justice Alito’s dissent criticized the majority for destabilizing Fourth Amendment law and argued that “the records are not Carpenter’s in any sense.”³¹

Justice Gorsuch would get rid of the third-party doctrine and the *Katz* reasonable expectation of privacy test. He does “not agree with the Court’s decision today to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that seems to be only *Katz*-squared.”³²

**CSLI is . . .
“qualitatively
different.” So
even though
Carpenter
conveyed his
data to a third
party, he could
claim Fourth
Amendment
protection in it.**

17. 138 S. Ct. 2206 (2018).

18. 138 S. Ct. 1518 (2018).

19. 138 S. Ct. 1663 (2018).

20. 138 S. Ct. 577 (2018).

21. *Carpenter*, 138 S. Ct. at 2217.

22. *Smith v. Maryland*, 442 U.S. 735 (1979).

23. 425 U.S. 435 (1976).

24. 138 S. Ct. at 2216.

25. *Id.*

26. *Id.* at 2217.

27. *Id.* at 2222.

28. 565 U.S. 400 (2012).

29. *Carpenter*, 138 S. Ct. at 2218.

30. *Id.* at 2246 (Thomas, J., dissenting).

31. *Id.* at 2260 (Alito, J., dissenting).

32. *Id.* at 2272 (Gorsuch, J., dissenting).

Although the majority called this a “narrow” decision, it’s likely to have a broad impact.

He’d overrule those cases and “look to a more traditional Fourth Amendment approach.”³³

Although the majority called this a “narrow” decision,³⁴ it’s likely to have broad impact. The third-party doctrine now appears to be, as Justice Gorsuch wrote, “on life support.”³⁵

This was a welcome development for those concerned with privacy rights in the digital age. The third-party doctrine has faced mounting criticism in recent years, most notably from Justice Sotomayor, who in 2012 called the doctrine, “ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”³⁶

And CSLI isn’t the only type of encyclopedic information people reveal to third parties on a daily basis: “Emailing, tweeting, instant messaging, surfing searching liking, and downloading all create an inescapable trail of third-party records that may raise constitutional concerns on par with CSLI.”³⁷ Advocates can now plausibly argue that an officer needs a warrant to obtain various kinds of digital data turned over to third parties. The Electronic Frontier Foundation and American Civil Liberties Union have already filed lawsuits in Massachusetts and Maine seeking to expand *Carpenter* to warrantless searches of real-time (as opposed to historical) cell phone location information.³⁸

Like *Carpenter*, *Byrd* tackled Fourth Amendment “standing,” but in a different context. There, an officer had stopped and searched a rental car driven by Terrence Byrd. Byrd wasn’t listed on the rental agreement as an authorized driver. The Court unanimously held, in an opinion by Justice Kennedy, that “as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.”³⁹ Byrd could therefore challenge the search of the car. On remand, the Supreme Court invited the court below to address whether a person who intentionally uses a third party to rent a car by fraudulent scheme is no better than a thief.

Byrd had argued in the alternative that he had Fourth Amendment standing because of his common-law property interest in the rental car as a second bailee. This argument arises from *Jones*, where the Court found that attaching a GPS device to a vehicle was a Fourth Amendment search based on common-law trespass law, rather than on the reasonable expect-

tation of privacy test from *Katz v. United States*.⁴⁰ But Byrd failed to raise this argument in the District Court or Court of Appeals, so the majority declined to address it.

Justice Alito wrote a concurrence listing factors that may bear on a driver’s ability to claim a Fourth Amendment interest in a rental car. Justice Thomas authored an additional, intriguing concurrence that Justice Gorsuch joined. He expressed “serious doubts about the ‘reasonable expectation of privacy’ test from *Katz v. United States*.”⁴¹ He then explains the types of arguments he’d like to hear from future litigants on common-law property rights concepts and the Fourth Amendment. He asks litigants to argue “what kind of property interest . . . individuals need before something can be considered ‘their . . . effec[t]’ under the original meaning of the Fourth Amendment” and “what body of law determines whether that property interest is present.”⁴²

The Third Circuit has now considered *Byrd* on remand from the Supreme Court. It initially declined to suppress the fruit of the search because it was authorized by circuit precedent at the time it was conducted, so the good-faith exception to the exclusionary rule applied. On rehearing, though, the court vacated that ruling and sent the case back to the district court for additional fact-finding.⁴³

Collins also involved a vehicle search—this time of a motorcycle parked in a driveway adjacent to a home. A police officer had probable cause to believe that the motorcycle was stolen. So he walked up the driveway, lifted a tarp covering the motorcycle, and found the license plate and vehicle identification numbers. The officer then ran the numbers, confirming the theft. The parties agreed that lifting the tarp was a search under the Fourth Amendment. The issue was whether the officer needed a warrant, which he didn’t have, to do the search.

The majority, in an opinion by Justice Sotomayor, said yes. A house’s curtilage includes its driveway. The automobile exception to the warrant requirement didn’t apply because that exception’s scope “extends no further than the automobile itself.”⁴⁴ The officer invaded the space of the curtilage before reaching the motorcycle, and the Fourth Amendment protects that space, so he needed a warrant. This is no different from an officer who sees a stolen motorcycle through the window of a living room and then enters the house to search the vehicle.

Justice Thomas wrote another concurrence favoring major changes to settled Fourth Amendment law. He argued that the exclusionary rule does not apply to the states because it “appears nowhere in the Constitution, postdates the founding by more than a century, and contradicts several longstanding principles

33. *Id.*

34. *Id.* at 2220.

35. *Id.* at 2272 (Gorsuch, J., dissenting).

36. *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

37. Michael Price, *Carpenter v. United States and the Future of the Fourth Amendment*, 42 CHAMPION 48, 49 (2018).

38. EFF to Maine, *Massachusetts Courts: Rule Requiring Warrants to Access Cell Phone Location Data Applies to Real-Time Searches*, EFF (Aug. 30, 2018), <https://www.eff.org/press/releases/eff-maine->

[massachusetts-courts-rule-requiring-warrants-access-cell-phone-location](https://www.eff.org/press/releases/eff-maine-massachusetts-courts-rule-requiring-warrants-access-cell-phone-location).

39. *Byrd*, 138 S. Ct. at 1524.

40. 389 U.S. 347, 360 (1967).

41. *Id.* at 1531 (Thomas, J., concurring) (citation omitted) (quoting *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring)).

42. *Id.*

43. *United States v. Byrd*, 742 Fed. Appx. 587 (3d Cir. 2018).

44. 138 S. Ct. at 1671.

of the common law.”⁴⁵ As federal common law, Justice Thomas asserts, the exclusionary rule doesn’t bind the states.

Justice Alito wrote the lone dissent, arguing that the search was reasonable because the motorcycle “could have been uncovered and ridden away in a matter of seconds” and the officer’s “brief walk up the driveway impaired no real privacy interests.”⁴⁶ He quoted *Oliver Twist*: “If that is the law” then “the law is a ass—a idiot.”⁴⁷

Wesby is an odd little case. It considered a lawsuit by sixteen individuals against officers of the District of Columbia for illegally arresting them during a debauchorous party in a house they didn’t have permission to occupy. The officers arrived at the house at 1:00 AM in response to a noise complaint. Upon entry, they smelled marijuana and saw beer bottles and cups of liquor on a filthy floor. There was no furniture downstairs except a few metal chairs. A makeshift strip club was operating in the living room and a naked woman and several men were in an upstairs bedroom, where open condom wrappers were strewn about on a bare mattress. The partygoers scattered and hid when the officers arrived. The partygoers also gave conflicting stories as to why they were there. The Court held that these facts gave the officers probable cause to arrest the partygoers for trespassing. The court below erred by finding innocent explanations for each fact in isolation: “The totality-of-the-circumstances test ‘precludes this sort of divide-and-conquer analysis.’”⁴⁸

DOUBLE JEOPARDY

The Court decided one double jeopardy case of note this Term. *Currier v. Virginia*⁴⁹ was a 5–4 decision holding that a defendant can waive a double jeopardy claim by agreeing to a severance. Michael Currier was acquitted of burglary and larceny charges, then tried separately on a felon-in-possession charge. The government’s theory in its felon-in-possession case was that Currier had the gun during that same burglary and larceny. Currier argued that this violated his double jeopardy rights, even though he’d consented to the severance.

The Court disagreed. Justices Alito and Thomas and Chief Justice Roberts joined Justice Gorsuch’s plurality opinion. It held that Currier gave up his right to challenge the second trial on double jeopardy grounds by agreeing to the severance. The plurality then wrote that the Double Jeopardy Clause doesn’t include a right to issue preclusion at all. Justice Kennedy concurred but only on the grounds that Currier consented to the second trial and so can’t complain of it.

Justice Ginsburg wrote a dissent, which Justices Breyer, Sotomayor, and Kagan joined. She argued that Currier’s consent to a severance didn’t waive his right to rely on the issue-preclusive effect of acquittal. After all, courts must indulge every reasonable presumption against waiver of a constitutional right. Justice Ginsburg also took issue with the plural-

ity’s quest to “take us back to the days before the Court recognized issue preclusion as a constitutionally grounded component of the Double Jeopardy Clause.”⁵⁰ She “would not engage in that endeavor to restore things past.”⁵¹

SIXTH AMENDMENT

This Term the Court decided two noteworthy Sixth Amendment cases: an important case on decision making in the attorney-client relationship and one per curiam reversal.

In *McCoy v. Louisiana*,⁵² Court considered a defendant’s right not to admit guilt at his capital murder trial. Robert McCoy was charged with three counts of murder. He expressly objected to his attorney’s strategy of admitting guilt at trial to try to avoid the death penalty. The attorney reasonably believed that the evidence against McCoy was overwhelming and so told the jury at the guilt phase that McCoy was guilty to gain credibility and ask for their mercy at the sentencing phase.

Justice Ginsburg wrote the majority opinion. It held that “a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.”⁵³ Like the decisions whether to plead guilty, waive the right to a jury trial, testify, and forgo an appeal, the decision whether “the objective of the defense is to assert innocence” belongs to the defendant. The Sixth Amendment “speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant.”⁵⁴ This is true even if the client has mental health issues, as McCoy himself appears to have had.

In *Florida v. Nixon*,⁵⁵ the Court had held that defense counsel could concede a capital defendant’s guilt at trial when the defendant neither consents nor objects to that strategy. The majority opinion in *McCoy* distinguished *Nixon* in that McCoy “vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt.” It is therefore error for defense counsel to admit a capital defendant’s guilt over his express objection but not if he says nothing.

The Court further held in *McCoy* that the Sixth Amendment violation was structural error not amenable to harmless error review. It also noted that McCoy’s lawyer wouldn’t have violated his ethical obligations by presenting his client’s proposed alibi defense, as there was no avowed perjury.

Justice Alito wrote a dissent that Justices Thomas and Gorsuch joined. He argued that McCoy’s attorney didn’t actually admit guilt because he told the jury that McCoy lacked the requisite intent. McCoy’s attorney thus only admitted one element

[T]he decision whether “the objective of the defense is to assert innocence” belongs to the defendant.

45. 138 S. Ct. at 1678 (Thomas, J., concurring).

46. *Collins*, 138 S. Ct. at 1682–83.

47. *Id.* at 1681 (quoting Charles Dickens, *THE ADVENTURES OF OLIVER TWIST* 277 (1867)).

48. *Wesby*, 138 S. Ct. at 588 (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)).

49. 138 S. Ct. 2144 (2010).

50. *Currier*, 138 S. Ct. at 2164 (Ginsburg, J., dissenting).

51. *Id.*

52. 138 S. Ct. 1500 (2018).

53. *Id.* at 1505.

54. *Id.* at 1508 (quoting *Faretta v. California*, 422 U.S. 806, 819–20 (1975)).

55. 543 U.S. 175 (2004).

The Court decided two remarkable Free Exercise and Establishment Clause cases this Term.

of the offense—that McCoy killed three people—but not that he was guilty.

*Sexton v. Beaudreaux*⁵⁶ was a per curiam reversal of the Ninth Circuit's grant of habeas relief on ineffective assistance of counsel grounds. Nicholas Beaudreaux was convicted of murder in California and sentenced to fifty years to life. A witness to the shooting

identified Beaudreaux at a pretrial hearing and then at trial. He'd been shown two photo lineups of Beaudreaux earlier but had only tentatively identified him from those. Beaudreaux argued in his habeas petition that his trial attorney was ineffective for failing to file a motion to suppress the identification. The Ninth Circuit agreed, holding that the circumstances surrounding the identification were unduly suggestive because Beaudreaux's photo was in both photo lineups.

The Supreme Court disagreed. "The Ninth Circuit's opinion was not just wrong. It also committed fundamental errors that this Court has repeatedly admonished courts to avoid."⁵⁷ Because this was a federal habeas petition, the Ninth Circuit needed to give the state court decision more deference. Once again, the Supreme Court is seen reigning in the Ninth Circuit in a habeas case.⁵⁸

FIRST AMENDMENT RELIGION CLAUSES

The Court decided two remarkable Free Exercise and Establishment Clause cases this Term: *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*⁵⁹ and *Trump v. Hawaii*.⁶⁰ These weren't criminal cases but will likely impact future criminal cases that implicate the religion clauses, such as those where a criminal defendant alleges that the charged statute discriminates against her religion.

In *Masterpiece Cakeshop*, the Court held that the Colorado Civil Rights Commission's treatment of a baker who objected to baking a cake for a same-sex wedding violated the baker's right to freely exercise his religion. The Commissioner made statements on the record that the Court found hostile to the baker's sincerely held religious beliefs:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to jus-

tify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.⁶¹

The Commission also treated other bakers' conscience-based objections differently from *Masterpiece Cakeshop's* claim. This "violated that State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."⁶²

Justice Kagan wrote a concurrence that Justice Breyer joined. It argued there were permissible ways in which the Commission could have distinguished the other conscience-based objections. Justice Gorsuch wrote a separate concurrence, which Justice Alito joined, disagreeing with Justice Kagan's concurrence. Justice Thomas, joined by Justice Gorsuch, wrote yet another concurrence, arguing that the Commission violated the baker's freedom of expression in addition to his free exercise rights. Justice Ginsburg authored a dissent that Justice Sotomayor joined. In her opinion, the "different outcomes the Court features don't evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below."⁶³

*Trump v. Hawaii*⁶⁴ was a closely watched case in which the Court considered the constitutionality of Trump's second executive order limiting immigration from designated countries. Trump's first executive order suspended people from entering the country from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. This caused massive protests at airports across the country.⁶⁵ The Western District of Washington entered a restraining order blocking that executive order and the Ninth Circuit affirmed. Trump then replaced his first executive order with a Proclamation restricting entry from Iran, North Korea, Syria, Chad, Libya, Yemen, Somalia, and Venezuela.

The plaintiffs in *Trump v. Hawaii* argued that the Proclamation violates the Establishment Clause because it was motivated by animus toward Islam. They relied on statements Trump made during his campaign, such as his "Statement on Preventing Muslim Immigration," where he called for a "total and complete shutdown of Muslims entering the United States until our Country's representatives can figure out what is going on" and his statement that "Islam hates us."⁶⁶ They also noted that, after Trump's inauguration, Rudolph Giuliani said in a television interview that Trump had asked him to find a way to do his "Muslim ban" legally.⁶⁷

But the Court held, in a 5–4 opinion authored by Chief Jus-

56. 135 S. Ct. 2555 (2018) (per curiam).

57. *Beaudreaux*, 138 S. Ct. at 2560.

58. See, e.g., Robert Bames, *Supreme Court Reversals Deliver a Dressing-down to the Liberal Ninth Circuit*, WASH. POST (Jan. 31, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/30/AR2011013003951.html>.

59. 138 S. Ct. 1719 (2018).

60. 138 S. Ct. 2392 (2018).

61. *Id.* at 1729.

62. *Id.* at 1731.

63. *Id.* at 1749.

64. 138 S. Ct. 2392 (2018).

65. James Doubek, *PHOTOS: Thousands Protest at Airports Nationwide Against Trump's Immigration Order*, NPR (Jan. 29, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/29/512250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order>.

66. 138 S. Ct. at 2417.

67. *Id.*

tice Roberts, that the facially neutral Proclamation didn't violate the Establishment Clause because "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"⁶⁸

The Court also took the opportunity to overrule *Korematsu v. United States*, albeit in meticulously narrow language: "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority."⁶⁹

In dissent, Justice Sotomayor highlighted the apparent inconsistencies between *Masterpiece Cakeshop* and *Hawaii v. Trump*. She also criticized the majority's deference to the executive branch:

By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.

The Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments.⁷⁰

TIDBITS

This Term the Court also decided a couple federal habeas cases worth brief mention. It also avoided ruling on the merits of two important criminal cases likely to come back before the Court in the future.

*Wilson v. Sellers*⁷¹ held that when a federal court considers a federal habeas petition challenging an unexplained state ruling, it should "look through" the summary decision to the last related state-court decision providing a rationale. *Tharpe v. Sellers*⁷² was a per curiam reversal of the Eleventh Circuit, which had disposed of Tharpe's petition to reopen his federal habeas proceeding. Tharpe claims that his jury was biased against him based on his race. He has a sworn affidavit from a white juror stating that "there are two types of black people: 1. Black folks and 2. Niggers" and that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did;" the juror also said he wondered if "black people even have souls."⁷³

In *Kansas v. Vogt*,⁷⁴ the Court was set to decide whether using statements at a pretrial hearing violates the Fifth Amendment's prohibition against compelling a person to be a witness against himself. The Court dismissed the case as improvidently granted, leaving a circuit split in place.

The Court similarly declined to decide the merits in *United States v. Sanchez-Gomez*.⁷⁵ There the Ninth Circuit had held that shackling pretrial detainees violates the Fifth Amendment. The Supreme Court held that the case was moot because the defendants were no longer in pretrial detention.

THE TERM AHEAD

The 2018–19 Term is now underway, with the Court set to decide many important criminal cases this year. It has granted cert in *Gamble v. United States*, which asks it to overrule the separate sovereigns exception to the Double Jeopardy Clause and hold that a person can't be convicted of the same crime at the state and federal levels.

In *Timbs v. Indiana*, the Court will decide if the Excessive Fines Clause is incorporated against the states through the Fourteenth Amendment. At stake is whether the states can impose excessive civil forfeiture and other fines on criminal defendants, who are usually already impoverished.⁷⁶

Garza v. Idaho is a Sixth Amendment case worth watching. The Court will decide whether there's a presumption of prejudice when a client tells her attorney to file a notice of appeal and the attorney doesn't do so because the client's plea agreement included an appeal waiver.

The Court will also consider two death penalty cases of note—without, of course, the input of retired Justice Kennedy. In *Madison v. Alabama*, the Court will consider whether the Eighth Amendment prohibits executing an inmate with severe dementia that prevents him from remembering his crime and understanding his execution. Renowned civil rights attorney Bryan Stevenson argued on Madison's behalf.

Bucklew v. Precythe involves an inmate with a rare medical condition, who seeks to bring an as-applied Eighth Amendment challenge to Missouri's lethal injection protocol. The case may very well turn on Justice Kavanaugh's vote. He seemed sympathetic to the inmate's claim at oral argument, asking Missouri's attorney: "Are you saying even if the method creates gruesome and brutal pain you can still do it because there's no alternative?"⁷⁷

The real question is how Justice Kennedy's replacement will alter the course of death penalty law in the years to come.



Juliana DeVries is an Appellate Assistant Federal Public Defender for the Northern District of California and a former Ninth Circuit clerk. (The views expressed are her own and not those of her employer.)

68. *Id.* at 2418.

69. *Id.* at 2422.

70. *Id.* at 2448 (Sotomayor, J., dissenting) (citation omitted).

71. 138 S. Ct. 1188 (2018).

72. 138 S. Ct. 545 (2018) (per curiam).

73. *Id.* at 546.

74. 138 S. Ct. 1638 (2018).

75. 138 S. Ct. 1532 (2018).

76. U.S. DEP'T OF JUSTICE, OFFICE OF JUST. PROGRAMS, BUREAU OF JUST. ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 N.1 (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (estimating that 60–90% of all criminal cases involve indigent defendants).

77. Official Transcript of Oral Argument at 43, *Bucklew v. Precythe* (2018) (No. 17-8151), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-8151_8n59.pdf.

Moving from Class to Chambers:

Five Tips for Training New Clerks to Write for You

Sara B. Warf

For eleven years, I have taught new legal writers. I primarily teach UNC Law's 1L research, writing, and advocacy class, but in recent years have also taught an upper-level seminar titled Judicial Clerkship Writing for those students interested in learning to write like a clerk.¹ The students in both classes differ in skill level, naturally, but they have in common that they have never before done the type of writing the class requires of them.

Judges do much the same. Each time a new clerk or intern joins your chambers, you start training and guiding anew. Below are five increasingly specific tips on how to make that process as smooth as possible.

TRAIN THEM TO BE GHOSTWRITERS; TEACH THEM YOUR VOICE.

In one of Rex Stout's delightful Nero Wolfe mysteries,² a woman perpetrates a scheme in which she would write a slightly different version of a recently published novel, plant it among the rejected manuscripts inside the publishing house itself, and then sue the publishing house for plagiarism.³ Wolfe reads all the rejected manuscripts and realizes based on subtle style cues that they were all written by the same person, and that the same person had written a novel published by one of those houses. Wolfe gathers all the players together into his office, and—as he is dramatically exposing the woman's crimes—she explains: “I realized how stupid I had been not to write them in a different style, but you see I didn't really know I had a style. I thought only good writers had a style.”

Most law clerks, I believe, become law clerks because they love to write. In law school, students—particularly the good writers—develop their own writing style and voice as they write seminar papers, law review articles, etc. Inevitably, when they become law clerks, it's an adjustment to adopt the voice of their judges. But the first step, of course, is for them to notice that their judge *has* a particular voice.

When I introduce my seminar students to the fictional judge for whom they'll be clerking over the semester, I give them three of “her” opinions and have them fill out a style sheet as to the judge's preferences as evidenced by those opinions. The style sheet is broken into four categories and includes specific questions:

- *Overall structure.* How long do the judge's fact sections tend to be? What general internal structure does she use for the discussion of each distinct legal issue? How does she sepa-

rate arguments (e.g., Roman numerals? signal words?)?

- *Formatting/small-scale structure.* What is the judge's standard paragraph length? Does she seem to prefer the use of block quotes? In citing, does she use (citation omitted) or not?
- *Word choice.* Does she prefer *defendant*, *Defendant*, *defendant-appellant*, etc.? What transition phrases does she often use (e.g., “Here” to move back to the case at hand)? Does she use many adverbs? How does she feel about starting sentences with “And” or “But”?
- *General qualities.* How would you describe her tone?⁴ Does she focus on the moving/appealing party specifically or give equal time to both parties' arguments? How much dicta appears in her opinions?

The more you can memorialize instructions, FAQs, and style guides, the more time you will save with the orientation of each new clerk or intern—and the more consistency your chambers style will have from year to year.

BE EXPLICIT ABOUT WHAT YOU EXPECT FROM THEM.

One night, when my son was 3, I was sitting on a chair in his room trying to apply his post-bath lotion—a task I would wish only on my worst enemy—and he refused to stay still, dancing out of reach every few seconds. Like exasperated mothers everywhere, I put on my stern voice and said: “Come back here! Be still!”⁵ After several rounds of this, I planted my feet on the floor shoulder-width apart, pointed to the carpet between my feet, and said: “Come stand right here.” He came straight to that spot and stayed there for the duration.

I realized belatedly that “come here” and “be still,” which encompass abstract concepts like “be within arm's reach” and “then wait for an unspecified amount of time,” meant nothing to him. When I gave him a specific, concrete, achievable goal, he was able—and happy—to comply.

The more transparent and explicit you are about your expectations—both in terms of process and in terms of the ultimate product your clerks or interns need to produce—the easier it'll be for your new hires to fit smoothly into your chambers. Be mindful about telling the clerk or intern which exact thing you want. Some points to consider about helping your clerks and interns transition from a law school environment:

In law school, almost all writing assignments involve writing a document for a client for one purpose and then

Footnotes

1. My very first legal job was as a law clerk at the North Carolina Court of Appeals, and I stayed there for five years. I could not have loved it more.
2. REX STOUT, *PLOT IT YOURSELF* (1986).
3. She also murdered three people, but this is neither here nor there.

4. Because I drafted the opinions, the correct answer to this one is “snarky.”
5. Punctuated by that perennial favorite: “We could be done by now if you'd just listen!”

not revisiting or reusing it. In chambers, pieces of writing might get used repeatedly for different reasons; for example, some judges like for their clerks to produce bench briefs solely to prepare for oral arguments, meaning that they don't want a particularly thorough or formal bench brief, while others expect a bench brief to be essentially a draft opinion. Tell them which you prefer.

In law school, email assignments and memos are sent straight to a professor, they go no further, and they're evaluated on their merits; in chambers, you only ask for such things when you're going to use them for a particular reason. If you've requested an email analyzing a specific legal question, are you going to use it to inform your end of a phone conversation, or are you going to forward it to the person involved? When you ask for that evaluation of a circulating opinion, is it with an eye toward concurring or dissenting or just to help you make up your mind?

In law school, we draw very specific boundaries around how much students may collaborate and how they should format submissions; tell your clerks and interns what you expect from them in terms of collaboration and what they send you. Should your clerks edit each others' writing before you see it, and should they edit interns' work first too? Do you prefer seeing drafts on paper or by computer? Should they save progressive versions of opinions or just change the same file? Do you like to see redlined subsequent drafts?

You're an expert: on the law, on drafting, and on your chambers. As an expert, your experience fills in the gaps for you on big projects or tasks, but new clerks and interns will need those gaps filled in with explicit instructions. Laying out exactly what you need them to produce or accomplish will get you the best results.

AS MUCH AS YOU CAN, PROVIDE CONCRETE WRITING FEEDBACK.

Every writing professor knows the feeling of having a student submit a first draft that needs improvement on virtually every level. The challenge then becomes triaging your concerns so that you address the most fundamental concerns first, leaving aside the finer points for a later draft.

I explain this to my students with a weeding metaphor: you can spend an hour pulling weeds out of your garden, filling multiple bags with your jagged-leaved enemies, and then—usually just as you turn back to look, satisfied, at your good work—you'll see dozens of tiny weeds in and among your flowers that you couldn't see before because of those larger weeds on top. The only way to root out the problems on every level is to go through many rounds of weeding, looking at a smaller scale each time.

It is immensely time-consuming to identify aspects of a draft that need improvement, explain why and how to make

that improvement, and then review the resulting edits. By far, the easiest thing to do with new writers is to correct their work and move on. But if you can invest the time early on to give them thorough and specific feedback, you will save yourself an enormous amount of work in the long run. If you have the luxury of time, make comments on the first draft and walk through them with your clerk; if not, give them redlines so that they can see the changes between their draft and your version.

Your new law clerks will not be used to the focus and clean lines of judicial opinions, and they will need practice and coaching to get there. One of my most frequent (and most useful) comments on student papers is: *This isn't wrong; it just isn't necessary.* If you can briefly cover this concept in a chambers style guide or an early conversation, you will likely save yourself the trouble of handing back drafts with a third of the pages simply crossed out.⁶

REMEMBER THAT THEY MIGHT NOT KNOW HOW TO WRITE FOR YOUR COURT.

One of the early classes in my seminar opens with a lecture about the roles of the various courts. As upper-level students, they of course already know the structure of both the federal and state court systems, but it hasn't always occurred to them that those courts' discrete roles will, by necessity, affect those courts' writings.

In that same class, I hand the students two opinions for the same case—one from the North Carolina Court of Appeals, and the subsequent one from the North Carolina Supreme Court—with the lines numbered in the margins. They map out the structure and content of each, noting as they go the line numbers for each chunk of information (e.g., lines 30-40 introduce the issue on appeal). By the end, they've deduced several distinctions: the Court of Appeals opinion is to the point, focuses on the defendant, and emphasizes the facts of this specific case; meanwhile, the Supreme Court opinion is more sweeping, focuses on issues of law, and emphasizes the case's role in the larger jurisprudence of the state.⁷ Despite their knowing in an abstract way the roles of the courts, students still tend to be surprised by this discovery, presumably because they simply have not made the conscious connection between a court's role and its output.

Thus, you might find that, despite your providing example opinions from your chambers, your new clerk is producing law-review-style surveys of the law at your error-correcting court, or streamlined resolutions of the case before the court at your policy-setting court. Knowing how to find, read, and

As an expert, your experience fills in the gaps for you on big projects or tasks, but new clerks and interns will need those gaps filled in with explicit instructions.

6. This may or may not be, but definitely is, what happened to the first draft I submitted to a clerk as a judicial intern. It was quite possibly the most helpful feedback I could have received at the time.

7. Indeed, despite the opinions being of almost identical length, the Court of Appeals opinion spends almost 60 lines applying the law to the facts of the case, while the Supreme Court spends only 8.

write about the law is a very general set of skills. Even if your clerks have summer experience in chambers—even if it was with *your* chambers—they will need some time and help to get up to speed with the very specific writing expected by clerks for your court.

HELP THEM MAKE DELIBERATE CHOICES IN STORY-TELLING.

I still vividly remember the more colorful cases on which I worked as a law clerk, and your new law clerks will almost certainly be drawn to the fascinating storytelling opportunities afforded by their new caseload in your chambers. They will also—as good legal writers and simply as storytellers—instinctively want to recount the entire story in the opinions they draft for you. The instinct they will need to develop instead is the ability to discern how much of the story to tell.

When my seminar students are drafting their opinions, we have a series of discussions about choosing what to include in an opinion. Part of this is informed by the judge's style, of course, but I emphasize to them the importance of making very deliberate choices in their writing.

This past spring, for example, my seminar students wrote their opinions about a case in which a pizza delivery man was attacked by two assailants with a baseball bat. The issues on appeal—admission of evidence, basis for a search warrant, and duplicative indictments—could easily be addressed without a detailed recounting of the underlying assault. In their first drafts, however, many students spent several hundred words describing the assault in extensive detail, down to the lingering physical effects on the victim. In my feedback, I flagged those sections and left a comment that simply asked: *Why?* That is, why are you spending this much time on the incident? I emphasized that I was not instructing them to change the fact

section, but rather requesting that they consciously decide on the reasons behind it. Later, in class, the students pair up for peer feedback on the fact section; after the partner reads it, the author explains his or her choices, structure, etc., and together the pair discusses improvements.

When we come back together as a class, I suggest that they think of an attorney reading this opinion in the future. What words will he latch onto to supplement his spurious argument? What inferences will he draw from the lengthy discussion of the victim's injuries? Will he argue to a court that because the injuries to the victim in his case were not so severe, this opinion does not apply? Will he latch onto the short window between the assault and police arrival emphasized by your timeline as a distinguishing factor?

This recursive and deliberate (and somewhat cynical) examination of their fact sections is most important as a prelude to the students doing the same with their legal analysis. If I can cultivate in them that mindset of making deliberate choices based on a hypothetical lawyer mining their opinions for implications, policies, or warnings that were never intended, they can edit their legal analysis all the more precisely on their own.



Sara B. Warf, J.D., is a Clinical Associate Professor at the University of North Carolina School of Law. There, she teaches both Research, Reasoning, Writing, and Advocacy to first-year students and Judicial Clerkship Writing to second- and third-year students. Before that, she spent five years clerking at the North Carolina Court of Appeals and three years as an appellate attorney. She can be reached at swarf@email.unc.edu, and she tweets quite often from @SaraBWarf.

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

2019 MIDYEAR MEETING

SAVANNAH, GEORGIA
Savannah Marriot Riverfront
April 11-13
\$189 single/double



Adobe Stock

2019 ANNUAL CONFERENCE

CHICAGO, ILLINOIS
The Drake Hotel
September 15-20
\$245 single/double



Adobe Stock

THE AJA ANNUAL CONFERENCE: THE BEST JUDICIAL EDUCATION AVAILABLE ANYWHERE
For more information, go to <http://amjudges.org/conferences>.



JWorks:

The Next Generation of Court Technology

When it comes to investing in court case management systems, the buy-or-build debate rages on. Historically, courts tend to go all-in one way or the other, purchasing a monolithic CMS from a single supplier or building every piece of functionality themselves. How about some middle ground?

That middle ground is JWorks—a new type of CMS, where flexibility and intelligence intersect to create a powerful and seamless information management environment in your court. Design your own screens, fields, rules, workflow, and APIs allowing you to keep your CMS technology in your hands....where it belongs.

Learn more about our next-gen CMS, call 800.406.4333 or visit:
equivant.com

JWorks

equivant.com

ēquivant

Understanding Public Trust in the Courts:

The Centrality of Vulnerability

Joseph A. Hamm

Courts have an important place in American life. While many would think first of the police as the institution most directly responsible for maintaining the law, the courts are an integral part of ensuring social order. Indeed, as illustrated by practices regarding warrants and cases challenging police action, much of the authority typically attributed to the police is, to some degree, controlled by the courts.

Importantly, however, as is often the case with institutions of government in the United States, this considerable authority comes with relatively limited power: The judiciary controls “neither the purse nor the sword,” leaving it heavily reliant upon other institutions and upon the public in general.¹ Thus, an extreme argument can be made that the courts *need* the positive perceptions of the majority of the public to function at all,² but others have pointed to these perceptions as important simply because effective courts *should* be perceived well by the public they serve.³ In either case, there is little question that public perceptions of the courts matter and in recognition of this, considerable effort has been expended by to improve and protect them.⁴

TRUST

A wide variety of constructs have been investigated within this umbrella notion of “public perceptions of the state courts” and include constructs like confidence, legitimacy, cynicism, support, and so on,⁵ but one especially important construct is trust. From the National Conference on Public Trust and Confidence in the Justice System in 1999⁶ to the more recent National Initiative for Building Community Trust and Justice,⁷ trust is widely recognized as critical for positive court-community relationships. Despite the strong emphasis on the construct, however, consistency in conceptualization has been elusive. In fact, courts scholarship contains at least three importantly different understandings.

The first of these “versions of trust” arises primarily from the scholarship addressing the Process Model of Legitimacy. This model suggests that procedural concerns are especially important for evaluations of legal authorities⁸ and has been supported by an impressive body of research, especially in the policing context.⁹ Trust has an important role in this literature but, notably, its specific nature is not well-defined.¹⁰ Instead, this “trust” is variously understood as an outcome or driver of

Footnotes

1. The FEDERALIST NO. 78 (1788) (Alexander Hamilton) .
2. George W. Dougherty et al., *Evaluating Performance in State Judicial Institutions: Trust and Confidence in the Georgia Judiciary*, 38 ST. & LOC. GOV. REV. 176 (2006); Susan Olsen & David A. Huth, *Explaining Public Attitudes towards Local Courts*, 20 JUST. SYS. J. 41 (1998).
3. Sandra Day O'Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust*, 36 CT. REV. 10 (1999).
4. David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 CT. REV. 24 (Fall 1999); Steve Leben, *Public Trust and Confidence in the Courts*, 36 CT. REV. 36 (Fall 1999); NATIONAL CENTER FOR STATE COURTS, *SEPARATE BRANCHES, SHARED RESPONSIBILITIES: A NATIONAL SURVEY OF PUBLIC EXPECTATIONS ON SOLVING JUSTICE ISSUE* (2009), available at <https://cdm16501.contentdm.oclc.org/digital/collection/ctcomm/id/118>.
5. E.g., Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697 (2006); Sara C. Benesh & Susan E. Howell, *Confidence in the Courts: A Comparison of Users and Non-Users*, 19 BEHAV. SCI. & THE LAW 199 (2001); Dougherty, *supra* n. 2; Joseph A. Hamm et al., *Exploring Separable Components of Institutional Confidence*, 29 BEHAV. SCI. & THE LAW 95 (2011); Joseph A. Hamm et al., *Deconstructing Confidence in State Courts*, 3 J. TRUST RES. 11 (2013); Olsen & Huth, *supra* n. 2; David B. Rottman, *On Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It?* 35 CT. REV. 14 (Winter 1998); James P. Wenzel et al., *The Sources of Public Confidence in State Courts: Experience and Institutions*, 31 AM. POL. RES. 191 (2003).
6. NATIONAL CENTER FOR STATE COURTS, *NATIONAL ACTION PLAN: A GUIDE FOR STATE AND NATIONAL ORGANIZATIONS* (2000), available at <https://cdm16501.contentdm.oclc.org/digital/collection/ctcomm/id/20>.
7. The National Initiative for Building Community Trust and Justice, a collaboration of several entities with the United States Department of Justice, has a website at <https://trustandjustice.org/>.
8. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. OF PSYCH. 375 (2006).
9. E.g., Kristina Murphy, *The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders*, 28 LAW & HUMAN BEHAV. 187 (2004); Maarten Van Craen & Wesley G. Skogan, *Trust in the Belgian Police*, 12 EUR. J. CRIMINOLOGY 129 (2004); Jonathan Jackson et al., *Does the Fear of Crime Erode Public Confidence in Policing*, 3 POLICING 100 (2009); JONATHAN JACKSON ET AL., *JUST AUTHORITY? TRUST IN THE POLICE IN ENGLAND AND WALES* (2014).
10. Jonathan Jackson & Jacinta M. Gau, *Carving up Concepts? Differentiating between Trust and Legitimacy in Public Attitudes of Legal Authority*, in INTERDISCIPLINARY PERSPECTIVES ON TRUST: TOWARDS THEORETICAL AND METHODOLOGICAL INTEGRATION (Ellie Shockley, Tess M. S. Neal, Lisa PytlikZillig, & Brian Bornstein eds, 2016); Jacinta M. Gau, *The Convergent and Discriminant Validity of Procedural Justice and Police Legitimacy: An Empirical Test of Core Theoretical Propositions*, 39 J. CRIM. JUST. 489 (2011); Tom R. Tyler & Jonathan Jackson, *Future Challenges in the Study of Legitimacy and Criminal Justice*, in LEGITIMACY & CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION (Justice Tankebe & Alison Liebling eds., 2013).

procedural justice, as a subcomponent or operationalization of legitimacy, or as an umbrella term for all perceptions of legal authorities.¹¹ It suffices, however, to say that this account of trust is strongly tied to legitimacy in that both center on a perception that the courts should have authority. Thus, this account suggests that when courts behave or are expected to behave appropriately as authorities, they will be trusted.

The second version of trust arises from political science scholarship. Although much of this work focuses on perceptions of the United States Supreme Court,¹² some has addressed perceptions of the state courts specifically.¹³ Trust within this literature is also somewhat inconsistently defined but is usually associated with constructs like confidence and support. In one of the only explicit definitions presented in this literature, George Dougherty and colleagues argue that trust is a fiduciary concept that concerns whether the courts fulfill expectations.¹⁴ Thus, within this literature, trust is strongly connected to perceptions of satisfaction with the courts such that trust is a function of their ability to address public expectations regarding the services they provide.

The third version of trust in the courts comes from the broader literature on trust more generally.¹⁵ In this work, scholars across contexts are increasingly settling on an understanding of trust as a willingness to accept vulnerability to the agency of the target of that trust.¹⁶ This account differs from the previous two by suggesting that trust resides not in an evaluation of the courts themselves, but is instead a psychological state or feeling within the trustor that orients them toward acting in ways that accept their vulnerability to harm from the direct actions of the courts.¹⁷ Thus, within this account, trust exists when the public, recognizing this potential for harm, remains willing to work with—or at least not against—them.

VULNERABILITY AND THE COURTS

I argue that operating from this third account has especially strong potential to foster efforts that most successfully improve and protect the court-community relationship, but this requires the acceptance of two fundamental arguments: (1) that there is potential for harm to the public in the court-community relationship and (2) that the courts are at least per-

ceived to have some level of control over this potential for harm.

Regarding the first argument, the most obvious potential harms controlled by the courts are faced by defendants. For these individuals, appearing in court necessarily opens them up to potential harm in both outcome (e.g., an unnecessarily harsh verdict) and process (e.g., an inability to tell their side of the story), but other participants in court proceedings are not immune. For example, victims risk that their attacker could go free and witnesses risk public embarrassment in an inconsiderate examination. For these and other individuals, cooperation with the courts requires at least a tacit acceptance of the fact that they could experience these and other harms.

In addition to the potential for harm to participants in court proceedings, the court-community relationship also involves the potential for harm to the wider public. A 2009 survey by the National Center for State Courts suggested that a little less than half of the population has not had direct contact with the courts.¹⁸ Nonetheless, it is important to remember that, given their place in American life, the operation of the courts is not inconsequential to these individuals, especially because of the strong popular focus on them.¹⁹ Thus, one important potential harm to this *second public*²⁰ arises from violations of more abstract notions of what the courts should be. For example, when the courts are believed to have systemically disparate impacts on minority communities, there is often a perceived harm, even for individuals who are unlikely to experience those disparate outcomes personally. The public outcry against the abuses in Ferguson, Missouri, and the backlash against the outcome of the case against Brock Turner both serve as poignant reminders of the fact that even though the potential for harm to the courts' second public may be somewhat attenuated as compared to those who have had direct court contact, it is nonetheless present and influential.

The second argument upon which this conceptualization of trust rests regards the courts' role in addressing the probability and intensity of these potential harms. As noted in the definition posed above, trust is a willingness to accept vulnerability, specifically, to the *agency*²¹ of the courts. This agency is defined as a *perceived* ability to make decisions that affect the potential harm to the trustor. Thus, even though courts are typically

11. Tom R. Tyler, *The Psychology of Procedural Fairness: A Test of the Group-Value Model*, 57 J. PERS. & SOC. PSYCH. 830 (1989); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC. REV. 513 (2003).

12. James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. OF LAW & SOC. SCI. 201 (2014).

13. E.g., Benesh & Howell, *supra* n. 5; Christine A. Kelleher & Jennifer Wolak, *Explaining Public Confidence in the Branches of State Government*, 60 POL. RES. Q. 707 (2007); Damon M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy, Assessing Citizen's Diffuse Support for State Courts*, 36 AM. POL. RES. 297 (2008); Geoffrey D. Peterson et al., *Electing to Trust: An Exploration of the Relationship between Public Opinion and Localized Processes of Judicial Selection*, 33 AM. REV. POL. 51 (2012).

14. Dougherty et al., *supra* n. 2, at 178.

15. Roger C. Mayer et al., *Integrative Model of Organizational Trust*, 20 ACAD. MGMT. REV. 709 (1995).

16. Bill McEvily & Marco Tortoriello, *Measuring Trust in Organisational Research: Review and Recommendations*, 1 J. TRUST RES. 23 (2011).

17. Joseph A. Hamm et al., *On the Cross-Domain Scholarship of Trust in the Institutional Context*, in INTERDISCIPLINARY PERSPECTIVES ON TRUST: TOWARDS THEORETICAL AND METHODOLOGICAL INTEGRATION (Tess M. S. Neal, Ellie Shockley, Lisa PytlikZillig, & Brian Bornstein eds., 2016).

18. NATIONAL CENTER FOR STATE COURTS, *supra* n. 4.

19. David B. Rottman, *Who Trusts the Trial Courts, to What Extent, and Why? In MOTIVATING COOPERATION AND COMPLIANCE WITH AUTHORITY* (Brian H. Bornstein & Alan J. Tomkins eds, 2015).

20. David B. Rottman, *Adherence to Procedural Fairness in the Justice System*, 6 CRIMINOLOGY & PUB. POL. 835 (2007).

21. Albert Bandura, *Toward a Psychology of Human Agency*, 1 PERSP. ON PSYCH. SCI. 164 (2006).

bound to specific processes or decisions (e.g., sentencing guidelines), the considerable power differential between the courts and the public often means that the public still perceives the courts as chiefly responsible for their decisions. This account of trust suggests that when an individual trusts the courts, they feel that even though there is a possibility that the courts may cause (or at least allow) some level of harm, they are willing to take a *leap of faith*²² and cooperate.

IMPLICATIONS

So what does this mean for judges as they go about their daily work of hearing cases and interacting with the public? The most important takeaway of this argument regarding the nature of trust lies in the proposed centrality of perceived vulnerability. As a result, efforts to improve public perceptions that explicitly address salient vulnerabilities should be most effective. For judges, addressing these vulnerabilities can be as simple as remembering that even though the courts are primarily intended to address harm, they do create at least the *potential* for harm rooted in their agentic actions. To the extent that this conceptualization of trust is applicable in the state courts context, taking the time to understand and acknowledge the potential harms that defendants, witnesses, jurors, and victims feel as they enter the courtroom will help build trust. Adherence to procedural justice and working to meet expectations in these interactions will remain relevant, but directly addressing vulnerability allows judges to acknowledge their power differential as it matters most to the individual and to highlight the concerns that most saliently get in the way of a positive relationship.

Although taking time to elicit and address these perceived vulnerabilities may be helpful in all interactions with the public, it may well be that these discussions would be disruptive to individual proceedings. Instead, judges may be better served by separate engagement efforts that seek to bring representatives into a dialogue with the court to help understand the salient vulnerabilities that may impede a more positive relationship. Many previous court engagement efforts have peripherally addressed assumed vulnerabilities but most have not, as yet, allowed these issues to take center stage: Rather than working with communities to identify and then explicitly address the public's perceived vulnerabilities, most engagement efforts start by working to determine knowledge or service gaps and work to address them directly. Although these approaches may, in fact, address vulnerabilities that communities feel, these problem-centered approaches may fail to allow sufficient space for community members to highlight specific vulnerabilities as they see them. What is needed are efforts that seek specifically to identify the potential harms that the public is concerned about and then work to provide the assurances necessary to

help the public see that the courts are not only aware of these specific concerns but are worthy of being entrusted with them.

A second implication of this account of trust lies in what it suggests about measurement. Increasingly, courts are working to integrate monitoring and evaluation efforts that allow them to determine efficacy, and to identify and adjust elements that are less effective than expected. Comprehensive monitoring and evaluation strategies often involve surveying court users or the public generally about court processes (e.g., procedural fairness), general evaluations (e.g., legitimacy and satisfaction), and the respondents' willingness to cooperate or actual cooperation (e.g., willingness to bring current or future cases to court for resolution). While these factors are important, the notion of trust presented here suggests that they may neglect a critical issue. Because trust as conceptualized here is neither an evaluation of the courts nor cooperation with them, most existing monitoring and evaluation efforts fail to account for it.²³ This may be an important oversight because evidence suggests that trust be the intervening state that connects these evaluations to cooperation behavior.²⁴ This, however, should not be understood to suggest that monitoring and evaluation not include measures of evaluations or cooperation. Evaluations of the courts should be measured, especially as performance indicators. Applying this conceptualization of trust, however, suggests that these perceptions will only lead to cooperation when the individual is willing to accept their vulnerability. Similarly, cooperation is also important to measure, but it can only be directly addressed retroactively and in relation to specifically identified behavior(s). Future behavior, however, by definition, cannot be directly measured and, although it is interesting, asking people how likely they feel they *would be* to cooperate is not necessarily reliable or valid. Measuring a willingness to accept vulnerability to the agency of the courts may be closer to cooperation than evaluations of the courts and more applicable to a variety of future cooperation behaviors than specific measures of past or current cooperation.



Joseph A. Hamm is Assistant Professor of Criminal Justice and Environmental Science at Michigan State University. A psychologist by training, his work lies at the nexus of government and the public where he investigates what trust is, how best to measure it, and its connection to outcomes like cooperation and compliance. Hamm's work has included research on trust in courts and law enforcement, as well as other state and federal entities, and is designed to advance a cross-boundary social science of trust. He has a Ph.D. in psychology and a Master of Legal Studies degree from the University of Nebraska–Lincoln.

22. Guido Möllering, *Rational, Institutional, and Active Trust: Just Do It!? in TRUST UNDER PRESSURE: EMPIRICAL INVESTIGATIONS OF TRUST AND TRUST BUILDING IN UNCERTAIN CIRCUMSTANCES* (Katinka Bijlsma-Frankema & Rosalinde Klein Wollthuis eds., 2005).

23. Here are examples of survey questions that move in this new direction: (1) I am generally comfortable with the authority the courts in my community have to make rulings that I have to abide by. (2) I would be comfortable letting the courts in my commu-

nity decide a case that was important to me. These were used in a recent evaluation of the Hennepin County (Minn.) courts. See Joseph A. Hamm, *An Application of an Integrated Framework of Legitimacy to the State Courts Context*, in preparation.

24. Joseph A. Hamm et al., *Fair Process, Trust, and Cooperation: Moving Toward an Integrated Framework of Police Legitimacy*, 44 CRIM. JUST. & BEHAV. 1183 (2017).

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

John F. Muffler

National Judicial College Faculty;

Administrator, National Center for Judicial Security, United States Marshals Service (Ret.)

johnfmuffler@gmail.com

Independent security consultant

This personal-security checklist is from the Judicial Family Institute (<http://www.judicialfamilyinstitute.org>). The Judicial Family Institute is a committee of the Conference of Chief Justices; its website has resources to help judges and their families. More security tips can be found on their website under "Topics & Programs/Security."

Decisions of the Supreme Court of Canada in Criminal Matters:

January 1 to October 31, 2018

Wayne K. Gorman

In this edition's article, I will review decisions rendered by the Supreme Court of Canada concerning criminal law matters during the period of January 1 to October 31, 2018. As will be seen, the Supreme Court considered a multitude of criminal law issues, including the obligation of the Crown to disclose evidence to the accused, the offences of influence peddling and first-degree murder, and the impact of mistake of law in imposing sentence and informer privilege. Let us start with the Court's consideration of the law of evidence and informer privilege.¹

EVIDENCE

INFORMER PRIVILEGE AND SOLICITOR CLIENT COMMUNICATIONS:

In *R. v. Brassington*, four police officers with the Royal Canadian Mounted Police were charged with offences, including an attempt to obstruct the course of justice, relating to alleged misconduct during a police investigation.² The Supreme Court noted that when the officers "were charged, the RCMP and the Crown told them that they were prohibited from discussing 'the circumstances of their investigations in a manner that might reveal the identity of confidential informers to anyone, including their legal counsel.'"

Before their trial, they applied for a declaration that they could discuss with their defence counsel information they learned during the investigation that might reveal the identity of confidential informers. The application judge granted the application, declaring that the officers could discuss any information in their possession with counsel. She held that the "requirement of proving 'innocence at stake' did not apply" because the exception fit poorly in circumstances where "the accused already knows the privileged information and merely seeks to discuss it with counsel."

The Crown and the RCMP applied pursuant to section 37 of the Canada Evidence Act, for an order that disclosure be prohibited:

[A] Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.³

The application judge dismissed the application. The Crown appealed. The British Columbia Court of Appeal dismissed the appeal, holding that the order allowing disclosure was civil rather than criminal in nature and thus an appeal under section 37(1) was unavailable.

The Crown appealed to the Supreme Court of Canada. The Supreme Court described the issue raised as being: "[W]hen police officers are charged with crimes relating to their conduct during an investigation, can they, at their own discretion, disclose to their defence lawyers information they learned during that investigation that might reveal the identity of a confidential informer?"

The Supreme Court allowed the Crown's appeal. It held that the declaratory order should be set aside. It granted an order pursuant to section 37(6) of the Canada Evidence Act prohibiting the officers from disclosing informer privileged information to their counsel, subject to a successful innocence-at-stake application. The Court indicated that "the 'privilege should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction. . . .' There are no other exceptions to informer privilege."

The Supreme Court concluded that the officers were not entitled to disclose the informer-privileged information to their lawyers: "Our jurisprudence prevents piercing informer privilege unless the accused can show that his or her innocence is at stake. . . . No evidence of 'innocence at stake' was presented. The police officers are therefore not entitled to disclose the information to their lawyers."

Footnotes

1. There are a number of ways in which a criminal case can reach the Supreme Court of Canada by way of appeal. They involve obtaining "leave to appeal" from the Supreme Court and appeals "as of right": (1) the Supreme Court can grant leave to appeal on a question of law (see sections 691(1)(b) and 691(2)(c) of the *Criminal Code*); (2) an accused person has a right to appeal to the Supreme Court if a conviction is affirmed or an acquittal set aside on any question of law upon which a judge of the Court of Appeal dissents (see sections 691(1)(b) and 691(2)(a) of the *Criminal Code*); (3) an accused person has a right to appeal to the Supreme Court on a question of law if their acquittal at trial is set aside and

the Court of Appeal enters a verdict of guilty (see section 691(2)(b) of the *Criminal Code*); (4) the Crown can appeal as of right when a conviction is set aside by a Court of Appeal if a judge of the Court of Appeal dissents on a question of law (see section 693(1)(a) of the *Criminal Code*); (5) the Crown can appeal if granted leave by the Supreme Court on a question of law when a conviction is set aside by the Court of Appeal (see section 693(1)(b) of the *Criminal Code*); and (6) through the *Supreme Court Act*, R.S.C. 1985.

2. *R. v. Brassington*, 2018 SCC 37 (Can.).

3. Canada Evidence Act, R.S.C. 1985, c. C-5, s. 37(1).

Finally, the Court held that

requiring the police officers to exercise caution with respect to what information they disclose to their lawyers does not amount to a *per se* interference with their constitutional rights. Police officers bear particular responsibilities by virtue of the positions of power and trust they occupy, including obligations to keep informer-privileged information in the strictest confidence. Neither the right to solicitor-client privilege nor the right to make full answer and defence relieves police officers of those obligations.

PRIOR CONSISTENT STATEMENTS:

In *R. v. Cain*, the accused was convicted of the offence of sexual assault. A majority of the Nova Scotia Court of Appeal (Justice Scanlon dissenting) dismissed his appeal.⁴

An appeal was taken to the Supreme Court of Canada as of right. The Supreme Court considered the appeal based upon the issue of whether the trial judge used a prior consistent statement of the complainant to confirm the truth of her testimony at the trial.

The appeal was dismissed. In a brief oral judgment, the Supreme Court stated:

The trial judge found that the inconsistencies involved only insignificant peripheral matters, and so he rejected Mr. Cain's contention that any inconsistencies rendered the complainant not credible or her evidence unreliable. The trial judge did not rely on consistencies between the statements and testimony to bolster the truth of the complainant's testimony. This was an appropriate use of a prior consistent statement and did not constitute an error of law.

OFFENCES

SEXUAL-ASSAULT CONSENT:

In *R. v. Gagnon*, Warrant Officer J. Gagnon was charged with the offence of sexual assault, an offence punishable under section 130 of the *National Defence Act*.⁵ He was acquitted by a court-martial panel. The Crown appealed to the Court Martial Appeal Court of Canada, arguing that the Military Trial Judge erred in placing the defence of honest belief in consent before the panel. The appeal was allowed and a new trial was ordered. The accused appealed to the Supreme Court of Canada.

The appeal was dismissed. In a brief oral judgment, the Supreme Court stated: "[T]here was no evidence from which a trier of fact could find that the appellant had taken reasonable steps to ascertain that the complainant was consenting. . . . It follows that the defence of honest but mistaken belief should not have been put to the panel."

PROCEDURE

CROWN DISCLOSURE:

In *R. v. Gubbins and Vallentgoed*, two accused were each charged with the offence of operating a motor vehicle with a blood-alcohol level exceeding .08, contrary to section 253(1)(b) of the *Criminal Code*. In each case, the essential evidence against them was the results of the analysis of their breath conducted on breathalyzer machines.⁶

Before their trials, both of the accused requested that the Crown disclose to them the maintenance records for the breathalyzer machines used to analyze their breath samples. The Crown refused to provide the requested disclosure.

Mr. Vallentgoed's application was dismissed and he was subsequently convicted at trial. Mr. Gubbins was granted a stay of proceedings on the basis of the Crown's failure to disclose the records.

The Alberta Court of Appeal considered both matters on appeal. A majority of the Court of Appeal affirmed Mr. Vallentgoed's conviction. It set aside the stay entered in relation to Mr. Gubbins and remitted his matter for a new trial.

THE APPEAL:

Appeals were taken to the Supreme Court of Canada by both accused. The Supreme Court described the issues raised by the appeals in the following manner:

These appeals deal with the scope of the Crown's disclosure obligations with respect to maintenance records of breathalyzer instruments. . . . Are the maintenance records part of first party disclosure, subject to inclusion in the Crown's standard disclosure package? Or, are these records third party records, which require the defence to demonstrate their likely relevance before an order for disclosure can be made?

THE SUPREME COURT OF CANADA:

The Supreme Court of Canada dismissed both appeals. It held that these "records are subject to third party (rather than first party) disclosure. On the evidence in both cases, the defence failed to show that the maintenance records meet the requisite threshold for third party disclosure."

The Supreme Court noted that it has held that "the Crown has a duty to disclose all relevant, non-privileged information in its possession or control, whether inculpatory or exculpatory. This is referred to as first party disclosure." However, the "Crown" for the purposes of disclosure "does not refer to all Crown entities, but only to the prosecuting Crown All other Crown entities, including police, are third parties for the purposes of disclosure." For third-party disclosure to occur, an accused person must "show that the record is 'likely relevant.'"

The Supreme Court held that to determine if a record is subject to first- or third-party disclosure, the following factors should be considered:

4. *R. v. Cain*, [2018] 421 D.L.R. 239 (Can.).

5. *R. v. Gagnon*, 2018 SCC 41 (Can.).

6. *R. v. Gubbins and Vallentgoed*, 2018 SCC 44 (Can.).

(1) Is the information that is sought in the possession or control of the prosecuting Crown? and (2) Is the nature of the information sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown?

The Supreme Court concluded that the maintenance records are not part of first-party disclosure because they “are not in the possession or control of the prosecuting Crown. They do not form part of the ‘fruits of the investigation’; and the evidence in this case is that the maintenance records are not ‘obviously relevant’ to the cases of the accused”

APPLICATION TO THIS CASE:

The Supreme Court held that neither accused had proven that the maintenance records were “likely relevant” as to whether “an instrument was malfunctioning or operated improperly [and i]n the absence of any such evidence, the expert evidence of the Crown is persuasive that the maintenance records are not relevant. By its nature, this is a technical and scientific question, not a matter of doctrine.”

CERTIORARI:

In *R. v. Awashish*, a companion case to *Gubbins*, the accused was also charged with operating a motor vehicle with a blood-alcohol level exceeding .08, contrary to section 253(1)(b) of the *Criminal Code*.⁷ Before her trial, she applied for an order requiring the Crown to “inquire” into the existence of maintenance records for the breathalyzer machine used to analyze her breath. The application was granted by a provincial-court judge.

The Crown successfully obtained an order of *certiorari* to quash the order. The accused appealed to the Quebec Court of Appeal. The Court of Appeal allowed the appeal, holding that *certiorari* was not available because the trial judge’s decision was made within the exercise of her jurisdiction as the trial judge. The Crown appealed to the Supreme Court of Canada.

The appeal was dismissed. The Supreme Court indicated that resort to *certiorari* is “tightly limited by the *Criminal Code* and the common law so as to ensure that it is not used to do an ‘end-run’ around the rule against interlocutory appeals.” The Court held that

certiorari in criminal proceedings is available to parties only for a jurisdictional error by a provincial court judge. . . . For third parties, *certiorari* is available to review jurisdictional errors as well as errors on the face of the record relating to a decision of a final and conclusive character vis-à-vis the third party

The Supreme Court held that the order of *certiorari* should not have been issued because the decision of the trial judge did not involve a jurisdictional error. However, the Supreme Court concluded that “Ms. Awashish did not establish a basis for the records’ existence or relevance. The Crown was therefore

under no obligation to inquire into the matter.” The trial judge “erred in holding otherwise. However, given that she made no jurisdictional error, *certiorari* cannot be used to correct that error.”

INTERLOCUTORY INJUNCTIONS OF PUBLICATION BANS:

In *R. v. Canadian Broadcasting Corporation*, the accused was charged with the first-degree murder of a person under the age of eighteen.⁸ At the trial, a publication ban was issued prohibiting the publication, broadcast, or transmission in any way of any information that could identify the victim, pursuant to section 486.4(2.2) of the *Criminal Code*.

Before the issuance of the publication ban, the Canadian Broadcasting Corporation (CBC) had posted information on its website, which revealed the identity of the victim. After the publication ban was issued, the CBC refused to remove the information.

The Crown sought the issuing of a mandatory interlocutory injunction directing the removal of the victim’s identifying information from the website.

The application judge dismissed the application, concluding that the Crown had not established the requirements for an interlocutory injunction. The Crown appealed. A majority of the Alberta Court of Appeal allowed the appeal and granted the injunction.

The CBC appealed to the Supreme Court of Canada. The appeal was allowed and the injunction was set aside. The Supreme Court indicated that an application for a mandatory interlocutory injunction must satisfy three elements:

At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a “serious question to be tried” The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction. . . .

The Supreme Court also indicated that this constituted a “general framework” and that there are cases “which require ‘an extensive review of the merits’ at the first stage of the analysis.”

The Supreme Court held that an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant’s case at the first stage “is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case”:

A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise “put the situation back to what it should be”. . . .

7. *R. v. Awashish*, 2018 SCC 45 (Can.).

8. *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5 (Can.).

The Supreme Court concluded that “the chambers judge applied the correct legal test in deciding the Crown’s application, and his decision that the Crown’s case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.”

WHEN A WITNESS REFUSES TO ANSWER:

In *R. v. Noremore*, the accused was charged with the offence of attempted murder.⁹ At his trial, a witness refused to answer a question asked by defence counsel. The trial judge reminded the witness of the potential consequences of failing to answer, but the witness continued to refuse to answer, and the trial judge did not cite the witness for contempt.

The accused was convicted and appealed. A majority of the Court of Appeal of Newfoundland and Labrador overturned the conviction, concluding that the trial judge’s failure to cite the witness for contempt caused the trial to be unfair.

The Crown appealed, as of right, to the Supreme Court of Canada, which allowed the appeal and restored the conviction. In an oral judgment the Supreme Court held that “the trial judge did not err in the way in which he addressed a witness’s refusal to answer a question put to him by defence counsel”:

The question the witness refused to answer was put to him by defence counsel in an attempt to raise doubts about who wrote two notes found in Mr. Normore’s residence. The trial judge relied on these notes, along with other evidence, to find that Mr. Normore had committed the offences in question. However, in all of the circumstances of this case, including that Mr. Normore subsequently admitted to writing the most incriminating statement in these notes, we are of the view that the trial judge’s failure to take further steps to compel the witness to answer the question put to him could not have had an effect on the verdict.

TRIAL JUDGE’S REASONS—SUFFICIENCY:

In *R. v. Black*, the accused was convicted of the offence of importing cocaine into Canada.¹⁰ He appealed from conviction, arguing that the trial judge’s reasons were insufficient. A majority of the Ontario Court of Appeal (Pardu J.A., dissenting) dismissed the appeal. The accused appealed, as of right, to the Supreme Court of Canada.

In a brief judgment, the Supreme Court of Canada allowed the appeal, stating:

Unlike my colleagues, I am not prepared to infer that the trial judge engaged in the necessary reasoning from the conclusory statements [T]he majority concludes, based on the context of the evidence and the arguments made at trial, that the trial judge implicitly held that the appellant in this case knowingly imported cocaine. . . .

I am not convinced that in this case the trial judge’s reasoning was apparent enough in the context of the record for it to be discernable to this court without this court having to

We agree with Justice Pardu that the trial judge’s reasons, even when read as a whole and in the context of the trial record, fail to reveal the basis on which the trial judge concluded that the Crown had proven the mental element of the offence beyond a reasonable doubt. The reasons fail to fulfil the function of permitting effective appellate review.

The appeal is therefore allowed, and a new trial is ordered.¹¹

TRIAL JUDGE’S REASONS—STEREOTYPICAL THINKING:

In *R. v. A.R.J.D.*, the accused was charged with three counts of sexual assault.¹² He was acquitted. The Crown’s appeal to the Alberta Court of Appeal was successful, and a new trial was ordered.

The accused appealed to the Supreme Court of Canada. The Supreme Court considered the appeal on the issue of whether the trial judge’s reasons illustrated the use of stereotypical thinking in rejecting the complainant’s evidence.

The appeal was dismissed. In a brief oral judgment, the Supreme Court of Canada issued the following judgment:

In considering the lack of evidence of the complainant’s avoidance of the appellant, the trial judge committed the very error he had earlier in his reasons instructed himself against: he judged the complainant’s credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law.¹³

THE WITHDRAWAL OF A GUILTY PLEA:

In *R. v. Wong*, the accused pleaded guilty to the offence of trafficking in cocaine and was sentenced to nine months of imprisonment.¹⁴ Because of the accused’s status as a “permanent resident of Canada,” the sentence had the consequence of a loss of his permanent-resident status and a removal order from Canada being issued without any right of appeal being allowed.

The accused appealed from conviction, seeking to withdraw his guilty plea. He filed an affidavit indicating that before entering his plea of guilty, he had been unaware of the possible immigration consequences of his conviction and sentence.

The British Columbia Court of Appeal dismissed the appeal.

9. *R. v. Noremore*, 2018 SCC 42 (Can.).

10. *R. v. Black*, 2018 SCC 10, [2018] 419 D.L.R. 1 (Can.).

11. In her dissent in the Ontario Court of Appeal, Pardu J.A. stated:

reassess the case itself and substitute its own analysis. There may be an implicit route available from the trial judge’s explicit factual findings . . . to a finding of the appellant’s guilt, but “it is not appropriate for this court to attempt to discern that route and explain it”: *R. v. Capano*, 2014 ONCA 599, 313 C.C.C. (3d) 135, at para. 74.

R. v. Black, 2017 ONCA 599 (Can. Ont. C.A.)

12. *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 422 D.L.R. 469 (Can.).

13. In *R. v. Baksza*, 2018 ABCA 873, [2018] A.J. No. 873 (Can. Alta. C.A.), the Alberta Court of Appeal considered *A.R.J.D.*, and indicated that it illustrated “the dangers associated with judging while wearing stereotypical blinders.”

14. *R. v. Wong*, 2018 SCC 25 (Can.).

The accused was granted leave to appeal to the Supreme Court of Canada.

The Supreme Court described the issue raised by the appeal in the following manner:

This case concerns the proper approach for considering whether a guilty plea can be withdrawn on the basis that the accused was unaware of a collateral consequence stemming from that plea, such that holding him or her to the plea amounts to a miscarriage of justice under s. 686(1)(a)(iii) of the *Criminal Code*

The appeal was dismissed. The Supreme Court indicated that an accused person “need not show a viable defence to the charge to withdraw a plea on procedural grounds.” The Court held that in order to withdraw a guilty plea the accused must demonstrate “prejudice”:

In our view, an accused seeking to withdraw a guilty plea must demonstrate prejudice by filing an affidavit establishing a reasonable possibility that he or she would have either (1) pleaded differently, or (2) pleaded guilty, but with different conditions. . . .

A guilty plea on different conditions will suffice to establish prejudice where a court finds that the accused would have insisted on those conditions to enter a guilty plea and where those conditions would have alleviated, in whole or in part, the adverse effects of the legally relevant consequence. . . .

The Supreme Court also held that to be granted leave to withdraw a guilty plea an accused person must “articulate a meaningfully different course of action to justify vacating a plea, and satisfy a court that there is a reasonable possibility he or she would have taken that course.”

CONCLUSION—WONG:

The Supreme Court concluded that the appeal should be dismissed because though the accused

filed an affidavit before the Court of Appeal, he did not depose to what he would have done differently in the plea process had he been informed of the immigration consequences of his guilty plea

OFFENCES

INFLUENCE PEDDLING:

Section 121(1)(d) of the *Criminal Code* creates the offence of “influence peddling,” which is defined as:

having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for

cooperation, assistance, exercise of influence or an act or omission in connection with

(i) anything mentioned in subparagraph (a)(iii) or (iv), or

(ii) the appointment of any person, including themselves, to an office

In *R. v. Carson*, the accused was charged with the offence “influence peddling,” contrary to section 121(1)(d) of the *Criminal Code*.¹⁵

The accused had used government contacts to help a company, H2O Professionals Inc. (H2O), sell water treatment systems to First Nation’s Communities. In exchange, H2O promised to pay a commission to the accused’s girlfriend. After the agreement was made, the accused spoke to government officials at Indian and Northern Affairs Canada to promote the purchase of H2O’s products.

The trial judge entered an acquittal, having concluded that it was the communities rather than the government that decided whether to purchase the water systems. The Ontario Court of Appeal allowed a Crown appeal and substituted a conviction.

The accused appealed to the Supreme Court of Canada. The Supreme Court indicated that “[t]he sole issue in this appeal is whether the assistance he promised to provide was in connection with ‘any matter of business relating to the government.’” The Court found that the accused “admitted to having influence with the government. He also admitted that he demanded a benefit for another person as consideration for assisting H2O by calling upon his government contacts to promote the sale of its water treatment systems to First Nations.”

The appeal was dismissed and the conviction affirmed. The Supreme Court of Canada held that an offence under section 121(1)(d) of the *Criminal Code* “requires that the promised influence be in fact connected to a matter of business that relates to government” and “a matter of business relates to the government if it depends on or could be facilitated by the government, given its mandate.”

The Supreme Court described the elements of an offence under section 121(1)(d) as being the following:

1. having or pretending to have influence with the government, a minister, or an official;
2. directly or indirectly demanding, accepting, or offering or agreeing to accept a reward, advantage or benefit of any kind for oneself or another person;
3. as consideration for the cooperation, assistance, exercise of influence, or an act or omission;
4. in connection with a transaction of business with or any matter of business relating to the government.

15. *R. v. Carson*, 2018 SCC 12, [2018] 423 D.L.R. 389 (Can.).

The Supreme Court also held, at paragraph 24, that the phrase “any matter of business relating to the government” must be “interpreted broadly. A matter of business relates to the government if it depends on government action or could be facilitated by government, given its mandate. Thus, s. 121(1)(d) captures promises to exercise influence to change or expand government programs.”

The Court indicated that section 121(1)(d)

criminalizes the selling of influence in connection with any matter of business relating to the government. The accused does not need to actually have influence with the government, endeavour to exercise influence, or succeed in influencing government to be found guilty of this offence. Indeed, the text of s. 121(1)(d) explicitly targets everyone “having or pretending to have influence with the government.” The offence is complete once the accused demands a benefit in exchange for a promise to exercise influence in connection with a matter of business that relates to government.

The Supreme Court concluded that the accused’s

promised assistance was in connection with a matter of business relating to the government. . . . By demanding a benefit in exchange for his promise to exercise his influence with the government to H2O’s advantage, Mr. Carson undermined the appearance of government integrity. This is exactly the type of conduct s. 121(1)(d)(i) is intended to prohibit.

FIRST-DEGREE MURDER DURING A FORCIBLE CONFINEMENT:

Section 231(5)(e) of the *Criminal Code* indicates that if the death of a person is caused during the commission of the offence of forcible confinement, the murder is first-degree murder:

Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit [either kidnapping or forcible confinement].

In *R. v. Magoon*, the accused were charged with the offence of first-degree murder and convicted of the offence of second-degree murder.¹⁶ The offence involved the killing of a young child (Meika) by the child’s father and step-mother. The trial judge had acquitted the accused of first-degree murder on the basis that they had not forcibly confined Meika while inflicting the blows that killed her.

The accused appealed from the second-degree murder conviction, and the Crown appealed from the acquittal on the charge of first-degree murder.

The Alberta Court of Appeal allowed the Crown’s appeal and entered a conviction for first-degree murder. The accused

appealed to the Supreme Court of Canada. The appeal was dismissed.

The Supreme Court of Canada held that the Court of Appeal did not err in finding the accused guilty of first-degree murder. It held that the five elements of the offence as set out in the section 231(5)(e) of the *Criminal Code*, including a forcible confinement, had been established at the trial.

The Supreme Court indicated, at paragraph 61, that pursuant to section 231(5) of the *Criminal Code*, “second degree murder becomes first degree murder where the accused commits the murder in conjunction with one of the other offences listed in that section, such as sexual assault or kidnapping. All of the offences listed in s. 231(5) involve unlawful domination.”

The Supreme Court referred to its decision in *R. v. Harbottle*, and indicated that “for an accused to be convicted of first degree murder under s. 231(5) of the *Criminal Code* the Crown must establish beyond a reasonable doubt that”:

- (1) the accused was guilty of the underlying crime of domination or of attempting to commit that crime; (2) the accused was guilty of the murder of the victim; (3) the accused participated in the murder in such a manner that he was a substantial cause of the death of the victim; (4) there was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim; and (5) the crimes of domination and murder were part of the same transaction.

The Supreme Court indicated that at “issue in this case are the first and fifth *Harbottle* elements: Was Meika unlawfully confined, and were the unlawful confinement and murder part of the same transaction? We begin with the first element—unlawful confinement.

FORCIBLE CONFINEMENT:

Section 279(2) of the *Criminal Code* states:

- (2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

The Supreme Court of Canada held, at paragraph 64, that pursuant to section 279(2) of the *Criminal Code*, the Crown must show that:

- (1) the accused confined the victim, and (2) the confinement was unlawful. . . . [U]nlawful confinement occurs if

16. *R. v. Magoon*, 2018 SCC 14, [2018] 361 C.C.C. 1 (Can.).

“for any significant period of time [the victim] was coercively restrained or directed contrary to her wishes, so that she could not move about according to her own inclination and desire” The “restriction need not be to a particular place or involve total physical restraint.” . . . Restraint of the victim through physical acts of violence is sufficient but not necessary to establish unlawful confinement. Confinement can be effected “by fear, intimidation and psychological and other means.”

Regarding children, the Supreme Court of Canada indicated that “a finding of confinement does not require evidence of a child being physically bound or locked up; it can just as easily result from evidence of controlling conduct.”

The Supreme Court of Canada concluded that there was “no doubt that Meika was confined on Sunday. She was coercively restrained and directed contrary to her wishes. And the confinement was clearly unlawful. The acts of ‘discipline’ were grossly disproportionate, cruel, degrading, deliberately harmful, and far exceeded any acceptable form of parenting.”

PART OF THE SAME TRANSACTION?

The Supreme Court concluded that “the unlawful confinement and murder were part of the same transaction”:

The course of unlawful confinement leading up to Meika’s death was . . . the “continuing illegal domination” of Meika, representing an “exploitation of the position of power created by the underlying crime.” . . . And the unlawful confinement persisted right up to the moment Meika lost consciousness.

CONCLUSION—MAGOON:

The Supreme Court concluded “that Ms. Magoon and Mr. Jordan unlawfully confined Meika, and the unlawful confinement and murder were two distinct criminal acts that formed part of a single transaction. The Court of Appeal of Alberta did not err in substituting verdicts of guilty for first degree murder.”

FAILING TO PROVIDE THE NECESSITIES OF LIFE:

Section 215 of the *Criminal Code* makes it an offence for a parent to fail to provide “the necessities of life” to a “person under [their] charge.”

In *R. v. Stephan*, the accused were convicted of the offence of failing to provide the necessities of life to their child.¹⁷ Their one-year-old son died when the accused parents did not take him to a doctor but chose to treat him with homeopathic remedies. The parents were charged and convicted with failing to provide the necessities of life.

An appeal to the Alberta Court of Appeal by the accused was dismissed (Justice O’Ferrall dissenting). The accused

appealed to the Supreme Court of Canada. In a brief oral judgment, the Supreme Court allowed the appeal, stating: “[T]he learned trial judge conflated the *actus reus* and *mens rea* of the offence and did not sufficiently explain the concept of marked departure in a way that the jury could understand and apply it. Accordingly, we . . . quash the conviction and order a new trial.”¹⁸

FAILING TO REMAIN AT THE SCENE OF AN ACCIDENT:

In *R. v. Seipp*, the accused was convicted of the offence of failing to stop at the scene of an accident, contrary to section 252(1) of the *Criminal Code*.¹⁹ His appeal to the British Columbia Court of Appeal was dismissed.

He appealed to the Supreme Court of Canada. That appeal was dismissed. The Supreme Court of Canada considered the appeal on the issue of whether the necessary intent had been proven at the trial. In a brief oral judgment, the Court stated:

The evidence on which Mr. Seipp relies is that he fled the scene to avoid criminal liability for possession of a stolen vehicle. This is not evidence to the contrary. Rather, it is evidence that Mr. Seipp intended to avoid criminal or civil liability from his care, charge, or control of the vehicle involved in the accident. Such an intent falls within the ambit of the *mens rea* established by the expression “intent to escape civil or criminal liability” in s. 252(1).

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

SECTIONS 10(B) AND 24(2):

Section 10(b) of the *Charter* guarantees every arrested or detained person in Canada the right to contact counsel “without delay.” Section 24(2) of the *Charter* allows a trial judge to exclude evidence if the evidence was obtained in violation of the *Charter*.

In *R. v. G.T.D.*, the accused was convicted of the offence of sexual assault.²⁰ His appeal to the Court of Appeal of Alberta was dismissed. He appealed to the Supreme Court of Canada on the issue of whether evidence led at the trial should have been excluded based upon his right to contact counsel having been infringed.

The appeal was allowed. In a brief oral judgment, the Supreme Court of Canada indicated that the accused’s right to contact counsel was infringed and that the evidence obtained should be excluded:

The right to counsel under s. 10 (b) of the *Charter* obliges police to “‘hold off’ from attempting to elicit incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel” (*R. v.*

17. *R. v. Stephan*, 2018 SCC 21, [2018] 423 D.L.R. 52 (Can.).

18. In his dissenting reasons in the Alberta Court of Appeal, Justice O’Ferrall held that the trial judge had failed to properly instruct the jury “with respect to: (1) what a failure would have consisted of for the purpose of the second element of the *actus reus*, and (2) the evidence it should have considered in assessing whether there

had been a failure” and “erred in law in articulating the second element of the *actus reus* of the offence of failing to provide the necessities of life.” [2017] ABCA 380 (Can. Alta. C.A.).

19. *R. v. Seipp*, 2018 SCC 1, [2018] 362 C.C.C. 2 (Can.).

20. *R. v. G.T.D.*, 2018 SCC 7, [2018] 359 C.C.C. 340 (Can.).

Prosper, [1994] 3 S.C.R. 236, at p. 269). The first issue in this appeal is whether the question “Do you wish to say anything?,” asked at the conclusion of the standard caution . . . after G.T.D. had already invoked his right to counsel, violated this duty to “hold off.” We are all of the view that it did, because it elicited a statement from G.T.D.²¹

SENTENCING

Refusing to Comply with a Breathalyzer Demand After Causing an Accident Resulting in Death and the Effect of “Collateral Consequences” and Mistake of Law on Sentencing:

In *R. v. Suter*, the accused drove his vehicle onto a restaurant patio, killing a young child. The circumstances were described by the Supreme Court of Canada in the following manner:

While the vehicle was stopped in that space, Mrs. Suter turned to her husband and exclaimed “Maybe we should just get a divorce.” At about the same moment, she realized that the vehicle was inching forward, and she yelled at her husband to stop. Unfortunately, Mr. Suter’s foot had come off the brake pedal and instead of hitting the brake, he pressed down on the gas pedal. The vehicle accelerated through the glass partition and within a second or two, it slammed into the restaurant wall.²²

After the collision, the accused was pulled from his vehicle and beaten by people at the scene. Subsequently, he was abducted by a group of vigilantes who used a set of pruning shears to cut off his thumb.

When the accused was arrested, the police made a demand for samples of his breath to be provided for alcohol content analysis. He spoke to counsel and refused to comply with the demand. He subsequently was charged with and pleaded guilty to the offence of refusing to provide a breath sample knowing that he caused an accident resulting in a death, contrary to section 255(3.2) of the *Criminal Code*. An expert report filed at the sentence hearing indicated that the accused “would not have blown ‘over 80’ [the lawful limit in Canada] had he provided the police with a breath sample.” The sentencing judge described the offence as an “accident caused by a non-impaired driving error.”

The sentencing judge imposed a period of four months of imprisonment and a thirty-month driving prohibition. The Crown appealed.

The Court of Appeal of Alberta allowed the Crown’s appeal and increased the period of imprisonment imposed to a period

of twenty-six months. The accused was granted leave to appeal by the Supreme Court of Canada.

The appeal was allowed. The Supreme Court concluded that the four-month period of imprisonment imposed by the sentencing judge was “manifestly inadequate.” However, it also held that the sentence imposed by the Court of Appeal was excessive. The Supreme Court reduced that sentence imposed to time served (approximately ten-and-one-half months), but upheld the driving prohibition.

The Supreme Court held that the Alberta Court of Appeal

improperly recast the accident as one caused by health and alcohol problems, anger, and distraction. It reweighed the evidence and looked to external factors that had no bearing on the gravity of the offence for which Mr. Suter was charged, nor on Mr. Suter’s level of moral blameworthiness. In doing so, the court effectively punished Mr. Suter for a careless driving or dangerous driving causing death offence for which he was neither tried nor convicted. This was an error in principle that . . . resulted in the imposition of an unfit sentence.

COLLATERAL CONSEQUENCES:

The Supreme Court indicated that there “is no rigid formula for taking collateral consequences into account. They may flow from the length of sentence, or from the conviction itself.” The Supreme Court described a collateral consequence as “any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender.” The Supreme Court concluded that the sentencing judge “correctly” considered “the vigilante violence experienced by Mr. Suter could be considered—to a limited extent—when crafting an appropriate sentence.”

The Supreme Court held that collateral consequences “cannot be used to reduce a sentence to a point where the sentence becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender.”

MISTAKE OF LAW:

The Supreme Court indicated that though a mistake of law

is not a defence to a criminal charge . . . mistake of law can nevertheless be used as a mitigating factor in sentencing . . . This is because offenders who honestly but mistakenly believe in the lawfulness of their actions are less morally blameworthy than offenders who—in committing the same offence—are unsure about the lawfulness of their actions, or know that their actions are unlawful.

21. In *R. v. Ippak*, 2018 NUCA 3, [2018] Nu. J. No. 18, it was suggested that *G.T.D.* stands for the proposition that proof of “a systemic and institutional pattern of *Charter* violations by a police service” will make the breach more likely to result in exclusion of evidence:

The Supreme Court of Canada’s recent decision in *R. v. GTD*, 2018 SCC 7, allowing the accused’s appeal on the basis of the dissenting reasons of Veldhuis JA of this Court in *R. v. GTD*,

2017 ABCA 274 [GTD], reiterates the seriousness of breaches where the evidence lead at trial establishes a systemic and institutional pattern of *Charter* violations by a police service. That matter concerned s 10(b) breaches by police whose standard caution card asked all arrestees whether they wished to say anything about the offence being charged after the arrestee was advised and asserted his or her right to counsel, triggering the state’s obligation to hold-off eliciting evidence.

22. *R. v. Suter*, 2018 SCC 34, [2018] 363 C.C.C. 1 (Can.).

REFUSAL CHARGES AND LACK OF IMPAIRMENT:

The Supreme Court held that although “a finding of non-impairment is a relevant mitigating factor when sentencing an offender for a refusal offence, its mitigating effect must be limited.” The Court indicated that “the seriousness of the offence and the moral blameworthiness of the offender stem primarily from the refusal itself, and not from the offender’s level of impairment.”

AN APPROPRIATE SENTENCE:

The Supreme Court indicated that “the sentencing range for the s. 255(3.2) offence is the same as for impaired driving causing death and driving ‘over 80’ causing death—low penitentiary sentences of 2 or 3 years to more substantial penitentiary sentences of 8 to 10 years, depending on the circumstances.”

After referring to the “attenuating circumstances” present, the Supreme Court concluded that a period of “15 to 18 months’ imprisonment” would have been an appropriate sentence “while not losing sight of the gravity of the [offense]:

But for these attenuating circumstances, I am of the view that a sentence of three to five years in the penitentiary would not have been out of line.

Unlawfully refusing to provide the police with a breath sample after having caused an accident resulting in a death is an extremely serious offence. . . . It carries with it a maximum punishment of life imprisonment—and with good cause. When a person refuses to provide a breath sample in response to a lawful request, this deprives the police, the court, the public at large, and the family of the deceased of the best evidence as to the driver’s blood alcohol level and state of impairment. Moreover, it places a barrier in the way of the ongoing efforts and pressing objective of deterring, denouncing, and putting an end to the scourge of impaired driving.

CONCLUSION—SUTER:

Though the Supreme Court concluded that a fit sentence at the time of sentencing would have been one of fifteen to eighteen months of imprisonment, it imposed a sentence of time served because the accused

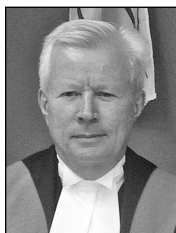
spent almost nine months awaiting this Court’s decision . . . to now impose on Mr. Suter what would have been a fit disposition at the time he was sentenced would cause him undue hardship, and serve no useful purpose. In short, it would not be in the interests of justice to reincarcerate Mr. Suter at this time.

CONCLUSION

As we have seen, the Supreme Court of Canada has considered a number of important issues in the criminal law context in 2018, including issues of evidence, procedure, and sentencing.

Interestingly, we have also seen the Supreme Court issue brief oral judgments in cases which appeared to raise important questions of law. These brief judgments can be tantalizingly difficult to apply. It is particularly interesting that these judgments are primarily rendered in appeals that have come before the Supreme Court as of right.

Finally, which of these judgments will have the greatest long-term impact? I would choose the Supreme Court’s decision in *Gubbins* because the Court’s decision in this case settles a long-standing disclosure issue in Canada. As the Supreme Court noted in *Gubbins*: “Canadian courts have differed as to which disclosure regime applies to breathalyzer maintenance records.” Now, this issue is settled.



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

AJA FUTURE CONFERENCES

2019 MIDYEAR MEETING

SAVANNAH, GEORGIA
Savannah Marriot Riverfront
April 11-13
\$189 single/double

2019 ANNUAL CONFERENCE

CHICAGO, ILLINOIS
The Drake Hotel
September 15-20
\$245 single/double

For more information, go to <http://amjudges.org/conferences>

Answers to Crossword

from page 187

O	N	S	A	V	S	E	E	S	M	E	S	T	E	E	L
S	P	C	I	E	B	I	M	P	A	L	M	E	I	A	E
O	S	N	I	C	A	N	I	N	M	E	N	A	T	I	O
S	I	R	J	N	O	B	B	R	E	R	E	T	E	B	L
S	I	R	J	N	O	B	B	R	E	R	E	T	E	B	L
S	N	E	S	P	E	E	D	E	N	I	T	O	N	V	L
E	G	M	E	E	G	D	E	N	I	T	O	N	V	L	E
M	E	I	T	E	C	R	A	T	I	O	C	E	I	H	M
R	O	R	S	E	N	A	T	I	O	C	E	I	H	M	E
B	O	R	E	M	A	R	E	T	I	R	O	C	E	I	H
T	I	E	H	R	E	C	E	I	O	S	G	E	R	E	B
T	I	C	R	I	T	S	I	D	I	H	G	I	T	D	E
O	N	N	A	S	N	N	I	N	A	B	A	O	W	A	V
I	C	O	R	A	L	P	E	R	E	L	E	C	H	O	I
H	A	T	S	N	S	V	E	N	S	F	O	M	E	S	S

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

AMERICAN JUDGES ASSOCIATION 2019 MIDYEAR MEETING

SAVANNAH, GEORGIA *Savannah Marriot Riverfront*

April 11-13
\$189 single/double



Adobe Stock

AMERICAN JUDGES ASSOCIATION 2019 ANNUAL CONFERENCE

CHICAGO, ILLINOIS *The Drake Hotel*

September 15-20
\$245 single/double



Adobe Stock

THE AJA ANNUAL CONFERENCE: THE BEST JUDICIAL EDUCATION AVAILABLE ANYWHERE
For more information, go to <http://amjudges.org/conferences>.



WANTED:

A JUDGE WHO WOULD LIKE TO JOIN THE TEAM OF EDITORS FOR COURT REVIEW, THE QUARTERLY JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

We are accepting applications to join our editing team. Our plan is generally to have each of the *Court Review* editors take responsibility for one issue per year, while also participating in quarterly conference calls and helping to coordinate content. We hope to add one or two additional judges to our team. This is a great way to stay on top of issues of interest to judges and to help shape the information flow going to other judges throughout the United States and Canada.

Please send your expression of interest to Editors@courtreview.org. If you have a CV or resume, please enclose it—and let us know of any experience you have in writing and editing.



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.

LIVING COLORS by Judge Victor Fleming

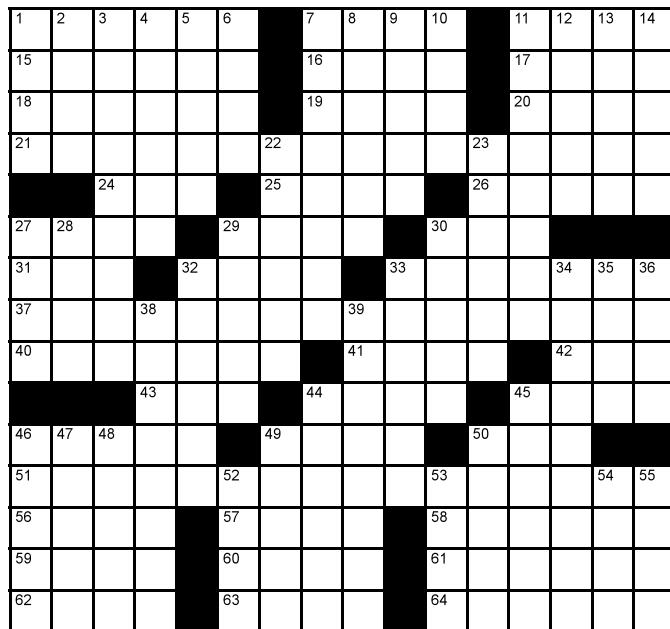
Across

- 1** Took to the airport, e.g.
7 Bergman collaborator Nykvist
11 Berets and bonnets
15 Like some music
16 Champagne pop?
17 Ambler or Seavareid
18 Thing seen on a lab slide
19 Cozy country lodges
20 A.D. part
21 Area where a bordello might be found
24 Army div. officer
25 Frozen drink brand
26 Clark's big role
27 Wearisome speaker
29 Common test answer
30 West of Tinseltown
31 Simile's middle
32 Max, Buddy or Bugs
33 Forum participant
37 It's typically non-violent and financially motivated
40 Hand-lotion ingredient
41 Defeat, barely
42 Movie star Ryan
43 Butter helping
44 Put together
45 Items in pocket protectors
46 Garlicky mayonnaise
49 Heroine of "Last Days of Pompeii"
50 Rapper ____ Wayne
51 Panel with highly qualified members

- 56** Threat to a misbehaving child
57 Chicken chow ____
58 Response to a doubter
59 '60s singer Sands
60 Florida tree
61 Muscle toned by curls
62 Fishing-rod attachment
63 Captain Hook aide
64 Refuses to comply

Down

- 1** Villain of "The Lion King"
2 Reflective sigh
3 Pattern seen in lumber
4 End of a threat
5 Male model Lanzoni
6 Patriotic symbol
7 Feature of Betty Boop's hairdo
8 Buyer
9 "Sesame Street" Muppet
10 Loch ____
11 "I second that!"
12 Golfer Palmer, to his "army"
13 Touch of color
14 Lawyer-author Turov
22 Find employment
23 Channeler's state
27 Loud shout
28 Fed. agency concerned with worker safety
29 Understood without being said
30 Join together
32 Upscale L.A. section
33 Deject



- 34** Chronological listings
35 Augury
36 Rules of conduct, for short
38 Summit
39 1989 Morgan Freeman film
44 Kind of hotspot or router
45 Publisher's headache
46 Lum's partner
47 "____ little baby ducks" (Tom T. Hall lyric)
48 Type of navel

- 49** Construction element
50 Donizetti heroine
52 Troublesome tykes
53 Sails on sloops
54 Fox Sports rival
55 No great shakes

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

Answers are found on page 184.

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

2019 MIDYEAR MEETING

SAVANNAH, GEORGIA
 Savannah Marriot Riverfront
 April 11-13
 \$189 single/double



Adobe Stock

2019 ANNUAL CONFERENCE

CHICAGO, ILLINOIS
 The Drake Hotel
 September 15-20
 \$245 single/double



Adobe Stock

THE AJA ANNUAL CONFERENCE: THE BEST JUDICIAL EDUCATION AVAILABLE ANYWHERE
 For more information, go to <http://amjudges.org/conferences>.



The Resource Page



WEBSITES OF INTEREST

National Inventory of Collateral Consequences of Conviction

<https://niccc.csgjusticecenter.org>

As judges, we know that criminal sentences carry consequences. The ones we usually encounter are the direct ones—the defendant must serve some amount of time in prison, followed by parole or postrelease supervision. But there are a great many other consequences of a criminal conviction. Judges, attorneys, and members of the public who want to understand the criminal-justice system more fully will want to know about them too.

There's now a searchable online database where you can find the collateral consequences for convictions throughout the United States. The project, years in the making, launched in late 2018.

The project came in response to the federal Court Security Improvement Act of 2007, which told the National Institute of Justice to collect and analyze the collateral consequences of convictions in each United States jurisdiction. In 2012, the American Bar Association's Criminal Justice Section began work on collecting the collateral consequences in all 50 states, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, and the federal criminal-justice system.

The Council of State Governments Justice Center took over the project in 2017 and launched the new National Inventory of Collateral Consequences of

Conviction website in late 2018. The website is part of the National Reentry Resource Center (<https://csgjusticecenter.org/nrrc>), a project funded by the U.S. Department of Justice, Bureau of Justice Assistance.

A sample search on the database for collateral consequences of convictions in Kansas showed more than 500 results, each with citation to the statute mandating that consequence. You can click an additional button to add collateral federal consequences.

According to the Council of State Governments Justice Center, most of the collateral consequences of conviction relate to the ability to obtain employment.

In addition to the searchable database, the website also has links to reports about collateral consequences of convictions, model legislation in the area (like the Uniform Collateral Consequences of Conviction Act, proposed in 2010), and several webinars available on demand. One of those teaches how to use the National Inventory of Collateral Consequences of Conviction database effectively. Others explore how technology has influenced the process for clearing criminal records and how barriers to occupational licensing for people with criminal records might be addressed. Presentation slides used in each of the webinars can easily be downloaded.

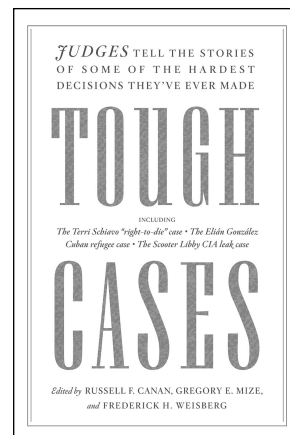


NEW BOOKS

TOUGH CASES: JUDGES TELL THE STORIES OF SOME OF THE HARDEST DECISIONS THEY'VE EVER MADE (The New Press, 2018, Russell F. Canan, Gregory E. Mize & Frederick H. Weisberg, eds.). \$26.99 (280 pp.).

Judging can be a lonely calling. Sometimes there's no one you can talk to about the case that's keeping you awake at night.

But other judges have been there before. And thirteen of them have written the story of some of the toughest cases they handled. They tell the stories from a personal perspective, hoping to give the public a glimpse behind the curtain. For fellow judges, though, it's a



chance to hear directly from an experienced colleague about how a case you didn't seek changed the way you look at other cases—or even your career or your life.

In separate chapters, these judges have told the personal story of a case or series of cases they've handled. Some are familiar stories from a new viewpoint: the case to determine whether Terri Schiavo should continue to be on life support, and the trial of Scooter Libby, the chief of staff to Vice President Dick Cheney. Others were high-profile, though not nationally: an elected judge throwing out a ballot initiative approved by nearly a million voters in Washington State; an appointed judge who presided over the trial to the court of a case in which a mother was charged with murdering her four daughters, whose decomposed bodies were found when eviction papers were served. All of the stories are compelling.

Most of the stories are from experienced judges. One, from Judge Michelle Ahnn in Los Angeles, tells the story of transition to the bench—going from regular cases of “decisional fatigue” in Year 1 to a better, compartmentalized experience in Year 2.

Judges will find themselves in many of the stories, but with the benefit of the considered perspective of another judge. Family members of a judge will get a better sense of the issues and emotions that are part of the job. And members of the public will see inside a branch of government in a way that's rarely available. We're glad these judges took the time to tell their stories.

