The Art of Judging – Part I: Avoiding Reversal

9th Circuit Judicial Conference
Monday, July 11, 2016

PROCEDURAL CHECKLIST
re: common grounds for remand

1. Consider whether there is reason to dismiss the action under *Heck v. Humphrey*, 512 U.S. 477 (1994), or the *Rooker-Feldman* doctrine (*see Lance v. Dennis*, 546 U.S. 459 (2006)), or to abstain under *Younger v. Harris*, 401 U.S. 37 (1971).

2. Dismissal should be without prejudice when dismissing:
   - an action for lack of subject matter jurisdiction, including under the *Rooker-Feldman* doctrine, *see Cooper v. Ramo*s, 704 F.3d 772, 777 (9th Cir. 2012) (citing *Frigard v. United States*, 862 F.2d 201, 294 (9th Cir. 1988) (per curiam));
   - an action for lack of personal jurisdiction, *see Grigsby v. CMI Corp.*, 765 F.2d 1369, 1372 n.5 (9th Cir. 1985);
   - an action for failure to serve the complaint in a timely manner, *see* Fed. R. Civ. P. 4(m); *Oyama v. Sheehan (In re Sheehan)*, 253 F.3d 507, 512-13 (9th Cir. 2001);
   - an action as *Heck*-barred, *see Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (per curiam);
   - an action for failure to exhaust administrative remedies, *see McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (per curiam);
   - state law claims after declining supplemental jurisdiction, *see Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1046 (9th Cir. 1994).

3. If an action is referred to a magistrate judge for all purposes under 28 U.S.C. § 636(c), the record should contain consent from all parties. *See Allen v. Meyer*, 755 F.3d 866, 868 (9th Cir. 2014); *Wilhelm v. Rotman*, 680 F.3d 1113, 1118-21 (9th Cir. 2012).

4. Before leave to proceed in forma pauperis is denied, or an action is dismissed for failure to state a claim, plaintiff should be granted leave to amend or the court should explain why amendment would be futile. *See Rodriguez v. Steck*, 795 F.3d 1187, 1188 (9th Cir. 2015) (order); *Akhtar v. Mesa*, 698 F.3d 1202, 1212-13 (9th Cir. 2012).

5. Before an action is dismissed for failure to prosecute, or for failure to comply with an order, plaintiff is entitled to proper notice. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1228-29 (9th Cir. 2006).

6. Following a final decision, the clerk needs to enter a separate document constituting the judgment so that the time period for appeal begins to run. *See* Fed. R. Civ. P. 58; *In re Bonham*, 229 F.3d 750, 760 n.3 (9th Cir. 2000).

Prisoner 42 U.S.C. § 1983 Cases

- Consider timeliness of prisoner filings under the mailbox rule. *See* Fed. R. App. P. 4(c)(1); *Douglas v. Noelle*, 567 F.3d 1103, 1106 (9th Cir. 2009).
- Give prisoner notice of curable deficiencies in complaint. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212-13 (9th Cir. 2012).
- Treat exhaustion of administrative remedies as an affirmative defense. *See Jones v. Bock*, 549 U.S. 199, 211-217 (2007).
- Give prisoner notice of summary judgment requirements. *See Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012).
- Treat prisoner's verified complaint as evidence at summary judgment. *See Jones v. Blanas*, 393 F.3d 918, 922-23 (9th Cir. 2004); *Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) (en banc).

Criminal Cases

- Properly advise under Fed. R. Crim. P. 11(c) before accepting guilty plea. *US v. Carter*, 795 F.3d 947, 951 (9th Cir. 2015).
- Develop factual record as to sentencing guidelines. *US v. Doe*, 705 F.3d 1134, 1156 (9th Cir. 2013).
- Explain sentence, particularly if above guideline. *Rita v. US*, 551 U.S. 338, 356-58 (2007); *US v. Carty*, 520 F.3d 984, 991-92 (9th Cir. 2008) (en banc).
- Make clear when exercising discretion. *US v. Henderson*, 649 F.3d 955, 964 (9th Cir. 2011); *US v. Rojas-Millan*, 234 F.3d 464, 475 (9th Cir. 2000).
- Resolve or find irrelevant any factual objection to the presentence report. Fed. R. Crim. P. 32(i)(3)(B); *US v. Petri*, 731 F.3d 833, 838-40 (9th Cir. 2013); *US v. Doe*, 705 F.3d 1134, 1154-55 (9th Cir. 2013).
- Do not reference 8 U.S.C. § 1326(b) in judgment. *US v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000); *US v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000).

Habeas Cases

- Grant or deny a certificate of appealability (COA). Rule 11(a), Rules Governing section 2254 Cases, 28 U.S.C. foll. § 2254; Rule 11(a) Rules Governing section 2255 Cases, 28 U.S.C. foll. § 2255.

The Emotionally Intelligent Judge:

A New (and Realistic) Ideal

Terry A. Maroney

As a Supreme Court Justice once wrote, "dispassionate judges" are "mythical beings," like "Santa Claus or Uncle Sam or Easter bunnies."[1] Judges have emotions, and emotions influence decision making. These observations may seem obvious, even banal. But their implications are broad-reaching. Judicial emotion is more common than most people—certainly laypeople, and perhaps judges as well—would like to believe. Further, emotion almost certainly has a substantial impact on judicial decision making and behavior—and that is not necessarily a bad thing.

The ideal of the emotionless, "dispassionate" judge has a very long pedigree. More than three centuries ago, Thomas Hobbes wrote in *Leviathan* that the ideal judge is "divested of all fear, anger, hatred, love, and compassion."[2] To a modern ear such a blunt statement sounds, perhaps, antiquated. To the extent this is so, it is because the Legal Realists of the early twentieth century largely convinced us of the importance of the person wearing the robe. Law is not certain, and judges have discretion, within which space ostensibly "alogical" or "non-rational" forces have room to operate.[3] As the great Benjamin Cardozo once mused, "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."[4]

In our post-Realist world, such frank acknowledgment of judges' humanity is relatively commonplace. As other contributions to this special issue make clear,[5] judges are affected by factors as diverse as fatigue and life experiences, and they deploy common (but sometimes misleading) decision-making shortcuts known as heuristics. Judges are likely no better than ordinary humans at multitasking or truth-telling. An entire academic cottage industry is devoted to ascertaining the decisional influence of personal characteristics such as gender and political party.

But we still seldom talk about the *emotional* aspect of judges' humanity. And when we do, we run into a fairly solid wall of opposition. Judicial emotion generally is seen as an unfortunate consequence of having to populate the legal system with fallible, biased, real people. Indeed, emotion traditionally has been counted among the primary sources of fallibility and bias. A Maryland judge expressed this well: "Judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the species."[6] The task of the legal system, under this contemporary view, is to systematically reduce the opportunities for judicial emotion to insert itself; the task of the good judge is to prevent emotion from exerting any influence wherever such opportunities remain.

We saw this view vividly articulated during the 2009 nomination of now-Justice Sonia Sotomayor, who some feared would have an overly "empathic" judging style. One senator implied that judges' emotions posed a threat to liberty;[7] a prominent professor declared that a "compassionate, empathetic judge was very likely to be a bad judge";[8] a journalist noted that the mere suggestion that emotion might affect judging was "radioactive."[9] Even among Sotomayor's supporters, defense of empathy (or any emotional influence) was tepid at best. She was finally able to put the issue to rest by offering a standard post-Realist narrative: that while judges are not "robots" and do have feelings, a good judge recognizes those feelings and puts them aside.[10]

Certainly, judges are *not* robots, so the first half of that story is correct. But what if the latter part is wrong? What if emotion—at least sometimes—offers something of value to judicial decision making? Judge Richard A. Posner has suggested as much, writing that judges ought not try to become "emotionless, like computers," because feelings might sometimes be necessary to good judging.[11] Justice William J. Brennan similarly asserted that good judgment flows from a "dialogue of

Footnotes

Many of the ideas expressed in this article are explored in much greater depth in my prior works, all of which are available at my Vanderbilt Law School faculty website and on SSRN. *See* Terry A. Maroney, *Angry Judges,* 65 Vand. L. Rev. 1207 (2012); *Emotional Regulation and Judicial Behavior,* 99 Cal. L. Rev. 1485 (2011); and *The Persistent Cultural Script of Judicial Dispassion,* 99 Cal. L. Rev. 629 (2011). This article is by design lightly footnoted; I refer the interested reader to the extensive citations in those longer publications.

1. United States v. Ballard, 322 U.S. 78, 93-94 (1944) (Jackson, J., dissenting).
2. Thomas Hobbes, Leviathan 203 (A.R. Waller ed., 1904) (1651).
3. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 Harv. L. Rev. 697, 706 (1931).
4. Benjamin N. Cardozo, The Nature of the Judicial Process 167-68 (1921).
5. *See* Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 Ct. Rev. 76 (2013); Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 Ct. Rev. 114 (2013).
6. State v. Hutchinson, 271 A.2d 641, 644 (Md. 1970).
7. Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Assoc. Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary, 111th Cong. 13 (2009) (statement of Sen. Orrin Hatch). *See also id.* at 17 (statement of Sen. Lindsay Graham) (a judge's most critical qualification is "the capacity to set aside one's own feelings so he or she can blindly and dispassionately administer equal justice for all").
8. John Yoo, *Closing Arguments: Obama Needs a Neutral Justice*, Phila. Inquirer, May 10, 2009, at C3.
9. Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. Times, Apr. 26, 2010, at A12.
10. Sotomayor Confirmation Hearings, at 71, 120 (statement of J. Sonia Sotomayor).
11. Richard A. Posner, Frontiers of Legal Theory 226 (2001).

reason and passion."[12] If that is so, what might that dialogue sound like?

These are questions that law need not—indeed, cannot—answer on its own. A rich and fast-growing body of literature on the role of emotion in human life offers insight and guidance. Indeed, the study of emotion is one of the fastest-growing sectors within psychology and neuroscience. This explosion in the "affective sciences" joins a resurgence of interest in the topic within philosophy, history, and sociology. The consensus from outside law is clear. Emotion's impact on decision making and behavior can be (and usually is) positive, even indispensible. Emotion's impact can also be detrimental, depending on factors such as intensity, duration, and—most critically—context. Drawing on these interdisciplinary insights, we can think in a coherent way about when emotion might help a judge perform her job better, when it might hinder job performance, and how a judge might tell the difference.

This short article offers the judge a roadmap for thinking about the role of emotion in judicial decision making. It first presents the limited empirical evidence drawn from judges themselves, demonstrating that coping with emotional challenges is an unrecognized aspect of judges' work. It goes on to describe what the affective sciences teach us about emotions' impact on human decision making and behavior. To make the discussion concrete, the article periodically applies those insights to the phenomenon of judicial anger. Finally, an analysis of emotional regulation strategies offers a concrete path by which judges can learn to maximize helpful iterations of emotion and minimize destructive ones.

COPING WITH EMOTIONAL CHALLENGES: AN UNDER-APPRECIATED ASPECT OF JUDGING

Judges, particularly trial judges, often have to manage the emotions of other people. Distraught victims and witnesses have to be attended to; disruptive family members or criminal defendants must be cautioned, disciplined, or removed; angry disputes between lawyers need to be mediated or broken up.[13] Judges are asked to filter out emotional influences, such as disturbing evidence and provocative buttons or t-shirts worn by spectators, if there is a risk that a jury's emotions might be manipulated or inflamed.[14] Indeed, trial judges may be called upon to instruct jurors about how to handle their emotions during deliberations.[15]

While the legal system recognizes that handling the emotions of others is part of a judge's job, it tends to ignore something just as important: the fact that judges, too, have emotions to handle.[16] Misbehaving lawyers and litigants can make judges angry. Disturbing evidence may affect a judge as much as it does a juror. The stories of litigants' unhappy lives can trigger sadness. Judges might feel frustrated, even depressed, when they are unable to fix all the ills paraded before them. As one has written, "[S]ometimes [the judge] has to just sit up there and watch justice fail right in front of him, right in his own courtroom, and he doesn't know what to do about it, and it makes him feel sad. . . . Sometimes he even gets angry about it."[17] Litigation generally follows harm or grievance, meaning that such unpleasant emotions are nowhere in short supply.

Because our legal culture expects judicial "dispassion," . . . judges do not often disclose their emotional reactions . . . .

Fortunately, judges also experience more pleasant emotions. They may feel joy when a suffering child is placed with a family, or hope when a drug-court defendant completes treatment and begins to turn his life around. Presiding over naturalization ceremonies for new Americans is an occasion for gratitude, even a soaring feeling that psychologists call "elevation."[18] Crafting a tightly reasoned, well-written opinion can generate pride. Simply feeling like you are doing a good job, even under trying circumstances, can be a source of deep satisfaction. The emotions a judge feels will be as varied as the cases she hears.

Because our legal culture expects judicial "dispassion," however, judges do not often disclose their emotional reactions or discuss how they process them. As that taboo breaks down, we may see increased space for much-needed empirical work exploring those issues. As things stand today, we must glean clues from rare moments of candor.

Those moments show that emotion infuses many aspects of judges' work. Judges sometimes note their emotions before declaring an intention to override them.[19] With the proliferation of cameras in courtrooms, coinciding with the growth of social-media outlets, the public has developed an appetite for intemperate displays, gleefully referred to as "benchslaps." In burial disputes, which often involve grisly details and vitriolic

12. William J. Brennan, *Reason, Passion, and "The Progress of the Law,"* 10 Cardozo L. Rev. 3 (1988).
13. *See, e.g.*, Lydia Polgreen, *In Affidavit at Bail Hearing, Track Star Denies He Intended to Kill Girlfriend*, N.Y. Times, Feb. 20, 2013, at A9 (describing how the Olympian Oscar Pistorius broke down at his bail hearing: "Magistrate Desmond Nair called a recess to allow Mr. Pistorius, who was sobbing loudly, his face contorted, to regain his composure. 'My compassion as a human being does not allow me to just sit here,' Magistrate Nair said.").
14. Carey v. Musladin, 549 U.S. 70, 76 (2006).
15. California v. Brown, 479 U.S. 538, 542-43 (1987); Saffle v. Parks, 494 U.S. 484, 493 (1990).
16. Arlie R. Hochschild, The Managed Heart: Commercialization of Human Feeling 7 (1983) (defining sociological concept of "emotional labor").
17. Carrington v. United States, 503 F.3d 888, 899 (9th Cir. 2007) (Pregerson, J., dissenting) (quoting Gerry H. Spence, Of Murder and Madness: A True Story, 490 (1983)).
18. Jonathan Haidt, *Elevation and the Positive Psychology of Morality*, in Flourishing: Positive Psychology and the Life Well-Lived 275-89 (C. L. M. Keyes & J. Haidt eds., 2003)
19. *See, e.g.*, States v. Cutts, No. 2008CA000079, 2009 WL 2170687 (Ohio App. 5 Dist. Jul. 22, 2009) (Delaney, J. concurring) ("I am saddened by the tragic loss of life this case presents and sympathize with the families of all involved. But, when I put on the robe as judge, I must not let my feelings, my emotions … influence my review and application of the law.").

Data from two small case studies further illuminate the reality of judicial emotion.

family dynamics, judges have voiced the "dismay," "sympathy," and "difficulties and embarrassment" with which they grapple.[20] Recently, several prominent federal judges have disclosed that they find criminal sentencing to be particularly infused with emotion.[21]

While trial-level work in the state criminal and family courts may provide the steadiest flow of emotion-triggering situations, no judge is immune. Highly publicized instances of intra-court animosity, including in the appellate courts, sometimes shine an unflattering light on the role of personal feelings.[22] Even the highly cloistered appellate environment of the U.S. Supreme Court has an emotional life. Justice David Souter reportedly cried during the process of deciding *Bush v. Gore*,[23] and Justice Clarence Thomas, not known for public displays of emotion, has said that "some cases . . . will drive you to your knees."[24]

Data from two small case studies further illuminate the reality of judicial emotion. In the first, Australian magistrate judges answered a survey about various aspects of their work.[25] Much like state trial-court judges in the U.S. system, Australian magistrates handle the majority of civil and criminal actions. These judges reported expending significant effort to manage their emotions, most of which were negative. One, for example, characterized his work as "seeing absolute misery passing in front of you day in, day out, month in, month out, year in, year out."[26] Another reflected thus on working with child-welfare cases:

> I have a problem walking away and just erasing everything I've heard about families and the stress that they're under, the treatment children have been dished out, what will happen to them for the rest of their lives. I just find it difficult to walk away from that and go home to my own children and look at them and think "Oh, God", you know. I usually find I try to be more patient with my own children when I go home after a day in the [family court]. So it's just the sadness; there is no good news.[27]

Similar sentiments were expressed by a small group of Minnesota state judges asked to reflect on victim-impact statements.[28] The researchers described one response thus:

> One judge . . . recalled a DWI case in which a young child [had] almost lost his life. His mother delivered an impact statement in which she described how she thought her son was going to die. "I remember thinking," the judge said, "I am going to cry." But he regained what he thought was necessary composure because "you are not supposed to cry on the bench when you are a judge."[29]

Other Minnesota judges reported feeling frustration, anger, and compassion, emotions prompted both by the underlying facts and by the victim-impact statements.

Importantly, both the Australian and Minnesotan judges reported that they found the work of regulating their emotions to be difficult. One magistrate offered a particularly stark assessment:

> Now, there's two things that can happen to you. Either you're going to remain a decent person and become terribly upset by it all because your emotions—because your feelings are being pricked by all of this constantly or you're going to become—you're going to grow a skin on you as thick as a rhino, in which case I believe you're going to become an inadequate judicial officer because once you lose the human—the feeling for humanity you can't really—I don't believe you can do the job.[30]

This perception of nothing but bad options was, unfortunately, echoed by the Minnesota judges. Some reported feeling that, as the legal system tends "to strip away emotions," they were "working in a factory of sorts in which we are just grinding these cases out," causing them to worry that they were becoming "insulated and numb" in the process.[31]

These windows into judges' experience suggest that their work often prompts an emotional response; that such responses are often unpleasant; that managing those emotions is difficult; and that these challenges have an impact on how the judge acts in the moment and on how she feels about her work in the longer term. These voices also strongly suggest that judges feel inadequately trained and supported in this aspect of their work.

Fortunately, insights from the affective sciences can help change this rather bleak assessment.

20. Heather Conway & John Stannard, *The Honours of Hades: Death, Emotion, and the Law of Burial Disputes*, 34 U. South Wales L.J. 860 (2011).
21. *See* Benjamin Weiser, *Madoff Judge Recalls Rationale for Imposing 150-Year Sentence,* N.Y. Times, at A1, A19 (Jun. 29, 2011) (interview with Judge Denny Chin); Del Quentin Wilber, *Judge Who Had 'No Passion for Punishment' Retires After 31 Years*, Wash. Post, June 1, 2012 (interview with Judge Ricardo Urbina).
22. *One Federal Judge Does Battle with 19 Others*, N.Y. Times, May 1, 1996, at B6.
23. Douglas W. Kmiec, *The Case for Empathy: Why a Much-Maligned Value Is a Crucial Qualification for the Supreme Court*, America Magazine (May 11, 2009).
24. Adam Liptak, *Justice Thomas, 5 Years Slient: There's No Arguing with Him*, N.Y. Times, Feb. 13, 2011, A1 (also quoting Thomas as saying that cases can make him "morose").
25. Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32(4) J. Law & Society 590-614, 614 (2005).
26. *Id.* at 611.
27. *Id.* at 613.
28. Mary Lay Schuster & Amy Propen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 6 Law, Culture & Humanities 75 (2010).
29. *Id.* at 89.
30. Anleu & Mack, *supra* note 25, at 612.
31. Schuster & Propen, *supra* note 28, at 89.

EMOTION AND DECISION MAKING: INSIGHTS FROM PSYCHOLOGY AND NEUROSCIENCE[32]

The first insight the legal system would do well to internalize is that we need not ask judges to "strip away" their emotions, because those emotions offer something of value.

Contemporary scholarship outside of law has generated a consensus that emotion is an evolved, adaptive mechanism, necessary for survival, social cohesion, and practical reason. This consensus is rapidly eroding the stark division between reason and emotion that traditionally has held sway in both the sciences and in law. As I explain briefly below, emotion reveals reasons, motivates action in service of reasons, and enables reason.

Emotion reveals reasons. This insight flows from what psychologists refer to as the "cognitive-appraisal" theory. This theory focuses on the "aboutness" of any given emotion. Emotions are not random; rather, they are directed at objects. We love our mothers, for instance, and the specificity of that love is how we experience the concept of "love." Further, every emotion has a basic underlying thought and belief structure—an "appraisal"—which is an important way in which we distinguish them from one another. Anger, for example, reflects a judgment that someone has wrongly threatened or damaged something or someone that we value. In contrast, we feel sad when we perceive an irreversible loss, or guilty when we perceive ourselves to have done wrong.

It is helpful to think of appraisal structure as akin to the theory of universal grammar. Human language is built of a relatively constrained set of grammatical elements—nouns versus verbs, function versus lexical words, and so on—but different cultures fill in different content, making our languages distinct. Similarly, all humans appear to have a common core of basic emotions underlain by highly similar appraisal structures, but how we fill in those structures can vary. What makes one person afraid might make another person happy. This is not because these two people have radically different concepts of fear and happiness; rather, they have radically different ideas as to what states of the world satisfy the conditions that trigger those emotions.[33] In the case of anger, what constitutes a perceived wrong will vary; who we consider part of the group on whose behalf it is right to be angry will vary; even the proper goal to be advanced by anger—for example, vindicating honor or broadcasting moral judgment—will vary.

Thus, emotion embodies thought, often complex and even culturally scripted thought, and those thoughts can be evaluated just like any others.[34] Again, the example of anger is helpful. Whether we approve or disapprove of an angry person depends on whether we think her perception of the triggering event is accurate—that is, whether the event really occurred as she believes it did—and whether her judgments strike us as warranted—that is, whether the event really constitutes a wrong of which a person rightfully should disapprove.

[W]e need not ask judges to "strip away" their emotions, because those emotions offer something of value.

Thus, emotion reveals what a person is thinking. It reveals her reasons.

Emotion motivates action in service of reasons. Emotions do not simply reflect passive assessment of what we perceive to be happening in the world; they prompt us to respond to that world. The idea in the sciences is that we evolved capacity for emotion in order to maximize survival chances, and we now use that capacity to propel us in the direction of a wider variety of goals. Fear provides a nice example. If you perceive that a grizzly bear is approaching, your perceptions and resulting thoughts will spur fear. Fear will focus your attention on the bear and prompt you to evaluate its relevance to your goals—for example, the desire not to be mauled or killed. Fear then enables responsive action, including patterns of bodily response (like fleeing), as well as typified facial expressions (grimacing) and verbalizations (screaming) that signal your emotional state to others. This is a rather primal example, but the same principle holds for all emotions. Feeling love toward an infant, for example, tends to motivate actions designed to keep the baby alive and thriving, and feeling guilty about having wronged a friend tends to show itself in a pained face, which can communicate a desire to repair the relationship.

Thus, emotion not only reflects thoughts; it serves as an adaptive signal that something of import to a person's flourishing is at stake and activates a real-time response.

32. The following discussion is drawn primarily from the following scientific sources: THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES (David Sander & Klaus R. Scherer eds., 2009); REGULATING EMOTIONS (Marie Vandekerckhove et al. eds., 2008); PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES (Paula M. Niedenthal et al. eds., 2006); HANDBOOK OF AFFECTIVE SCIENCES (Richard J. Davidson et al. eds., 2003); HANDBOOK OF EMOTIONS (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000); COGNITIVE NEUROSCIENCE OF EMOTION (Richard D. Lane & Lynn Nadel eds., 2000); JOSEPH LEDOUX, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE (1996); THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS (Paul Ekman & Richard J. Davidson eds., 1994); ANDREW ORTONY ET AL., THE COGNITIVE STRUCTURE OF EMOTIONS (1988); Keith Oatley & P.N. Johnson-Laird, *Toward a Cognitive Theory of Emotions*, 1 COGNITION & EMOTION, 29-50 (1987).
33. Though evolved "biological universals link the *if* with the *then*," individual and cultural factors "affect the *if*" by determining what circumstances are thought to constitute, for example, "a demeaning offense" (for anger) or an "irrevocable loss" (for grief). Richard S. Lazarus, *Universal Antecedents of the Emotions*, *in* THE NATURE OF EMOTION, *supra* note 32, at 167-68.
34. JOHN DEIGH, EMOTIONS, VALUES, AND THE LAW 12 (2008) (emotions "are on a par with beliefs and judgments, decisions and resolutions," for they are "states that one can regard as rationally warranted or unwarranted, justified or unjustified by the circumstances in which they occur or the beliefs on which they are based").

Not only does reason facilitate and shape emotion, but each plays a vital role in our ability . . . to navigate the world . . . .

Emotion enables reason. Finally, one of the most cutting-edge implications of modern research is that emotion and reason are intertwined, such that the latter can't fully be realized without the former. Neuroscience, for example, has shown that people with particular sorts of brain disease and injury show a decline in both emotional capacity and substantive rationality.[35] Extreme emotional deficits in such people are strongly correlated with inability to engage in vital forms of reasoning—evidenced, for example, by inability to make appropriate, self-interested choices in a simple gambling task. They become unable to suppress inappropriate actions, to understand and respond to social cues, and to advance their own interests and preferences. In other words, social and emotional competence can be devastated while more purely cognitive capacities, like logic, remain intact.

Emotion also appears necessary to moral judgment. A creative series of experiments involving the classic philosophical "trolley problem" illustrate that phenomenon.[36] In the trolley problem people are asked to choose between two options. The first is to flip a switch to divert an out-of-control trolley, killing a worker on the diversion track but saving five people in its original path. The second option is to push a human being off a bridge so that he lands in front of the trolley, saving the five but killing him. In either case the cold calculation is the same: save five lives by sacrificing one. Most normal people, though, think option one is moral, even necessary, while option two is immoral. The differential? Emotion. The heightened emotional salience of person-pushing accounts for an overwhelming preference for switch-flipping. Psychopathy provides another example of emotion's relevance to morality. The antisocial and amoral behavior typifying serial murderers and other psychopaths correlates at the neural level with a lack of normal emotional response.[37] Psychopaths' moral indifference mirrors their emotional indifference.

In short, emotion is not the enemy of reason. They are interdependent. Not only does reason facilitate and shape emotion, but each plays a vital role in our ability competently to navigate the world, including our capacity for substantive rationality and moral judgment. This is as true for judges as it is for human beings generally.

Emotion is not always a positive force. The prior discussion has highlighted the overall positive contribution of emotion. Given the generally negative narrative we have inherited in our legal culture, it is important to spell out the parameters of that contribution. But, of course, the negative narrative has to have *some* truth to it.

Indeed, it often has a lot of truth to it. Another insight from the sciences is that all human tendencies and capacities that are adaptive most of the time are maladaptive some of the time. The common decisional heuristics described elsewhere in this special issue fit into that category: quick, efficient guides to judgment that work quite well in many situations but predictably lead to error in a small set of others. This is certainly true of emotion.[38]

By way of illustration, recall the story of the approaching grizzly bear. Fear quickly narrows attention to sources of threat (the bear) and opportunity (escape routes), to the exclusion of other stimuli. That attentional effect is vital, but it has costs. For example, you will be far less able to perceive and remember less emotionally vivid aspects of the situation, like an important conversation you were having just before you saw the bear. The emotion needs to be intense to do its job, but as a result you might not notice the ditch standing between you and the escape route.

Similarly, different emotionally infused mood states tend to dispose us to different decisional styles, which might be disadvantageous in particular situations. Moods are experiential states that are more generalized, longer-lasting, and less object-driven than emotions: think of the difference between feeling "down" and being concretely sad about the death of a beloved pet. Because emotions and moods are so closely related, though, they often are studied together. Often what starts as a discrete emotion will morph into a mood (you are sad that your dog died, and it makes you feel down for a long time for no particular reason), or our moods predispose us to experience discrete emotions (you feel down, so you find more things to be sad about). Moods, unfortunately, can be mismatched with the decisional demands we face at any given moment. This, too, is a nice insight raised elsewhere in this special issue, in which it is noted that certain moods "are best suited for decision-making tasks that are interesting or require creativity or efficiency," while others are "best suited for decision tasks that are effortful and/or require careful consideration and analysis."[39] In an example of particular relevance to judges, people in sad moods tend to scrutinize evidence more carefully than do happy or angry people, meaning that happiness, anger, and their associated moods can sometimes contribute to blind spots. This is why Judge Posner once warned

35. S. W. Anderson et al., *Impairments of Emotion and Real-World Complex Behavior Following Childhood- or Adult-onset Damage to Ventromedial Prefrontal Cortex*, 12 J. Int. Neuropsychol. Soc. 224 (2006); Bechara et al., *Characterization of the Decision-Making Deficits of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 Brain 2189 (2000).
36. Joshua Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 Sci. 2105, 2105-07 (2001).
37. Kent A. Kiehl, *Without Morals: The Cognitive Neuroscience of Criminal Psychopaths,* in 3 Moral Psychology: The Neuroscience of Morality: Emotion, Brain Disorders, and Development 120-49 (Walter Sinnott-Armstrong ed., 2008).
38. Paul Slovic et al., *The Affect Heuristic*, *in* Heuristics and Biases: The Psychology of Intuitive Judgment 397, 397-420 (Thomas Gilovich et al. eds., 2002).
39. Kimberly D. Elsbach & Pamela S. Barr, *The Effects of Mood on Individuals' Use of Structured Decision Protocols*, 10 Organization Sci. 181, 193 (1999).

that we ought to "beware the happy or the angry judge!"[40]

Finally, very intense emotion can sometimes lead us astray and even defeat our goals. Fear can paralyze; sadness can overwhelm; love can blind. This reality is so evident from our lives that it needs no further comment here.

A full understanding of emotion's impact, then, requires us to consider both what it offers and what it might take away. Recognizing emotion's value is critical, given how thoroughly we've disparaged it to date. That does not mean we should give it free rein. The capacity to *regulate* emotion is a skill every bit as critical as is the capacity to *feel* emotion.

A full understanding of emotion's impact . . . requires us to consider both what it offers and what it might take away.

THE PLUSES AND MINUSES OF EMOTION FOR JUDGES

These fundamental understandings about the nature and function of emotion clearly matter to judges as people. An emotionally well-adjusted judge is likely to have better physical health, happier work-life balance, and more functional personal relationships. Like caring for the body, caring for emotional health helps us achieve more satisfying lives.

The remainder of this article, though, focuses how these insights affect judges as judges—that is, in the concrete context of judicial work settings. After extending the prior discussion to judicial emotion, using anger as the primary example,[41] the article goes on to explain how judges can most effectively regulate the emotions they are bound to have.

First, one benefit of an emotion for judges is that it signals seriousness, both internally and externally. Consider anger. Angering events are vivid, which sends a signal that something important is happening. Whereas some emotions have a strong withdrawal tendency—for example, disgust makes us back away—anger keeps us engaged, meaning that it focuses the judge's attention to the offending person and situation. Anger also communicates seriousness to others. Its typical physical manifestations—raised voice, clenched eyebrows, narrowed eyes, a scowl, and tensed muscles—are extraordinarily potent communicative devices. Anger conveys power. Thus, the emotion sends important signals both *to* the judge and *from* the judge.

Second, anger motivates us to assign blame and consequences. It is tightly bound up with an urge to restore justice. Further, anger makes us more willing to take risks, in part because it is associated with optimism and feelings of being in control. Indeed, experimental studies show that people prefer being in an angry state when faced with a confrontational task, because anger helps them take on and succeed at the confrontation. It also literally heats us up, to prepare the body and mind for action—think of that telltale "boiling" feeling. Thus, anger facilitates both judgment and action.

These attributes are of obvious utility to judges—indeed, one is tempted to say they are *necessary*, or even that anger is quintessentially judicial. A judge often is asked to assign blame and consequences, which anger can help her do. It can also help her take necessary risks. Judges sometimes have to alienate powerful interests, upset potential voters, disappoint decent people who have been wronged, and even jeopardize public safety. The late Judge John Sprizzo of the Southern District of New York, for example, once expressed fury at having to release high-level drug dealers because of fatal flaws in the indictment.[42] Similarly, some judges reported recently that they hesitated in sanctioning police officers who had committed blatant perjury, citing a fear of ruining careers or conferring an undeserved benefit on defendants. Anger at the officers' abuse of the system helped them do what was right, not what was easy.[43]

Anger can also keep the judge's mind in the courtroom, so to speak. Given the welter of stimuli and stressors to which judges are exposed, they may need emotion to flag possible misconduct, direct attention to it, and keep attention from sagging. Moreover, anger's expressive benefits are strategically invaluable. Consider the difference between quietly suggesting that a lawyer stop making improper objections despite repeated instructions not to do so and smacking your hand on the bench and using a sharp tone.

Anger is not the only emotion that can serve judges well. Expressions of sorrow, for example, may demonstrate respect to present victims. A nice example from recent events: In a display remarkable enough to be extensively covered by the media, a New York City trial judge presiding over the sentencing of a serial killer cried when pronouncing sentence.[44] One of the things that made this moment remarkable was that the sentence made no practical difference; the defendant was already serving multiple life terms in California. The judge's tears drove home its symbolic and emotional importance. The victims' families reported that those tears meant a lot to them: they felt that their suffering had been acknowledged, turning a proceeding that could have been painfully *pro forma* into one that was meaningful.

If the tears-at-sentencing example shows that judicial emotion can convey compassion and respect, other emotions might instill motivation. Much of the drug-court model, for example, is premised on the idea that if the defendant feels that the judge cares about his future, he will be motivated to change. That defendant, we hope, will internalize some of the judge's hopes for him. Judges also report reciprocal benefits; feeling such hope, at least from time to time, can make the more difficult

40. Richard A. Posner, How Judges Think 110 (2008).
41. Much of the discussion of anger's psychological attributes is drawn from International Handbook of Anger: Constituent and Concomitant Biological, Psychological, and Social Processes (Michael Potegal et al. eds., 2010); Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker*, 19 J. Behav. Dec. Making 115 (2006); and James R. Averill, Anger and Aggression: An Essay on Emotion 248-49 (1982).
42. William Glaberson, *The Law; Judge Refuses to Open Proceeding*, N.Y. Times, Mar. 10, 1989, at B7.
43. Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. Times, May 12, 2008, at B1.
44. Russ Buettner, *Judge Cries During Sentencing of Serial Killer Rodney Alcala*, N.Y. Times, Jan. 8, 2013, at A17.

[A]nger can lead to decisions that are premature or overly punitive—or both.

moments far more bearable.

The flip side of this coin, of course, is the danger posed by judicial emotion. Anger again provides our primary example. First, as suggested by the prior discussion of moods, anger tends to trigger shallow patterns of thought, such as reliance on schemas and heuristics. Stereotypes are a particularly pernicious sort of schema, raising the danger that when a judge is angry she will be more prone to two-dimensional judgment of litigants, lawyers, or witnesses.[45] Of course, we are most worried about negative stereotypes, like racial bias, but positive stereotypes, like thinking police officers tend not to lie, are equally worrisome. The point is that to the angry judge, people may appear as types rather than as individuals.

Another shallow thought pattern typical of the angry person is quick endorsement of information that confirms the initial anger appraisal. This means that the angry judge is likely to give potentially important counter-evidence short shrift. Interestingly, angry people tend also to be disproportionately persuaded by angry-sounding arguments, regardless of whether those arguments are actually better.[46]

Next, anger can lead to decisions that are premature or overly punitive—or both. The heightened sense of certainty it brings can make a judge feel confident in the correctness of her decisions very quickly. That tendency confers an obvious advantage when further deliberation will be of no utility or quick action is essential. Judges frequently confront those situations—for example, a witness may start to testify about something off-limits and need to get shut down. But the tendency is just as obviously disadvantageous where information-gathering and reflection would disrupt an unwarranted assumption or uncover a previously overlooked point.

A case example illustrates this danger. In a complex civil case, a district court judge was reversed for having dismissed the plaintiffs' case with prejudice as a sanction for discovery abuse.[47] The lawyers' conduct was legitimately infuriating: they played games, provided misleading information, and evaded discovery orders. But the judge's anger eventually took the case down a bad road. He appeared to become predisposed to interpret every dispute in the way least favorable to the plaintiffs; possible lies became clear ones; investigation increasingly seemed futile. Things finally came to a head in a heated exchange in which a lawyer addressed the court in a way best described as snarky, and then suggested that the judge was factually mistaken about the procedural history of the matter. When the judge asked whether the plaintiff had produced certain documents, the lawyer retorted, "To them?," provoking this response:

> THE COURT: Well, hell, yes. Why would you ask a question like that? Hell, yes, to the defendant. . . . I kept telling you to produce stuff. . . . You ducked. You wove. You did everything to keep from producing them. . . . Now what the hell do you not understand? You must produce them. Jesus Christ, I don't want any more ducking and weaving from you on those 58 documents. That's unbelievable. That gives credence to everything I just heard from the defense. Now, tell me why else you don't think that I ought to dismiss this case . . . You better tell me. I'm about ready to throw this thing out. When you tell me that you still haven't produced those goddamn 58 documents after four times, four times I've ordered you to produce them. You are abusing this Court in a bad way. Now tell me.
>
> MR. STARRETT: Well, may I start with the fact—
>
> THE COURT: Yes.
>
> MR. STARRETT: —that you have not ruled four times to give them those 58 documents—
>
> THE COURT: That's it. I'm done. I'm granting the defendant's motion to dismiss this case for systematic abuse of the discovery process. Mr. Harris [defense counsel], I direct you to prepare a proposed order with everything you've just put on that presentation. I'll refine it and slick it up. [Plaintiff's witness] has abused this court, has misled you, has lied on his deposition. It's obvious he's lying about that e-mail. This case is gone. . . . What a disgrace to the legal system. . . . We're done. We are done, done, done. What a disgrace. . . . We're done.

In this exchange, the final straw was counsel's effort to explain that not all of the documents in question had been ordered produced four times. Though tin-eared and poorly timed, the assertion was basically true. But by that point, the judge was simply "done." And once he was "done," he went straight to the most punitive response, which left him open to reversal.

The point is not in any way to condemn the judge. Indeed, the appellate court clearly had sympathy for his understandably human reaction, and it probably is safe to say that every judge could think of at least one situation in which she has acted similarly. The point, rather, is to demonstrate how even well-placed anger can create a decisional cascade which, if not interrupted, may lead to error.

Third, judicial anger can bleed over into other situations. Being angry at one person for one set of reasons increases the odds of becoming angry at another person for another set of reasons, whether that person deserves it or not. This reality can lead to both misplaced and disproportionate blame. For example, experimentally induced, utterly irrelevant anger has been shown in mock-jury studies to correlate with more punitive judgments of tort defendants, as well as with greater levels of punishment.[48]

45. David DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCHOL. SCI. 319 (2004).
46. David DeSteno et al., *Discrete Emotions and Persuasion: The Role of Emotion-Induced Expectancies*, 86 J. PERSONALITY & SOC. PSYCHOL. 43 (2004).
47. Sentis Group v. Shell Oil, 559 F.3d 888 (8th Cir. 2009).
48. Neal R. Feigenson, *Emotions, Risk Perceptions, and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2003); Neal Feigenson et al., *The Role of Emotions in Comparative Negligence Judgments*, 31 J. APPLIED SOC. PSYCHOL. 576 (2001); D.A. Small & J. Lerner, *Emotional Policy: Personal Sadness and Anger Shape Judgments About a Welfare Case*, 29 POL. PSYCHOL. 149 (2008).

Fourth, intense judicial anger can manifest in a grossly disproportionate way that can feel literally involuntary. Stated colloquially, judges sometimes just lose it. A quick look at the "benchslap" market—a popular feature on *Above the Law*—makes this clear.[49] Every major media outlet in the country reported on a Fifth Circuit oral argument in which Chief Judge Edith Jones slammed her hand on the bench and told a fellow judge to "shut up."[50] Just as much media coverage descended on the Wisconsin Supreme Court when one Justice was accused of choking another during a testy exchange in chambers.[51] A top-trending video on YouTube (inelegantly but accurately called "Flipping the Bird to the Judge") showed a judge at video arraignment coming down hard on a young defendant who disrespected him (he later reversed the sanctions when she apologized and explained she had been on drugs at the time).[52] Type "angry judge" into the YouTube search engine and you will find an astonishing array of videos showing judges screaming, throwing things, even pulling out guns. From a judge's perspective, one of the biggest downsides of losing it is that suddenly *you* are the story.[53]

Finally, there is reason for judges to worry about the heightened sense of power that anger can engender. Because judges have actual power over actual people, we might well worry that anger could help a judge feel justified in acting like an "absolute monarch,"[54] or like "God in my courtroom."[55]

If the previously described cluster of anger attributes is necessary to judging, this cluster seems anathema to it. Other emotions have evident downsides as well. Contempt, in particular, presents clear dangers. Contempt is much like anger but with one crucial difference. When we feel contempt for someone we are judging them to be our inferior, not just hierarchically but as a human being.[56] For this reason it often is considered to be a mixture of anger and disgust. Contempt would appear to underlie the unfortunate insults judges sometimes lob at sentencing, such as "animal," "lowlife," or "scumbag."[57] Because a judge has no claim to superiority but only to authority, contempt is likely unsuitable in nearly every instance.

And now we find ourselves on the horns of a dilemma. Judicial emotion giveth and it taketh away. Anger, our recurrent example, is necessary to critical aspects of judging, but it simultaneously has tendencies that can impair judging. The same would appear likely to hold true for most emotions, though some will tend generally to be more positive (one nomination: compassion) or negative (one nomination: contempt). We therefore are a juncture at which judges need to call upon emotion regulation.

[E]motion regulation refers to any attempt to influence what emotions we have, when we have them, or how those emotions are experienced or expressed.

JUDICIAL EMOTION REGULATION

In the psychological literature, emotion regulation refers to any attempt to influence what emotions we have, when we have them, and how those emotions are experienced or expressed. Regulation typically entails changing the emotion-eliciting situation, changing your thoughts about that situation, or changing your responses to that situation.[58]

These are processes in which we all regularly engage, including when at work. How we do so is heavily influenced by professional norms: flight attendants and bill collectors, for example, have to meet very different expectations as to how they feel and display emotion.[59] The ideal of dispassion supplies the background professional norm for judges. When judges report trying to act professionally, they are somehow engaging in emotion regulation in an attempt to experience and project neutrality. As the prior discussion revealed, not only is this not always a good goal, it is an unrealistic one. It's particularly unrealistic to expect judges to pull off this feat with precisely no guidance as to *how*. Justice Sotomayor stated

49. http://abovethelaw.com.
50. Debra Cassens Weiss, *5th Circuit Oral Arguments Turn Contentious When Chief Judge Tells Colleague to Shut Up*, A.B.A. J., Sept. 26, 2011.
51. Crocker Stephenson, Cary Spivak & Patrick Marley, *Justices' Feud Gets Physical*, MILWAUKEE-WISCONSIN J. SENTINEL, June 25, 2011.
52. http://www.youtube.com/watch?v=lLA7dQ-uxR0 (more than 15 million views).
53. Sometime this may be what the judge is going for. This seemed to be the case with a federal district judge who gained notoriety by publicly releasing a sarcastic court order inviting lawyers to a "kindergarten party" where they would learn how "to practice law at the level of a first year law student." It quickly went viral on the Internet. Morris v. Coker, Nos. A-11-MC-712-SS, A-11-MC-713-SS, A-11-MC-714-SS, A-11-MC-715-SS, 2011 WL 3847590, at *1 (W.D. Tex. Aug. 26, 2011). It's worth debating whether public humiliation of this sort is a legitimate tactic.
54. McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States 264 F.3d 52, 68 (D.C. Cir. 2001) (quoting Chandler v. Judicial Council of Tenth Circuit of the United States, 398 U.S. 74, 84 (1970)).
55. Gottlieb v. Sec. & Exch. Comm'n, 310 F. App'x 424, 425 (2d Cir. 2009).
56. Dacher Keltner et al., *Emotions as Moral Intuitions*, *in* AFFECT IN SOCIAL THINKING AND BEHAVIOR 161, 163 (Joseph P. Forgas ed., 2006).
57. In re Merlo, 34 A.3d 932, 972 (Pa. Ct. Jud. Disc. 2011); In re Lokuta 964 A.2d 988, 1054 (Pa. Ct. Jud. Disc. 2008); Milmir Constr. v. Jones, 626 So. 2d 985, 986 (Fla. Ct. App. 1993).
58. Much of the discussion of emotion regulation is drawn from the following scientific sources: T.L. Webb et al., *Dealing with Feeling: A Meta-Analysis of the Effectiveness of Strategies Derived from the Process Model of Emotion Regulation*, 138(4) PSYCHOL. BULL. 775 (2012); REGULATING EMOTIONS (Marie Vandekerckhove et al. eds., 2008); HANDBOOK OF EMOTION REGULATION (James J. Gross ed. 2007); James J. Gross, *Emotion Regulation: Affective, Cognitive, and Social Consequences,* 39 PSYCHOPHYSIOLOGY 281 (2002); James J. Gross, *Antecedent- and Response-Focused Emotion Regulation: Divergent Consequences for Experience, Expression, and Physiology*, 74 J. PERSONALITY AND SOC. PSYCHOL. 224 (1998).
59. HOCHSCHILD, *supra* note 16.

[R]esearch shows that emotion regulation may be pursued by way of a diverse array of strategies . . . .

with confidence that a good judge simply puts her emotions aside. Would that it were so easy.

The good news is that while judicial emotion regulation may not ever be easy, everyone can get better at it, and its processes need not remain a mystery. The first step certainly is self-awareness, or what Justice Sotomayor referred to as recognizing your emotions. The second step—about which we've displayed a remarkable collective silence—is to engage appropriate emotion-regulation techniques. Fortunately, that is something about which contemporary psychological research has a lot to say.

Such research shows that emotion regulation may be pursued by way of a diverse array of strategies, each with distinct costs and benefits. There is no such thing as a "good" or "bad" strategy: all have both occasional utility and maladaptive manifestations. However, some emotion regulation strategies tend more toward particular types of costs and benefits, not to mention paradoxical or unintended effects, and thus tend to be more or less well suited to particular contexts.

In the judging context, the ideal of dispassion has both obscured that necessary level of analysis and pushed judges toward strategies that tend to be maladaptive. Just because generations of judges may have handled emotion in a particular way—by, say, ignoring it—doesn't make the approach effective. Poor regulatory choices can be remarkably impervious to correction through experience.

The most critical regulatory capacities for a judge, therefore, are sensitivity to her own experience, a deep bench of strategic options, and context-driven flexibility in how those options are employed. This combination allows her to exert far greater control over her emotions and how she chooses to express them.

Calling on the research literature illuminates which emotion-regulation strategies are unlikely to be helpful, are most likely to be harmful, and are most likely to be productive for judges.

Unlikely to be helpful: avoidance. One very common regulation strategy is avoidance. Avoidance comes in several different flavors. You can simply avoid situations because of their anticipated emotional effect; if that is not possible, you might try to modify the situation to alter its emotional salience; and if that is not possible, you might actively distract yourself. Imagine that you have a contentious relationship with your father-in-law, with whom you have to attend a big family dinner, and you know that talking with him always makes you angry. You might arrange in advance to be seated far away from him at dinner; if that is not socially acceptable, you might arrange for someone you like to be seated on your other side and engage that person in conversation whenever possible; and if you do have to talk with your father-in-law, you might pretend to listen while mentally going over your upcoming week's schedule. Such avoidance techniques are terrifically helpful in regular life. If you avoid or significantly block out the emotion trigger, you never have an emotion to deal with.

Unfortunately, this strategy is very seldom appropriate for judges. Judges' ability to choose the emotional situations to which they are exposed is extremely limited. Not only do you not choose your cases, but often you can't even choose your court or the subject matter of your docket. This is, to be sure, sometimes possible: a judge who finds family court intolerably stressful might try to switch to a commercial docket, or a state-court judge might seek appointment to the federal bench because it will entail more variety and less exposure to violent crime. But no matter the court or its jurisdictional parameters, you can't control who comes in the door, and you are guaranteed cases that will over time cover the emotional spectrum. A judge can (and generally must) recuse herself from a specific case if she has direct emotional involvement, such as a close personal connection to a party. Otherwise, avoiding unwanted emotion generally will not justify recusal unless it is so extreme as to pose a serious threat to fundamental fairness.[60]

Nor can judges always modify situations in a meaningful way. Again, it is possible on the margins. You can delegate talking with an irritating lawyer to a clerk, or call breaks, or limit argument time, or otherwise tinker around with details to buy some time and relief. These small tweaks can be enormously helpful. The big emotion triggers, however, often can't be worked around. This is so for two primary reasons.

First, part of the judge's job is to orchestrate the exposure that other people have to those triggers. If, for example, you are deciding under the applicable rules of evidence whether to withhold autopsy photos from the jury because you worry that their emotional impact will outweigh informational value, you need to look at them yourself. Indeed, you need to both *have* and *notice* your own reaction, so it can serve as a rough barometer to what could be expected from the jury. By helping other people avoid triggers, you must face them yourself. Second, it is often the most emotionally vivid aspects of a case that demand your most careful attention. At criminal sentencing, or when setting damages in tort and mass-disaster cases, you must take close account of the precise harms caused. Even with lower-impact emotional triggers, like a particularly inept argument by a borderline-incompetent attorney, it is not professionally acceptable to literally tune out (tempting though it might be), as something important might happen. This relates to another point raised elsewhere in this special issue: judicial multi-tasking, which is one way of distracting yourself, has consequences. Not surprisingly, distracted people demonstrate impoverished recall of the situations from which they are distracting themselves—that's the point, after all.[61]

Avoidance therefore is available to judges only in a marginal way—ironically, because it works too well. It helps judges handle emotional challenges only by helping them disengage from what it is about the job that makes it emotionally challenging.

Most likely to be harmful: experiential suppression and denial. The strategy that is most obviously harmful for judges

60. Liteky v. United States, 510 U.S. 540 (1994).
61. Gal Sheppes & Nachshon Meiran, *Divergent Cognitive Costs for Online Forms of Reappraisal and Distraction,* 8 EMOTION 870, 871 (2008).

is to try to suppress emotion directly. Think of this as vowing as a matter of willpower not to feel what you do not wish to, or pretending—to yourself and others—that you are not feeling it. A California state judge, for example, once described his approach thus: "I'm not moved by emotion one way or the other. I'm just kind of like an iceberg, but there is no heating. I'm just here."[62]

The first problem with this strategy is that it does not achieve its intended purpose. (In the universe of problems, that is a pretty big one to have.) Attempts to suppress emotional experience or thoughts of an emotional event have not been shown to have any meaningful effect on the emotions themselves. In fact, suppression raises the danger of "ironic rebound."[63] Think of a rough parallel to the "don't-think-of-a-pink-elephant" phenomenon, in which the more you try not to think of something the more you think of it.[64] Research shows that we are somewhat better at suppressing emotions than other sorts of thoughts, but that is a relative, not absolute, facility. Emotional suppression can be followed by a counterproductive increase in the frequency and intrusiveness of emotional thoughts. Suppression also increases the physiological concomitants of the undesired emotion, such as elevated heart rate and sweating. It may give the illusion of calming the mind, but it does not calm the body.

These rebound and reactivity effects are especially pronounced when a person is under conditions of stress and cognitive load, which describes most moments in a judge's working life. Adding denial to the mix tends to make matters worse, because combining greater physical reactivity with conscious disavowal of its source is dangerous. It creates a reaction in search of a cause, meaning a person can easily latch onto an unrelated, and sometimes innocent, target. The combination has also been associated with impulsive decision making.[65]

Further, suppression and denial are highly effortful. Because of the internal resources they consume, these strategies impair memory, are associated with impaired performance on logical tasks, and lead to overly simplistic judgments.

Finally, these strategies take a toll on the judges who use them. People who regularly suppress and deny emotion can develop what psychologists call a "repressive coping style."[66] That style is characterized by (among other things) rigidity and arrogance, two qualities we clearly would like to discourage. Indeed, those qualities have unique potential to erode the public's perception of the judiciary.[67] People who habitually repress emotion also are far less able to handle emotion when they do experience it. One cautionary tale may be found in a Florida Supreme Court decision removing a trial judge from the bench.[68] He repeatedly treated litigants and lawyers in a callous, rude, condescending, and abusive manner. His own psychiatrist testified that a repressive anger-management style had come to define the judge's personality, such that he was in a constant state of "emotional over-control" that left him unable to "incorporate emotions into his life." Instead, he displayed an utter lack of empathy and periodically exploded. Finally, a repressive coping style is associated with poor health outcomes, such as anxiety, hypertension, and coronary heart disease.[69]

Emotional suppression can be followed by a counterproductive increase in the frequency and intrusiveness of emotional thoughts.

Caveats about the occasional utility of all regulatory strategies notwithstanding, it is hard to say much good about emotional suppression and denial. The best that can be said is that a judge might sometimes have no choice but to use them in extraordinary situations where the emotion threatens to overwhelm the judge, there is no way to alter the situation, and a temporary effort to completely ignore the reaction is the only way to act in a professionally necessary manner. One can imagine such situations. A judge who finds herself forced into that position, though, will be much better off if she recognizes it for what it is and gives herself time and space to cope with that emotion after the crisis is over.

Often necessary, but comes at a cost: behavioral suppression. Fortunately, emotion is not the only thing a judge can suppress. Another common strategy is to suppress only its external manifestation. Behavioral suppression involves inhibition of facial expressions (*e.g.*, grimacing), verbalizations (*e.g.*, groaning), or bodily movement (*e.g.*, cringing). One masks the true emotional state with an expression reflecting either neutrality (as with a "poker face") or a desired one (as with a fake smile). All judges likely spend a good deal of their time doing exactly that—and for some very good reasons. However, behavioral suppression takes a toll of its own.

The reasons why a person sometimes needs to hide emotion are rather obvious, particularly to judges. Selectively displaying

62. People v. Carter, No. C053369, 2009 WL 626113 (Cal. App. 3 Dist. Mar. 12, 2009).
63. Daniel M. Wegner, *How to Think, Say, or Do Precisely the Worst Thing for Any Occasion*, 325 Sci. 48-50 (2009).
64. Daniel M. Wegner, White Bears and Other Unwanted Thoughts: Suppression, Obsession, and the Psychology of Mental Control 122-24 (1989).
65. Renata M. Heilman et al., *Emotion Regulation and Decision Making Under Risk and Uncertainty*, 10 Emotion 257 (2010).
66. Sander L. Koole, *The Psychology of Emotion Regulation: An Integrative Review*, 23 Cognition & Emotion 4, 6 (2009); Lynn B. Myers & Nazanin Derakshan, *To Forget or Not to Forget; What Do Repressors Forget and When Do They Forget?*, 18 Cognition & Emotion 495 (2004).
67. *McBryde*, 264 F.3d at 66 ("Arrogance and bullying by individual judges expose the judicial branch to the citizens' justifiable contempt.").
68. In re Sloop, 946 So.2d 1046 (S. Ct. Fla. 2007) (per curiam).
69. Josh M. Cisler et al., *Emotion Regulation and the Anxiety Disorders: An Integrative Review,* 32 J. Psychopathology and Behav. Assessment 68, 75 (2010); Richard Chambers et al., *Mindful Emotion Regulation: An Integrative Review*, 29 Clinical Psychol. Rev. 560 (2009).

Self-aware judges can learn to do quick gut-and-brain checks not only on what they are feeling, but on why they feel it.

emotion can be highly strategic. A judge might want to keep an obnoxious attorney from knowing he has gotten to her, so as to discourage the behavior by refusing the attorney satisfaction. (Conversely, the judge may believe that a flash of anger might shut the behavior down, in which case she would opt for a controlled display.) She may need to model calmness and decorum to others, such as disruptive family members, which will make her courtroom management duties easier. She may need to prevent a jury from perceiving what she thinks of a witness, party, or attorney so as not to influence the jury's independent evaluation. She may want to prevent other observers, including the public, from being able to guess what she thinks, lest it improperly broadcast an outcome. The good news is that inhibiting the outward signs of emotion is relatively effective, particularly if you are well practiced in doing so. Judges often can keep others from perceiving what they feel.

Unfortunately, behavioral suppression is not very effective as an internal matter. It, too, is effortful, so it has some negative effects. Behavioral suppression impairs memory for information presented during the suppression period. Other cognitive capacities, like logical reasoning, also suffer.[70] Those effects may not be as pronounced as with suppression and denial, but they remain significant; indeed, they are equivalent to those attending avoidance. As stated bluntly to this author by a prominent scholar, behavioral suppression makes a person temporarily "stupider."

Further, keeping an emotion from showing does not keep a person from feeling it. Again, the profile is less extreme than with experiential suppression. Controlling your facial and bodily movements generally will blunt, but not eliminate, positive emotions. Interestingly, it has no such effect for negative ones. That is, suppressing a smile can make you a bit less happy, but suppressing a frown is not likely to make you less angry. Judges tend to be most concerned about displaying emotions such as sorrow, contempt, disgust, and anger, but it is not at all clear that behavioral suppression will have any effect on this cluster of feelings. Finally, suppressing expression does not lessen emotion's physiological concomitants, and it may in fact increase them.

Judges can take some comfort that behavioral suppression is usually going to work in terms of how you are perceived. However, it is important to be aware that controlling outward signs of emotion comes at a cost and is not doing any work in terms of dealing with the emotion itself.

Most likely to be helpful: cognitive reappraisal and disclosure. Thus far the analysis has looked to one strategy (avoidance) that is seldom available; one (suppression and denial) that is counterproductive, even dangerous; and one (behavioral suppression) that is often necessary but generally costly and ineffective. Fortunately, two other strategies have a more positive profile. If the judge can neither avoid, alter, nor ignore an emotional situation, she may change how she thinks about it. She also can choose to enlist the perspectives of others by selectively disclosing her experiences. This final section takes up these approaches in turn.

Cognitive reappraisal. Recall that an "appraisal" refers to the thought structure that underlies any given emotion. A "reappraisal" therefore refers to a change in those thoughts, which then leads naturally to a different emotional response. If, for example, a person comes to believe that a harm was inflicted accidentally rather than deliberately or negligently, she has no more reason to be angry and may instead be simply sad.

The first way in which judges can leverage the power of reappraisal is by examining the reasons behind their emotions, so as to determine whether they represent a correct and appropriate response. The judge in the viral YouTube video, for example, may have reacted much less angrily had he considered the high probability that the defendant was under the influence of drugs. Her behavior would have been equally offensive to decorum, but would not have represented a personal insult. In contrast, it may be entirely appropriate to be angry at a defendant who uses sentencing as a forum to insult and taunt his victims.[71] Reasons matter. Self-aware judges can learn to do quick gut-and-brain checks not only on what they are feeling, but on why they feel it.

While reappraisal may be engaged in real time, a good deal of thought realignment can happen during times of reflection. Consider trying the following exercise. Think about situations in which people you encounter at work—lawyers, litigants, witnesses, and colleagues—have made you mad. Any given judge's anger triggers will, upon introspection, break into relatively stable categories, such as lying, cheating, abusing others, disrespect, sloppiness, and so on. Then think about why those particular things make you angry. Finally, think about whether those reasons justify anger, taking care to examine why or why not. In a light-hearted but revealing article reflecting just such an exercise, a Los Angeles state-court trial judge identified reliable triggers for his anger, including "lack of civility," tardiness, cell phones going off in court, "attorney incompetence," and the "herding cats" work of trying to get everyone in the courtroom at the same time.[72] He concluded that he would be much happier if he let some of those go—for example, by reminding himself that he is sometimes late, decent people sometimes forget to turn off their cell phones, and so forth.

Attorney incompetence, in contrast, is legitimately anger-

70. Jane M. Richards & James J. Gross, *Personality and Emotional Memory: How Regulating Emotion Impairs Memory for Emotional Events*, 40 J. Res. in Personality 631 (2006); Jane M. Richards, *The Cognitive Consequences of Concealing Feelings,* 13 Current Directions in Psychol. Sci. 131 (2004); Jane M. Richards & James J. Gross, *Emotion Regulation and Memory: The Cognitive Costs of Keeping One's Cool*, 79 J. Personality & Soc. Psychol. 410 (2000).
71. Jennifer Preston, *Teenage Gunman in Ohio Mocks Victims' Families*, http://thelede.blogs.nytimes.com/2013/03/19/teenage-gunman-in-ohio-mocks-victims-families/ (Mar. 19, 2013).
72. Gregory C. O'Brien, Jr., *Confessions of an Angry Judge*, 87 Judicature 251, 252 (2004).

ing. This is an important conclusion to reach, too, but not because it changes the underlying emotion. Rather, deliberately accepting the underlying thoughts puts the judge at just enough distance to evaluate her possible responses, and to choose the most fitting one. The judge in Los Angeles learned to choose different patterns of response to unprepared or unskilled attorneys—typically by being direct, courteous, and brief—by focusing on what was within his power to change. Chief Judge Alex Kozinski describes engaging in a similar mental exercise after a prosecutor lied to him about a matter of consequence. After reflection, he concluded that anger was precisely the right response, and he therefore chose to name the prosecutor in a harsh written opinion so as to maximize the deterrent message.[73]

The second cognitive appraisal technique that holds great promise for judges is committing to look at situations through a professional "lens." This is best explained with an analogy to being a doctor. Like judges, doctors regularly encounter stimuli that naturally provoke strong emotions, like festering wounds. An important part of learning to be a doctor is learning to regard that festering wound as professionally relevant.[74] It represents a source of information about what is wrong with the patient and an opportunity to display professional competence. The doctor thus learns to regard it without disgust, not by suppressing disgust but by thinking about the wound in a way that fails to satisfy the appraisal structure of disgust.

Judges have their own festering wounds to confront. Sometimes that is literally true—recall the example of the autopsy photos—but more often it is figuratively true. Courtrooms can be a theater for much that is broken and disturbing in our world and how we treat one another. For many judges, the most effective way of approaching that reality will be, when possible, to treat vivid stimuli as professionally relevant rather than personally provocative. Such a precommitment helps the judge stay focused on specific goals—for example, discerning the informational value of that autopsy photo, since she is the only one empowered to make that judgment call. That professional lens can dissipate the emotional salience of the stimuli.

Judges would likely report that when this works, it works well. The experimental literature shows that even laypeople can deliberately call on such a neutral-observer approach—tellingly, by pretending briefly to be doctors—with good results. When asked to look at disturbing images as a doctor would, and to think about them "objectively and analytically rather than as personally, or in any way emotionally relevant," they feel less emotion; show less emotion; display enhanced, not diminished, memory; and show decreased physiological reactivity.[75]

Reappraisal . . . is of enormous value to judges because it asks them to think differently, instead of simply commanding them to feel differently.

Of course, labs are labs. What an experimental subject can pull off for a short period of time, in a controlled environment, with an anticipated stimulus and explicit instructions, is instructive. To be pulled off by real judges in real situations, this species of reappraisal must be trained and practiced.

Reappraisal, in sum, is of enormous value to judges because it asks them to think differently, instead of simply commanding them to feel differently.

Disclosure. As the above discussion reveals, some amount of emotion is inevitable, no matter how skilled a judge is at regulation. Some situations cannot be avoided; behavioral suppression leaves emotions largely intact. Even cognitive appraisal has limits, for not every situation can be rethought. Sometimes the elderly person really did lose her entire life savings to a fraud, or that parent really did brutally rape his child, or the defendant really does spit in your face.[76] Nor would one want to rethink every situation. The warm glow that comes from helping families heal, for example, should be savored for what it is. And the professional lens sometimes will simply crack. No judge has truly seen everything, and everyone will be thrown from time to time, just as doctors are. The only way to prevent such moments is to become closed off and jaded—to grow that "rhino skin" feared by the Australian magistrate.

One highly effective strategy for coping with and learning from those inevitable emotions is disclosure. Disclosure, also known in the literature as "social sharing," is the act of thinking and talking about your emotions and the experiences that triggered them.[77] To be productive, it must be selective: a judge should not, for example, indulge in highly public expressions of vitriol against a colleague.[78] But when done thoughtfully and with a prosocial motive, judicial disclosure of emotion can be invaluable.

This is not because social sharing eventually dissipates the

73. 30 United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993). The judge omitted the individual's name once he was satisfied the message had been heard.
74. Daisy Grewal & Heather A. Davidson, *Emotional Intelligence and Graduate Medical Education*, 300 J. AM. MED. ASS'N 1200 (2008); Jason M. Satterfield & Ellen Hughes, *Emotional Skills Training for Medical Students: A Systematic Review*, 41 MED. EDUC. 935 (2007); Vanda L. Zammuner & Cristina Galli, *The Relationship with Patients: "Emotional Labor" and Its Correlates in Hospital Employees, in* EMOTION IN ORGANIZATIONAL BEHAVIOR 251-283 (C. E. J. Hartel et al. eds., 2005); Allen C. Smith III & Sheryll Kleinman, *Managing Emotions in Medical School: Students' Contact with the Living and the Dead*, 52 SOC. PSYCHOL. Q. 56 (1989).
75. These results, consistent throughout the psychological literature, recently were confirmed in a meta-analysis. *See* Webb et al., *supra* note 58.
76. *How to Piss Off the Judge*, YOUTUBE (Aug. 13, 2009), http://www.youtube.com/watch?v=uCNo4ky6GXE.
77. Much of this discussion is drawn from Bernard Rimé, *Interpersonal Emotion Regulation*, in HANDBOOK OF EMOTION REGULATION, *supra* note 32, at 466-85; PSYCHOLOGY OF EMOTION, *supra* note 32, at 185-89; and the work of the James Pennebaker lab, http://homepage.psy.utexas.edu/HomePage/Faculty/Pennebaker/Home2000/JWPhome.htm.
78. Crocker Stephenson et al., *Justices' Feud Gets Physical*, MILWAUKEE-WISCONSIN J. SENTINEL, June 25, 2011.

The emotionally intelligent judge is self-aware and is able to think coherently about her emotions . . .

emotion, as if you were emptying a bag. To the contrary, it tends to reawaken the emotion, often quite vividly. Chief Judge Kozinski, for example, recounted to this author a story more than four decades old of his son nearly being run over, and he reported feeling as terrified, guilty, and shaken as if it had happened yesterday. Paradoxically, though, disclosure is a basic impulse that people overwhelmingly experience as a net positive. Why?

First, disclosure enhances self-knowledge. By talking or writing about emotional experiences, we help create a detailed internal data bank of those experiences. That data bank allows us to judge our reactions more coherently and consistently. This sense of heightened self-knowledge and control can help us live with emotion more comfortably, for we come to experience those emotions as an integrated aspect of the self.

Second, disclosure enlists insight and support from others. This is particularly true when we share emotional challenges with people who face similar circumstances. Imagine the exercise proposed earlier, in which you identified persistent anger triggers. Now imagine showing your list to another judge. That judge would be well-positioned to help with any necessary reappraisal by explaining whether and how she believes you are off base, overreacting, or right on the mark. Your spouse, friends, and other close confidants can serve a similar function. Perhaps most importantly, communicating with others helps us feel understood and supported. Numerous judges have reported to this author that they wish they could have this sort of communication with their colleagues but feel nervous about doing so, largely because of stigma. The more judges were to act on that impulse to disclose, the less stigmatized it would become.

Finally, public disclosure of judicial emotion also can be productive (and would go a long way toward dissolving the stigma). When the public sees the human underneath the robe, it has a better understanding of how a judge is doing her job. Disclosing emotion makes transparent an otherwise hidden input to judicial decision making and invites evaluation thereof. As the tears-at-sentencing example showed, the reaction can be quite positive, even enhancing respect for the judiciary. A rather different sort of public disclosure would be to write about it in an opinion, article, or book. For example, Chief Judge Kozinski wrote a law review article about a criminal sentencing that unexpectedly triggered those feelings he had when he inadvertently placed his son in danger, prompting him to show the defendant mercy. Once on the table, the propriety of such a motivation was open for debate.[79]

Disclosure thus can help judges feel more comfortable with their emotions, and helps ensure that those emotions influence decision making in a deliberate, thoughtful, and transparent way.

CONCLUSION

Within law, we have inherited some hefty cultural baggage, weighted down with the belief that a good judge is emotionless. This article has unpacked that baggage and suggested that it is that belief, not emotion, that should be put aside. We need a new ideal: that of the *emotionally intelligent judge*. The emotionally intelligent judge is self-aware and is able to think coherently about her emotions and to be in control of their expression. She is willing to seek the opinions and support of others and approaches the emotional challenges of the job with openness and flexibility.

In attempting to thus shift our ideal, we are not alone. More than a decade ago pioneers in medical education came to realize that, by acculturating doctors to a similar ideal of dispassion, they inadvertently were training them to suppress and deny emotion, with bad results. Medical students lost empathy for patients with each year of training; many showed performance-impairing levels of emotional disengagement.[80] These pioneers now are seeking to train medical professionals to improve their emotion-regulation skills. So far, all results are positive: among the important findings is that clinical performance improves as measures of emotional intelligence rise.[81]

Even with these advances, the general pattern unfortunately persists. Describing her recent studies of the impact of emotion on Canadian oncologists, a health psychologist has emphasized the importance to doctors of acknowledging their feelings, especially grief:

> Not only do doctors experience grief, but the professional taboo on the emotion also has negative consequences for the doctors themselves, as well as for the quality of care they provide. Our study indicated that grief in the medical context is considered shameful and unprofessional. Even though participants wrestled with feelings of grief, they hid them from others because showing emotion was considered a sign of weakness. . . . The impact of all this unacknowledged grief was exactly what we don't want our doctors to experience: inattentiveness, impatience, irritability, emotional exhaustion and burnout. . . . Even more distressing, half our participants reported that their discomfort with their grief over patient loss could affect their treatment decisions with subsequent patients. Oncologists are not trained to deal with their own grief, and they need to be.[82]

If we were to replace the words "oncologists" and "doctors" with "judges," I daresay most judges would nod in recognition. Whether in medicine or law, cultural baggage this heavy is not easily shed.

Fortunately, the psychology of emotion has done much of

79. Alex Kozinski, *Teetering on the High Wire*, 68 U. COLO. L. REV. 1217 (1997).
80. Myrle Croasdale, *Students Lose Empathy for Patients During Medical School*, AM. MED. NEWS, Mar. 24, 2008.
81. Satterfield & Hughes, *supra* note 74; Grewal & Davidson, *supra* note 74.
82. Leeat Granek, *When Doctors Grieve*, N.Y. TIMES, May 27, 2012, at SR12.

the heavy lifting already. There is much we still need to learn about judicial emotion, but we know more than enough to get started. Judges can learn to prepare realistically for, and respond thoughtfully to, the emotions they are bound to feel. It's time we integrated those lessons into how we train and support our judiciary.

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Emotional Regulation and Judicial Behavior

Terry A. Maroney*

Judges are human and experience emotion when hearing cases, though the standard account of judging long has denied that fact. In the post-realist era it is possible to acknowledge that judges have emotional reactions to their work, yet our legal culture continues to insist that a good judge firmly puts those reactions aside. Thus, we expect judges to regulate their emotions, either by preventing emotion's emergence or by walling off its influence. But judges are given precisely no direction as to how to engage in emotional regulation.

This Article proposes a model for judicial emotion regulation that goes beyond a blanket admonition to "put emotion aside." While legal discourse on judicial emotion has been stunted, scientific study of the processes of emotion regulation has been robust. By bringing these literatures together for the first time, the Article reveals that our legal culture does nothing to promote intelligent judicial emotion regulation and much to discourage it.

An engagement model for managing judicial emotion promises to reverse this maladaptive pattern. It provides concrete tools with which judges may prepare realistically for emotional situations they necessarily will encounter, respond thoughtfully to emotions they cannot help but feel, and integrate lessons from such emotions into their behavior. Importantly, the medical community has begun to pursue just such a program to promote competent emotion regulation by doctors.

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The engagement model is far superior to all its alternatives. Other regulation strategies, such as avoidance, are fundamentally incompatible with judges' professional responsibilities. Suppressing the expression and experience of emotion—encouraged by the status quo—is costly and normatively undesirable. Suppression is unrealistic, exacerbates cognitive load, impairs memory, and can paradoxically increase emotion's influence while rendering that influence less transparent. The judicial-engagement model, in contrast, leverages the best of what the psychology of emotion regulation has to offer. It puts a name to what extraordinary judges already are doing well and makes it available to all judges. By setting aside not judicial emotion but, rather, the crude manner in which we have asked judges to manage it, we stand materially to improve the quality of judging.

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INTRODUCTION

"Judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the species."[1]

Hon. Thomas B. Finan, in his opinion in State v. Hutchinson

"We're not robots [who] listen to evidence and don't have feelings. We have to recognize those feelings and put them aside."[2]

Hon. Sonia Sotomayor, testifying before the U.S. Senate Judiciary Committee

Judges are human and experience emotion when hearing cases. Judges regularly are angered by misbehaving lawyers and litigants.[3] They routinely encounter disturbing evidence that can provoke not just anger but disgust.[4] Litigants' unhappy lives can prompt sadness.[5] The inability to fix all the ills paraded before them can make judges feel frustrated, even depressed.[6] As litigation generally follows harm or grievance, such unpleasant emotions may be the most frequent.[7] But judges also experience more pleasant emotions. They may feel joy when a needy child is placed with a family, or hope when a

1. State v. Hutchinson, 271 A.2d 641, 644 (Md. 1970).

2. Andrew Malcom, *Sotomayor Hearings: The Complete Transcript, Part 1*, TOP OF THE TICKET, (July 14, 2009, 9:57 AM), http://latimesblogs.latimes.com/washington/2009/07/sonia-sotomayor-hearing-transcript.html.

3. *See, e.g.*, *In re* Duckman, 898 A.2d 734 (2006) (describing how trial judge admitted being very angry at lawyer who refused order to consult with client before withdrawing plea).

4. *See, e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008) (reciting horrifying medical evidence of effects of child rape).

5. *See, e.g.*, People v. Cerda, No. B146553, 2002 WL 418156, at *4 (Cal. Ct. App. Mar. 19, 2002) ("It's sad [that the defendant] started out very young and God knows there was nobody there to tell him right from wrong. . . . [I]t's sad and it makes the court sad . . . .").

6. Carrington v. United States, 503 F.3d 888, 899 (9th Cir. 2007) (Pregerson, J., dissenting) ("[S]ometimes . . . [t]he judge has to just sit up there and watch justice fail right in front of him, right in his own courtroom, and he doesn't know what to do about it, and it makes him feel sad. . . . Sometimes he even gets angry about it.") (quoting GERRY SPENCE, OF MURDER AND MADNESS: A TRUE STORY 490 (1983)) (first alteration and last omission in the original).

7. Adam Liptak, *No Argument: Thomas Keeps Five-Year Silence*, N.Y. TIMES, Feb. 13, 2011, at A1 (quoting Thomas as saying, "I tend to be morose sometimes. . . . There are some cases that will drive you to your knees."); *see also* Benjamin Weiser, *Judge Recalls Rationale for Imposing 150-Year Sentence*, N.Y. TIMES, June 28, 2011, at A1 (describing interview with Judge Denny Chin, in which he reported being "particularly moved" by story of a widow whose late husband's savings, along with her own, were stolen by Bernard Madoff in massive Ponzi scheme).

drug court defendant completes treatment and promises to turn his life around.[8] Even crafting a tightly reasoned, well-written opinion can generate feelings of pride.[9] Emotionless judges are "mythical beings," like "Santa Claus or Uncle Sam or Easter bunnies."[10]

Yet legal accounts long have perpetuated the conception of the emotionless judge. This author previously has explored the depth and persistence of this cultural script of judicial dispassion.[11] The idea that a good judge is able to insulate her decision making from any emotional influence is deeply rooted in European Enlightenment notions of rationality and objectivity, to which emotion was thought to be opposed.[12] Indeed, in 1651, Thomas Hobbes declared that the ideal judge is "divested of all fear, anger, hatred, love, and compassion."[13] This notion became so entrenched that, two and a half centuries later, a leading continental theorist pronounced such judicial dispassion to be a "fundamental tenet of Western jurisprudence."[14] In the United States at the time of the Founding, emotionless judging was seen as part and parcel of the democratic structure itself: necessary to the process of taming the self-interested passions of the public.[15]

Over the course of the twentieth century, however, the script of judicial dispassion has been slightly moderated. When a standard account is in

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8. *See, e.g.*, JAMES L. NOLAN, REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 99–104 (2001); Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209 (2009).

9. *See, e.g.*, Interview by Susan Swain, C-SPAN, with the Hon. Antonin Scalia (June 19, 2009), *available at* http://supremecourt.c-span.org/assets/pdf/AScalia.pdf (transcribing interview in which Justice Scalia describes how he does not enjoy writing but enjoys "having written," and finds it "more fun" to write dissents).

10. Unites States v. Ballard, 322 U.S. 78, 93–94 (1944) (Jackson, J., dissenting) (attaching that description to "dispassionate judges").

11. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 630 (2011) (defining "judicial dispassion" synonymously with "emotionless judging"); *see also id.* at 636 & n.27 (showing how the twin meanings of dispassion, "*emotionless* and *impartial*," came to be linked).

12. Maroney, *supra* note 11, at 633–34 (showing how emotionless judging "has come to be regarded as a core requirement of the rule of law, a key to moving beyond the perceived irrationality and partiality of our collective past").

13. THOMAS HOBBES, LEVIATHAN 203 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651), *quoted in* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J., 1, 40 (1998).

14. Karl Georg Wurzel, METHODS OF JURIDICAL THINKING (1904), *translated in* SCIENCE OF LEGAL METHOD: SELECTED ESSAYS 298 (Ernest Bruncken & Layton B. Register eds., 1917) ("[A]bsence of emotion is a prerequisite of all scientific thinking," including judging); *see also* Maroney, *supra* note 11, at 635 (explaining how Wurzel's vision cohered with the Langdellian concept of "law as science").

15. Maroney, *supra* note 11, at 634–36 (citing, inter alia, JAMES MADISON, THE FEDERALIST NO. 49, at 317 (Clinton Rossiter, ed., 1961) ("It is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."); *see also* Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2005 (2010) (describing judges' "paradigmatic status," which has been understood to require "the separation of legal reason from emotion").

significant tension with everyday experience, dissenting voices eventually tend to emerge; such has been the case with judicial emotion. The early twentieth-century legal realists, particularly Benjamin Cardozo and Jerome Frank, called attention to the inevitability of emotional influences as part of their broader project of recognizing the many ways in which judges are human.[16] This aspect of the realists' message, which lay largely dormant for decades, was rediscovered by a small group of judges and theorists at the end of the century. For example, in the mid-1980s Justice William J. Brennan urged a new look at what Cardozo called the interplay of "reason and passion" in judging.[17] In the following decades, Richard A. Posner and a handful of other scholars were on record assuming that emotion does influence judicial decision making.[18] Showing the staying power of the realists' core insight, the basic point that judges are human is now relatively uncontroversial. In the post-realist era, therefore, it has become possible to acknowledge that judges have emotional reactions to their work.[19]

This moderated account of judicial experience has remained paired with the goal of dispassion. Most of the early legal realists appeared to assume that the point of acknowledging judicial emotion was to better control it, and many of the new emotional realists have done the same.[20] As revealed in debates about judicial "empathy" spurred by the 2009 confirmation hearings of Justice Sonia Sotomayor, the idea that it is harmful to allow emotion to influence judging remains widespread.[21] If the pre-realist vision of the "good judge" was of one who felt no emotion whatsoever, the contemporary vision is of one who recognizes her emotions and firmly puts them aside.[22]

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16. Maroney, *supra* note 11, at 652–57 (excavating the half-submerged emotion theories of these legal realists, including Benjamin Cardozo and Jerome Frank).

17. Maroney, *supra* note 11, at 657–58 (citing William J. Brennan, Jr., *Reason, Passion, and "The Progress of Law,"* 10 CARDOZO L. REV. 3 (1988)).

18. Maroney, *supra* note 11, at 657–64 (analyzing work of scholars and judges whom the author dubs the "new emotional realists").

19. *Id.* at 664 ("The new emotional realists have largely stopped fighting over the premise[] that judges *qua* judges have emotions").

20. Maroney, *supra* note 11, at 668. The exceptions have been those judges and theorists who have argued that emotion is an indispensable guide to judicial action, or—more commonly—that emotion sometimes can play a positive role in judicial decision making. *See id.* at 668–71. As explored further *infra*, this author endorses the latter view. *See id.* at 671 (characterizing a view of judicial emotion as normatively variable as "the clearly correct choice . . . in light of contemporary emotion scholarship"), but adoption of that view is not essential to most aspects of the argument propounded herein.

21. Maroney, *supra* note 11, at 636–40. One senator declared that judicial emotion puts "nothing less than our liberty" at stake; *id.* at 638 & n.34 (quoting Senator Orrin Hatch). Numerous political stakeholders and commentators insisted that it tends in the direction of subjectivity and irrationality; *see id.* at 637–39; *see also id.* at 631 & n.5 (citing commentator who in 2010 characterized accusation of empathic judging as "radioactive"); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1065 (2006) [hereinafter Posner, *The Role of the Judge*] (asserting that a judge would be criticized if he were to explain a decision in terms of his emotions).

22. *See, e.g.*, *supra* note 2 (citing testimony of Sonia Sotomayor to that effect); *see also*

Thus, under both the traditional account of judging and its post-realist iteration, we expect judges to manage emotion, either by preventing its emergence or by walling off its influence. That is, to invoke a psychological concept, what we expect of a good judge is good "emotion regulation."[23] At the same time, judges are given no direction as to how to engage in emotional regulation beyond simply shutting off their emotions—which seems like a tall order even for the most determined judge.

This Article proposes a model for emotion regulation on the bench that goes beyond a blanket admonition to "put emotion aside." To do so, it joins for the first time two previously disconnected areas of inquiry: the jurisprudential study of judicial behavior and the psychological study of emotion regulation.

While legal discourse on the inevitability of judicial emotion and the necessity of regulation has been stunted, scientific study of the processes of emotion regulation has been robust.[24] In that literature, emotion regulation is understood to encompass any attempt to influence what emotions we have, when we have them, and how those emotions are experienced or expressed.[25] So defined, it is a process in which all people regularly engage.[26] When at a funeral, one generally feels differently than one does at a wedding. If one does not feel differently, one tries to—and if the effort fails, one will at least try to project the socially appropriate emotion.[27] Similarly, when at work, one generally is expected to engage and display emotion differently than in one's private life.[28]

Judges, like all people, try to regulate their emotions so as to conform to social expectations, their desired self-image, and the norms of their profession. The ability to regulate emotion flexibly in response to these various and shifting demands is a hallmark of what is popularly known as "emotional

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Maroney, *supra* note 11, at 641–42 (noting continuing "sting" of the "emotional judge" label, because of which a judge may feel compelled to insist either that he experienced no emotion or was able "fully to set it aside").

23. *See infra* note 25 (defining emotion regulation).

24. HANDBOOK OF EMOTION REGULATION, at xi–xiv & fig.P.1 (James J. Gross ed., 2007) (noting that academic citations to "emotion regulation" have increased dramatically since 1991); Sander L. Koole, *The Psychology of Emotion Regulation: An Integrative Review*, 23 COGNITION & EMOTION 4, 5 (2009) ("[O]ne of the most vibrant areas in contemporary psychology").

25. James J. Gross, *Antecedent- and Response-Focused Emotion Regulation: Divergent Consequences for Experience, Expression, and Physiology*, 74 J. PERSONALITY & SOC. PSYCHOL. 224 (1998) [hereinafter Gross, *Antecedent- and Response-Focused*]; *see also* Iris B. Mauss et al., *Culture and Automatic Emotion Regulation*, *in* REGULATING EMOTIONS 39, 40 (Marie Vandekerckhove et al. eds., 2008) (defining emotion regulation as "deliberate or automatic changes in any aspect of the emotional response, including the eliciting situation, attention, appraisals, subjective experience, behavior, or physiology").

26. James J. Gross & Ross A. Thompson, *Emotion Regulation: Conceptual Foundations*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 3, 7–8; *see also* Koole, *supra* note 24, at 5 (asserting that people engage in "some form of emotion regulation almost all of the time").

27. *See infra* Part II.

28. *See infra* Part I (explicating the concept of "emotional labor").

intelligence,"[29] a sort of intelligence to which judges may aspire. But the very idea of judicial emotional intelligence is absent from the discourse. Because our legal culture alternates between round denial that judges experience emotion and blithe insistence that any emotion can simply be put aside, it does nothing to promote intelligent emotion regulation in judges. Indeed, the culture does much to discourage it.[30]

This pattern can and should be reversed. The science of emotion regulation illuminates both the ways in which our traditional approach is misguided, as well as the path forward.[31] For example, though the traditional approach presupposes that judges easily can manage feeling on the bench, psychology teaches us that the processes of emotion regulation are complex, effortful, sometimes counterintuitive, and counterproductive if poorly deployed.[32] Emotion regulation may be pursued by way of a diverse array of strategies, each with distinct costs and benefits.[33] Attempts to influence emotions may have "paradoxical or unintended effects," just as efforts to influence thoughts do.[34] Further, different strategies for regulating emotion have different effects on decision making.[35] Applying these insights to the judging context casts the flaws of our current approach into sharp relief. It reveals that the regulatory strategies we implicitly promote—such as the

29. Daniel Goleman's bestselling *Emotional Intelligence: Why It Can Matter More than IQ* has spawned an industry devoted to cultivating "EQ." *See generally* DANIEL GOLEMAN, http://www.danielgoleman.info (last visited Sept. 16, 2011). The concept also has gained traction in academic psychology. *See also* PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES 162 (Paula M. Niedenthal et al. eds., 2006); Nicola S. Schutte et al., *Antecedent-Focused Emotion Regulation, Response Modulation and Well-Being*, 28 CURRENT PSYCHOL. 21, 23 (2009) ("emotional intelligence" includes "managing emotion in the self") (citing John D. Mayer et al., *Emotional Intelligence: Theory, Findings, and Implications*, 15 PSYCHOL. INQUIRY 197 (2004)).

30. *See infra* Section IV.A; *see also* Maroney, *supra* note 11, at 640, 642, 678 (explaining how deep stigma associated with expressions of judicial emotion discourages intelligent analysis of its impact and role).

31. All psychological studies, of course, should be applied to law with care. The external validity of most relevant research, including in emotion regulation, is not fully certain, as many (but not all) such studies take place in laboratories and as virtually none have used judges as subjects. *See* Frederick Schauer, *Is There a Psychology of Judging?*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 103 (David Klein & Gregory Mitchell eds., 2010). Further, emotion-regulation research historically has focused on so-called "negative" emotions, such as fear, disgust, and anger, and regulation of so-called "positive" emotions (such as happiness) is less well understood. *See* James J. Gross, *Emotion Regulation: Past, Present, Future*, 13 COGNITION & EMOTION 551 (1999). The model herein explicated proceeds with these caveats firmly in mind, seeking to apply to law lessons as to which there is a relatively strong scientific consensus.

32. *See infra* Parts II & IV.

33. *See infra* Section II.C.

34. Gross, *supra* note 25, at 224; *see also* Koole, *supra* note 24, at 6 ("[S]ome forms of emotion regulation ironically bring about the very emotional outcomes that people hope to avoid."). *See infra* Section IV.B.

35. Renata M. Heilman et al., *Emotion Regulation and Decision Making Under Risk and Uncertainty*, 10 EMOTION 257 (2010) (discussing empirical evidence that "different regulation strategies could have different decision implications").

suppression of emotional experience—are the ones most likely to incur far more cost than benefit; conversely, those most likely to be beneficial—such as the public sharing of emotional experience—are the ones we most stigmatize.

By proposing a psychologically grounded model for judicial emotion regulation, this Article also contributes to broader debates about judicial behavior. First, it begins to fill an important gap in research on the psychology of judicial decision making. Though such research has grown in scale and importance in recent decades, the failure to address questions of judicial emotion is perhaps its most conspicuous omission.[36]

Second, the Article reinforces and extends the literature applying to judges certain insights from behavioral law and economics. That literature documents not only that judges are prone to the same heuristics and biases as are other human beings, but also that these factors influence their judging—and not always for the better. For example, judges overweight small risks and underweight large ones, just as most people do.[37] They also are prone to anchoring, hindsight, and egocentric biases, and they rely on ostensibly nonrational decisional tools such as intuition.[38] This Article demonstrates another way in which judges are human, and, in so doing, it identifies a promising new area calling for further research.

Third, this Article helps to address one of the thorniest normative issues in contemporary law-and-emotion theory: the role that emotion *ought* to play in judicial decision making.[39] While a small group of judges and theorists—most notably Judge Posner—has insisted that emotion rightly plays some role, to date none has proposed a coherent theory of that role.[40] This Article articulates one facet of such a theory: because emotions reflect perceptions, beliefs, and values, judges can extract from their emotions lessons that may be relevant to specific legal issues before them. More broadly, those lessons may be integrated into judges' understanding of legal constructs, such as mercy.[41]

The Article, therefore, both takes the post-realist account of good judging on its own terms and pushes at the edges of that account. It shows how judges

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36. *See* David Klein, *Introduction*, *in* PSYCHOLOGY OF JUDICIAL DECISION MAKING, *supra* note 31, at xv (noting absence of attention to role of emotion, despite its promise as "an important area of inquiry for students of judges").

37. W. Kip Viscusi, *How Do Judges Think About Risk?*, AM. L. & ECON. REV. 26, 36 (1999).

38. John C. Anderson et al., *Evaluation of Auditor Decisions: Hindsight Bias and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711 (1993); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Marianne M. Jennings et al., Outcome Foreseeability and Its Effects on Judicial Decisions (unpublished manuscript). Judges' damage awards in hypothetical cases are concretely influenced by anchoring their thoughts to an irrelevant dollar amount. *See* Guthrie et al., *supra*, at 787–94; *see also* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998). Their faulty risk assessments also cause personal injury damage awards to deviate from cost-benefit models. *See* Viscusi, *supra* note 37, at 26.

39. Maroney, *supra* note 11, at 668 (describing this "normative difficulty").

40. *Id.* (demonstrating lack of theoretical and descriptive specificity).

41. *See infra* Section III.C.

interested in setting emotion aside might try to do so, with the greatest chance of success and at the least cost; however, it also suggests that the goal of dispassion itself be reconsidered.[42] The ideal of the dispassionate judge thus might be replaced by that of the emotionally well-regulated judge.

To these ends, the Article proceeds as follows. Part I sets forth the problem: judges experience emotions, those emotions must be regulated, and judges have no extant models for how to do so. This Part begins by introducing the sociological construct of "emotional labor." Emotional labor is emotion regulation that takes place in a work context and is driven by professional goals and expectations;[43] it therefore is a useful frame within which to discuss what judges do on the bench. This Part then draws on three sources of evidence to show that judges perform emotional labor. First, though many judges deny emotion, emotional expression sometimes nonetheless leaks through. Second, judges sometimes openly admit the impact of emotion. Indeed, this Part describes a conversation with the Hononorable Alex Kozinski in which he does just that. Third, two small studies of magistrates and trial judges reveal how difficult those judges perceive emotion regulation to be. This Part ends by asking how, given what we know about the psychology of emotion regulation, judges can perform their emotional labor in the most productive manner.[44]

Part II supplies the necessary scientific foundation for answering that question. It shows why emotion must be regulated, explains the hedonic and utilitarian motivations that drive emotion regulation, and introduces the major regulation strategies, which are organized into two general and contrasting types: *suppression* and *engagement*. Importantly, it clarifies that regulation is vital whether one believes emotion to be helpful or harmful to decision making. Finally, this Part outlines the potential costs and benefits attending diverse strategies, shows that poor regulatory choices can be remarkably impervious to correction through experience, and reminds us that regulation never can be expected fully to extinguish emotion. This overview sets the stage for a comparison of the net benefit of the proposed model relative to its alternatives.

Part III uses these lessons to construct a new model—the *emotional engagement* model—for judicial emotion regulation. This Part demonstrates that engagement strategies are, in general, the best suited to the judicial task, and it shows how judges may make use of them. Judicial engagement with emotion gives judges tools with which to prepare realistically for inevitable emotional challenges, process and respond thoughtfully to any emotions they

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42. *See* Maroney, *supra* note 11, at 651, 681 (advocating that the script be put aside because "the theoretical foundation from which the script of judicial dispassion has been meaningfully eroded").

43. ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 7 (1983).

44. *See, e.g.*, Klein, *supra* note 36, at xiii (positing that the psychology of judging asks, "Knowing what we do about people generally, what should we expect of people put in the positions that judges are and asked to do what they do?").

may have, and integrate those emotions into their decisional processes and professional self-concept. To demonstrate further the promise of an engagement model, this Part points to an instructive parallel between the regulatory challenge facing judges and that facing doctors. Engagement efforts currently gaining traction within medical education point the way toward what we ought to be doing in the judging context.

Part IV further demonstrates the value of the proposed model by showing the inadequacies of the alternatives. It shows, as an initial matter, that avoidance and mindfulness strategies are generally—though not invariably—incompatible with the judicial task. Even weightier objections adhere to strategies designed to suppress the expression and experience of emotion. Suppression, though implicitly encouraged by our legal culture, is both unrealistic and normatively undesirable, and its costs generally are not outweighed by benefits. Moreover, this Part argues that judicial emotion suppression is just the sort of maladaptive regulatory cycle that becomes non-self-correcting. Finally, this Part notes that suppression of emotion is not just bad for judging—it is bad for judges. Suppression's pedigree is, in short, poor evidence of its value.

The Article concludes by reflecting more broadly on our concept of the "good judge." Many judges will, over the course of their careers, develop sound and flexible strategies for coping with emotion. But they do so despite our collective efforts, not because of them. To improve judicial decision making, we should embrace a model that would enable all judges to work with—rather than suppress—their emotions.

I.
JUDGES' EMOTIONAL LABOR AND THE CHALLENGE OF EMOTION REGULATION

This Part demonstrates the problem of judicial emotion regulation. Emotion in judging is not itself the problem; the problem, rather, is that collective silence on the impact of emotion on judging frustrates our ability to discern and shape how judges cope with their emotions in practice.[45] That silence is perpetuated by the pressure judges feel to deny that emotion plays any part in their decision making.[46] This Part therefore ferrets out evidence of judicial emotion regulation from a variety of sources, including qualitative studies of active judges. It demonstrates that emotion does play an inevitable part in judicial decision making and that judges lack any viable, transparent model for regulating it.

The first step in this analysis is to recognize that judges are engaged in an occupation that involves "emotional labor." The term was coined by the

45. Maroney, *supra* note 11.

46. Posner, *supra* note 21, at 1065 (asserting that "[t]he role of emotion . . . is concealed" because a judge would be criticized for revealing it).

sociologist Arlie Hochschild in her seminal 1983 work *The Managed Heart*.[47] Hochschild defined emotional labor as the work of managing one's emotions so as to "create a publicly observable facial and bodily display" in conformance with the expectations of one's profession and workplace.[48] What sort of emotional experience and expression is considered appropriate for any given profession or workplace will vary enormously.[49] Actors, for example, are expected to bring a high level of emotional engagement to their work; electricians are not. Hochschild's field research involved airline flight attendants, who are expected both to project pleasant, calm feelings at all times and to facilitate those feelings in customers.[50] In contrast, the bill collectors she studied were expected to display negative emotions, such as anger, and to foster feelings of fear in the debtors with whom they interacted.[51] One's position in a workplace hierarchy also will have an impact. Some emotional intimacy may be considered appropriate when speaking with a close professional peer, but not with a supervisor. Further, service professionals (such as flight attendants) work with "emotional supervisors" who monitor and punish noncompliance, whereas professionals—Hochschild mentions both doctors and judges—are largely self-policing.[52] What is constant is that all jobs will impose emotion norms that one must work to satisfy. Such labor may entail either "deep acting," in which the worker seeks to change her emotions to conform to workplace norms, or "surface acting," in which she changes merely those emotions' external manifestation.[53]

The emotional-labor construct has become enormously influential in sociology, particularly in the study of organizational behavior.[54] Recently,

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47. HOCHSCHILD, *supra* note 43, at 7 ("[E]motional labor is sold for a wage and therefore has exchange value.") (emphasis removed).

48. *Id.*

49. Mauss et al., *supra* note 25, at 47 (noting that profession deeply influences regulation).

50. HOCHSCHILD, *supra* note 43, at 1–9.

51. *Id.* at 137–38.

52. *Id.* at 153 (arguing that professionals "supervise their own emotional labor by considering informal professional norms and client expectations"); *id.* at 52–53 (stating that the "art" of emotional labor is passed "from judge to law clerk, professor to graduate student, boss to rising subordinate"); *id.* at App. C; *see also* Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32 J.L. & SOC'Y 590, 614 (2005) (asserting that judges' emotional labor also is monitored by the public and lawyers, and sometimes by higher courts); Alicia A. Grandey, *Emotional Regulation in the Workplace: A New Way to Conceptualize Emotional Labor*, 5 J. OCCUPATIONAL HEALTH PSYCHOL. 95 (2000).

53. HOCHSCHILD, *supra* note 43, at 35–48. Though the distinction may appear subtle, it is anything but. Hochschild frequently draws on the craft of acting to illustrate her emotional-labor constructs. *Id.* Similarly, this author is reminded of an exchange she once had in a workshop with Patrick Stewart, then best known as a master Shakespearean actor. Stewart was frustrated that the student, in his estimation, was reading the lines with the intention of projecting the character's emotion, rather than inhabiting the character and naturally projecting the emotion. The student protested that this seemed like "a very fine line." Stewart, incredulous, responded, "My child, it is the very opposite of a fine line. It is a deep gulf." When the student re-read the scene, all assembled burst into applause; the apparently subtle shift was immediately, dramatically evident.

54. Grandey, *supra* note 52, at 95 (noting that emotional labor is now widely recognized,

academic psychologists have noted its close relationship with emotion regulation. Simply put, emotional labor is "emotion regulation that occurs within work contexts."[55] Emotion-regulation research thus provides a valuable tool for measuring the costs and benefits—both for workers and for their work—of the regulatory processes activated by attempts to comply with workplace norms.[56]

For judges, the ideal of judicial dispassion supplies the workplace norm; they are expected both to feel and project affective neutrality.[57] Because affective neutrality is not a naturally occurring human state, at least not when we encounter emotion-provoking stimuli,[58] judges must engage in emotional labor in order to comply with it. However, expressions of judicial emotion are heavily stigmatized.[59] Not only does this stigma make judges' labor particularly hard, as a practical matter it makes the study of judicial emotion regulation difficult because it reduces the number of instances in which the work of managing emotion is frankly acknowledged.

Yet we can locate some evidence of judges' emotional labor. Perhaps the clearest public acknowledgment of the phenomenon came during Justice Sotomayor's 2009 Senate confirmation hearings.[60] Facing the hostile implication that she might bring to the Court an "empathic" or "emotional" judging style, she was quick to insist that, while she is not a "robot," she takes care to put emotion aside when hearing and deciding cases.[61] Other judges have taken a similar approach, noting the emotions prompted by cases before them,[62] but declaring their intention to override the emotional response and prevent it from entering the reasoning process.[63] In burial disputes, for example, which often involve a combination of grisly details, grieving litigants, and vitriolic family dynamics, judges have voiced the "dismay," "sympathy," and "difficulties and embarrassment" with which they have had to grapple before

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though it once was "ignored in the study of organizational behavior").

55. Vanda L. Zammuner & Cristina Galli, *The Relationship with Patients: "Emotional Labor" and Its Correlates in Hospital Employees*, *in* EMOTIONS IN ORGANIZATIONAL BEHAVIOR 251, 254 (Charmine E.J. Härtel et al. eds., 2005).

56. *Id.* at 252–53 (seeking to bridge the gap between sociological research on emotional labor and psychological research on emotion regulation).

57. Maroney, *supra* note 11, at 656–58; Anleu & Mack, *supra* note 52, at 599.

58. *See supra* Section II.A.

59. Posner, *supra* note 21, at 1065.

60. A fuller account of the judicial-emotion narratives in the Sotomayor hearings is found in Maroney, *supra* note 11.

61. *See supra* note 2.

62. *See supra* notes 1–10.

63. *See, e.g.*, State v. Cutts, No. 2008CA000079, 2009 WL 2170687, at *36 (Ohio Ct. App. Jul. 22, 2009) (Delaney, J., concurring) ("I am saddened by the tragic loss of life this case presents and sympathize with the families of all involved. But, when I put on the robe as judge, I must not let my feelings, my emotions, . . . influence my review and application of the law."); Commonwealth v. White, 910 A.2d 648, 658 (Pa. 2006) (reporting statement by trial judge that he must set aside the fact that a juvenile defendant's "life circumstances make my heart weep").

coming to a decision.[64] Virtually always, such an admission is accompanied by an overt commitment to ignore those sentiments, a display of dispassion that serves to reinstate the judge's image as an embodiment of legal authority.

In addition to these episodic displays, some judges have not only openly addressed the inevitability of coping with emotion, but have gone on to suggest that emotion might play some legitimate role in their decisional processes.[65] Judge Irving Kaufman, for example, has written that when the law provides the judge "with decisional leeway, we do well to recognize that our intuition, emotion and conscience are appropriate factors in the jurisprudential calculus."[66] Judge Posner, too, has acknowledged judges' emotional labor, asserting that "it would be misleading to say that good judges are less 'emotional' than other people. It is just that they deploy a different suite of emotions in their work from what is appropriate both in personal life and in other vocational settings."[67] He does not, unfortunately, go on to define the contents of that judge-specific "suite," though he offers some relevant hints. Judge Posner suggests, for example, that judges are motivated to do a good job because they fear being shamed.[68] He also muses that happiness and anger might unduly curtail judicial deliberation.[69] To date, though, Judge Posner has not offered a fuller account of judicial emotion, nor—most relevant here—has he attempted to specify how judges go about managing the emotions he believes them invariably to have.[70]

Ninth Circuit Chief Judge Alex Kozinski, in conversation with this author, has demonstrated a preliminary move toward the introspection that could facilitate development of such an account.[71] He recounted two vivid examples

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64. Heather Conway & John Stannard, The Honours of Hades: Death, Emotion, and the Law of Burial Disputes (2010) (unpublished manuscript) (citing a variety of such cases in Ireland, England, and Australia); *see also* Berman Swartz, Comment, *Property—Nature of Rights in Dead Bodies—Right of Burial*, 12 S. CAL. L. REV. 435, 436 (1939) ("Judges beneath the juridical robes react more or less as do average citizens. . . . We are here concerned with a field of law wherein human emotions, sentiment and a feeling of morality are more apt to play an important part . . . .").

65. Maroney, *supra* note 11 (tracing the line from the Legal Realists to the "new emotional realists," including Brennan and Posner).

66. Irving J. Kaufman, *The Anatomy of Decisionmaking*, 53 FORDHAM L. REV. 1, 16 (1984).

67. Richard A. Posner, FRONTIERS OF LEGAL THEORY 245 (2001); *see also* Maroney, *supra* note 11, at 659–61 (discussing Posner's account of judicial emotion in, inter alia, RICHARD A. POSNER, HOW JUDGES THINK (2008) [hereinafter POSNER, HOW JUDGES THINK] and FRONTIERS OF LEGAL THEORY); POSNER, HOW JUDGES THINK, *supra*, at 119 ("[P]erhaps few judges are fully inoculated against the siren song of an emotionally compelling case."); *id.* at 106 ("The character of an emotional reaction, at once gripping and inarticulable, does not make emotion always an illegitimate or even a bad ground for a judicial decision.").

68. POSNER, HOW JUDGES THINK, *supra* note 67, at 38 ("Criticism can induce guilt as well as shame, of course.").

69. *Id.* at 110 ("Beware the happy or the angry judge!").

70. *Cf. id.* at 119 (echoing idea that "setting sympathies aside" is part of "playing the judicial game").

71. Interview with the Hon. Alex Kozinski, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, in Nashivlle, Tenn. (Feb. 6, 2010) [hereinafter Kozinski Interview].

of cases in which his emotions were directly engaged. In both, he reported that he expended considerable effort to examine those emotions and to attempt to channel them appropriately. In the first case, *United States v. Kojayan*,[72] the judge recalled becoming extremely angry upon learning that a prosecutor had lied in court about material elements of the state's case. As to the second, also a criminal case, Chief Judge Kozinski recounted how he was unexpectedly affected by evidence that the defendant had made one "very big mistake" that jeopardized her entire life—deciding to act as a drug mule. Evidence of that mistake triggered memories of what he regarded as a similarly big mistake of his own—negligently allowing his son to crawl into traffic.[73] Those memories awakened in him feelings of intense dread and fear. In both instances, the Chief Judge reported, he deliberated over how best to manage his emotions in light of the legal issues presented, and eventually he was able to integrate his feelings into his decisional process.[74]

Perhaps the best evidence of judicial emotion and the necessity of its regulation lies in two small case studies. The first is a pilot study of Australian magistrate judges, which was designed, in part, to measure the relevance of Hochschild's emotional-labor construct.[75] Australian magistrates handle the vast majority of civil and criminal actions, and are most directly analogous to state trial-court judges in the U.S. system.[76] Importantly, researchers noted that these judges work in the shadow of a professional norm precisely mirroring the standard account described in this Article.[77] This norm dictates that judges "not be swayed" by emotion, and deems any judicial action that is so swayed to be "irrational."[78] Against this backdrop, the surveyed judges reported a significant amount of emotional labor of two sorts.

The first entails handling the emotions of litigants and other court participants.[79] This sort of emotional labor is, to be sure, quite understudied, but its popular legitimacy is clear: we expect judges to control the emotions of others.[80] For example, judges are expected to instruct jurors about how they are to handle their emotions,[81] regulate the admission of emotionally charged

72. United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993).

73. Chief Judge Kozinski discussed this case, though with less attention to its emotional aspects, in Alex Kozinski, *Teetering on the High Wire*, 68 U. COLO. L. REV. 1217 (1997).

74. *See infra* Section III.C.

75. Anleu & Mack, *supra* note 52, at 592 (describing study as the first to explore how magistrates "regulate their own emotions and display of feelings and those of court users," which had not before "been examined in any depth"). Anleu is a sociologist; Mack is a law professor.

76 *Id.* at 593–96 (describing work of magistrate judges).

77 *Id.* at 599–601 (describing "feeling rules" applied to Australian judicial officers).

78. *Id.* at 601–02.

79. *Id.* at 614 (noting that such labor is designed to instill a positive impression of court system); *see also* Gross & Thompson, *supra* note 26, at 8 (defining "extrinsic" regulation as that which entails the management of others' emotions).

80. *See, e.g.*, Weiser, *supra* note 7, at A20 (describing "excruciating pressure" on sentencing judge to "balance the law, the public's emotions, and his own deeply held beliefs").

81. *See* California v. Brown, 479 U.S. 538, 542–43 (1987) (approving of "anti-sympathy

evidence,[82] and control emotional displays and outbursts.[83] Such other-oriented, or extrinsic, labor fits with relative comfort into the ideal of dispassionate judging. Indeed, we likely believe that a judge who is properly distanced from her own emotions is better equipped to handle those tasks.

But—of even greater relevance here—the Australian magistrates also reported a second sort of emotional labor: expending effort to manage their own emotions.[84] These emotions ranged from sympathy to revulsion, but the most frequently reported emotions were negative. One magistrate, for example, characterized his work as "seeing absolute misery passing in front of you day in, day out, month in, month out, year in, year out."[85]

Such findings are echoed in a recent study of twenty-two U.S. state-court judges in Minneapolis and St. Paul.[86] The study, consisting of open-ended interviews by two professors of rhetoric, was meant to explore the "emotionology" of victim impact statements, not judicial emotion.[87] However, the judges sometimes commented on their own emotions in response to such statements. For example:

> One judge . . . recalled a DWI case in which a young child almost lost his life. His mother delivered an impact statement in which she described how she thought her son was going to die. "I remember thinking," the judge said, "I am going to cry." But he regained what he thought was necessary composure because "you are not supposed to cry on the bench when you are a judge."[88]

Other judges reported feeling frustration, anger, and compassion when hearing such cases, emotions prompted both by the underlying facts and by the impact statements.[89]

Thus, in both of these studies, judges reported performing emotional labor directed toward controlling their own emotions. Indeed, they reported such labor even when they were not asked about it directly, but where the cases about which they were asked inevitably entailed such labor.

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instruction"); Saffle v. Parks, 494 U.S. 484, 493 (1990) (same).

82. *See* FED. R. EVID. 403 (1999).

83. *See* Carey v. Musladin, 549 U.S. 70, 76 (2006) (noting that lower courts have "diverged widely" in treatment of emotional displays in the courtroom, but declining to establish any standards); *see also* Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851 (2009).

84. Anleu & Mack, *supra* note 52, at 614.

85. *Id.* at 611.

86. *See* Mary Lay Schuster & Amy Propen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 6 LAW, CULTURE & HUMAN. 75 (2010).

87. The study therefore focused on the judges' other sort of emotional labor—managing the emotions felt and expressed by others, particularly crime victims. *Id.*

88. *Id.* at 89.

89. *Id.*

Just as important, the judges in both these studies reported that regulating their emotions is difficult.[90] One Australian magistrate, reflecting on his work with child welfare cases, said:

> I have a problem walking away and just erasing everything I've heard about families and the stress that they're under, the treatment children have been dished out, what will happen to them for the rest of their lives. I just find it difficult to walk away from that and go home to my own children and look at them and think 'Oh, God', you know. I usually find I try to be more patient with my own children when I go home after a day in the [family court]. So it's just the sadness; there is no good news.[91]

Even more starkly, one magistrate described herself as being stuck between poor options:

> Now, there's two things that can happen to you. Either you're going to remain a decent person and become terribly upset by it all because your emotions – because your feelings are being pricked by all of this constantly or you're going to become – you're going to grow a skin on you as thick as a rhino, in which case I believe you're going to become an inadequate judicial officer because once you lose the human – the feeling for humanity you can't really – I don't believe you can do the job.[92]

This magistrate felt trapped between the Scylla of too much emotion and the Charybdis of no "feeling for humanity" at all.

Notably missing in this account is a third option, by which the judge is able to remain "a decent person"—and, thus, a competent professional—and handle the emotional challenges gracefully, without constantly being "terribly upset."[93] This magistrate's perception of nothing but bad options was, unfortunately, echoed by many of the Minnesota judges. They reported feeling that, as the legal system tends "to strip away emotions," they were "working in a factory of sorts in which [they] are just grinding these cases out," and worried that they were in the process becoming "sort of insulated and numb."[94] These magistrates and judges have no models for that third option, one that reflects

90. Anleu & Mack, *supra* note 52, at 611 (quoting one judge, reflecting on that difficulty, as saying "that's what you get paid for, I guess"); Schuster & Propen, *supra* note 86, at 89 (citing judges' assertion that listening to victim impact statements can be "powerfully painful").

91. Anleu & Mack, *supra* note 52, at 613. The authors do not identify the gender of the magistrates who provided this quote and the next. However, they note that both male and female magistrates reported emotional labor, and propose that gender might have some impact on how such labor is performed.

92. *Id.* at 612.

93. Anleu and Mack posit that judges' emotional labor can entail significant costs on judges themselves, including "distress and emotional exhaustion." Anleu & Mack, *supra* note 52, at 612.

94. Schuster & Propen, *supra* note 86, at 89. This danger was recognized by Hochschild as well. HOCHSCHILD, *supra* note 43, at 90 ("A principle of emotive dissonance, analogous to the principle of cognitive dissonance, is at work. Maintaining a difference between feeling and feigning over the long run leads to strain.").

functional, performance-facilitating emotion regulation. Unfortunately, this is not surprising: the continuing stigma surrounding judicial emotion effectively stymies its development.

In sum, this Part has shown that judges experience emotions that they must regulate, that such regulation is difficult, and that they are given no guidance on how to carry it out. All that judges are given is a simple command: feel no emotion, and, if you do, put emotion aside. Once we move past that simple command, the challenge is to develop a viable model for judicial emotion regulation. It is to that challenge that this Article now turns.

II.
A THEORETICAL ACCOUNT OF EMOTION REGULATION

To understand what the psychology of emotion regulation has to offer in constructing a model for judicial behavior requires that one first understand that field's fundamentals. This Part therefore explains why emotion needs to be regulated at all, including what motivates people to regulate their emotions. It then introduces the range of regulatory strategies that humans employ, as well as their potential costs and benefits. Parts III and IV delve deeper into each of these concepts in the course of applying them to judges.

A. Why Regulate Emotion?

In Western political philosophy, the dominant view long has been that emotion is "more primitive, less intelligent, more bestial, less dependable, and more dangerous than reason."[95] If one adheres to this view, as law traditionally has,[96] the need for emotion regulation is obvious. Regulation is the mechanism for controlling emotion's pernicious influence and achieving rationality, much as a master controls a slave.[97] But that once-dominant view is experiencing a precipitous decline.[98] The last century, particularly its last two decades, witnessed a veritable explosion of academic interest in emotion—not just in psychology but also in philosophy, history, and the neurosciences.[99] This scholarship is diverse, but has generated a consensus that emotion is an evolved,

95. Robert C. Solomon, *Philosophy of Emotions*, *in* HANDBOOK OF EMOTIONS 3, 3 (Michael Lewis et al. eds., 3d ed. 2008).

96. *See* Maroney, *supra* note 11; *see also* Anleu & Mack, supra note 52, at 602 (asserting that the traditional legal story is that "emotions are inappropriate to judicial office").

97. Solomon, *supra* note 95, at 3 (remarking that the "metaphor of master and slave" is one of "the most enduring metaphors of reason and emotion").

98. Maroney, *supra* note 11, at 648 (canvassing evidence of a "dramatic shift in how emotion and reason are thought to interact").

99. Maroney, *supra* note 11, at 676 (describing that explosion and consequent availability of a new emotional epistemology); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006) (noting substantial uptick in research on emotion, and analyzing its relation to legal theory); *see generally* THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES (David Sander & Klaus R. Scherer eds., 2009) (compiling much contemporary emotion theory from various disciplines).

adaptive mechanism, necessary for survival, social cohesion, and practical reason.[100] Emotion responds to stimuli in our environment; it reflects our valuation of those stimuli in light of individual and collective goals. Its phenomenology facilitates responses in service of those goals, and its outward expression serves to communicate our beliefs and needs to others.[101] Literal absence of emotion cannot, under this account, be the desired end of regulatory effort.

From a contemporary viewpoint, then, emotion regulation requires a more sophisticated justification, based not on a prejudgment of emotion's invariant value but, rather, on contextual evaluation of that value. That emotion is now understood to be of enormous value to thought, reason, and action does not signify that it must be allowed free rein.[102] Indeed, despite the continued cultural traction of the reason/emotion dichotomy,[103] popular conceptions of good emotion regulation do not generally involve assessment of the degree to which a person has banished emotion. Rather, they involve assessment of whether the person has the right emotions, in the right situation, for the right reasons, and to the right degree.[104] These judgments may be internal, as when we measure whether we feel comfortable with our emotional state, whether in the moment or as a general matter. They also may be externally oriented, entailing a social judgment of one's character and values. "As the individual

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100. Marie Vandekerckhove et al., *Regulating Emotions: Culture, Social Necessity, and Biological Inheritance*, *in* REGULATING EMOTIONS, *supra* note 25, at 1, 1 ("Research on emotions in the past 20 years has increasingly portrayed emotions as highly functional phenomena of crucial evolutionary significance and biological grounding—in individual as well as in social and cultural terms."); Arvid Kappas, *Psssst! Dr. Jekyll and Mr. Hyde are Actually the Same Person! A Tale of Regulation and Emotion*, *in* REGULATING EMOTIONS, *supra* note 25, at 15, 18.

101. Robert W. Levenson, *Human Emotion: A Functional View*, *in* THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 123, 125 (Paul Ekman & Richard J. Davidson eds., 1994); *see generally* Maroney, *supra* note 11 (explicating contemporary view of emotion).

102. *See* Jennifer S. Beer & Michael V. Lombardo, *Insights into Emotion Regulation from Neuropsychology*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 69 ("free expression is [not] always adaptive"); Gross, *supra* note 31, at 558 ("However real the many benefits of emotion, then, it is important not to overstate the advantages of acting in accord with untrammeled emotional impulses."); Vandekerckhove, *supra* note 100, at 1–2.

103. That traction is particularly strong in *legal* culture. Kathryn Abrams, *The Progress of Passion*, 100 MICH. L. REV. 1602, 1602 (2002) (book review of THE PASSIONS OF LAW (Susan A. Bandes ed., 1999)) (noting that the "dichotomy between reason and the passions," like "an abandoned fortress . . . casts a long shadow over the domain of legal thought").

104. *See, e.g.*, Tanja Wranik et al., *Intelligent Emotion Regulation: Is Knowledge Power?*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 393–407, 393 (invoking popular conceptions of "emotional intelligence," including ability to recognize and manage emotion in light of context and goals). Artistotle, too, said as much:

> [F]ear and . . . anger and pity . . . may be felt both too much and too little, and in both cases not well; but to feel them at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way, is what is both intermediate and best, and this is a characteristic of virtue.

JAMES R. AVERILL, ANGER AND AGGRESSION: AN ESSAY ON EMOTION (1982) (quoting ARISTOTLE, NICOMACHEAN ETHICS 1106b20, *in* THE BASIC WORKS OF ARISTOTLE 958 (R. McKeon ed., 1941)).

who laughs at a funeral or fails to show guilt after committing a crime will tell us, there are few quicker routes to social scorn than inappropriate emotion."[105]

Humans, therefore, are highly motivated to regulate their emotions, motivation that may be either *hedonic* or *utilitarian*.[106] Hedonic motivation is fairly straightforward: it refers to the desire to avoid unpleasant, painful feelings (often referred to as "negative" emotions) and to seek out pleasant ones (often referred to as "positive" emotions).[107] One reason to regulate one's emotions, then, is to maximize pleasure and decrease pain.[108] When we feel sad, we may try to find ways to feel better. When we feel angry, we may try to find ways to calm down. When we feel happy, we may try to extend the moment. However, "[f]eeling good and not feeling bad are not invariant emotion regulation motivations;"[109] one may override the hedonic impulse when doing so confers some benefit. As "short-term pleasure and long-term utility do not always coincide," if unpleasant emotions have utility, people would be expected to seek them out—or at least tolerate them—in order to achieve that utility.[110] Conversely, they would be expected to forego opportunities for pleasant emotion. Indeed, that is precisely what people do.[111]

Such utilitarian regulation may be *task-responsive*, as when one seeks to magnify or inhibit emotions to enhance performance in a particular situation.[112] For example, one may try to get "psyched up" for a test or important game, replacing fear with excitement.[113] A different goal might be *impression management*, in which one guards against the negative social judgment that follows defiance of an emotion norm.[114] Such norms may attend a temporary

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105. Beer & Lombardo, *supra* note 102, at 69; *see also* John A. Bargh & Lawrence E. Williams, *The Nonconscious Regulation of Emotion*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 429, 434 ("[I]f we were seemingly not concerned over a threat to the community or group, these would signal that our goals are not the same as the others', and this would threaten our standing within our group.").

106. Maya Tamir et al., *Business or Pleasure? Utilitarian Versus Hedonic Considerations in Emotion Regulation*, 7 EMOTION 546, 546 (2007).

107. PSYCHOLOGY OF EMOTION, *supra* note 29, at 157; Koole, *supra* note 24, at 14. It is common in the affective-sciences literature to use the terms *positive* and *negative* as synonymous with *pleasant* and *unpleasant*. This usage accurately describes emotions' hedonic attributes but carries an erroneous connotation as to their normative status. All emotions are adaptive, and their normative value in any given instance depends on how well they respond to any given situation, whether they are manifested in pathological ways, and whether they reflect accurate beliefs and good values. Tamir et al., *supra* note 106, at 552. However, the terminology is so prevalent that avoiding its use would be cumbersome.

108. *Id.* at 546.

109. PSYCHOLOGY OF EMOTION, *supra* note 29, at 157–58.

110. Tamir et al., *supra* note 106, at 546 ("[U]tilitarian considerations play an important, if underappreciated, role in emotion regulation").

111. *Id.*

112. Koole, *supra* note 24, at 14 (showing how emotion-regulation processes are used to satisfy "priorities that are set by specific norms, goals, or tasks").

113. Tamir et al., *supra* note 106, at 546.

114. PSYCHOLOGY OF EMOTION, *supra* note 29, at 158.

role, such as being a guest at a wedding (expected to feel and display happiness), or longer-term roles, such as spouse (expected to take and show joy in the other's success). These forms of utilitarian emotion regulation may be *prosocial* if they attend to relational concerns, as when one hides emotion to avoid hurting someone's feelings or endures negative emotion for someone else's benefit.[115] For example, the winner of a prestigious academic contest may suppress expressions of pride when talking to his best friend, who lost. A parent taking a terrified child to her first day of kindergarten may feel a painful level of empathy with the child, or perhaps even guilt, but she will tolerate those emotions if she believes kindergarten to be sufficiently important to the child's development. Finally, utilitarian regulation can be *self-protective*. One may need to suppress or feign emotion in order to protect personal safety—such as not showing fear to a threatening other. In a situation of mixed emotions, one may choose to focus on just one in order to elicit salutary reactions from others—such as expressing sadness rather than jealousy to one's flirtatious spouse, in the hopes of spurring concern rather than defensiveness.[116]

Thus, just as emotion is adaptive, so too is the capacity to regulate it. Regulation serves to "fine-tune" our emotional system to "socio-cultural contexts,"[117] providing "important flexibility to our behavioral repertoire."[118] Emotion regulation is a mechanism by which one may pursue a diversity of goals in complex and shifting environments characterized by multiple—sometimes competing—demands.[119] It is profoundly shaped by expectations as to what emotions are appropriate to feel and express in particular situations, as well as to how they are to be felt and expressed. Such emotion norms may be explicitly taught, as is done with children,[120] or disseminated through the diffuse mechanisms of culture.[121]

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115. *Id.*

116. *Id.*

117. Vandekerckhove et al., *supra* note 100, at 3.

118. Richard J. Davidson et al., *Neural Bases of Emotion Regulation in Nonhuman Primates and Humans*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 47, 47; *see also* DANIEL M. WEGNER, WHITE BEARS AND OTHER UNWANTED THOUGHTS: SUPPRESSION, OBSESSION, AND THE PSYCHOLOGY OF MENTAL CONTROL 122–24 (1989).

119. Gross, *supra* note 31, at 551–73 (arguing that emotional regulation can resolve conflicts between emotional and cognitive judgments, as in moral problems requiring choice between utilitarian and nonutilitarian outcomes; ultimatum games; and intertemporal choice); Samuel M. McClure et al., *Conflict Monitoring in Cognition-Emotion Competition*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 204, 204–05 (offering, as a stylized example, TV character Jack Bauer's conflict between saving from terrorists either one person to whom he is emotionally tied or millions of unknown persons).

120. *See* Susan D. Calkins & Ashley Hill, *Caregiver Influences on Emerging Emotion Regulation: Biological and Environmental Transactions in Early Development*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 229.

121. Batja Mesquita & Dustin Albert, *The Cultural Regulation of Emotions*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 486, 487 (suggesting that cultural norms commonly are dichotomized into feeling rules—what one is supposed to feel—and display rules—what emotion one is supposed to communicate, and how).

This account thus far explains the *why* and *what* of emotion regulation. What remains to be explored is the *how*.[122]

B. Emotional Regulation Strategies

People have access to a wide variety of regulatory strategies with which to perform their emotional labor. Emotion regulation strategies exist along a "continuum from conscious, effortful, and controlled" to "unconscious, effortless, and automatic," and efforts that once were the former can over time become the latter.[123] They may be engaged either before or after the emotion arises.[124] Regulation might entail changing the emotion-eliciting situation, changing one's thoughts about that situation, or changing one's responses to that situation.[125]

Though there are many different ways to categorize this range of strategies, they may be loosely grouped according to their consonance with a fundamental distinction between types of emotion—avoid and approach.[126] Put simply, certain emotions, such as fear, tend to entail a motivation to withdraw from the emotion-evoking stimulus (like an advancing bear), whereas others, like anger, tend to entail a motivation to engage with it (as with the urge to strike out against someone who has insulted your family). With emotion regulation, the emotional reaction is itself the stimulus. Thus, regulatory strategies may be grouped roughly according to whether they entail a motivation to avoid the emotion or, rather, to approach it. In this Article, these types are labeled *suppression*, capturing the range of strategies aimed at avoiding or withdrawing from emotion, and *engagement*, capturing the range of those that accept a level of contact with it.[127]

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122. PSYCHOLOGY OF EMOTION, *supra* note 29, at 159 (noting that if emotion norms dictate "how to respond in an emotionally appropriate way, and emotion regulation motives explain why people modify their emotions in view of emotion norms," emotion regulation strategies describe the methods by which they do so).

123. Gross & Thompson, *supra* note 26, at 8.

124. Heilman et al., *supra* note 35, at 263.

125. Gross & Thompson, *supra* note 26, at 10. Another common emotion regulation strategy is to alter one's subjective and physical state through use of drugs and alcohol. Josh M. Cisler et al., *Emotion Regulation and the Anxiety Disorders: An Integrative Review*, 32 J. PSYCHOPATHOLOGY & BEHAV. ASSESSMENT 68, 75 (2010). Because this tactic is so obviously off-limits to judges when in their professional role, this Article does not discuss it.

126. There is no single agreed-upon taxonomy of regulation strategies. Koole, *supra* note 24, at 11–12. The binary categorization proposed herein is useful because it groups together individual strategies that proceed from a similar set of metacognitions and motivations. *Cf.* George Loewenstein, *Affect Regulation and Affective Forecasting*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 180–203, 181 (suggesting two categories, "those that involve altering one's appraisal of a situation, and those that involve distraction or suppressing of thoughts or feelings"); Brian Parkinson & Peter Totterdell, *Classifying Affect-Regulation Strategies*, 13 COGNITION & EMOTION 277 (1999) (adopting approach/avoid distinction).

127. The range of strategies aimed at avoiding or withdrawing from emotion might just as easily be referred to by the label "disengagement," that is, the opposite of engagement. Adopting that terminology would avoid a potential confusion between the category and certain of the specific

1. Suppression Strategies

Suppression is designed to either prevent emotion entirely or eliminate its subjective and behavioral manifestations.

Avoiding the Emotional Stimulus. One strategy is to avoid situations because of their anticipated emotional effect. Such *situation selection* "requires an understanding of the likely features of remote situations, and of expectable emotional responses to those features," on the basis of which one constructs desired environments.[128] For example, if a person knows from experience that being in the same room with her father-in-law causes her to feel angry, she can seek to prevent ever being in the same room with him. Situation selection is not always possible, though, not just because of social obligation but also because "backward- and forward-looking biases make it difficult to appropriately represent past or future situations" for purposes of planning to avoid them.[129] And, obviously, life frequently serves up surprises.

If a situation is unavoidable, or if one has failed to anticipate the need to avoid it, it might instead be *modified* so as to minimize its emotional effects.[130] In this instance, the person might seat her father-in-law at the opposite end of the dinner table to prevent conversation. Modification strategies also include *attentional deployment*—that is, choices as to whether to pay attention to emotion-provoking aspects of a situation. For example, one could choose to cover her eyes or ears.[131] Even if one keeps eyes and ears open, attention can be redirected internally. One common way to redirect attention is *distraction*, which may include, to give some common examples, thinking about something else or singing quietly to oneself.[132] By using any one of these tools to avoid perception of the emotion-eliciting stimulus, one can avoid the emotion.

If, however, a situation cannot be avoided or its emotional attributes fully modified, one may instead choose to suppress the resulting emotional experience and its expression.

Anticipatory Suppression of Emotional Experience. If the situation is anticipated, one may decide in advance simply not to feel any emotion in

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strategies it embraces, such as behavioral suppression. However, the term "disengagement" sounds passive in a way that may disguise the effortful nature of certain avoid/withdraw strategies; it also may inadvertently signal an unwarranted degree of confidence in one's ability easily to disengage from emotion. Recognizing that each choice has pros and cons, this Article chooses the term "suppression" as better capturing the range of strategies urged upon judges in contemporary legal culture. Thanks to James Gross for suggesting this alternative terminology, which may prove to be of use in future explorations of the topic.

128. Gross & Thompson, *supra* note 26, at 11.

129. *Id.*

130. *Id.* at 12 (explaining that situation modification involves "modifying external, physical environments").

131. *See* Mauss et al., *supra* note 25, at 41.

132. Gross & Thompson, *supra* note 26, at 13; Gal Sheppes & Nachshon Meiran, *Divergent Cognitive Costs for Online Forms of Reappraisal and Distraction*, 8 EMOTION 870, 871 (2008); Loewenstein, *supra* note 126, at 190.

response to it.[133] Such anticipatory suppression sometimes is thought of as steeling oneself or going into an emotional lock down. Imagine Lady Macbeth urging her wavering husband to ignore his fear and guilt and to focus instead on the goal of taking Duncan's throne: "screw your courage to the sticking-place," she tells him, "and we'll not fail."[134] Ultimately, Macbeth was unable to succeed in quelling emotion; his failing was a common human one. If an emotion emerges or re-emerges despite one's firmest intentions, or if one has failed to anticipate the need to steel against it, it can be denied or repressed.

Denial and Repression. *Denial* refers to cognitive disengagement from the emotion within the self.[135] For example, "a person might feel angry (say, for losing a soccer tournament) but not wish to admit these feelings to himself because they do not adhere to his ideal self (for example, being a good loser). To do so, he might deny feelings of anger."[136] Denial also might entail not pretending that the emotion never existed but, instead, insistence that it has been extinguished ("I am over it"). Such denial may operate at the surface level, as when the person realizes the continued viability of the emotion but sees utility in disclaiming it, or it may be deep, as when the person sincerely believes he has extinguished the emotion. At its strongest, denial becomes what Sigmund Freud called *repression*, the literal forgetting of disturbing emotional memories and their displacement into the unconscious.[137]

Behavioral Suppression. Finally, one may suppress not the experience of emotion but only its outward manifestation. *Behavioral suppression* involves inhibition of expressive behavior, such as facial expressions (for example, smiling or grimacing), verbalizations (such as cheering or groaning), or bodily movement (for example, cringing or jumping for joy). Corresponding to Hochschild's "surface acting," it entails masking the true emotional state with an expression reflecting either neutrality (as with a "poker face") or a desired one (as with a fake smile).[138]

Each of these strategies is designed to create distance between the self and one's emotional experience and expression, whether as a preemptive strategy or a reactive one.

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133. *See* Gross & Thompson, *supra* note 26, at 14. Anticipatory suppression is here distinguished from Gross's concept of reappraisal, discussed in the following Section. Barnaby D. Dunn et al., *The Consequences of Effortful Emotion Regulation When Processing Distressing Material: A Comparison of Suppression and Acceptance*, 47 BEHAV. RES. & THERAPY 761, 764 n.2 (2009) (classifying antecedent commitment to nonemotionality as a form of emotion suppression).

134. WILLIAM SHAKESPEARE, MACBETH act 1, sc. 7.

135. *See, e.g.*, Mauss et al., *supra* note 25, at 40–41 (defining denial as cognitive disengagement); Phillip R. Shaver & Mario Mikulincer, *Adult Attachment Strategies and the Regulation of Emotion*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 446–65, 452 (characterizing denial as one way to keep emotional systems "deactivated").

136. Mauss et al., *supra* note 25, at 40.

137. *See, e.g.*, WEGNER, *supra* note 118, at 7 (explaining Freudian meaning of repression).

138. HOCHSCHILD, *supra* note 43, at 35–43.

2. Engagement Strategies

Instead of avoiding or suppressing emotion, however, one can choose to engage with both its existence and its particulars.

Cognitive Reappraisal. The first engagement strategy is *cognitive reappraisal*,[139] which, being relatively complex, requires a commensurately complex explanation. It directly targets a core component of emotion: the assessment of environmental stimuli and their relation to one's goals. For example, if one feels fear at the sight of an advancing snake, she has determined that the object is a snake, considered what she knows about snakes, and judged it to represent a threat to her personal safety, something she values.[140] This cluster of perceptions, judgments, and motivations are what psychologists call an appraisal.[141] To reappraise connotes a change in either the perception (it's not a snake, it's a curvy stick), the evaluative judgment (that particular type of snake is harmless), or the goal (my physical safety is not something I value).[142] Corresponding to Hochschild's "deep acting," reappraisal involves changing one's thoughts in order to feel the desired emotional state, which may then be reflected genuinely.[143]

Like a suppression strategy, reappraisal can be either anticipatory or reactive.[144] Antecedent reappraisal involves pre-commitment to a set of beliefs

139. *See* Gross & Thompson, *supra* note 26, at 16–17.

140. *See* Wranik et al., *supra* note 104, at 397 ("[F]ear/anxiety is thought to be associated with evaluating the situation as threatening; sadness with helplessness in an undesirable situation where there is little or no hope of improvement; anger with blaming someone else for an undesirable situation; and guilt with blaming oneself."); Richard S. Lazarus, *Universal Antecedents of the Emotions*, *in* THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS, *supra* note 101, at 163, 164 (asserting that all emotions can be reduced to such "core relational themes").

141. Nico H. Frijda et al., *The Influence of Emotions on Beliefs*, *in* EMOTIONS AND BELIEFS: HOW FEELINGS INFLUENCE THOUGHTS 1, 1 (Nico H. Frijda et al. eds., 2000) (explaining that under cognitive appraisal theory emotions "result from how the individual believes the world to be, how events are believed to have come about, and what implications events are thought to have"); Koole, *supra* note 24, at 13.

142. Gross & Thompson, *supra* note 26, at 16–17.

143. HOCHSCHILD, *supra* note 43, at 35–43.

144. Elaboration on a point of departure from Gross's influential framework here is in order. Gross classifies reappraisal as antecedent-focused, meaning it is engaged prior to emotion elicitation. This use of the term is potentially misleading, as one can cognitively change one's relationship to a stimulus, or ideas about a stimulus, either before or after encountering it. Reappraisal more naturally should describe the latter, for it suggests that one already has engaged in an appraisal—for example, "this person has threatened me by yelling in my face"—that needs to be rethought—for example, "I am mistaken, he was yelling to his friend"—in order for the emotional trajectory to be altered. Reappraisal is a new belief applied to a past or ongoing stimulus; the anticipatory version might instead be called a "pre-appraisal." Gross has argued that reappraisal is properly thought of as antecedent-focused even if initiated once emotion is underway, for it then is antecedent to a new emotional event. Gross & Thompson, *supra* note 26, at 16–17. While this is true, the reappraisal is still logically subsequent to the first event. Cognitive reframing may well have different effects when engaged during, as opposed to before, the emotion episode of interest. *See* Sheppes & Meiran, *supra* note 132, at 870. Therefore, in this Article I distinguish between "anticipatory" (or "antecedent") and "reactive" reappraisal.

or attitudes designed to channel one's reaction to an anticipated emotional stimulus in the desired direction.[145] For example, the woman consistently angered by her father-in-law might consider whether there is another way to frame his behavior. She may conclude that her father-in-law "talks only about himself because he doesn't have many friends," meaning that when he starts talking about himself his behavior will elicit sympathy rather than anger.[146] Similarly, one might decide to think of an upcoming "romantic date as an opportunity to learn about somebody new instead of as an opportunity to be negatively evaluated,"[147] which might prompt excitement instead of anxiety.

Emotions also may be cognitively reframed once they are underway.[148] Such reactive reappraisal "involves attending to the emotional situation but changing its emotional meaning," by changing either one's relationship to it—"I am the adult here"—or one's beliefs about it—"my son is not trying to make me crazy, he is just being a typical teenager."[149]

Disclosure. Emotions also may be regulated by engaging the support of others. *Disclosure* "entails a description, in a socially shared language, of an emotional episode to some addressee by the person who experienced it."[150] This often takes the form of talking about the experience, but can include writing, singing, producing artwork, or any other form of expressive activity.[151] Disclosure may be designed to engage others in the process of cognitive reappraisal, as when others help pick apart the experience and find ways to reframe it. For example, if our hypothetical dinner-party host feels insulted by her father-in-law, she might discuss the incident with another relative in an attempt to determine whether the insult was inadvertent or deliberate, and whether it is worth being upset over. Disclosure may also entail not changing the emotion but finding ways to live with it more comfortably. For example, persons who have lost a family member may talk with one another to help identify ways in which their painful experiences have carried some benefit, such as clarifying what matters in their lives.

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145. *See* PSYCHOLOGY OF EMOTION, *supra* note 29, at 169–70.

146. Mauss et al., *supra* note 25, at 41.

147. Cisler et al., *supra* note 125, at 70.

148. Sheppes & Meiran, *supra* note 132, at 870–71.

149. *Id.* at 871 (further subdividing these mechanisms as "self-focused," or "decreasing the sense of personal meaning of the situation," or "situation-focused," in which one reinterprets the external events); *see also* PSYCHOLOGY OF EMOTION, *supra* note 29, at 163, 169 (giving further examples); Oliver P. John & James J. Gross, *Individual Differences in Emotion Regulation*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 351, 353 (presenting evidence that people report trying to control their emotions by changing the way they think about the emotion-provoking situation).

150. Bernard Rimé, *Interpersonal Emotion Regulation*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 467.

151. *Id*. at 466–85; *see also Expressive Writing with Feedback*, THE ONLINE RESEARCH CONSORTIUM, http://www.utpsyc.org/Write (last visited Sept. 16, 2011) (setting forth experimental "expressive writing" project in the laboratory of James Pennebaker, University of Texas-Austin Department of Psychology).

Mindfulness. A final regulation strategy, one that has received particular attention of late, is mindfulness.[152] A mindfulness approach is drawn in large part from the Buddhist tradition and is geared primarily toward therapeutic goals, such as the treatment of clinical depression, anxiety, and chronic pain.[153] Its essence is nonjudgmental observation and acceptance of all mental phenomena, including emotion.[154] It directs attention to, not away from, the emotion, but it does not seek directly to influence or change that emotion. Mindfulness, sometimes also referred to as a metacognitive approach, often includes meditation, muscular relaxation, and voluntary control of one's breathing.[155] It is thought to facilitate emotion regulation by a counterintuitive mechanism that might be called gaining control by letting go.[156]

C. Potential Costs, Benefits, and Limits of Regulatory Strategies

As the prior discussion revealed, people motivated to regulate their emotions—for either hedonic or utilitarian reasons, or both—make a fundamental choice either to withdraw from or approach the emotion (and the stimuli that prompt it), and then make further choices as to a specific regulatory strategy within the chosen category. Before delving into these concepts as applied to judges, this Part briefly broadens the lens to focus on factors that frame those choices and their consequences. It introduces the notion that regulatory strategies carry distinct costs and benefits; explains one critical reason why people may choose and persist in strategies that are, on balance, maladaptive; and shows why it is unrealistic to expect any given regulatory strategy to be fully effective.

First, all regulatory strategies carry potential costs and benefits. These are not, as a general matter, invariant: all regulatory strategies have occasional utility, just as all have potentially maladaptive manifestations.[157] For this

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152. Richard Chambers et al., *Mindful Emotion Regulation: An Integrative Review*, 29 CLINICAL PSYCHOL. REV. 560 (2009).

153. Chambers et al., *supra* note 152, at 561. More recently, mindfulness is being conceptualized as a tool for helping children focus and regulate emotion. *See* Mindful Schools, www.mindfulschools.org (last visited Sept. 14, 2011); SUSAN GREENLAND, THE MINDFUL CHILD: HOW TO HELP YOUR KID MANAGE STRESS AND BECOME HAPPIER, KINDER, AND MORE COMPASSIONATE (2010).

154. Koole, *supra* note 24, at 27. Mindfulness thus entails elements of both engagement and disengagement, as it contemplates deliberate attention to the emotion but disengagement from emotion's usual evaluative components. However, it entails no suppressive elements.

155. *Id.* at 28.

156. Chambers et al., *supra* note 152, at 563, 566 (arguing that mindfulness can "facilitate a healthy engagement with emotions" instead of a pathological desire to control them).

157. *See, e.g.*, U. MICH. EMOTION & SELF-CONTROL LAB., http://selfcontrol.psych.lsa.umich.edu (last visited Sept. 14, 2011) (exploring differences between adaptive and maladaptive iterations of regulatory strategies). For example, distraction can be highly adaptive in a situation where disturbing stimuli cannot otherwise be avoided and where exposure could cause serious trauma. Consider this dialogue from the biographical movie *The Blind Side*:

Leigh Anne: I swore I'd never ask but . . . how'd you make it out of there, Michael?

Michael: When I was little, and something awful was happening, my Mama would tell me

reason, researchers agree that the most critical regulatory capacity is flexibility.[158]

That said, some strategies tend more toward particular types of costs and benefits, and thus tend to be more or less well suited to particular contexts.[159] For example, some emotion regulation strategies are more effortful than others. It takes particular effort to override a hedonic motivation with a utilitarian one; similarly, it can be hard work to control one's facial expressions.[160] Such an expenditure of effort consumes cognitive resources, leaving the person with fewer resources with which to perform other tasks.[161] Behavioral suppression tends to impair memory; cognitive reappraisal tends to enhance it.[162] Reactively suppressing emotional experience tends to increase physiological arousal; mindfulness tends to decrease it.[163] Repression is correlated with poor mental and physical wellbeing; the opposite is true of disclosure.[164] These points are explored further at later junctures. The critical point here is that the relative advantage of any given regulatory strategy is profoundly context-driven, for an effect that may be beneficial in one situation could be a liability in another.

However, one's choice of strategy can be driven by factors other than the relevant attributes of the particular context, including by unconscious factors,[165] creating the potential for systematically maladaptive choices. Certainly this is true for various forms of mental illness.[166] Of greater relevance here, though, is

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> to close my eyes. She was trying to keep me from seeing her do drugs or other bad things. And she'd say, "Keep 'em closed till I say so." And then when she was finished or the bad things were over, she'd say, "now when I count to three, you open your eyes and the past is gone, the world is a good place, and it's all gonna be ok."
>
> *Leigh Anne:* You closed your eyes.

JOHN LEE HANCOCK, THE BLIND SIDE 125 (Green Rev., Apr. 28, 2009) (script). Such a strategy would, however, become maladaptive for the adult such a child becomes, if that adult finds that the only way he can manage difficult situations is to close his eyes. Similarly, while specifically attending to the specifics of an emotional experience can be highly adaptive, *see infra* Part III, it can become counterproductive if it hardens into obsessive rumination. *See* Susan Nolen-Hoeksema et al., *Rethinking Rumination*, 3 PERSP. ON PSYCHOL. SCI. 400–24 (2008).

158. Nancy Eisenberg et al., *Effortful Control and Its Socioemotional Consequences*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 287–306, 290 ("[W]ell-regulated people . . . respond flexibly to the varying demands of experience"); James J. Gross, *Emotion Regulation: Affective, Cognitive, and Social Consequences*, 39 PSYCHOPHYSIOLOGY 281, 289 (2002) [hereinafter Gross, *Emotion Regulation*] (warning of dangers of "inflexibly" and invariably seeking to override emotion).

159. Grandey, *supra* note 52, at 105 ("Because emotion regulation may be performed in different ways, it is possible that some methods are more effective than others and may thus impact performance on the job.").

160. Eisenberg et al., *supra* note 158, at 287–88 (explaining effortful control).

161. *See, e.g.*, Dunn et al., *supra* note 133, at 762 (referencing "series of well controlled studies" showing consequences of behavioral suppression). *See generally infra* Part IV.

162. *Compare infra* notes 312–14, *with infra* note 187.

163. *Compare infra* notes 366–69, *with infra* note 155.

164. *Compare infra* notes 380–81, *with infra* notes 392–93.

165. Bargh & Williams, *supra* note 105, at 430 (calling attention to nonconscious emotion regulation).

166. *See* Laura Campbell-Sills & David H. Barlow, *Incorporating Emotion Regulation into Conceptualizations and Treatments of Anxiety and Mood Disorders*, *in* HANDBOOK OF EMOTION

the fact that even healthy persons' regulatory choices are strongly influenced by their implicit beliefs about emotion itself. This makes sense: one chooses a strategy based on an idea about what is likely to work, which depends on an idea about the nature of the thing to be regulated. Thus, the often-unexamined lay beliefs people hold about emotion are powerfully linked to the regulatory strategies they choose to engage.[167] Importantly, simple beliefs about emotion dispose one to simple, even crude, regulatory strategies.[168] For example, a person with little understanding of emotion's components, function, and value may regularly resort "to simple rules[,] such as 'if I feel angry . . . then I suppress all expression of this emotion when I am in public.'"[169] Similarly, people who think of emotion as a relatively fixed "entity," rather than something complex, contextual, and malleable, have little incentive to expend effort and energy trying out varied regulation strategies.[170] Overly simplistic or ineffective regulatory choices, which are common, therefore can be remarkably impervious to correction through experience.[171]

Finally, all efforts at regulation have limits. Indeed, emotion's inherent power itself limits regulation's reach. Much of emotion's value derives from being to some degree involuntary. If one "function of feeling states is to motivate us to do what we need to do to secure [our] goals," that function "would be undermined if we had the ability to regulate our own affect at will."[172] If one loves one's child, for example, one is disposed to care for her, and failure or inability to do so will be cause for suffering. The feeling cannot easily be extinguished, and its persistence is a signal of the value ascribed to the child. Were the emotion fully controllable, it would lose that informational and motivational value.

Individual variation also plays a role; some people are simply more adept than others at shaping their emotional experience and expression.[173] However, not even persons relatively skilled at emotion regulation function optimally all the time. Consider one particularly spectacular example of regulatory failure in the workplace, drawn from the flight-attendant context earlier studied by Hochschild. In August 2010, veteran JetBlue flight attendant Steven Slater did something he never had done before: he angrily cursed out a rude passenger on the airplane's public address system, grabbed a beer, and exited the plane via

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REGULATION, *supra* note 24, at 542, 543 ("[M]any clinical features of anxiety and mood disorders may be considered as maladaptive attempts to regulate unwanted emotions").

167. Wranik et al., *supra* note 104, at 400, 403 (noting that the "way individuals represent their emotions shapes the way they regulate them," including "if and why we choose to regulate, and the strategies we ultimately employ"); Koole, *supra* note 24, at 22 (asserting that strategies are driven by implicit and explicit beliefs about emotion); Tamir et al., *supra* note 106, at 731–44.

168. *See* Wranik et al., *supra* note 104, at 398; John & Gross *supra* note 149, at 366.

169. Wranik et al., *supra* note 104, at 398.

170. John & Gross, *supra* note 149, at 366.

171. Loewenstein, *supra* note 126, at 197.

172. *Id.* at 181.

173. John & Gross, *supra* note 149.

the escape slide.[174] What makes that wildly inappropriate display instructive is that it does not happen more often. Slater became a folk hero because he embodied the fantasies of people who find it difficult constantly to rein in their emotions at work, but nonetheless manage to do so.[175]

Therefore, though emotion regulation is a crucial tool for personal wellbeing and professional success, and though people are highly motivated to practice it, it often will fail fully to extinguish emotion. Just as people "have some capacity to intentionally direct their own thoughts," we have some capacity to manipulate our feelings—but that capacity often falls short.[176]

* * *

As this Part has shown, emotion regulation is necessary to harness emotion's adaptive value across situational variables; serves both hedonic and utilitarian goals; is shaped by cultural, social, and workplace norms; and can be achieved by way of a diverse set of strategies. Each of these strategies comes with various potential costs, like memory impairment, and benefits, such as decreased physical arousal. Persons with strong regulatory skills have the flexibility and judgment to engage the strategy that will best serve situational demands. However, simplistic notions of emotion tend to discourage the development and exercise of those skills. Finally, emotion regulation never will be a failsafe method for actually eliminating emotion or "setting it aside."

With these fundamentals firmly in mind, we may begin to imagine how a model for judicial emotion regulation might unfold.

III.
THE EMOTIONALLY ENGAGED JUDGE: A MODEL FOR EMOTION REGULATION ON THE BENCH

As the prior Parts made clear, judicial emotion regulation is not an *if*, or even a *when*—it is a *how*. Given a choice, judges should engage in those regulatory tactics with the greatest predictable benefits and with predictably fewer effects that impair the type of decision making in which we expect them to engage.[177] A viable model of judicial emotion regulation must thus maximize benefit and minimize cost, but it must also do more: it must be achievable. It must be accessible to ordinary judges in the ordinary course of their work, and it must, at its core, be compatible with the essence of the judicial function—

174. Corey Kilgannon & Liz Robbins, *Flight Attendant Had Long Imagined Escaping Down Chute*, N.Y. TIMES: CITY ROOM (Aug. 11, 2010, 4:43 PM), http://cityroom.blogs.nytimes.com/2010/08/11/flight-attendant-had-long-imagined-escaping-down-chute-2 (bringing together news reports and video footage related to Slater incident).

175. In discussing the incident, Slater remarked that flight attendants frequently contemplate such actions but "never actually do it." *Id.*

176. Lowenstein, *supra* note 126, at 180–81.

177. These costs may be called either *decision costs* (referring to the harmful impact of emotion regulation strategies on judges' decision making, not to the costs of making decisions) or *error costs*. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 166–68 (2006).

fair, clear-eyed perception and resolution of disputes within the frame established by law. This Part offers such a model.

This model proposes that judicial emotion is, virtually always, best regulated not by turning away from it, but rather by turning toward it.[178] The emotional engagement model herein imagined offers judges tools with which to prepare realistically for the emotional stimuli they encounter, respond thoughtfully to any emotions that arise, and integrate those emotions meaningfully into their decisional and learning processes. The model does not pretend to provide a checklist or rigid template; competent judicial emotion regulation, like all competent emotion regulation, depends upon flexibility and judgment in responding to a full array of real-time challenges. Rather, the model identifies relatively stable structural attributes of the context of judging that render particular strategies generally more or less well suited to that context.[179] It also assigns higher value to strategies that, by their nature, are more flexible. After explaining the model, which relies primarily on the strategies of cognitive reappraisal and disclosure, this Part concludes by summarizing its essential features.

A. Preparing Realistically for Judicial Emotion

The first, and possibly most promising, strategy for judicial emotion regulation is anticipatory cognitive reappraisal. Reappraisal engages the power of thought to shape one's relationship to, and processing of, emotional stimuli. It provides a concrete tool with which judges can prepare for emotional stimuli in such a way as to diminish their emotional impact. Importantly, it appears to do so with minimum cognitive costs—in fact, it can actually improve both attention and memory.

1. Using Thought to Change or Diminish Emotion: Experimental Evidence

Recall that anticipatory cognitive reappraisal involves thinking about an emotional stimulus before actually encountering it, so as to foster the desired emotional state.[180] Such reappraisal can facilitate the substitution of one emotion for another—for example, trading anger for sympathy.[181] Of perhaps even greater interest for judges, it also can help a person move toward relative

178. WEGNER, *supra* note 118, at 175.

179. The judicial engagement model, then, provides a new frame within which more granular assessments may be pursued. Judging has certain core attributes but also embraces myriad subcultures and task domains. For example, appellate judges' work is quite different from that of trial judges; that difference may affect the frequency with which judges in those different settings call on certain engagement strategies, or how easy it is to avoid suppression strategies. Regulation also will be affected by variables as diverse as the type of case presented, time pressures, and the presence and behavior of others. Further theoretical and empirical work is needed to flesh out how judges do, and should, regulate their emotions in light of these variables and the complex tradeoffs they create.

180. *See supra* notes 139–43.

181. *See supra* note 146.

emotional neutrality. For example, one may decide to look at gruesome photos as would a doctor trying to make a diagnosis.[182] Indeed, one of the most consistent findings in the psychology of emotion regulation is that this technique is, in the laboratory, relatively effective in reducing an otherwise natural emotional response.[183]

This effect has been demonstrated, for example, in a series of studies in which participants are shown emotionally provocative film clips or slides. Before seeing these images, subjects are alerted to their likely impact; for example, in one study they were informed that the slides would show people who had been seriously injured. Some participants are told to suppress visible emotional behaviors, and some are given no regulation instructions at all.[184] The other participants, of most interest here, are given some version of the following instruction:

> We will show you the slides in just a moment. Please view them carefully and listen to the accompanying background information. In addition, we would like to see how well you can control the way you view things. Therefore, it is very important to us that you try your best to adopt a neutral attitude as you watch the slides. To do this, we would like for you to view these slides with the detached interest of a medical professional. In other words, as you watch the slides, try to think about them objectively and analytically rather than as personally, or in any way, emotionally relevant to you. So, watch the slides carefully, but please try to think about what you are seeing in such a way that you don't feel anything at all.[185]

Compared to behavior-suppression and no-instruction subjects, persons who are given this sort of neutral-observer instruction reliably show decreased behavioral and subjective measures of emotional response.[186] For example, they show no elevation in physiological activation, such as increased heart rate or sweating. They also report feeling less emotionally aroused. They naturally display fewer telltale emotional expressions, likely because their actual emotional experience is dampened.

The laboratory studies also show that these benefits of short-term, focused anticipatory reappraisal are relatively cost-free. Relative to persons instructed to suppress emotional expression, the reappraisal subjects demonstrate intact

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182. Jane M. Richards & James J. Gross, *Emotion Regulation and Memory: The Cognitive Costs of Keeping One's Cool*, 79 J. PERSONALITY & SOC. PSYCHOL. 410, 416 (2000).

183. Gross & Thompson, *supra* note 26, at 14.

184. *See* Richards et al., *supra* note 182.

185. *Id*. at 415. Similar instructions have been used in many experiments. *See, e.g.*, Sheppes & Meiran, *supra* note 132, at 871.

186. *See, e.g.*, Heilman et al., *supra* note 35, at 258 ("[R]ecent studies offer evidence that the acute use of reappraisal effectively decreases physiological arousal") (citing M. R. Delgado et al., *Regulating the Expectation of Reward via Cognitive Strategies*, 11 NATURE NEUROSCIENCE 880–81 (2008)).

cognition, suffer no decrease in memory, and may even show enhanced nonverbal memory.[187]

Such results, demonstrating the power of thought to either redirect or dampen emotional experience at relatively low cost, have been consistently replicated.[188] Indeed, similar effects have been shown in other studies with very different experimental designs. In a classic 1964 study, for example, experimental subjects watched an explicit film of a tribal circumcision ceremony, known to provoke disgust. Some were instructed to think about positive aspects of that ritual, such as the boys' pride in the ceremony and its relevance to their community status.[189] Focusing on those meanings reduced disgust, with no ironic increase in physiological reaction. Indeed, the participants reported not just a more pleasant emotional state but better concentration.[190] Another classic study demonstrated that even children can make use of this technique. Four-year-olds were presented with a choice: if they could wait for an experimenter to return to the room, they would receive two treats (such as marshmallows); if they instead rang a bell before he returned, they would receive only one. Some of the children were primed to think about the treats in a fashion unconnected to their hedonic value—for example, to think of marshmallows as "white, puffy clouds"—while others were primed to think of them as "yummy and chewy." The neutral-prime children were far more able to tolerate the uncomfortable emotional state and held off ringing the bell three times longer.[191]

As these examples show, redirecting thought to aspects of an experience that tend toward the desired emotional state is relatively effective and cost-free. So long as those aspects are relevant and attention is not drawn away from

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187. Gross, *Antecedent- and Response-Focused*, *supra* note 25, at 224 (presenting evidence that strategy decreases emotion experience and behavioral expression with no impact on memory); Gross, *Emotion Regulation*, *supra* note 158, at 281; Loewenstein, *supra* note 126, at 183–84; Jane M. Richards, *The Cognitive Consequences of Concealing Feelings*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 131 (2004) ("[C]hanging how we think about an event to neutralize its emotional impact[] leaves cognitive functioning intact.").

188. Sheppes & Meiran, *supra* note 132, at 870 ("[R]eappraisal leaves memory of the emotional situation intact or, in some cases, even improves recall").

189. PSYCHOLOGY OF EMOTION, *supra* note 29, at 169 (describing R.S. Lazarus & E. Alfert, *Short-Circuiting of Threat by Experimentally Altering Cognitive Appraisal*, 69 J. ABNORMAL & SOC. PSYCHOL. 195–205 (1964)).

190. This author recently conducted a parallel self-experiment at an infant's ritual circumcision. While many in the gathering covered their eyes or conveniently arranged to be out of the room, I stood in the front, watched the procedure, and focused my thoughts on how this child was being welcomed into his family and community, and on the pride his parents and grandparents felt in passing on their valued traditions. I felt no disgust or anxiety. *Cf.* Loewenstein, *supra* note 126 (reporting a similar self-experiment with focused attention to pain).

191. *See* Loewenstein, *supra* note 126, at 184 (discussing Walter Mischel & Nancy Baker, *Cognitive Appraisals and Transformations in Delay Behavior*, 31 J. PERSONALITY & SOC. PSYCHOL. 419 (1975)); *see also* Walter Mischel & Ozlem Ayduk, *Willpower in a Cognitive-Affective Processing System: The Dynamics of Delay of Gratification*, *in* HANDBOOK OF SELF-REGULATION 99–129 (Kathleen D. Vohs & Roy F. Baumeistereds eds., 2004); McClure et al., *supra* note 119, at 212–14.

critical features of the situation—as would be the case with, for example, distracting oneself by staring at a painting on the wall[192]—such redirection can facilitate performance.

2. Thinking (and Feeling) Like a Medical Professional: An Instructive Parallel

In considering how these results might help judges learn to anticipate and shape their emotional reactions, one sort of experimental task presents the most obvious parallel: adopting the perspective of a medical professional.[193] It therefore is instructive here to consider why that perspective appears to work for these purposes, an exploration that provides a deeper understanding of how reappraisal can function in a professional context.

Like judges, doctors regularly must engage in emotional labor. They necessarily encounter stimuli that naturally provoke strong emotions.[194] Doctors must, for example, handle dead bodies, bodily fluids, and intimate parts of the human body; they also must confront the causes and effects of serious illness and death on the individual, family, and societal levels.[195] Moreover, doctors have been acculturated to a strong professional norm of dispassion.[196] Even doctors' white coats are designed to signal emotional neutrality, paralleling one role of the black robe.[197] Thus, although the work of the doctor and that of the judge undoubtedly is different, the emotion regulation challenge is strikingly similar, as is the normative backdrop against which it operates.

Anticipatory reappraisal long has been at the heart of how medical education has prepared doctors to meet that challenge, though the profession had not until recently spoken of it in these terms. Medical school seeks to facilitate large-scale cognitive transformation by habituating students to distinct patterns of engagement with potent stimuli.[198] For example, Hochschild describes how teaching hospitals historically have "staged" the students' first autopsy so as to manage their emotions. Instructors cover the corpse's face and genitalia, model high-level technical skill, focus on the information imparted by

192. *See infra* Section IV.A.

193. *See supra* note 185.

194. Zammuner & Galli, *supra* note 55, at 251 (noting that health care professionals deal with patients' "suffering, pain, anger and helplessness, and deal with death-associated issues," and therefore often are "burdened with negative feelings such as anxiety, fear, embarrassment, and, possibly, the despair their 'clients' feel.").

195. Allen C. Smith III & Sheryll Kleinman, *Managing Emotions in Medical School: Students' Contact with the Living and the Dead*, 52 SOC. PSYCHOL. Q. 56, 59 (1989).

196. *Id.* at 57 (explaining how doctors were trained to embrace an "ideology of affective neutrality"; as we "associate authority in this society with an unemotional persona, . . . professional socialization" involves "development of an appropriately controlled affect").

197. Zammuner & Galli, *supra* note 55, at 252.

198. *See, e.g.*, Smith & Kleinman, *supra* note 195, at 59 (discussing how students must touch genitalia and "see feces, smell vomit, touch wounds, and hear bone saws," experiences that cause embarrassment, guilt, and disgust).

extracted organs, and use scientific language.[199] Medical students thus are helped to experience the concrete value of dissection to their training and development, and thus to their ability to succeed professionally and help patients.[200] This reframing of the experience of handling a dead body can redirect the emotion away from disgust or sadness and foster instead a sense of excitement and interest. Focusing on the professional role also will motivate selective attention to those aspects of a situation that are most relevant to competent performance, which frequently will be emotionally salient aspects—for example, grotesque discharge—that a layperson would be expected to try and avoid. Such experiences, over time, ideally ripen into an attitude that enables previously disturbing stimuli to obtain a different meaning relative to doctors' goals.[201]

It therefore is not accidental that the role of "medical professional" is the one used with relative efficacy in the experimental literature on anticipatory reappraisal.[202] That attitude tends to realign each of the core components of an emotion: perception of a stimulus, evaluation of both the nature of and one's relationship to that stimulus, and valuation of one's goals relative to the threat or opportunity the stimulus represents.[203] A gruesome wound (the sort of image typically shown in the experiments) becomes a source of valuable information; a doctor is someone who can perceive and understand that information, and the doctor's relative utility is in being able to act on that information to help the wounded person. Thus realigned, the appraisal effortlessly triggers a new emotional experience—or may cause the situation to fail to register as emotionally salient at all.

Interestingly, as complex as this process is, the experiments show that laypersons appear able temporarily to "drop in" to this role. Because most laypersons have at least a basic sense of what is important to a doctor, being instructed to think like one likely helps them see gruesome images as imparting important information to which it is important to attend closely. Setting aside for the moment the question of whether non-medical-professionals can maintain such an attitude, the evidence at a minimum is that such deliberate role adoption is relatively effective and cost-free "during a short period of time

199. HOCHSCHILD, *supra* note 43, at 49–50.

200. Medical students thus learn to recast disturbing situations cognitively; the stimuli become "mechanical" or "analytical problems," "intellectual puzzles" to solve. Smith & Kleinman, *supra* note 195, at 60.

201. HOCHSCHILD, *supra* note 43, at 49–51; Smith & Kleinman, *supra* note 195, at 60, 62 ("[A]natomical and procedural details become personally insignificant but academically significant," and students come to experience "the excitement of practicing 'real medicine,' the satisfaction of learning, and the pride of living up to medical ideals.").

202. *See supra* note 169 (presenting experiments in which reappraisal subjects were asked to adopt the attitude of a medical professional).

203. *See supra* Subsection II.B.2.

in the context of a laboratory experiment," when the emotional stimulus is somewhat anticipated.[204]

3. Anticipatory Cognitive Reappraisal in the Judging Context

The anticipatory cognitive reappraisal that appears effective in the medical context also holds great promise for judges. It fits with relative ease into our standard account of judging, as it promises some measure of affective neutrality. Moreover, it relies primarily on the power of thought, a mental facility that, unlike emotion, we happily associate with judges. Like that of a doctor, the role of a "judge" is one that helpfully can focus cognition. Indeed, embedded in our collective mental model of the competent judge is the role of "objective" and "neutral" arbiter, which requires a form of thought that is highly "technical" and "analytical"—the same words experimental subjects are asked to associate with doctors.[205] Legal education, the primary training ground for judges, also pursues an implicit program of cognitive realignment. Just as doctors are trained to look at a grisly wound to gather information critical to task performance, lawyers are trained to look for the legal elements of a claim (or lack thereof) buried in messy human situations. Sometimes the parallel is even tighter: a judge might be called upon to examine photos of a wound, just as a doctor would—for example, to evaluate whether it appears defensive, as asserted by an expert. The theater of judging—donning the robe, appearing on a raised bench, being addressed by honorifics—provides regular reminders of the judge's role, as does donning a white coat and answering to "doctor."

The frame of law, then, as much as the frame of medicine, provides structural elements necessary to achievement of cognitive reappraisal, or what Hochschild would call deep acting. Indeed, when we contemplate our instincts as to what would constitute good judicial emotion regulation, once we understand reappraisal we likely will recognize it as promising that which we envision.[206] Similarly, when judges report feeling like they are able to put emotion aside,[207] they likely are referring to the effect of some form of reappraisal—though they, and we, have not previously had the language to describe it.

The fact that we have lacked that language matters. Without understanding anticipatory reappraisal it is not possible to engage it fully, strategically, or consistently. Though the experimental literature proves that the

204. Cisler et al., *supra* note 125, at 78–79 (noting there are "surprisingly little data" on long-term use).

205. *See supra* note 185 (reflecting such instructions).

206. Thanks to Chris Guthrie and Phoebe Ellsworth, as well as to faculty members at the Louisiana State University Law Center, for confirming their agreement with this instinct. *Cf.* Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 23, 24–25 (1996).

207. *See, e.g.*, Schuster & Propen, *supra* note 86, at 89 (quoting judge who reported that "I think I am able to put things behind me in order to just keep living. I seem to be able to finish something and be done with it and not have it haunt me too long.").

strategy can be engaged episodically, evidence from medicine suggests that, to develop into a sustainable pattern, anticipatory reappraisal must be both trained and practiced—something our legal culture does not do, at least not transparently. Law school, the primary training ground for judges, does not, as a rule, seek to teach emotion regulation strategies.[208] Research revealed no instance in which judicial training institutes have done so.[209] Judges are simply left to figure it out on their own.

The medical parallel strongly indicates that this is a serious mistake. Historically, doctors were also left to figure this challenge out on their own, with negative repercussions for both the doctors and their work product.[210] Emotion regulation was relegated to a "hidden curriculum" within medical school.[211] And while young doctors were learning the skills and internalizing the goals necessary to professional competence, they were often taking the dispassionate persona to an undesirable extreme. Some students would brag about the level to which they dehumanized other humans, whether cadavers or live patients.[212] Medical students were losing empathy for patients with each year of training, and many showed levels of "emotional withdrawal and disengagement" that concretely impaired their performance.[213] Doctors were likely to perceive themselves as caught between the same Scylla and Charybdis

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208. Randy Cohen, *When Med Students Post Patient Pictures*, N.Y. TIMES MAG., Feb. 13, 2011, at 21.

209. A search for programs offered by the Federal Judicial Center and the National Center for State Courts revealed no judicial training on emotion; nor does either organization offer any publications on the topic. *See* NAT'L CENTER FOR STATE COURTS, http://www.ncsc.org (last visited Sept. 16, 2011); FED. JUD. CENTER, http://www.fjc.gov (last visited Sept. 16, 2011). Recent discussions with emotion-research colleagues in Western Europe suggest that this gap may be less pronounced there, where national systems for judicial selection tend to incorporate training beyond law school to a degree unmatched in the United States. This represents a promising site for future research.

210. *See generally* Jason M. Satterfield & Ellen Hughes, *Emotional Skills Training for Medical Students: A Systematic Review*, 41 MED. EDUC. 935 (2007) (explaining that medical education has paid inadequate attention to development of emotional awareness and skills, and reviewing evidence that such skills can be trained); Daisy Grewal & Heather A. Davidson, *Emotional Intelligence and Graduate Medical Education*, 300 J. AM. MED. ASS'N 1200, 1200–02 (2008) (proposing that medical training would benefit from deliberate inclusion of emotional intelligence training).

211. Smith & Kleinman, *supra* note 195, at 56, 66 ("Affective socialization proceed[ed] with no deliberate control, but with profound effect").

212. *See id.* at 63 ("[I]n order to manage their own feelings, [medical] students sometimes manufacture or exaggerate negative conclusions about the patient or project their own feelings onto the patient.").

213. *See, e.g.*, Grewal & Davidson, *supra* note 210, at 1201; Satterfield & Hughes, *supra* note 210, at 936; Myrle Croasdale, *Students Lose Empathy for Patients During Medical School*, AM. MED. NEWS (Mar. 24/31, 2008), http://www.ama-assn.org/amednews/2008/03/24/prsb0324.htm (noting that emotionally disengaged students scored more poorly on standardized tests of communication skill); *see also* Smith & Kleinman, *supra* note 195, at 57 (stating that regulation strategies affect "the medicine [students] learn and threaten their individual wellbeing").

as did the Australian magistrate, and many were choosing the path of the "rhino" skin.[214]

Therefore, medical professionals are now seeking explicitly to train regulatory strategies.[215] In so doing, they have internalized methods that long have been embraced by certain other professions not hobbled by a similar "ideology of affective neutrality,"[216] such as the field of social work.[217] The evidence, thus far, is promising. Not only have medical professionals with higher "emotional intelligence" ratings been shown to demonstrate better clinical performance,[218] but these skills also appear to be teachable. A recent meta-analysis of such efforts, underway in both pre- and post-graduate settings, concluded that "all controlled trials showed positive outcomes."[219] There is no reason why judicial training could not follow the example of medicine. Though

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214. Anleu & Mack, *supra* note 52, at 612; *see also* POSNER, HOW JUDGES THINK, *supra* note 67, at 119 ("Just as doctors tend to be callous about sick people, judges tend to be callous about pathetic litigants because they have seen so many of them."); Gross & Thompson, *supra* note 26, at 9 ("[C]ognitive strategies that dampen negative emotions may help a medical professional operate efficiently in stressful circumstances, but also may neutralize . . . empathy, thereby decreasing helping.").

215. Grewal & Davidson, *supra* note 210, at 1200–02; Kant Patel, *Physicians for the 21st Century: Challenges Facing Medical Education in the United States*, 22 EVALUATION & HEALTH PROFS. 379 (1999); Satterfield & Hughes, *supra* note 210, at 935–41; Anemona Hartocollis, *Getting into Med School Without Hard Sciences*, N.Y. TIMES, July 30, 2010, at A1; Stacey Teicher Khadaroo, *Medical School Reinvented: Adding Lessons in Compassion*, CHRISTIAN SCI. MONITOR, Sept. 15, 2009, at 2; Felice Aull, *Mission Statement*, MED. HUMAN., http://medhum.med.nyu.edu (last visited Sept. 16, 2011); *The New Pathway MD Program*, HARV. MED. SCH., http://hms.harvard.edu/pme/newpathways.asp (last visited Sept. 16, 2011).

216. Smith & Kleinman, *supra* note 195, at 56.

217. *See* HOCHSCHILD, *supra* note 43, at 53. Hochschild discusses the example of professionals who work with highly disturbed children. Such children often act in such a way as to naturally provoke anger, frustration, even fear. In order to help such children, these professionals must manage their emotions by learning how "to *experience* the child, not simply a proper way to seem to feel." *Id.* That training process includes learning about why these children act as they do and what is proven to help. Those thoughts help the professional focus on her role vis-à-vis the child, which then fosters a productive emotional attitude—feeling "sympathy and tenderness," even toward a child "who kicks, screams, and insults" her. *Id.* at 5.

218. Grewal & Davidson, *supra* note 210, at 1201 (describing study involving nurses); *see also* Satterfield & Hughes, *supra* note 210, at 936 ("[M]anagement of emotions in the self may impact on provider wellbeing, provider satisfaction, professionalism and patient outcomes").

219. Grewal & Davidson, *supra* note 210, at 1201 (showing that training improved measurable indicators of emotion skill); Satterfield & Hughes, *supra* note 210, at 935, 939 ("[E]motion skills, much like physical examination skills, can be regarded as a properly defined, teachable (and measurable) skill set . . . ."). Of course, maladaptive patterns persist, underscoring the reality that reform must be large scale and long term. Consider a recent letter to an ethics column, in which the writer recounted that medical-student friends had posted pictures on Facebook "with captions like 'a 5-foot-9 Hispanic male walks into a bar . . . ' under a picture of a patient with a piece of rebar piercing his abdomen." Randy Cohen, *When Med Students Post Patient Pictures*, N.Y. TIMES MAG., Feb. 13, 2011, at 21. While acknowledging that "battlefield humor" is a coping mechanism, the columnist and a doctor with whom he consulted worried that, "[r]ather than simply giving doctors sufficient emotional distance to function effectively, this sort of horsing around might harden their hearts, making them less able to regard a patient as fully human. Such a transformation is not inevitable, but it is worth considering, particularly in a doctor's training. And many med schools do consider that . . . ." *Id.*

it would run counter to the standard account of judging, such training would allow judges to leverage existing models in service of realistic preparation for the emotional stimuli they are certain to encounter.

Anticipatory reappraisal, in sum, is of enormous value to judges because it asks them to think differently, not simply to feel differently. It involves engagement with the appraisals underlying the emotional states they hope to alter. A strong professional role concept, like that of doctor or judge, ideally will embed a system of beliefs and goals that will shape reappraisal in service of competent performance.[220] To harness all of the strategy's benefits, it must be both practiced and transparently pursued. By allowing one to look closely rather than look away, such reappraisal can foster clear-headedness rather than hard-heartedness.

Anticipatory reappraisal is not, however, a complete strategy for judicial emotion regulation. As the medical example suggests, attempting to screen out literally all emotional reactions can have deleterious effects.[221] Nor is such an expectation realistic. One must accept some emotional persistence and the consequent need for real-time adjustment; reappraisal can be stymied by unanticipated situations and stimuli or unanticipated reactions to anticipated stimuli. Effective reappraisal therefore sometimes explicitly involves an if-then plan to cope with residual emotion.[222] Further, as the following Section explicates, judges may formulate and engage reappraisal processes after an emotion has begun to develop.

B. Responding Thoughtfully to Judicial Emotion

The efficacy of anticipatory reappraisal—though impressive—is relative, not absolute.[223] In the real world in which judges work, many situations "cause individuals to get somewhat emotional before they start trying to control these emotions."[224] Instead of regarding emotion as a failure, judges may choose to face that emotion, seeking to respond thoughtfully to it.

Reactive cognitive reappraisal, which is much like its anticipatory counterpart except for its time-ordering relative to emotion onset, is a relatively effective method for doing so. Indeed, its mechanisms and effects are quite

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220. Heilman et al., *supra* note 35, at 261.

221. Indeed, such an approach easily may harden into rigid anticipatory suppression, which unlike reappraisal comes at a significant cost. *See infra* Section IV.B.

222. *See generally* Inge Schweiger Gallo et al., *Strategic Automation of Emotional Regulation*, 96 J. PERSONALITY & SOC. PSYCHOL. 11 (2009) (presenting experimental evidence of value of formulating an if-then plan for emotion management).

223. *See, e.g.*, Heilman et al., *supra* note 35, at 259–60 & tbl.1 (showing decrease, not elimination, of fear and disgust).

224. Sheppes & Meiran, *supra* note 132, at 873 (discussing experimental subjects asked to let feelings arise before being instructed to adopt a neutral stance). *Cf.* Loewenstein, *supra* note 126, at 188 (taking a "relaxed attitude" about one's future emotions is more adaptive than being strongly invested in having a specific experience).

similar. Flight attendants, for example, reported to Hochschild that they tried to diffuse anger at unruly, abusive passengers by considering that they might be acting badly because of difficult personal circumstances—such as having experienced a family tragedy.[225] Laypersons also report such efforts, as when one tries to think about a disturbing situation "from a different perspective" to see if a new emotion will thus emerge.[226]

Judges, too, can choose to re-interpret stimuli. If a lawyer's arrogant manner is making the judge angry, she can decide to attribute that manner to insecurity, which might diffuse her anger. Reappraisal may also entail "refreshing" the relevant professional role concept. One study of medical students offered an instructive example: one student was repelled by armpit odor, and whenever she encountered that odor she would deliberately re-focus on the diagnostic importance of examining the armpit.[227] Similarly, a judge might prepare herself to view gruesome autopsy photos, but still find herself struggling with disgust when she does so. By reminding herself exactly why it is important to look closely, she can reestablish the analytic relationship that will allow her to do so.

In each of these iterations, reappraisal requires a relatively high level of self-awareness and focus on the specifics of the emotional experience.[228] It does its work by examining the emotion to see if it can be reframed, rather than by denying it.

Reactive cognitive reappraisal also is relatively cost-free. However, because it "requires overcoming a previously well-established tendency of identifying with the emotional content (formed during the long unregulated duration prior to the strategy initiation)," it is somewhat more costly than its anticipatory counterpart.[229] Though it leaves cognition intact, post-onset reappraisal does consume some self-control resources.[230] This evidence provides an important reminder that all emotion regulation comes at some cost. The most pertinent measurement being a relative one, the costs of reappraisal

225. HOCHSCHILD, *supra* note 43, at 25 (describing "ways that an obnoxious person could be reconceived in an honest but useful way," such as a victim "of fear of flying").

226. Loewenstein, *supra* note 126, at 189 (referring to lay subjects' efforts to "reason about why the objective situation is not so bad").

227. *See, e.g.*, Smith & Kleinman, *supra* note 195, at 60.

228. Wranik et al., *supra* note 104, at 400 ("The more elaborate the knowledge about emotion categories and underlying appraisal processes, the more likely the individual will learn to quickly reappraise a situation on specific evaluative criteria before an emotion episode becomes problematic or else to recover by focusing on those appraisals and elements of an event or the self that may matter most for the emotional episode.").

229. Sheppes & Meiran, *supra* note 132, at 871.

230. *Id.* ("Late reappraisal involves attending to the emotional situation (and as such leaves memory intact), but it consumes self control resources, as one has to stop and override the well established previous interpretation when transforming it to a neutral one," resulting in diminished performance on Stroop tasks).

still are considerably fewer than those of the alternatives. Unlike most suppression strategies, for example, reactive reappraisal leaves memory intact.[231]

Despite the relative cost advantage of reappraisal in the judging context, other considerations somewhat limit its utility. First, whether anticipatory or reactive, judicial reappraisal is bounded by a reality constraint. Some emotional stimuli cannot be reframed as anything other than what they are. In the experimental literature, for example, subjects sometimes are directed to imagine a disturbing news report to have been faked or a dead person to be an actor playing dead.[232] As useful as this exercise may be in the laboratory, reappraisal in real life is productive only if it is geared toward generating "realistic and evidence-based representations of emotion-provoking situations."[233] Judges cannot engage in fantastical thinking about real phenomena. The judge can decide to believe that the rude lawyer acts rudely because he is insecure; that interpretation may be true, and, even if it is not, it may help make the judge's interactions with the lawyer more productive and less infuriating. However, she cannot pretend that the lawyer is an actor. While the judge may find it easier to look at an autopsy photo if she temporarily pretends it to be a photo of a mannequin, she cannot actually come to believe it is not of a dead person. Because we require judges to be anchored in reality, reappraisal is available to judges only insofar as those reappraisals also are anchored in reality.[234]

Second, reappraisal sometimes does its work by narrowing attention. For example, when Carlos Beltrán was exuberantly booed by fans of his former team upon returning to their home stadium, he chose to focus on the fact that they cared about him enough to boo.[235] This sort of selective rethinking can be effective in redirecting emotion, but it may conflict with judges' professional obligations. It is not always productive to focus judges' attention disproportionately on those aspects of situations as move them toward the desired emotional state. Because judges are charged with observing and judging an entire case, their attention needs, as much as possible, to be fairly distributed among all of its relevant aspects: the witness's irritating qualities as

231. *Id. See infra* Part IV.

232. PSYCHOLOGY OF EMOTION, *supra* note 29, at 170 (citing T. Kramer et al., *Effects of Stress on Recall*, 5 APPLIED COGNITIVE PSYCHOL. 483 (1991)).

233. Laura Campbell-Sills & David H. Barlow, *Incorporating Emotion Regulation into Conceptualizations and Treatments of Anxiety Disorders*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 550 (stating that it is dysfunctional merely to tell oneself something "that is supposed to make them feel better" or to engage in "Pollyanna" thinking or goal-defeating rationalizations).

234. Again, a similar point may be made for doctors. Medical students sometimes report handling dissections and autopsies by conceptualizing the body as a nonhuman object, such as a toaster or cat. Smith & Kleinman, *supra* note 195, at 61. This level of self-protective reappraisal can be helpful if (as in a vivid dream) one knows it is not true, but cannot be entertained as truth.

235. Bargh & Williams, *supra* note 105, at 436.

well as his charming ones, the mundane question of statutory interpretation as well as the exciting one of first impression.[236]

Finally, post-onset reappraisal can simply fail, just like any other strategy could. The more potent the emotion, the less effective one's efforts at reappraisal tend to be.[237] A judge's reaction to an accused serial killer likely may be less easy to rethink than would be any feelings she may have about a person accused of breaching a shipping contract. The same holds true for less complex emotions. A simple, almost reflexive emotion, such as surprise or terror—imagine an object flying quickly toward one's face—has less cognitive content to manipulate relative to socially complicated emotions such as contempt, guilt, or shame.[238] A judge therefore may have a better chance at reappraising her complicated emotional relationship with a troubled but promising drug court client with whom she has repeat interactions than she would her quick reaction to a hostile party she sees only once, and briefly.

Thus, reappraisal is a relatively efficient strategy by which judges may change the post-onset trajectory of an emotion with relatively few costs. But it has limits, meaning some judicial emotions still must be coped with by other means.

C. Integrating Judicial Emotion

Emotions that make it through the twin gates of anticipatory and reactive cognitive reappraisal can, and should, be integrated into judges' decisional and learning processes. The integration stage has two essential components: introspection and disclosure. Integration sometimes will lessen emotion's impact, particularly over time. But its more important effect is to allow the judge to accept that emotion's existence and to cull from it whatever lessons it offers.[239] In this sense, integration is the aspect of the engagement model that poses the most direct challenge to the standard account of judging because it posits that judicial emotion might contain such lessons, some of which will be directly relevant to the judge's decision-making processes.

Emotional introspection. Introspection involves recognition of the emotion and focused attention to its particulars. Though a common lay perception is that such close engagement will magnify emotion's impact, the opposite generally is true. For example, despite the common intuition that distraction will reduce physical pain, focusing on pain can more effectively

236. *See infra* Section IV.A (making similar point as to distraction).

237. *See* Gross, *supra* note 31.

238. *Id.* (reappraisal most effective in situations in which cognitive appraisal is most accessible).

239. The point is not, however, to allow emotions "free reign." Koole, *supra* note 24, at 25 (pointing to evidence that anger "venting" actually increases anger). Integration also differs from mindfulness, in that it contemplates both noticing the emotion and drawing lessons from it, while mindfulness endorses only the first element. *But see infra note* 295 (positing that some judicial emotions might properly be regulated in a mindful manner).

mitigate it.[240] People who attempt to suppress feelings of pain sometimes experience more, not less, discomfort.[241] Similarly, voluntarily "specifying emotional information results in less intense emotional feelings and physiological arousal, in increased sense of self-efficacy, and in more adaptive behavior and performance."[242] Counterintuitively, the more specific the reflection, the better.[243] Even people with anxiety sensitivity or panic disorder experience less negative emotion when told to attend to, rather than suppress, the specifics of their emotional experience.[244] Voluntary, conscious, detailed focus on one's emotions therefore can lessen their impact—perhaps by making them less mysterious.[245]

With introspection, people also may be able to find meaning in emotional challenges, as when women with breast cancer come to believe that illness caused them helpfully to reevaluate their lives.[246] While identifying that meaning does not lessen the emotion associated with the experience itself, it does enable the person to experience the emotion as less distressing in the broader context of her life. Through introspection, then, emotions can be more easily accepted as an aspect of one's experience, potentially an instructive one.

Emotional introspection is not entirely foreign to our concept of judging, though it is far more foreign than cognitive reappraisal. Justice Sotomayor, after all, expressed her view that judges must "recognize" their emotions.[247] Of course, she immediately followed that statement with one assuming that those emotions may be simply put aside. Because of the associated stigma, judges seldom demonstrate a deeper concept of introspection. The cases discussed by the Honorable Alex Kozinski with this author, however, provide an example of how judicial introspection might function.[248]

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240. WEGNER, *supra* note 118, at 64–65 (explaining that severe pain "appears to 'break through' the shield of self-distraction," and therefore people report less pain when they actually focus attention on the painful sensation than when they attempt distraction); Loewenstein, *supra* note 126, at 197.

241. Loewenstein, *supra* note 126, at 186–87. Even if the physical perception of pain stays steady, deliberate focus can lessen the degree to which it is perceived as distressing.

242. Pierre Philippot, Aurore Neumann et al., *Emotion Information Processing and Affect Regulation: Specificity Matters!*, *in* REGULATING EMOTIONS, *supra* note 25, at 202.

243. Koole, *supra* note 24, at 27–28 ("Concrete rather than abstract processing of emotional experience also leads to global improvements in cognitive flexibility."); Wranik et al., *supra* note 104, at 399 ("[V]oluntarily focusing on specific personal emotional information induces less emotional arousal than does thinking about the same information at a general level.").

244. Cisler et al., *supra* note 125, at 68.

245. PSYCHOLOGY OF EMOTION, *supra* note 29, at 184 ("[G]radual confrontation with the unwanted emotional thought may be a remedy against the physiological rebound because it facilitates habituation to the unwanted emotional thought, which also reduces the other concomitant emotional responses (i.e., bodily arousal) over the course of time.").

246. *See id.* at 183.

247. Malcom, *supra* note 2.

248. Kozinski Interview, *supra* note 71.

When Chief Judge Kozinski learned that the prosecutor had lied,[249] he did not just notice that he was angry; he sought to determine why he was angry and to decide whether those reasons justified or even compelled some judicial response. Three reasons emerged.[250] First, Chief Judge Kozinski was angry on behalf of the public, whose trust the prosecutor had violated. Second, he was angry on behalf of the defendant, whose life had been affected. Finally, he was angry on his own behalf, because the prosecutor had disrespected him, his authority, and the rules of his courtroom. Upon further reflection, he determined that his feelings of being personally affronted were relevant, for a judge must be able to rely on the good faith of litigants. But he also assessed that this reason to be angry was relatively less important to other people. He decided to base his response primarily on vindicating the interests of the public and the defendant and to use his anger as to all three reasons as a metric for the outrageousness of the conduct. The level of self-interrogation modeled by Chief Judge Kozinski in this instance allows a judge to distinguish between cases in which an emotion rightly informs the legal determination and those in which it might instead lead to an intemperate or inaccurate reaction.[251]

Emotional disclosure. Another way to facilitate emotional integration is through disclosure.[252] Emotional disclosure is a basic human impulse. Despite individual differences in disclosure frequency and style—persons with a general pattern of suppressing emotion, for example, are far less prone to disclose—most people seek outlets for talking and writing about their emotions, often repeatedly.[253] Disclosure is not usually a mechanism by which people extinguish their emotions. Despite the folk theory that talking about emotion eventually eliminates its impact, this is not always so, particularly for very intense emotions. In fact, each emotional disclosure tends to reactivate the experience.[254] Reactivation therefore clearly creates a hedonic motivation for disclosing pleasant emotional experiences. But people paradoxically experience

249. United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993).

250. This analysis was offered by the Chief Judge in the process of re-dissecting the experience with this author. It therefore represents a backward-looking attempt to reconstruct his contemporaneous process. That process may well have been less articulate and more compressed, given that he did not talk it through with another person at the time and as he has continued to think about the incident in the years since.

251. *Cf.* Paoul Poder, *The Political Regulation of Anger in Organizations*, *in* REGULATING EMOTIONS, *supra* note 25, at 291–309, 292 ("perceiving anger as exclusively negative could legitimize an overregulation of anger"); Phillip R. Shaver et al., *Adult Attachment Theory, Emotion Regulation, and Prosocial Behavior*, *in* REGULATING EMOTIONS, *supra* note 25, at 121, 128 (noting importance of distinguishing between (a) "specific," "functional" expressions of anger and (b) "dysfunctional," "dissociated" ones).

252. *See generally James W. Pennebaker*, U. TEX., http://homepage.psy.utexas.edu/HomePage/Faculty/Pennebaker/Home2000/JWPhome.htm (last visited Sept. 14, 2011) (gathering research on emotion and expressive writing).

253. PSYCHOLOGY OF EMOTION, *supra* note 29, at 185–87.

254. *See* Rimé, *supra* note 150, at 470.

disclosure as highly beneficial even if the reawakened emotions are painful,[255] suggesting a utilitarian benefit as well.

The utilitarian benefits of emotional disclosure, of which judges may partake, are twofold. First, disclosure is prosocial. Communicating with others helps the discloser feel understood and facilitates receipt of needed support.[256] By moving the experience from the individual to the social realm, the discloser strengthens connections to and within the group. Second, and more important for present purposes, disclosure facilitates productive self-knowledge. It engages the self and others in thoughtful analysis in which they further explore emotion's underpinnings and extract its lessons.[257] This process can help the discloser arrive at any needed cognitive or behavioral changes—for example, by reorienting beliefs that have caused her to feel angry, or by helping her plan a different course of action in the future. These downstream consequences of disclosure may eventually lead to a lessening of emotion's impact.[258] But even when they do not, that impact becomes less distressing because it is better integrated into the person's sense of self.[259]

Judicial disclosure of emotion is even more foreign a concept than is introspection, but it occupies an important place within the engagement model. Chief Judge Kozinski again provides an example that partially illuminates this previously hidden idea.[260] When confronting his own feelings of fear and dread triggered by the drug-mule case, he first practiced the sort of introspection described above. He eventually determined that his emotional reaction—though having nothing literally to do with the case, unlike the case in which his anger stemmed directly from the prosecutor's actions—served as a potent reminder that all people make mistakes, sometimes enormous ones. He therefore chose to extend to that defendant the sort of mercy allowable within applicable legal confines. Importantly, Chief Judge Kozinski then chose to write about the experience in a thoughtful essay, grappling, in part, with the question of whether his private feelings properly influenced his judicial decision.[261] This rare public act of disclosure helped the judge incorporate the experience into

255. Koole, *supra* note 24, at 27.

256. Rimé, *supra* note 150, at 474 & tbl. 23.1.

257. *Id.* (explaining how sharing can facilitate cognitive change, in which one may abandon prior goals, reorganize motives, modify the symbolic universe that feels disrupted, re-create meaning, and reframe the emotional event).

258. PSYCHOLOGY OF EMOTION, *supra* note 29, at 189 (asserting that disclosure has "long-term benefits because it reduces physiological reactivity, and facilitates emotional adjustment due to the repeated confrontation with and reprocessing of the emotional information").

259. Emotional experiences are not walled off into an undesired "not-self," a shame-based dissociation that Freud believed (correctly, as it turns out) to be highly maladaptive. PSYCHOLOGY OF EMOTION, *supra* note 29, at 185 (explaining how in psychoanalytic tradition the "accumulation of non-expressed emotions" is thought to be highly negative); Koole, *supra* note 24, at 27 (arguing that disclosure promotes self-insight).

260. Kozinski Interview, *supra* note 71.

261. Kozinski, *supra* note 73, at 1217. He determined that it did, and reiterated that conviction in the interview.

his own evolving account of the nature of mercy. It did not dampen the emotions themselves; indeed, Chief Judge Kozinski reported that even recounting the story to this author, decades later, reawakened his fear and dread as vividly as if it were the day that his son crawled into the road.[262] But it did serve to facilitate introspection and learning.

Further, such a disclosure made transparent what the judge could have—and under the standard account of judging should have—hidden, inviting public evaluation of his decisional process. Chief Judge Kozinski made a similar point about the lying-prosecutor case. He deliberately wrote an opinion that, in his words, "bristled" with anger. That expression of anger, he explained, was an important signal of the degree of his displeasure, thus increasing that opinion's punishment impact and deterrent value.[263]

As these examples show, judicial emotion disclosure can help ensure that emotion makes its way into judicial decision making only in a deliberate, thoughtful, and transparent way, if at all. It also allows others in the legal community, and in the polity, to engage in debate over the legitimacy and value of those emotions.

The integration aspect of the engagement model requires the greatest shift in cultural expectations of judging. Judges' emotional disclosures become more stigmatized as they move along the continuum from private to public—starting, perhaps, with talking with one's spouse at the dinner table, to discussion with judicial colleagues, to writing law review articles and books, to inclusion in a written opinion.[264] Judges presumably engage in private conversations of the first sort, but our access to them is (rightly) limited. Discussions with colleagues appear to take place seldom, if ever; indeed, Chief Judge Kozinski reported that he "could not imagine" talking about emotion with his judicial colleagues as he had with this author.[265] Academic accounts are scarce,[266] and overt expressions of emotion in the courtroom or in the written opinion may be,

262. Kozinski Interview, *supra* note 71.

263. *Id.* (including judge's assertion that an important "moral and pedagogical" function is served by writing an emotionally-infused opinion like *Kojayan*, and reported being told that new prosecutors in that office are required to read the opinion as a teaching tool about "what not to do"). This view is unlikely to be idiosyncratic to Chief Judge Kozinski. Indeed, after reading a draft of this Article, a retired judge from a small, rural jurisdiction contacted this author to report his agreement. In his words, "I found sometimes telling the lawyer my emotional reaction to their argument was helpful to both [of us]. It allowed me to better hear and understand what they were trying to tell me. It allowed them to understand how to address my concerns." Email from Hon. Richard Erlich to Terry A. Maroney (May 17, 2011) (on file with the author).

264. Posner, *Role of the Judge*, *supra* note 21, at 1065 (stating that a judge would be criticized for explaining his decision "in terms of an emotion"); James Taranto, *The "Empathy" Paradox: Sotomayor Rejects Obama's Judicial Philosophy*, WALL ST. J. (July 15, 2009), http://online.wsj.com/article/SB124767724285246273.html ("It would be politically unwise . . . to say, 'When deciding a case, I follow my heart.'").

265. Kozinski Interview, *supra* note 71 ("This is not really something we talk about.").

266. Maroney, *supra* note 11 (collecting the few such accounts of judicial emotional experience).

and often are, roundly denounced.[267] But this need not be so. While judges need not always—or even regularly—disclose their emotional processes in public, the examples offered by Chief Judge Kozinski strongly suggest that doing so sometimes should be accepted—and even regarded as desirable.

Integration, in sum, enables people—including judges—to build "a specific and detailed data bank" about their emotional experiences.[268] Even when an experience remains vivid, it can be integrated into memory structures and used "effectively in information processing and behavior" in future situations.[269]

For these reasons, medical professionals are now experimenting with the approach as well. A similarly strong taboo once prevented medical students from discussing the challenges they faced in learning to manage their emotions, leading many of them to assume they were doing it poorly.[270] Now that the taboo is starting to lift, those students may use disclosure techniques to address the problem as a shared one.[271] For example, a New York school now offers fourth-year medical students a "journaling" course, in which they write about emotional challenges, share and discuss those writings with peers, and seek to integrate these experiences into their overall medical training.[272] Such steps designed to facilitate the processes of integration would be just as useful for judges, even if they are strongly at odds with dominant judicial norms.

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This Part has constructed an engagement model for judicial emotion regulation. It may be summarized as follows.

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267. *See* Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, NEW REPUBLIC (May 2, 1994, 12:00 AM), http://www.tnr.com/article/politics/sentimental-journey.

268. Philippot et al., *supra* note 242, at 206 ("Such knowledge is necessary for effective interpersonal and personal problem solving, and for reducing the tension between the ideal and the real selves.").

269. Shaver et al., *supra* note 251, at 125.

270. *See* Smith & Kleinman, *supra* note 195, at 60 (explaining that one consequence of failing openly to address emotional regulation is that medical students believed others were better at it than they were, and handled the difficulty "privately, only vaguely aware that all students face the same problem").

271. *See id.* (stating that "deafening silence" prevented medical students "from defining the problem as shared, or from working out common solutions").

272. Conversations with Carina G. Biggs, M.D., Assistant Professor of Surgery, Director of Trauma Education, Division of Trauma and Surgical Critical Care, S.U.N.Y. Downstate Medical Center (Oct. 15, 2010 & Jan. 21, 2011). To the limited extent that such discussions are taking place in legal education, it is within the context of clinical programs. *See, e.g.*, Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLINICAL L. REV. 135 (2002); Ann Juergens, *Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching*, 11 CLINICAL L. REV. 413 (2005); Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173 (1999); Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999). For a rare exception, see Grant H. Morris, *Teaching with Emotion: Enriching the Educational Experience of First-Year Law Students*, 47 SAN DIEGO L. REV. 465 (2010). However, even within clinical education (of which not all law students take advantage) attention to emotion is sporadic.

Judges are best able to manage their emotions by turning toward them. Anticipatory cognitive reappraisal allows the judge to leverage the power of thought and the structures of law in order to shape the perception and evaluation of emotionally salient stimuli. When successful, reappraisal allows judges to experience the stimuli in a relatively neutral fashion at minimum cost to cognition and memory, or even with a boost in those capacities. This sort of emotion regulation may be accommodated into existing models of judging with relative ease, but only if the ideology of affective neutrality is loosened enough to allow purposeful training in and commitment to the strategy. Important though this step would be, it would not be sufficient, for some judicial emotion is unavoidable.

The second step of the model contemplates that unanticipated or residual emotions may be cognitively reframed. Such reactive reappraisal, though relatively effective, is not always appropriate—for example, where it would require entertaining nontruthful narratives or directing attention away from important details. Judges, even more than other people, need to be open to emotion without seeking always to rethink it.

The third step, therefore, is integration, which makes use of both introspection and disclosure. Introspection requires that judges turn squarely toward the emotion in order to ascertain to what it is responsive, whether its underlying appraisals are accurate, whether it reflects beliefs and values that appropriately are enshrined in law, and the implications of those assessments for their judging. Disclosure draws others into that process, which helps judges learn from experience, allows others to challenge or support their handling of that experience, and serves the democratic goal of transparency.

These three stages of the engagement model push with progressive strength against the standard account of emotionless judging. That account should yield to the model, which is simultaneously pragmatic and aspirational: it provides both a concrete set of tools for managing emotion at a minimum cost and a normative account of how judicial emotion might impart something of value. This conclusion is buttressed by the fact that a similar approach is gaining ground among doctors, who face strikingly similar challenges.

The next and final Part further shows the value of the engagement model by demonstrating its superiority relative to the possible competitors, including the status quo.

IV.
WHY THE ENGAGEMENT MODEL IS SUPERIOR TO ITS ALTERNATIVES

The preceding Part made the positive case for the engagement model. This Part demonstrates its superiority relative to the possible alternatives. Because the watchword of functional emotional regulation is flexibility,[273] the point is

273. PSYCHOLOGY OF EMOTION, *supra* note 29, at 193 ("[A]bility to flexibly adjust the way

not that other strategies are never necessary or productive in the judicial context. The point is that they seldom are, and even then only as an occasional supplement to engagement.

The Part begins by showing why avoidance and mindfulness strategies generally are inapposite to good judging. It goes on to argue that the standard account of judging incentivizes behavioral and experiential suppression of emotion, both anticipatory and reactive, and makes the case that such suppression is both unrealistic and normatively undesirable. Only behavioral suppression sometimes—but only sometimes—is so necessary as to justify its costs. This Part concludes by noting that the engagement model, unlike its alternatives, promises happy side benefits for judges' health and professional longevity.

A. Avoidance and Mindfulness Are Generally Inapposite to Good Judging

In determining the relative merits of emotion regulation strategies, context is paramount.[274] The unique context of judging renders two common regulation strategies generally incompatible with competent performance of the judicial function.

The first strategy is avoidance. Judges have limited ability to avoid or meaningfully alter emotion-provoking situations. This is largely so because judges are expected to perform the first sort of emotional labor documented by the empirical studies: managing the emotional experience of others.[275] The avoidance techniques of situation selection and modification are key to that other-oriented emotional labor. For example, the judge can in some circumstances allow an alleged victim of child sexual abuse to testify outside the presence of the accused in an effort to protect that child from emotional trauma.[276] The judge may also decide to exclude gruesome autopsy photos from evidence, if she determines that jurors will experience an outsized emotional reaction with little informational payoff.[277] She may allow victim impact statements on the theory that victims may find in them some relief from emotional pain, but she also may limit their number;[278] similarly, she may curtail spectators' displays of grief or anger in order to control the emotional tenor of the courtroom.[279] But as this is the regulatory function judges are expected to serve vis-à-vis litigants, witnesses, spectators, and fact-finders, they are severely constrained in their ability to achieve similar results for

one regulates one's emotions . . . is related to . . . health.") (second omission in original) (internal quotations omitted).

274. *See supra* Section II.A.

275. *See supra* Part I.

276. Maryland v. Craig, 497 U.S. 836 (1990); Coy v. Iowa, 487 U.S. 1012 (1988).

277. *See, e.g.*, FED. R. EVID. 403 (1999).

278. Schuster & Propen, *supra* note 86, at 89.

279. *See, e.g.*, Carey v. Musladin, 549 U.S. 70, 76 (2006).

themselves.[280] To take action in any of these situations, the judge must face the emotional stimuli whose effects she is attempting to control. She must share the courtroom with the defendant, examine the photographs, listen to the impact statements, and so on. The judge simply does not have the avoidance option she may extend to others.

The same holds true for situations in which the judge is not seeking to orchestrate the emotions of others, but instead faces a situation that affects only her. If a lawyer's rude behavior to the judge sparks anger, for example, she generally cannot simply leave the courtroom.[281] The judge's ability to modify emotionally charged situations is largely constrained by the necessity of keeping a court running. It also may be constrained by law. If the judge is afraid of a defendant, for example, she may be able to make some modifications to assuage her fear—such as bringing in additional guards—but not so many as to prejudice a jury.[282] Nor can the judge routinely engage in aggressive distraction tactics, such as thinking of something else or reading something unrelated. She is unable to practice this sort of avoidance precisely because it works too well. While distraction is effective in blocking out emotional stimuli, and thus interrupting the progression of the associated emotion, it is equally effective in blocking out much else that is going on. Not surprisingly, distracted persons reliably demonstrate "impoverished recall" of the situations from which they are distracting themselves.[283] Judges must, at a minimum, pay attention.

Perhaps the most effective and permissible avoidance strategy would be to avoid situations the judge routinely finds most challenging by thoughtfully choosing the court in which she works. For example, some judges have indicated that they would like to avoid assignments in "Coroner's Court," as the cases heard there are particularly "depressing."[284] Conversely, judges may choose assignment to a so-called alternative court, such as drug court, if they believe that those cases are likely to be more hedonically satisfying.[285] Judges certainly are free to make such choices, and they should do so if they find themselves better suited to certain types of assignments. But this is only a

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280. Grandey, *supra* note 52, at 98 (stating that workers "may not have the breadth of situation modification that is available outside of a work role").

281. *But see infra* note 287 (noting report from a retired judge that sometimes he did just that).

282. She cannot, for example, shackle the defendant to a table absent clear necessity, much as she might want to. *See* Deck v. Missouri, 544 U.S. 622 (2005).

283. Sheppes & Meiran, *supra* note 132, at 871 (explaining that distraction causes "impairment of the emotional-situation encoding process").

284. Anleu & Mack, *supra* note 52, at 604 (discussing findings in ROGER DOUGLAS & KATHY LASTER, REFORMING THE PEOPLE'S COURT: VICTORIAN MAGISTRATES' REACTIONS TO CHANGE 20 (1992)).

285. *See generally* Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement*, 74 NOTRE DAME L. REV. 439, 469 (1999); DONALD J. FAROLE, JR. & AMANDA B. CISSNER, CTR. FOR COURT INNOVATION, SEEING EYE TO EYE: PARTICIPANT AND STAFF PERSPECTIVES ON DRUG COURTS 5 (2005).

marginal strategy. Many judges work in courts of general jurisdiction and have virtually no control over what types of cases land in their courtrooms. Even those who work in specialized courts hear a wide range of cases that will provoke an equally wide range of emotions. Some family court cases, like adoptions, will be joyful; some commercial cases will involve sympathetic families made destitute by fraud; some drug court clients will make the judge angry even if others make her proud. Judges cannot avoid hearing cases properly before them, regardless of the emotional reactions they may provoke.

Avoidance, then, is seldom permissible. To be sure, a judge might be able to engage in light forms of stimulus avoidance and modification, particularly when not in the courtroom.[286] She might, for example, be able to choose when to read briefs or review evidence that is likely to be either pleasing or upsetting, take breaks, and introduce peripheral distractions or mood-changers, such as music.[287] But, as a general matter, avoidance is unavailable to judges because its indulgence is incompatible with core requirements of their work.

Mindfulness, too, is of only limited value to judges. Recall that the goal of mindfulness is sustained attention to emotional experience combined with "metacognitive insight," in which emotions "are perceived to be transient, insubstantial mental events."[288] Indeed, mindfulness specifically rejects the "habitual tendency" to treat emotions as if they might reflect "an accurate view of reality."[289] One consequence of that ontological stance is to reject the "widespread belief that [emotional] reactions are sometimes necessary—for example, justified indignation at injustice."[290] Instead, one is asked to withhold any judgment of emotion—say, that it is pleasant or unpleasant, desired or not,

286. Medical students, for example, try to avoid some stimuli in small ways. *See* Smith & Kleinman, *supra* note 195, at 64–65 (giving as example covering a corpse's pubic hair when examining other parts of the body).

287. *Cf.* Karen Allen & Jim Blascovich, *Effects of Music on Cardiovascular Reactivity Among Surgeons*, 272 J. AM. MED. ASS'N 1172 (1994) (reporting their findings that surgeons who chose music to play when operating demonstrated both reduced autonomic reactivity and improved performance). Judges may even be able to use some of these techniques in the courtroom on occasion. The retired judge who reached out to this author reported that he did sometimes walk out of his courtroom if something happened to make him "really upset." He would take some time to calm down and think, then walk back in and respond to whatever had happened. That judges cannot practice this sort of momentary avoidance most, or much, of the time does not mean they never can do so. Erlich, *supra* note 263.

288. Chambers et al., *supra* note 152, at 562 ("[P]erceiving thoughts to be simply thoughts, rather than as an ontological reflection of reality"); *see also* Cisler et al., *supra* note 125, at 70 ("noticing the emotion-based sensations without attempting to alter them"); Dunn et al., *supra* note 133, at 761 (explaining that mindfulness encourages people to "adopt an accepting, observing, non-judgmental relationship to their emotions").

289. Chambers et al., *supra* note 152, at 567–68. In contrast, Western regulatory models encourage adoption of "more accurate or more psychologically beneficial representations of reality." *Id.*

290. *Id.* at. 567–68 & n.4 (offering the "caveat" that it is good to be afraid of a snake that may kill you).

appropriate or not—so as to unlink the emotion from its usual impact on thought and action.[291]

These aspects of mindfulness render it largely incompatible with judging. The core tenet of mindfulness is withholding judgment; the core mission of judging is to judge. The objects of mindfulness and judging are, to be sure, different. Mindfulness asks that a person not judge her emotions; judging asks that she judge the merits of a claim, the state of the law, or the truthfulness of a witness. But being nonjudgmental as to one's emotions often is fundamentally incompatible with being judgmental as to these other objects. For example, if a judge feels outrage upon learning that a public official has seriously abused the rights of an innocent citizen, it would be counterproductive to hold that outrage in awareness without judging it. The outrage is a relevant, if partial, metric of the outrageousness of the conduct, which may be relevant to the legal issues, such as whether the act "shocks the conscience."[292] More, judges cannot subscribe to the ontological claim. Just as judges must judge, they must adopt an account of reality. Imagine that a judge is afraid of a witness or litigant. A reason not to act on that fear would be if it were based on the person's physical resemblance to another, demonstrably dangerous, person. A reason to listen to the fear (and order more security, perhaps, or seek to be removed from the case) would be because the person has threatened the judge or her family.[293] The differential legitimacy of those two fearful states as a basis for judicial action depends entirely on their differential relationship to relevant aspects of reality. A truly mindful attitude, however, would be indifferent as to that differential.

As with avoidance, mindfulness might be helpful if lightly engaged on the margins. Some of its methods can be embraced without commitment to its nonjudgmental ontology.[294] A judge might learn, for example, to deliberately slow her breathing during trying moments. Integration also may include the adoption of a nonjudgmental attitude toward certain unalterable emotions, a process by which the judge can be forgiving of her own humanity.[295] In

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291. Among distance runners there is a saying that captures this idea: "pain is inevitable, but suffering is optional." HARUKI MURAKAMI, WHAT I TALK ABOUT WHEN I TALK ABOUT RUNNING, at vii (2008). Rather than try to ignore pain, runners will pay attention to it (for example, because it might give important information about injury or hydration needs) but disengage from judgment of that pain as negative.

292. *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998) (adopting the "shocks the conscience" test); Rochin v. California, 342 U.S. 165, 172 (1952) (same). Conversely, a family court judge's happiness upon finalizing the adoption of a needy child by a loving family should be regarded positively. That emotion reflects the benefit the judge has rendered, which in turn feeds professional satisfaction and makes less pleasant courtroom moments more bearable.

293. *See* A.G. Sulzberger, *3 U.S. Judges Testify in a Death Threat Case*, N.Y. TIMES, Mar. 2, 2010, at A28 (detailing the testimony of Seventh Circuit Judges Richard A. Posner, William J. Bauer, and Frank Easterbrook, in a case in which a radio talk show host said each deserved to be killed for upholding Chicago's handgun ban; in explaining why they took the threat seriously, Judge Easterbrook cited "the murders of a federal judge's husband and mother by a man unhappy with a court ruling").

294. *Cf.* Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023 (2002).

295. *Cf.* Satterfield & Hughes, *supra* note 210, at 937 fig.1 (stating that emotional regulation

general, though, both strategies are off the judicial table. Avoidance tends to entail an unacceptable level of disengagement from the situations judges are called on to mediate, and mindfulness tends to ask judges to withhold the sorts of judgment they ought to make.

B. Emotional Suppression Is Harmful to Judging

The remaining competitors to the judicial-engagement model are the other suppression strategies: behavioral suppression, anticipatory suppression of emotional experience, denial, and repression. Only the first sometimes is necessary. Each of these strategies is individually costly, and collectively they are undesirable, even dangerous. After demonstrating how the script of judicial dispassion implicitly encourages these suppression tactics, this Section explores in greater depth their many disadvantages, particularly for judges.

1. The Status Quo Encourages Judicial Emotion Suppression

The standard account of emotionless judging does not exist in a vacuum; rather, it flows from a specific set of beliefs about emotion itself, beliefs that motivate those who hold them toward emotional suppression. The underlying beliefs—which long have animated legal theory—are that emotion is stubborn and irrational, the necessary enemy of objectivity and reason.[296] That simplistic view has, in popular culture, been slightly eroded by the emotional-intelligence construct,[297] and it has been largely abandoned in the sciences.[298] However, in Western legal culture it remains firmly entrenched.[299] The crude view of the target encourages a commensurately crude view of the manner in which it should be confronted:[300] as with an enemy in battle, emotion must be pushed back or eradicated.[301] The combination of collective silence about judicial emotion, the public expectation that judges both be and appear emotionless, and simplistic underlying theories of emotion combine to encourage suppression.

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skills for doctors should include "self-forgiveness"). This is perhaps the most promising aspect of mindfulness for judges. A metacognitive approach may be particularly helpful when judges experience emotions about emotions—for example, being angry or ashamed for feeling emotion despite efforts to set it aside. If there is no obvious case-relevant lesson to draw from the emotion, which sometimes will be the case, the most productive step for the judge might be simply to notice the emotion, accept its existence, and disengage from any judgment of it, including a negative self-judgment. Full exploration of the potential benefits of metacognitive approaches for judges goes beyond the scope of this Article, and is deserving of greater research.

296. *See* Maroney, *supra* note 11.

297. Vanda L. Zammuner, *Men's and Women's Lay Theories of Emotion*, *in* GENDER AND EMOTION 48 (Agneta H. Fischer ed., 2000).

298. Maroney, *supra* note 11, at 643–51.

299. *See* Abrams, *supra* note 103, at 1602.

300. *See supra* Subection II.B.3. (showing how simplistic beliefs about emotion drive simplistic regulatory strategies); PSYCHOLOGY OF EMOTION, *supra* note 29, at 157 (explaining that regulation is affected by whether a person's "knowledge of . . . emotions is well developed or extensive").

301. Anleu & Mack, *supra* note 52, at 599 (asserting that "suppression of emotion" is "a key attribute of traditional conceptions of the [judicial] profession").

This conclusion is supported by the fact that medical students during the pre-reform period, operating within a similar belief structure, reported feeling obligated to suppress emotion. Medical students reported that they hid their feelings "behind a cloak of competence" and expected to be able "get control of themselves through sheer willpower."[302] One student explained that because feelings "don't fit" with what was expected of her as a young doctor, she "was going to learn to get rid of them."[303] She continued: "Don't know how yet, and some of the possibilities are scary. What's left when you succeed?" Said another, "It's kind of dehumanizing. We just block off the feelings, and I don't know what happens to them."[304]

Judges, too, feel such pressure to suppress their feelings. The Australian magistrates and Minnesota trial judges seemed equally daunted by, and afraid of the ill effects of, that blunt approach, though they believed this to be what was expected of them.[305] Perhaps more alarmingly, other judges may take pride in their ability to succeed at it. Consider the following statement on the record by a criminal-court trial judge:

> I learned a long time ago when I first became a judge, when there is an offer and it's not accepted and you go to trial . . . [, and the] defendant is convicted, then I'm sitting here going to sentence the defendant, and all I hear is a lot of loud tear-jerking pleas. Lawyers . . . try to get the Judge to feel sorry. DAs try to get the Judge to be angry, and I'm past all that. I'm not moved by emotion one way or the other. I'm just kind of like an iceberg, but there is no heating. I'm just here.[306]

Being an "iceberg" should no more be the goal of emotion regulation than should acquiring a "rhino skin." But such would appear to be the goal of the status quo approach. And, as the following Subsections show, that approach has consequences.

2. Behavioral Suppression, Though Sometimes Necessary, Is Extremely Costly

One of the primary ways in which judges presently might be expected to conform to the ideal of emotionless judging is through behavioral suppression, that is, the effortful masking of emotions. Judges freely admit to such surface acting, to use Hochschild's term, as the impression it creates is central to image maintenance.[307] Unfortunately, behavioral suppression imposes significant costs. The empirical evidence of these costs is among the clearest in the literature, largely because behavioral suppression is the easiest strategy to test

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302. Smith & Kleinman, *supra* note 195, at 57.
303. *Id.* at 68.
304. *Id.* (noting that similar socialization happens in military training).
305. *See supra* Part I.
306. People v. Carter, No. C053369, 2009 WL 626113 (Cal. Ct. App. Mar. 12, 2009).
307. Schuster & Propen, *supra* note 86, at 89 (asserting that judges "feel the need to conceal how the emotions conveyed in impact statements can affect them or suffer loss of authority," and therefore "suppress their own emotional affect").

experimentally.[308] More, such surface acting does not change judges' experience of emotion in the way that might be expected.

The first sort of cost is cognitive load. Because it entails the override of a naturally patterned reaction, behavioral suppression is effortful; more importantly, the effort is both of the type and of sufficient magnitude as to detract from the cognitive resources available for other important tasks. For example, participants instructed to conceal the outward expression of their emotions while watching film clips performed more poorly on a subsequent anagram-solving exercise than did persons not asked to suppress.[309] The expenditure of regulatory effort impaired their ability to carry out subsequent tasks that were themselves cognitively challenging. Conversely, executing a cognitively challenging task—being told to suppress an emotionally neutral thought—has been shown to impair subjects' subsequent ability to suppress emotionally expressive behavior.[310] Such results have been robustly replicated.[311] Cognitive capacity is a limited resource. Behavioral suppression draws heavily against its balance, leaving fewer resources available for problem-solving and other forms of self-control.

Second, behavioral suppression impairs memory. Studies consistently have shown that suppression of emotional expression impairs memory for information encountered during the suppression period.[312] Experimental subjects told to suppress their visible emotional reactions to film clips, for example, showed worse recall of information imparted by the film clips. They also reported being less confident in their memories, suggesting that the impairment was sufficiently severe as to reach conscious awareness.[313] Studies such as this one demonstrate memory costs even when one is only an observer of the emotional stimulus. Not surprisingly, such costs also accrue when one is a participant. In another study, married couples were asked to discuss an emotionally charged area of conflict. Those persons who also were instructed to suppress emotional expression during the exchange showed impaired memory

308. Loewenstein, *supra* note 126, at 200 n.7 (noting that behavioral suppression is more frequently tested experimentally than is "suppression of subjective feelings").

309. PSYCHOLOGY OF EMOTION, *supra* note 29, at 172 (citing Roy F. Baumeister et al., *Ego Depletion: Is the Active Self a Limited Resource?*, 74 J. PERSONALITY & SOC. PSYCHOL. 1252 (1998)).

310. *Id.* (citing Mark Muraven et al., *Self-Control as a Limited Resource: Regulatory Depletion Patterns*, 74 J. PERSONALITY & SOC. PSYCHOL. 774 (1998)); Kappas, *supra* note 100, at 26 (noting costs to "cognitive resources" and "impact on social relations").

311. Dunn et al., *supra* note 133, at 762 (referencing "series of well controlled studies" showing consequences of behavioral suppression); Richards, *supra* note 187, at 131 (showing that behavioral suppression also impairs "communication[] and problem solving").

312. Jane M. Richards & James J. Gross, *Personality and Emotional Memory: How Regulating Emotion Impairs Memory for Emotional Events*, 40 J. RES. PERSONALITY 631 (2006); Richards, *supra* note 187, at 131; Richards & Gross, *supra* note 182, at 410.

313. PSYCHOLOGY OF EMOTION, *supra* note 29, at 171 (discussing Richards & Gross, *supra* note 182, and Jane M. Richards & James J. Gross, *Composure at Any Cost? The Cognitive Consequences of Emotion Suppression*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1033 (1999)).

for the verbal content of the conversation: their minds, otherwise occupied, simply did not as fully capture and encode what was said.[314]

The cognitive load and memory impairments attending behavioral suppression are significant, and not just statistically so. Startlingly, the costs of behavioral suppression, particularly memory impairment, are equivalent to those attending literal avoidance.[315] In the blunt words of the most prominent contemporary scholar of emotion regulation, behavioral suppression actually makes one temporarily "stupider."[316]

These costs might nonetheless appear worthwhile if behavioral suppression were significantly to advance the goal of emotional neutrality to which judges are told to aspire—however, it does not. Behavioral suppression has little efficacy in down-regulating subjective experience—that is, helping the suppressor feel less of the emotion.[317] It may even exaggerate some aspects of that experience. Those same experimental subjects told to suppress their visible emotional reactions to film clips, for example, showed increased physiological arousal.[318] Similar results have been demonstrated elsewhere; behavioral suppression may block emotion's external bodily expression, but the internal bodily concomitants of emotion continue and often amplify.[319]

Further, the subjective impact that behavioral suppression does have is non-bidirectional. It is easier to magnify emotion with behavioral manipulation than it is to suppress it. While exaggerating emotional expressions can increase the subjective experience of pain, for example, suppression does not decrease it.[320] And to the extent that behavioral suppression can sometimes affect emotional experience, it does so far more easily with positive emotions than negative ones.[321] Thus, a judge who suppresses the expression of happiness may make herself somewhat less happy, but if she suppresses the expression of anger she is not at all likely to feel less angry. Experimental studies

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314. PSYCHOLOGY OF EMOTION, *supra* note 29, at 171 (discussing Jane M. Richards et al., *Emotion Regulation in Romantic Relationships: The Cognitive Consequences of Concealing Feelings*, 20 J. SOCIAL & PERSONAL RELATIONSHIPS 599 (2003)).

315. Richards & Gross, *supra* note 312, at 631; Chambers et al., *supra* note 152, at 565.

316. Conversation with James J. Gross (Mar. 5, 2010).

317. Heilman et al., *supra* note 35, at 261–62 (finding that suppression "is ineffective in regulating unpleasant feelings").

318. PSYCHOLOGY OF EMOTION, *supra* note 29, at 171 (discussing Richards & Gross, *supra* note 182, and Richards & Gross, *supra* note 313).

319. PSYCHOLOGY OF EMOTION, *supra* note 29, at 175 (finding that chronic behavioral suppression may "perpetuate the feelings one is concealing"); Chambers et al., *supra* note 152, at 565 (finding that expressive suppression increases intensity and frequency of sympathetic and cardiovascular activities); Cisler et al., *supra* note 125, at 71 (finding that behavioral suppression increases physical arousal and startle reflex); Kappas, *supra* note 100, at 26 (finding that behavioral suppression leads to an increase of physiological activity).

320. PSYCHOLOGY OF EMOTION, *supra* note 29, at 165.

321. For example, assuming the facial expression of happiness can make one feel happier, and inhibiting its expression can dampen—though not eliminate—positive feelings. *Id.*; *see also* Chambers et al., *supra* note 152, at 565.

overwhelmingly demonstrate that behavioral suppression "is not an efficient strategy for reducing negative feelings and emotional arousal."[322]

Behavioral suppression, then, does not eliminate judges' emotions. To the extent it may change emotional experience to some degree, the impact is markedly unbalanced, leaving intact or even exaggerating the unpleasant emotions that judges are more likely to experience.

But—highlighting the critical importance of context—judges' surface acting sometimes carries unique benefits that render its costs worth incurring. Specifically, manipulating emotional expression successfully can interrupt emotion's communicative aspects, which can serve important utilitarian aims.

Consider that emotional expression is a core component of any given emotion's life-course precisely because it serves to communicate one's experiences and needs to others. The ability to send and receive such signals through the face, voice, and body greatly facilitates interpersonal relationships and coordination.[323] Recall the example of the advancing snake: screaming and displaying a fearful face serve to let others know of the danger, both so they can render aid and so they themselves can avoid the danger. It is this same communicative aspect that sometimes motivates and justifies squashing emotional expression.

The first iteration of this other-directed communicative benefit is in modeling a desired emotional state. Hochschild described how flight attendants are required to project feelings of contentment and calm so as to predispose passengers toward those same emotions.[324] Judges can do the same for the court's "consumers."[325] A judge's successful projection of neutrality and calm, even if not genuinely felt, can set the tone for others, and through a process of emotional contagion may actually help them—consciously or not—achieve an emotional state similar to the one she projects.[326]

The second iteration is perhaps more important: behavioral suppression of emotion allows the judge to control others' access to her evaluation of any given situation. Recall the example of hiding evidence of fear when facing a potential attacker. One might do this because to show the emotion communicates an appraisal of the situation, informing the adversary of his relative power and conferring an unwanted advantage. Similarly, it sometimes is important for a judge to prevent others' perception of her evaluations. This is

322. PSYCHOLOGY OF EMOTION, *supra* note 29, at 166–67.

323. Craig A. Smith et al., *Emotion-Eliciting Appraisals of Social Situations*, *in* AFFECT IN SOCIAL THINKING AND BEHAVIOR 85, 85 (Joseph P. Forgas ed., 2006); Tom Johnstone & Klaus R. Scherer, *Vocal Communication of Emotion*, *in* HANDBOOK OF EMOTIONS, *supra* note 95, at 220, 223.

324. HOCHSCHILD, *supra* note 43, at 110–14.

325. Anleu & Mack, *supra* note 52, at 603, 607–11 (showing that surveyed magistrates reported engaging in such emotional modeling).

326. Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399 (2006) (emotional contagion is a largely unconscious process by which we absorb the emotions of others).

most likely to be of utility in adversarial matters being heard before lay fact-finders. To illustrate: if a witness is testifying in a manner the judge believes to be patently incredible, perhaps because she has knowledge of matters that have been kept from the jury, she may feel contempt.[327] If she were to allow the normal expressions of contempt, such as a curled lip or derisive snort,[328] jurors would be able to deduce from those expressions the underlying appraisal. They would not have access to the precise judgment embedded therein, but would perceive the fact of contempt, from which they easily may deduce that the judge regards the testimony (and the witness) as contemptible. That perception would threaten the decision-making structure of the trial, as jurors have been deputized to make such credibility determinations but would likely defer to the judge's were they to perceive it.

Other situations, in contrast, may call for the judge strategically to suppress or allow expression. Imagine she is in the position of trying to help broker a settlement or serve as a mediator. As emotional expressions signal her evaluation of a party's position and demands, she will want to suppress them where they might unduly advantage one party, but allow them when doing so will facilitate settlement by helping a party accurately perceive its true bargaining position.

Thus, controlling emotional expression sometimes forms an important part of the judge's professional commitments, including the commitment not to unduly influence decisions that have been delegated to others. Behavioral suppression is relatively effective for these communicative purposes. Controlling facial expression, bodily movement, and the sound of one's voice often succeeds in blocking others' perceptions of one's true emotions.[329] In these discrete situations in which behavioral suppression is critical to judicial task performance, then, its costs are worth incurring, for it does tend to achieve the desired benefit, which may be difficult to achieve otherwise.

The efficacy of surface acting, however, has limits. As the renegade JetBlue flight attendant episode reminds us, emotion sometimes simply overtakes control capacity, even when such capacity is so practiced as to be habitual. Judges, too, sometimes "lose it." Consider this report from one of the interviewed Minnesota judges, describing a sentencing hearing:

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327. Contempt is often characterized as a mix of disgust and anger, accompanied by an evaluation that the person toward whom it is directed is of lower status. *See, e.g.*, ROBERT C. SOLOMON, THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE (1993); Cendri Hutcherson, The Moral Emotions: A Social-Functionalist Account of Anger, Disgust, and Contempt 7–11 (May 2008) (unpublished Ph.D. dissertation, Stanford University).

328. Paul Ekman & Karl G. Heider, *The Universality of a Contempt Expression: A Replication*, 12 MOTIVATION & EMOTION 303 (1988).

329. PSYCHOLOGY OF EMOTION, *supra* note 29, at 166. For this same reason, behavioral suppression can impair interpersonal functioning, as interpersonal interactions are flattened. Emily A. Butler et al., *Emotion Regulation and Culture: Are the Consequences of Emotion Suppression Culture-Specific?*, 7 EMOTION 30 (2007); *see generally* Gross & Oliver, *supra* note 149.

> I said, "Sir, you are going to prison, and that's where animals like you belong." And I usually don't say that but, if you get called a MF [expletive abbreviated] ten times, and it was by someone who raped a step-daughter, and he's in your face . . . And I felt bad later. I thought, "OK, you lost your cool." But I didn't feel that badly, but I try not to stoop to their level. I felt bad-good.[330]

Losing one's cool, as this judge notes, can be quite hedonically pleasing, and pleasure sometimes will take precedence over utility.

Moreover, despite a judge's most determined efforts, hints of her emotional state often will leak out. Such leaks—called microexpressions—typically are measured as quick flashes of an emotion's typified facial expression. These may be consciously detectible only by a trained observer.[331] However, even masked emotions may be perceptible to lay persons. Even if the signals do not register consciously, people are remarkably able to sense the emotions of others.[332] Some of this exquisite attunement, an evolutionary mechanism for catching the signals that evolution has designed emotion to send, focuses not just on facial expression but also on bodily actions—think of a person nervously jiggling her leg or leaning away from someone with whom she is pretending to be friendly. Judges sometimes lose the capacity for behavioral control entirely and at other times will communicate emotion despite being relatively controlled. This reality serves as a reminder that behavioral suppression cannot be fully relied upon, even in those situations in which its communication-blocking effects justify the considerable costs of attempting it.

In sum, behavioral suppression is extremely costly. It will not help judges achieve emotional neutrality. It can, however, help them project such neutrality or to project an emotion other than the one they are feeling, which sometimes serves an important utilitarian function. The engagement model, it should be recalled, can serve this function equally well and at a lower cost. If, because of cognitive reappraisal, the judge feels less of the emotion, she will not have to expend anywhere near the same effort to suppress its manifestation. In fact, she may need to expend no effort whatsoever. But as the model contemplates that some emotion will persist, some emotions may need to be masked. The costs of surface acting therefore sometimes must be tolerated. But those costs are greater than we have realized, and the benefits of the strategy are narrower. Its use therefore should be restricted to only those situations in which the

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330. Schuster & Propen, *supra* note 86, at 93.

331. Paul Ekman has built an industry centered on detection of the such microexpressions. *See* Paul Ekman, *Cutting Edge Behavioral Science for Real World Applications*, DR. PAUL EKMAN, http://www.paulekman.com (last visited Sept. 17, 2011).

332. Matthew J. Hertenstein & Dacher Keltner, *Gender and the Communication of Emotion via Touch*, 64 SEX ROLES 70 (2011) (reviewing and expanding evidence showing that touch, along with facial expression and vocalization, communicates several distinct emotions).

communicative benefits are actually necessary. Behavioral suppression is an occasionally useful tactic, not a steady state toward which a judge should aspire.

3. Suppressing Emotional Experience Is Unrealistic and Unjustified

Behavioral suppression targets only the evidence of emotion; other suppression strategies target the emotional experience itself. Such efforts are, as a general rule, unsuccessful and costly. Where they appear to be successful, apparent short-term success generally comes at a serious long-term cost.

a. Anticipatory Suppression Is Unrealistic

First, anticipatory suppression of emotional experience, such as a vow to remain an "iceberg" no matter what, is highly unlikely to be effective. It might well dampen the judge's subjective experience to some degree. It will not, however, eliminate it. Not all emotions can be headed off at the pass just by willing it to be so.[333]

One reason, often discussed in the behavioral law and economics literature, is the frequency of error in affective forecasting. Affective forecasting refers to one's predictions as to the nature, intensity, and duration of future emotional states.[334] People tend to be accurate as to what emotions will follow future events; for example, winning the lottery is likely to make one happy, losing a limb is likely to make one sad, and most people would accurately predict those reactions. But people tend to be quite inaccurate about both the intensity with which they will experience these emotions and their duration.[335]

Why these distortions are so pervasive is not entirely clear, but they likely stem from systematic errors in imagining the specifics of the future event, meaning projection and reality are mismatched. For example, one will imagine winning the lottery as a standalone event, but it will be experienced as part of a holistic life story.[336] Other aspects of one's life—such as the continued existence of health difficulties—will attenuate the lottery's impact. Some situations provoke complex and mixed emotions, but we may imagine them

333. Chambers et al., *supra* note 152, at 566; Koole, *supra* note 24, at 6 ("[P]eople may still display unwanted emotions despite their best efforts."). The converse also is true: not all emotional experiences can be called into being by willing it to be so. In fact, that exercise of will can make the desired state less likely. Loewenstein, *supra* note 126, at 186 (reporting that conscious effort to be happy resulted in a decline in happiness).

334. Loewenstein, *supra* note 126, at 186–88; *see also* Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155 (2005).

335. Loewenstein, *supra* note 126, at 187; Blumenthal, *supra* note 334, at 167–70; John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516 (2008); John Bronsteen et al., *Welfare as Happiness*, 98 GEO. L.J. 1583 (2010).

336. Blumenthal, *supra* note 334, at 167, 172–75. The distance between imagination and reality also can result in an emotional reaction that is utterly unlike the predicted one. For example, if a person wins the lottery the day after her child dies for lack of an expensive medical treatment, the sudden influx of money is more likely to provoke anguish than joy.

more simplistically.[337] Affective forecasting errors may stem as well as from incorrect intuitions about how highly novel events will make us feel.[338] If one has never seen an autopsy photo, it is easy to under-or-over-estimate how disturbing it will be. These errors create distance between the emotional experiences for which one is preparing oneself and the ones that actually unfold, lessening the effectiveness of a strict vow to remain unmoved.

Judges, as people, are prone to the affective forecasting errors that can frustrate efforts to prevent emotion.[339] To be sure, many of their predictions are likely to be less distorted than those of laypersons, as many emotion-provoking situations will be far less novel. Compared to a juror, judges are likely to have seen many more autopsy photos and heard many more "tear-jerking pleas."[340] Judicial experience therefore is likely to lead to some improvement in affective forecasting. But even if events unfold as judges expect, they—like all people tend to do—may systematically misjudge the level and duration of their emotional impact.[341] Indeed, the persistence of such error is made more likely by the expectation that judges should not feel emotion at all, a distortion that discourages the thoughtful reflection on which learning from experience depends.[342] Moreover, judges cannot predict every aspect of the situations with which they will be confronted. They simply cannot have seen and heard everything.[343]

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337. Loewenstein, *supra* note 126, at 187.

338. *Id.* at 187–88.

339. *Cf. supra* notes 28–29 (demonstrating that judges are prone to other sorts of heuristics and biases).

340. People v. Carter, No. C053369, 2009 WL 626113 (Cal. Ct. App. Mar. 12, 2009). This sort of habituation is an important aspect of professional acculturation to commonly encountered stimuli. *See* POSNER, HOW JUDGES THINK, *supra* note 67, at 119 ("the hand of little employment hath the daintier sense") (quoting WILLIAM SHAKESPEARE, HAMLET act 5, sc. 1).

341. *See supra* note 335.

342. Loewenstein, *supra* note 126, at 197.

343. *See, e.g.*, Spruill v. Nat'l R.R. Passenger Corp., Civ. A. No. 93-4706, 1995 WL 534273 (E.D. Pa. Sept. 5, 1995) (admonishing lawyer for improper rebuttal: "I really didn't know how to handle the whole thing. . . . [B]ased on my years of experience as a trial judge, I have never seen anything like it."); Skyler M. v. Brice H., No. B190498, 2007 WL 2109797 (Cal. Ct. App. July 24, 2007) ("All my years of sitting here, I don't think I've ever seen a doctor cry on the witness stand . . . ."); Caldwell v. Lucas, 13 P.3d 560, 563 (Or. Ct. App. 2000) (weighing evidence that custody-seeking father had serious criminal history of domestic violence but had not harmed his well-adjusted children: "It is a tremendous dilemma. I have never seen anything like it."). Similarly, even highly experienced trauma surgeons will encounter a novel situation that provokes intense emotion, as the experience of a doctor who tried to save the life of a nine-year-old Tucson girl—killed in the 2011 assassination attempt on a U.S. Congresswoman—poignantly illustrates. Dr. Randall S. Friese described his experience:

> "I'm very glad that I didn't meet her parents," he said. "I think I would have had trouble. I would have had emotional . . ." His voice trailed off. "I would have embarrassed myself," he said. He closed his eyes for just a moment and sighed once more. "I usually don't get upset." He add[ed], "I don't know why, it's just tough."

Denise Grady & Jennifer Medina, *From Bloody Scene to E.R., Life-Saving Choices*, N.Y. TIMES, Jan. 15, 2011, at A1 (ellipsis in original).

Even setting aside these weighty objections, anticipatory suppression is a flawed strategy. Researchers consistently have cautioned strongly against the "pitfalls" of committing to such an "unrealistic and inflexible" approach.[344] Rather than being a true strategy for avoiding emotion itself, it is likely instead to represent a pre-commitment to behavioral suppression, coupled with the mistaken assumption that such expressive control constitutes experiential control.

Alternatively, anticipatory suppression may represent a pre-commitment to deny or repress any emotion that does emerge. As the following Subsection explains, those reactive experiential suppression strategies are just as unjustified, particularly in the judging context.

b. Denial and Repression Are Costly

Deliberately distancing oneself from emotion, pretending and representing that it does not exist (and perhaps never existed), or literally forcing oneself to forget the emotional experience (and even what prompted it) all carry many of the same costs as behavioral suppression—and then some. This Subsection explores the experimental and clinical evidence of the costs of such reactive experiential suppression; this Part then goes on to show evidence of these strategies' negative impact on judicial behavior.

i. Cognitive and Memory Costs

As denial and repression are effortful, it is not surprising that they entail many of the same costs as behavioral suppression. Indeed, such costs form an important part of the classic Freudian concept of denial.[345] Freud theorized that the defensive "work" of keeping from awareness emotions that are intolerable or incompatible with the ideal self would come at the cost of expenditure of "psychic energy."[346] This is precisely what studies have shown.

First, the cognitive load caused by efforts to ignore or tamp down emotional experience can lead to overly simplistic decision making. This was shown, for example, in a creative study of interpersonal judgment. Experimental subjects were made to act in a way incompatible with their emotional state: specifically, they were instructed to ingratiate themselves to a man who was treating them very rudely, and thus to act pleasantly toward him despite any negative feelings he was causing them to experience. The study combined elements of behavioral and reactive experiential suppression. Subjects were asked, at a minimum, to mask their initial emotion, such as

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344. Chambers et al., *supra* note 152, at 566.

345. The more precise Freudian label is "defense." Drew Westen & Pavel S. Blagov, *A Clinical-Empirical Model of Emotion Regulation: From Defense and Motivated Reasoning to Emotional Constraint Satisfaction*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 373, 377 ("The concept of defense in psychodynamic theory represents what was probably the first theory of emotion regulation.").

346. Westen & Blagov, *supra* note 345, at 377.

anger, but as the task would be greatly facilitated were they actually able to override that emotion, the subjects likely tried to do so. When these subjects later were asked to evaluate aspects of the rude man's personal views, they—more than other subjects—were prone to shallow interpretations reflecting serious logical error. It appears that they were drawn to those illogical interpretations because they were the ones requiring the least evaluative thought.[347]

Reactively distancing oneself from emotional experience also has been shown to impair memory.[348] Pushing emotional thoughts out of mind appears to tax working memory reserves, with the result that even emotionally neutral information about the situation may pass through awareness without being stored for later encoding in longer-term memory.[349] Further, what is remembered may be distorted. This is particularly true when episodic denial deepens into repression. Persons who habitually deny and repress negative emotions, for example, have particular difficulty remembering information falling within the *emotionally unpleasant* category.[350] Researchers therefore concur that, like behavioral suppression, "internal control" of emotion experience "is costly," leaving fewer resources available for logic, self-control, and social judgment.[351]

The critical question again being the net of cost against benefit, one must ask whether denial and repression are nonetheless worthwhile in the judging context. They are not. These strategies would carry the same episodic communicative benefits as behavioral suppression if only they were equally effective in masking emotion. This would be so if they were successful in

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347. *See generally* Daniel T. Gilbert et al., *Of Thoughts Unspoken: Social Inference and the Self-Regulation of Behavior*, 55 J. PERSONALITY & SOC. PSYCHOL. 685 (1987); *see also* Daniel T. Gilbert, *Thinking Lightly About Others: Automatic Components of the Social Inference Process*, *in* UNINTENDED THOUGHT: THE LIMITS OF AWARENESS, INTENTION, AND CONTROL 189 (James S. Uleman & John A. Bargh eds., 1989). After being made to ingratiate themselves to the rude man (actually one of the experimenters), the subjects were shown politically conservative answers the man had given to a series of questions. They also were told that the experimenters had supplied the man with those answers. The subjects were asked to infer the man's political leanings. Compared with other subjects, the "forced ingratiators" were more likely to conclude that the man was a conservative—even though they knew that his answers were causally unrelated to his political beliefs. *See* WEGNER, *supra* note 118, at 81–82.

348. Dunn et al., *supra* note 133, at 761 (reporting that subjects asked to suppress both experience and expression of emotion showed diminished free recall).

349. Chris R. Brewin & Laura Smart, *Working Memory Capacity and Suppression of Intrusive Thoughts*, 36 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 61 (2005). This study supports the conclusion by showing that greater working memory capacity is associated with greater ability to suppress unwanted negative thoughts. *See generally* A DICTIONARY OF PSYCHOLOGY 822 (Andrew M. Coleman ed., Oxford 3d ed. 2009) (defining working memory).

350. Matthew S. Shane & Jordan B. Peterson, *Self-Induced Memory Distortions and the Allocation of Processing Resources at Encoding and Retrieval*, 18 COGNITION & EMOTION 534 (2004) ("[M]emory distortions . . . [d]o not appear limited to clinical populations. Rather, self-induced memory distortions appear to occur regularly in the general population . . . . ").

351. WEGNER, *supra* note 118, at 81–82; *see also* Mauss et al., *supra* note 25, at 41, 47–48. *Cf.* Sheppes & Meiran, *supra* note 132, at 871 (explicating cognitive and memory costs of distracting oneself from an emotional experience).

blocking or erasing the emotion, such that behavioral control would follow naturally. But, as the following Subsection demonstrates, denial and repression are singularly ineffective at emotion elimination. They also entail the danger of emotional rebound.

ii. Ironic Rebound Effects

Ironically, emotional denial and repression may magnify the emotion they purport to eliminate. It is now well understood that thought suppression can have such a rebound effect, in which the effort to control a thought increases its impact.[352] Similarly, repression of emotion paradoxically might imbue it with greater salience and power.[353]

Our contemporary understanding of thought suppression stems largely from Daniel Wegner's seminal "white bear" studies.[354] Inspired by a story that the young Tolstoy "was once challenged by his older brother to stand in a corner until he could stop thinking of a white bear," Wegner and colleagues demonstrated that, indeed, persons told not to think of white bears are largely unable to do so. In fact, they think of white bears *more* frequently once they are released from the command.[355] Such ironic effects of thought suppression have since been robustly replicated.[356] Indeed, they now form a core of folk-psychological theory: the more one tries not to think about something, the more one thinks about it. Similarly, sometimes the more one concentrates on not doing or saying something, the more likely one is to do or say precisely that thing—even when (or perhaps *because*) it is precisely the *wrong* thing.[357]

Attempts to deny and repress subjective emotional experiences and thoughts also appear to have rebound effects, magnifying precisely what they aim to neutralize. The white bear studies do not themselves compel this conclusion, as they involved an emotionally neutral stimulus (assuming one has no idiosyncratic emotional connection to white bears). However, this idea was central to Freud's theory of repression. Repressed emotions, Freud asserted, are not neutralized. Instead, the "inhibited intention" becomes an "antithetic idea"

352. PSYCHOLOGY OF EMOTION, *supra* note 29, at 176 (defining rebound effect as the "ironic and counterproductive effect of active suppression of an unwanted thought"); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (arguing that ironic effects might magnify influence of evidence a judge vows to ignore).

353. Loewenstein, *supra* note 126, at 190–91 (positing that willing oneself to "be calm, cool, and collected" might "backfire").

354. *See* WEGNER, *supra* note 118.

355. *Id.* at 4 ("The irony, then, is not only that people found it hard to suppress a thought in the first place, but that the attempt to do this made them especially inclined to become absorbed with the thought later on.").

356. *See, e.g.*, ERIC RASSIN, THOUGHT SUPPRESSION (2005).

357. Daniel M. Wegner, *How to Think, Say, or Do Precisely the Worst Thing for Any Occasion*, SCIENCE, July 3, 2009, at 48–50. Edgar Allen Poe called these actions "the imp of the perverse." *Id.*

or "counter-will," and those emotions come to "enjoy an unsuspected existence in a sort of shadow kingdom, till they emerge like bad spirits and take control of the body."[358] Wegner, too, clearly believed thought and emotional suppression to be linked, hypothesizing that efforts to control emotional thoughts and experiences also are likely to "throw a monkey wrench into our mental apparatus."[359]

Evidence now strongly suggests that Wegner and Freud were correct. As Wegner explained in a recent review of the research:

> Unwanted emotions associated with thoughts not only provide a reason to avoid those thoughts but also prompt an unwanted emotional punch when the thoughts return. Emotions we put out of mind are experienced with unusual intensity when the emotional thoughts recur after suppression.[360]

Such rebound sometimes entails an increase in emotional thoughts one has tried to set aside. For example, people instructed to suppress thoughts of emotional topics before sleep report more frequent dreaming about those topics.[361] Such emotional rebound is particularly likely when the would-be-suppressor is under conditions of stress.[362] The same holds true for conditions

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358. Sigmund Freud, *A Case of Successful Treatment by Hypnotism*, *in* 1 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 117–28 (James Strachey ed., 1953). Freud believed the effects of repressed emotion to be most likely to emerge when the person was under significant strain. *See id.* at 127 ("this mechanism is supremely characteristic of hysteria; however, it does not occur only in hysteria"). As Freud also asserted, a primary reason people try to suppress thoughts in everyday life (as opposed to in laboratories) is because those thoughts cause, or are associated with, unwanted feelings. WEGNER, *supra* note 118, at 22 (noting how Freud "thus transformed the problem of unwanted thoughts into one of unwanted feelings"). Emotional repression is not the only motivation; thoughts also may be unwanted because they encourage behaviors we prefer to avoid, such as eating doughnuts, or reflect beliefs we prefer to reject, such as racism. *Id.* at 26–37.

359. *Id.* at xii ("When we admonish ourselves . . . not to feel something . . . our attempt to say no is often no more effective than a flyswatter held up to stop a cannonball.").

360. Wegner, *supra* note 357, at 49; *see also* Michael C. Anderson & Benjamin J. Levy, *Suppressing Unwanted Memories*, 18 CURRENT DIRECTIONS PSYCHOL. SCI. 189 (2009).

361. Wegner, *supra* note 357, at 48–50; *see also* Elke Geraerts et al., *Long Term Consequences of Suppression of Intrusive Anxious Thoughts and Repressive Coping*, 44 BEHAV. RES. & THERAPY 1451 (2006) (finding that when asked to evoke and then suppress self-relevant, autobiographical thoughts, participants showed a rebound effect for both positive and anxious thoughts). The rebound effect appears particularly strong for persons who habitually repress emotion. *See id.* ("[R]epressive coping enables individuals to avoid negative and trauma-related thoughts in the short run, but in the long run, . . . leads to intrusive thoughts . . . ."). Unfortunately, suppression of emotional thought and suppression of emotional experience seldom are cleanly distinguished. *See* Loewenstein, *supra* note 126, at 182 ("skirting" question of whether "if, after committing a gross *faux pas*, one attempts not to think about it," it is more appropriate to say "one is distracting oneself from one's thoughts or one's feelings").

362. Wegner, *supra* note 357, at 49 (reporting that "when anxious thoughts are suppressed under mental load, their return can rekindle anxiety with particular vigor", and memories we try to forget actually will be more easily remembered when other stressors tax the conscious effort to forget). Sports psychologists are familiar with this tendency for anxiety and pressure to cause precisely counter-intentional actions, such as the "yips" in golf. *Id.*

of cognitive load. In one experiment, for example, subjects were asked to recall happy or sad past events, and were then told to stop feeling the emotion evoked by those memories. Those subjects that were also given a cognitive-load task (rehearsing a nine-digit number) were not only less able to suppress the emotion but "ironically produced the opposite effect, that is, the rebound of the unwanted emotion."[363]

Other studies, it must be noted, show that rebound in the frequency of emotional thoughts is not inevitable, particularly in the absence of stress and cognitive load, and even suggest that people are relatively more skilled at repressing emotional thoughts than neutral ones.[364] But even studies showing no post-suppression rebound have shown that unwanted emotional thoughts may be more intrusive than neutral ones during the suppression period.[365] Even more compelling, the evidence shows that suppression entails an increase in the physiological arousal connected to emotional thoughts, whether or not the thoughts themselves increase.[366] Thus, people asked to suppress thoughts of an old romantic partner show greater physiological arousal when later allowed to think about him or her.[367] A similar finding emerged from a study in which participants were shown a disturbing film of sawmill accidents and instructed not to feel emotion. Though they reported success in feeling "cool and detached," they showed markedly increased skin conductance.[368] Physiological rebound holds where emotional thoughts recur, even if they do not recur with paradoxically increased frequency and even where one is not conscious of any recurrence. In short, under circumstances in which denial and repression may appear to calm the mind, they do not calm the body.[369]

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363. PSYCHOLOGY OF EMOTION, *supra* note 29, at 178 (describing Daniel M. Wegner et al., *Ironic Processes in the Mental Control of Mood and Mood-Related Thoughts*, 65 J. PERSONALITY & SOC. PYSCHOL. 1093 (1993)). These results provide "suggestive support for the idea that the ironic effects under cognitive load were stronger for those who had to suppress their feelings . . . than those who concentrated on the desired feeling." *Id.*

364. PSYCHOLOGY OF EMOTION, *supra* note 29, at 179–81 (discussing, *inter alia*, Peter Muris et al., *Suppression of Emotional and Neutral Material*, 30 BEHAV. RES. & THERAPY 639 (1992)). The working hypothesis for this differential is that people are more likely to be motivated to avoid unwanted emotions than neutral thoughts.

365. Brewin & Smart, *supra* note 349, at 66.

366. *See* NATURE OF EMOTION, *supra* note 101, at 235–62 (detailing physiological elements of emotion).

367. Wegner, *supra* note 357, at 49.

368. WEGNER, *supra* note 118, at 149 ("[T]rying to suppress an emotion *while the emotion-producing stimulus is present* yields the same or greater arousal than trying to experience the emotion.") (citing to Asher Koriat et al., *The Self-Control of Emotional Reactions to a Stressful Film*, 40 J. PERSONALITY 601 (1972)); *see also* PSYCHOLOGY OF EMOTION, *supra* note 29, at 182 ("The suppression of emotionally exciting thoughts may thus be counterproductive because even though it diminishes the frequency of intrusive thoughts, it causes people to become aroused each time the suppressed thought returns to mind."); Cisler et al., *supra* note 125, at 72.

369. PSYCHOLOGY OF EMOTION, *supra* note 29, at 181. Persons instructed to repress emotional experience also have been shown to have a slower physical recovery after being exposed to air enriched with carbon dioxide. Cisler et al., *supra* note 125, at 70–71 (citing to M.T. Feldner et al., *Emotional Avoidance: An Experimental Test of Individual Differences and Response Suppression*

Denial and repression therefore entail all of the cognitive and memory costs associated with behavioral suppression. Not only do these reactive attempts to suppress subjective experience stand an equally poor chance of neutralizing emotion, but they add to those costs the danger of emotional rebound.

c. Emotion Suppression Poses a Particular Threat to Judicial Behavior

Thus far, this Part has shown that emotional suppression is a costly strategy and that it is likely to be one to which judges frequently resort. For all the reasons described above, and others given more explicit treatment here, these costs pose a significant challenge to competent performance of the judicial function.

First, judges work under conditions of cognitive load. Unlike most experimental subjects, whose emotional suppression is tested in a short-term, controlled, single-task manner, judges generally must juggle multiple tasks and objectives for sustained periods of time.[370] The cognitive and memory costs of suppression therefore are particularly likely to be consequential, and the importance of judicial decision making magnifies concern about such costs. Judges need to think logically about difficult problems, such as contested points of law; accurately perceive and remember events, such as testimony and argument; and make complex interpersonal judgments, such as evaluating tone of voice and body language to gauge litigants' and witnesses' sincerity. These are precisely the sorts of tasks whose performance is impaired.[371] Some of these effects can be mitigated. For example, writing multiple drafts of an opinion, discussing cases with clerks, and reviewing exhibits and transcripts can fill holes in memory and provide opportunity for reasoned reflection. But not all the effects can be mitigated. Many difficult decisions must be made quickly—such as an immediate ruling on a hearsay objection—and cannot later be undone. Faulty memories can harden; social information such as tone of voice cannot be conveyed in a transcript. As judicial cognitive load is inevitable and its effects significant, it should not be magnified unnecessarily.

Second, these same conditions of cognitive load increase the chances of emotional rebound. Those chances are higher if the judge is acting under conditions of anxiety or stress, as often is the case—particularly in charged adversarial settings that unfold in public view. Suppression's physiological effects are of particular concern. The physical concomitants of emotion, such as

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Using Biological Challenge, 41 BEHAV. RES. & THERAPY 403 (2003), and Matthew T. Feldner et al., *Anxiety Sensitivity—Physical Concerns as a Moderator of the Emotional Consequences of Emotion Suppression During Biological Challenge*, 44 BEHAV. RES. & THERAPY 249 (2006)).

370. Heilman et al., *supra* note 35, at 259 ("[N]aturally occurring emotions are more salient and valenced than those induced in the laboratory, and their influences on cognition may be more conspicuous.").

371. Chambers et al., *supra* note 152, at 565 (reporting that suppression particularly impairs recall of social information).

increased sweating and heart rate, dispose one to take or not to take certain actions: consider what it feels like to have a "short fuse" when one is agitated.[372] When dissociated from conscious experience, such arousal is particularly dangerous, for it is open to misdirection.[373] Everyday life and folk psychology provide ready examples of this sort of emotional Whac-A-Mole game.[374] A parent who seethes with unexpressed anger at his boss may yell at his child for little reason. Similarly, a judge who is consciously disengaged from her emotions but continues to experience physical arousal may blow up over a lawyer's small infraction. Sometimes we recognize such misdirection; often we do not. The deeper the emotional experience has been buried, the greater the danger. Indeed, one recent study suggests that this combination of conscious suppression with physical arousal is associated with impulsive decision making.[375] This is precisely the sort of decision making we least want from our judges.

Third, as suppression does not eliminate judges' emotional experience but likely just displaces it, it makes emotion's effects on judging less transparent and predictable—not just to the public, but to judges themselves. Research on judges' inability to ignore inadmissible evidence offers an instructive parallel. Notwithstanding their commitment to set such evidence aside, judges generally are unable to avoid being influenced by relevant but inadmissible evidence of which they are aware.[376] Similarly, emotion is likely to exert influence notwithstanding efforts at suppression. Even setting aside the normative question of whether emotion should play a role in judging, a conversation worthy of far greater exploration than is possible here,[377] whatever role it might

372. OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 99, at 1–2 (noting that such predispositions referred to as "action tendencies").

373. Misdirection is a danger because physiological arousal tends to take a relatively consistent form across emotional states. Consider that both grief and joy can cause tears, and both fear and anger involve elevated heartbeat. *See* NATURE OF EMOTION, *supra* note 101, at 235–62 (collecting scientific perspectives on whether emotions have distinct physiological patterns). People distinguish between these different states not only on the basis of how they feel in the body but also the thoughts with which they are accompanied. That is, we largely understand our emotions based on the interpretation we give to our arousal. Thus, studies have shown that persons who are unaware of (or out of touch with) the reason for their physiological arousal will search for an explanation in their environment. That explanation may be entirely wrong. WEGNER, *supra* note 118, at 146–48 (discussing classic model of Stanley Schachter & Jerome E. Singer, *Cognitive, Social and Physiological Determinants of Emotional State*, 69 PSYCHOL. REV. 379 (1962)); *see also* A.S.R Manstead, *A Role-Playing Replication of Schachter and Singer's (1962) Study of the Cognitive and Physiological Determinants of Emotional State*, 3 MOTIVATION & EMOTION 251 (1979); Donald G. Dutton & Arthur P. Aron, *Some Evidence for Heightened Sexual Attraction Under Conditions of High Anxiety*, 30 J. PERSONALITY & SOC. PSYCHOL. 510 (1974).

374. *Whac-A-Mole*, http://www.bobsspaceracers.com/whac-a-mole/html-index.htm.

375. Heilman et al., *supra* note 35, at 258 (citing Karen Pezza Leith & Roy F. Baumeister, *Why Do Bad Moods Increase Self-Defeating Behavior? Emotion, Risk Taking, and Self-Regulation*, 71 J. PERSONALITY & SOC. PSYCHOL. 1250 (1996)).

376. Wistrich et al., *supra* note 352, at 1251.

377. Maroney, *supra* note 11.

actually be playing should, at a minimum, be as transparent as possible, if for no other reason than to facilitate that conversation.

These reasons are sufficient to demonstrate suppression's unjustifiable costs in the judging context. But there is another reason to be wary. Suppression indirectly can harm judging by harming judges.

C. Emotional Suppression Is Bad for Judges

Judges who routinely suppress emotion and its expression eventually are changed by that routine. What began as an episodic response can ossify into a trait,[378] and judges risk developing what is known in the psychological literature as a repressive coping style.[379] It is abundantly clear from the clinical literature that a repressive coping style is bad for judges as people. Unrealistic, inflexible patterns of coping with emotional demands are associated with poor health outcomes, including anxiety, hypertension, and coronary heart disease.[380] Denying and repressing negative emotions, in particular, often takes a toll on psychological wellbeing, hampering one's ability to adjust well to life's challenges.[381]

More important here, a repressive coping style is almost certainly bad for judges *qua* judges. The memory impairments attending repression can become endemic, developing into "global deficits in memory formation."[382] Habitual suppression fosters overconfidence in judges' ability to control emotion.[383]

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378. Bargh & Williams, *supra* note 105, at 437. Once nonconscious, regulation's influence becomes impervious to change, much as the decision effects of emotion itself cannot be consciously regulated if one is unaware of it. *Id.* at 438 ("You can't hit what you can't see.").

379. Geraerts et al., *supra* note 361, at 1451; Koole, *supra* note 24, at 20; Lynn B. Myers & Nazanin Derakshan, *To Forget or Not to Forget: What Do Repressors Forget and When Do They Forget?*, 18 COGNITION & EMOTION 495 (2004) (asserting that emotional repressors are "self-deceivers"); Westen & Blagov, *supra* note 345, at 378.

380. Chambers et al., *supra* note 152, at 564 (noting difficulties that stem from "frequent or automatic attempts to control or suppress emotional experience and expression"); Cisler et al., *supra* note 125, at 68*; see generally* Oliver P. John & James J. Gross, *Healthy and Unhealthy Emotion Regulation: Personality Processes, Individual Differences, and Life Span Development*, 72 J. PERSONALITY 1301 (2004).

381. WEGNER, *supra* note 118, at 9.

382. Shane & Peterson, *supra* note 350, at 551, 554 (arguing that though "individuals who utilise such motivated cognitive avoidance techniques may rate themselves as happier, and may evidence reduced levels of stress and anxiety after severe trauma, serious cognitive and intellectual effects may result"). Habitual suppressors display significant memory deficits, particularly for negatively valenced material, even when that negatively valenced material was not self-relevant. That is to say, they have worse memory for events that caused bad feelings in other people—not just in themselves. *Id.*

383. Though persons who suppress emotion tend to report experiencing less negative emotion, they exhibit not just impaired cognitive and social skills but also greater physiological reactivity. Mauss et al., *supra* note 25, at 48; *see also* Ineke Wessel & Daniel B. Wright, *Emotional Memory Failures: On Forgetting and Reconstructing Emotional Experiences*, 18 COGNITION & EMOTION 449, 453 (2004); Shaver et al., *supra* note 251, at 126, 129 (finding that people who claim to be fully in control show dissociation between that belief and nonconscious measures of emotion); Westen & Blagov, *supra* note 345, at 378 (defining disjuncture as "illusory mental health").

Habitual suppression can also manifest in selective criticism of threatening information, trivializing or selectively forgetting such information, making self-serving attributions, inflating one's self-concept, engaging in downward social comparison, and derogating others.[384] Emotional suppression too easily can move judges down a path of becoming arrogant and dismissive. Whatever qualities we may want from our judges, those are not among them.

This is not an idle concern; judges sometimes display just such traits. A vivid example of this phenomenon was recently described by the Supreme Court of Florida, which took the radical step of removing from office a judge who repeatedly had treated litigants and lawyers in a callous, rude, condescending, and abusive manner.[385] Not only were these undesirable traits apparently caused by the judge's inflexible efforts at emotional suppression, but those same efforts were singularly ineffective at actually controlling his emotions. The judge's own psychiatrist testified that a repressive anger-management style had come to define the judge's personality, with devastating effects on his judging.[386] By constantly "striving to demonstrate calm in difficult situations," she testified, the judge eventually "placed himself in" a state of "emotional over-control."[387] His drive to control his emotions became so strong that he was unable to "incorporate emotions into his life without worrying he would display inappropriate anger"—which, inevitably and ironically, he did.[388]

Taken together, this evidence strongly suggests that judges may become overconfident in their ability to eliminate emotion by willing themselves not to feel it, denying that they do, and controlling its outward expression.[389]

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384. Koole, *supra* note 24, at 20; *see also* Shaver et al., *supra* note 251, at 136–37 (stating that persons who habitually avoid emotion are prone to "grumble about the burden" of helping needy others and "express disapproval, lack sympathy and compassion," and "feel pity, inferior to oneself, and can be accompanied by disgust or disdain. Avoidant attachment (measured with a self-report questionare) is inversely associated with endorsing two self-transcendent values, benevolence (concern for close others) and universalism (concern for all humanity)").

385. *In re* Sloop, 946 So.2d 1046 (Fla. 2007) (per curiam). Judge Sloop had (among other offenses) issued nonappearance warrants for eleven traffic-offense defendants, though they had obeyed official instructions to wait in the wrong courtroom. The eleven traffic offenders therefore were handcuffed, chained, taken to jail, strip-searched, and held for nine hours. When later confronted by another judge, Sloop said he did not think it was a "big deal." *Id.* at 1051; *see also id.* (opining that this was "a very big deal . . . . Judge Sloop's callous disregard for these individuals was the antithesis of his judicial obligations.").

386. *Id.* at 1052.

387. *Id.* at 1053.

388. Sloop had been accused of misconduct before for failing to control his temper and had agreed to participate in "anger management" therapy. However, the testifying clinicians indicated that "lack of empathy," tendency to try to over-control emotion, and use of anger as a mechanism to control others had become features of his "personality." *Id.* at 1053, 1057.

389. WEGNER, *supra* note 118, at 15 (noting "seductive" illusion that we can will ourselves to control thoughts, feelings, and behaviors). Overconfidence has its own downsides, perhaps because it discourages self-examination and learning. *See, e.g.*, Stuart Oskamp, *Overconfidence in Case-Study Judgments*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 287, 292 (Daniel

Suppression's ineffectiveness may itself create another set of emotions—frustration, unhappiness, or even shame, triggered by the judge's failure to satisfy the ideal of emotionless judging.[390] Routinely to suppress emotions, then, is "just as rigid as to always *act* on them."[391]

Finally, just as suppression indirectly can harm judging by harming judges, engagement indirectly can benefit judging by benefiting judges. Emotional engagement strategies—such as disclosure—have been shown to "buffer against health risks"[392] and are associated with measures of mental health and wellbeing. While primarily relevant to judges as people, this health bonus is also good for judging, as it reduces burnout and increases professional longevity.[393] Though not an independent basis for embracing the engagement model, these additional benefits confirm the wisdom of doing so.

CONCLUSION

This Article has asked that we go beyond the blanket admonition to judges that they simply set emotion aside, and instead to imagine a world in which they are able transparently to manage the emotions they cannot help but feel. Elsewhere I have called for our legal culture to let go of the script of judicial dispassion;[394] this Article has shown the sort of analysis in which it is possible to engage once we do. It has offered a model that is grounded in the best of what the psychology of emotion regulation has to offer, that is achievable, and that is compatible with our highest aspirations for judges' professional competence.

The judicial-engagement model puts a name to what extraordinary judges already are doing well. There always have been judges willing to break with script and confess that emotion plays a role in their professional lives. Over time, many undoubtedly also have found ways to cope with it well. Judges high in natural emotional intelligence likely have found it intolerable to implement professionally strategies utterly at odds with those they engage personally, and

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Kahneman et al. eds., 1982) (stating that overconfidence can manifest in certainty that is "entirely out of proportion to . . . actual correctness").

390. *See* Lazarus, *supra* note 140, at 164 & tbl.1 (defining cognitive content of shame as failure to live up to an ego ideal). Whether judges do feel these negative emotions in response to perceived failures of self-control is an interesting empirical issue worthy of exploration. The accounts gathered herein suggest that they likely do. *See supra* note 78 (reporting that Australian magistrates related finding it difficult to live up to the ideal of dispassion); *supra* note 330 (showing that judge felt conflicted, or "bad-good," for being unable to control himself as he thought he was supposed to); *supra* note 295 (suggesting that a metacognitive approach might be appropriate for such emotions about emotions if they cannot otherwise be regulated through engagement).

391. Bargh & Williams, *supra* note 105, at 433 ("emotion regulation . . . should not be just a blanket, unconditional affair of suppressing or attenuating one's emotional reactions").

392. Cisler et al., *supra* note 125, at 79; Grandey, *supra* note 52, at 107.

393. Mauss et al., *supra* note 25, at 52 ("positive consequences such as lower levels of burnout and greater job satisfaction"). Concrete "burnout" costs, such as "less empathy and connection with citizens," have been shown in police officers. Grandey, *supra* note 52, at 104–07.

394. Maroney, *supra* note 11.

on their own have come to unify the two. These, perhaps, are the judges we think of as having a good judicial "temperament," an oft-invoked but profoundly underspecified quality.[395] But they are swimming against the tide. We should take no comfort in the fact that some judges will do naturally what we tell them not to do and will achieve privately what we discourage publicly.

Not only is such a state of affairs disingenuous, but it delegates the possibility of productive emotion regulation only to those judges with unusual personal skill. Certainly there always have been doctors who have managed to avoid the pitfalls of their training because of innate skill, but the profession and those it serves are far better off if doctors with less natural skill come to acquire it. Emotion regulation skills can be learned.[396] Sometimes life itself provides the laboratory; some studies indicate that capacity for adaptive emotion regulation tends to increase among the elderly.[397] But we should no more leave the process to time as to nature, particularly since poor regulatory skills can become dangerously self-perpetuating. The cramped set of beliefs about emotion built into our judicial ideal is a prime candidate for such a negative cycle, as it stifles experimentation and learning.

The transition to judicial engagement may feel awkward in a legal culture geared so strongly toward suppression. It requires, as a starting point, that judges be at least somewhat aware of their emotions. Once past that threshold, though, engagement fosters increased awareness. The more one practices engagement the more effective it becomes. In contrast, those who suppress their emotions are both less aware of and less in control of them.[398] As Wegner suggests, the best way to manage emotion is not to endlessly twist the ratchet toward greater control; we instead must "avoid the avoiding."[399] By fostering emotional engagement we not only support judges: we stand to improve the quality of judging.

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395. *See* John & Gross, *supra* note 149, at 351; Mary K. Rothbart & Brad E. Sheese, *Temperament and Emotion Regulation*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 331. The medical analogue might be "bedside manner," similarly valued but historically neither well-defined nor adequately trained.

396. Wranik et al., *supra* note 104, at 403 ("[W]e are hopeful that many can improve their emotion regulation skills by learning more about emotions and by putting new knowledge into place.").

397. Susan Turk Charles & Laura L. Carstensen, *Emotion Regulation and Aging*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 307.

398. *See* Grandey, *supra* note 52, at 106; Koole, *supra* note 24, at 19; Shaver et al., *supra* note 251, at 125 ("Inability or unwillingness to deal openly with the causes of painful emotional states confines avoidant people to a single regulatory path: suppressing emotion or dissociating oneself from its manifestations in experience and behavior. . . . These regulatory efforts consist of denial or suppression of emotion-related thoughts and memories, diversion of attention from emotion-related material, suppression of emotion-related action tendencies, and inhibition or masking of verbal and nonverbal expressions of emotion.").

399. Wegner, *supra* note 357, at 50.

Angry Judges

*Terry A. Maroney**

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INTRODUCTION

Judges get angry. They get angry at lawyers. A federal district judge, for example, gained notoriety by publicly inviting lawyers to a "kindergarten party" where, he proposed, they would learn how "to practice law at the level of a first year law student."[1] They also get angry at litigants. An "angry" California judge revoked Lindsay Lohan's probation for failure to take her community service obligations seriously;[2] a week later, Lohan's father was denied bail by a "very angry judge" who "read him the riot act" for violating an order of protection.[3] They even get angry at each other. Chief Judge Edith Jones of the Fifth Circuit, during an oral argument, slammed her hand on the bench, told a fellow judge to "shut up," and suggested he leave the courtroom.[4] Judicial anger is a persistent reality, a regular feature of judges' emotional diet. The popular website *Above the Law* has even given a catchy name to judges' public expressions of anger: "benchslaps."[5]

Legal culture, however, is of two minds about judicial anger. On the one hand, anger could be called the quintessentially judicial

1. Morris v. Coker, Nos. A–11–MC–712–SS, A–11–MC–713–SS, A–11–MC–714–SS, A–11–MC–715–SS, 2011 WL 3847590, at *1 (W.D. Tex. Aug. 26, 2011).

2. Bob Tourtellotte, *Angry Judge Revokes Lindsay Lohan Probation*, REUTERS (Oct. 19, 2011), http://blogs.reuters.com/bob-tourtellotte/.

3. Kathleen Perricone, *Michael Lohan Denied Bail by Angry Judge*, N.Y. DAILY NEWS, Oct. 29, 2011, http://articles.nydailynews.com/2011-10-29/news/30337909_1_kate-major-michael-lohan-angry-judge.

4. Debra Cassens Weiss, *5th Circuit Oral Arguments Turn Contentious When Chief Judge Tells Colleague to Shut Up*, A.B.A. J., Sept. 26, 2011, http://www.abajournal.com/news/article/5th_circuit_oral_arguments_turn_contentious_when_chief_judge_tells_colleagu/. Jones later apologized for her "intemperate language." *Id.*

5. *See* ABOVE THE LAW, http://abovethelaw.com (last visited Feb. 5, 2011).

Electronic copy available at: http://ssrn.com/abstract=2099634

emotion. Humans (including judges) feel anger when we perceive that a rational agent has committed an unwarranted wrongdoing; that experience of anger generates a desire to affix blame and assign punishment, and facilitates actions necessary to carry out that desire.[6] This coupling of judgment and action rather precisely describes one core function of the judge. Indeed, we may expect judges to act as society's anger surrogates, so as to avoid vigilante action. We often rely on them to assign blame, frequently task them with assigning consequences, and always hope they will be motivated to perform these functions.

On the other hand, anger seems to pose a danger to the neutral, careful decisionmaking we also expect of judges. Anger is powerful, and its effects sometimes regrettable; consider the actions of a Florida judge who, "red faced and yelling," left the bench to "physically intimidate" an assistant state attorney.[7] Anger is the prototype for the traditional view of emotion—a view strongly reflected in legal theory—as a savage force that unseats rationality, distorts judgment, manifests in impulsive aggression, and imperils social bonds.[8] Indeed, fear of such irrationality led Judge Richard A. Posner to declare that we ought to "beware . . . the angry judge!"[9]

Law's split attitude on judicial anger, then, reflects an inability to reconcile our valuation of what anger offers with our fear of what it threatens to take away.

Aristotle counseled that we might reconcile these opposing impulses by recognizing that anger "may be felt both too much and too little, and in both cases not well."[10] Rather than categorically condemning or lauding anger, he urged that we judge anger through the lens of virtue. Virtue consists of feeling anger "at the right times, with reference to the right objects, towards the right people, with the

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6. JAMES R. AVERILL, ANGER AND AGGRESSION: AN ESSAY ON EMOTION 248–49 (1982); INTERNATIONAL HANDBOOK OF ANGER: CONSTITUENT AND CONCOMITANT BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL PROCESSES (Michael Potegal et al. eds., 2010); *see infra* Parts I.B., III.

7. Rene Stutzman, *Judge Shea to Be Reprimanded by Florida Supreme Court for Yelling at Attorneys*, ORLANDO SENTINEL, June 1, 2011.

8. Michael Potegal & Raymond W. Novaco, *A Brief History of Anger*, *in* INTERNATIONAL HANDBOOK OF ANGER, *supra* note 6, at 9, 15 ("Anger is the prototype for the classical view of emotions as 'passions' that seize the personality, disturb judgment, alter bodily conditions, and imperil social interaction."); *see also* Kathryn Abrams, *The Progress of Passion*, 100 MICH. L. REV. 1602, 1602 (2002) (describing stark dichotomy between reason and emotion in legal thought); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 119 (2006) (same).

9. RICHARD A. POSNER, HOW JUDGES THINK 110 (2008).

10. ARISTOTLE, NICOMACHEAN ETHICS 1106B20, *in* THE BASIC WORKS OF ARISTOTLE 958 (R. McKeon ed., 1941).

right motive, and in the right way."[11] To be sure, Aristotle's counsel was directed to human beings generally and not to judges specifically. One of the most enduring lessons of the early-twentieth-century legal realists, though, is that judges are human first.[12] Judges' humanity properly is regarded as the starting point, and the fact of also being a judge frames a second-order inquiry as to whether and how the human phenomena of interest should be molded to suit the judicial role.[13] At the most basic level, then, the Aristotelian tradition challenges the traditional legal supposition that anger is a suspect feature of judicial experience, and a suspect basis for judicial action, merely because it is an emotion.[14] Rather, it suggests, judicial anger sometimes is appropriate and sometimes not; the difference resides in reasons—what the emotion is about—and action—how the emotion is experienced and expressed.

Modern affective science—that is, the psychological and neuroscientific study of human emotion[15]—proceeds from the same theoretical basis and adds empirical substance. Affective science confirms that emotions are rooted in thoughts, reflect judgments, and are directed toward objects.[16] Emotions, including anger, can be evaluated by interrogating the accuracy of, and values behind, those thoughts and judgments as they relate to those objects. The science also provides concrete tools with which to discern anger's impact on thought, behavior, and decisionmaking.[17] Those impacts then can be judged as normatively desirable or not. This inquiry cannot be undertaken in the abstract; such judgments are highly dependent on context. Judging is one such context.[18] The second-order inquiry, then, is to evaluate anger's impact on behavior and decisionmaking as good or bad in light of the judicial role. And to do this, we must have an

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11. *Id.*

12. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 656 (2011) (citing Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 706 (1931)).

13. Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1489 & n.44 (2011).

14. *See* Maroney, *supra* note 12, at 634–42 (the ideal of emotionless judging has both a long pedigree and contemporary traction).

15. *See* HANDBOOK OF AFFECTIVE SCIENCES (Richard J. Davidson et al. eds., 2003); THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES (David Sander & Klaus R. Scherer eds., 2009).

16. ANDREW ORTONY ET AL., THE COGNITIVE STRUCTURE OF EMOTIONS (1988); Maroney, *supra* note 12, at 643–45 (citing, *inter alia*, MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT (2001)).

17. Maroney, *supra* note 12, at 644–48.

18. Maroney, *supra* note 13, at 1514.

idea of what we want that behavior and decisionmaking to look like—and why.

This Article weaves together these philosophical, psychological, and jurisprudential strands to create an account of judicial anger—one that can break the present stalemate in which we simultaneously, but without an explanatory theory, welcome and reject such anger. Interdisciplinary analysis reveals tools by which we may evaluate specific iterations of judicial anger as justified or not, and its behavioral and decisional impacts as desirable (or tolerable) or not. This Article proposes that those who are angry for the right reasons, and in the right way, be thought of as *righteously angry judges*.

By proposing this new model, this Article furthers important debates on judicial behavior. First, it builds on a growing scholarship examining judicial emotion. Such scholarship—spearheaded most recently by this author, but also encompassing work by the Hon. Richard A. Posner,[19] the Hon. William J. Brennan,[20] and the early-twentieth-century legal realists[21]—seeks both to expose the reality that judges experience emotion and to interrogate how such emotion does, and should, influence their judging. In prior work, this author has sought to build a theoretical base for that project, to use cutting-edge empiricism to give it substance, and to articulate a normative frame within which to judge it.[22] This Article is the third in that series. Such scholarship fills a gap in the psychological study of judging, which historically has left aside questions of emotion.[23] It similarly furthers the behavioral law and economics project, which explores the myriad of ways in which judges' human attributes influence their decisions.[24]

Second, whereas prior scholarship has tended to treat judicial emotion as a general category, this Article focuses exclusively on one emotion: anger. It therefore brings the analysis to a new level of

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19. POSNER, *supra* note 9; RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY (2001).

20. William J. Brennan, Jr., *Reason, Passion, and "The Progress of Law,"* 10 CARDOZO L. REV. 3 (1988).

21. JEROME FRANK, LAW AND THE MODERN MIND (1930).

22. Maroney, *supra* note 12; Maroney, *supra* note 13. Going forward, the series will include explorations of judicial temperament; emotion, gender, and the female judge; and the impact of the diverse settings in which judges work (e.g., appellate versus trial dockets, family versus criminal court). The project, currently devoted to constructing a theory of judicial emotion, eventually will include an empirical component.

23. David Klein, *Introduction* to THE PSYCHOLOGY OF JUDICIAL DECISION MAKING, at xv (David Klein & Gregory Mitchell eds., 2010) (stating that emotion is an important but understudied "area of inquiry for students of judges").

24. Maroney, *supra* note 13, at 1492 nn.36–38 (citing, *inter alia*, Klein, *supra* note 23, at xv; W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26, 36 (1999)).

particularity. Such a deliberately narrow focus has been productively applied to other questions of law and emotion; consider, for example, recent work on regret and abortion rights,[25] as well as the relevance of happiness to regulatory law.[26] The narrower focus allows for a sharper image.

Third, this Article promises to have real-world impact. Judging the propriety of instances of judicial anger is a regular feature of the case law, and thus is important doctrinally.[27] The model proposed herein demonstrates how a previously undertheorized—or, one might less charitably say, sloppy—area of law can be afforded greater rigor. Judges, too, stand to benefit. Just as medical professionals increasingly are taking note of the emotional aspects of their work, attending to which improves job satisfaction and performance, judges are poised to begin doing the same.[28] This author's prior work has sparked that development;[29] this Article will further it. Developing judicial awareness of anger and the ways in which it can be managed is particularly critical given the frequency with which angry judges are accused of bias and misconduct.[30]

The Article proceeds as follows. Part I briefly encapsulates this author's prior work showing that judicial emotion is both inevitable

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25. Chris Guthrie, Carhart, *Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008).

26. John Bronsteen et al., *Welfare as Happiness*, 98 GEO. L.J. 1583 (2010); *see also* John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009).

27. *See infra* Part II (discussing doctrinal treatment of judicial anger episodes).

28. Maroney, *supra* note 13, at 1517–19 (drawing parallel to the medical profession's move toward emotional engagement); *see also* Leeat Granek, *When Doctors Grieve*, N.Y. TIMES, May 27, 2012, at SR12 (describing study showing that oncologists are inadequately prepared to cope with emotional demands of job, with concrete impacts on quality of care).

29. Since the publication of *Emotional Regulation*, this author has been approached with requests to work with judges to develop judicial training around issues of emotion, both in the United States and elsewhere. One such training is now being planned, for example, with the Ecole Nationale de la Magistrature in Paris.

30. *See, e.g.*, Lynda Cohen, *Atlantic County Superior Court Judge—Accused of Screaming at a Woman During a Custody Hearing—Apologizes but Denies Ethics Violation*, PRESS OF ATLANTIC CITY, Sept. 4, 2010, http://www.pressofatlanticcity.com/news/breaking/article_b22e6be8-b755-11df-b0a1-001cc4c03286.html; Lise Olsen, *Secrecy May Help Misbehaving Judges*, HOUSTON CHRON., Dec. 14, 2009, http://www.chron.com/news/houston-texas/article/Secrecy-may-help-protect-misbehaving-judges-1737681.php (federal judge drew complaints about "bursts of temper" for years before "alcohol, emotional and judgment problems landed him behind bars"); Kerri Rempp, *Neb. Judge Reprimanded for Behavior in Custody Case*, RAPID CITY J., June 14, 2010, http://rapidcityjournal.com/news/article_57599ddc-77b3-11df-bec2-001cc4c03286.html (stating that a judge was censured for "angry and condescending tone and demeanor"); Robert H. Tembeckjian, Op-Ed., *How Judges Hide from Justice*, N.Y. TIMES, May 22, 2005, at 25(L) (stating that the New York Commission on Judicial Conduct "censured a Brooklyn Criminal Court judge for coming off the bench in unprovoked anger and grabbing and screaming at a defense lawyer").

and not necessarily—or even usually—a bad thing. Judges are human, and emotion is central to human life: it reflects a rational assessment of the world, motivates action, and enables reason. The emotionless judge is a dangerous myth. But though judicial emotion cannot be eliminated, it can be well regulated. The Part briefly distinguishes between regulation efforts that are counterproductive and those that help a judge steer the correct emotional course. It then moves from emotion in general to anger specifically. It presents a summary of that emotion and its core attributes, engaging first with the ancient philosophical debate over whether anger ever is justifiable, and (after answering in the affirmative) outlining the physical and psychological effects with which it is associated. Finally, it explains that, among the emotions judges are likely to feel in the course of their work, anger is the most visible and readily identified.

Part II demonstrates the reality of judicial anger. It scours case law, news reports, new-media sources such as YouTube, and judges' self-reports to discern both the common objects of, and reasons for, judicial anger. Angry judges' most frequent targets are lawyers, who occupy first place by a considerable distance. Following lawyers are litigants, witnesses, and—perhaps surprisingly—other judges. The most common prompts for such anger are incompetence, disrespect, unwarranted harm inflicted on others, and lies. Judicial anger is not unusual and is not the mark of a "bad judge." However, particular judges appear to have more difficulty than others in handling anger. Though the Article does not attempt to analyze the psychological makeup of individual judges, the findings of this Part suggest that certain judges seem prone to anger states that are relatively frequent and extreme.[31]

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31. This sort of judge—some of whom are mentioned in this Article—will be analyzed in greater depth in the next article in this series, focusing on judicial temperament. Temperament is notoriously ill-defined, though all appear to concur that (whatever it is) it is extremely important. I anticipate proposing that lack of a proper judicial temperament should be understood to consist of poor emotion-regulation skills in persons with high levels of trait anger.

It is worth noting here that, while complaints about temperament usually focus on behavior in the professional setting, expressions of anger in a judge's personal life sometimes spark debate over fitness to serve. For example, Judge William Adams of Texas is under fire because his daughter posted to YouTube a video of him angrily beating her eight years earlier. The beating was a punishment for illegally downloading files to her computer. The incident received widespread press coverage, and many people have called for Adams to be removed from the bench. *See* Melissa Bell, *Hillary Adams Hopes Father, Judge William Adams, Will Repent After She Posted Violent YouTube Video*, WASH. POST, Nov. 3, 2011, http://www.washingtonpost.com/blogs/blogpost/post/hillary-adams-says-she-posted-violent-youtube-video-in-hopes-her-father-judge-william-adams-would-repent/2011/11/03/gIQAjoZliM_blog.html (describing popular outcry and official investigation after video went "viral" and daughter appeared on the Today show).

Having shown judicial anger as it is, Part III takes on the issue of how it ought to be. It presents a new theoretical model, that of the *righteously angry judge*. It begins by noting that the audience to judicial anger (whether the public, members of the media, or reviewing courts) tends to evaluate the propriety of anger states along two axes. The first is justification, or the reasons for the anger; the second is manifestation, or the manner in which it is experienced and expressed. The Part deepens the analysis of those two axes, which it positions as the core components of righteousness.

Focusing first on justification, it argues that anger can be a legitimate judicial experience, and a legitimate basis for judicial action, with the threshold condition being that it rest on good reasons. A reason is "good" if its premises are factually accurate, if it is relevant to an issue properly before the judge, and if it reflects good values. The Part then uses concrete examples to show how good and bad reasons can be distinguished. For example, it demonstrates that, when commingled with contempt, judicial anger conveys a belief in the judge's superiority.[32] Because judges in a democratic society have no claim to superiority, but only to authority, such anger reflects a fundamentally bad judicial value.

Good reasons are the threshold condition; however, judges' anger also must manifest in an acceptable way. Judicial anger manifestation embraces both the judge's own experience of anger and the way in which she expresses that anger to others. In its focus on manifestation, the Part transitions from philosophy to affective science, using that science to explain anger's impact on behavior. Anger, it shows, has distinct effects on the processes and outcomes of decisionmaking—for example, a tendency to spur quick decisions that rely on heuristics. It also is associated with distinct modes of expression—for example, a tendency to spur physical approach. Again using concrete examples, the Part demonstrates how judicial anger is, and ought to be, experienced and expressed. Importantly, it also shows how emotion-regulation skills—the tools we use to shape what emotions we have, when we have them, and how we express them[33]—can help judges manifest anger so as to maximize its benefits and minimize its dangers.

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32. Paul Ekman, *Antecedent Events and Emotion Metaphors*, *in* THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 146, 147 (Paul Ekman & Richard J. Davidson eds., 1994) (defining contempt as "feeling morally superior to someone").

33. James J. Gross, *Antecedent- and Response-Focused Emotion Regulation: Divergent Consequences for Experience, Expression, and Physiology*, 74 J. PERSONALITY & SOC. PSYCHOL. 224, 224 (1998).

The Part concludes by encapsulating the new model. The righteously angry judge is angry for good reasons, experiences and expresses that anger in a well-regulated manner, and uses her anger to motivate and carry out the tasks within her authority. Righteously angry judges deserve not our condemnation but our approval.

I. JUDICIAL EMOTION AND ANGER

Before analyzing how and why judges get angry, it is important first to establish why judicial emotion warrants our attention; what is special about anger; and how anger can be identified.

A. Judicial Emotion: Its Inevitability and Potential Utility

The standard legal story is that judges ought to be—and are capable of being—emotionless. As I have explained elsewhere, since the time of the Enlightenment ideas of the "good judge" have included the command that such a judge be "divested of all fear, anger, hatred, love, and compassion."[34] Over the course of the last century, this ideal—once considered a fundamental tenet of Western jurisprudence[35]—has been somewhat moderated. Few today would dispute that judges are human, that humans experience emotion, and that judges therefore experience emotion.[36]

However, our legal culture continues to insist that such judicial emotion be tightly controlled. Justice Sotomayor reflected the now-prevailing view when she testified at her 2009 confirmation hearings, "We're not robots [who] listen to evidence and don't have feelings. We have to recognize those feelings and put them aside."[37] Under this postrealist account, judicial emotion is to be temporally isolated—that is, experienced only at a predecisional moment—and operationally neutered—that is, disabled from exerting any effects on behavior and decisionmaking.[38] At critical moments of deliberation and action, the judge is still expected to be emotionless.

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34. Maroney, *supra* note 12, at 630–31 (quoting THOMAS HOBBES, LEVIATHAN 203 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651)).

35. Karl Georg Wurzl, *Methods of Juridical Thinking* (1904), *reprinted in* SCIENCE OF LEGAL METHOD: SELECT ESSAYS 298 (Ernest Bruncken & Layton B. Register trans., 1917).

36. Maroney, *supra* note 13, at 1487.

37. *Id.* at 1483 (quoting Andrew Malcolm, *Sotomayor Hearings: The Complete Transcript, Part 1*, TOP OF THE TICKET (July 14, 2009, 9:57 AM), http://latimesblogs.latimes.com/washington/2009/07/sonia- sotomayor-hearing-transcript.html.).

38. Maroney, *supra* note 13, at 1488–89 (tracing the evolution of thought on judicial emotion).

Even this moderated adherence to the ideal of emotionless judging is profoundly out of step with reality, for two reasons. First, even were it achievable, emotionlessness is not always a worthy goal, even for judges.[39] Second, emotion generally cannot be eliminated; it can only be regulated.[40]

A foundational tenet of modern psychology is that emotions are critical to human flourishing.[41] Emotions rest on thoughts: they reflect our evaluations of events in the world and the relationship of those events to our goals and values.[42] Emotions thus reflect reasons. They also motivate action in service of reasons. An emotion signals that an event is of particular importance, facilitates responsive behavior, and can signal our needs to others.[43] Emotion also is critical to substantive rationality, particularly the ability to make social judgments, choices regarding one's own welfare, and moral decisions.[44] These concepts find further intellectual backing in philosophical accounts.[45] Emotion and cognition both contribute to rationality, just as both emotional and cognitive dysfunction can detract from it.[46]

Were judges truly to suppress all emotion, then, they would lose something of importance. They would lose an important source of engagement with, and commitment to, the reality of their work. An Australian magistrate, for example, has expressed that a judge who loses contact with "that feeling for humanity," reflected in emotion, cannot do her job.[47] Judge Mark Bennett, in a rare instance of public self-disclosure, offers a similar assessment:

> Early in my second year as a judge I had a discussion about sentencing with a mentor judge . . . . I told him of the extraordinary difficulty and emotional toll I was encountering in sentencing. He said, "Don't worry, Mark, it will get much easier." Out of

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39. Maroney, *supra* note 12, at 668–71 (citing, *inter alia*, POSNER, FRONTIERS OF LEGAL THEORY, *supra* note 19, at 228, 242).

40. *See generally* Maroney, *supra* note 13.

41. Maroney, *supra* note 12, at 645 (citing, *inter alia*, JOSEPH LEDOUX, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE 37–72 (1996)) (noting consensus that "emotions are evolved mechanisms for maximizing survival chances").

42. *See, e.g.*, Richard S. Lazarus, *The Cognition-Emotion Debate: A Bit of History*, *in* HANDBOOK OF COGNITION AND EMOTION 3, 3 (Tim Dalgleish & Mick J. Power eds., 1999); Klaus R. Scherer, *Appraisal Theory*, *in* HANDBOOK OF COGNITION AND EMOTION, *supra*, at 637–63. For more in-depth explanation of this fundamental aspect of emotion theory, see Maroney, *supra* note 12, at 642–44, and Maroney, *supra* note 13, at 1501–03.

43. Maroney, *supra* note 12, at 644–45; Maroney, *supra* note 13, at 1502.

44. Maroney, *supra* note 12, at 645–48.

45. *Id.* at 647–48.

46. *Id.* at 646–48; *see also* Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375 (2006).

47. Maroney, *supra* note 13, at 1496 (citing Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32 J.L. & SOC'Y 590, 612 (2005)).

> respect, I did not respond, but I said to myself, if it gets easy to deprive someone of their liberty please shoot me. I have not been shot, and it hasn't gotten any easier.[48]

As one commentator noted during the public debate over judicial "empathy" prompted by the nomination of Justice Sotomayor, without emotions judges "don't know how much anything is worth."[49]

Though complete suppression of judges' emotions is not a worthy goal, regulation of those emotions is.[50] Like all humans, judges can (and do) exert energy to shape what emotions they have, when they have them, and how those emotions are experienced and expressed.[51] The innate human capacity for regulation allows us continually to try and steer the emotional course best suited to the situation at hand.[52] This Article delves more deeply into judicial anger regulation at a later juncture.[53] For present purposes, it is sufficient to note that suppression and denial—efforts simply not to feel what one wants not to feel, or to pretend one is not feeling it—tend to be highly counterproductive, especially for judges.[54] This is as true for anger as for other emotions. In contrast, recognizing and engaging with emotion allows judges to rethink, change, or accept it.[55] Engagement strategies provide the greatest hope for helping judges maintain access to emotion in a way that furthers, not hinders, job performance.[56]

These propositions together suggest that judicial emotion, including anger, is inevitable; that at best it can be managed, not eliminated; and that such management need not have the invariant goal of utmost minimization, because judicial emotion might sometimes be appropriate, even valuable.

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48. Mark W. Bennett, *Heartstrings or Heartburn: A Federal Judge's Musings on Defendants' Right and Rite of Allocution*, THE CHAMPION, Mar. 2011, at 26 n.1.

49. David Brooks, Op-Ed., *The Empathy Issue*, N.Y. TIMES, May 29, 2009, at A25.

50. Maroney, *supra* note 13, at 1498 ("Literal absence of emotion cannot . . . be the desired end of [the] regulatory effort.").

51. *Id.* at 1486 (citing James J. Gross & Ross A. Thompson, *Emotion Regulation: Conceptual Foundations*, *in* HANDBOOK OF EMOTION REGULATION 3, 7–8 (James J. Gross ed., 2007)).

52. *Id.* at 1500 (citing, *inter alia*, DANIEL M. WEGNER, WHITE BEARS AND OTHER UNWANTED THOUGHTS: SUPPRESSION, OBSESSION, AND THE PSYCHOLOGY OF MENTAL CONTROL 122–24 (1989)).

53. *See infra* Part III.B.

54. Maroney, *supra* note 13, at 1532–50.

55. *Id.* at 1509–27.

56. *Id.* at 1550–51.

B. Anger: A Summary

We now turn to the specific case of anger.[57] Anger is a complicated emotion, but one about whose basic properties philosophers and psychologists agree.[58] Anger consistently is associated with a sense that the self, or someone or something one cares about, has been offended or injured, coupled with a belief that another person was responsible.[59] The responsible person must appear to have acted culpably, either because she intended to harm or was neglectful where care was warranted.[60] To experience anger—as opposed to, say, despair—in response to such a trigger, one generally also holds some sense of being able to influence the situation or cope with it.[61] Change any one of these components and you change the emotion. For example, if one perceives herself to be the responsible agent, she will feel guilt or shame; if a situation (say, a devastating earthquake), not a person, is responsible, she generally will feel

57. *See, e.g.*, Leonard Berkowitz, *Anger*, *in* HANDBOOK OF COGNITION AND EMOTION, *supra* note 42, at 411, 418 (discussing theoretical debate over how cleanly emotions can be distinguished); *cf.* Lisa Feldman Barrett, *Are Emotions Natural Kinds?*, 1 PERSP. ON PSYCHOL. SCI. 28, 29 (2006).

58. Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition*, 19 J. BEHAV. DECISION MAKING 115, 117 (2006) (a "remarkably consistent picture of anger emerges" from the psychological literature: anger is "associated with a sense that the self (or someone the self cares about) has been offended or injured," a "sense of certainty . . . about what has happened" and "what the cause of the event was . . . that another person . . . was responsible," and that "the self can still influence the situation" or has the "power or ability to cope" with it).

59. RICHARD S. LAZARUS, EMOTION AND ADAPTATION 222–25 (1991) (anger supposes an external human agent who ought to be held accountable); Berkowitz, *supra* note 57, at 415–16 ("appraisal conceptions" of anger locate the emotion in an appraisal of "offense or mistreatment," and "disapproval of someone's blameworthy action"); Paul M. Litvak et al., *Fuel in the Fire: How Anger Impacts Judgment and Decision-Making*, *in* INTERNATIONAL HANDBOOK OF ANGER, *supra* note 6, at 287, 291; *see also* Paul Ekman, *Facial Expressions*, *in* HANDBOOK OF COGNITION AND EMOTION, *supra* note 42, at 301, 318 ("The specific event which gets an American angry may be different from what gets a Samoan angry" because what one "finds provocative, insulting or frustrating may not be the same across or within cultures," but the core "theme will be the same.").

60. This component of anger, central to many philosophical and psychological accounts, likely applies only to the anger of older children and adults. *See* Nancy L. Stein & Linda J. Levine, *The Early Emergence of Emotional Understanding and Appraisal: Implications for Theories of Development*, *in* HANDBOOK OF COGNITION AND EMOTION, *supra* note 42, at 383, 395 ("[W]ith increasing age, children become . . . more likely to respond with anger when harm is intentionally caused by another person."). Further, children and adults sometimes respond with anger to situations caused by no culpable agent, such as when they experience pain. *See* AVERILL, *supra* note 6, at 127–46; Stein & Levine, *supra* (acknowledging such "irrational" anger, which may be more properly understood as distress that primes one to interpret other stimuli as angering).

61. LAZARUS, *supra* note 59.

sadness; and if she has no power to influence or cope with the situation, she likely will feel fear and anxiety.[62]

This Section begins by engaging with the ancient debate, relevant to our contemporary one, over anger's justification. It then presents a brief overview of how anger is experienced and expressed.

1. Justifying Anger

An important threshold question is whether anger *ever* can be justified. Contemporary ambivalence on this question reflects long-standing philosophical and theological debates. The anti-anger position is associated with Seneca, considered the greatest of the Roman Stoics, and the opposing one with Aristotle.[63] Seneca and Aristotle agreed on a number of fundamental principles, such as the fact that anger is directed at persons who culpably have inflicted harm on someone or something within one's zone of care,[64] and that it predisposes one to pursue punishment or correction of the wrong.[65] They agreed, further, that making such a complex evaluative

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62. *Id.*; *see also* Berkowitz, *supra* note 57, at 415 (in differentiating emotions, "interpretation of the cause" is "vital"); *id.* at 417 (citing N.L. Stein & L.J. Levine, *Making Sense Out of Emotion*, *in* PSYCHOLOGICAL APPROACHES TO EMOTION 45–73 (N.L. Stein et al. eds., 1990)) (if a person believes the situation cannot be remedied, she is more likely to be sad). In psychology, these underlying reasons are referred to as the emotion's "appraisal" structure. PAULA M. NIEDENTHAL ET AL., PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES 13–17 (2006) (examining cognitive appraisal theories); NUSSBAUM, *supra* note 16, at 19–79, 139–69; Klaus R. Scherer, *Evidence for Both Universality and Cultural Specificity of Emotion Elicitation*, *in* THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS, *supra* note 32, at 172, 179–234.

63. AVERILL, *supra* note 6, at 74. Seneca's actual opposite might have been Lacantius, who argued "that anger was given by God for the protection of humankind." *Id.* at 75–76. Aristotle's more nuanced position has unquestionably been more influential, however, and is more often offered as the relevant contrast.

64. I coin the term "zone of care" to encompass all persons on whose behalf one might properly be angry. *See* ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT 253 (1990) (though Aristotle defined anger as an injury to oneself or one's friends, it is possible to broaden the concept to all those about whom one is motivated to care, and with whom one can find a way to empathize).

65. AVERILL, *supra* note 6, at 74; *see also* NUSSBAUM, *supra* note 16, at 29 (anger requires this set of beliefs: "that some damage has occurred to me or to something or someone close to me; that the damage is not trivial but significant; that it was done by someone; probably, that it was done willingly"). Aristotle and the other Greek philosophers developed a sophisticated taxonomy of anger terms, including *menis* (wrath), *chalepaino* (annoyance), *kotos* (resentment), *cholos* (bitterness or bile), *thumos* (zeal), and *orgē* (intense anger). AVERILL, *supra* note 6, at 80; Potegal & Novaco, *supra* note 8, at 13–14. Philosophers and psychologists sometimes contest whether one can be angry only at another human, *see* NUSSBAUM, *supra* note 16, at 130 n.95, but most agree that anger at a nonhuman requires anthropomorphizing. AVERILL, *supra* note 6, at 95 ("[W]e all sometimes become angry at inanimate objects, and at events that are justified and/or beyond anyone's control. But in such circumstances we also typically feel somewhat foolish and embarrassed about our own anger. Hence, the exceptions tend to prove (test) the rule.").

judgment requires the exercise of reason.[66] Where they parted ways was on the fundamental question of whether anger always is destructive or sometimes is productive.

Seneca laid out his position in *De Ira*, the first known work devoted entirely to anger.[67] For Seneca, anger's dependence on reason did not redeem the emotion, for he believed it to be grounded in the wrong use of reason. First, Seneca advocated that the cognitive judgments underlying anger represent false valuations of the world and one's place in it. Affronts to one's pride, for example, should not arouse anger, because one should not be prideful.[68] Second, Seneca argued that the thinking underlying anger necessarily reflects illogic and weakness.[69] Third, he posited that anger depends on a free-will choice to yield to the feeling.[70] Though the ability to make such a choice stems from humans' status as rational agents, the consequences of so choosing are irrational. Once yielded to, anger—"the most hideous and frenzied of all the emotions"—vanquishes the reason on which its existence depends.[71] Anger in this quintessentially Stoic view therefore is a mistake in all instances.[72] And because Seneca framed anger as a choice, he could call it a blameworthy mistake, in a way that a primal urge is not.

Seneca wrote largely in response to the account advanced centuries earlier by Aristotle. In contrast to the Stoics, Aristotle believed that anger could be entirely good and proper.[73] One *should* value one's own safety, dignity, and autonomy, just as one should care about the safety, dignity, and autonomy of others. One should feel a strong impulse to respond to affronts to those goods, for only thus are those goods appropriately valued and the world set right.[74] Anger is in this view "commingled with, if not equivalent to, justice itself."[75]

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66. AVERILL, *supra* note 6, at 83 (quoting SENECA, DE IRA, Loeb Classical Library edition, AD 40-50/1963, at 115 ("Wild beasts and all animals, except man, are not subject to anger; for while it is the foe of reason, it is nevertheless born only where reason dwells.")).

67. *Id.* at 82–83 (citing SENECA, DE IRA).

68. GERTRUDE GILLETTE, FOUR FACES OF ANGER: SENECA, EVAGRIUS PONTICUS, CASSIAN, AND AUGUSTINE 7 (2010) (explaining that, to Seneca, anger always is caused either by arrogance (overvaluation of the self) or ignorance (wrongly thinking things of the world to have value)).

69. AVERILL, *supra* note 6, at 85 (quoting SENECA, DE IRA, *supra* note 66, at 267: "No mind is truly great that bends before injury. The man who has offended you is either stronger or weaker than you: if he is weaker, spare him; if he is stronger, spare yourself.").

70. WILLIAM S. ANDERSON, ANGER IN JUVENAL AND SENECA 153 (1964) (the mind causes *ira* by assenting to it); AVERILL, *supra* note 6, at 83.

71. AVERILL, *supra* note 6, at 83 (quoting SENECA, DE IRA, *supra* note 66, at 107).

72. *Id.* at 75, 83.

73. *Id.* at 82.

74. WHAT IS AN EMOTION? CLASSICAL READINGS IN PHILOSOPHICAL PSYCHOLOGY 44–52 (Cheshire Calhoun & Robert C. Solomon eds., 1984) [hereinafter WHAT IS AN EMOTION?] (quoting

Not all anger, though, is the equivalent of justice in the Aristotelian account. Only virtuous anger is just.[76] To be enraged with a person who has violated one's mother is virtuous, as not to feel rage would signify an inadequate valuation of one's mother.[77] In contrast, to become furious at a slave for committing some small error in front of guests is not virtuous, for it bespeaks too heavy an investment in displaying one's status as a superior.[78]

Reason thus is as central to Aristotle's account as to Seneca's, but it serves as anger's most redeeming quality. Reason supplies not just the underlying appraisal that triggers the emotion, but also the mechanism by which one evaluates it. Through reason one determines whether the beliefs and values reflected in angry feelings have a good factual and moral basis.[79] Moreover, reason helps us determine whether feelings and the actions they spur are commensurate to the insult. Aristotle wrote that, as to anger, "we stand badly if we feel it violently or too weakly, and well if we feel it moderately"[80]—the goal being not "an algebraic mean between two set quantities," but rather a response that is perfectly calibrated to the nature of the offense, the qualities of the offender, and the prospects for corrective action.[81]

With the competing visions thus understood, it is apparent that the Aristotelian view is the superior one with which to evaluate judicial anger. This is so, in large part, because it is the view that most accurately captures lived human experience. Whatever the rhetorical value of eschewing anger, our lives would be unrecognizable

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ARISTOTLE, NICOMACHEAN ETHICS) ("[T]hey are thought to be fools who fail to become angry at those matters they ought.").

75. Potegal & Novaco, *supra* note 8, at 18. Plato, too, took the position that anger was "a natural, open response to a painful situation." *Id.*; *see also* AVERILL, supra note 6, at 77 (explaining that, to Plato, anger became "allied with reason to protect the individual from wrongs perpetrated by others").

76. Antony Duff, *Virtue, Vice, and Criminal Liability*, *in* VIRTUE JURISPRUDENCE 193, 194–98 (Colin Farrelly & Lawrence B. Solum eds., 2008) (explaining Aristotelian virtue, in which reason and passion "speak with the same voice" and jointly manifest in right actions).

77. AVERILL, *supra* note 6, at 97 (explaining that all but Seneca agreed that one sometimes has "not only the right but the *obligation* to become angry"); WHAT IS AN EMOTION?, *supra* note 74, at 44–52 (quoting ARISTOTLE, RHETORIC) (anger is directed at persons who harm "those whom it would be a disgrace not to defend—parents, children, wives, subordinates").

78. The example is drawn from Seneca, who criticized anger triggered by "a slave's breaking of a cup" or "a subordinate's less-than-fawning subservience." NUSSBAUM, *supra* note 16, at 393. An Aristotelian virtue perspective would offer a different reason to criticize the emotion—not because it is angry, but because the appraisal giving rise to the anger is condemnable.

79. NUSSBAUM, *supra* note 16, at 29–31.

80. AVERILL, *supra* note 6, at 82 (quoting ARISTOTLE, NICOMACHEAN ETHICS 1105B25).

81. *Id.*

without it.[82] Not even Seneca appears actually to have believed his hard line; his real target was violence and cruelty, not anger per se.[83] The Aristotelian account similarly condemns needless violence and cruelty, but does not in the same stroke condemn all anger. That account instead invites us to dissect, educate, and shape this fundamental human experience through the power of our reason.

The best defense of the Stoic view in the judging context might be that a judge ought to accept the experience of anger solely for the purpose of discerning and judging its underlying reasons. At that point, the judge can choose to act on the basis of the reasons while leaving the emotion itself behind.[84] This account reflects Seneca's position that there is nothing done in anger that could not be done better under other influences and motives.[85] For example, he rejected arguments that anger might be necessary to action—as to motivate courage in battle—or might motivate a proper response to evil—as when one's mother has been raped.[86] Rather, the good warrior or son would act solely because, coldly considered, that action is the one best designed to further his goals. Thus, good underlying reasons could be divorced from all other aspects of the emotion.

While this account has superficial appeal, it is more semantic than substantive. First, the purported distinction is not so clean. As

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82. *Id.* at 31 ("More than most emotions, anger is often condemned as antisocial. . . . Yet anger is among the commonest of emotions."); *see also* NUSSBAUM, *supra* note 16, at 159–60 (stating that no human group has ever achieved the Stoic ideal, though it may aspire or purport to). Perhaps having a goal of total anger elimination could facilitate its minimization, which might be adaptive (particularly for persons with high trait anger); the more realistic goal of strategic minimization, however, could achieve that benefit without the dangers associated with striving for the unattainable. Maroney, *supra* note 13, at 1546–47 (detailing such dangers).

83. Seneca made his case against anger easier by focusing only on its most extreme manifestations. Where Aristotle contemplated a wide range of angering provocations, from minor insults to violent attacks, Seneca's examples are of unbridled rage and cruelty. AVERILL, *supra* note 6, at 85 (quoting SENECA, DE IRA) ("[If] anger suffers any limitation to be imposed upon it, it must be called by some other name—it has ceased to be anger; for I understand this to be unbridled and ungovernable."); *see also* ANDERSON, *supra* note 70, at 56–57; NUSSBAUM, *supra* note 16, at 393. Seneca's view on anger appears diametrically opposed to Aristotle's largely because of definitional sleight of hand.

84. This proposition was suggested by a number of participants, including judges, in pre-publication workshops of this Article.

85. ANDERSON, *supra* note 70, at 160 (explaining that Seneca wrote that the angry man should "rationally set about the punishment or the ending of the crime. Anger contributes nothing to this goal."); AVERILL, *supra* note 6, at 84; Potegal & Novaco, *supra* note 8, at 15–16 (stating that Seneca maintained that "both in sport and war, the disciplined combatants defeat the angry ones," just as Sun Tzu, a 4th century BC military strategist saw anger as a "fault upon which military commanders could capitalize").

86. ANDERSON, *supra* note 70, at 150 (stating that the worst sort of "iniurua," or a "gratuitous, unmerited, unexpected act of evil," is "the murder of one's father or rape of one's mother").

reasons are a necessary part of any emotion, to act on anger is in large part to act on reasons.[87] This does not settle the matter, though, as anger is a complex bundle consisting not just of reasons but also behavioral effects (described more fully in the sections to follow).[88] When a judge describes herself as acting on underlying reasons alone, she almost certainly is describing a process of tightly controlling those effects. The second rejoinder, then, is that the effort to isolate reasons from behaviors and to mold the latter ought to be understood as a form of emotion regulation.[89] The judge may, for example, keep her voice low and steady, take a break, or restrain an impulse to decide an issue quickly, letting her temperature cool first. Such a judge is not refraining from "acting out of anger"; she is choosing how to enact her anger in light of situational demands. She is regulating anger rather than setting it aside. This distinction *is* a substantive one. As this Article later explains, controlling angry behavior does not generally eliminate anger experience, and trying to achieve the latter often has deleterious effects. Nor should we presume that tamping down anger's behavioral concomitants is always the right path; those concomitants sometimes are useful, even for judges.[90] A judge who thinks of herself as engaging with her anger—both its reasons and its associated behaviors—is in a much better position to enact it appropriately than one who thinks of herself as not acting on it at all. The former perspective is encouraged by the Aristotelian account but forestalled by the Stoic one. In short, while stigma gives judges an incentive to draw this semantic distinction—acting on reasons sounds more palatable than acting on emotion—it is neither accurate nor justified.

Finally, the superiority of the Aristotelian account is evidenced by the number of allies it claims, both ancient and contemporary.[91] For example, the early Christian theologian Sir Thomas Aquinas defined anger much as Aristotle had—a judgment "by which

87. *See supra* Part I.A.

88. Kate Stith, in this vein, has suggested to this author that in this Article the term "moral disapproval" could be inserted every time "anger" appears, and would more accurately describe what we want from judges. I maintain, in contrast, that while moral judgment is a necessary part of anger, anger's other components merit recognition and, sometimes, approval.

89. *See infra* Part III.B.3.b.

90. *See infra* Part III.B.3.b.

91. Though Plato and Aristotle held differing views of emotions generally, their views on anger's redeeming qualities are surprisingly harmonious. Plato asserted that anger can be allied either with the rational portion of the *psychē*, as when it helps protect the individual from wrongdoing, or with the irrational portion, as when loss of control leads to rash deeds. AVERILL, *supra* note 6, at 77–78; *see also* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 93 (1880) ("[T]he violation of justice is injury," and "is the proper object of resentment, and of punishment, which is the natural consequence of resentment.").

punishment is inflicted on sin"—and maintained that, while it can be turned to bad ends, it is an indispensable aspect of justice.[92] That account is strongly embraced by virtually all contemporary philosophers of emotion,[93] and underpins virtually all of modern affective science.[94] This Article therefore analyzes the propriety of judicial anger through a fundamentally Aristotelian lens.

2. Anger's Core Characteristics

Seneca and Aristotle devoted close attention to anger not just because of its close relation with reason, but also because of its distinctive effects, alluded to in the prior Section. If their debate highlighted the importance of examining those effects, contemporary psychology has taken up that challenge. A robust literature demonstrates how, "[o]nce activated, anger can color people's perceptions, form their decisions, and guide their behavior."[95] Such effects, more closely scrutinized at a later juncture,[96] may be briefly synopsized as follows.

Anger is strongly associated with a sense of certainty, individual agency, and control.[97] These characteristics tend to predispose one to make quick decisions, privileging fast judgment over close analysis.[98] Anger also energizes the body and mind for action;[99] an angry person feels motivated to approach the offending situation

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92. AVERILL, *supra* note 6, at 87–90 (Aquinas synthesized Aristotelian thought with Christian teachings). Lacantius distinguished between uncontrollable rage and just anger, writing that the latter "ought not be taken from man, nor can it be taken from God, because it is both useful and necessary for human affairs." *Id.* at 87 (quoting LACANTIUS, DE IRA DEI).

93. Martha Nussbaum and Robert Solomon have been perhaps the strongest contemporary philosophical voices advocating that emotion—including anger—be regarded as both reflective of reasons and constitutive of reason. Maroney, *supra* note 12, at 644.

94. JOHN DEIGH, EMOTIONS, VALUES, AND THE LAW 12, 142 (2008) (reflecting modern philosophical consensus that thought is "an essential element of an emotion"); Maroney, *supra* note 12, at 644 (citing THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS, *supra* note 32, at 179–234.

95. Lerner & Tiedens, *supra* note 58, at 116; *see also id.* at 121–22 tbl.1 (synopsizing extant experimental literature on effects of anger on judgment and decisionmaking).

96. *See infra* Part III.B.2.

97. C.A. Smith & P.C. Ellsworth, *Patterns of Cognitive Appraisal in Emotion*, 48 J. PERSONALITY & SOC. PSYCHOL. 813, 813–38 (1985).

98. Lerner & Tiedens, *supra* note 58, at 126.

99. Emotions carry distinct "action tendencies," or physiological changes that prepare the body for particular sorts of action. C.E. IZARD, THE PSYCHOLOGY OF EMOTIONS 241 (1991) (stating that in anger "the blood 'boils', the face becomes hot, the muscles tense[,] [t]here is a feeling of power and an impulse to strike out"); Berkowitz, *supra* note 57, at 411, 412–13 (explaining anger's physiological concomitants, including increased heart rate, muscle tension, and a "hot" feeling), 424 (emotions' "action readiness" tendencies).

and change it.[100] Though the goal of anger is thus in an important sense positive, the means by which change is pursued can be destructive.[101] Whether acts that are immediately destructive—such as violent attack or sharp words—ultimately are positive or negative depends, of course, on context. Raising my voice at one who has insulted me can quickly signal how seriously I take the insult and jolt the offender into an apology; raising my voice at an infant who is crying from hunger serves no such purpose.

Moreover, anger can be—and often is—coexperienced with other emotions.[102] One can feel simultaneously angry and sad, disgusted, or contemptuous. An angry person can even feel hope and joy, as when she is contemplating vengeance.[103] Combinations are as varied as the triggering events.

Finally, anger comes in many flavors. *State* anger refers to an anger episode consisting of the above-described components. Such episodes can be brief or they can linger; short spurts of anger often are experienced as being "hot," while lingering anger can harden into a "cold" state.[104] Anger states can be experienced as uncontrollable, almost as if imposed by a force outside the self, or they can feel more manageable; the difference generally hinges on the emotion's intensity.[105] *Trait* anger, in contrast, refers to a baseline tendency to feel angry.[106] Persons with high levels of trait anger are the ones we describe as having a short fuse or a "choleric disposition"; anger defines much of who they are and how they are perceived.[107]

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100. Berkowitz, *supra* note 57, at 416–17 (angry persons focus on goal of changing undesirable situations), 424–25 (summarizing research showing that anger often is experienced as an urge toward verbal expression, such as screaming, and physical aggression, perhaps with the aim of doing injury); Eddie Harmon-Jones et al., *The Effect of Manipulated Sympathy and Anger on Left and Right Frontal Cortical Activity*, 4 EMOTION 1, 1–6 (2004) (anger has strong approach tendency); Litvak et al., *supra* note 59, at 291.

101. Nico H. Fridja et al., *Relations Among Emotion, Appraisal, and Emotional Action Readiness*, 57 J. PERSONALITY & SOC. PSYCHOL. 212 (1989) (destructive means include aggression and fighting); *see also* LAZARUS, *supra* note 59, at 225 (the angry person may be "potentiated" toward open aggression).

102. Lerner & Tiedens, *supra* note 58, at 131; Mick J. Power, *Sadness and Its Disorders*, *in* HANDBOOK OF COGNITION AND EMOTION, *supra* note 42, at 497, 503–07 (suggesting that "two or more basic emotions might lock an individual into a complex emotional state," such as with a combination of sadness and anger, "a common experience" typifying phenomena such as grief).

103. WHAT IS AN EMOTION?, *supra* note 74, at 44; Lerner & Tiedens, *supra* note 58, at 130.

104. Berkowitz, *supra* note 57, at 414. The speed with which anger arises also can vary. *See* Litvak et al., *supra* note 59, at 290 (explaining that "practiced" anger, as is common within a family, ignites quickly when "scripts" are activated).

105. AVERILL, *supra* note 6, at 164, 199, 207–08.

106. *Id.* at 260.

107. Tanja Wranik & Klaus R. Scherer, *Why Do I Get Angry? A Componential Appraisal Approach*, *in* INTERNATIONAL HANDBOOK OF ANGER, *supra* note 6, at 243, 256; *see supra* note 31

As this brief overview reveals, anger is in an important sense rational. Contrary to stereotype, it is triggered by reasons—and a fairly constrained set of reasons at that, having to do with culpable infliction of unwarranted harm. True to stereotype, it disposes the angry person to action. Like all emotions, anger is multifaceted, carrying a complex set of attributes that can be deployed poorly or well—including, as the remainder of the Article will show, by judges.

C. The Ubiquity and Visibility of Judicial Anger

Anger is particularly important to examine on its own, because it is one of the most common emotions that judges will experience. This is true because the sorts of situations and stimuli that tend to trigger anger commonly are present in judges' work environments. Not only will judges get angry, but they inevitably will express that anger to others. Among the judicial emotions, anger is also likely the easiest to see. Not only is anger one of the most easily recognized emotions, but (as the following Part will demonstrate) among the judicial emotions its expression appears to be the least stigmatized.

Anger likely is one of the most common judicial emotions, first, because it is one of the most common emotions that humans experience in our everyday lives.[108] Anger is a particularly common emotion to experience while at work.[109] Judges' work being what it is, anger triggers are especially likely to be a regular feature of judges' days. Many of the people with whom judges must interact, whether directly or indirectly, are angry. Litigation reflects disputes; disputes entail accusations of wrongdoing and attributions of blame; the parties therefore tend to start legal proceedings already angered.[110] Moreover, the processes of litigation themselves tend to make people—particularly lawyers—angry. (Nonlawyers may not understand why being served with an improper interrogatory, or having opposing counsel repeatedly reschedule a deposition, can be so infuriating, but it is.) Judges therefore are exposed to a good deal of others' anger.

(proposing that trait anger, rather than state anger, is a core component of poor judicial temperament).

108. AVERILL, *supra* note 6, at 162–63.

109. *See* ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING (1983).

110. *See, e.g.*, Josh Getlin, *Law and Disorder; Tart, Tough-Talking Judge Judy Sheindlin Presides over the Grim Pageant of Dysfunction Known as Manhattan's Family Court*, L.A. TIMES, Feb. 14, 1993, at E1 (stating that in family court, "[e]verything that can go wrong with an American family plays out on its stage daily"); Don Van Natta, Jr., *Dispute of Court Officers and Judges Escalates*, N.Y. TIMES, Nov. 22, 1995, at B3 ("With so many people and so many emotions jammed into such small spaces," New York City courts can be hard to manage.).

Judges must actively manage that anger, including by encouraging negotiation, policing disputes, and curtailing outbursts.[111] Through constant exposure to such unpleasant interactions, a judge may find herself getting angry, too; this is particularly so if her work conditions are stressful and physically uncomfortable.[112] At a minimum, she may get irritated, which shortens her fuse.[113] That fuse often will find a spark: as the following Part demonstrates, the people who surround the judge often act in a way reasonably calculated not just to make them angry at one another, but also to make her angry at them.

Anger also is relatively easy to identify. In addition to its strong tendency to motivate approach, it tends to manifest in a characteristic facial expression, typically including a frown and deeply furrowed brow.[114] It also changes the quality of one's voice, making it sharper, louder, and more staccato.[115] Importantly, this cluster of anger characteristics is remarkably consistent. Across cultures, people are more likely correctly to identify a typified "anger face" than any other facial expression of emotion.[116]

All of anger's typical manifestations, though—on face, voice, and body—can be deliberately regulated, and sometimes overridden.[117] For example, a person can put on a "poker face," calm the voice, and restrain herself from shaking her fist.[118] Some people are quite adept

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111. Maroney, *supra* note 13, at 1495 (citing Anleu & Mack, *supra* note 47, at 614).

112. LAZARUS, *supra* note 59, at 419–21 (noting studies that show "exposure to irritating cigarette smoke, foul odors, high room temperatures" and similar conditions "can generate anger and aggression"). One theory why this is so is that the unpleasant feelings generated by aversive stimuli prime the person to interpret ambiguous stimuli in a manner consistent with anger. *Id.* at 423–24; *see infra* Part III.B.2. (explaining how anger at one object can predispose a person to become angry at another); *cf.* Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 398 (2006) (offering theory of emotional contagion, by which one assumes the emotional state of another).

113. *See* MaryAnn Spoto, *N.J. Court Punishes Judge for Yelling at Woman*, NJ.COM (June 17, 2011, 6:00 AM), http://www.nj.com/news/index.ssf/2011/06/nj_court_punishes_judge_for_ye.html (explaining that a judge attributed angry "tirade" against mother in visitation case to "being 'burned out' from his years in family court with its increased caseload and decreased staff"); *see also* LAZARUS, *supra* note 59, at 418 (noting close relationship between anger and irritation).

114. Ekman, *supra* note 59, at 301, 305, 308–09.

115. NIEDENTHAL ET AL., *supra* note 62, at 49–50 (describing studies showing emotions' effect on speech).

116. Jonathan Haidt & Dacher Keltner, *Culture and Facial Expression: Open-ended Methods Find More Expressions and a Gradient of Recognition*, 13 COGNITION & EMOTION 225, 256 (1999). Evolutionary theorists posit that humans recognize anger expressions most readily because another person's anger is relatively likely to signal a survival threat. *See* Berkowitz, *supra* note 57, at 412–14 (describing research on cross-cultural consistency of many anger attributes).

117. Maroney, *supra* note 13, at 1501–12 (distilling research).

118. *Id.*

at such regulation, while others are not, and people both manifest and mask anger differently.[119] The possibility of effective regulation and the reality of individual variation can frustrate the ability reliably to identify anger. Familiarity helps. One often can tell if one's spouse is angry, for example, by detecting subtle iciness in her vocal tone, or noticing that he is drumming his fingers heavily.[120] Absent such familiarity, masked anger can go undetected.

The possibility of effective masking poses a challenge for identifying judicial anger. Consider a YouTube video of a court proceeding, which shows a criminal defendant spitting in a judge's face.[121] In that particular clip, the one emotion the judge clearly displays is surprise, and then her face quickly reverts to neutral.[122] The judge might have been angry, and might have deliberately kept that anger from showing (perhaps because she believed that is what a judge is supposed to do), but one cannot tell from that video.[123]

A converse problem must also be noted. Because anger is associated with physical aggression, one may assume that when aggression is observed the actor must have been angry. This is not the case.[124] An aggressor may act instrumentally—imagine a calculating paid assassin. One also may be aggressive from motives of self-defense or defense of others. For example, two Florida judges recently gained some infamy for acting aggressively in court. One (whose actions also were captured in a video posted on the Internet) jumped off the bench to join others in overpowering a defendant who was attacking a

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119. *Id.* at 1539–41 (citing, *inter alia*, Sander L. Koole, *The Psychology of Emotion Regulation: An Integrative Review*, 23 COGNITION & EMOTION 4, 6 (2009)).

120. William Lyons, *The Philosophy of Cognition and Emotion*, *in* HANDBOOK OF COGNITION AND EMOTION, *supra* note 42, at 21, 36 ("[O]ne person might display anger by banging the table, shouting, and slamming the door," while another "might display it by being unusually quiet and undemonstrative, and by closing the door with studied carefulness as he left the room with exaggerated courtesy.").

121. *How to Piss Off the Judge*, YOUTUBE (Aug. 13, 2009), http://www.youtube.com/watch?v=uCNo4ky6GXE. Note that the title reflects the poster's assumption that the act of spitting *did* anger the judge.

122. *Id.* The typical "surprise" face entails a widening of both eyes and the mouth, forming an "O" shape. NIEDENTHAL ET AL., *supra* note 62, at 126. Particularly in the slow-motion portion of the video, one can see these markers of surprise on the judge's face for a quick moment.

123. Tellingly, in a longer version of the video one can gather that the judge *was* angry. That version shows her leaning close to the defendant and telling him that she is about to recuse herself, which will ensure that she will "never have to see him for one further second." Her voice, facial expression, and words are strongly suggestive of controlled anger. He then spits at her. After he spits and she displays a surprised-then-neutral face, she sits back, folds her arms across her chest, and fixes her face into a glower. *Suspect Spits on Judge*, YOUTUBE (Aug. 6, 2009), http://www.youtube.com/watch?v=vuj2_7_uaAQ. Those bookends provide the needed clues to her emotional state. Many glimpses of a judge's actions will lack such bookends.

124. AVERILL, *supra* note 6, at 30–31.

witness;[125] the other pulled a gun from under his robe in similar circumstances.[126] These judges might have been angry when they acted, or they might have become angry upon reflecting on the events. But because their actions need not have been triggered by anger, they are not evidence of it.[127] Further, judges may sometimes feign anger in order to make a point.[128]

Thus, a judge may be angry and we may not be able to tell, and a judge may act aggressively, or otherwise look and sound angry, but not be angry. Still, anger remains a *relatively* visible target. Where a typical anger trigger is present; where the judge allows typified anger expressions, such as a glowering face or raised voice; and where acts of aggression—not just actual violence, but pointing, shaking or banging a fist, or issuing threats—are accompanied by such facial and vocal clues, we can be fairly sure it is anger we are seeing.[129]

Finally, we do not have to hunt aggressively for such moments because anger is the emotion judges appear to feel most free to express. Emotional expression generally is highly stigmatized in judges, and long has been.[130] This remains true for anger to some

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125. Elie Mystal, *Judge of the Day: For Real*, ABOVE THE LAW (Mar. 25, 2009), http://abovethelaw.com/2009/03/judge-of-the-day-for-real/.

126. David Lat, *Judge of the Day: John Merrett*, ABOVE THE LAW (Mar. 28, 2007), http://abovethelaw.com/2007/03/judge-of-the-day-john-merrett/.

127. In contrast, when a judge of the Western District of Tennessee grabbed the lapels of an attorney, his aggressive behavior was by all accounts motivated by anger. *See Federal Judge Agrees to Six-Month Leave of Absence, Counseling, After Claims He Mistreated Lawyers*, ASSOCIATED PRESS, Aug. 31, 2001, *available at* http://www.law.com/jsp/article.jsp?id=900005523602&Federal_Judge_Agrees_to_SixMonth_Leave_of_Absence_Counseling_After_Claims_He_Mistreated_Lawyers.

128. Such "fake" anger is of course difficult to distinguish from "real" anger, particularly if the judge is skilled at fakery. In conversation with judges this author has found that they frequently speak of doing precisely this, often to give their words greater gravitas and ensure that people are listening. This author also has observed this tactic with some frequency in juvenile courts. When assigning consequences to juveniles, particularly when those consequences are relatively lenient, the judge may "gin up" a range of emotional displays designed to impress seriousness on the youth, make him feel lucky for not having received a harsher consequence, and make him afraid of reoffending. When asked, juvenile judges often will freely admit using that tactic. When an advocate knows the judge well enough, these theatrical displays are easy to recognize.

129. The primary danger in relying on those signals is, of course, the possibility of "ginned up" anger displays. *See, e.g., infra* note 161. Distinguishing between real and feigned anger, unfortunately, has an "I know it when I see it" quality. One way to work through that difficulty would be to ask the judge whether she was engaging in a manufactured display. However, because of the stigma, some judges may claim that to have been the case even when they *were* sincerely angry. *Cf.* Sam Dolnick, *After Delay, Kerik's Trial to Start on Nov. 9*, N.Y. TIMES, Oct. 26, 2009, at A26. Teasing apart this puzzle is one important part of the ongoing project, especially its eventual empirical component.

130. Maroney, *supra* note 12, at 670–71 (citing POSNER, FRONTIERS OF LEGAL THEORY, *supra* note 19, at 226).

degree. For example, after media reports represented that a judge had spoken angrily to a high-profile defendant—the former New York City Police Commissioner—the judge put himself on the record insisting that he "wasn't really angry."[131] But the stigma attached to anger is markedly less than the stigma attached to other emotions, say, sorrow or fear. One much more readily finds in the case law references to judges' anger than to any other emotion. The media, too, much more frequently report instances of judges expressing ire at lawyers, defendants, and witnesses.[132] Indeed, judges sometimes openly own up to even the most extreme bouts of fury. A state-court judge, after being repeatedly cursed at by a defendant, indicated that the "[r]ecord should show that . . . if I'd have had a shotgun I need to have shot him but I don't have it today."[133]

The reputational costs of showing anger, while not zero, thus appear to be markedly less than the costs of showing other emotions. The likely reason for this lesser stigma is a cultural perception of anger as status enhancing.[134] Whatever the reason, its effect is to generate relatively more data on judicial anger, data we now may examine.

II. ANGRY JUDGES

This Part demonstrates the reality of judicial anger by gathering evidence of its expression. While the ways in which judges express anger vary, the usual objects of that anger are fairly stable: lawyers, litigants and witnesses, and other judges.

Judicial anger is common enough that just a bit of digging reveals its traces. In the case law, evidence of judicial anger may be found primarily in connection with allegations of judicial bias, often

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131. Dolnick, *supra* note 129; Alice McQuillan & Hasani Gittens, *Judge Revokes Kerik's Bail, Sends Former Commish to Jail*, NBC N.Y. (Oct. 20, 2009), http://www.nbcnewyork.com/news/local/Judge-Revokes-Keriks-Bail-Sends-Former-Commish-to-Jail-65005027.html.

132. Without purporting to attach to it a quantitative value, I base these qualitative statements on the experience of conducting (both alone and with research assistants) many searches for evidence of judicial emotion over the course of five years. Evidence of judicial anger is relatively plentiful. Evidence of other judicial emotions has been, in our experience, much more difficult to find, by several orders of magnitude.

133. Johnson v. State, 642 A.2d 259, 262 (Md. Ct. Spec. App. 1994).

134. *See generally* Larissa Z. Tiedens, *Anger and Advancement Versus Sadness and Subjugation: The Effect of Negative Emotion Expressions on Social Status Conferral*, 80 J. PERSON. & SOC. PSYCHOL. 86 (2001) (expressing anger raises social status). This may also be a point of gender differentiation, as male and female anger displays may be differentially assessed in this regard. *See supra* note 22.

urged in support of motions for recusal,[135] appeals from imposition of contempt[136] and other sanctions against attorneys and parties,[137] or due process challenges.[138] Anger may also underlie imposition of sanctions against the judge for violating codes of conduct,[139] or prompt review of his fitness to serve at all.[140] Judges sometimes also share their experience of work-related anger. Los Angeles trial judge Gregory O'Brien, Jr., for instance, recently penned a candid, self-deprecatingly humorous article titled "Confessions of an Angry Judge."[141] Finally, as the "benchslaps" feature of *Above the Law* suggests, there is a robust market for media reports of judicial anger expressions. These windows into judicial anger reveal important information about its objects.[142]

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135. Gottlieb v. Sec. & Exch. Comm'n, 310 F. App'x 424, 425 (2d Cir. 2009) (explaining that plaintiff alleged that the judge "was biased against him because of 'the tempest which took place between them . . . when they clashed and had words in open court' "); Johnson v. Schnucks Inc., No. 09-CV-1052-WDS-SCW, 2011 WL 219900, at *1 (S.D. Ill. Jan. 24, 2011) (stating that plaintiff complained that the judge's "tone of voice, overall demeanor, and statements . . . were angry and hostile"); *In re* Russell, 392 B.R. 315, 355 (Bankr. E.D. Tenn. 2008) (explaining that plaintiff alleged the judge "became very angry and used a very harsh tone").

136. 18 U.S.C. § 401 (2006); *Johnson*, 642 A.2d at 262; State v. Hasan, No. 2007-063, 2009 WL 2475304, at *3 (N.J. Super. Ct. App. Div. 2009) (attorney appealed a contempt finding by judge who admitted to being outraged by frivolous motions and who apologized for expressing anger).

137. FED. R. CIV. P. 11; Tollett v. City of Kemah, 285 F.3d 357, 362 (5th Cir. 2002) (stating that the judge admitted to feeling "insulted" and "angry by the fact that this case would go up on a simple $5,000" sanction).

138. Jones v. Luebbers, 359 F.3d 1005, 1009 (8th Cir. 2004) (describing a judge, who admitted to being angry at defense counsel, as "angry, abusive, and threatening"); Galvan v. Ayers, No. CIVS001142DFL DAD P, 2006 WL 657121, at *16 (E.D. Cal. Mar. 15, 2006) (stating that a judge expressed impatience with defendant's testimony and had both "exasperated expressions on his face" and was red in the face); State v. Munguia, 253 P.3d 1082, 1086–87 (Utah 2011) (explaining that a judge described the defendant's behavior as "selfish" and "filthy" and said he wished he could have imposed a longer sentence).

139. McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of the United States, 264 F.3d 52, 54–55 (D.C. Cir. 2001).

140. *In re* Sloop, 946 So. 2d 1046, 1051, 1053, 1057 (Fla. 2007) (per curiam); Christopher Danzig, *Ex-Judge of the Day: Yes, Flashing Your Piece in Court Is a "Poor Rhetorical Point"*, ABOVE THE LAW (Feb. 29, 2012), http://abovethelaw.com/2012/02/ex-judge-of-the-day-yes-flashing-your-piece-in-court-is-a-poor-rhetorical-point/ (explaining that a judge was "frustrated" with rape victim who was being "disrespectful, combative and unresponsive" during testimony; he pulled out a concealed handgun, pretended to hand it to her, and suggested she shoot her lawyer).

141. Gregory C. O'Brien, Jr., *Confessions of an Angry Judge*, 87 JUDICATURE 251, 252 (2004).

142. One important caveat is that these windows are just that: limited openings through which we see evidence of the phenomenon of interest. It is highly unlikely that written opinions, self-disclosures, and media reports capture the entire universe of judicial anger, particularly given the continued traction of the script of dispassion. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1065 (2006) (stating that the role of emotion is concealed because judges are criticized for revealing it). Anger against other judges, for example,

A. Anger at Lawyers

Lawyers are the most frequent targets of judges' anger. Anger at attorneys tends to be triggered by perceptions that they are incompetent; interfering with the prompt, orderly, and fair hearing of cases; defying the judge's authority; or lying—and sometimes all of these. As Judge O'Brien quipped, not only is attorney incompetence a frequent provocation, but "[w]orse still is impertinence by the incompetent, a combination that persistently remains in fashion."[143]

One of the best-known explosions of judicial wrath came from U.S. District Court Judge John Sprizzo. He ignited a media firestorm when, in 1989, he excoriated prosecutors for having handled a drug case so badly, in his view, that he had no choice but to dismiss charges against half the defendants.[144] When a prosecutor protested that "heroin traffickers" were about to "walk out the door," Sprizzo responded:

> Now, wait. You are not going to lay that one on me. You let heroin traffickers out the door by not proceeding in a competent enough fashion. . . . Do you know what is wrong with your office, and you in particular? You assume all we have to do is say narcotics. . . . [a]nd the judge will roll over and let the case go to the jury. You people have not been trained the way I have been trained. . . . I am telling you that in this case you didn't get away with it. If you had been a competent prosecutor, which you are not, you would have hedged against the possibility that maybe the judge would disagree with you . . . on the law. . . . If these drug dealers are walking free, it is because you did not hedge against that possibility. Don't lay it at my doorstep. . . . [I]f they are walking out of here it is because you people were not competent enough to put in an extra charge in your indictment. Sit down.[145]

The judge's words were so "scathing" that he promptly sealed the record to prevent media reports from reaching and prejudicing jurors.[146] As reported in his obituary nearly a decade later, the

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is unlikely to bubble into public view at anything near the rate at which it occurs, given the infrequency with which judges' dealings with one another are open to public view. Still, these glimpses provide important clues as to what is likely happening more generally.

143. O'Brien, *supra* note 141; *see also* Keith L. Alexander, *D.C. Superior Court Judge Declares Mistrial over Attorney's Incompetence in Murder Case*, WASH. POST, Apr. 1, 2011, http://www.washingtonpost.com/local/dc-superior-court-judge-declares-mistrial-over-attorneys-competence-in-murder-case/2011/04/01/AFlymrJC_story.html (stating that a judge, "obviously angry and frustrated, told [lawyer] that his performance in the trial was 'below what any reasonable person would expect in a murder trial' ").

144. William Glaberson, *The Law; Judge Refuses to Open Proceeding*, N.Y. TIMES, Mar. 10, 1989, at B7.

145. *Id.*

146. Sprizzo unsealed the transcript of the proceedings only after being legally challenged by the NEW YORK TIMES. *Id.*

infamous incident put Sprizzo's formidable "temper" on public display.[147]

While Sprizzo's reaction may have been sharp, it was not unique. Ninth Circuit Chief Judge Alex Kozinski has spoken unapologetically about his anger at a federal prosecutor, whom he caught in a lie; indeed, he characterized the incident as perhaps the angriest he has ever been at work.[148] While Sprizzo chewed the errant lawyer out verbally, Kozinski did so in writing. In his telling, he deliberately included the prosecutor's name multiple times in a scathing written opinion, removing it only after the U.S. Attorney's Office asked him to do so, and after he was satisfied that his message to that lawyer and his Office had been heard.[149]

Judicial anger at attorney incompetence and misconduct sometimes comes packaged not in a vicious tongue-lashing but in a thick layer of sarcasm. This varietal is heavily favored in the "benchslap" market. Consider, for example, the lawyer-directed benchslap with which this Article began. U.S. District Court Judge Sam Sparks, unhappy with lawyers who were seeking to quash certain subpoenas, issued an order directing them to attend a "kindergarten party" in his courtroom.[150] At that party, he wrote, they would learn such crucial skills as:

> How to telephone and communicate with a lawyer . . . .
>
> An advanced seminar on not wasting the time of a busy federal court and his staff because you are unable to practice law at the level of a first year law student.

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147. Bruce Weber, *John E. Sprizzo, 73, U.S. Judge, Dies*, N.Y. TIMES, Dec. 18, 2008, at B12; *see also* Editorial, *The Judge Who Spoke Too Soon*, N.Y. TIMES, Mar. 10, 1989, at A32 (characterizing the judge's remarks as "heated" and "angry," and opining that "the judge would not have got involved with this insult to the First Amendment had he had the presence of mind to hold his tongue").

148. Maroney, *supra* note 13, at 1493 (citing Interview with the Hon. Alex Kozinski, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, in Nashville, Tenn. (Feb. 6, 2010)).

149. *Id.*; *see also* John Schwartz, *Judges Berate Bank Lawyers in Foreclosures*, N.Y. TIMES, Jan. 10, 2011, at A1 (stating that judges handling shoddily-done foreclosures have begun to "heap some of their most scorching criticism on the lawyers"); Christine Stapleton & Kimberly Miller, *Foreclosure Crisis: Fed-up Judges Crack Down on Disorder in the Courts*, THE PALM BEACH POST, Apr. 4, 2011, http://www.palmbeachpost.com/news/news/real-estate/foreclosure-crisis-fed-up-judges-crack-down-on-dis/nLrJ2/ ("Angry and exasperated" judges are "hitting back by increasingly dismissing" foreclosure cases and accusing lawyers of "fraud upon the court."); Jonathan Bandler, *Angry Judge Delays Annabi, Jereis Corruption Trial Until 2012*, LOHUD.COM (May 17, 2011), http://www.lohud.com/article/20110518/NEWS02/102170004/Angry-judge-delays-Annabi-Jereis-corruption-trial-until-2012 (stating that an "angry federal judge lashed out" at prosecutors for bringing charges that could have been brought months earlier).

150. Morris v. Coker, No. A–11–MC–712–SS, A–11–MC–713–SS, A–11–MC–714–SS, A–11–MC–715–SS, 2011 WL 3847590, at *1 (W.D. Tex. Aug. 26, 2011).

> Invitation to this exclusive event is not RSVP. Please remember to bring a sack lunch! The United States Marshalls have beds available if necessary, so you may wish to bring a toothbrush in case the party runs late.[151]

Aggressively snarky,[152] the kindergarten-party order quickly went viral on the Internet.[153] The judge seems to have been so angry that he wanted not just to change the lawyers' behavior but also to humiliate them.[154]

Other judges also use barbed sarcasm to communicate anger to lawyers. Consider *Fox Industries v. Gurovich,* a routine civil case that devolved into a "morass."[155] Multiple opinions by both the district judge and the magistrate paint a picture of two people being slowly, but effectively, driven crazy by Simon Schwarz, Esq. The judges were infuriated not only by the lawyer's incompetence, but also by his apparent willingness to defy their authority and lie. In one episode that the judge called the "mystery of the evanescent courthouse," Schwarz missed a hearing (resulting in a default against his client) and claimed that he and a taxi driver were excusably unable to find the (very large) federal courthouse, despite being in the right (very small) town. Such a mishap, wrote the judge, was plausible only if "Mr. Schwarz and his driver deliberately avoided looking at the courthouse (*cf.* Lot and his daughters fleeing the destruction of Sodom and Gomorrah, *see* Genesis 19:15-17)."[156] Refusing a motion to disqualify himself, the judge agreed that he had "expressed varying degrees of disapprobation, hostility, impatience, dissatisfaction, annoyance, and anger with [Schwarz's] antics," including by calling

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151. *Id.*

152. MERRIAM-WEBSTER'S DICTIONARY (2012) (defining "snarky" as "crotchety, snappish; sarcastic, impertinent, or irreverent in tone or manner").

153. Two thousand three hundred and ninety-four people "liked" or shared the ABOVE THE LAW feature on the "kindergarten party order" on Facebook, and more than four hundred people "tweeted" it on their Twitter accounts.

154. *See infra* notes 270–74 and accompanying text (addressing propriety of seeking to humiliate).

155. No. CV 03-5166(TCP)(WDW), 2006 WL 2882580, at *8 (E.D.N.Y. Oct. 6, 2006). The case involved trade secrets and an employment noncompete agreement.

156. Fox Indus., Inc. v. Gurovich, 323 F. Supp. 2d 386 (E.D.N.Y. 2004). The judge continued:

> [Schwarz] offers increasingly detailed and fantastic excuses for his absence. *See, e.g.*, Exhibit 17 to Gore's Motion to Disqualify, featuring three photos taken at various locations within Central Islip that purport to demonstrate the invisibility of the mammoth white courthouse. Yet, as a point of epistemology, as Defense Secretary Donald Rumsfeld has observed in other circumstances, "An absence of evidence is not evidence of an absence." Even if Mr. Schwarz "could not find" it, the Alfonse M. D'Amato United States Courthouse *does* exist and *is* visible to the dozens of other lawyers, as well as hundreds of jurors, witnesses and workers, who arrive here every day. (And, ironically, one of the photos . . . actually *does* picture the courthouse.)

Id. at 388 n.1 (emphasis in original).

various of his statements " 'baloney,' 'false,' 'fraud,' 'impossible,' 'incredible,' and 'a lie.' "[157] He refused, however, to apologize for his anger, for those statements, or for characterizing Schwarz's briefs as "ejaculations."[158]

Snarky benchslaps draw attention because they are funny—a guilty pleasure, an indulgence in *Schadenfreude*.[159] Indeed, one of the main draws of television judges is their frequent use of over-the-top anger and sarcasm. Judge Judy, with her "iron gavel" and "tough-talking take-downs," is "ratings gold"[160] for her network because people enjoy seeing "bozos loudly castigated."[161] Of course, whether one finds a benchslap funny depends on whether it seems like the person really is a "bozo" who deserves the derision.[162] And attorneys on the receiving end, not surprisingly, often protest that they do not deserve it, or that even if they do, their clients should not be the ones to suffer.

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157. *Id.* at 389.

158. About the term "ejaculations," the court wrote:

> [T]he Court is at a loss as to how else to describe the sentences in Mr. Schwarz's brief that consist only of the words 'How ridiculous!' and 'How pathetic!' . . . Surely Mr. Schwarz is aware of the alternate definition of "ejaculation": to wit, a "sudden short exclamation." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.2000). The Court obviously did not intend an alternative available meaning.

Id. at 388 n.2; *see also Fox Indus.*, 2006 WL 2882580, at *8–9 (magistrate furious over lawyer's usurpation of court's authority in matter of subpoenas).

159. MERRIAM-WEBSTER'S DICTIONARY (2012) (defining "Schadenfreude" as "enjoyment obtained from the troubles of others").

160. Cynthia McFadden et al., *Judge Judy Rules No-Nonsense Court*, ABC NIGHTLINE (May 18, 2010), http://abcnews.go.com/Nightline/judge-judy-rules-nonsense-tv-court/story?id=10667950.

161. Brendan Koerner, *Judge Judy: The Most-Watched Court Show for 452 Straight Weeks*, SLATE (May 27, 2005), http://www.slate.com/articles/arts/number_1/2005/05/judge_judy.html (explaining that viewers love Judge Judy "because she offers them a fantasy of how they'd like the justice system to operate"). Of course, Judy Sheindlin acted the same way when she was a real judge in the Manhattan Family Court. Getlin, *supra* note 110 ("Scheindlin runs her court with an impatience that borders on rage" and speaks "with a hint of fury."). But when she was a real judge, that angry manner drew "scathing criticism," not adoration. *Id.* (lawyers complained that she was "needlessly cruel and sarcastic, a loose cannon in the halls of justice"). Judge Judy is a good example of the difficulty of distinguishing real from "ginned up" anger. *See supra* note 128. However sincere her anger displays may have been when she was a real judge, it is hard to believe that every televised anger display is sincere. She surely is acutely aware that her popularity and continued employment depend on successfully acting angry.

162. *Cf.* J. GILES MILHAVEN, GOOD ANGER 72–74 (1989) (noting the humor value in seeing someone get his "comeuppance"). Indeed, some of the pleasure a reader might take in seeing the apparently incompetent Schwarz get his comeuppance dissipates upon learning that he suffered from a serious brain disease, which might have contributed to his infuriating behavior. Fox Indus. v. Gurovich, No. CV 03-5166(TCP)(WDW), 2006 WL 941791, at *2 (E.D.N.Y. Apr. 12, 2006).

When judges make their anger at counsel known, those counsel may cry foul, claiming bias or partiality sufficient to damage their clients' interests.[163] Challenged benchslaps involve not just sarcasm but also raised voices, red faces, yelling, insults, and threats. Courts, however, are reluctant to grant relief on this basis. Importantly, they are reluctant precisely because they believe such anger to be exceedingly commonplace. As one reviewing court explained:

> [T]here is one form of professional predisposition all judges share that may be classified as a kind of bias: expressions of dissatisfaction with deficient lawyering, overbearing advocacy and deceptions that stretch judicial patience to its outer boundaries. These practices often arouse manifestations of frustration, annoyance and even anger on the part of judges. But, even if short-tempered, such reactions alone are not sufficient to disqualify a judge from a case because they are not necessarily wrongful or inappropriate; indeed, at times they may be called for or understandable.[164]

Thus, where counsel repeatedly failed to meet deadlines and submitted markedly inferior work product, it was perhaps "infelicitous or unmellifluous" for the judge to refer to his pleadings as "junk" and "garbage"; but these and other expressions of anger were to be expected and did not give rise to a claim of bias.[165]

Legal doctrine, then, assumes that judges' anger at lawyers is common and pervasive. As the Supreme Court declared in the leading case of *Liteky v. United States*:

> *Not* establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.[166]

The empirical basis for this pronouncement is amply confirmed through the case law. Other courts give judges wide latitude in expressing anger at attorneys for making "misrepresentations" and speaking in "half-truths" before the court,[167] as well as for asking

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163. At least in the context of a recusal motion or due process challenge, judicial bias against a lawyer is legally meaningful only if it inures to the detriment of the client. *See, e.g.*, United States v. Kahre, No. 2:05-CR-0121-RCJ-RJJ, 2007 WL 2110500, at *1–2 (D. Nev. July 13, 2007); Avitia v. Metro. Club of Chi., Inc., No. 88 C 6965, 1990 WL 205278, at *1 (N.D. Ill. Dec. 13, 1990).

164. Teachers4Action v. Bloomberg, 552 F. Supp. 2d 414, 416 (S.D.N.Y. 2008) ("[O]rdinarily frustration or anger are spontaneous reactions, often provoked by some objectively discernible cause . . . . In this category would fall expressions of dissatisfaction, frustration or anger that stem from the judge's response to what he or she regards as poor or excessive performance of counsel or inappropriate behavior of parties.").

165. *Id.* at 417.

166. 510 U.S. 540, 555–56 (1994).

167. *Avitia*, 1990 WL 205278, at *3 (attorney with a history of rude behavior was trying to judge-shop by prompting intemperate displays that he could use to justify a recusal motion).

improper questions and making baseless arguments.[168] Reviewing courts sometimes express discomfort with particularly vehement expressions, such as a judge commanding a lawyer to sit down and shut up,[169] and are particularly chagrined when benchslapping happens in front of the jury.[170]

The very ubiquity of such anger, however, makes it hard to condemn. As the Second Circuit has noted: "Judges, while expected to possess more than the average amount of self-restraint, are still only human. They do not possess limitless ability, once passion is aroused, to resist provocation."[171]

A courtroom video posted on YouTube provides a vivid example. A Kentucky state-court judge can be seen blowing his top when a smug lawyer accuses him of condoning jury tampering and threatens an investigation. The judge's voice raises, he curses and becomes visibly agitated, and at one point he smashes the bench with his fist and declares, "I'll yell all I want, this is my court."[172]

Very few such judicial anger displays are found to warrant relief, in no small part because doing so would upend a large number of cases. But judges do sometimes indulge in displays of anger that are sufficiently extreme as to prompt corrective measures.[173] In one criminal case, a trial judge created a poisonously "acrimonious" environment through repeated clashes with the defense attorney, at one point implying that he would physically harm the attorney were

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168. *Kahre*, 2007 WL 2110500, at *2.

169. Taylor v. Abramajtys, 20 F. App'x 362, 364 (6th Cir. 2001) (lawyer was trying to provoke judge into outburst; court declined to find trial judge ran afoul of *Liteky* standard, though it was displeased with anger displays before jury).

170. Francolino v. Kuhlman, 224 F. Supp. 2d 615, 647 (S.D.N.Y. 2002). The trial judge in a Mafia case was outraged at the defense for delivering a lengthy opening statement that she believed was full of irrelevancies and "vented her anger" at these and other perceived missteps in front of the jury. She also got angry at the defendant, calling him a "prima donna," and accused defense counsel of making objections "rudely," threatening that "I will do things you don't like when you treat me in a way that I don't like." Though the reviewing court declined to award habeas relief, it expressed its displeasure with those anger displays.

171. *In re* Bokum Res. Corp., 26 B.R. 615, 622 (D.N.M. 1982) (rejecting bankruptcy attorney's request that the judge be recused because he was so angry as to be red in the face); *see also* United States v. Weiss, 491 F.2d 460, 468 (2d Cir. 1974) (rejecting claim of favoritism by the trial judge); Green v. Court of Common Pleas, No. 08-1749, 2008 WL 2036828, at *4 (E.D. Pa. May 30, 2008) (rejecting habeas claim; judge had been very angry at defense counsel for disobeying order, but did not act irrationally).

172. *Prosecutor Makes Threats to a Judge?*, YOUTUBE (posted on Feb. 19, 2009), http://www.youtube.com/watch?v=Dk6y5n_1-Yo&feature=related.

173. United States v. Candelaria-Gonzalez, 547 F.2d 291, 297 (5th Cir. 1977) (trial "judge's sarcasm, his frequent interruptions and his antagonistic comments in the jury's presence," all directed at counsel, deprived defendant of fair trial).

he able.[174] But even though it overturned the defendant's conviction, the appellate court expressed sympathy for the judge:

> [T]rials in the district courts are not conducted under the cool and calm conditions of a quiet sanctuary or an ivory tower, and . . . enormous pressures are placed upon district judges by an ever increasing criminal docket and a demand for speedier trials of criminal defendants. These pressures can cause even conscientious members of the bench . . . to give vent to their frustrations by displaying anger and partisanship, when ordinarily they are able to suppress these characteristics. But grave errors which result in serious prejudice to a defendant cannot be ignored simply because they grow out of difficult conditions.[175]

In sum, judges' anger at lawyers is an inevitable, even ordinary occurrence. The degree to which this is so is reflected in the doctrine that has evolved in response: only the most extreme manifestations of judges' anger at lawyers trigger oversight, even if quotidian manifestations prompt occasional chagrin. Nor does it appear that courts provide breathing room for judicial anger simply as a concession to human weakness. Sometimes, it seems, they regard such anger and its expression as being "called for."[176]

B. Anger at Parties and Witnesses

Judges' anger also is directed at parties and witnesses.[177] Compared with lawyers, these participants in the courtroom drama have fewer opportunities to display incompetence. The more common

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174. United States v. Nazzaro, 472 F.2d 302, 311 n.10, 312 (2d Cir. 1973). The entire colloquy was as follows:

> Mr. Schwartz: [The Assistant U.S. Attorney] promised me those papers for fourteen months, that's why I moved [for dismissal on speedy-trial grounds], not because of your Honor. I think you have disliked me since that time.
>
> The Court: If you want to get on an emotional basis, you may.
>
> Mr. Schwartz: I don't. I want to take out the personal feelings between us. I don't want to have any personal feeling.
>
> The Court: Counselor, the jury box is empty, and I will tolerate some things that come close to being contemptuous.
>
> Mr. Schwartz: I am only talking to your Honor without the jury.
>
> The Court: You have now interrupted me four times. You are about twenty-five or thirty-five years my junior and I have not got the strength to cope with you, but I do have the power—so just stop it.

175. *Id.* at 304.

176. Teachers4Action v. Bloomberg, 552 F. Supp. 2d 414, 416 (S.D.N.Y. 2008).

177. *See, e.g.*, *Judge Apologizes for Yelling, Says He Wants to Keep "Gossip" Out of Trial*, SAN DIEGO SOURCE, Jan. 2, 1998, http://www.sddt.com/News/article.cfm?SourceCode=19981028cf&r=324 (stating that a judge acknowledged that "he had become 'emotional' " when yelling at defense witnesses). In one anecdotal measure of how much more frequently judges become angry with lawyers as compared with litigants, Judge O'Brien barely mentions litigants in his account of what used to make him angry. O'Brien, *supra* note 141 (complaining only about "stress" caused by trials of pro se litigants).

triggers for anger directed at this group are defiance of judicial authority, insulting the judge, lying, and (particularly for criminal defendants) having committed the acts underlying the case.

Disobeying direct orders is a particularly efficient route to judicial anger.[178] In *U.S. v. Gantley*, for example, the trial judge had ruled a polygraph examination of the defendant inadmissible; when the defendant tried on cross-examination to bolster his credibility by referring to that polygraph, the judge had an immediate outburst. Though he dismissed the jury and "cooled down," he ordered a mistrial.[179] Another trial judge became enraged at an expert witness. He knew that the witness, one Taylor, would in his testimony be quoting someone who had used the word "goddamned," and he asked Taylor not to repeat that word. In his testimony, Taylor replaced "goddamned" with "GD," which made the judge apoplectic: he excused the jury, chewed Taylor out, and then told the jury that Taylor had disobeyed him on purpose.[180]

Criminal defendants, in particular, run into problems when a judge perceives defiance. One defendant, for example, talked out of turn.[181] The judge sent the jury out and attempted to explain to the defendant why he was not permitted to speak. When the defendant protested, he and the judge engaged in the following colloquy:

> Court: Listen to me now. . . . We are going to have order. . . . I have asked you kindly to please speak through your attorney. What . . . I may have to do is have you bound and gagged . . . .
>
> Defendant: I asked kindly to speak to you.
>
> Court: Listen to me.
>
> Defendant: I sure did.

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178. *See* Carol Marbin Miller, *Barahona Judge Goes After Gag-order Violators*, THE PALM BEACH POST, Oct. 21, 2011, http://www.palmbeachpost.com/news/news/barahona-judge-goes-after-gag-order-violators/nLy5T/ (explaining that a judge was angry at child welfare workers for apparently leaking to media information about a case in which they were witnesses, despite a gag order).

179. United States v. Gantey, 172 F.3d 422, 431 (6th Cir. 1999) (upholding declaration of a mistrial because the "jury's observation of Judge Forester's understandable, if short-lived, anger . . . is likely to have caused some level of unfair jury bias").

180. Cappello v. Duncan Aircraft Sales of Fla., Inc., 79 F.3d 1465, 1475 (6th Cir. 1996) (finding the furious response inappropriate, as witness was trying to comply with judge's order, but calling it harmless error). Defiance also may be found in *Fox Industries*, in which the civil defendant, Gore, appeared to be doing nearly as much to drive the judge and magistrate crazy as his lawyer. Gore repeatedly violated court orders not to compete with plaintiff's business. Even after being found in contempt he insisted (implausibly) that the judge had not found his conduct to be willful, leading the court to comment drily on the lack of evidence that Gore had been "having an out-of-body experience." Fox Indus., Inc. v. Gurovich, No. CV–03–5166, 2004 WL 2348365, at *2 (E.D.N.Y. Aug, 25, 2004).

181. Shaw v. State, 846 S.W.2d 482, 485 (Tx. Ct. App. 1993).

> Court: . . . The jury is going to sit there and see you bound and gagged before them, and they are going to determine you are dangerous person [sic] right before they go out and determine whether to give you life. Do you really think that's an intelligent thing to do?
>
> Defendant: Do you think what you are doing is an intelligent thing to do?
>
> Court: I'm not going to discuss it any further with you. If you will conduct yourself as a gentleman, we will proceed. . . .
>
> Defendant: I've been trying. I've been trying. . . .
>
> Court: Let's get the tape.[182]

The judge then had the defendant bound and gagged. One gets the distinct sense that the defendant's cheeky rejoinders, turning the judge's words back on him, were the last straw for the judge.[183]

As that colloquy suggests, judges may get particularly angry when they perceive that a party or witness has insulted them. In yet another episode of the *Fox Industries* saga, the judge was none too pleased to hear tape recordings in which the civil defendant referred to his orders as "a joke" and described them with "an earthy term"[184] that the judge tactfully translated as "*merdique*."[185] Consider, too, the defendant in *Mayberry v. Pennsylvania*.[186] On trial for holding hostages in prison, he was found guilty of criminal contempt for calling the presiding judge a " 'dirty sonofabitch,' 'dirty tyrannical old dog,' 'stumbling dog,' and 'fool' "; accusing him of "running a Spanish Inquisition"; and telling him "to 'Go to hell' and 'Keep your mouth shut.' "[187] Though the judge at whom these abuses were directed tried to "maintain calm," the Court found it necessary to have the contempt proceedings overseen by a different judge "not bearing the sting of these slanderous remarks."[188]

Similarly, in *Ungar v. Sarafite* the Court noted that some criticisms are "so personal and so probably productive of bias that the judge must disqualify himself."[189] Though the majority did not find

182. *Id.* at 485–86.

183. *Id.* at 486 ("Even from our appellate perch, we acknowledge that the patience of the trial judge is often pushed to the limit, however, judicial patience is part of the job . . . ."); *see also* KRQE, *Judge Angry at Mouthy Criminal*, YOUTUBE (Sept. 7, 2011), http://www.youtube.com/watch?v=uWXFbVpF_pQ (judge scolding accused "mouthy" criminal for impolite courtroom behavior).

184. 323 F. Supp. 2d 386, 388 (2004).

185. *Fox Industries, Inc.*, 2004 WL 2348365, at *2. *Merdique* translates as "shitty." REVERSO, http://dictionary.reverso.net/french-english/merdique (last visited July 30, 2012).

186. Mayberry v. Pennsylvania, 91 U.S. 499, 505 (1971).

187. *Id.*

188. *Id.*

189. 376 U.S. 575, 583 (1964).

that to be such a case,[190] the dissenters opined that the defendant's outbursts created

> a head-on collision between the judge and a witness . . . . The bias here is not financial but emotional. . . . Judges are human; and judges caught up in an altercation with a witness do not have the objectivity to give that person a fair trial. . . . An impartial judge, not caught up in the cross-currents of emotions enveloping the contempt charge, is the only one who can protect all rights and determine whether a contempt was committed or whether the case is either one of judicial nerves on edge or of judicial tyranny.[191]

Thus, the Court has recognized that judges would have to be superhuman to avoid being angered when insulted. Judge Marvin Frankel admitted as much in his widely read 1973 book on sentencing, in which he recounted the following story:

> Judge X . . . had tentatively decided on a sentence of four years' imprisonment. At the sentencing hearing . . . [t]he defendant took a sheaf of papers from his pocket and proceeded to read from them, excoriating the judge, the "kangaroo court" in which he'd been tried. . . . Judge X said, "I listened without interrupting [and] I simply gave the son of a bitch five years instead of the four."[192]

Lying also is a potent trigger.[193] For example, in response to harsh words spoken at sentencing by a judge who found the defendant's testimony to have been "totally unbelievable and preposterous," the reviewing court wrote that even if the remark were improper, "it should be recognized that a judge is only human, being ordinarily imbued with a strong sense of duty and responsibility to the community. In his or her conscientiousness, the judge will sometimes speak out in frustration and even anger."[194]

Much as it has in the anger-at-lawyers context, then, doctrine has evolved in recognition of the inevitability of judicial anger against parties and witnesses because of their behavior during the litigation.

Finally, judges get angry at persons for having committed the acts that gave rise to the litigation. As the *Litkey* Court noted, "[t]he judge who presides at a trial may, upon completion of the evidence, be

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190. *Id.* at 584 (1964) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions."); *id.* at 585–86 ("Neither in the courtroom nor in the privacy of chambers did the judge become embroiled in intemperate wrangling with petitioner . . . petitioner's final intemperate outburst provoked no emotional reflex in the judge.").

191. *Id.* at 601–02 (Douglas, J., dissenting).

192. MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 18 (1973).

193. Ron Arnold, *Angry Federal Judge Rips 'False Testimony' of Federal Scientists*, WASH. EXAMINER (Sept. 22, 2011), http://washingtonexaminer.com/article/41022 (in a "searing opinion," judge "ripped two Interior Department scientists for giving 'false' and 'incredible' testimony").

194. Carr v. Senkowski, No. 01-CV-689, 2007 WL 3124624 (W.D.N.Y. Oct. 23, 2007); *see also infra* notes 271–72 and accompanying text (discussing Campbell v. United States, No. 5:07-0120, 2010 WL 1379992 (S.D. W. Va. Mar. 10, 2010)).

exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person."[195] Both civil and criminal parties draw judicial ire on this basis. For example, local television coverage reposted on YouTube shows an Alabama Family Court judge yelling at a mother accused of neglect. After she mutters something in response to his statement that she might deserve jail time, he smacks his hand on the bench and barks, "You're not taking care of your child *now*, ma'am!" Asked by the reporter to reflect on his outburst, the judge said, "I reacted humanly. I'll try not to do that in the future."[196]

A judge may become "ill disposed towards" nonparties as well. Another YouTube reposting of local news coverage shows a judge, presiding over the sentencing of a man convicted of child sexual abuse, loudly berating the victims' mother. She had left the children accessible to the boyfriend despite having been sexually assaulted by him herself. Visibly angry—with a red face, raised voice, and shaking finger—the judge tells the mother that her behavior is "despicable," and that she is "disgusting," "an atrocious mother," and "not a victim."[197]

Though anyone's behavior can draw the judge's wrath, this is particularly an issue for criminal defendants. First, anger at the conduct underlying the defendant's offense might increase the potency of some other provocation. For instance, one Minnesota judge reported the following incident:

> I said, "Sir, you are going to prison, and that's where animals like you belong." And I usually don't say that but, if you get called a MF [expletive abbreviated] ten times, and it was by someone who raped a step-daughter, and he's in your face . . . And I felt bad later. I thought, "OK, you lost your cool."[198]

The combination of personal attack and a particularly egregious offense may explain why this judge was unable to maintain his composure. Similarly, another YouTube video shows a judge becoming irate while sentencing a man convicted of shooting at police officers because the man openly mocked him, smiled, and laughed during the proceeding.[199]

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195. 510 U.S. at 550–51.

196. *Judge Naman Yells at Mom*, WKRG (May 14, 2009), www.wkrg.com/a/53028/. The judge later expressed embarrassment. *Id.*

197. *We Need More Judges Like This*, YOUTUBE (July 23, 2007), http://www.youtube.com/watch?v=jbfZGSy-ydY&feature=related (sentencing in Fulton County, Georgia, reported on Local News 2).

198. Mary Lay Schuster & Amy Propen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 6 L. CULTURE & HUMAN. 75, 93 (2010).

199. Associated Press, *Judge, Defendant Spar During Sentencing*, YOUTUBE (Mar. 24, 2009), http://www.youtube.com/watch?v=X7Z4LQO6B58 (judge threatened to gag defendant, threw a folder onto his desk, imposed the maximum sentence—to which the defendant replied "thank

But defendants' offense behavior alone may be sufficient, and the moment at which judges tend to give voice to that sort of anger is at sentencing.[200] Judicial anger at sentencing is a special sort of anger because it is the most likely to be unapologetically acknowledged, its expression both deliberate and controlled. At sentencing, judges may perceive that it is part of their role to express anger—not just on their own behalf, but on behalf of the victims and the public.[201] Reflecting others' anger is part of the expected script at sentencing, particularly in high-profile and death penalty cases.[202]

It would be a mistake to assume that judges are merely acting as mouthpieces, however; they may well feel the anger themselves. Indeed, it is extremely common for the media, in reporting on judges' remarks to the defendant at sentencing, to refer to these judges as angry.[203] Of course, these judges might be skilled at mimicking anger

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you, I'll take another"—and waved mockingly at the defendant while saying "bye bye"); *see also Vancouver Judge Yells at Convict, Then Apologizes*, SEATTLE TIMES, Mar. 3, 2009, http://seattletimes.nwsource.com/html/localnews/2008807477_apwavancouverswatsentencing1stldwritethru.html (judge spars with defendant and mockingly calls out "bye bye").

200. Anthony McCartney, *Angry Sentencing for Murray*, ASSOCIATED PRESS, Nov. 30, 2011 (judge delivered a "tongue lashing" to doctor convicted of involuntary manslaughter in death of Michael Jackson).

201. In the words of a judge of the Iowa Court of Appeals:

> I see absolutely nothing wrong, and as a matter of fact I think it should be encouraged, in a judge speaking freely, openly and expansively to the defendant, lecture, cajole, empathize, sympathize, show compassion, warmth, and comprehension, show anger, umbrage, ire and indignity. These are human emotions that are meaningful to the person before the court, emotions they understand and easily comprehend. To go by rote in an emotionless ritual loses its human values and is less effective . . . . [Sentencing is] a 'show-down' where society, as represented by the judge, confronts a defendant for his antisocial conduct . . . . The time of sentencing is a desirable place for the judge to let his feeling be known . . . .

State v. Bragg, 388 N.W.2d 187, 194 (Donielson, J., specially concurring) (Iowa App. 1986). The view that judicial anger at sentencing communicates a deserved moral message is unabashedly retributivist. *See* Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 331–36 (1993) (a sentencing judge's role includes the task of "correcting" a defendant's "false statement" of his worth relative to that of the victim); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 671 (1989) ("retribution cannot be neatly divested of anger," and it is "hard to imagine a sentencer finding that an offender deserves a severe punishment" without calling on anger). However, anger expression also can serve utilitarian aims. *See Bragg*, 388 N.W.2d at 190, 192 (harsh words meant to encourage the defendant to "alter his conduct" and become a "productive, useful citizen").

202. Pillsbury, *supra* note 201; *see also* Benjamin Weiser, *Madoff Judge Recalls Rationale For Imposing 150-Year Sentence*, N.Y. TIMES, June 29, 2011, at A1 (Judge Chin "seemed to find a way to translate society's rage into a number").

203. *See, e.g.*, Martha Neil, *Judge Detains 2 Teens, Puts Ankle Monitor on Boy, 11, for Flash Mob Attack on Law Student and Others*, A.B.A. J., Aug. 19, 2011, http://www.abajournal.com/news/article/judge_jails_2_teens_puts_ankle_monitor_on_boy_11_re_flash_mob_attack_on_law/ (describing sentencing by "angry juvenile court judge").

in order to achieve a desired effect.[204] That phenomenon might be routine at sentencing, as the judge is explicitly positioned as the voice of the community. Speaking candidly about sentencing, though, Judge Denny Chin has acknowledged that "there is a lot of emotion involved."[205] Anger appeared to play an important role in his decision to impose a heavy sentence against a defendant convicted of passport fraud and trying to fake his own death in the 9/11 attacks, actions Chin called "despicable and selfish."[206] Anger may have played a similar role in his decision to sentence disgraced financier Bernard Madoff to 150 years in prison.[207] Similarly reflecting on the high emotionality of sentencing, not just as a mouthpiece but also as a person, Judge Bennett wrote that some of the sentencing allocutions he has heard from defendants "have pulled at my heartstrings and even brought me to tears, while others have given me heartburn and elevated my already too high blood pressure."[208] He placed into the latter category "infuriatingly insincere nonsense from sophisticated, highly educated white collar defendants."[209]

When judges get angry at parties and witnesses, then, it often is because those persons act disrespectfully, lie, buck the court's power, insult the judge or the legal system, or have committed acts (sometimes in court, sometimes just proven there) that lead the judge to conclude they are "thoroughly reprehensible."[210]

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204. *See supra* note 128 and accompanying text.

205. Benjamin Weiser, *A Judge's Education, a Sentence at a Time*, N.Y. TIMES, Oct. 7, 2011, at MB1 (quoting Judge Chin as saying that "[e]motion comes into play in every sentencing decision").

206. *Id.*

207. Weiser, *supra* note 202 ("Two years later, [Chin's] recollections resurrect all the anger, shock and confusion that surrounded Mr. Madoff's crimes . . . ."); *cf.* Richard F. Doyle, *A Sentencing Council in Operation*, 25 FED. PROBATION 27 (1961) (sentencing introduces a "human element" because different judges respond differently "in the presence of emotionally charged situations personally pleasing or especially repugnant to them").

208. Bennett, *supra* note 48, at 26.

209. *Id.* Another apparently infuriating allocution was as follows:

> I addressed the defendant: 'I note in paragraph 45 of the PSR report that you knocked your then live-in girlfriend off the front porch and broke her jaw in seven places and her leg in three places. Why would you do that to her?' He responded: 'She deserved it.' I countered: 'Excuse me, I don't think I heard your answer.' His follow up: 'I said she deserved it.' I don't know what you could have said that would have helped you, but this really, really hurt you! He received an extra 10 months per word.

Id.

210. Liteky v. United States, 510 U.S. 540, 550–51 (1994).

C. Anger at Other Judges

Finally, judges get angry at one another. This permutation of judicial anger is the least visible, and it tends to draw the most attention when it surfaces. In news coverage of *Bush v. Gore*, for example, a commentator noted that the evident procedural wrangling within the Supreme Court over whether a Florida recount should go forward laid bare the "tension and anger that the court had managed to contain under a veneer of civility."[211]

On multijudge courts, dissents provide one window into such anger. Dissent, of course, follows disagreement. While disagreement is unpleasant, it need not be angering. "Principled disagreement"[212] is highly valued in our system of law, and judges often go to great pains to express respect for one another even as they clash over legal and factual interpretation. But dissents sometimes reveal disagreements with a more personal tone, and these tend to come dipped in particularly biting rhetoric.

Perhaps no one has perfected the art of the angry dissent better than Justice Antonin Scalia.[213] Linda Greenhouse has described Scalia as "enraged" and "dyspeptic," particularly when writing in

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211. Linda Greenhouse, *Bush v. Gore: Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A18. Judges are not the only court personnel at whom judges get angry. Don Von Natta, *Dispute of Court Officers and Judges Escalates*, N.Y. TIMES, Nov. 22, 1995, at B3 (detailing "high-volume clash laced with personal attacks and, at times, profanity" between New York City judges and uniformed court officers).

One might assume that interjudicial anger would be more common on multijudge courts, as those judges are more frequently in contact with one another, and thus have more opportunities to be angered. This may be true, but as this Section reveals, judges who primarily operate solo—such as district judges within the Fifth Circuit—also get angry with one another. The impact of the court on which a judge sits, including not just the question of multi-member versus solo jurisdiction but also subject matter restrictions (e.g., family versus criminal), hierarchal position (e.g., trial versus appellate), and so on, are worthy of further exploration. One reader has suggested, for example, that trial-court judges are more likely to get angry at misbehaving people, while appellate judges are more likely to get angered by ideas—for example, a colleague's opposing position on a contested idea. Future installments of this judicial-emotion project will look squarely at these structural distinctions.

212. In *Grutter v. Bollinger*, Judge Moore said in his concurring opinion:

> Dissenting opinions typically present principled disagreements with the majority's holding[, which are] perfectly legitimate and do not undermine public confidence in our ability as judges to do what we have sworn to do [and which] can be phrased in strong terms without damaging the court's ability to function as a decision-making institution in a democratic society. Judges criticize their colleagues' reasoning all the time, and, if they are to carry out their oaths of office, they must do so. This robust exchange of ideas sharpens the focus and improves our analysis of the legal issues.

Grutter v. Bollinger, 288 F.3d 732, 752 (6th Cir. 2002) (Moore, J., concurring)

213. LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 20–21 (1999) (Scalia frequently demonstrates both anger and contempt).

dissent;[214] another commentator describes Scalia's writing as "equal parts anger, confidence, and pageantry," such that his opinions—particularly dissents—"read like they're about to catch fire from pure outrage."[215] Of course, Scalia is far from the only Justice to use that forum to rail against his fellows' perceived misdeeds.[216] Nor need anger always be deduced from words on the page. As Adam Liptak has noted, choosing to read a dissent from the bench—as Justice Stevens did in *Citizens United*—allows a Justice to "supplement[] the dry reason on the page with vivid tones of sarcasm, regret, anger and disdain."[217]

A look beyond the Supreme Court reveals other instances of judges publicly expressing their anger at one another. The Sixth Circuit's handling of challenges to the University of Michigan's race-conscious admissions policies provides an example.[218] A divided *en banc* court disagreed sharply over the policies' constitutionality.[219] Nothing remarkable there. What was remarkable was Judge Boggs's decision in dissent to accuse colleagues of deliberately manipulating the composition of the panel in order to determine the result.[220] Charged language on both sides left little doubt as to the high emotional pitch.[221] Judge Moore, one of the accused judges, wrote that Boggs had caused "grave harm" to them, the court, and "the Nation as a whole," declaring that his "shameful" opinion would "irreparably damage the already strained working relationships among the judges

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214. Linda Greenhouse, *Justice Scalia Objects*, N.Y. TIMES OPINIONATOR (Mar. 9, 2011, 8:40 pm), http://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects/.

215. Conor Clark, *How Scalia Lost His Mojo*, SLATE (July 5, 2006, 3:59 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/07/how_scalia_lost_his_mojo.html (Scalia's dissent in *Planned Parenthood v. Casey* "achieved a level of frustrated fury usually reserved for undersea volcanoes and small dogs tied to parking meters").

216. Webster v. Reproductive Health Servs., 492 U.S. 490, 538–47 (1989) (Blackmun, J., dissenting) (railing against majority's opinion as a "[b]ald assertion masquerad[ing] as reasoning," and claiming majority was "deceptive" and "disingenuous").

217. Adam Liptak, *In a Polarized Court, Getting the Last Word*, N.Y. TIMES, Mar. 8, 2010, at A12 (Justice Stevens's angry dissent in *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 929 (2010) (Stevens, J., dissenting), gained significant power through his decision to read it aloud, despite obvious physical and mental strain); Dahlia Lithwick, *The Pinocchio Project*, SLATE (Jan. 21, 2011, 2:15 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2010/01/the_pinocchio_project.html.

218. *See* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002). The cases ultimately were resolved by the United States Supreme Court. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

219. *Grutter*, 288 F.3d 732 (splitting 5-4 in favor of constitutionality of race-conscious admissions policy).

220. *Id.* at 810 (Boggs, J., dissenting).

221. For example, Judge Clay decried Boggs's decision "to stoop to such desperate and unfounded allegations." *Id.* at 772.

of this court."[222] Nor did the rancor dissipate. When a report (prepared by one of the dissenters) later concluded that the Chief Judge had committed misconduct, he disputed its methods and conclusions to *The New York Times*—a rare public move, the reporter wrote, evidencing "continued strained relations."[223]

The Fifth Circuit, too, has exposed its fair share of collegial relations strained by anger. A long-running feud involving District Judge John McBryde—reputed to have a "particularly nasty temper, even for a judge"[224]—blossomed in the mid-1990s into one of "the biggest, rawest brawls in the history of the Federal judiciary."[225] At the feud's pinnacle, a Special Investigative Committee of the Fifth Circuit Judicial Council investigated charges that McBryde had abused lawyers, witnesses, and a court clerk.[226] The lengthy, rancorous, and public proceedings[227] revealed serious interjudge conflict. McBryde once became "angry and lashed out at a fellow judge who joked about" his impatience; he called two fellow judges "despicable"; and he ordered a visiting state-court judge removed from his courtroom without even asking why he was there.[228] It came to light that the Chief Judge of his District, Jerry Buchmeyer, had written a nasty satirical song about McBryde and his wife had sung it at a bar revue performance.[229] The acrimony between the two men was pronounced enough to warrant mention in Buchmeyer's obituary.[230]

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222. *Id.* at 752–58 (Moore, J., concurring) (arguing that Boggs's dissent "marks a new low point in the history of the Sixth Circuit"). The personal element of the discord was underscored by Moore's assertion that Boggs had "refused to accept" personal assurances that "we did not engage in the manipulation of which he has accused us." *Id.* at 753 n.2.

223. Adam Liptak, *Court Report Faults Chief Judge in University Admissions Case*, N.Y. TIMES, June 7, 2003, at A16.

224. Christine Biederman, *Temper, Temper*, DALL. OBSERVER, Oct. 2, 1997, http://www.dallasobserver.com/1997-10-02/news/temper-temper/.

225. *One Federal Judge Does Battle with 19 Others*, N.Y. TIMES, May 1, 1996, at B6.

226. The Committee held a nine-day hearing with fifty-five witnesses, tried (unsuccessfully) to persuade McBryde to accept psychiatric treatment, found a pattern of abuse, and recommended sanctions, which eventually were upheld by the D.C. Circuit. Judge McBryde's disciplinary history, of which this is just one example, is long. *See* McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of United States, 264 F.3d 52 (D.C. Cir. 2001) (citing to, *inter alia*, *In re* Matters Involving Judge John H. McBryde, Under the Judicial Conduct & Disability Act of 1980, No. 95-05-372-0023 (Jud. Council 5th Cir. 1997); Report of the Special Comm. of the Fifth Circuit Judicial Council Regarding Complaints Against, and the Investigation into the Conduct of, Judge John H. McBryde (Dec. 4, 1997)).

227. *McBryde*, 264 F.3d at 54–55.

228. *Id.* at 71–72 ("Because of the chilling effect of Judge McBryde's rules and his manner of enforcement . . . attorneys, fearing humiliation or embarrassment, forego actions they believe are in their clients' best interests and fail to preserve issues for appeal.").

229. Nathan Koppel, *Law Blog Obituary: U.S. District Judge Jerry Buchmeyer*, WALL ST. J. L. BLOG (Sept. 23, 2009, 3:34 PM), http://blogs.wsj.com/law/2009/09/23/law-blog-obituary-us-

Given cultural fascination with "dirty laundry," public attention to judicial infighting tends to be colored with more than a shade of titillation. This is even more so when judges lash out at each other in ways that are more outré. When Chief Judge Jones publicly told her Fifth Circuit colleague to "shut up" because she perceived him to be hogging oral argument time, it was perceived as truly shocking.[231] Even more shocking are allegations of physical violence, such as those swirling around the Wisconsin Supreme Court. That court in 2011 was asked to rule on a controversial bill curtailing the collective bargaining rights of public employees. Chief Justice Shirley Abrahamson prepared a "stinging" dissent accusing Justice David Prosser of partisanship.[232] The night before the opinion's release, a number of the justices gathered in the chambers of Justice Ann Walsh Bradley. "The conversation grew heated," and Bradley asked Prosser to leave after he made "disparaging" remarks about Abrahamson. While accounts here diverge, Bradley claims that Prosser then choked

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district-judge-jerry-buchmeyer/. The song, set to the meter and tune of "King Herod's Song" from *Jesus Christ Superstar*, contained these lyrics:

> Lawyers I am overjoyed
> That you're all here today.
> Now listen very carefully
> To what I have to say.
> Stupid lawsuits, motions wasting time,
> That's gonna stop, 'cause I'm your God,
> And I'll treat you just like slime.
> Yes! I'm the Judge,
> I'm the Great John McBryde,
> Miss a deadline like a fool,
> I'll send you to reading school[!]

Biederman, *supra* note 224. The reference to "reading school" reflects an instance in which McBryde "bludgeoned" a "hapless" attorney into attending "reading comprehension classes" and filing "demeaning affidavits" of attendance. These steps were punishment for having (for good reason) failed to follow the letter of a standing order related to depositions. *McBryde*, 264 F.3d at 68.

230. Koppel, *supra* note 229 ("[F]or our money, the most entertaining thing Buchmeyer ever wrote was directed at a fellow jurist, U.S. District Judge John McBryde."). Many years later, McBryde remains on the bench, and complaints still roll in at a regular clip. *See, e.g.*, Jonathan Turley, *Texas Judge Clears Attorneys After Judge McBryde Refers Them for Possible Criminal Prosecution After They Sought His Removal from Case*, A.B.A. J. (Jan. 13, 2001, 6:30 am), http://www.abajournal.com/news/article/federal_judge_recommends_criminal_charges_for_lawyers_who_questioned_his_im/.

231. For a representative example, see David Lat, *Judicial Diva Gone Wild? Chief Judge Jones Tells Judge Dennis to Shut Up*, ABOVE THE LAW (Sept. 21, 2011, 7:43 pm), http://abovethelaw.com/2011/09/benchslap-of-the-day-chief-judge-jones-tells-judge-dennis-to-shut-up/.

232. Crocker Stephenson, Cary Spivak & Patrick Marley, *Justices' Feud Gets Physical*, MILWAUKEE-WISCONSIN J. SENTINEL, June 25, 2011, http://www.jsonline.com/news/statepolitics/124546064.html.

her.[233] The choking allegation (currently under investigation) has a history: Bradley has complained of Prosser's periodic "flashes of extreme anger," and Prosser, for his part, admits to having once called Abrahamson a "total bitch" and vowing to "destroy her."[234]

In sum, judges get angry, sometimes very angry. Anger at lawyers is the most commonplace and the least frequently condemned manifestation. Anger at others in the *dramatis personae* of any given case, though less ubiquitous, is nonetheless common. It also is increasingly visible, given the proliferation of cameras in courtrooms and the ease of online video circulation. Judges' fury at one another occasionally surfaces, too, despite both incentives to keep it under wraps and layers of secrecy that facilitate such discretion.

The following Part proceeds from this knowledge base as to how judicial anger is and takes on the question of how it ought to be.

III. THE RIGHTEOUSLY ANGRY JUDGE

Exposing judicial anger, the project of the preceding Part, is interesting not only for what it reveals about its objects but also for what it reveals about its audience. How such anger is evaluated—whether by a reviewing court, a journalist, a member of the public, or the anger's target—revolves around two essential axes: *justification* and *manifestation*.

Justification captures the "why" of the anger, while manifestation refers to the way in which it is experienced by the judge and expressed to others. Some instances of judicial anger seem both wholly justified and experienced and expressed in an appropriate way. For example, lawyers and parties sometimes are seen as bringing the judge's wrath upon themselves, and it may seem entirely proper for the judge to feel angry and to let that anger show.[235] Some wrath might seem justified, as might expression of it, but we might nonetheless worry about its impact on the judge herself: if the anger responds to a personal insult, for example, perhaps she will act rashly out of a desire for score settling.[236] Sometimes only the manner of expression seems inappropriate, such as when understandable ire is

233. *Id.*

234. *Id.*; *see also Supreme Court Debate Focuses on Rancor Among Current Justices*, MILWAUKEE-WISCONSIN J. SENTINEL, Mar. 21, 2011, http://www.jsonline.com/news/statepolitics/118410829.html (providing background on the incident).

235. *See, e.g.*, Campbell v. United States, No. 5:07-0120, 2010 WL 1379992 (S.D. W. Va. Mar. 10, 2010); United States v. Kahre, No. 2:05-CR-0121-RCJ-RJJ, 2007 WL 2110500 (D. Nev. 2007).

236. *See, e.g.*, Mayberry v. Pennsylvania, 91 U.S. 499, 505 (1971).

vented before the jury.[237] In other instances, the anger itself seems unjustified—for example, being angry at counsel for imagined wrongs—and thus *any* experience or expression of it is deemed inappropriate.[238] In capturing how we actually think about judicial anger, then, these elements emerge as the critical ones.

As this Part asserts, those are the correct elements, and it is possible to conceptualize them in a coherent way—though to date we have not done so. Relying on the elements of justification and manifestation helps us to more tightly draw the distinction between acceptable and unacceptable judicial anger. Recalling Aristotle's counsel, they allow us to give substance to the idea—otherwise just a platitude—that judges ought to be angry "at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way."[239]

This Part takes on justification first. It draws on concrete examples to elaborate the distinction between good and bad reasons for judicial anger, and argues that a good reason is one that is accurate, relevant, and reflects good values. It then takes on manifestation. It explores the various behavioral impacts of judicial anger, such as increased reliance on heuristics—an experiential effect—and a tendency to show on the face—an expressive effect. These effects create both opportunities and dangers for judges. This Part again draws on concrete examples to demonstrate how we might distinguish the former from the latter in theory, and argues that strong emotion-regulation skills help judges enact that distinction in practice. Adequate justification and appropriate manifestation together comprise righteous judicial anger.

A. Being Angry "with the Right Motive"

Justification captures Aristotle's concern that anger be underlain by a correct "motive," in the sense that it is directed at the right persons and for good reasons. Righteous judicial anger rests on accurate premises; is relevant; and reflects worthy beliefs and values.

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237. *See, e.g.*, Taylor v. Abramajtys, 20 F. App'x 362 (6th Cir. 2001); Francolino v. Kuhlman, 224 F. Supp. 2d 615 (S.D.N.Y. 2002).

238. *See, e.g.*, *In re* McBryde, 117 F.3d 208, 213 (5th Cir. 1997); United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973).

239. AVERILL, *supra* note 6, at 82 (quoting ARISTOTLE, NICOMACHEAN ETHICS 1106B20, *in* THE BASIC WORKS OF ARISTOTLE, *supra* note 10, at 958).

1. Righteous Judicial Anger Reflects Factually Accurate Premises

The most straightforward of these inquiries is the first, going to accuracy. If a judge is angry at a lawyer for having lied to him, for example, it is relevant whether the lawyer really lied. To be more precise, it matters whether the statement actually was untrue, whether the lawyer believed it to be untrue, and whether the lawyer intended to mislead. The judge's assessment of the truth status of any of these questions might be literally wrong.[240]

This was precisely the issue underlying one of the many allegations of misconduct against Judge McBryde. McBryde angrily accused an Assistant United States Attorney of being "engaged in falsehood and deception" when she asserted that certain information, which he wanted her to produce, had been ordered sealed by another judge.[241] The Fifth Circuit found the accusation to have been baseless.[242] It eventually imposed a three-year ban barring McBryde from hearing cases involving certain lawyers, apparently out of concern that he was unable accurately to judge reality where they were concerned.[243] At least as to those persons, the Circuit seemed to worry, the judge was liable to become angry for no reason.

McBryde is not unique in this regard; other judges get angry for reasons that prove ephemeral.[244] A Florida judge, for example, became enraged with a group of traffic-offense defendants whom he thought had disobeyed their orders to appear. It turned out that a court officer had led them to the wrong courtroom, where they were waiting as instructed.[245] In another incident, captured on video and posted on the Internet, a judge appears to have become angry at a

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240. *Cf.* Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 869–77 (2009) (evaluating truth status of judges' assertions about emotion).

241. *In re McBryde*, 117 F.3d at 213.

242. *Id.* at 217 ("Judge McBryde's attack on AUSA Darcy A. Cerow and Postal Inspector Rex Whiteaker and his accusations against them of lying and contempt of court were baseless, threatening irreparable damage to the professional reputations and careers of both."). According to Janet Napolitano, then the United States Attorney for the District of Arizona, McBryde's rash accusation hindered a grand jury investigation, and meant that several persons would likely avoid prosecution entirely. *Id.* at 216.

243. *Id.*

244. *See* Cappello v. Duncan Aircraft Sales, Inc., 79 F.3d 1465 (6th Cir. 1996) (recounting an incident where a trial judge "excoriated" a witness who said "GD" after the judge instructed him not to say "goddamned").

245. *In re* Sloop, 946 So. 2d 1046 (Fla. 2007). More disturbing than the original error was the fact that the judge seemed unconcerned when that error was pointed out to him. He neglected to take timely steps to release the accused traffic offenders, who because of his orders had been jailed and strip-searched.

litigant who sat down slowly when court was called into session.[246] The judge likely thought the man was refusing to sit, but it appears that he was confused about whether he was supposed to sit or stand, as the judge had just called out his name.

Judges can, of course, make mistakes. The fact of a mistake does not impugn her qualifications or character, particularly if it is an honest one, but it does rob her anger of justification. This is particularly so if the mistake could have been noticed and corrected. We do not expect judges to be factually correct as if by magic. We expect them, rather, to exercise due diligence as to facts, and to be prepared to subject angering facts to an appropriate, even heightened, level of scrutiny.[247]

The more difficult cases are those requiring that we judge the anger's underlying premises not for their accuracy but for their propriety. In these instances, we ask not whether the judge is angry for no reason, but whether she is angry for no *good* reason.

2. Righteous Judicial Anger is Relevant

If a judge becomes angry for reasons having nothing to do with the matter at hand, that anger is irrelevant.[248] It may stem from a reason, even a good reason, but because it does not pertain to legally or morally salient features, it is not a good reason for the purposes of judicial action in that instance.

Liteky offers a constructive parallel, as it reflects a concern with irrelevance.[249] The primary issue in that case was whether disqualifying bias could be found only if a judge's ill opinion of a party, witness, or attorney stemmed from an "extrajudicial source"—that is,

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246. RidleyReport.com, *Judge Loses It on Cam, Jails Man for Sitting Too Slow*, WORLD NEWS (Nov. 14, 2008), http://wn.com/Judge_loses_it_on_cam,_jails_man_for_sitting_too_slow.

247. *See infra* Part III.B.2 (demonstrating how anger itself can curtail such diligent scrutiny).

248. Unlike other iterations of judicial anger, it is difficult to see reflections of truly irrelevant anger in the case law or media reports. Judges are highly unlikely to recognize, let alone admit to, such anger as a basis for action, and it would be difficult for an outside observer to deduce hidden sources of anger. This therefore is one instance in which the window on judicial anger is unduly limited. *See supra* note 132. We can get intermittent hints, including from the secondary literature. *See, e.g.*, *Former Judge Newton Reprimanded by Court*, FLA. B. NEWS, June 15, 2000, at 13 (reporting a judge made "threatening and abusive" comments to a lawyer who had filed a recusal motion, saying "judges can make or break attorneys" and "clients come and go, but you have to work with the same judges year in and year out. You better learn who your friends are."); Bennett, *supra* note 48, at 26 ("Another poor [sentencing] allocution came from a defendant who, after a lengthy trial, told me what a terrible and unfair judge I was. Hmmm . . . Who do you think the trial judge on your § 2255 petition is going to be?").

249. Liteky v. United States, 510 U.S. 540, 550 (1994).

one rooted in events outside the four corners of the case.[250] Though it declined such a holding, the Court did opine that bias is more likely where the ill will stems from such a source. Its prime example was not anger but hatred—specifically, hatred of Germans.[251] If a judge, entrusted with a case involving a German defendant, begins with a fixed hatred of Germans—based, for example, on his military service—that hatred is likely to undergird a disqualifying bias. Though the Court was not explicit as to precisely why, the apparent concern was that the emotion reflects a category judgment that prevents the judge from responding adequately to the defendant's individuality.

A similar argument might be made about anger. Anger from an irrelevant source might color the judge's perceptions and opinions in diverse and subtle ways.[252] Indeed, the analysis of the following Section shows that this often is true.[253] A person who is angry for one reason may attribute ambiguous signals (like slowness to sit) to deliberate wrongdoing. Such anger seems obviously unfair if its trigger has literally no relevance: perhaps the judge was ticked off at the obnoxious lawyer who argued the previous case, and took it out on the next person to appear. It may also seem unfair even if rooted in the case but misapplied within it. A judge might find cause for anger with a litigant when she is really mad at his lawyer. Even if the lawyer is the target both times, the judge might find fault with some current, relatively blameless act because she is seething over an earlier misstep. In still other instances, the judge might have access to information that she ought not to have, as when a party improperly raises extraneous and prejudicial information, or that she ought to put aside for the moment, as when she learns facts during a suppression hearing that are not at issue at trial. Anger also may be irrelevant because it relates only to an issue delegated to another decisionmaker, such as the jury.

In none of these instances is a judge's anger justified, even if it is entirely understandable.

3. Righteous Judicial Anger Reflects Good Beliefs and Values

Perhaps most importantly, anger that is anchored to an accurately perceived, relevant event may nonetheless be unjust if the

250. *Id.*
251. *Id.*
252. *Id.*
253. *Infra* Part III.B.2.

evaluation of that event's significance reveals undesirable beliefs and values.[254]

Liteky again provides a starting point for that deeper level of inquiry. In defining the distinction between an "unfavorable opinion" of a party, which may be allowable, and bias against that party, which is not, the Court wrote: "One would not say, for example, that world opinion is biased or prejudiced against Adolf Hitler. The words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate* . . . ."[255]

As the *Liteky* Court wrote, the unfavorable opinion would be wrong only if it is "undeserved."[256] In that instance, the Court was implying that hatred of Hitler is deserved, as it represents an appropriate response to evil.

Drawing again the parallel to anger, judicial anger would be deserved if it responds to evil,[257] but undeserved if the triggering action is not properly characterized as wrongful, and its result not properly considered an unwarranted harm (or any sort of harm at all). These determinations often are quite different in the judging context than in other areas of life because actions that constitute wrongful infliction of harm in other contexts might lack that status in law. Pleading not guilty to a crime one actually did commit, for example, might constitute a "lie" in a colloquial sense, but it is not properly treated as a lie by a judge. Judicial anger at a defendant for having pleaded not guilty would never be appropriate because the judge who treats as a lie the decision to put the state to its proof has chosen to devalue something that law commands her to value. Deeming reasons as "bad" or "good" for purposes of judicial anger, then, requires that we

254. SOLOMON, *supra* note 64, at 271 ("Our emotions betray our philosophies, whether they are petty, pathetic and narrowly self-serving or expansive, compassionate, principled, and bold."); Maroney, *supra* note 240, at 873–75 (judges' emotions reflect their underlying beliefs and values, which may be normatively assessed).

255. *Liteky*, 510 U.S. at 550 (emphases in original). The Court went on to quote Jerome Frank thus: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *Id.* at 551 (quoting *In re* J.P. Linahan, Inc., 138 F.2d 650, 654 (2d Cir. 1943)). Frank, the famous early-twentieth-century legal realist, was one of the first to argue that judges' emotions do, and perhaps should, play a role in their decisionmaking. Maroney, *supra* note 12, at 654–56.

256. *Liteky*, 510 U.S. at 550.

257. GILLETTE, *supra* note 68, at 99 (Augustine held that anger, "when it is a reaction against evil," is "not to be lightly dismissed").

keep firmly in mind both the legal context and the judge's role within it.[258]

Contrast, for example, *Shaw*, the earlier-described case in which a judge had the defendant's mouth taped shut,[259] with *Lewis v. Robinson*.[260] In *Lewis* the defendant, after having his motion to represent himself denied multiple times, shouted profanities at his attorney and hit him, causing the attorney to bleed.[261] The judge ordered the defendant shackled and his mouth taped shut. In both cases the judge appeared to be angry at the defendant when he issued the order to apply the tape.[262] However, in *Shaw* the judge was angry because the defendant had talked back to him, while in *Lewis* the defendant had become violent. What distinguishes the cases is the judge's entitlement to be angry, based on normative conceptions of what represents an unacceptable affront to the judge and others within his zone of care. Violence clearly is such an affront; being "mouthy" generally is not, however irritating and unwise it may be.[263]

Similar issues arise when a party successfully appeals a ruling and appears before the same judge on remand. In one such case, in which a race-discrimination plaintiff won reversal of a directed verdict, the trial judge complained that the Sixth Circuit had put "egg on my face."[264] Though he immediately went on to insist that he was

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258. O'Brien, *supra* note 141, at 252 (a judge is supposed to "have thick skin and remain calm, neutral, friendly, and courteous," even though "in a non-judicial setting I might be commenting on the horse counsel rode in on").

259. Shaw v. State, 846 S.W.2d 482, 485–86 (Tx. Ct. App. 1993).

260. 67 F. App'x 914 (6th Cir. 2003).

261. *Id.* at 917.

262. *Id.* at 923 ("[S]tatements by the trial judge . . . clearly expressed impatience, dissatisfaction, annoyance, and also anger . . . ."); *Shaw*, 846 S.W.2d at 487.

263. *Shaw*, 846 S.W.2d at 485–86 (court distinguished judge's reaction to back-talking from cases in which the defendant is reasonably believed to be a danger if unrestrained). Being "mouthy" generally will not provide an adequate reason because litigants have the right to assert their points of view, even if they do so poorly and to their ultimate detriment. While a judge has a responsibility to police and channel such expressions as a matter of courtroom management, she does not have the power to shut them down completely. *See* N.Y. DAILY NEWS, Sept. 10, 1998, at 18 (reporting that a judge yelled "Are you physically unable to keep your mouth closed?" at a defendant who whispered loudly during the prosecution's opening statement); *Clark County Judge Shouts Down Defendant*, KHQQ6 (Mar. 5, 2009), http://www.khq.com/story/9953585/clark-county-judge-shouts-down-defendant (judge apologized, saying incident was "the worst I've ever had happen in a courtroom with someone being mouthy"); Michelle Caruso & Helen Kennedy, *Shaddup, Irate Judge Tells McDougal*, N.Y. DAILY NEWS (Sept. 10, 1998), http://articles.nydailynews.com/1998-09-10/news/18081885_1_nancy-mehta-susan-mcdougal-partner-of-president-clinton; Spoto, *supra* note 113 (judge told party, "Don't you dare talk back to me"). These cases also implicate not just the reasons for the judges' anger but their actions in response. A good deal of the difficulty in *Shaw* is that the judge's reactions seem overblown, even though his anger had some basis. *See infra* Part III.B (addressing appropriate anger manifestation).

264. Anderson v. Sheppard, 856 F.2d 741 (6th Cir. 1988).

"not mad about it," when the case again went up on appeal the Circuit seemed clearly to disbelieve that disclaimer.[265] As the Fifth Circuit succinctly declared in a different case, "a litigant's taking an appeal of right should not be a source of 'insult' or 'anger' for a district judge."[266]

As these and other cases[267] reveal, one recurring bad reason for judicial anger is that the object of anger has done something she is entitled to do. Unjust anger may also be triggered when the anger object does something she is *required* to do.

In *Harrison v. Anderson,* for example, a murder victim had, before her death, mentioned a local judge's name in connection with a drug operation closely related to the attack that caused her eventual demise.[268] When that judge was assigned to the homicide trial, the attorney for the accused sought recusal. The judge became enraged at the suggestion that he was involved in drug dealing. If, however, the attorney had potentially credible information that the judge's personal interests were implicated, he was required as a matter of professional responsibility to seek the recusal. Indeed, the case makes clear why, because the judge went on to make a series of rulings against the defense that seemed designed primarily to keep his name out of the story.[269] While any judge would be upset at the suggestion of serious criminal wrongdoing, no judge is entitled to be angry at an attorney for doing her job.[270] Even were the allegations in the recusal motion to cause reputational harm, that would not be an unwarranted harm; the professional obligation provides the warrant.

Judicial anger, then, may be undeserved by reason of being directed at persons who have exercised a right or lived up to an obligation. However, a judge's ire sometimes hits just the right mark.

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265. *Id.* The district judge also appeared to be angry at the plaintiff because he had resisted settlement offers toward which the judge was pushing the parties. *Id.*

266. Tollett v. City of Kemah, 285 F.3d 357 (5th Cir. 2002); *see also* North Carolina v. Pearce, 395 U.S. 711, 725 (1969) (imposition of greater penalty based upon a successful appeal violates due process).

267. *See* Alicia Cruz, *N.J. Judge Max Baker Reprimanded for Yelling at Mother During Family Court*, N.J. NEWSROOM (June 17, 2011), http://www.newjerseynewsroom.com/state/nj-judge-max-baker-reprimanded-for-yelling-at-mother-during-family-court (judge yelled at party while she was trying to answer a question).

268. 300 F. Supp. 2d 690 (S.D. Ind. 2004).

269. *Id.*

270. *See also* United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973) (trial judge became progressively more angry with the defense attorney as he made reasonable efforts to protect the defendant's interests); *cf.* Draughn v. Johnson, 120 F. App'x 940, 945 (4th Cir. 2005) (noting and reversing lower-court decision granting state prisoner's claim on habeas that the trial judge "gave the appearance of anger" when the prisoner asked his attorney to move for recusal on the ground of racial bias).

Contrast these cases with one in which a prisoner made false allegations of serious government misconduct.[271] The government had to thoroughly investigate his allegations before debunking them. As the reviewing court correctly concluded, the judge presiding over that case was "appropriately angered" by the prisoner's conduct, as he had sought to waste time and divert law-enforcement resources.[272] Similarly, federal judges in New York reportedly were "outraged" when they observed police officers telling blatant lies while under oath.[273] In such instances, anger is directly responsive to a blameworthy harm, and the objects are the persons who committed those harms. The victims, such as criminal defendants harmed by the lies of government actors, fall within the judge's zone of care, for she is responsible for protecting their legal rights. The judge herself is a victim in many such cases, as when her reliance on lawyers' or police officers' good faith is abused. The offender's wrongful actions may also make the judge an unwilling partner in a wrong, as when she lacks power to improve the performance of a borderline-incompetent lawyer who is harming his client's interests.[274] More broadly, the fair administration of justice itself is within the judge's zone of care. Insults to justice are insults about which the judge is entitled to be angry.[275]

Judicial anger at criminal sentencing often can be justified as well, and for a similar set of reasons.[276] By the time of sentencing, blameworthy conduct already has been shown. Assuming, as the judge must, the accuracy of that finding, the judge is entitled to respond emotionally to any harm the defendant has caused. Expressing anger vividly demonstrates to victims and their survivors that they are within the judge's zone of care. It communicates, in a way that other demonstrations could not, that they are members of the valued

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271. Campbell v. United States, No. 5:07-0120, 2010 WL 1379992 (S.D. W. Va., Mar. 10, 2010).

272. *Id.*; *see also* Maroney, *supra* note 13, at 1498 (Kozinski became livid upon learning that a federal prosecutor had lied to him).

273. Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES, May 12, 2008, http://www.nytimes.com/2008/05/12/nyregion/12guns.html?pagewanted=all.

274. *See, e.g.*, Carrington v. United States, 503 F.3d 888, 899 (9th Cir. 2007) (Pregerson, J., dissenting) ("[S]ometimes . . . [t]he judge has to just sit up there and watch justice fail right in front of him, right in his own courtroom, and he doesn't know what to do about it, and it makes him feel sad . . . . Sometimes he even gets angry about it." (quoting GERRY SPENCE, OF MURDER AND MADNESS: A TRUE STORY 490 (1983))).

275. Potegal & Novaco, *supra* note 8, at 18 ("In classical Athens . . . [a] frequent trope is that law itself was angry at the accused.").

276. *See supra* notes 190–97.

community.[277] It also demonstrates judicial respect for the defendant. As one feels anger only where a human agent has chosen to inflict an unwarranted harm, showing anger reveals the judge's assessment that the defendant is a fellow human possessed of moral agency. By using his authoritative position to send moral messages to the wrongdoer, the judge ideally frees others in society from feeling a need to do so themselves, including through vigilante action.[278]

In contrast, judicial anger might be used not to send deserved moral messages but to belittle, humiliate, or dehumanize. This is a particular danger in criminal sentencing, but it is by no means limited to that setting. For example, rather than force the defendant to hear both an account of the harm he has caused and the judge's moral condemnation of those acts,[279] she might call him a "lowlife" or "scumbag."[280] Insults, gratuitous displays of power, extreme sarcasm, mocking, and demeaning language all reflect that the judge is using anger to assert her dominance. Assertions of power are, to be sure, sometimes appropriate. Anger at lawyers, witnesses, and parties may be helpful in reminding those persons that the judge is in charge of both the courtroom environment and the processes of litigation.[281] Belittling actions appear meaningfully different. Acting so as to humiliate or belittle strongly suggests that anger is no longer

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277. This message may be particularly important for victims whose interests have been diminished not only by the defendant's actions but also by relative societal disadvantage or scorn. *See* Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 568 (1998) (quoting judge who actively denigrated gay Asian-American homicide victim).

278. CAROL TAVRIS, ANGER: THE MISUNDERSTOOD EMOTION 48 (1983) ("[I]n the absence of a formal judiciary, anger operates as a personal" emotion, driving individuals to "see to it that their rights are respected and justice seen to.").

279. Benjamin Weiser, *Judge Explains 150-Year Sentence for Madoff*, N.Y. TIMES, June 28, 2011, http://www.nytimes.com/2011/06/29/nyregion/judge-denny-chin-recounts-his-thoughts-in-bernard-madoff-sentencing.html?pagewanted=all ("In a society governed by the rule of law, [Judge Chin] wrote, the message had to be sent that Mr. Madoff would be 'punished according to his moral culpability.' ").

280. *See In re* Merlo, 34 A.3d 932, 972 (Pa. Ct. Jud. Disc. 2011) (judge "in a tirade" called defendant a "low life" and "a scumbag"); *In re* Lokuta 964 A.2d 988, 1054 (Pa. Ct. Jud. Disc. 2008) (judge screamed at the defendant that she was "nothing but a fat pig, whore, lowlife"); *cf.* Milmir Constr. v. Jones, 626 So. 2d 985, 986 (Fla. Ct. App. 1993) (judge called attorney a "scumball").

281. Judges' expressions of anger at one another are harder to justify by this particular criterion. Judges who are peers—like colleagues on the Sixth Circuit or Wisconsin Supreme Court—should not attempt to assert power over one another, whether by use of anger or otherwise. Judges who sit in a superior position, such as those on appellate courts and courts of last resort, seldom need anger to assert their power over the judges below them in the hierarchy. *Cf.* Roper v. Simmons, 543 U.S. 551, 585 (2005) (O'Connor, J., dissenting) ("tak[ing] issue with the Court's failure to reprove . . . the Supreme Court of Missouri's unabashed refusal to follow our controlling decision in *Stanford*").

operating in isolation: instead, it has become corrupted with contempt.[282] Contempt, like anger, reflects a judgment that a fellow human has acted badly. Unlike anger, it goes on to value that fellow human as "vile, base, and worthless."[283] It explicitly positions its target as an inferior,[284] not just hierarchically but as a human being, and motivates public assertions of that inferior status.[285] When judicial anger becomes intertwined with contempt, it loses its claim to justification, for it has internalized a fundamentally bad judicial value: superiority. While judges have a legitimate claim to authority, they have no such claim to superiority.

Diagnosing the corrupt values underlying anger that has become intertwined with contempt delineates a sort of judicial anger that is particularly unjustified. But the analysis thus far also has

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282. *See supra* notes 96–97 (anger often co-occurs with other emotions); *see also* Taylor v. Abramajtys, 20 F. App'x 362 (6th Cir. 2001); Morris v. Coker, Nos. A–11–MC–712–SS, A–11–MC–713–SS, A–11–MC–714–SS, A–11–MC–715–SS, 2011 WL 3847590, at *1 (W.D. Tex. Aug. 26, 2011); *In re* Moore, 626 N.W.2d 374 (Mich. 2001); Dorian Block, *Bronx Supreme Court Judge Joseph Dawson Calls for Proper Attire in Court*, N.Y. DAILY NEWS, July 28, 2009, http://articles.nydailynews.com/2009-07-28/news/17927682_1_shorts-shirt-office-of-court-administration; Cruz, *supra* note 267 ("I'm a Superior Court judge that demands the respect of my position, and you will give it to me."). One striking aspect of Judge McBryde's opinions is the frequency with which he points out the spelling and grammar errors of pro se litigants, which seems unnecessary and belittling. *See, e.g.*, Scales v. Texas, No. 4:07-CV-160-A, 2007 WL 1341926, at *1–2 (N.D. Tex. May 1, 2007) (repeating three times in the space of a page that the defendant submitted a document entitled "A Writ of Mandams"); Berry v. Bridgeport Pre Release Ctr., No. 4:03–CV–638–A, 2003 WL 21529726 (N.D. Tex. July 2, 2003) (quoting defendant's allegation that during an ankle surgery "the other side was life along," and stating that he "assumes" this was intended to convey that one side of the ankle was fixed and the other was left alone); *cf.* Fox Indus., Inc. v. Gurovich, No. CV 03-5166(TCP)(WDW), 2006 WL 941791, at *2 (E.D.N.Y. Apr. 12, 2006) (poking fun at attorney for complaining he needed additional time because of "the 'onslaught of the Sabbath' ").

283. ROBERT PLUTCHIK, EMOTIONS: A PSYCHOEVOLUTIONARY SYNTHESIS (1980); Cendri Hutcherson & James J. Gross, *The Moral Emotions: A Social-Functionalist Account of Anger, Disgust, and Contempt*, 100 J. PERSONALITY & SOC. PSYCHOL. 719, 733–34 (2011) (differentiating anger and contempt). Contempt often is conceptualized as a mixture of anger and disgust. Ursula Hess, *Contempt*, *in* OXFORD COMPANION, *supra* note 15, at 99–100.

284. ROBERT C. SOLOMON, THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE (1993) (anger is directed toward an equal status individual, contempt toward a lower status individual); Dacher Keltner et al., *Emotions as Moral Intuitions*, *in* AFFECT IN SOCIAL THINKING AND BEHAVIOR 161, 163 (Joseph P. Forgas ed., 2006) ("Contempt is defined by feelings of superiority and dominance vis-à-vis inferior others.").

285. For example, a sneer—commonly (though not universally) associated with this emotion—vividly communicates one's belief that the other person is contemptible. Paul Ekman, *Antecedent Events and Emotion Metaphors*, *in* THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS, *supra* note 32, at 147 (contempt's distinct facial expression is characterized by curling the lip on one side of the mouth). Contempt is uniquely destructive to relationships of equality. In marriage, for example, evidence of contempt is an especially destructive force that predicts marital conflict and dissolution. *See* MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2007) (discussing research to that effect by John Gottman).

suggested two situations in which judicial anger is most likely to *be* justified. One is obvious moral wrongs against society; the other is obvious moral wrongs against the legal system.

Law and morality need not (and often do not) overlap, but they sometimes do.[286] Even in a democratic society in which a wide diversity of moral judgments is permitted, certain acts of disregard for others offend virtually everyone, demonstrating the persistence of a moral baseline.[287] It is at these moments of convergence—where we share a strong moral instinct as to what constitutes an unwarranted wrong, what it means to act culpably, and who is a member of the valued community—that judicial anger is at its peak level of justification. This can explain not just the tolerance, but the expectation, of judicial anger at criminal sentencing, especially in cases involving *malum in se* offenses. The same can be said of judicial anger at insults to the legal system itself. Those not operating within that system are unlikely to have a strong sense of precisely what constitutes an unwarranted harm inflicted upon it, particularly as we have delegated to judges the authority to police the legal sphere. But the broader categories into which such harms fall—lying, cheating, taking advantage, insulting—often do offend a shared moral sense. The most unambiguously justified judicial anger, then, arises at the clear intersection of law and morality.

In sum, judicial anger is unjustified if its underlying reasons are literally incorrect or irrelevant; if the anger object has acted within the zone of his rights or obligations; or if anger becomes infected with contempt. In contrast, judicial anger may be justified if it is based on an accurate perception of reality; is relevant to the issues properly before the judge at that moment; and reflects a correct judgment that the offender has inflicted an unwarranted harm on someone or something within the judge's zone of care—particularly if that assessment coheres with widely shared moral values.

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286. "Hard positivists" maintain that there is no necessary connection between morality and the category of "law." "Inclusive positivists" agree, but maintain that in any given system of law, law might sometimes depend on, or at least overlap with, morality. Jules L. Coleman, *Beyond Inclusive Legal Positivism*, 22 RATIO JURIS 359 (2009).

287. *See, e.g.*, Liteky v. United States, 510 U.S. 540, 550 (1994) (condemnation of Hitler is the paradigmatically easy case); Paul H. Robinson, *Empirical Desert*, *in* CRIMINAL LAW CONVERSATIONS 29 (Paul H. Robinson et al. eds., 2009) (presenting theory of punishment rooted in empirical evidence of "shared intuitions of justice").

B. Being Angry "In the Right Way"

Justified judicial anger, even though felt "with reference to the right objects, towards the right people, and with the right motive," should be interrogated further, to determine if it is manifested appropriately[288]—in Aristotle's words, whether it is felt "in the right way." The mechanism for feeling and expressing judicial anger neither "too violently nor too weakly,"[289] given the context, is emotion regulation. If well regulated, judicial anger does not unduly detract from the work at hand, nor does its expression unduly disrupt either the mechanisms or image of justice. In fact, well-regulated judicial anger can benefit those interests, not merely fail to harm them.[290]

If justification relies heavily on philosophical accounts, manifestation relies heavily on affective psychology. The empirical data indicate that anger creates both opportunities and dangers for judges; effective regulation can maximize the former and minimize the latter.

1. The Behavioral Benefits of Judicial Anger

It may seem odd to speak of anger as having any benefits, given the negativity with which it often is regarded. Even within psychology, it historically has been referred to as one of the "negative" emotions.[291] But all emotions confer at least some benefits in some circumstances, and anger is no different.[292] Anger can be constructive

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288. O'Brien, *supra* note 141, at 251 (describing learning to act differently despite that fact that the "reasons for [his] anger were real enough").

289. AVERILL, *supra* note 6, at 82 (quoting ARISTOTLE, NICOMACHEAN ETHICS).

290. It is important to note that unjustified anger, too, must be regulated. Just because anger is not warranted does not mean that judges will not feel it. People often feel emotions they should not. Maroney, *supra* note 13, at 1503. A judge may know that he is not entitled to be angry at a lawyer or party for having appealed, but may feel his temper rising nonetheless. O'Brien, *supra* note 141, at 251 ("No one enjoys receiving notice of a writ or published reversal," and "[t]here is no salt in the wound worse than that of a smug petitioner/appellant helpfully informing me in front of a crowded courtroom of a just-issued writ or reversal."). The regulatory strategies discussed at a later juncture are, therefore, also relevant to unjustified anger. *See infra* Part III.B.3. The primary focus here, however, is on the effects that even *justified* anger can have on judicial behavior.

291. Lerner & Tiedens, *supra* note 58, at 129–31 (anger might properly be regarded as a positive emotion).

292. Maroney, *supra* note 12, at 670 n.4 (emphasizing "emotion's capacity for flexible adaptation to changing conditions") (citing Richard J. Davidson et al., *Neural Bases of Emotion Regulation in Nonhuman Primates and Humans*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 51, at 47–68; Marie Vanderkerckhove et al., *Regulating Emotions: Culture, Social Necessity, and Biological Inheritance*, *in* REGULATING EMOTIONS 1, 1–12 (Marie Vanderkerckhove et al.

and prosocial.[293] Certain of anger's effects, particularly its tendency to facilitate judgment and motivate responsive action, make it useful to judges.

First, anger facilitates judgment. It does this in part by narrowing and focusing attention.[294] Angering events are vivid and compelling. The emotion is a signal that something of import is taking place, and it helps keep attention directed at the offending person and the situation he has brought about.[295] Once attention is focused on those objects, anger predisposes one to approach them.[296] Whereas some emotions have a strong tendency toward withdrawal—for example, disgust makes one back away, whether literally or metaphorically—anger keeps one engaged.[297] And, of course, anger is strongly associated with attributions of blame. Blame runs through the entire experience: anger will not be triggered unless the initial appraisal of the situation suggests a blameworthy actor, and will not persist unless that appraisal does as well. Thus, through the experience of anger, one's attention is focused on the offender and the harm he has caused; one is motivated to approach the situation, which provides an opportunity for a closer look; and if that closer look confirms the attribution of blame, one reaches a judgment.

Second, anger motivates responsive action. It is associated not only with judgments of injustice, but also with a motivation to restore justice.[298] An angry person tends to have a strong desire to change the unjust situation for the better.[299] And because "anger exacerbates risk seeking and causes people to perceive less risk," angry persons are likely to take chances in order to bring about that change.[300] Further,

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eds., 2008)). Whether anger's effects are on balance helpful or unhelpful depends on context, and should not be presumed to be negative. Litvak et al., *supra* note 59, at 301–04.

293. Potegal & Novaco, *supra* note 8, at 19 (" '[R]ighteous anger' is not necessarily constructive and prosocial, but depends on who is getting angry, what they do about it, and who is telling the story.").

294. Lerner & Tiedens, *supra* note 58, at 116; Litvak et al., *supra* note 59, at 298.

295. Litvak et al., *supra* note 59, at 288 (anger commands attention and is a strong judgment cue).

296. *Id.* at 291.

297. Hutcherson & Gross, *supra* note 283 (noting disgust's withdrawal tendency).

298. Litvak et al., *supra* note 59, at 301.

299. Lerner & Tiedens, *supra* note 58, at 116 (anger makes one "eager to act"); Litvak et al., *supra* note 59, at 291. The way in which one strives to make the situation better may take the shape of actions that are destructive in the short term, like aggression and fighting. Nico Fridja, P. Kuipers, & E. ter Schure, *Relations Among Emotion, Appraisal, and Emotional Action Readiness*, 57 J. PERSONALITY & SOC. PSYCHOL. 212 (1989).

300. Jennifer Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCHOL. 146 (2001); Lerner & Tiedens, *supra* note 58, at 123–24; Litvak et al., *supra* note 59, at 296–97.

because the emotion is associated with optimism and feelings of being in control,[301] angry people have heightened confidence in their ability to succeed, which helps them take those chances.[302] Experientially, anger generates the energy necessary to enact change.[303] The physiological changes that cause one to feel "hot" or "boiling"[304] literally prepare the muscles and mind for action.[305] Indeed, experimental studies show that people tend to prefer being in an angry state when faced with a confrontational task because the anger helps them both take on and succeed at the confrontation.[306]

Third, anger carries expressive benefits. Anger expressions—raised voice, clenched eyebrows, narrowed eyes, scowls, tensed muscles—are extraordinarily potent communicative devices.[307] Such physical manifestations command the attention of others and convey seriousness of purpose.[308] Anger, simply put, conveys power.[309]

These attributes of anger are of obvious utility to judges—indeed, one is tempted to say they are *necessary* to judging. Given the welter of stimuli to which judges are exposed, they may need the assistance of anger to flag possible misconduct and direct attention to

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301. C.A. Smith & P.C. Ellsworth, *Patterns of Cognitive Appraisal in Emotion*, 48 ATTITUDES & SOC. COGNITION 813 (1985); Cai Xing, The Effects of Emotion and Motivation on Attentional Patterns in the Decision-Making Process 2–3 (Feb. 2009) (unpublished Ph.D. dissertation, Brandeis University Dept. of Psychology).

302. Jennifer S. Lerner et al., *Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment*, 14 PSYCHOL. SCI. 144 (2003) (angry and happy persons have similar levels of optimism about the self; angry people tend to believe they can control and improve a situation, and conquer obstacles); Lerner & Tiedens, *supra* note 58, at 125 (anger triggers "a bias toward seeing the self as powerful and capable"); Litvak et al., *supra* note 59, at 295, 296–97, 303 ("Anger co-occurred with appraisals of individual control and triggered continuing perceptions of such control," not "just in the immediate situation but in novel situations.").

303. Lerner & Tiedens, *supra* note 58, at 130 ("[S]tudies have found that angry people often sense themselves as 'more energized' to assault the cause of their anger.").

304. NUSSBAUM, *supra* note 16, at 60–61; WHAT IS AN EMOTION?, *supra* note 74, at 49 (The "substance" of anger is "the boiling of the heart's blood and warmth.").

305. Nico Fridja, *Action Readiness*, *in* OXFORD COMPANION, *supra* note 15, at 1.

306. Litvak et al., *supra* note 59, at 303; *see also id.* at 297 (presenting experimental evidence supporting conclusion that "anger could produce better judgments and choices than neutrality in situations where risk aversion is inappropriate").

307. *Id.* at 287.

308. *Id.* at 287–88.

309. WALTER B. CANNON, BODILY CHANGES IN PAIN, HUNGER, FEAR, AND RAGE 276 (1915) ("Anger is the emotion preëminently serviceable for the display of power . . . ."); Lerner & Tiedens, *supra* note 58, at 116; Litvak et al., *supra* note 59, at 296; Potegal & Novaco, *supra* note 8, at 10 ("While community members may experience anger at the social deviance of others, expressing that anger is the particular province of dominant individuals and leaders who are deemed to be justified in doing so."); Larissa Z. Tiedens, *Anger and Advancement Versus Sadness and Subjugation: The Effect of Negative Emotion Expressions on Social Status Conferral*, 80 J. PERSONALITY & SOC. PSYCHOL. 86 (2001) (expressing anger raises social status).

it. Given the wearying nature of the job, particularly in the high-volume courts where most judges work,[310] they may need anger's boost to keep attention from sagging.[311] And, clearly, the most critical task with which we entrust our judges is that of rendering judgment. Anger helps them perceive what their judgments are, for the emotion is a clear sign of the underlying appraisal.[312] It then helps them muster both the desire and energy to do what must be done. Moreover, the expressive benefits are considerable. The object of judicial anger is on immediate notice: her attention, too, is more sharply focused, and the angry judge's message has substantially greater power. Moreover, when a member of the public sees the judge's outrage, she can immediately perceive the nature of the underlying judgment, serving transparency interests. If that judgment coheres with her own, she is assured that the judge is a worthy steward, one who cares deeply about the things about which she wants him to care.

Finally, judicial anger can be particularly helpful because making attributions of blame can be risky. Judges sometimes have to alienate powerful interests, upset potential voters, and even jeopardize public safety. Recall, for example, Judge Sprizzo's scathing indictment of prosecutors' incompetence, which required him to free a number of people who likely were high-level narcotics dealers.[313] Such a decision takes resolve, which anger can fortify. Similarly, some judges who concluded that police officers had committed perjury hesitated in enacting that judgment out of fear of ruining careers or conferring an undeserved benefit on criminal defendants.[314] Outrage can help judges push past those fears. It also will make the costs of action seem more worthwhile. The angry judge has a greater sense of his potency; that, combined with a more optimistic outlook, helps to reassure him that his actions can bring about an ultimately positive outcome, even if the repercussions feel negative in the short term.

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310. Anleu & Mack, *supra* note 47, at 612 (judges' emotional labor can entail significant costs on judges themselves, including "distress and emotional exhaustion").

311. Indeed, repetition and boredom are regular features of many trials. These phenomena clearly affect juries, and likely affect judges too. *Cf.* Juliet Macur, *As Clemens Trial Drags, Jury Keeps Dozing*, N.Y. TIMES, May 16, 2012, at B15 (noting the dismissal of two jurors for falling asleep during the Roger Clemens trial).

312. Ellen Peters et al., *Affect and Decision Making: A "Hot" Topic*, 19 J. BEHAV. DECISION MAKING 79, 80 (2006) ("[A]ffect can act as information: at the moment of judgment or choice, decisionmakers consult their feelings about a choice and ask, 'How do I feel about this?' ") (citing N. Schwarz & G. Clore, *Mood as Information: 20 Years Later*, 14 PSYCHOL. INQUIRY 294 (2003)).

313. *See supra* note 145.

314. Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES, May 12, 2008, at B1.

Further, if the judge chooses to broadcast his anger, he significantly increases the force of his message.

Thus, anger triggered by injustice generates the zeal necessary for difficult action in service of social betterment,[315] zeal judges can put to good use.

2. The Behavioral Dangers of Judicial Anger

Anger's effects, however, are not uniformly positive. Just as all emotions confer benefits in some circumstances, they create dangers in others.[316] For judges, the main dangers of anger are that it may trigger relatively shallow patterns of thought; lead to premature or overly punitive decisions; bleed over into unrelated contexts; and manifest in a grossly disproportionate way.[317]

First, anger triggers relatively shallow thought patterns.[318] Other ostensibly "negative" emotions, such as sadness, tend to spur deeper information processing.[319] Anger tends to have the opposite effect. An angry person, like a happy one, will tend to skate more on the surface of available information.[320] Anger is strongly associated with greater use of heuristics, or short-cut guides to interpreting stimuli.[321] It also is associated with reliance on other sorts of readily

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315. MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 366 (1966) ("They called me 'the angriest Negro in America.' I wouldn't deny that charge. . . . I believe in anger. The Bible says there is a time for anger."); Potegal & Novaco, *supra* note 8, at 19 (noting popular notion that good works can be triggered by anger, and giving as an example movement to abolish slavery).

316. Maroney, *supra* note 12, at 642.

317. This was one of Seneca's primary concerns. ANDERSON, *supra* note 70, at 169 (to Seneca, anger does not suit the "role of ruler and judge"; anger "should as much as possible be routed from the mind of [the] judge," lest he "commit the most outrageous injustice in the name of righteous wrath; and, stubborn in his anger, he will refuse to bend before criticism").

318. Litvak et al., *supra* note 59, at 293 (distinction between anger's process and outcome effects), 298–99 (depth-of-processing effects). Note, however, that at least one study shows this tendency is not invariable. "Because anger is associated with the desire to confront, oppose, and argue," angry persons may "become particularly vigilant about creating oppositional arguments," in the course of which they examine evidence carefully and "engaged in better hypothesis testing." *Id.* at 299 (citing M.J. Young & L.Z. Tiedens, Mad Enough to See the Other Side: The Effect of Anger on Hypothesis Disconfirmation (2009) (unpublished manuscript)).

319. Xing, *supra* note 301 (sadness associated with systematic decisionmaking).

320. Litvak et al., *supra* note 59, at 299; Xing, *supra* note 301 (anger associated with faster decisions and reliance on heuristics).

321. Larissa Z. Tiedens & S. Linton, *Judgment Under Emotional Certainty and Uncertainty: The Effects of Specific Emotions on Information Processing*, 81 J. PERSONALITY & SOC. PSYCHOL. 973 (2001) (anger-activated heuristic processing (e.g., greater reliance on the superficial cues of the message and less attention to the argument quality)); Larissa Z. Tiedens, *The Effect of Anger on the Hostile Inferences of Aggressive and Non-Aggressive People*, 25 MOTIVATION & EMOTION 233 (2001) (anger-activated heuristic processing (e.g., use of chronically accessible scripts)).

"accessible cognitive scripts" such as stereotypes.[322] Anger therefore increases the odds of interpreting others' behavior and intentions in conformance with preconceived ideas about how one expects people of that sort—whatever the salient category—to act.[323] Anger-fueled shallowness of thought can be characterized not only by taking shortcuts but also by quick endorsement of information that confirms the initial anger appraisal.[324] The angry person also will be disproportionately persuaded by angry arguments.[325] Thus, though anger's approach tendency ensures some closer look, that closer look may be cursory, biased, and self-reinforcing.[326]

Second, anger might lead to premature decisions. The heightened sense of certainty it brings can make one feel confident in the correctness of her decisions at a relatively early stage, discouraging consideration of alternatives.[327] This decisional effect is the natural outcome of the process effects described above. Script-driven, shallow processing enables quick decisionmaking.[328] Similarly, a disinclination to second-guess oneself allows for fast responsive action. While these tendencies confer obvious advantages in situations in which further deliberation will be of no utility, they are just as obviously disadvantageous where information gathering and reflection would disrupt an unwarranted assumption, uncover a subtle point, or

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322. Lerner & Tiedens, *supra* note 58, at 126; Litvak et al., *supra* note 59, at 299 ("Angry persons tend more to find explanations for behavior in accessible cognitive scripts, rather than consider alternatives.").

323. Anger thus can activate prejudice. D. DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCHOL. SCI. 319 (2004); D.M. Mackie et al., *Intergroup Emotions: Explaining Offensive Action Tendencies in an Intergroup Context*, 79 J. PERSONALITY & SOC. PSYCHOL. 602 (2000).

324. This bias toward emotion-confirming information is not unique to anger. Litvak et al., *supra* note 59, at 298. It also is true of most decisionmaking; once one has come to an initial hypothesis one selectively attends to and privileges evidence that confirms it. *See* Keith Findley, *Tunnel Vision*, *in* CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH 303, 303–24 (Brian L. Cutler ed. 2012).

325. D. De Steno et al., *Discrete Emotions and Persuasion: The Role of Emotion-Induced Expectancies*, 86 J. PERSONALITY & SOC. PSYCHOL. 43 (2004); Lerner & Tiedens, *supra* note 58, at 125.

326. Litvak et al., *supra* note 59, at 290 (citing B.M. Quigley & J.T. Tedeschi, *Mediating Effects of Blame Attributions on Anger*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 1280 (1996)) (describing a feedback dynamic, in which the more anger one feels, the more one perceives others to be responsible for a negative event, and the more one perceives others to be responsible for a negative event, the more anger one feels).

327. Litvak et al., *supra* note 59, at 299 (certainty "gives people the meta-level sense that they already have enough information to feel confident in their judgment").

328. *Id.* at 289 (emotions automatically trigger a set of responses that enable a person to deal quickly with problems or opportunities).

otherwise bring the ultimate judgment in line with a more factually grounded or desirable one.[329]

Third, as suggested in the previous Section, anger can have bleed-over effects. The fact of being angry at one person for one set of reasons can dramatically increase the odds of becoming angry at another person for another set of reasons.[330] Such incidental anger effects have been robustly demonstrated.[331] The angry person is likely to interpret ambiguous stimuli consistently with an anger hypothesis, even in entirely unrelated situations.[332] Given the centrality of blame to anger, one common outcome of this phenomenon is that "anger triggered in one situation can automatically elicit a motive to blame in other situations."[333] For example, experimentally induced, irrelevant anger has been shown in mock-jury studies to correlate with more punitive judgments of tort defendants, as well as with greater levels of punishment.[334] Thus, anger can—and often does—spill over, leading the already-angry person to find additional reasons to be angry, assign blame, and take punitive action. This incidental effect is clearly disadvantageous if the new anger objects have done nothing to deserve it.

Finally, anger can manifest in a grossly disproportionate fashion. Though the emotion is not always associated with hostility

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329. *Id.* at 299 (though angry persons "will be more biased than neutral individuals in a judgmental context in which additional mental resources will aid decision-making," in "some contexts, more thinking can produce worse judgments"; for example, "induced sadness increased reliance on arbitrary anchors in judgment," showing that the "decreased depth of processing associated with anger may be a boon in some situations" (citing G.V. Bodenhausen et al., *Sadness and Susceptibility to Judgmental Bias: The Case of Anchoring*, 11 J. PSYCHOL. SCI. 320 (2000))).

330. Litvak et al., *supra* note 59, at 287–88; *see also* NUSSBAUM, *supra* note 16, at 98 ("Given one and the same induced physiological condition, subjects will identify their emotion as anger if placed in a situation in which they are given reasons to be angry (e.g., at the experimenters for their insulting and intrusive questions).").

331. Lerner & Tiedens, *supra* note 58, at 116 (anger has "infusive potential," in that it "commonly carries over from past situations to infuse normatively unrelated judgments and decisions").

332. One psychological hypothesis for why this would be so is the "Appraisal Tendency Framework," which proposes that the "original appraisal patterns associated with each emotion triggered distinct appraisal tendencies in the subsequent judgments," meaning the subsequent judgment is likely to be consonant with the first. Litvak et al., *supra* note 59, at 295, 288–89.

333. *Id.* at 289.

334. Neal R. Feigenson, *Emotions, Risk Perceptions, and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2003); Neal Feigenson et al., *The Role of Emotions in Comparative Negligence Judgments*, 31 J. APPLIED SOC. PSYCHOL. 576 (2001); Lerner & Tiedens, *supra* note 58, at 119 (angry persons' judgments of criminals and unjust behaviors are likely to be relatively harsh; the emotion also reduces generosity); D.A. Small & J. Lerner, *Emotional Policy: Personal Sadness and Anger Shape Judgments About a Welfare Case*, 29 POL. PSYCHOL. 149 (2008) (induced-anger subjects provided less assistance to welfare recipients than sad subjects).

and aggression, it often is.[335] It can drive urges to yell, strike out, and injure. When such urges pass a tipping point, they can feel literally involuntary—hence the vernacular description of rage as "losing it."[336] And even when anger does not boil over into verbal or physical aggression, it can make one "indiscriminately punitive."[337] The powerful nature of the emotion is, in this instance, one of its greatest liabilities. Further, the sense of personal power anger engenders might combine uncomfortably with judges' actual power over other people. Power that goes to a judge's head, particularly if combined with the feelings of superiority attending contempt, can foster arrogance and abuse. A judge may act like an "absolute monarch,"[338] or declare—in the words of one trial judge—"I am God in my courtroom."[339]

If the previously described cluster of anger attributes is necessary to judging, this cluster seems anathema to it. We hope judges will engage in deep thinking and analysis if the legal or factual issues before them are at all complex. We expect them to consider alternatives and resist simplistic conclusions. Stereotypes, particularly very pernicious ones based on factors like race or gender, would seem to have no proper place.[340] An angry judge might cut off deliberation and argument before important ideas and information

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335. Lerner & Tiedens, *supra* note 58, at 116.

336. This is an interesting point of gender divergence. Men typically see anger expression as a way of taking control, while women tend to see it as loss of self-control. One hypothesis is that women are more reluctant to express anger and do it only when anger is at a higher intensity, when they are more likely to feel they already have lost control. Litvak et al., *supra* note 59, at 304; *see supra* note 22 (previewing future focus on emotion and female judges).

337. Lerner & Tiedens, *supra* note 58, at 116, 123.

338. McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States 264 F.3d 52, 68 (D.C. Cir. 2001) (quoting Chandler v. Judicial Council of Tenth Circuit of the United States, 398 U.S. 74, 84 (1970)); *see also* Ungar v. Sarafite, 376 U.S. 575, 601–02 (1964) (Douglas, J., dissenting) (expressing concern with judicial "tyranny"); *McBryde*, 264 F.3d at 66 ("Arrogance and bullying by individual judges expose the judicial branch to the citizens' justifiable contempt.").

339. Gottlieb v. Sec. & Exch. Comm'n, 310 F. App'x 424, 425 (2d Cir. 2009). This particular danger of judicial anger is acute in judges with high levels of trait anger. In the Article to follow, focused on poor judicial temperament, *see supra* note 22, I will argue that judges who deploy their anger in a relentlessly top-down fashion have aggrandized to themselves the wrath typically reserved for gods and kings. *See* AVERILL, *supra* note 6, at 86–87 (tracing accounts of anger in Old and New Testaments of the Christian Bible); ARISTOTLE, RHETORIC, *in* WHAT IS AN EMOTION?, *supra* note 74, at 44–52 (the "anger of divine king is mighty"); Potegal & Novaco, *supra* note 8, at 9–12 (divine wrath a feature of virtually every known religious system); *see also Ungar*, 376 U.S. at 601–02 (1964) (Douglas, J., dissenting) (expressing concern with judicial "tyranny"); *supra* note 217 (Judge McBryde compared to both God and a king).

340. Lerner & Tiedens, *supra* note 58, at 123 ("[T]he mere experience of anger can automatically activate precursors to prejudice.").

have time to emerge. A strong sense of certainty can blind her to a more complicated reality.

It seems clear, too, that we hope judges will assess people, issues, and cases on their own merits. Most judges juggle many cases at once, meaning anger triggered in one can infect multiple others. Litigated cases usually are comprised of a long series of interactions between the judge and a large cast of characters, meaning grievances easily can accumulate and relevant distinctions become muddy.[341] Bleed-over effects therefore pose a concrete danger in the real world of judging.

Moreover, it nearly goes without saying that we would rather our judges not engage in violent anger displays.[342] When a judge truly "loses it," she has also lost control over the courtroom, impairing both her ability to project authority and popular perceptions of justice. Indeed, it is precisely these displays that draw the most media attention. The damage to the public image of justice can be considerable even where extreme anger displays take place outside the courtroom, as with the choking allegation on the Wisconsin Supreme Court. We hope, further, that even where anger is tethered to a legitimate trigger—such as clear proof that a civil or criminal defendant committed a serious wrong—judges will be punitive only to the degree called for by the situation, particularly as they serve as a hedge against popular calls for disproportionate punishment. Finally, we hope that judges will use their considerable power responsibly. Anger's extraordinary strength might push them to abuse it. In sum, because judges often work under difficult conditions in which the ideals of deliberation, impartiality, and calm already are besieged, it seems that adding anger to the mix might sound the death knell for those ideals.[343]

One recent case, *Sentis Group v. Shell Oil*,[344] provides a rich example of many of these potentially deleterious effects. In that case, a district court judge dismissed plaintiffs' case with prejudice as a sanction for discovery abuse. The Eighth Circuit's careful dissection of

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341. Recall the consistently infuriating Mr. Schwarz of *Fox Industries*. *See supra* notes 155–58 and accompanying text.

342. *See* Rene Stutzman, *Judge Shea to Be Reprimanded by Florida Supreme Court for Yelling at Attorneys*, ORLANDO SENTINEL, June 1, 2011, http://articles.orlandosentinel.com/2011-06-01/news/os-judge-shea-yells-too-much-20110601_1_public-reprimand-agency-that-polices-judges-complaint (describing particularly inappropriate courtroom behavior that led to the reprimand of a Florida judge).

343. O'Brien, *supra* note 141, at 251 ("It is hard to suffer fools gladly when my courtroom is packed with people wanting my urgent attention.").

344. 559 F.3d 888 (8th Cir. 2009).

the path to that dismissal, performed under the doctrinal auspices of a judicial-bias allegation, provides the raw material from which we may discern a judicial anger spiral in action.

The judge[345] in *Sentis* had ample grounds for anger. The plaintiffs played games with discovery, provided misleading information, and seemed to be looking for ways to evade orders.[346] Once triggered, though, anger took the judge down a very bad road. He became predisposed to interpret every new dispute consistently with his anger baseline. Possible lies became clear ones; investigation seemed unnecessary.[347] He became disproportionately receptive to arguments pointing to willful wrongdoing, even though defendants (sensing an opportunity) seemed deliberately to be "fanning the flames" of his outrage.[348] Conversely, he became curtly dismissive of contrary evidence.[349] These phenomena came to a head in an in-chambers hearing, a portion of which reads as follows:

> THE COURT: Have you produced the 58 documents that were the original request that's generated the trip to the Eighth Circuit[?]
>
> MR. STARRETT [Plaintiffs' counsel]: To them?
>
> THE COURT: Well, hell, yes. Why would you ask a question like that? Hell, yes, to the defendant.
>
> [. . .]
>
> THE COURT: I kept telling you to produce stuff . . . . You ducked. You wove. You did everything to keep from producing them. You go to the Eighth Circuit. They tell you to produce them, and you still goddamn don't produce them. Now what the hell do you not understand? You must produce them. Jesus Christ, I don't want any more ducking and weaving from you on those 58 documents. That's unbelievable. That gives credence to everything I just heard from the defense. Now, tell me why else you don't think that I ought to dismiss this case . . . You better tell me. I'm about ready to throw this thing out. When you tell me that you still haven't produced those goddamn 58 documents after four times, four times I've ordered you to produce them. You are abusing this Court in a bad way. Now tell me.

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345. In a telling move, the Circuit appears studiously to have avoided naming the judge, referring to him only as "the court" or "the district court." *Id.* at 888–905. The decision not to call the judge out personally reflects its oft-noted "sympathy" for the judge and its unwillingness to "condemn" his anger, even as it found its effects unacceptable. *Id.* at 891. Contrast this move with other courts that have chosen specifically to name the offending persons, so as to make the anger more pointed. *Cf.* Maples v. Thomas, 132 S. Ct. 912 (2012) (Court, ruling that death-row inmate did not lose opportunity to appeal because of gross negligence by Sullivan & Cromwell, repeatedly called out two of that firm's associates by name).

346. 559 F.3d at 891–98 (recounting plaintiff's actions that "provoked" the defense and district court).

347. *Id.* at 897 (demonstrating certainty that all allegations of plaintiff misconduct were true).

348. *Id.*

349. *Id.* (judge interrupted plaintiff's counsel when he offered contrary information to explain plaintiff's conduct).

> MR. STARRETT: Well, may I start with the fact—
>
> THE COURT: Yes.
>
> MR. STARRETT: —that you have not ruled four times to give them those 58 documents—
>
> THE COURT: That's it. I'm done. I'm granting the defendant's motion to dismiss this case for systematic abuse of the discovery process. Mr. Harris [defense counsel], I direct you to prepare a proposed order with everything you've just put on that presentation. I'll refine it and slick it up. [Plaintiff's witness] has abused this court, has misled you, has lied on his deposition. It's obvious he's lying about that e-mail. This case is gone. . . . What a disgrace to the legal system in the Western District of Missouri. . . . We're done. We are done, done, done. What a disgrace. . . . We're done.

As the initial exchange shows, the judge had a short fuse. To be sure, counsel's "To them?" is asinine, even taunting—to whom would plaintiffs produce discovery if not the defendants? At an earlier juncture, though, the remark might have been merely irritating. But by that point in the litigation it was all that was required to set the judge off. His language quickly became hostile and unbounded. The final straw was counsel's effort to explain that not all of the documents had been ordered four times. Though perhaps tin-eared, and certainly poorly timed, the assertion was true; counsel's distinction between discovery that had and had not been subject to particular orders was accurate and potentially relevant.[350] But that technical distinction had ceased to have meaning to the judge. The simple cognitive schema of discovery abuse, and the flat characterization of plaintiffs and their attorneys as liars, appeared to supply sufficient answers. All discussion was cut off; the judge was simply "done." And once he was "done," he went straight to the most punitive response possible: dismissal of the entire action, with prejudice.

The Circuit went to great pains not to condemn the judge for what appears to have been an understandable human reaction to trying circumstances. The initial point here is the same. Good judges sometimes will lose it.[351] While such moments do not impugn them as people, neither does the fact that they had good reasons always salvage the situation. And though the Circuit carefully ruled only on the basis that the *Sentis* judge's anger spiral created an *appearance* of partiality,[352] the second point here is deeper: it created *actual* partiality. Moreover, it did so in an entirely predictable way, a way that likely is operative in many cases, very few of which will be so closely dissected. This is precisely what judicial anger, even when it

350. *Id.* at 902–03.

351. Maroney, *supra* note 13, at 1542.

352. 559 F.3d at 891.

has a legitimate starting point, can do if left unchecked—hence Judge Posner's caution to "beware" the angry judge.[353]

3. Regulating Judicial Anger to Maximize Benefits and Minimize Dangers

To summarize thus far: anger facilitates judgment, including by focusing attention and motivating responsive action. Anger makes it easier to take chances, confront difficult people and situations, and incur the costs of action. Its expression communicates with unusual clarity, conveying the underlying judgment and underlining its seriousness. But anger also increases reliance on heuristics and stereotypes, contributes to premature decisions, biases how evidence and arguments are heard, and can bleed over into unrelated contexts. An angry person might be unduly punitive, engage in distasteful and even violent outbursts, and acquire an unwarranted sense of her power over others.

So at this juncture we find ourselves back on the horns of our original dilemma. Anger giveth and anger taketh away. Justified anger is necessary to critical aspects of judging, but simultaneously has tendencies that can impair judging.[354] We therefore have come to the juncture at which judges need to call upon emotion regulation. Emotion regulation is the mechanism by which humans "fine-tune" our emotional responses to serve situational demands.[355] Strong regulation skills enable judges to draw on the unique features of anger when they are helpful and to minimize them when they are not.[356]

In previous work, I have outlined a theory of judicial emotion regulation that provides the relevant theoretical model.[357] Rather than repeat that analysis, the purpose of this Section is succinctly to encapsulate the model's fundamentals, demonstrate its applicability to anger, and offer additional insights about anger management.

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353. POSNER, *supra* note 9, at 110.

354. Lerner & Tiedens, *supra* note 58, at 132 ("The emerging portrait of the angry decisionmaker is more complex than one might have expected.").

355. Maroney, *supra* note 13, at 1504 & n.117 (citing Marie Vandekerckhove et al., *Regulating Emotions: Culture, Social Necessity, and Biological Inheritance*, *in* REGULATING EMOTIONS 3 (Marie Vandekerckhove et al. eds., 2008)).

356. *Id.* at 1492 (analogizing to heuristics, which are beneficial in some instances and detrimental in others).

357. *Id.* at 1531–32.

a. Applying the Engagement Model of Judicial Emotion Regulation to Anger

What I have called the *engagement model* of judicial emotion regulation is comprised of three core components: preparing realistically for emotion, responding thoughtfully to it, and integrating lessons about (and from) emotion into one's judging. Insistence on emotionless judging, in contrast, encourages denial and suppression. That approach not only fails to extinguish undesired emotions, but also tends to both magnify emotions' effects and needlessly consume cognitive resources. Much of the psychological literature on which this model relies has to do with anger.[358] The empirical evidence is particularly persuasive in showing that anger suppression consumes resources such as memory; distorts social judgment; risks ironic emotion "rebound" effects; and increases physiological arousal.[359] Engagement thus provides a solid model for judicial anger management.

Preparing realistically for anger. First, judges can prepare realistically for anger by acknowledging that many of the people they encounter in the course of their work, including lawyers, litigants, witnesses, and colleagues, are bound to make them mad. A given judge's anger triggers will, upon introspection, break into relatively stable categories, such as lying, cheating, and abusing others.[360] Judge O'Brien, for example, was able to identify several reliable triggers for his own anger, including "lack of civility," "attorney incompetence," and the "herding cats" work of trying to get everyone in the courtroom at the same time.[361] In contrast, it appears that what makes Justice Scalia "bl[o]w his stack" is his assessment that other judges are being sloppy, inconsistent, or adhering to views he finds legally unsupportable or socially destructive.[362]

Identifying recurrent triggers is a critical first step.[363] Using a regulation technique known as anticipatory cognitive reappraisal, the judge then may think in advance about how those recurrent triggers

358. *Id.* at 1527.

359. *Id.* at 1511 (cataloging experimental evidence showing negative effects of anger suppression).

360. *See supra* Part I.A.

361. O'Brien, *supra* note 141, at 252 ("What is so hard about taking a 15-minute recess in a jury trial? What is hard is that apparently nobody wears a watch anymore. . . . 'Here, kitty, kitty, kitty.' ").

362. Clark, *supra* note 215.

363. O'Brien, *supra* note 141, at 251 (describing the first step in handling his anger: "I first had to articulate the causes").

relate to her professional goals and obligations.[364] In so doing, she may precommit to a set of beliefs that will enable her to remain relatively nonreactive to angering stimuli when they arise. She also may train herself to focus, and frequently refocus, on her unique professional role as a neutral arbiter, which can have the same effect.[365] For example, a judge may realize that she tends to get snappy when a party has prevailed against her on appeal.[366] The judge can remind herself that just as she has a job to do, so too does the lawyer; that just as she is trying to do her job well, so too is the lawyer; and that dealing with error correction is part of being a judge in a system with appellate review, a system that confers many benefits, not just to society but also to her. That judge can also remind herself that the legally important element of a reversal is to discern where the higher court thinks she went wrong, analyze that decision, and work with it; focusing on those highly specialized tasks makes it harder to dwell on a sense of personal insult. Another judge, like Justice Scalia angered by the perceived failings of his colleagues, may remind himself that part of the point of having multijudge courts is that decent, competent people sometimes will differ on fundamental issues and call hard cases differently, not because those people are stupid, but because there are "conflicting correct" ways of seeing both the world and the law.[367]

Judges thus can precommit to ideas that rob a recurring situation of its angering significance. When that situation arises, it is far less likely to make them angry, even if it displeases them.[368]

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364. Maroney, *supra* note 13, at 1508–09, 1514–17 (defining cognitive reappraisal and collecting evidence of its efficacy).

365. As I have shown elsewhere, even laboratory subjects who commit to a "neutral observer" role are able to avoid most normal emotional reactivity for short periods of time. Whether humans can embody such neutrality in the real world, for longer periods of time, and when exposed to extraordinarily vivid stimuli is largely unstudied. The best evidence that they can do so comes from the medical profession. Neutrality is highly valued in doctors but very difficult to achieve. Medical educators, therefore, increasingly are seeking to teach productive emotion-regulation strategies, the goal being to help doctors achieve sufficient neutrality to perform competently but not so much as to lose touch with the human element of their work. Because the emotional challenges facing doctors and judges can be strikingly similar, that approach holds great promise in the judicial setting. To draw a crude parallel, the judge learns to search for legally relevant information in emotionally salient situations, much as a doctor learns to look for medically relevant information in (for example) a disgusting wound. For both the judge and the doctor, focusing on the professionally salient aspects of a situation, rather than on the aspects that would evoke an emotion such as disgust in a layperson, can reduce emotional reactivity relatively effortlessly. Maroney, *supra* note 13, at 1521.

366. O'Brien, *supra* note 141, at 251.

367. Maroney, *supra* note 240, at 879.

368. Maroney, *supra* note 13, at 1514–15 (just as a doctor learns to examine a gruesome wound for clinically relevant evidence, the judge may learn to examine a gruesome autopsy photo

Responding thoughtfully to anger. Judges will, of course, continue to get angry. They are not "icebergs,"[369] and if they remain open to the dramas unfolding before them they cannot help but react at least some of the time. Fortunately, anger can be cognitively reappraised midstream as well as in advance.[370] The judge can choose to reinterpret a provocative stimulus in a way that will disrupt or replace the emotion. For example, if an attorney appears to be gloating over his appellate victory, the judge might ask if she is truly angry at him for *this* incident, or whether anger has cumulated or crept in from elsewhere and is being displaced. Realizing that it is the latter is likely to diffuse her anger. She also can decide to chalk up his obnoxious manner to social ineptitude. That attribution may prompt annoyance, or even sympathy, but is unlikely to trigger anger.

However, cognitive reinterpretation is not always realistic. Not all stimuli can be anticipated or rethought: perhaps that lawyer really *is* gloating, enjoying the experience of publicly taking the judge down a notch.[371] In such a situation the judge can interrogate the propriety of the valuation she has attached to her anger's factual basis. She might, for example, ask herself what is it that she feels has been harmed. If it is her reputation or dignity, does this lawyer's conduct pose any real threat to those goods? Perhaps the people whose opinions matter most to the judge, such as judicial peers, will be utterly unaffected, even sympathetic. And even if important others truly will regard her less favorably, the judge still can ask whether responding with anger reflects defensible values.[372] Perhaps that reaction shows that she prizes her public reputation inordinately. She might prefer to ground her sense of dignity and worth, as a person and as a judge, in her own honest assessment of the value and quality of her work. She may also ask herself honestly whether she has come to regard the offending lawyer as literally beneath her—a cretin, a moral inferior—indicating the corrosive presence of contempt. The judge may diffuse the feeling by determining that her anger reflects evaluations that, despite their grounding in reality, she has reason to reject.

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for legally relevant criteria; both come to experience such stimuli as not disgusting but informational).

369. *Id.* at 1537 (quoting judge in People v. Carter, No. C053369, 2009 WL 626113 (Cal. Ct. App. Mar. 12, 2009)).

370. Maroney, *supra* note 13, at 1522–23.

371. O'Brien, *supra* note 141, at 251 ("There is no salt in the wound worse than that of a smug petitioner/appellant helpfully informing me in front of a crowded courtroom of a just-issued writ or reversal.").

372. *Id.* at 253 ("The rules are rules. They are not commandments. It may be a sin to break a commandment, but a rule is simply a rule.").

Some anger might pass all these checkpoints. A defendant spitting in one's face, for example, is virtually impossible to interpret as anything other than a deliberate expression of hatred. That expression is condemnable because of the extreme and unwarranted disregard it shows, not just of the judge but also of the legitimacy of the legal process.[373] The anger is both reality based and normatively proper; indeed, Aristotle might identify this as a situation in which *not* getting angry would be suspect. Regardless, the judge can ask herself whether it is relevant to the tasks at hand, and whether giving voice to it would further or hinder her overall goals.[374]

As the case of the spitting defendant shows, such a determination involves complex judgment calls. If the defendant is going to continue to appear before that judge, the anger might inform how she chooses to interact with him. For example, it may help her feel comfortable concluding that he has no respect for the forum and deciding to withhold discretionary benefits—such as continuances—or chances to be near her.[375] Similarly, expressing her anger in some way might convey how seriously she regards the conduct. Such a move might both prompt behavioral change and reassert her authority, both to him and to spectators. But several variables could shift her assessment. If (as was the case in the actual situation) the defendant is being removed and will pose no ongoing threat, there is no need to set ground rules for future interaction. Expressing anger to prompt behavior change or an apology[376] would be wasted effort if (as seems likely) the defendant has no interest in obeying the judge, no matter what she says or does. Nor will such expression necessarily reinforce authority. Particularly if it is loud or hostile, it might model for others behavior that the judge will then have to expend energy to control.[377] If everyone else present shares the assessment that the defendant is

373. This is not to say that cognitive reappraisal is impossible, just that it would be particularly hard. The judge might, for example, decide to believe that a defendant who would act this way is deeply disturbed for reasons having nothing to do with her. Positioning herself as an accidental object of his hatred might sap the situation of its personal relevance, and thus its angering propensity.

374. Maroney, *supra* note 13, at 1540–41.

375. Restricting the defendant's physical access to the judge would be a productive sort of "situation modification." *Id.* at 1541.

376. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004) (explaining power of apology).

377. Maroney, *supra* note 13, at 1540 n.325 (explaining how judges regulate emotion in order to model courtroom behavior for others). If in a different situation the judge's anger is based in reality, defensible, *and* relevant, she might nonetheless choose to mask it—for example, because she wants to hide her opinions from a jury. *Id.* at 1540–41; *see also* Kenji Yoshino, *The "Civil" Courts: The Case of Same-Sex Marriage*, 54 ARIZ. L. REV. 469, 478 (2012) ("[T]he presence of a judge can do wonders for mitigating the race to the bottom of incivility.").

irrational and beyond reach (which also seems likely), expressing anger might lead them to perceive that he "won" by getting the judge to "sink to his level." In that case, restraint might seem admirable. What course of action is most advantageous to the judge often will rely on a split-second assessment of all these variables, a process that for a good judge likely becomes more intuitive and well calibrated over time.[378]

Finally, judges can respond thoughtfully to anger if they are specifically aware of some of its more dangerous tendencies, such as increasing reliance on heuristics and stereotypes. Having cultivated the requisite self-awareness, the judge can take the feeling of rising anger as a sign that she might need to force herself to proceed with greater than usual caution, to take more rather than less time, and to honestly interrogate the adequacy of her thought processes.

Integrating lessons from anger. The final aspect of judicial emotion regulation is to strive to incorporate lessons from one's emotions into the broader story of her life as a judge. Much of this process depends on the self-awareness and introspection that also underlies the preceding steps. Two other components are worthy of additional explanation: disclosure and self-acceptance.

Expressing anger in the moment—for example, to an offending attorney—is one form of emotional disclosure. But other forms may be equally or more helpful, particularly in encouraging the judge to identify recurrent triggers and evaluate their relevance to her work. The judge may choose to discuss angering experiences with family, friends, other judges, or even the public.[379] Those to whom anger is disclosed can offer their insights into whether it seems factually based, relevant, normatively defensible, and the like; this discursive process can provide the judge with needed feedback. The judge thus builds a "database" of her work-related anger, one that can inform the process of preparing and responding to anger going forward.

Disclosure may also have subjective benefits. While disclosing anger is unlikely to diffuse it (and, as explained below, may sometimes increase it), disclosure can make it far easier to live with.[380] This is even so where the judge is not proud of how she acted. Efforts at regulation will sometimes (perhaps often) fail. The judge may lose

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378. I say "for a good judge" because judges with consistent anger management problems do not appear to improve with practice. Poor emotion regulation habits can become dangerously self-reinforcing, and in the case of anger likely ossify into patterns that eventually we regard as evidencing poor temperament. Maroney, *supra* note 13, at 1543.

379. *Id.* at 1527–30.

380. *Id.* (discussing research on the many social and personal benefits of emotion disclosure, even for unpleasant emotions).

composure when she wishes she had not, or continue to feel anger she knows she should not.[381] In those instances, she might feel shame,[382] which might motivate her to hide her feelings.[383] She could choose instead to regard the shame-inducing anger episode as an opportunity for self-improvement.[384] Such an effort might include public sharing; for example, the judge may find it helpful to apologize.[385] If public expressions feel counterproductive or intimidating, she might talk with trusted confidantes.[386] Even if the judge keeps her dialogue entirely internal, she can choose simply to be forgiving of her own humanity.[387] Such self-acceptance may help the judge recover valuable perspective—allowing her, for example, to focus instead on the satisfying aspects of her job, and to regard occasional turmoil as the price of gaining the many benefits of being a judge.[388]

In sum, these three steps—realistic preparation, thoughtful response, and integration—are recursively related. Commitment to each facilitates success at any one. Judges can leverage the power of their reason to anticipate and, if needed, rethink their angry feelings. They can allow, restrain, or shape anger expression to serve utilitarian goals. They can build a highly personalized account of what sort of anger is to be welcomed and what rejected, and forgive themselves their inevitable missteps. Judges must invest time and thought in recognizing what tends to make them angry, how they tend

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381. *See* Schuster & Propen, *supra* note 198 (quoting judge who "lost [his] cool"); *Judge Naman Yells at Mom*, *supra* note 196.

382. Johnny R.J. Fontaine, *Shame*, *in* OXFORD COMPANION, *supra* note 15, at 367–68 (shame is a painful, self-conscious emotion representing a negative perception of the self in relation to unmet expectations, either those set by others or one's own "ideals and aspirations").

383. Bernard Rimé et al., *Social Sharing of Emotion: New Evidence and New Questions*, *in* 9 EUROPEAN REVIEW OF SOCIAL PSYCHOLOGY 145, 163 (W. Stroebe & M. Hewstone eds., 1998) (experiences of shame are particularly likely to be kept secret).

384. Batja Mesquita & Janxin Liu, *The Cultural Psychology of Emotion*, *in* HANDBOOK OF CULTURAL PSYCHOLOGY 734, 744 (Shinobu Kitayama & Dov Cohen eds., 2007) (explaining research showing that while in Western cultures shame tends to prompt withdrawal, in East Asian cultures shame tends to be met with attempts at "self-improvement," sharing, and development of "adaptive resources").

385. *Vancouver Judge Yells at Convict, Then Apologizes*, *supra* note 199 (judge shouted "shut your damn mouth" at defendant, then apologized).

386. Bernard Rimé et al., *Long-lasting Cognitive and Social Consequences of Emotion: Social Sharing and Rumination*, 3 EUROPEAN REVIEW OF SOCIAL PSYCHOLOGY 225, 238 (W. Stroebe and M. Hewstone eds., 1992) (sharing of shameful experiences is often "more restricted to close and intimate partners than [is] talking about other emotions").

387. Maroney, *supra* note 13, at 1535–36 n.295 ("[T]he most productive step for the judge might be simply to notice the emotion, accept its existence, and disengage from any judgment of it, including a negative self-judgment.").

388. O'Brien, *supra* note 141, at 253 ("Judging is one of the world's great jobs. We are independent, relatively well compensated, and . . . have box seats to the great game of life. The knowledge that this is so puts the stresses of the job into proper perspective.").

to act when angry, and how anger has worked to help or hinder their judging.[389] These skills, fortunately, can be practiced and learned.[390] Anger management is a process that, while never perfected or finished, should grow easier over time.

b. Special Issues in Judicial Anger Management

As this analysis reveals, judicial engagement with anger promises to be as helpful as judicial engagement with emotion more generally. It is important to emphasize that the model is not a rigid checklist, nor could it be. The most critical element in judicial anger management, as with all emotion regulation, is flexible responsiveness to context.[391] Considering three regulatory challenges unique to anger helps demonstrate how this is so.

First, research involving the well-known "ultimatum game" paradigm provides an instructive example.[392] In a simple ultimatum game, an experimental subject is told that a game partner will be given a sum of money and will choose what portion of it to offer the subject. If the subject accepts the partner's offer, she receives that sum; if she rejects the offer, neither gets anything. Accepting any offered amount therefore is economically advantageous. Subjects tend, however, to reject offers they perceive to be unfair.[393] Tellingly, they disproportionately reject unfair offers when they believe the game partner to be a human being (rather than a computer program), and those rejections are associated with a strong response in brain areas correlated with anger.[394] Such studies demonstrate that anger can motivate principle-driven decisions, even when those decisions are disadvantageous from the perspective of pure utility.[395] That is, it seems to take particular effort to override an anger response where

389. *Id.* at 251 ("I used to be an angry judge. The reasons for my anger were real enough. Being a judge is stressful. For the past 10 years, though, I have been mellow. In deciding to change, I first had to articulate the causes of my stress and then to determine which were within my ability to minimize. (If some of my complaints sound petty, or unreasonably harsh, they in fact were. That was part of my self-discovery.)").

390. Maroney, *supra* note 13, at 1522–23, 1555.

391. *Id.* at 1510–11, 1514 ("[C]ompetent judicial emotion regulation . . . depends upon flexibility and judgment in responding to a full array of real-time challenges.").

392. *See* Martin A. Nowak et al., *Fairness Versus Reason in the Ultimatum Game*, 289 SCIENCE 1773, 1773 (2000) (describing ultimatum games).

393. Samuel M. McClure et al., *Conflict Monitoring in Cognition-Emotion Competition*, *in* HANDBOOK OF EMOTION REGULATION, *supra* note 51, at 204, 211–12.

394. *Id.* The fact that humans are far more likely to be angered at another human, as opposed to an inanimate object (unless it is anthropomorphized), drives home the salience of anger as the driving force in enacting fairness judgments.

395. *Id.*

doing so would confer a concrete benefit—such as some money over no money—at the cost of a moral benefit.

The fact that anger has this characteristic, though, does not dictate any particular response from the perspective of judicial emotion regulation. Favoring principle-driven decisions over utilitarian ones is of obvious benefit where this is just the calculus we expect of our judges. One might, for example, speculate that such a process underlay the recent decision of a federal district judge to reject what he assessed to be a patently unfair settlement proposal between the Securities and Exchange Commission and Citigroup.[396] While accepting the settlement would have conferred some financial benefit to harmed parties, and would have saved the judge future time and effort (not to mention criticism), anger may have enabled him to assume those costs. If the deal was actually unfair, those costs are worthwhile, as the parties now have an incentive to craft a fairer one. In other instances, elevation of moral principle over practicality is not what we ask of our judges. If, for example, a judge were presented with a carefully brokered *Alford* plea[397] that would free three almost-certainly innocent inmates, we would not want her to reject it because she is angry that the state stubbornly refuses to vacate the convictions.[398] The deal may be unfair, but so too is the consequence of rejecting it.[399] If the inmates are competent they should be the ones to make that choice, given that they would be the ones to bear the costs.

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396. Sec. & Exch. Comm'n v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011) ("[T]he Court concludes, regretfully, that the proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest."). Interestingly, several workshop participants reacted to this speculation as if it were insulting to the judge in question, the Hon. Jed Rakoff. The point here is quite the opposite: that if Judge Rakoff felt angry at the parties, such anger was likely to have been both appropriate and helpful. Such reactions by the workshop participants demonstrate the persistence of stigma associated with judicial emotion.

397. North Carolina v. Alford, 400 U.S. 25 (1970) (finding constitutional the entry of a guilty plea from a defendant who protests his innocence).

398. This example is drawn from the case of the "West Memphis Three." *See* Campbell Robertson, *Deal Frees "West Memphis Three" in Arkansas*, N.Y. TIMES, Aug. 20, 2011, at A1 (describing the case). One may be tempted to say the judge should use that anger to motivate an act of courage in dismissing the charges himself, but in many jurisdictions—including Arkansas—he may lack that authority, *see* Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence,"* 22 U. ARK. LITTLE ROCK L. REV. 629 (2000), meaning he has the choice of taking the *Alford* plea or consigning the inmates to continued incarceration.

399. WEST OF MEMPHIS (Fearless Films 2012) (documentary showing path to the *Alford* pleas, as well as hearing in which pleas entered, despite one defendant's reluctance to take any action suggesting responsibility; quoting that defendant's friend as saying, "this deal sucks," but showing he took it in order to free co-defendant from death row).

We therefore would expect the judge to find a different manner in which to channel her anger.[400]

Second, other aspects of anger that affect its regulation profile similarly point to the importance of context. Because of anger's strong tendency to motivate and fuel approach, it may take particular effort to halt its physical concomitants. These tendencies are suited perfectly to some situations, terribly to others. If a lawyer begins to make a wildly improper argument in front of the jury, the judge may need to react quickly and forcefully to forestall a mistrial—she may need to raise her voice, smack the bench, point at the lawyer to get his attention, and force him immediately to stop talking. In other instances she will have (or can create) time and space within which to choose a different reaction.[401] Similarly, anger's certainty renders the processes of cognitive reappraisal less accessible and more effortful. Avoiding reappraisal prevents waffling, which confers a distinct advantage in some situations.[402] But other situations call for deliberation and introspection, or even aggressive skepticism about one's initial conclusions, even if the judge is facing criticism as a "waffler" and is under pressure to reach a fast conclusion.

Third and finally, anger disclosure creates special dangers. Though disclosure of other emotions—say, sadness—has been shown to not reduce emotional experience,[403] anger disclosure actually has been shown to *increase* it.[404] Despite the folk wisdom underlying primal scream therapy, anger often is not diffused by letting it out, for example, by "venting."[405] This holds true for various forms of anger disclosure, including both spontaneous expression (like shouting at a

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400. The point here is not to assert, as a matter of fact, that Judge Jed Rakoff was in fact angry at Citigroup and the SEC, or that the judge in the West Memphis cases was angry at Arkansas state officials. This may be true, but the larger point is that these cases show the distinction between situations in which anger could either support or not support rejection of a deal, highlighting the importance of the precise legal context and the interests at stake.

401. Maroney, *supra* note 13, at 1584 n.287 ("[A] retired judge . . . reported that he did sometimes walk out of his courtroom if something happened to make him 'really upset.' He would take some time to calm down and think, then walk back in and respond to whatever had happened.").

402. Lerner & Tiedens, *supra* note 58, at 132 ("[A]nger can buffer decision makers from indecision, risk aversion and over analysis"); O'Brien, *supra* note 141, at 251 ("[M]ost decisions from the bench must be made without benefit of preparation, reflection, or consultation.").

403. Maroney, *supra* note 13, at 1523. The primary benefits of emotion disclosure are increased access to resources such as constructive feedback and social support.

404. Brad J. Bushman, *Does Venting Anger Feed or Extinguish the Flame? Catharsis, Rumination, Distraction, Anger, and Aggressive Responding*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 724, 724–31 (2002).

405. *Id.* at 725–26, 729–30 (marshaling empirical evidence against "catharsis theory" of anger venting).

lawyer in court), informal disclosure (like talking with a spouse), and carefully planned communications (like publishing a fiery dissent). Further, contrary to popular belief, anger is often experienced as hedonically enjoyable, specifically when one is anticipating confronting, defeating, or otherwise getting back at the person at whom one is angry.[406] This phenomenon raises the distinct danger that judges who express anger may come to enjoy it, including the sense of power it generates, and may become progressively less selective in allowing its expression. Further, making anger known can be destructive in a way that showing other emotions, like sadness, generally cannot. The poisonous effect of the Boggs dissent in the Sixth Circuit affirmative action case, for example, or the interpersonal rancor brought on by performing the biting satirical song about Judge McBryde, is extraordinarily difficult to repair.

These realities do not provide a reason for judges to not express or discuss anger. They do, however, mean that anger expression and disclosure are to be treated with far greater care than other forms of disclosure. Because they will not lessen the feeling, such steps should be designed to serve another purpose, such as processing a given anger trigger's basis or strategizing future responses. More than with other emotions, private disclosures often may be preferable to public ones. Moreover, it will be more important for judges to allow themselves time—even a moment—to choose their anger expressions carefully, to be sure that expression serves a prosocial purpose rather than an antisocial one.[407]

Regulating emotion in light of these three special features of anger requires the judge to make a great many distinctions—between situations in which moral concerns do or do not predominate over utilitarian ones, in which quick, decisive action is or is not called for, and in which disclosing anger will or will not be prosocial. Making those distinctions necessarily depends on context, substance, and particulars. It depends, in other words, on reasoned analysis and self-reflection, tasks that rest in the nonalgorithmic mental processes of human judges.

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406. Lerner & Tiedens, *supra* note 58, at 129–31.

407. Maroney, *supra* note 13, at 1530 n.287 (describing how one judge would buy himself such time by leaving the courtroom momentarily); *see also supra* notes 379–88 and accompanying text (giving examples of prosocial uses of anger disclosure).

C. The New Model of Judicial Anger, Encapsulated

This Part has proposed a new model for judicial anger, that of the righteously angry judge. The model is rooted in the core themes of anger itself—a judgment that a rational agent has committed an unwarranted wrongdoing, which generates a desire to affix blame and assign punishment, and facilitates action to carry out that desire. It may be encapsulated as follows.

Righteous judicial anger is, first, based on an accurate perception of reality. It is responsive to actual, not imagined, acts. Those acts must have been committed by persons who had some meaningful level of choice, and must have caused real harms, not ephemeral or insignificant ones. The righteously angry judge strives to be as open as possible to accurate perception of these elements, to be diligent in her search for truth, and to prevent anger from coloring her view or blocking her ability to update information.

Second, righteous judicial anger is relevant. It bears on issues properly before the judge and sheds light on how those issues should be evaluated. The righteously angry judge strives to perceive the causes of her anger—whether, for example, it reflects the seriousness of an attorney's defiance of court orders, or whether it stems from that attorney's consistently abrupt manner or an unrelated insult suffered earlier in the day. If the anger is irrelevant, or only marginally relevant, the judge seeks to ground her actions in other factors.

Third, righteous judicial anger reflects beliefs and values that are worthy of a judge in a democratic society. The righteously angry judge seeks to avoid anger at attorneys, witnesses, colleagues, and parties for taking actions they have a right, or even an obligation, to take. She seeks to do so even though such actions might be highly irritating; entail acts that are oppositional to the judge and her decisions; open her to the possibility of criticism and reversal; make her work significantly harder; and (in the case of judicial colleagues) embody substantive judgments she believes to be incorrect or harmful. The worthiness of the beliefs and values underlying judicial anger is at its peak where they reflect widely shared moral sentiments of harm, culpability, and shared community. The righteously angry judge also seeks to avoid contempt, as that emotion reflects an unwarranted claim of superiority.

Righteous judicial anger not only is accurate, relevant, and reflective of good values, it also is experienced and expressed in an appropriate way. The righteously angry judge is aware of both the benefits and dangers of anger, and seeks to maximize the former and minimize the latter. She seeks to draw on anger's certainty and power

when justice requires her to make fast, difficult, even risky, decisions, and to resist its pull where the situation merits greater scrutiny and caution. She interrogates her punitive impulses to see if they are well grounded and commensurate to the harm. She considers the impact on others of expressing her anger, and seeks to embody only those reactions as will further some legitimate interest—such as stopping destructive behavior, broadcasting authority, or channeling society's moral messages.

Finally, righteous judicial anger is enabled by strong emotion-regulation skills, which can be learned and must be regularly practiced. The righteously angry judge seeks to prepare realistically for anger, for it is certain to come; to respond thoughtfully to anger, for she may be able to rethink the situation or select a different response to it; and to integrate anger into her behavior and decisionmaking, by making use of it when it is righteous and by finding other outlets—such as private disclosure to a trusted colleague—when it is not. The judge must not deny or suppress her anger. Rather, she must face it honestly and engage with it closely. She must also accept that she is fallible. She will make mistakes, allow anger to bleed from one situation to another, value things like her pride more than she ought, and indulge in displays she wishes she had not. The righteously angry judge faces these failings and seeks to learn from them.

When judicial anger has all these characteristics, feeling and expressing it serves the ends of justice—indeed, in the Aristotelian view it *is* justice. As the Greek tradition would hold, when "law itself is angry," so too should be the judge.[408]

CONCLUSION

As this Article has shown, judicial anger is inevitable, and its manifestation both frequent and obvious. We cannot get away with ignoring it. Interestingly, the Article also has shown that despite the historical party line against any judicial experience or expression of emotion, anger escapes blanket condemnation in practice. The close look shows why anger would be treated specially: in the real world, people in contact with law often act in ways that would make any reasonable person—including a reasonable judge—angry. Fellow judges are reluctant to impose on others feeling rules they could not possibly live up to themselves. Nor *should* they live up to such a standard. Courts' reluctance to condemn judicial anger is deepened by

408. Potegal & Novaco, *supra* note 8, at 18.

a strong sense that it is sometimes warranted, such that failing to feel it would be suspect. If a judge were to feel entirely unmoved by lying, scheming, derailing legal proceedings, and harming others for no reason, we might question whether she had lost touch with reality in some fundamental, career-ending way. As Robert C. Solomon, the eminent contemporary philosopher of the emotions, has written, we cannot "have a sense of justice without the capacity and willingness to be personally outraged."[409]

On the other hand, even though we cannot look away from judicial anger, we might sometimes wish we could. Angry judges scream and flail about; they threaten and insult lawyers, parties, and one another; in the most extreme instances, they physically attack. Just as the absence of anger seems fundamentally at odds with our aspirations for judges, unbounded anger does as well. While the YouTube-viewing or Judge Judy-loving public might consume such incidents with glee, those who care deeply about justice and its image cannot help but wince.

While adherence to the ideal of dispassionate judging places us on record as Stoics, then, reality has made us accidental Aristotelians. Law is of two minds about judicial anger for good reason.[410] Our legal culture simply cannot eschew judicial anger, any more than it could applaud all its iterations. We have no choice but to ask whether it stems from good reasons and is felt in the right way.

However, because we have not come to this place deliberately or transparently, our analyses tend to be shallow and undertheorized. Indeed, it is typical in the case law for a reviewing court to recite the evidence of anger, quote the general principles of cases creating a generous buffer zone, and simply conclude that the anger was (or, far less frequently, was not) within the buffer. Just as often, courts dodge the issue entirely—for example, by quickly characterizing the display as harmless error. Popular assessments of judicial anger are even less coherent, as they tend to swing on whose ox is being gored. This Article has demonstrated that our evaluation can be more disciplined and principled. By focusing tightly on questions of justification and manifestation, we can test judicial anger for righteousness.

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409. SOLOMON, *supra* note 64, at 42 (" '[N]egative' emotions" such as "outrage" have "an essential place in the cultivation of justice."); *id.* at 243 ("Our sense of justice is not just the product of New Age sentiments but a dynamic engagement in a world which we ourselves know to be often offensive and unfair . . . a world we accordingly resent and act to change.").

410. Lerner & Tiedens, *supra* note 58, at 132 (anger might take a decisionmaker in a bad direction sometimes, a good direction in others); Peters et al., *supra* note 312, at 83 (Emotion "can have frightening effects on decision making," but also can assist "decision makers to integrate disparate information and to make sense out of a complex world.").

We should entertain no illusions that this will be easy. Judges will not find it easy to feel only righteous anger, nor will those of us who judge the judges find it easy to diagnose righteousness. Indeed, we should expect these tasks to be hard.[411] This is particularly so as—despite a shared moral baseline—we are unlikely ever to be in true consensus as to the normative values underlying all instances of judicial anger. As Aristotle wrote:

> [I]t is not an easy task to delineate how, at whom, at what, and for how long one should anger, nor at what point justifiable anger turns to unjustifiable. He who swerves a bit toward excess of anger is not to be blamed[, but] [h]ow far and how much one has to swerve before he becomes . . . blameworthy is not easy to specify.[412]

Faced with this difficulty, we need not rely on vague intuitions or deal with anger episodes as a disconnected series of one-offs. The model set forth in this Article provides us with theoretical tools with which to imagine righteous judicial anger and practical tools with which to achieve it. Except in extreme circumstances, and there will be some, judges who fall short of this ideal merit not condemnation but guidance. Righteously angry judges, in contrast, merit our approval and thanks.

411. Lerner & Tiedens, *supra* note 58, at 132 ("[A]ngry decision makers may then, as Aristotle suggested long ago, have a difficult time being angry at the right time, for the right purpose, and in the right way.").

412. WHAT IS AN EMOTION?, *supra* note 74, at 51 (quoting ARISTOTLE, NICOMACHEAN ETHICS).

A TRIBUTE TO JUDGE MARK KRAVITZ

by
Jeremy Fogel[*]

It is my great privilege to contribute to this memorial to Judge Mark Kravitz. Unlike most of my fellow contributors, I didn't know Judge Kravitz for all that long, and he was fighting his heroic battle with ALS for much of the time that I did know him. Yet it was apparent to me from our first meeting, and throughout the subsequent months that we worked together in the often arcane but vitally important arena of judicial rule-making, that he was a remarkable judge and a remarkable person.

One of the principal roles of the Federal Judicial Center (FJC), of which I am honored to serve as Director, is to carry out applied research for the committees of the Judicial Conference of the United States. Our professional staff, many of whom have advanced degrees in both law and social science, assist the various rules committees in assessing the practical effects of existing or proposed provisions, hopefully helping them to avoid the unintended policy consequences that often accompany changes in procedural rules. Judge Kravitz was one of the first people I met when I became Director, and I later spent a significant amount of time interacting with him and watching him work.

Another major responsibility of the FJC is education of federal judges. Every new judge attends our intensive orientation programs, and most judges participate in the workshops and seminars that we offer for experienced judges. I'm often asked what qualities define a great judge. The answer actually is fairly complicated, as no two judges are exactly the same, and the judges I've known who've touched me and others most deeply have had a wide variety of talents and personal traits. But three characteristics of every great judge I've known are competence, integrity, and good judicial temperament.

Competence includes intellect, substantive knowledge, analytical ability, and the ability to express oneself well. But I think that it also includes the ability to see the big picture, to understand the relationships among people and interests, to have the maturity of judgment to weigh the consequences of one's actions carefully. Getting the legal or logical answer right is necessary but not always sufficient. Context matters.

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For a judge, integrity involves honesty, courage, transparency, and a commitment to the process—to making decisions on the basis of legal principles rather than one's personal views or preferences. But in its fullest sense it also means questioning ourselves, doing our best to insure that we avoid biases and intellectual or emotional shortcuts, and making decisions as thoughtfully as we can.

A good judicial temperament requires courtesy, patience, the ability to listen well, and a delicate balance of flexibility and firmness. But it also reflects humility, an understanding at one's core that an individual judge is not the central figure in the legal narrative but rather a symbol of our society's aspirations for justice and fairness, and a channel through whom those aspirations are imperfectly but meaningfully realized.

Judge Kravitz exemplified each of these qualities. He was extraordinarily competent. He rendered nearly a decade of distinguished service as a district judge in New Haven, Connecticut. And he helped both of the Judicial Conference committees he chaired—first the Advisory Committee on Civil Rules and then the Standing Committee on the Federal Rules of Procedure—navigate a multitude of difficult conversations, invariably cutting to the heart of the issue and keeping the broader implications of the rule-making process in mind.

He led with unfailing integrity. There were no hidden agendas, power plays, or quick fixes. He encouraged and facilitated a process in which all points of view, even those at the margins of the discussion, were considered fully and thoughtfully.

And he did this, even after he had become ill and struggled painfully to express himself clearly, with remarkable decency and civility. Watching him one always had the sense that something deeper than the practical task of writing rules was at work, that his leadership always was grounded in the vision of a just legal system that the rules are intended to support and serve.

Both rules and the people who make them always are a work in progress, and the rule-making enterprise to which Judge Kravitz gave so much of his time and talent will continue to play a critical role in the development of our courts. The accelerating pace of social and technological change—not least the profound transformation of the ways in which people communicate—has made strong, thoughtful leadership in this effort particularly important. Mark Kravitz has left us with an enduring example of what such leadership looks like. He will be greatly missed and fondly remembered.

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2015 Year-End Report on the Federal Judiciary

In 1838, John Lyde Wilson, a former governor of South Carolina, made a grim contribution to the literature of dispute resolution by publishing "*The Code of Honor; or Rules for the Government of Principals and Seconds in Duelling*." That 22-page booklet, sized to fit comfortably alongside a gentleman's matched pair of dueling pistols, specified the procedure for issuing a challenge, the duties of seconds, and the proper conduct of the duel itself. More detailed than its predecessors, the Irish and French dueling codes, Wilson's rulebook set out time limits, the form and methods of written communications, the obligation to attempt reconciliation without bloodshed, and—if attempts at mediation failed—how to pace off the field of battle. Wilson professed that he was not advocating that adversaries settle their disputes through duels, but he claimed that dueling was inevitable "where there is no tribunal to do justice to an oppressed and deeply wronged individual." He suggested that laying out practices and procedures to ensure that duels would be conducted fairly—including

provisions for resolving disputes through apology and compromise—would in fact save lives.

It may be that Wilson's code had exactly the opposite effect, glorifying and institutionalizing a barbarous practice that led to wanton death. Our Nation had lost Alexander Hamilton to a senseless duel in 1804. Abraham Lincoln and Mark Twain could have perished in duels if their seconds, in each instance, had not negotiated an amicable solution. But others were not so fortunate; one historian has calculated that, between 1798 and the Civil War, the United States Navy lost two-thirds as many officers to dueling as it did to more than 60 years of combat at sea.

Public opinion ultimately turned against dueling as a means of settling quarrels. By 1859, eighteen of the 33 States of the Union had outlawed duels. Following the Civil War, a public weary of bloodshed turned increasingly to other forums, including the courts, to settle disputes. But reminders of the practice persist. When Kentucky lawyers are admitted to the bar, they are required, by law, to swear that they have not participated in a duel.

Today, Wilson's pamphlet stands on the bookshelf as a largely forgotten relic of a happily bygone past. But it is also a stark reminder of government's responsibility to provide tribunals for the peaceful resolution

of all manner of disputes. Our Nation's courts are today's guarantors of justice. Those civil tribunals, far more than the inherently uncivilized dueling fields they supplanted, must be governed by sound rules of practice and procedure.

The Rules Enabling Act, 28 U.S.C. §§ 2071 *et seq.*, empowers the federal courts to prescribe rules for the conduct of their business. The Judicial Conference—the policy making body of the federal judiciary—has overall responsibility for formulating those rules. Consistent with that charge, Congress has directed the Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." 28 U.S.C. § 331. The primary work is done through the Conference's Committee on Rules of Practice and Procedure (known as the Standing Committee), which in turn enlists guidance from advisory committees that focus on the specialties of appellate, bankruptcy, civil, and criminal procedure, and the rules of evidence. Those committees solicit recommendations, conduct public hearings, draft proposed rules, and propose amendments for the Judicial Conference's consideration. If the Judicial Conference concurs, the proposed rules and amendments, together with a report on their promulgation, are submitted to the Supreme Court for its approval. If the Court approves, the rules are then laid before Congress,

by the annual deadline of May 1, for its examination. Unless Congress intervenes by December 1, the new rules take effect.

This process of judicial rule formulation, now more than 80 years old, is elaborate and time-consuming, but it ensures that federal court rules of practice and procedure are developed through meticulous consideration, with input from all facets of the legal community, including judges, lawyers, law professors, and the public at large. Many rules amendments are modest and technical, even persnickety, but the 2015 amendments to the Federal Rules of Civil Procedure are different. Those amendments are the product of five years of intense study, debate, and drafting to address the most serious impediments to just, speedy, and efficient resolution of civil disputes.

The project goes back to 2010, when the Advisory Committee on Civil Rules sponsored a symposium on civil litigation, which brought together federal and state judges, law professors, and plaintiff and defense lawyers, drawn from business, government, and public interest organizations. The symposium, which generated 40 papers and 25 data compilations, confirmed that, while the federal courts are fundamentally sound, in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts. The symposium specifically identified the need for procedural reforms that

would: (1) encourage greater cooperation among counsel; (2) focus discovery—the process of obtaining information within the control of the opposing party—on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information.

The Advisory Committee on Civil Rules set to work on those problems. Over the next three years, the Committee drafted proposed amendments and published them for public comment. It received more than 2,300 written comments and held public hearings in Dallas, Phoenix, and Washington, D.C., eliciting input from more than 120 witnesses. The Committee then revised the amendments in response to the public recommendations. The proposed amendments received further scrutiny from the Standing Committee, the Judicial Conference, and the Supreme Court, before submission to Congress. The amended rules, which can be viewed at http://www.uscourts.gov/federal-rules-civil-procedure, went into effect one month ago, on December 1, 2015. They mark significant change, for both lawyers and judges, in the future conduct of civil trials.

The amendments may not look like a big deal at first glance, but they are. That is one reason I have chosen to highlight them in this report. For example, Rule 1 of the Federal Rules of Civil Procedure has been expanded

by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.

Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality:

> "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need. That assessment may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery.

The amended rules accordingly emphasize the crucial role of federal judges in engaging in early and effective case management. The prior rules—specifically Rule 16—already required that the judge meet with the lawyers after the complaint is filed, confer about the needs of the case, and develop a case management plan. The amended rules have shortened the deadline for that meeting and express a preference for a face-to-face encounter to enhance communication between the judge and lawyers. The amendments also identify techniques to expedite resolution of pretrial discovery disputes, including conferences with the judge before filing formal motions in aid of discovery. Such conferences can often obviate the need for a formal motion—a well-timed scowl from a trial judge can go a long way in moving things along crisply.

Recognizing the evolving role of information technology in virtually every detail of life, the amended rules specifically address the issue of "electronically stored information," which has given birth to a new acronym—"ESI." Rules 16 and 26(f) now require the parties to reach agreement on the preservation and discovery of ESI in their case management plan and discovery conferences. Amendments to Rule 37(e) effect a further refinement by specifying the consequences if a party fails to observe the generally recognized obligation to preserve ESI in the face of foreseeable litigation. If the failure to take reasonable precautions results in a loss of discoverable ESI, the courts must first focus on whether the information can be restored or replaced through alternative discovery efforts. If not, the courts may order additional measures "no greater than necessary" to cure the resulting prejudice. And if the loss of ESI is the result of one party's intent to deprive the other of the information's use in litigation, the court may impose prescribed sanctions, ranging from an adverse jury instruction to dismissal of the action or entry of a default judgment.

The rules amendments eliminate Rule 84, which referenced an appendix containing a number of civil litigation forms that were originally designed to provide lawyers and unrepresented litigants with examples of proper pleading. Over the years since their publication, many of those forms

have become antiquated or obsolete. The Administrative Office of the United States Courts assembled a group of experienced judges to replace those outdated forms with modern versions that reflect current practice and procedure. They have largely completed their work. The Administrative Office has already posted 12 revised forms on the federal judiciary's website, with three more to follow in the next month. See http://www.uscourts.gov/forms/pro-se-forms.

The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—"the just, speedy, and inexpensive determination of every action and proceeding"—only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.

I think we are off to a good start. The Federal Judicial Center, which is the educational and research arm of the federal judiciary, has created a training program for federal judges to ensure they are prepared to introduce the procedural reforms in their courtrooms. Training is necessary for lawyers too, and the American Bar Association and many local bar organizations have initiated educational programs and workshops across the country. The practical implementation of the rules may require some adaptation and innovation. I encourage all to support the judiciary's plans to

test the workability of new case management and discovery practices through carefully conceived pilot programs. In addition, a wide variety of judicial, legal, and academic organizations have supplied key insights in the improvement of both federal and state rules of practice, and they are continuing to provide their perspectives and expertise on the rollout of the new rules. I am confident that the Advisory Committee on Civil Rules will continue to engage the full spectrum of those organizations in its ongoing work.

The success of the 2015 civil rules amendments will require more than organized educational efforts. It will also require a genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share.

Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation. Faced with crushing dockets, judges can be tempted to postpone engagement in pretrial activities. Experience has shown, however, that judges who are knowledgeable, actively engaged, and accessible early in the process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine

the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing.

As for the lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship. I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics. The test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results.

I am hardly the first to urge that we must engineer a change in our legal culture that places a premium on the public's interest in speedy, fair, and efficient justice. But I am motivated to address the subject now because the 2015 civil rules amendments provide a concrete opportunity for actually getting something done.

In the nineteenth century, a change in culture left dueling by the wayside and left us with lessons learned. Joseph Conrad's novella "*The Duel*" tells the tale, taken from fact, of two gallant French cavalry

officers, D'Hubert and Feraud. Estranged by a trifling slight, they repeatedly duel over a 15-year period. According to newspapers of the era, the real-life antagonists, Dupont and Fournier, would cross swords and draw blood whenever their military service brought them near to one another. Conrad's characters, like the real ones, relentlessly persist in their personal feud through the rise, fall, reemergence, and ultimate exile of Napoleon, as the world transforms around them. In the end, these soldiers, who should have been comrades in a patriotic cause, spent much of their adult lives focused on a petty squabble that left them with nothing but scars. We should not miss the opportunity to help ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result.

Another year has quickly passed, and once again, I am privileged and honored to be in a position to thank all of the judges, court staff, and judicial personnel throughout the Nation for their continued excellence and dedication.

Best wishes to all in the New Year.

Appendix

Workload of the Courts

In the 12-month period ending September 30, 2015, caseloads decreased in the Supreme Court, the regional appellate courts, the district courts, the bankruptcy courts, and the pretrial services system. Growth occurred, however, in the number of persons under post-conviction supervision.

The Supreme Court of the United States

The total number of cases filed in the Supreme Court decreased by 4.65 percent from 7,376 filings in the 2013 Term to 7,033 filings in the 2014 Term. The number of cases filed in the Court's *in forma pauperis* docket decreased by 5.50 percent from 5,808 filings in the 2013 Term to 5,488 filings in the 2014 Term. The number of cases filed in the Court's paid docket decreased by 1.47 percent from 1,568 filings in the 2013 Term to 1,545 filings in the 2014 Term. During the 2014 Term, 75 cases were argued and 75 were disposed of in 66 signed opinions, compared with 79 cases argued and 77 disposed of in 67 signed opinions during the 2013 Term. The Court also issued eight per curiam decisions during the 2014 Term in cases that were not argued.

The Federal Courts of Appeals

In the regional courts of appeals, filings dropped four percent to 52,698. Appeals involving pro se litigants, which amounted to 51 percent of filings, fell four percent. Total civil appeals decreased seven percent. Criminal appeals rose three percent, as did appeals of administrative agency decisions, and bankruptcy appeals grew seven percent.

The Federal District Courts

Civil case filings in the U.S. district courts declined six percent to 279,036. Cases involving diversity of citizenship (i.e., disputes between citizens of different states) fell 14 percent, largely because of a reduction in personal injury/product liability filings. Cases with the United States as defendant dropped seven percent in response to fewer filings of prisoner petitions and Social Security cases. Cases with the United States as plaintiff went down 10 percent as filings of forfeiture and penalty cases and contract cases decreased.

Filings for criminal defendants (including those transferred from other districts) held relatively steady, declining one percent to 80,069. Defendants accused of immigration violations dropped five percent, with the southwestern border districts receiving 79 percent of national immigration defendant filings. Defendants charged with property offenses (including

fraud) fell six percent. Other reductions were reported for filings involving traffic offenses, general offenses, regulatory offenses, and justice system offenses. Drug crime defendants, who accounted for 32 percent of total filings, rose two percent. Increases also occurred in filings related to firearms and explosives, sex offenses, and violent crimes.

The Bankruptcy Courts

Bankruptcy petition filings decreased 11 percent to 860,182. Fewer petitions were filed in all bankruptcy courts but one—the Middle District of Alabama had three percent more filings this year. Consumer (i.e., nonbusiness) petitions dropped 11 percent, and business petitions fell 12 percent. Filings of petitions declined 14 percent under Chapter 7, eight percent under Chapter 11, and three percent under Chapter 13.

This year's total for bankruptcy petitions is the lowest since 2007, the first full year after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 took effect. From 2007 to 2010, bankruptcy filings rose steadily, but they have fallen in each of the last five years.

The Federal Probation and Pretrial Services System

A total of 135,468 persons were under post-conviction supervision on September 30, 2015, an increase of two percent over the total one year earlier. Of that number, 114,961 persons were serving terms of supervised

release after leaving correctional institutions, a three percent increase from the prior year.

Cases activated in the pretrial services system, including pretrial diversion cases, fell five percent to 95,013.

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United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title I. Scope of Rules; Form of Action

Federal Rules of Civil Procedure Rule 1

Rule 1. Scope and Purpose

Currentness

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; February 28, 1966, effective July 1, 1966; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007; April 29, 2015, effective December 1, 2015.)

Fed. Rules Civ. Proc. Rule 1, 28 U.S.C.A., FRCP Rule 1
Including Amendments Received Through 2-1-16

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2015 Amendment

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with -- and indeed depends upon -- cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 16

Rule 16. Pretrial Conferences; Scheduling; Management

Currentness

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

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(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) ***Contents of the Order.***

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi) set dates for pretrial conferences and for trial; and

(vii) include other appropriate matters.

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(4) ***Modifying a Schedule.*** A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) ***Matters for Consideration.*** At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

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(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

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(f) Sanctions.

(1) ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

CREDIT(S)

(Amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 29, 2015, effective December 1, 2015.)

Fed. Rules Civ. Proc. Rule 16, 28 U.S.C.A., FRCP Rule 16
Including Amendments Received Through 2-1-16

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2015 Amendment

The provision for consulting at a scheduling conference by "telephone, mail, or other means" is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

The order may provide for preservation of electronically stored information, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed.

The order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).

Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions I to III are contained in this document. For Notes of Decisions for subdivisions IV to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

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(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

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(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) ***Disclosure of Expert Testimony.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

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(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

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(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

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(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

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(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

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(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii)describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must

include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

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(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) ***Early Rule 34 Requests.***

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) ***When Considered Served.*** The request is considered to have been served at the first Rule 26(f) conference.

(3) ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

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(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or

party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

CREDIT(S)

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Fed. Rules Civ. Proc. Rule 26, 28 U.S.C.A., FRCP Rule 26
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2015 Amendment

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c) ... On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations", no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that [t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery ...'

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations. Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information -- perhaps the only information -- with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party -- often an individual plaintiff -- may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice

these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and

the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision ..." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting

should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan -- issues about preserving electronically stored information and court orders under Evidence Rule 502

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Currentness

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) ***Specific Motions.***

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted -- or fails to permit inspection -- as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders.***

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees.

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But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Sought in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) ***Sanctions Sought in the District Where the Action Is Pending.***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

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(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) ***In General.***

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

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(2) ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

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CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; amended by Pub.L. 96-481, Title II, § 205(a), October 21, 1980, 94 Stat. 2330, effective October 1, 1981; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 16, 2013, effective December 1, 2013; April 29, 2015, effective December 1, 2015.)

Fed. Rules Civ. Proc. Rule 37, 28 U.S.C.A., FRCP Rule 37
Including Amendments Received Through 2-1-16

End of Document

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2015 Amendment

Subdivision (a). Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

Subdivision (e). Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the

lost information be preserved. Such requirements arise from many sources -- statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control -- the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A

party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain

evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence. Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence

to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

3

Cover Sheet
For
Model Discovery Plan
Chief Judge B. Lynn Winmill

Guidelines for Counsel:

Guideline 1: The Court requires each case to be governed by a written Discovery Plan prepared pursuant to Rule 26(f)(3).

Guideline 2: The attached Model Discovery Plan is designed to help you draft your own Discovery Plan customized to the needs of your case. This Model Discovery Plan may contain provisions you do not need, and may be missing others that you do need. Add or delete provisions as you feel necessary. Your Discovery Plan might be 2 pages or 20 pages depending on the complexity of your case and the anticipated discovery.

Guideline 3: The Court expects you to expend real time, thought and energy in coming up with a workable Discovery Plan, and to draft realistic limits on discovery with an eye to avoiding unnecessary expenditures of time and money.

Guideline 4: All discovery in this case shall be conducted in accordance with Rule 1, which requires that the Rules "be construed, administered, and employed **by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding."

Guideline 5: So long as counsel are acting in good faith, the Court will be very flexible in adopting agreements to change the Discovery Plan, or in imposing reasonable and necessary changes in the absence of an agreement of counsel.

Guideline 6: To facilitate this flexibility, the Court will schedule short status conferences with counsel, ranging from monthly conferences in complex cases and quarterly conferences in more garden-variety cases. One of the topics for those status conferences will be a report on the progress of discovery and whether the Discovery Plan requires modification.

Guideline 7: Discovery issues shall be analyzed by you – and, if necessary, resolved by the Court – using the proportionality factors set forth in Rule 26(b)(1): (1) The importance of the issues at stake in the action; (2) The amount in controversy; (3) The parties' relative access to relevant information; (4) The parties' resources; (5) The importance of the discovery in resolving the issues; and (6) Whether the burden or expense of the proposed discovery outweighs its likely benefit.

Guideline 8: Rule 26(g) requires the parties "to consider [proportionality] factors in making discovery requests, responses or objections." *See Advisory Committee Notes.*

Guideline 9: Proportionality "does not place on the party seeking discovery the burden of addressing all proportionality considerations." *See Advisory Committee Notes.*

Guideline 10: The Rules do not authorize boilerplate objections or refusals to provide discovery on the ground that it is not proportional – the grounds must be stated with specificity. *See Advisory Committee Notes.*

Guideline 11: Monetary stakes are only one factor in evaluating proportionality. A case seeking to "vindicate vitally important personal or public values" (like "employment [or] free speech" issues) "may have importance far beyond the monetary amount involved." *See Advisory Committee Notes.*

Guideline 12: Transparency in search methodology is crucial to instilling confidence in the production of ESI and other material. Thus, each party should reveal the search methodology they use in responding to requests for production of ESI and other material, to the extent possible given the protections afforded by the attorney-client privilege and the work product doctrine.

Guideline 13: Pursuant to Rule 26(f)(2), the Discovery Plan is due 14 days after the meet-and-confer session discussed in Rule 26(f)(1). But in some cases that might be difficult because the parties have not had time to review voluminous initial disclosures or because those disclosures were late-filed or incomplete. The timing of initial disclosures is currently under consideration by the District's Local Rules Committee. In the meantime, the Rule 26(f)(2) deadline will apply but the Court will work with counsel on a case-by-case basis to determine if that deadline needs to be modified.

Guideline 14: File your Discovery Plan on CM/ECF. The Court will incorporate the Discovery Plan's deadlines into the Court's Case Management Order so there will be a single Order with all deadlines to avoid any confusion.

Guideline 15: No party shall file a motion seeking to resolve a discovery dispute until first engaging in a mediation session with the Court. The Court makes these a top priority and can schedule them very quickly. The protocol for setting up a mediation session is discussed in each Case Management Order and at the Court's webpage at:

https://www.id.uscourts.gov/district/judges/winmill/discovery_disputes.cfm

DATED: May 2, 2016

B. Lynn Winmill
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

Plaintiff, v. Defendants.	Case No. 0:0-CV-0000-BLW **(MODEL) DISCOVERY PLAN**

I. Preservation

a. **Preservation & Proportionality:** The parties have applied the proportionality standard in Rule 26(b)(1) to determine what information should be preserved and what information should not be preserved.

b. **Electronically Stored Information (ESI):** With regard to ESI, the parties agree that:

   i. **Date Range:** Only ESI created or received between ____ and _____ will be preserved;

   ii. **Scope of Preservation:** The parties agree to:

      1. Preserve the Following Types of ESI

         a. _____

      2. From the Following Custodians or Job Titles:

         a. _____

      3. From the Following Systems, Servers, or Databases

a. _____

iii. **Preserved But Not Searched:** These data sources are not reasonably accessible because of undue burden or cost pursuant to Rule 26(b)(2)(B) and ESI from these sources will be preserved but not searched, reviewed, or produced:

1. *[E.g. backup media of [named] system, systems no longer in use that cannot be accessed, etc.]* _____.

iv. **Not Preserved:** Among the sources of data the parties agree are not reasonably accessible pursuant to Rule 26(b)(2)(B), and shall not be preserved, are the following:

1. *[E.g. voicemails, PDAs, mobile phones, instant messaging, automatically saved versions of documents, backup media created before* _____*, etc.].*

v. **ESI Retention Protocols:** Going forward, the parties agree *[to modify/not to modify]* the document and ESI retention/destruction protocols of *[party]*.

1. *[if modified, describe modifications here]*

vi. **Cost Sharing:**

☐ *[The parties agree to share the cost of an electronic discovery vendor; shared document repository; or other cost saving measures]*

☐ *[The parties agree to bear their own costs for preservation of e-discovery]*

II. Initial Disclosures

a. *[if already provided]* Pursuant to Rule 26(a), initial disclosures were provided on the following dates:

- Plaintiffs: _____.
- Defendants: _____.

b. *[if not yet provided]* The parties agree to modify the deadlines in Rule 26(a) to allow initial disclosures to be provided on the following dates:

- Plaintiffs: _____.
- Defendants: _____.

c. *[change to form]* The parties agree to modify the form of the Rule 26(a) initial disclosures as follows: _____.

d. *[exempt]* The parties agree that this proceeding is exempt under Rule 26(a)(1)(B) from the requirement to provide initial disclosures.

III. Scope of Discovery

a. **Scope:** Discovery is necessary on the following subjects/issues:

- For Plaintiff:

1. _____;
2. _____;
3. _____.

4. _____;

5. _____;

- For Defense:

6. _____;

7. _____;

8. _____;

9. _____;

10. _____.

IV. Discovery Boundaries

a. **Limits:** The parties agree to limit the number of discovery tools as follows:

☐Depositions: _____

☐Interrogatories: _____

☐Requests for Production: _____

V. ESI

a. ***Checklist:*** *The Court has attached the "Checklist" for ESI Discovery prepared by the Federal District Court for the Northern District of California to assist counsel in their meet-and-confer session.*

b. ***Proportionality****: Although not a hard and fast rule, a party from whom ESI has been requested in the typical case will not be expected to search for responsive ESI:*

- *from more than 15 key custodians;*
- *that was created more than 5 years before the filing of the lawsuit;*
- *from sources that are not reasonably accessible without undue burden or cost; or*
- *for more than 160 hours, inclusive of time spent identifying potentially responsive ESI, collecting that ESI, searching that ESI, and reviewing that ESI for responsiveness, confidentiality, and for privilege or work product protection. The producing party must be able to demonstrate that the search was effectively designed and efficiently conducted.*

c. **ESI File Format:** The parties agree to produce documents in the following file format[s] *[check any that apply]*:

☐ PDF;

☐ TIFF;

☐ Native; and/or

☐ Paper.

d. **ESI Production Format:** The parties agree that documents will be produced *[check any that apply]*:

☐ with logical document breaks;

☐ as searchable;

☐ with load fields enabling review in common litigation databases such as Summation and Concordance;

☐ with metadata, and, if so, in the following fields: _____.

e. **ESI Search Methodology**: The parties have agreed to use the following search methodology:

☐ Predictive coding (or technology assisted review);

☐ Keyword search;

☐ Other: _____.

f. **Search Methodology – Transparency:** The parties agree that they will share their search methodology for responding to requests for production of ESI to the following extent: _____.

g. **General ESI Production vs. E-mail Production:** The parties agree that general ESI production requests under Federal Rules of Civil Procedure 34 and 45, or compliance with a mandatory disclosure order of this court, shall not include e-mail or other forms of electronic correspondence (collectively "e-mail"). To obtain e-mail parties must propound specific e-mail production requests.

h. **E-mail Custodian List Exchange:** On or before *[date]*, the parties agree to exchange lists identifying (1) likely e-mail custodians, and (2) a specific identification of the *[15]* most significant listed e-mail custodians in view of the pleaded claims and defenses.

i. **Discovery Re E-mail Custodians, Search Terms & Time Frames:** Each requesting party may propound up to *[5]* written discovery requests and take *[one]* deposition per producing party to identify the proper custodians, proper search terms, and proper time frame for e-mail production requests. The court may allow additional discovery upon a showing of good cause.

j. **Form of E-mail Production Requests:** E-mail production requests shall identify the custodian, search terms, and time frame. The parties shall cooperate to identify the proper custodians, proper search terms, and proper time frame.

k. **Limits on E-mail Production Requests – Custodians:** Each requesting party shall limit its e-mail production requests to a total of *[8]* custodians per producing party for all such requests. The parties may jointly agree to modify this limit without the court's leave.

l. **Limits on E-mail Production Requests – Keyword Search Terms:** Each requesting party shall limit its e-mail production requests to a total of *[10]* keyword search terms per custodian per party. The parties may jointly agree to modify this limit without the court's leave. The keyword search terms shall be narrowly tailored to particular issues. Indiscriminate terms, such as the producing company's name or its product name, are inappropriate unless combined with narrowing search criteria that sufficiently reduce the risk of overproduction.

m. **Liaison:** Each party *[has identified/will identify]* a Liaison who is responsible for, and knowledgeable about (or has access to a person knowledgeable about), that party's ESI. This includes the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI in this matter. The parties will rely on the Liaisons, as needed, to confer about ESI and to help resolve disputes without court intervention.

VI. Deadlines

a. The deadline for the completion of fact discovery is: _____.

b. The deadline for completion of expert witness discovery is: _____.

VII. Phased or Issue-Specific Discovery

a. *[Phased Discovery]* The parties agree to conduct discovery in phases, focusing in the first phase on key information that is easily accessible. The parties will then use that the results of that initial phase of discovery to guide further discovery.

- **First Phase of Discovery**: During the first phase, the parties will conduct discovery on the following subject[s]:

  _____.

- **Scope of First Phase**: During the first phase of discovery, the parties shall take the following discovery:

  - Depositions: _____

- Interrogatories: _____
- Requests for Production: _____

- **Deadline for Completion of First Phase**: The parties shall complete the first phase of discovery on or before _____.
- **Further Discovery**: Following completion of the first phase of discovery, the parties will meet together to determine what discovery, if any, is needed in the next phase.

b. *[Issue-Specific Discovery]* The parties agree that discovery should be focused first on *[jurisdiction] [venue] [qualified immunity] [affirmative defenses that may be dispositive] [information necessary to engage in meaningful settlement discussions] [etc.]*.

- **Deadline for Completion of Issue-Specific Discovery**: The discovery on the issue of *[jurisdiction] [venue]][qualified immunity][affirmative defenses that may be dispositive][information necessary to engage in meaningful settlement discussions] [etc.]* will be completed on or before _____, at which time the parties will meet to determine what needs to be done next.

VIII. Documents Protected From Discovery

a. **Clawback:** Pursuant to Fed. R. Evid. 502(d), the parties request the Court to enter an Order that production of a privileged or work-product-protected document, whether inadvertent or otherwise, is not a waiver of privilege or

work-product protection in this case or in any other federal or state proceeding.

b. **Quick Peek:** The parties

☐ *[agree that a "quick peek" process pursuant to Fed.R.Civ.P. 26(b)(5) is not necessary in this case]*

☐ *[agree to a "quick peek" process pursuant to Fed.R.Civ.P. 26(b)(5) as set forth herein: _____].*

c. **Post-Complaint Communications:** Communications involving trial counsel that post-date the filing of the complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.

IX. Protective Order

a. The parties have agreed to the terms of a Protective Order to protect *[trade secrets, proprietary material, personal information, etc]* and will submit that to the Court for its approval.

b. The parties understand that even if they agree to seal material filed with the Court, they must still file a motion to seal and obtain Court approval that the sealing meets with the Ninth Circuit standards for sealing. *See Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).

United States District Court
Northern District of California

CHECKLIST FOR RULE 26(f) MEET AND CONFER
REGARDING ELECTRONICALLY STORED INFORMATION

In cases where the discovery of electronically stored information ("ESI") is likely to be a significant cost or burden, the Court encourages the parties to engage in on-going meet and confer discussions and use the following Checklist to guide those discussions. These discussions should be framed in the context of the specific claims and defenses involved. The usefulness of particular topics on the checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter.

I. Preservation

- ❒ The ranges of creation or receipt dates for any ESI to be preserved.
- ❒ The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- ❒ The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved.
- ❒ Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material.
- ❒ The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., "HR head," "scientist," "marketing manager," etc.).
- ❒ The number of custodians for whom ESI will be preserved.
- ❒ The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- ❒ Any disputes related to scope or manner of preservation.

II. Liaison

- ❒ The identity of each party's e-discovery liaison.

III. Informal Discovery About Location and Types of Systems

- ❒ Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems).
- ❒ Description of systems in which potentially discoverable information is stored.
- ❒ Location of systems in which potentially discoverable information is stored.
- ❒ How potentially discoverable information is stored.
- ❒ How discoverable information can be collected from systems and media in which it is stored.

IV. Proportionality and Costs

- ❒ The amount and nature of the claims being made by either party.
- ❒ The nature and scope of burdens associated with the proposed preservation and discovery of ESI.
- ❒ The likely benefit of the proposed discovery.
- ❒ Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measures.

Revised December 1, 2015

- ❒ Limits on the scope of preservation or other cost-saving measures.
- ❒ Whether there is relevant ESI that will not be preserved pursuant to Fed. R. Civ. P. 26(b)(1), requiring discovery to be proportionate to the needs of the case.

V. Search

- ❒ The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.
- ❒ The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

VI. Phasing

- ❒ Whether it is appropriate to conduct discovery of ESI in phases.
- ❒ Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.
- ❒ Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- ❒ Custodians (by name or role) most likely to have discoverable information and whose ESI
- ❒ will be included in the first phases of document discovery.
- ❒ Custodians (by name or role) less likely to have discoverable information and from whom discovery of ESI will be postponed or avoided.
- ❒ The time period during which discoverable information was most likely to have been created or received.

VII. Production

- ❒ The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- ❒ The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.
- ❒ The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- ❒ The production format(s) that ensure(s) that any inherent searchablility of ESI is not degraded when produced.

VIII. Privilege

- ❒ How any production of privileged or work product protected information will be handled.
- ❒ Whether the parties can agree upon alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification.
- ❒ Whether the parties will enter into a Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production.

4

ABA Model Rules of Professional Conduct (2004)

American Bar Association Model Rules of Professional Conduct (2002 edition)*

As passed by the American Bar Association, House of Delegates February 5, 2002 and amended in August 2002.

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Edition Notes

[This edition incorporates the changes adopted by the ABA House of Delegates, February 5, 2002, in response to the recommendations of the Ethics 2000 Commision, and the further amendments adopted by the ABA House of Delegates in August 2002. There is following each rule a link to the pre-2002 language, at this date still the model for most state rules.]*

Select one of the following starting points by double-clicking on it:

1. PREAMBLE, SCOPE, TERMINOLOGY
2. RULES
3. COMMENTS

PREAMBLE, SCOPE AND TERMINOLOGY

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are

or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and

thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional

judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or

incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

[Pre-2002 version]

Rule 1.0: TERMINOLOGY

(a) "**Belief**" or "**believes**" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "**Confirmed in writing**," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "**Firm**" or "**law firm**" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "**Fraud**" or "**fraudulent**" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "**Informed consent**" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "**Knowingly**," "**known**," or "**knows**" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "**Partner**" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "**Reasonable**" or "**reasonably**" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "**Reasonable belief**" or "**reasonably believes**" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "**Reasonably should know**" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "**Screened**" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "**Substantial**" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "**Tribunal**" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "**Writing**" or "**written**" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "**signed**" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

[Comment][Pre-2002 version]

CLIENT-LAWYER RELATIONSHIP

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[Comment][Pre-2002 version][State Narratives]

Rule 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

[Comment][Pre-2002 version][State Narratives]

Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

[Comment][Pre-2002 version][State Narratives]

Rule 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[Comment][Pre-2002 version][State Narratives]

Rule 1.5: Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

[Comment][Pre-2002 version][State Narratives]

[Note: Rule 1.15, as recommended by the Ethics 2000 Commission, would have required that communication of fees and expenses, and changes in them, be communicated to the client in writing unless the "it is reasonably foreseeable that total cost to a client, including attorney fees, will be [$500] or less." In February 2002 the House of Delegates deleted the requirement of a writing, stating that fee communications be "preferably in writing." As of 2002, five jurisdictions require a written fee agreement for all new clients: Connecticut, District of Columbia, New Jersey, Pennsylvania, and Utah. Two additional states require a written fee agreement in many representations: Alaska (fees in excess of $500), California (fees for all non-corporate clients in excess of $1,000).

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was

involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

[Comment][Pre-2002 version][State Narratives]

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

[Comment][Pre-2002 version][State Narratives]

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgement or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

[Comment][Pre-2002 version][State Narratives]

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer has acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[Comment][Pre-2002 version][State Narratives]

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

[Comment][Pre-2002 version][State Narratives]

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment,

unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

[Comment][Pre-2002 version][State Narratives]

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

[Comment][Pre-2002 version][State Narratives]

Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

[Comment][Pre-2002 version][State Narratives]

Rule 1.14 Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

[Comment][Pre-2002 version][State Narratives]

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer the dispute is resolved. The lawyer

shall promptly distribute all portions of the property as to which the interests are not in dispute.

[Comment][Pre-2002 version][State Narratives]

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

[Comment][Pre-2002 version][State Narratives]

Rule 1.17 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction nay elect either version) in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firm;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

[Comment][Pre-2002 version][State Narratives]

Rule 1.18 Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

[Comment] [Pre-2002 version][State Narratives]

COUNSELOR

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

[Comment][Pre-2002 version][State Narratives]

Rule 2.2 Intermediary

{Deleted}

[Pre-2002 version][State Narratives]

Rule 2.3 Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

[Comment][Pre-2002 version][State Narratives]

Rule 2.4 Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the

lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

[Comment] [Pre-2002 version][State Narratives]

ADVOCATE

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[Comment][Pre-2002 version][State Narratives]

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

[Comment][Pre-2002 version][State Narratives]

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[Comment][Pre-2002 version][State Narratives]

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

[Comment][Pre-2002 version][State Narratives]

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

[Comment][Pre-2002 version][State Narratives]

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

[Comment][Pre-2002 version][State Narratives]

Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[Comment][Pre-2002 version][State Narratives]

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(iii) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

[Comment][Pre-2002 version][State Narratives]

Rule 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5 .

[Comment][Pre-2002 version][State Narratives]

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

[Comment][Pre-2002 version][State Narratives]

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

[Comment][Pre-2002 version][State Narrative]

Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

[Comment][Pre-2002 version][State Narratives]

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

[Comment][Pre-2002 version][State Narratives]

LAW FIRMS AND ASSOCIATIONS

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[Comment][Pre-2002 version][State Narratives]

Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

[Comment][Pre-2002 version][State Narratives]

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance

that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[Comment][Pre-2002 version][State Narratives]

Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

[Comment][Pre-2002 version][State Narratives]

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

[Comment][Pre-2002 version][State Narratives]

Rule 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

[Comment][Pre-2002 version][State Narratives]

Rule 5.7 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

[Comment][Pre-2002 version][State Narratives]

PUBLIC SERVICE

Rule 6.1 Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights,

civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

[Comment][Pre-2002 version][State Narratives]

Rule 6.2 Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

[Comment][Pre-2002 version][State Narratives]

Rule 6.3 Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

[Comment][Pre-2002 version][State Narratives]

Rule 6.4 Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision

in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

[Comment][Pre-2002 version][State Narratives]

Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

[Comment][Pre-2002 version][State Narratives]

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

[Comment][Pre-2002 version][State Narratives]

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

[Comment][Pre-2002 version][State Narratives]

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

[Comment][Pre-2002 version][State Narratives]

Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

[Comment][Pre-2002 version][State Narratives]

Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of the law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

[Comment][Pre-2002 version][State Narratives]

Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

[Comment][Pre-2002 version]

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

[Comment][Pre-2002 version][State Narratives]

Rule 8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

[Comment][Pre-2002 version][State Narratives]

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

[Comment][Pre-2002 version][State Narratives]

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

[Comment][Pre-2002 version][State Narratives]

Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

[Comment][Pre-2002 version][State Narratives]

5

Ethical Challenges and Professional Success: Public Duties, Private Clients and Professional Responsibility

2016 Judicial Conference of the United States Court of Appeals for the Ninth Circuit
July 11, 2016

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A High Opinion of Lawyers

The following quotation nicely captures the self-regard that lawyers once had of themselves:

"I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with than most other varieties of mankind."

-- Harrison Tweed (1885-1969), a President of the Bar Assn. of the City of New York and a President of the American Law Institute.

A Low Opinion of the Law

Now here is another quotation, very different, very cynical, written by the novelist Michael Connelly, and spoken by his fictional lawyer, Mickey Haller, in the bestselling novel, **The Lincoln Lawyer**:

"The Lincoln Lawyer"

"There was nothing about the law that I cherished anymore. The law school notions about the virtue of the adversarial system, of the system's checks and balances, of the search for truth, had long since eroded like the faces of statues from other civilizations. The law was not about truth. It was about negotiation, amelioration, manipulation. I didn't deal in guilt and innocence, because everybody was guilty. Of something. But it didn't matter, because every case I took on was a house built on a foundation poured by overworked and underpaid laborers. They cut corners. They made mistakes. And then they painted over the mistakes with lies. My job was to peel away the paint and find the cracks and widen them. To work my fingers and tools into those cracks and widen them. To make them so big that either the house fell down or, failing that, my client slipped through."

The Challenge Presented

- One of the challenges lawyers face today is reconciling these disparate views with their own sense of self, the roles this profession requires of them, and the role of our profession in society.

A Lawyer's Many Roles

Paragraphs [1] through [6] of the *Preamble* to the ABA **Model Rules of Professional Conduct**, and repeated in many state ethics codes, indicate that a lawyer may serve in many different professional roles, often filling two or more roles at the same time, either with the same client or with different clients.

A Lawyer's Many Roles

There are four roles identified in the *Preamble*. The lawyer as:

1. A representative of clients;
2. A third party neutral;
3. An officer of the court; and
4. A public citizen having special responsibility for the quality of justice.

What do these terms mean?

A Lawyer's Many Roles

1. As a representative of clients a lawyer can serve in a variety of capacities, as an:
   a) Advisor to the client,
   b) Advocate before tribunal on behalf of the client,
   c) Negotiator on behalf of the client; or
   d) Evaluator of a matter affecting the client for the use of others not the client.

Preamble, ¶ 2

A Lawyer's Many Roles

2. As a third party neutral, a lawyer is not representing a client in a matter or transaction.
   Instead, the lawyer's role is to try and facilitate the resolution of a dispute between two or more adverse parties.
   The lawyer will be acting, for example, as an arbitrator or mediator.
   Preamble, ¶ [3]

A Lawyer's Many Roles

3. A lawyer also is an officer of the legal system.

In the U.S. lawyers are admitted to practice in a jurisdiction, or before a court or other tribunal, by order of either the highest court of the jurisdiction or of the specific court or tribunal. Upon being admitted to practice a lawyer is subject to that jurisdiction's or tribunal's rules of ethics and practice.

The lawyer now has a shared responsibility for and a role in the proper administration of justice in that jurisdiction.

A Lawyer's Many Roles

4. A lawyer is also viewed as "a public citizen," having, "special responsibility for the quality of justice."

   In this capacity a lawyer is encouraged to seek improvements in:
   a) the law;
   b) access to the legal system;
   c) the administration of justice; and
   d) the quality of service rendered by the legal profession.

Preamble, ¶ [6]

Sources of Ethical Conflict

But are these roles always compatible?

For example, what if lawyers put the goal of zealous advocacy for a client ahead of their duties to the court?

After all, they are being paid by their clients.

Sources of Ethical Conflict

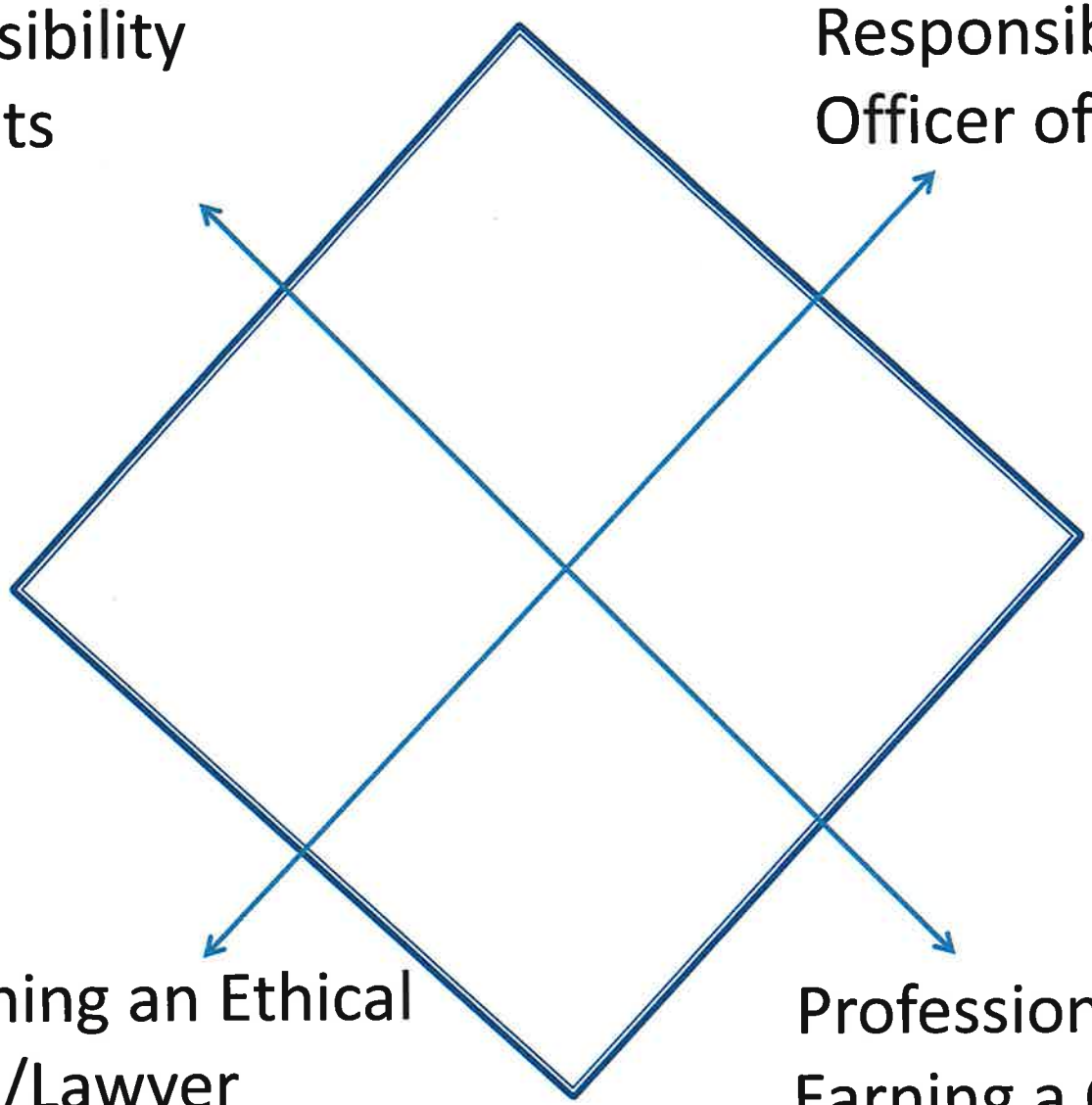
In fact, the Model Rules posit that "virtually all difficult ethical problems arise from a conflict between four factors" -- a lawyer's

1) responsibility to clients;
2) responsibility to the legal system; and
3) own interest in earning a satisfactory living, while
4) remaining an ethical person.

Preamble, ¶9

Responsibility to Clients

Responsibility as an Officer of the Court



Remaining an Ethical Person/Lawyer

Professional Success/ Earning a Good Living

Sources of Ethical Conflict

- These lines are not, however, of equal weight to most lawyers, nor are they equally distant from each other.
- For example, the line for responsibility to the client should be the widest, as it is seen a lawyer's primary duty, and it should lie closer to the line of professional success/earning a good living.
- Similarly, the line for responsibility to the legal system and the line for remaining an ethical person and lawyer should be closer to each other.

Responsibility to Clients

Professional Success/ Earning a Good Living

Remaining an Ethical Person/Lawyer

Responsibility as an Officer of the Court

To Fulfill These Roles, The Ethical Rules Require that A Lawyer Should:

1. Strive to be competent, prompt and diligent. [Preamble ¶4 and ¶7; MRs 1.1 and 1.3]

2. Maintain communication with a client concerning the representation. [Preamble ¶4, MR 1.4]

3. Keep confidential, information relating to the representation, except when disclosure is required or permitted by law or the ethics rules. [Preamble ¶4 and ¶8; MRs 1.6, 1.9, 1.13, 1.16, 1.18, 2.3 and 3.3]

A Lawyer Should:

4. Abide by the client's decision concerning the goals of the representation; determine the means to achieve those goals after consultation with the client. [MRs 1.2(a) and 1.4(a)(2)]
5. Avoid conflicts between the client's interests and the interests of other clients, third parties or the lawyer's own self-interest. [MRs 1.7, 1.9, 1.10, 1.11, 1.13, 1.16]

A Lawyer Should:

6. Not allow your legal services to be used for criminal or fraudulent purposes; use the law's process only for legitimate purposes and not to harass, intimidate, embarrass or delay others; do not file frivolous claims or unnecessarily extending litigation. [MRs 1.2(d), 3.1, 3.2 and 4.4]

7. Demonstrate respect for the legal system and those who work in it, including judges, other lawyers and public officials. [MRs 3.3 – 3.5, 8.2 – 8.4]

A Lawyer Should:

8. Strive to improve the law, the legal profession and access to legal services and exemplify the legal profession's ideals of public service. [Preamble, ¶7; MRs 6.1 to 6.5]
9. Avoid advertisements and solicitations of that are false or misleading. [MRs 7.1 to 7.5]
10. Conform to the requirements of the law in all professional, business and personal affairs. [Preamble, ¶5; MR 8.4]

Three Specific Issues

The modern rules of professional conduct seek a reasonable balance between the sources of ethical conflict for lawyers.

We can examine this balance by looking at three significant ethical issues that lawyers face:

Three Specific Issues

Model Rule ("MR") 1.1 -- Competence - **What does competence mean?**

MRs 1.6, 1.13, 2.3, 3.3 and 4.1 - Disclosure of Confidential Information - **When is it permissible?**

MRs 3.1 to 3.6 - Advocacy -- **What is Ethical Advocacy?**

Ethical Competence

- The first duty a lawyer owes to his client is to know the law. And so the very first sentence of the very first ethical rules says, "A lawyer shall provide competent representation to a client." MR 1.1. Short, declarative, decisive.
- The next (and final) sentence of the rule offers a definition of competence: "Competent representation requires the skill, thoroughness and preparation reasonably necessary for the representation."

Ethical Competence

- What does "reasonably necessary" mean?
- For example: Does competence mean expertise? In the Preamble, ¶7 states that a lawyer should "strive to attain the highest level of skill." But that is a goal, not a requirement.
- The higher the standard of competence required, the greater the burden placed on the lawyer.
- But the lower the standard of competence required, the greater the risk to the client.

Ethical Competence

- The Comments to Rule 1.1 attempt to thread this needle.
- Comment [2] rebuts the notion that competence means expertise. It notes that a lawyer need not have special training or prior experience to handle a new, unfamiliar legal problem and, "A newly admitted lawyer can be as competent as a practitioner with long experience."
- Why is this statement necessary?

Ethical Competence

- Comment [2] identifies the following legal skills that are important for all matters: a) the analysis of precedent, b) the evaluation of evidence, c) legal drafting and d) determining what kinds of legal problems a situation may involve.
- Where do lawyers first learn these skills?

Ethical Competence

- Comment [2] concludes that competence can be acquired through study or by association with another lawyer of established competence in the field.
- Thus, this rule establishes a requirement for lawyers to meet while also making clear that virtually all lawyers will be able to meet this requirement.
- Does the rule protect the public from incompetent lawyers? Does it enable most lawyers to provide a wide range of services?

Duty of Confidentiality

Lawyers are barred from disclosing confidential client information, "relating to the representation." MR 1.6(a).

This duty of confidentiality is one of the defining responsibilities a lawyer owes to a client.

Duty of Confidentiality

However, there is a difference in approach between Federal Rule of Civil Procedure 26(b)(5) and Model Rule 4.4(b) with respect to confidential information that is inadvertently disclosed to opposing counsel.

The Civil Rules are intended to facilitate disclosure and discovery, so FRCP 26(b)(5) puts the burden on the producing party (usually acting through counsel) to notify the recipient (usually a lawyer) when information produced during discovery is subject to a claim of privilege or protection as trial preparation material.

Duty of Confidentiality

By contrast, MR 4.4(b) is intended to protect against inadvertent disclosure of any confidential information related to the representation, not just privileged information or work-product.

And the ethics rule puts the burden on the recipient attorney, "who knows or reasonably should know that the . . . information was inadvertently sent," to, "promptly notify the sender," of the disclosure.

Ethical Disclosure

Nonetheless, lawyers are authorized to disclose confidential client information in a variety if circumstances.

Without such authorization in the ethics rules or in substantive law (*e.g.*, SEC Rules) a lawyer could be subject to discipline for making such disclosures.

In some instances the disclosure protects the client.

In other instances disclosure protects persons or entities other than the client.

And in still others, disclosure is authorized to protect the legal system itself.

Ethical Disclosure

Under MR 1.6:

When Authorized By the Client: MR 1.6(a)

To Benefit Third Parties: MR 1.6(b)(1)to (3)

(To prevent reasonably certain death or substantial injury; to prevent, rectify or mitigate crime or fraud that will harm the financial interests of another and in furtherance of which the client has used the lawyer's services)

Ethical Disclosure

To Benefit the Lawyer: MR 1.6(b)(4) to (7) (In a fee dispute; to establish a claim or defense in an action involving the client; to obey a lawful order; to resolve a conflict of interest)

To Protect the Client: MR 1.13(c) (Disclosure of confidential information related to the representation of an organizational client, to prevent reasonably certain substantial injury to the client in a matter related to the lawyer's representation, when the organization's highest authority has failed to address the matter. *See,* Comment [6] to MR 1.13

Ethical Disclosure

To Protect the Lawyer and the Rule of Law:

When it is necessary for the lawyer to not only withdraw from a representation, but to also give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. Comment [10] to MR 1.2; Comment [3] to MR 4.1.

Ethical Advocacy

- The most famous quotation regarding a lawyer's responsibility to zealously represent his or her client is the following comment by the British barrister Lord Brougham in his defense of Queen Caroline against a charge of adultery:

Lord Brougham's Famous Statement on Advocacy

"[A]n advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other."

Lord Brougham: *Defence of Queen Caroline before the House of Lords,* 1820: *Life and Times of Henry Lord Brougham,* ii., 406, n.

Ethical Advocacy

A lawyer's most important and defining role is that of an advocate for his or her clients. *See*, Preamble ¶2.

A lawyer must act "with zeal in advocacy" on a client's behalf, and "with commitment and dedication to the interests of the client." Comment [1] to MR 1.3.

Yet we balance this duty against a lawyer's duty to the legal system. Thus, the ethics rules place limits on what an advocate may do on a client's behalf.

Ethical Advocacy

For example, a lawyer should raise only claims and defenses that have a non-frivolous basis in law and fact, including a good faith argument for the extension, modification or reversal of existing law. MR 3.1.

Then a counter-balance; in a criminal proceeding or any proceeding that could result in incarceration, the lawyer may so defend as to require that every element of the case be proven MR 3.1.

Ethical Advocacy

A lawyer should make "reasonable" efforts to expedite litigation, but only when, "consistent with the interests of the client." MR 3.2.

(Some state codes of professionalism impose a greater duty on the lawyer to help expedite litigation than do the ethics rules. *E.g.*, Arizona Lawyer's Creed of Professionalism, ¶ B, sections 5 through 8.)

Ethical Advocacy

How should the reasonableness of the lawyer's conduct be judged? "The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay." Comment [1] to MR 3.2.

As an officer of the court, however, there are actions a lawyer cannot take regardless of whether such actions would help the client.

Ethical Advocacy

- These include: i) Making a false or misleading statement of law or fact to a tribunal or failing to correct such a statement if previously made; ii) failing to disclose legal authority in the jurisdiction known by the lawyer to be adverse to her client's position and not previously disclosed by opposing counsel; and iii) offering false evidence. MR 3.3(a).

Ethical Advocacy

In addition, the lawyer must take reasonable remedial measures, including disclosure if necessary, to prevent or correct any criminal or fraudulent conduct committed by "a person," [usually the lawyer's client or witness] in a proceeding before a tribunal. MR 3.3(b).

And in an *ex parte* proceeding, a lawyer must disclose, "all material facts known to the lawyer that will enable the tribunal to make an informed decision." MR 3.3(d).

Why are these steps required?

Ethical Advocacy

- As an officer of the court a lawyer must NOT: unlawfully obstruct access to evidence, falsify evidence, knowingly disobey court rules, make frivolous discovery requests, allude to irrelevant matters in trial, or;
- request that a person other than the client refrain from voluntarily giving relevant information to another party unless: i) the person is a relative or agent of the client, and ii) the lawyer reasonably believes their interests would not be adversely affected. MR 3.4(f).

Ethical Advocacy

- And a lawyer should not seek to illegally influence a judge, juror, prospective juror or other official. MR 3.5(a).
- Or engage in proscribed forms of trial publicity. MR 3.6.

Why not? Such acts could help the client. But they would undermine the integrity of the legal system of which the lawyer is a part.

Ethical Advocacy

Does this mean lawyer's never do these things? Of course some do.

The ethics rules provide a provide a bright line, but it is up to each lawyer to knowing when not to cross that line.

And on that note, let me close with my favorite quote from one of America's greatest lawyers, Abraham Lincoln:

Abraham Lincoln on Ethical Lawyering

"There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief -- resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave."

–**Abraham Lincoln**, from "Abraham Lincoln's Notes for a Law Lecture." (July 1, 1850, or later).

DISCUSSION

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Materials taken from PNDC.COM

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Sharon Ellison, author, "Taking the War Out of Our Words"

More in depth materials available at her website

Submitted by:

Maureen A. Tighe

United States Bankruptcy Judge

Central District of California

A revolutionary method for eliminating defensiveness

More than a technique, a new way of being

"From the time I first read this book in manuscript form, I knew that Sharon was onto something extraordinary. *Taking the War Out of Our Words* delivers every bit of its title's promise, giving us simple, powerful tools for breaking the cycle of defensive speech. This is truly a paradigm-shifting book. We're used to thinking that learning to communicate more effectively has to be a struggle. With this model profound changes can happen so quickly. It has not only helped me in my professional life and in my marriage, but in parenting a toddler as well!"

—Caroline Pincus, manuscript consultant and former senior editor at HarperCollins

Do you want to communicate honestly without getting defensive or into power struggles—no matter how others act?

Sharon Strand Ellison has dedicated her life to developing a method of communication that can disarm defensiveness and diffuse power struggle.

- **Listen to Sharon** quickly introduce you to the ideas . . .
- **Quick Links** for More Free Information about PNDC

Newsletter Signup

Sharon continues the conversation on the **PNDC Insight Blog**. Be part of the PNDC community by reading, sharing and commenting on the posts as well as reading what others have to say. *Be Non-Defensive ~ Be Strong.*

In the *Learning Room* section on the drop-down menu, you can access stories, exercises, articles and interviews.

You'll also find information about *Powerful Non-Defensive Communication*™ conference keynotes, workshops for professional organizations and public workshops for individuals, couples, & parents that Sharon and a diverse group of PNDC trainers offer. We invite you to visit often and share this information with others. If you like, you can **sign up for our newsletter** and get PNDC Tips & Stories and/or PNDC Event Notices.

How much does defensiveness cost us?

As Individuals:
Self-Esteem, Respect, Relationships

As Organizations:
Team Performance, Revenues, Reputation

As Professionals:
Productivity, Clients, Success

As Communities:
Local & Global Solutions, Peace, Abundance

The Problem—Defensiveness is Pervasive

And Expensive:
For Individuals, Families, Professional Organizations, Corporations, and Society

- For thousands of years people have used the "rules of war" as the basis for how we talk to each other.
- We often get defensive quickly when we want to protect ourselves.
- Traditional communication methods literally create and accelerate conflict.

The Solution—Eliminate Defensiveness

Just as we can develop new computer programs that serve different functions, we can shift to a new model for communication that does not have defensiveness as part of its "program."

The system for *Powerful Non-Defensive Communication*™ Sharon Strand Ellison has developed offers tools we need in order to:

- Protect ourselves without being defensive and achieve our goals without engaging in power struggle.

"The premise is powerful: Human communication has been shaped by our focus on defensive self-protection and power struggle."

—Mike Maza, Dallas Morning News

"*Taking the War Out of our Words* ought to be required reading in high school, college, before getting married, and before becoming a parent. Sharon Strand Ellison has the power to turn conflict into cooperation, resentment into rapport. This book can change lives and relationships, Read it and reap."

—Sam Horn, author of Tongue Fu! and Take the Bully by the Horns.

- Be open, honest, and authentic in a way that is freeing, disarming and contagious
- Resolve conflict and build respectful, reciprocal relationships so we can create health in our families, excellence in our work, and strong communities.

"Albert Einstein was able to visualize and communicate a more profoundly accurate model of how our physical Reality is structured, as a quantum space-time fabric. I believe Sharon Ellison has done the same with a more profoundly accurate model of how our human Relationships are structured, as a linguistic virtual reality. Changing how we speak changes how we relate. Her work might transform humanity in the 21st century."

—*Stephen Weitz, Ph.D., Biochemist*

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More about PNDC

By Sharon Strand Ellison

Below I have provided an overview of the traditional "*War Model" Communication* and the *Powerful Non-Defensive Communication*™ Model I have developed as an alternative. Each section is thorough enough to present a good initial picture of the differences between the two systems of communication. You can read about each system straight through, or go directly to whatever section interests you most.

The War Model:

Defensive Self-Protection & Neuroscientific Reasearch

Types of Defensive Reactions

Power Struggle

The Non-Defensive Model: Introduction

Changes in Attitude and Behavior

Non-Defensive Communication Tools — Questions, Statements & Predictions

Quantum Leaps

The War Model

Defensive Self-Protection

The goal in war is to gain control over other people by killing them, capturing them, or forcing them to retreat. In physical combat people use defensive maneuvers for self-protection. It is not a time to show vulnerability. My **book** opens with a basic motto for war: "To be open is to be vulnerable, and to be vulnerable is to be weak." Using the *rules of war* as the foundation for talking to each other, people follow this motto by shutting down and getting defensive in countless situations, such as when they believe someone has criticized their performance, judged their values or life-style, disagreed with their ideas, and/or hurt them in any way. Defensiveness has been our primary protective mechanism — not only at work and in our communities, but at home with our partners and loved ones.

Scientific Reasearch: Dr. Joseph LeDeux (and others) has deomstrated that the minute we get defensive, the complex problem-solving mechanism in the brain shuts down. We are instantly impacted at a physiological level, flooded with chemicals that usually don't dissipate for 20 minutes to an hour — assuming that *no one else reacts* defensively in response. Far from protecting us, defensiveness acts as an accelerant for conflict. It fuels the fire. The key functions of this *War Model* for communication are (1) defensiveness and (2) power struggle.

Audio Selections:

The War Model for Communication: Why Are We So Defensive? Audio
(*PNDC Principles & Practices, Track 1*)

The Physiology of Defensiveness —*Research by Dr. Joseph Le Deux* Audio
(*PNDC Principles & Practices, Track 4*)

Types of Defensive Manuevers

While often only semi-conscious, or even unconscious, our defensive reactions typically fall into the same three basic categories of defense used in war: *surrender, withdrawal and counterattack.* I demonstrate how each of these strategies actually includes one *passive* format designed primarily for *protection* and also an *aggressive* format, used both to protect and to *retaliate* against others. The ***PNDC Summary Sheet*** lists all six defensive modes in ***English*** and/or ***Spanish***. While a person might use any or all of six defensive reactions, most people have a favorite — a fallback position. In fact, much of what we think of as a person's personality is often simply the person's outer façade, the particular defense he or she most often hides behind.

Scott, a participant: "If I stop being defensive, I won't have any personality at all. No one will know who I am."

Audio Selection:

Six Defensive Modes — *A Hypothetical Story about a Work Team* Audio
(*PNDC Principles & Practices, Track 6*)

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Read Articles

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Free Download!

Contact Sharon to Schedule An Event

Power Struggle

I believe that whenever we get defensive, even if we use a passive defensive stragegy, we are still in power struggle. I also believe that power struggle is actually *the most pervasive and least recognized addiction on earth.* Power struggle, like any addiction, can become progressively more destructive. The drug of defensiveness can become more important than anything else—we may care more about being right than the impact an argument has on our relationship with someone we care about deeply. Because we have never changed the basic model for how we communicate, we consider such pervasive defensiveness and power struggle to be normal -- ***just human nature.***

Powerful Non-Defensive Communication™

Introduction: If we use a model for communication that doesn't rely on defensiveness and power struggle, we can create a level of change in our lives and our communities that might seem beyond imagination. It's like getting rid of an obsolete software program and getting a new one that can do entirely different things and obtain different results. PNDC can give us tools we need for communicating without getting defensive. While it is vital that we do not try to get *others* to drop their defenses, the bonus is that they frequently do — instantly — even in extreme conflict. They then become open to genuine conversation. In order to shift from defensive to non-defensive ways of listening and speaking, I believe we must (1) change key attitudes, and (2) shift how we ask questions; give feedback; express our own thoughts, feelings and beliefs; and create clear boundaries. These shifts include changes in (a) intention, (b) tone (body language and (d) formatting (phrasing).

Audio Selection:

A New Model for Communication
(*PNDC Principles & Practices, Track 6*)

Changes in Attitude and belief

In *war model communication,* people often don't "show their cards," which translates into not being fully honest. It also translates into not showing vulnerability. Being honesty and showing vulnerability are often both seen as a liability. Exposing our weaknesses can leave us open to attack. Exposing our strengths can mean giving someone else an opportunity to "take away our advantage."

Central to the PNDC process is the belief that we need to change our attitudes about honesty and vulnerability. Just as defensiveness and power struggle are an essential part of the infrastructure of *war model communication,* bringing honesty and vulnerability together is core to the PNDC process. As musician Lori G said, "The marriage of honesty and vulnerability creates an incredible alchemy." I believe that only when we bring honesty and vulnerability together will we communicate with the greatest power, and the two together do seem to have an amazing "chemistry." While we might strive for this in intimate relationships, an increasing number of corporations are now recognizing that greater "transparency" can be very effective in business as well.

Non-Defensive Communication Tools

Questions:

Traditionally we often ask questions with tone, body language and words that subtly or not so subtly convey our own opinion and judgments, or are leading or entrapping. People are often quite unconscious of the degree to which they do this, yet others may feel interrogated and shut down.

In the non-defensive model, our intention is never to control how people answer our questions. Our questions are genuinely curious, designed simply to understand their thoughts, feelings, beliefs, and/or actions. As a result, people are far less likely to feel controlled or a need to resist and defend. In many cases, people drop their defenses instantly.

Along with outlining more than a dozen ways to ask questions that get at the heart of an issue, I show how to ask questions in a different *tone of voice* — one that comes down at the end (like a statement) rather than up. I also demonstrate how to ask a question with a more neutral, receptive facial expression.

Listen to how to model the non-defensive tone for asking questions: The Learning Room, Audio Stories *and/or* Products

Statements:

Traditionally, giving others feedback often carries a tone of superiority, judgment, and/or criticism. Expressing our own opinions is typically an effort to convince others to agree the art of persuasion. In my books, CDs, and live presentations, I show how efforts to convince others to agree frequently backfire, causing them to resist our ideas.

I have developed a series of four steps for giving feedback and expressing our own thoughts, feelings, and beliefs. The steps involve: (1) telling the person what you heard them say with a focus only on their words; (2) naming anything that contradicts the words, from any one of four categories of contradiction -- for example, tone or body language; (3) describing your conclusions about the meaning of the contradiction or the person's intention, and (4) expressing your own thoughts, feelings and beliefs — subjectively, without trying to convince the other person to agree.

Each step is descriptive and subjective, providing others with specific pieces of information that help them understand how we got our conclusions and reactions. As a result, people are much more likely to feel respected and to want to listen, even seek our advice.

Listen to how to model the non-defensive tone for asking questions: The Learning Room, Audio Stories *and/or* Products

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Predictions:

Traditionally, when we "set limits," we are coaxing or threatening others to get them to do what we want, or what we think they should do — perhaps for "their own good." People will often make decisions that are contrary to their own best interest as a way to avoid being coerced. In a non-defensive model, we simply let the other person know how we will respond, depending on which of two alternative choices the person might make. It is always in the context of an "if ... then..." statement. For example, "If you do X, then I will do Y. If you don't do X, then I'll do Z."

We do not try to influence the person's decision when we make a prediction — which is the hardest part, I think, for most people. The prediction, like the question, must be very neutral. Two formats — limit-setting and challenge-choice — free people up to think things through without the need to resist being controlled. We can create security through predictability, as well as holding others more accountable for their decisions.

Listen to how to model the non-defensive tone for making predictions: The Learning Room, Audio Stories *and/or* Products under the audio-book: *Taking the Power Struggle Out of Parenting*

Quantum Leaps

Each of us can protect ourselves without getting defensive and have greater influence without being manipulative or controlling. Using non-defensive communication, we can be honest and powerful while being compassionate and sincere. We can speak with great clarity and walk away with increased self-esteem, even if the other person chooses not to cooperate. A somewhat magical "side effect" occurs when others suddenly drop their defenses. In the conversation that follows, each person involved may take quantum leaps in the kind of understanding that alters beliefs, reasoning, feelings, an/or behavior.

Audio Selection:

A World View — *Teachers & Coaches Who Inspire & Malcolm Gladwell, Author of "The Tipping Point*
(*PNDC Principles & Practices, Track 28*)

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Six Defensive Reactions

That Prevent Powerful, Non-Defensive Communication

When someone says or does something to make us feel put down, hurt, frustrated, or angry, we may feel attacked and try to protect ourselves by using one or more of these six defensive reactions. When we get defensive, we get into power struggles, which causes many unnecessary, destructive conflicts.

1. Surrender-Betray: We become a traitor to ourselves when we allow someone to mistreat us and then defend the person's behavior, taking the blame ourselves.

Example: We might say, "He just treated me rudely because he was in a bad mood. I should have known better than to ask a question just then."

2. Surrender-Sabotage: We outwardly give in or cooperate with someone and then undermine the person in some way.

Example: We might talk about the person behind her back, or procrastinate about doing something we told the person we'd do.

3. Withdraw-Escape: We avoid talking to someone about something we don't want to discuss.

Example: We might simply not answer, leave the room, or change the subject.

4. Withdraw-Entrap: We intentionally withhold information from someone as a way to trap her/him into making a mistake or doing something inappropriate.

Example: We might stare at someone and not answer a question he asks until he drops it or gets angry and says something that that makes him look bad.

5. Counterattack-Justify: We explain our own behavior or make excuses if someone questions or criticizes us to let him know he is wrong to be upset with us.

Example: We might say "I would have gotten that done sooner, but I've been really busy," or "I'm doing my best," or "I can't work any faster."

6. Counterattack-Blame: We attack or judge the other person to defend ourselves.

Example: We might blame the other person instead of looking at our own part in the problem, saying, "You are always so critical," or "You never listen to me."

www.pndc.com 510-655-8086 info@pndc.com ©1994 Sharon Ellison Powerful Non-Defensive Communication™

Powerful Non-Defensive Communication

We are using non-defensive communication when we ask questions, make statements and predict consequences in an open, sincere way without trying to control how other people respond. We can gather accurate information, speak with clarity, protect ourselves, and hold others more accountable. People are more likely to respect us and we can strengthen personal and professional relationships.

1. Ask Questions: **Nature:** curious, open, innocent, neutral, inviting

Purpose: To gather information to clearly understand what the person means

Example: If someone acts upset, the first step is to simply ask the person directly about your own assumption so he can confirm, deny, or qualify, for example, "Are you irritated (frustrated, angry, upset) about something?"

Avoid: Using a question to *express your own opinion* or to entrap others

2. Make Statements: **Nature:** open, direct, vulnerable, subjective, descriptive

Purpose: The first three steps are to state neutrally our subjective interpretation of 1) what we hear the other person saying, 2) any contradictions we see (perceive) in the person's tone, body language, and words, and 3) our conclusions regarding the person's overt and covert messages. The fourth step is not neutral and is to 4) fully express our own reactions, our feelings, beliefs, and reasoning.

Example: If the person continues to act irritable and yet denies it when asked, saying harshly, "I'm ***fine***!" — we might respond with this four part statement:

- **Hear:** "*When* I hear you saying that you are in a good mood
- **See:** *and* (at the same time) I see that you are rolling your eyes and shrugging,
- **Conclude:** *then* I believe that something is wrong and you don't want to tell me
- **Reaction:** *and* so I feel frustrated but don't want to try to make you talk."

Avoid: Stating *opinion* as fact or trying to convince others to agree

3. Predict Consequences: **Nature:** protective, foretelling, neutral, definitive, firm

Purpose: To create boundaries and security by telling another person ahead of time how we will react if he/she does make a certain choice, and how we will react if he/she does not make that choice.

Example: If the person still acts upset and continues to deny it, saying "I said I'm ***fine***, there's no ***problem***!" — we can set a limit using an "If . . . then" sentence:

- "If you would like to tell me what's going on, then I'd like to hear it."
- "If you don't want to tell me, then I don't want to try to make you."

Avoid: Using a consequence prediction to coax, *punish,* or *falsely* threaten others.

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Practice Concerns for Litigators

Presenter Biography

Mark Bassingthwaighte, Esq., ALPS Risk Manager: Since 1998, Mark Bassingthwaighte, Esq. has been a Risk Manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1150 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Mr. Bassingthwaighte is a member of the ABA and currently sits on the ABA's Law Practice Division's Professional Development Board, the Division's Ethics and Professionalism Committee and Lawyer Leadership & Management Committee, and he serves as the Division's Liaison to the ABA's Standing Committee on Lawyers Professional Liability. He received his J.D. from Drake University Law School and his undergraduate degree from Gettysburg College.

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The following is a collection of short articles, each of which discusses a common misstep that lawyers sometimes make. All are shared with the intent of helping you avoid the trouble others have had to face.

It Starts with Documenting Scope

Please, can we just acknowledge that lawyers as a group are terrible when it comes to seeing that their files are properly documented! Of course, not you, but all the other lawyers out there sure are. You wouldn't believe how bad it can get. I say this because with almost every claim we handle we're forced to deal with the lack of documentation of something and that's a serious problem. We're now forced to live with the reality that a word against word dispute between the client and the attorney is in play and that rarely ends well. In fact, as I was preparing this presentation, one of our claims attorneys shared a missing documentation story with me and I naturally asked about what our options are. The response was this. All we can do is throw money at the problem and hopefully settle it for a reasonable amount. Given this reality, let's start by taking a look at a common documentation misstep which is the failure to properly document scope of representation.

I know lawyers get tired of hearing it and risk folk like me get tired of always having to say it; but there is real value in documenting scope of representation on every new matter. Please note that I did not say with every new client, I said with every new matter. Now, I don't mean to suggest that every time a call comes in from some longstanding client that you, as their lawyer, should shoot off a new eight page contract or send a formal engagement letter. By no means do I wish to suggest that. I am suggesting, however, that anytime a new file is opened for a client, new or longstanding, one would be well served by taking a few moments to document the scope of representation on that new matter.

Many attorneys respond to this advice by sharing that they object to sending engagement letters to their longstanding and or well-known clients. They argue that doing so would be too formal and would detract from the attorney/client relationship. I could buy into this rationale if such clients never sued their attorneys. Unfortunately, longstanding clients, life-long friends, and even family members do sue their attorneys. In fact, some of our largest losses have come from claims that were brought by such clients. Here's the spin. There is no rule that requires an engagement letter to be a lengthy three page contract full of legalese. A simple thank-you note or confirming email indicating that the usual fees will be charged along with a reference to the nature and scope of the work to be done can suffice.

Finding that I didn't buy into the first excuse, this next argument is made. With flat fee work, such as transactional work, more time would be spent drafting and sending an engagement letter than is warranted. After all, the work itself is usually completed within a month and often sooner. In response, it is uncanny to note the number of times that a planned one-month transaction ended up taking far longer. Unforeseen complications abound, particularly in repetitive transactions such as real estate closings in an area where many transfers are taking place.

Of course, we also need to recognize that memories can be short, including our own. Who wants to be in a dispute with a client over what you were or weren't asked to do? When this type of dispute does arise, few clients remember that they said they only wanted to pay their attorney to do certain tasks and not every possible action that might have been indicated. Again, a short letter or confirming email can do wonders. This documentation not only confirms your understanding of what the client's needs are, thus avoiding the running with assumptions misstep, but can even be an opportunity to ask if there is anything else you might be able to assist the client with. What harm is there in asking for additional work?

Given what we're seeing in claims coupled with more and more attorneys moving into limited scope representation, I would also encourage you to consider documenting what you are not going to do. If there happens to be a workmans compensation component to a personal injury claim and you have no intention of handling that piece, put it in writing! The same could be said for those of you who handle divorces or obtain large settlements of any type but also have no intention of advising those clients as to any tax ramifications that might arise. If you are only being retained to provide a second opinion, document that you have no obligation to file suit on the client's behalf. It's all about documenting that the client was made aware of what you will and will not be doing. Further, where called for, you might also consider documenting that you advised them to seek the services of someone who can assist them on those issues that you won't be.

While documenting scope of representation up front is critically important, it is equally import to document that your representation has ended at the matter's conclusion. Just as with engagement letters, I continue to find that the use of a letter of closure varies greatly firm to firm as well as between attorneys within the same firm. The excuses that I often hear include statements like "in our firm we do a lot of flat fee in and out kinds of things and the effort simply isn't worth it," "I'm not about to say good-bye get out of here, particularly to my repeat clients," or "these matters never really close." Honestly, I don't buy into any of these.

Let's start with the basics. The purpose of a closure letter is to confirm that your representation has ended. From this perspective, I can understand why some might view these letters as more of a good-bye, get out of here statement and thus don't wish to use them; but consider this. Closure letters can be a powerful marketing tool when placed in a different light. Regardless of whether the client is an in and out flat fee client or a long-term repeat client, the client has honored you by entrusting their current legal matter with you. Why not acknowledge that and say thanks? A simple thank you note along the lines of the following can do wonders in terms of repeat work and referrals.

> *This concludes our representation of you in this matter. We hope that you found the quality of our work to be exemplary and we look forward to working with you in the future if and when the need ever arises. Thank you for allowing us to be of service. It has been our pleasure.*

If other matters remain open for the client, the letter can be modified accordingly. Instead of saying "we look forward to working with you in the future," you might say "we'll be in touch next week in regard to the Hightower matter." Write to your audience, and yes it's fine to have a few standard letters developed for various practice areas, but these things can and should be personalized which often takes just a minute or two.

Why not also use this letter to document that you have cut off unintended reliances? As attorneys, we often view flat fee in and out work as just that. Clients, however, may see it differently. They may feel that they have finally found their family attorney or their business lawyer. If you don't wish to have these types of clients mistakenly believe that you will look out for their interests on a going forward basis send a thank you letter. Consider the simple will. If you don't wish to take on the responsibility of informing everyone you've done a will for that the law has changed, cut off the possibility of that kind of unintended reliance. A statement inserted into your thank you letter along the lines of "Here are your wills, they should be reviewed every 3 to 5 years because laws do change" can help solve that problem in a non-dismissive way. The same would hold true for small business formations, particularly when you make the decision to hold the corporate books for these clients in the hopes that this will bring about additional work in the future. You don't get something for nothing when it comes to holding on to the corporate books of your clients because some will interpret your doing so as meaning they can rely on you to continue to look out for their interests when that's not the case.

A closing thank you letter is also the perfect place to document final instructions to the client. Even after you've completed your work, there may be times where a task or two remains for the client to complete. What might happen if a client fails to do that task or does it incorrectly? I believe attorneys do a pretty decent job of informing their clients about any remaining tasks that a client must take care of. Unfortunately, attorneys don't always document those instructions. This is why tax attorneys regularly write final instructions as to where to sign, where to send, what amount to pay, and by what date these steps must be taken in some type of closure letter. After all, they don't want to pay the interest and penalties after a client has missed a tax deadline and then says "Why didn't you tell me there'd be consequences if I missed that deadline?"

Two of the more significant benefits of a letter of closure concern conflicts of interest and the doctrine of continuous representation. In terms of conflicts, an interesting question that arises from time to time is when does a current client become a past client for conflict resolution purposes? The temptation is to rationalize that the passage of time coupled with a bright line gets you there. After all, doesn't the fact that the deed was delivered four months ago, the settlement proceeds were disbursed last year, the judge signed the final order three years ago, or the contract was signed over five years ago mean that these various matters were concluded and all of these clients are now past clients? Our conflict rules don't speak of bright lines or the passage of time as being determinative. Keep it simple. For conflict resolution purposes, once someone becomes a current client, they are always a current client unless and until you clearly document otherwise. This is typically done in a closure letter that clearly states something along the lines of "this concludes our representation of you in this matter." In fact, this is the reason why conflict savvy firms

keep all letters of closure even after destroying the related file years after closing it. The closure letter is part of the conflict database because it documents who is a current client and who is a past client.

The doctrine of continuous representation and its tolling of the statute of limitations in malpractice cases can also be a problem. Losses have been paid on claims where the work was done 20, 30, and even 40 years ago. Here is an example of how this can happen. A firm has represented a long-term client for years. The work has always focused on oil and gas leases and at this point the number of leases the firm has been involved with numbers well over 40. Unfortunately closure letters were never sent because they were viewed as offensive. The lawyers feared that they would be received as good-bye, get out of here letters. But what happens if a serious problem on one of the older matters comes to light and the client eventually sues? The lawyers want to argue that the subject file was closed years ago; but of course, there is no documentation of that. Due to the continuous representation coupled with the failure to formally close any of the long-term client's past files, an argument can be made that the running of the statute of limitations date has been tolled. If the firm had simply taken the time to send a thank you letter documenting that the work on each specific lease had been completed and the file was being closed, the outcome could be very different. Now an argument can be made that the closure letter started the SOL clock running and the window of opportunity to file suit has long since passed. That, my friend, is powerful stuff.

Finally, sometimes I'll hear that the time is takes to write closure letters simply isn't justified from a business perspective. Yes, there may be times were a more formal letter is called for but, again, remember to write to your audience. For some clients a simple "thanks for stopping by" email may suffice. The task can also be made much more efficient by developing a few templates for various practice areas. It's going to be much easier to customize a basic standard letter than create something new each and every time.

All of this speaks to the need to play it safe when it comes to documenting scope of representation. Clients are far less able to allege that their understanding of scope of representation was far broader than what yours was and, when there is no supporting documentation, we all know that it often doesn't work out well for the attorney particularly in the context of an allegation of malpractice. For this reason alone, the time spent documenting scope at the beginning and at the end of representation is well worth it. Try to get into a regular and consistent practice of doing so because claims attorneys will look for these types of documents in every claim file that comes in. They are that important.

Failing to Properly Document the File

In the discipline and malpractice arenas, poorly documented files can be a serious problem because now we're often forced to live with the reality that a word against word dispute between a lawyer and his or her client is in play and that rarely ends well for the lawyer. Here's just one story that highlights the problem.

Lawyer was retained by a client for the purpose of defending client in a contract

dispute. No fee agreement or engagement letter was ever drafted. Lawyer prepared and filed an answer to the complaint that simply denied the allegations. There were no paragraphs specifically identified as affirmative defenses or a counterclaim, in part due to the fact there was no copy of the subject contract in lawyer's possession. The matter eventually ended up in early mediation. Lawyer failed to draft and submit a mediation statement based upon a belief that the issues were simple and doing so would not have been cost effective. The matter was settled at mediation. The agreement provided client would sign a promissory note secured with a confession of judgment. Lawyer recalls telling client that this was not a favorable settlement for him but client decided to agree to it anyway due to the potential costs of going to trial coupled with the risk of an adverse verdict. In other words, client just wanted to put it all behind him. Lawyer drafted and sent client the final documents for signature. There was no cover letter explaining the documents or setting forth client's obligations under them. Client never signed the documents. Instead client hired another lawyer who renegotiated the settlement for slightly better terms. Client refused to pay the bill and lawyer turned the bill over to a collection agency. Client sued for malpractice.

There are all kinds of documentation missteps in the above example but there's an even bigger problem. In this situation there were no notes of any kind in the lawyer's file. There was nothing documenting the lawyers thinking, no record of what was communicated, no record of the decision making process. Apparently the staff person responsible for scanning closed files and shredding the original file once scanning was complete was never instructed to scan and preserve all attorney notes. Now that's a problem.

Here at ALPS, we hear all the excuses when it comes to the reason why a firm's documentation policies are not as thorough as they perhaps should be. "That step isn't necessary," "It takes too much time away from important work," "We didn't think keeping that was necessary", "There are too many others things we have to do," "The client would be offended if we did that," and "We were trying to keep the costs down" are commonly shared. That's all well and good until someone questions what you did or why you did it. Memories are short, yours included. Never forget the following. If you didn't document it, it wasn't said or it didn't happen. That's how it's going to play out in our world.

While the basics such as documenting scope of representation, who and who isn't a client, and that representation has ended are vitally important, my desire with this article is to identify a few documentation traps that if not properly handled could place you in a situation not unlike the one set forth above. Here's the ultimate goal. There should be a thorough written record of the advice given and the decision making process in every file and this record must be preserved for the life of the file.

The first trap involves the client who wants to save a little green. It's a trap because there may be unintended consequences that the client hasn't thought through. If a client is cost conscious to such a degree that limitations are being placed on your scope of representation (e.g. taking shortcuts such as having you rely on documents prepared by others, severely limiting the amount of authorized research or discovery, not wanting to

pay to have assets valued, not wanting to hire an expert, etc.), you must document that this client has been informed of the legal ramifications of the limitations being placed on your representation as well as the reasons why this client is making such a decision. Here's why. If this client is eventually harmed by his desire to save a little money he will turn to you and say "Why didn't you tell me that could happen? If I had only known I would have ponied up."

In a similar vein, if your client refuses to follow your legal advice it is **essential** for you to document the client has been informed of why you made your recommendation, the benefits of proceeding according to your advice, and the potential legal ramifications that might occur by not following your advice. Of course, don't forget to also document the client's stated reasons for making the decision to ignore your advice.

The next trap underscores one of the learnings from the story above. When closing a file, make certain that items like attorney notes, drafts of documents, memos, billing statements, and all substantive email exchanged are preserved because they serve as documentation of the work done, advice given, and the decision making process. Again, these documents should be maintained for the life of the closed file. Pay particular attention to email. All substantive email should be captured and preserved with the relevant file. I have visited too many firms where this isn't the case, and frankly, that's asking for trouble.

Finally, don't get caught in the comfort trap. Many attorneys thoroughly document the files of "problem clients" yet remain slack in the documentation of files with their longstanding "good clients." More often than not, this is due to a level of comfort that has developed with longstanding clients. Be careful because too much comfort can cloud one's perception of what needs to be documented. Understand that problem clients are not the only clients who sue. Take whatever time is necessary to thoroughly document all files throughout the course of representation. The peace of mind that follows will be much better than the feeling of regret for not having done so should a claim ever arise, particularly one brought by a long-term good client.

This comfort trap also arises in another situation you should keep in mind. In short, never forget that you don't get a pass when doing a legal favor for a friend or family member. Treat this matter the same as you would if you were going to charge a paying client for the same work. Deadlines need to be calendared, conflict checks need to occur, phone calls need to be documented, etc. Friends and family due sue when things don't turn out the way they expected; and when they do, if you happen to have no documentation of the advice given and the decision making process, you're about to learn a hard lesson just like the lawyer in our story above did.

Lack of Communication

MRPC Rule 1.4 Communication is one of those rules that seems clear on its face. We all know that as lawyers we are to keep our clients reasonably informed about the status of their matters as well as to promptly comply with reasonable requests for

information. There's nothing unexpected there. Most also know that the rule further states that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Maybe I'm just not seeing it, but all this seems rather straight forward to me. If it were that simple, however, why do attorneys continue to face disciplinary complaints and malpractice claims in the numbers that they do for simply failing to communicate? Perhaps there's more to the rule than what is generally remembered.

As I consider the implications of this rule, I have found it helpful to analyze the rule from a slightly different perspective than what's commonly done. So often, what we remember the rule as saying is taken at face value and discussed from the perspective of what needs to be communicated and when. One often hears of the importance of returning phone calls in a timely fashion, forwarding to the client copies of all relevant documents, providing regular and detailed billing, and personally visiting with the client to explain the status of a matter sufficient to allow the client to make informed decisions when deemed necessary. While all of this is quite important, I would like to come at the rule from the perspective of who gets to decide what. This helps me keep roles straight and remember who has employed who, which is key given other language in the rule which isn't as often recalled.

Beyond what is set forth above, Rule 1.4 also states that a lawyer shall inform the client of any decision or circumstance that requires the client's informed consent under the Rules. Now, Rule 1.2 Scope of Representation comes into play as do several conflict rules at a minimum. In addition, the Rule tells us that a lawyer is to reasonably consult with the client about the means by which the client's objectives are to be accomplished. For me, this language shifts the emphasis of the rule. The rule is no longer about what do I as the attorney think the client needs to know; but rather it is really about what does my client reasonably expect to be told throughout the course of representation. I believe there is real value in shifting the focus away from what the attorney thinks should be shared and moving it toward what a client would reasonably expect the attorney to share.

With all this in mind, what are the ramifications of this rule day to day for the practicing attorney? Certainly promptly returning phones calls, timely responding to client requests for information, forwarding copies of documents, and the regular sending of detailed bills are a given. But there is more. An attorney should keep clients informed of all court dates, all filings, and all offers to settle or mediate. Also, don't overlook telling clients about any changes to your contact information such as a change in your address, phone number, or email. Yes, perhaps a shift in perspective wasn't necessary to develop this list thus far; but I will share that many attorneys regularly struggle with following through on just these basics. Typical rationalizations or excuses include the client doesn't really need to be bothered with this, I know what my client will say or decide anyway, I don't have the time to tell them, the client doesn't want to be billed for the time it will take, etc. In short, attorneys start to run with assumptions and rationalizations when it comes to the basics of effective communication and this can be a dangerous play.

However, with the shift in focus in mind, how might this list of suggested practices expand? Consider scope of representation. As an attorney being hired to handle litigation for a financial institution, it is easy to understand how one might focus solely on the litigation. On the other hand, the client who has hired the attorney may be expecting their attorney to see the "big picture" and keep them informed about everything in play to include issue spotting. What if there is a regulatory reporting and/or compliance issue peripheral to the litigation? If the attorney is not up to handling the related issue she must say so because the client will often reasonably expect their attorney to not only issue spot but to take care of the related matter or at least inform them of anything that the attorney is not competent to or perhaps prepared to handle so that appropriate attention can be given to that peripheral issue. This is one reason why documenting scope of representation is critically important with all clients. Again, it is all about considering what clients would reasonably expect to be told.

So now we can expand our list of ramifications to include the following. Clients should be told what the scope of representation is and also what it isn't; they should be informed of their rights, especially in criminal matters; the ramifications of any actual or potential conflict issues should be fully explained to clients prior to their agreeing to representation; and client permission should be obtained for granting extensions of time to adverse parties, stipulating to evidence or testimony, agreeing to continuances, and for making and/or rejecting settlement offers. Clients expect to be told when their matter has concluded and what, if anything, they must yet do. Whether through inability or oversight, clients must also be informed of a failure to take action on the client's matter or that their case has been dismissed. Clients do reasonably expect to be informed about any and all of the above whether it's good news or bad.

When thinking about communication, this shift in perspective helps to keep the emphasis on the client and the fact that we, as the attorney, are in the client's employ. Many decisions are for the client to make. This reality does not in any way, shape or form minimize your role as the attorney. In fact, I believe this perspective helps to elevate an attorney's role. Consider the word "counselor" in light of Rule 1.4 and ask yourself what might that word mean in daily practice? For me it means that a lawyer is to advise the client about the legal and practical aspects of any given matter. She is to identify and evaluate alternative solutions pointing out the positive and negatives of each. The goal is to enable the client "...to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." (See Comment 5 to Rule 1.4 of the ABA Model Rules.) This intended outcome does require that we approach communication from the client's perspective. With all clients, ask yourself just what does the client need to know to be able to make intelligent decisions? As the attorney, if this question is never asked and answered with every client, you are taking an unnecessary risk that can and will at times lead to disastrous outcomes in the malpractice and disciplinary arenas.

Let's take this point one step further. Assume that you have taken on a regular run-of-the- mill divorce client. Should you discuss the option of conducting electronic data discovery? A number of attorneys simply never raise the issue. Some don't see the need.

Some see it as cost prohibitive, and some simply have no idea how to do it and/or no intention of ever going there in their own practice. Now focus on the client, haven't these attorneys actually made a decision that properly belongs to the client? I would argue that indeed they have. In fact we have reached a time where a follow-up attorney, hired to review a file of one of these attorneys after their client experienced an eventual unintended consequence from that attorney's failure to discuss, let alone conduct electronic data discovery, may tell the client that not only does he view the situation as a failure to communicate but there may also be a viable malpractice claim here so consider yourself forewarned.

I can't create a list of everything that an attorney should tell a client. I can only give examples of things to think about and a perspective from which to begin to address the issue. What clients expect to be told will vary with every client and on every matter. Talk with your clients and try to determine their expectations from the outset. The bottom line is this. Clients do expect to be fully informed and attorneys have an ethical obligation to meet that expectation. Here's the kicker, however. Your communication efforts must be handled in a way that seeks to assure that the client understands and comprehends all that is being communicated about all that must be decided. Forwarding copies isn't enough. This is how a jury is going to see it so once again, it's all in the details.

Co-Counsel Relationship Hazards

Co-counsel relationships are sometimes formed "on the fly" meaning that no thorough discussion as to who will be responsible for what ever occurs. This can be disastrous if both attorneys assume the other will meet a critical deadline and then neither actually files suit. Oops! It can get even messier if one of those two attorneys happens to be uninsured. Heaven forbid if the one who is uninsured is an out-of-state attorney who got you involved solely to act as local counsel. And here you thought you were just along for the ride with your assumed duties limited to serving as the mail drop. This is just one example of the hazards that can arise in co-counsel relationships.

Here's another. Local counsel had worked with an out-of-state firm on a number of matters over the years and the work done by this out-of-state firm was consistently of high quality. As a result, local counsel became less and less vigilant in staying on top of active matters being handled by the out of-state firm, eventually getting to the point where he just signed documents or made an appearance with out-of-state counsel when necessary. Eventually one of these matters ended up going to trial. When the judge entered the courtroom he unexpectedly informed the out-of-state attorney that certain documents were not in order and as a result the out-of-state attorney was not going to be able to try the case. The judge then turned to local counsel and said "you're up." Due to his total dependence on the efforts of the out-of-state firm, local counsel was completely unprepared; but with no other options he had to step up and try the case. It was apparent to everyone in the courtroom, including the client, just what had happened. While the local attorney reported that this experience was the most horrific experience of his career, he was able to acknowledge that his own assumptions helped create that nightmare.

Perhaps there was a time when, out of professional courtesy, we could assume that everything would be fine and that our professional colleagues were all competent. Sadly, those days are long gone. Consider that in an ABA report released in 2012, 45% of all malpractice claims during the period of 2008-2011 were the result of a substantive legal error.* Running with assumptions about the competency or reliability of any attorney you are about to co-counsel with can lead to serious malpractice and ethical trouble should something go terribly wrong. Understand that if you and your co-counsel share joint responsibility and/or are splitting the fee on the matter at hand, then you both owe undivided loyalty to your mutual client. This means that your client will look to hold you both accountable for all that happens should anything go wrong. With all this in mind, here are a few practice pointers that can significantly reduce your exposure to these kinds of problems if taken to heart.

- When considering entering into a co-counsel relationship with an attorney about whom little is known, investigate the attorney before committing to the relationship. At a minimum, confirm the lawyer is admitted to practice in the jurisdiction and conduct an Internet search of the attorney's name. You might also ask for recommendations or references, conduct a background check, interview the attorney, and/or contact area judges or attorneys who practice in the same field in order to ask about prospective co-counsel's qualifications and reliability.

- Have a formal written co-counsel agreement that documents the roles and responsibilities of each attorney. This agreement should address issues such as who will do what, how disagreements will be resolved, who gets paid what and when, who will hold client funds, who will bill the client, how will expenses be paid, who discusses expense decisions with the client, how will monies be split if the client only partially pays, etc. How the negotiation over the co-counsel agreement proceeds may help you decide whether the two of you can work well together. Consider also documenting your roles and responsibilities with the client if for no other reason than to avoid having assumptions in play there as well. Written documentation of roles should always be given to the client if one of you is going to have a very limited role in the matter.

- Commit to tracking all critical deadline dates on all co-counsel matters regardless of your level of involvement and follow up with your co-counsel to either confirm you will meet your specific deadline or to make certain that your co-counsel will meet hers. This is particularly important on those matters where your involvement is going to be limited to nothing more than your serving as a local contact who will eventually receive some type of referral fee. Again, remember that as co-counsel you are jointly responsible and liable for the client's matter. There really isn't any halfway with this. If lead co-counsel misses a deadline, you've got a problem. This is why attorneys who decide to exit a co-counsel relationship exit completely to include forfeiting any referral fee. Responsibility and liability does come with the money.

- Finally, make certain that your prospective co-counsel is adequately insured and do not accept a verbal assurance. I have had attorneys tell me that they will say they are insured to get work when in fact they are practicing without any coverage. Financial pressures in competitive markets can result in certain attorneys being forced to take financial risks. This means you do need to get written proof that the co-counsel is adequately covered. A simple swap of a copy of everyone's declaration page to their malpractice policy would suffice. If you find it hard to have this conversation, place the responsibility on your malpractice carrier. A request framed as "my malpractice carrier has advised that I obtain written verification of your coverage" can help.

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*Profile of Legal Malpractice Claims 2008-2011, ABA Standing Committee on Lawyer's Professional Liability 2012

How to Avoid Blowing a Statute of Limitations Date

Allowing a statute of limitations (SOL) to run on a client matter has always been a common malpractice error and I really don't see that changing. One would think that with the rise of computerized calendaring systems there would be a decrease in the frequency of these types of errors. Unfortunately, it hasn't played out that way. In fact, now-a-days malpractice carriers classify some of these claims as a failure to respond to the calendar. The calendaring system worked; but for one reason or another, the attorney just didn't get the job done. It happens. If statute of limitations dates come into play in your practice, here are a few thoughts shared for the purpose of helping you avoid becoming one of the many who have blown a filing deadline.

1) **Independently verify facts relevant to SOL dates** and identify the correct defendants from reliable sources in every instance. For example, verify accident dates from police reports and ascertain who the owner of the involved vehicle is because it may not be the driver of the other vehicle. Thorough investigation from reliable sources is the only way to ensure accurate information. Clients and the persons to whom they talk, for example physicians, may not be dependable sources of information. It is imperative that you understand the importance of conducting a thorough investigation as well as have the ability to make the determination as to the reliability of all information obtained. You must also have a working knowledge of the statutes and their application in the various state and federal courts. This is particularly important when declining representation because you do not want to specify when a SOL will run in a non-engagement letter if you are relying solely on client memory. If they are wrong, or you are not given all of the facts, you will be wrong on the legal advice given as to when the SOL date is to run. Finally, if you don't have time to do all of the above, just say no.

2) **Don't delegate what is your responsibility.** Make certain that you are the one always responsible for making the legal decisions as to when the SOL will run on any given matter. Although many attorneys will claim otherwise, the reality is support staff often routinely establish SOL dates and the attorney reviews the date

for statutory accuracy. As the attorney, you are well advised to take the time to note the jurisdiction, the venue, the parties involved, the type of case, verify dates and then go to the statutes each and every time to determine applicability and look for exceptions. Following through on this procedure can significantly reduce the likelihood of an error occurring when setting the statute of limitations date.

3) **Use reminder dates for all critical date calendaring.** There will never be a good reason to claim surprise when it comes to an approaching SOL deadline. Place reminder dates in the calendar well in advance of approaching deadlines in order to give yourself more than enough time to complete the necessary work in a thorough and professional manner.

4) **If you decide to withdraw, do so promptly.** In a perfect world you should try to withdraw at least six months prior to when the SOL will run. Inform the client of your withdrawal in writing and clearly advise the client of the applicable SOL deadline. Waiting until the last minute to withdraw increases the likelihood that the client will end up missing the SOL date and subsequently turn to you for recovery. This is the one situation where specifically stating when the SOL will run is advised because a thorough investigation of the matter has already occurred. On the flip side, try not to accept new cases at the eleventh hour as there is an increased risk of problems arising simply due to the lack of time to properly investigate the matter.

5) **Institute a diary system** that allows you to review each and every file every thirty to forty-five days. One disadvantage of any calendaring system, docket control system, and file setup process is that they create an unwarranted reliance upon their accuracy. Remember that a human being has updated the calendar, placed an entry into the docket and created the file and mistakes will occasionally occur. Worse yet, sometimes redundant systems simply multiply the number of places an error is recorded. Best practices dictate that each and every file be reviewed on a routine basis. When doing so, be certain to double check dates, independently verify all key facts, prepare necessary documents well in advance of approaching deadlines, and contact the client so that they don't feel forgotten about.

6) **File suit early and follow up with service of process in a timely manner.** Never get to within thirty days of the SOL date without having filed suit. Last minute filings are playing with fire because there is no room for error. Do not put off the paperwork or service of process hoping to reach a settlement at the last minute. Unexpected events such as illness, computer failure, the discovery of an incorrectly calendared date, office vandalism, weather events, and accidents on the way to the courthouse are all actual examples of what can go wrong. Play it safe and smart. If you discover you have named the wrong defendant, for example the defendant was a person and not a corporation, there will still be time to remedy the situation. In fact a number of firms require that all firm attorneys file suit thirty days in advance of the SOL date and set reminders from that date as a way to ensure that no SOL date will ever be missed. I strongly suggest you consider following their lead.

7) **Standardize your firm's calendaring procedures** and develop a calendaring guideline that sets forth all critical dates that might arise at your firm and describes the desired approach to responding to these dates. Standards can include the type of acceptable primary and redundant system an attorney or staff member might use individually, and should require data entry into the firm's various master calendar and docket systems. Standardization allows staff personnel to calendar confidently as they back up each other, allows the firm to monitor compliance to calendaring guidelines, provides assurances that no deadlines will be missed due to regular use of reminders by all, and provides an assurance that filings occur well ahead of deadline dates.

Never Forget that Little Things Do Matter

When I was young I tried to bake cookies on my own as a surprise for the rest of the family who were away for a few hours. Suffice it to say that I had yet to appreciate the difference between *t* and *T* as units of measurement or that baking soda and baking powder were two entirely different things. To this day my siblings still refer to those cookies as "clunkers." You could have repaired a cobblestone street with those things and we still laugh about it. Now, one might ask "What in the world do clunkers have to do with the practice of law?" While the cookies themselves don't, the lesson learned that day does and the lesson learned was that little things often matter far more than we might realize.

Allow me to share a few examples. A law firm picked up a significant corporate bankruptcy matter. Well into this representation, the responsible attorney instructed his competent long-time paralegal on how to disburse funds to a large group of unsecured creditors. He assumed that the paralegal understood the significance of the distinction between unsecured creditors whose claims were challenged and those whose claims were not. She didn't and no money was held back to pay those whose claims were not challenged.

An attorney, who relied heavily on case management software, took on a plaintiff personal injury matter. When these types of cases reached a certain point, it was this attorney's practice to click a link in the program that enabled an automated litigation checklist function. This particular matter happened to stall just prior to the point in time that said link would normally have been clicked so the automated litigation checklist was never enabled. Attorney was oblivious as a critical filing deadline came and went.

Another attorney attempted to have computer generated papers served on an individual at a personal residence. Service failed. The attorney investigated further, learned of, and verified an accurate work address for the individual and attempted to serve a second time. The papers were reprinted and sent out for service, unfortunately with the old address because the work address was never entered into the firm's database and no one double checked the papers. Deadline ran.

Firm is the registered agent for a number of client businesses. Suit papers were received by the secretary and filed in the appropriate client file instead of being forwarded to the client

because no one told her what to do in this situation. Default judgment was eventually entered against the client.

And finally, attorney failed to timely record real estate closing documents. In the interim liens against the former owner, but still owner of record, were placed on the property.

Claims along these lines are rather common and all resulted from a relatively minor misstep. After all, one doesn't normally view the failure to click on a specific link in a case management program as malpractice. Unfortunately the fallout of not doing so can be. By the same token it's so easy to rationalize that once a real estate sale has been finalized it doesn't really matter if the papers get filed this week or next. Unless of course that by the time next week rolls around this particular task has been forgotten about.

Little things do matter. While I would love to be able to share a short list of practice tips designed to help one avoid these kinds of claims, such a list would miss the point. It isn't about trying to identify all the crazy ways a minor oversight might result in a claim. The point that I am trying to make is that failing to appreciate that minor missteps can lead to major problems down the road is a serious misstep in and of itself. Clunkers do happen. If baking were that easy, everyone would be good at it.

Think about how you use your systems. If you rely on software programs to remind you to take care of critical tasks, remember that the information the program spits out is only going to be as good as the information that initially went in. If no date was ever entered or one was entered incorrectly, the program will fail you. What is your contingency plan if and when a minor misstep, like data not being properly entered, occurs? In a similar vein, do you review all final work products for accuracy and completion? For example, if you use a redaction software program to redact private information from a document, do you review said document to make certain that everything that should have been redacted in fact was?

Think about training and education for attorneys and staff to include periodic reviews with even seasoned staff. While I do have a strong tax background, it does take time for me to come up to speed each year around tax time. I simply don't prepare enough tax returns year after year to stay sharp. You might start to ask questions along the lines of the following. Are staff members trained and able to identify and handle the exceptions to any given procedure if and when an exception arises? Do staff and attorneys utilize checklists with repetitive work and are such checklists designed to respond to the exceptions that will occur? Do you confirm that the instructions provided are actually understood and, perhaps just as important, do you invite questions that will enable you to clarify any issue or concern that's identified?

Again, I have no short list of cautions for you that can be posted on a sticky note somewhere. All that I can share is that seemingly minor missteps can and do lead to trouble from time to time and I have tried to provide a few examples to underscore the point. I had an acceptable excuse as a child trying to bake cookies. I was young, inexperienced, and no one had yet taken the time to teach me the art of reading and following a recipe. As an educated and licensed attorney, however, imagine how a client might respond after

learning that you allowed the statute of limitations date to run on their matter because you forgot to click on a link in your case management program? I suspect that to say they would not view your explanation as an acceptable excuse and let it slide would be an understatement. Stay sharp folks and don't overlook the little things. The goal is no clunkers. They don't go down well. Trust me on that one.

Mixing Cocktails with Legal Advice Can Be an Accident Waiting to Happen

I will admit that I can appreciate a well-crafted cocktail; but I will also share that when I am in a situation where such beverages are being served, I never allow myself to get involved in a conversation about someone else's legal problems and I strongly encourage you to do the same. Let me share a short story as to why.

An associate at a law firm, who was not a litigator in any way, shape or form, attended a social function and perhaps had a few more than she should have. Regardless, she got involved in a conversation with another guest about a personal injury matter. In addition to sharing some generic advice, the associate also let the guest know there was still plenty of time to deal with it stating the statute of limitations in that jurisdiction was two years. Unfortunately, unbeknownst to our hero, there was an exception to the statute in play and the actual time to file suit was six months. The guest, relying on the advice received ended up not obtaining legal counsel until after the filing deadline had past. Associate and her firm were eventually sued for malpractice.

We are all well aware that drinking and driving can bring about serious consequences because when one's judgment and reflexes are impaired accidents can happen. Mixing cocktails and legal advice is similarly problematic. It's too easy for the combination of a casual friendly setting coupled with the consumption of a few adult beverages to cloud your better judgment. However, instead of leading to an automobile accident, you may find yourself having to deal with an accidental client.

Viable malpractice claims can easily arise out of situations involving an accidental client and these situations are not limited to casual conversations at cocktail parties. Casual conversations online, with extended family members or friends, and members of your church congregation or other community organizations you participate in are all additional examples of situations where you might want to proceed with caution. Unfortunately, we also can't overlook the office setting. Should you be concerned about passing along a little casual advice in a conversation with a corporate constituent while representing the entity itself? How about discussing issues with beneficiaries while representing the estate, trying to help a prospective client out during that first meeting when you know you are going to decline the representation, being a good Samaritan by making a few suggestions to someone on the phone who clearly has a problem but really can't afford an attorney, or answering a few questions from an unrepresented third party? The answer is, of course, yes. These are all situations that can easily lead to an accidental client. To underscore this point, who hasn't heard the old saying "No good deed goes unpunished?" Now remember that old sayings become old sayings because they have a ring of truth to them.

I am always a bit surprised by the response of attorneys who have had to deal with a claim brought by an accidental client. Statements along the lines of "I never intended to create an attorney-client relationship," "there was no signed fee agreement," or "no money was exchanged so how could this be" are common; but it's not about you! While these issues are not completely irrelevant, please understand that it is going to be more about how the individual you interacted with responded to the exchange. If whoever you were talking too happened to respond to the exchange as if they were receiving a little legal advice from an attorney about their legal issue and that response was reasonable under the circumstances it can start to get muddy. Worse yet, if it was reasonably foreseeable that this individual would rely or act on your casual advice and then in fact did so to their detriment, you may have a serious problem on your hands.

I share all this, not with a desire to try to convince you to keep quiet and never try to help someone else out. By all means do so. The world certainly could use a few more good Samaritans and a desire to help others through a little education is a good thing as long as you stay the course. I share all of this because I want you to be cognizant of the risk involved whenever you decide to step into those waters.

Here's the bottom-line. Accidental clients are for real and there is no such thing as legal light. So if you ever find yourself enjoying a wonderful evening at a party with a cocktail in hand and another guest who has just learned you are an attorney wants to pick your brain, keep the following in mind. Don't talk about legal issues you are not well-versed in. If you feel compelled to pass along a little advice remember to ask questions so you understand the entire situation. Just know that by doing so you may be held to the accuracy of that advice later on so you might want to jot down a few notes as soon as you can. Finally, know that it's ok to say you're not the right person to be asking, particularly after you've had a few! That said, Salute.

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REDRESSING INEQUALITY IN THE MARKET FOR JUSTICE: WHY ACCESS TO LAWYERS WILL NEVER SOLVE THE PROBLEM AND WHY RETHINKING THE ROLE OF JUDGES WILL HELP

*Russell G. Pearce**

> "To no one will we sell, to no one will we refuse or delay, right or justice."[1]

> "Equal justice is an implausible ideal; adequate access to justice is less poetic but more imaginable."[2]

The organized bar is in denial. It refuses to acknowledge that our legal system promises equal justice under law, but allows justice to be bought and sold.[3] Instead, the bar limits its attention to a small corner of this problem—the glaring fact that most low-income people cannot obtain any lawyer for their civil problems and cannot obtain adequate representation for their criminal defense.[4] As Deborah Rhode observes, "bar discussions

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1. Deborah L. Rhode, Access to Justice 47 (2004) (quoting the Magna Carta).

2. Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 Wash. U. J.L. & Pol'y 47, 61 (2003).

3. *See, e.g.*, Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084, 1089-92, 1112 (1983). For further elaboration of this point, see *infra* Part I.

4. Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear* Pro Se*: Causes, Solutions, Recommendations, and Implications*, 17 Geo. J. Legal Ethics 423, 423 (2004). For example, the Fordham Law School Library's quick and non-scientific survey of the American Bar Association President's column in the ABA Journal from 1992 through 2001 identified at least twenty-five columns highlighting pro bono or legal services to the poor in contrast to only one suggesting changes in the courts to make them more accessible to parties without lawyers. *See infra* app. for these citations. While focusing on pro bono and legal services, the bar has rejected efforts to open the market for legal services. *See, e.g.*, Rhode, *supra* note 1, at 87-96; Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 Fordham L. Rev. 883 (2004); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1267-76 (1995). It has also shown little interest in efforts to modify client advocacy to include a responsibility for the public good. For examples of these proposals, see David Luban, Lawyers and Justice (1988); William H. Simon, The Practice of Justice: A Theory of Lawyers' Ethics (1998); and Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589 (1985).

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of access to justice . . . assume that more access is better, and the trick is how to best achieve it."[5] In the context of civil legal needs, bar leadership has focused, without much success, on providing more lawyers to low-income people through increased funding and more pro bono hours.[6]

Given that our society primarily distributes legal services through the market and employs an adversary system of justice, the bar's proposals—if accepted—would have a very limited impact in advancing equal justice. The proposals address only a small portion of the inequality within the legal system and do not recognize that our society cannot provide the vast resources necessary to equalize the access to justice for low-income people. That does not mean that the bar should abandon its efforts. Rather, it should admit that these proposals have more of an effect of easing the suffering of those few low-income people lucky enough to obtain legal representation and not of realizing equal justice under law.

Inspired by Deborah Rhode's comprehensive and well-argued book, *Access to Justice*,[7] and her suggestion that courts should provide legal information and simple forms to unrepresented parties, this Essay goes a step further. It proposes replacing—in every case—the paradigm of judge as passive umpire with the paradigm of judge as active umpire. Judges, who already take a more active role in particular courts and particular types of cases, would have an obligation to ensure that the parties' procedural errors do not deprive the court of access to relevant evidence and legal arguments. While this proposal would certainly not eliminate unequal justice, it would at least be a major step toward reasonably equal justice under law.

I. THE MARKET FOR JUSTICE

The aspiration of equal justice under law implies an absolute measure of justice and of equality. As a rhetorical flourish, it remains dominant today. Most lawyers and judges, as well as the general public, would find appalling the notion that justice can be bought and sold.[8] Nonetheless, the reality is that our legal system largely distributes legal services through the market and justice through an adversary system where the quality of legal services has a major influence. As a result, to a significant degree, justice is bought and sold and the inevitable result is unequal justice under the law.

A comparison between the ideal paradigms of the adversary and inquisitorial systems highlights the centrality of legal representation to the determination of justice in an adversary system.[9] An inquisitorial system

5. Rhode, *supra* note 2, at 49.

6. Rhode, *supra* note 1, at 103-04, 145-46; *see also infra* app.

7. Rhode, *supra* note 1.

8. Hazard et al., *supra* note 3, at 1112-13; *see* Rhode, *supra* note 1, at 3 (highlighting the centrality of commitment to equal justice under law).

9. What follows is a description of the inquisitorial and adversarial paradigms. In practice, a variety of factors can make the two systems more or less similar. *See, e.g.*, Mirjan R. Damaška, The Faces of Justice and State Authority: A Comparative Approach to the

employs expert judges to manage and guide a process where the parties assist them in their search for justice. Inquisitorial judges conduct investigations, initiate cases, determine the issues, and control the presentation of evidence.[10] In contrast, the adversary system paradigm places the parties at the center of the search for justice.[11] The adversary system assumes that the parties' competitive, individual pursuit of self-interest results in the most just outcome, for the parties and for society as a whole.[12] Accordingly, the parties, not the court, conduct investigations, initiate cases, determine the issues, and control the presentation of evidence.[13] The court, whether acting through a judge or a jury, is a neutral umpire. It resolves disputes regarding the legal issues the parties identify, the admissibility of evidence the parties have determined is relevant, and decides factual contests the parties have placed before it.[14] For purposes of this Essay, I will refer to the work of the party or the party's representative in preparing and presenting a case as "lawyering," whether performed by the party's lawyer or by the self-represented party.

Where the parties have such great control of the process, the quality of their lawyering efforts undoubtedly has a major influence on the outcome.[15]

Legal Process 3-6 (1986).

10. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 826 (1985); *see also* Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 Int'l Legal Persp. 185, 187-88 (2001-02); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 380 n.24, 380-88 (1982).

11. John H. Langbein, The Origins of Adversary Criminal Trial 1-2, 8-9 (A.W. Brian Simpson ed., 2003); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1283 (1976); Resnik, *supra* note 10, at 380 n.3, 380-81.

12. Richard Posner has observed that the adversary system "resembles the market in its impersonality, its subordination of distributive considerations. The invisible hand of the market has its counterpart in the aloof disinterest of the judge." Richard A. Posner, Economic Analysis of Law 322 (1972). Other commentators have similarly compared the principles of the market to those of the adversary system. *See, e.g.*, Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together*, 29 J. Corp. L. 469, 484, 488 (2004); Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternative Sources of Virtue*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 305, 312 (2000); David Luban, *The Social Responsibility of Lawyers: A Green Perspective*, 63 Geo. Wash. L. Rev. 955, 974 (1995); W. Bradley Wendel, *Professional Roles and Moral Agency*, 89 Geo. L.J. 667, 698-99 (2001) (reviewing Arthur Isak Applbaum, Ethics for Adveraries: The Morality of Roles in Public and Professional Life (1999)). Many commentators have questioned whether the adversary system does indeed produce the most just result. *See, e.g.*, Langbein, *supra* note 11, at 1-2; Richard A. Posner, Overcoming Law 503 (1995) (describing justification of adversary system as "mystical faith"); David Luban, *Twenty Theses on Adversarial Ethics*, *in* Beyond the Adversarial System 134, 143-44 (Helen Stacy & Michael Lavarch eds., 1999). Some commentators have offered "nonconsequentialist justifications of the adversary system" which do not rely on the justness of the outcome. Luban, *supra* note 4, at 81-103; Monroe Freedman & Abbe Smith, Understanding Lawyer's Ethics 19-23 (2002).

13. Langbein, *supra* note 11, at 1; Chayes, *supra* note 11, at 1283; Resnik, *supra* note 10, at 380 n.23, 380-88.

14. *See supra* note 11 and accompanying text.

15. *See, e.g.*, Atkinson, *supra* note 12, at 488; Marc Galanter, *Why the "Haves" Come Out Ahead?: Speculation on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974);

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Precise measurement of this advantage is difficult. Other factors, such as the weight of relevant authority and available evidence, are likely to be significant influences as well. Accordingly, where the relative merits are comparable, the quality of lawyering will make a greater difference than where the relative merits vary greatly. Although a strong lawyer will win easily with a strong case, even a weak lawyer will have a good chance. But even the evaluation of what is a weak or strong case may vary; an excellent lawyer may be able to discover that what looks like a weak case is actually a strong one. While precise quantification of the effect of lawyering awaits further development, the strong influence of lawyering appears beyond dispute.[16]

Given this strong influence, the use of the market as the primary mechanism[17] for distributing legal services guarantees significantly unequal justice under law.[18] The more resources a party has, the better quality lawyering they can buy.[19] Parties with better lawyering are better able to achieve their goals in the legal system. In effect, wealthier parties have the capacity to buy more justice.[20] Rather than being the exception, inequality under law is more frequently the rule.

II. HOW MUCH INEQUALITY EXISTS IN THE MARKET FOR JUSTICE?

Current measures of the extent of unequal justice under law are quite gross and anecdotal. Absent an agreement on how to measure either justice or equality,[21] commentators tend instead to focus on "equal access to the justice system" as a surrogate.[22] But that measure also suffers from a lack of clarity. Determining equality requires a definition of legal need and lawyering quality to permit a comparison between similarly situated persons. Not only are these measures absent, but market analysis suggests that those needs are themselves dynamic and not easily susceptible to quantification.[23]

Hazard et al., *supra* note 3, at 1112 (noting that where "lawyers differ in skill, knowledge, and the time they can devote to a case, . . . justice—actual outcomes in the legal system—is related to the quality of lawyering that a client can afford"); Marvin E. Frankel, *An Immodest Proposal*, N.Y. Times, Dec. 4, 1977, (Magazine), at 92.

16. *See supra* note 15 and accompanying text.

17. Some exceptions exist. The government and, to a lesser degree, the bar provide services to the poor.

18. I do not mean to imply that the market for legal services is efficient. Indeed, the bar has created significant barriers to competition, such as restrictions on who can deliver legal services and who can have an ownership interest in firms delivering legal services. As a result, the price of legal services is significantly higher and the quality lower than what would result from an efficient market. *See, e.g.*, Cantrell, *supra* note 4; Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 Fordham L. Rev. 2581, 2599 (1999); Pearce, *supra* note 4, at 1272-73.

19. *See infra* note 15.

20. Langbein describes this as the "wealth effect." Langbein, *supra* note 11, at 1-2, 102-03.

21. Rhode, *supra* note 1, at 5.

22. *Id.*

23. *Id.*; Hazard et al., *supra* note 3, at 1091-92.

Nonetheless the gross, if somewhat indeterminate, inequality of our legal system in civil litigation is overwhelming.[24] Rhode finds that "[m]illions of Americans lack any access to justice, let alone equal access."[25] In civil proceedings, most low- and middle-income people lack any affordable access to legal services, while in the criminal justice system, the government funded access for those who cannot afford their own is demonstrably inadequate. "According to most estimates," notes Rhode, "about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet."[26] She observes that "[o]nly one lawyer is available to serve approximately 9,000 low-income persons, compared with one for every 240 middle- and upper-income Americans."[27] With regard to middle-income Americans, Rhode estimates that "[m]illions" of them are "priced out of the legal process."[28] As Richard Zorza adds, "[i]n many courts, well over [fifty] percent of litigants appear without lawyers."[29]

III. THE BAR'S PREFERRED SOLUTION: PROVIDING LAWYERS FOR THE POOR

Bar leaders have sought to address the problem of unequal justice under law through efforts to increase dramatically both funding and lawyer pro bono contributions.[30] They recommend major increases in government funding for civil legal services as well as increased contributions from lawyers.[31] They also urge strategies to persuade lawyers to provide many more pro bono hours than the existing average of "less than half an hour a week and . . . half a dollar a day" and to redirect efforts to helping the poor from the current emphasis on "assist[ing] family, friends, and charitable causes that largely benefit middle and upper income groups."[32] These strategies range from mandatory pro bono requirements to mandatory disclosure of pro bono hours, or voluntary commitment to provide a minimum pro bono contribution.[33]

24. By focusing on civil litigation, I do not mean to imply that equality abounds in criminal litigation. Even though indigent defendants have a legal right to court-appointed counsel in criminal cases, Rhode points to studies consistently observing that they do not receive adequate representation. The appointed lawyers often lack "experience or expertise in criminal defense," fail to perform competently, do not receive enough compensation to fund required research and preparation, and do not have the resources to conduct the necessary investigations. Rhode, *supra* note 1, at 122, 123-29. Rhode concludes that "[g]overnment legal aid and criminal defense budgets are capped at ludicrous levels, which make effective assistance of counsel a statistical impossibility for most low income litigants." *Id* at 3.

25. *Id.*

26. *Id.*

27. Rhode, *supra* note 2, at 47-48.

28. Rhode, *supra* note 1, at 103.

29. Zorza, *supra* note 4, at 423 n.1.

30. Rhode, *supra* note 1, at 187–90; *see also infra* app.

31. Rhode, *supra* note 1, at 103-04, 145-46; *see infra* app.

32. Rhode, *supra* note 1, at 17.

33. *Id.* at 16-18.

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IV. WHY ACCESS TO LAWYERS WILL NEVER SOLVE THE PROBLEM OF UNEQUAL JUSTICE

Access to lawyers will make only a limited difference in the equality of justice. Undoubtedly, the difference it makes will be important to some individuals. One study, for example, found that the vast majority of tenants evicted in housing courts did not have a lawyer and that none of the tenants in an experimental bar pro bono program had been evicted.[34] Providing low-income people with lawyers will mitigate the harms they might face in the legal system. Nonetheless, given the market distribution of legal services, proposals for providing lawyers to the poor will never eradicate inequality. A market perspective reveals at least three very real limits on these efforts.

First, even if all low-income people received legal representation, substantial inequality would remain.[35] While those low-income people would be better off, market distribution of legal services would remain the rule. Parties with greater resources would be able to purchase a higher quality of legal services and better absorb the costs of litigation.[36] This factor alone would guarantee significant inequality among those parties who have retained lawyers, as well as between those with lawyers and those without.

Second, even the effort to provide low-income people with lawyers faces the impossible challenge of providing resources for an elastic need.[37] More than twenty-five years ago, Gary Bellow and Jeanne Kettelson observed that legal needs "have a tendency to expand as potential beneficiaries see lawyers as capable of responding to their problems."[38] Accordingly, when free legal services are made available to the poor, "demand for services will increase to the limits of the available supply."[39]

Third, Bellow and Kettleson recognized that society could never provide the resources necessary to provide quality legal services to low-income people. They noted that "even if demand for legal services remained constant . . . it would not be possible or desirable to expand the bar to meet the need."[40] They explained that "to equalize the number of lawyers available to the very poor and the rest of the population" would require "[a] tenfold increase in the existing public interest bar" and that "to begin to provide the whole population with the same legal services that the affluent presently enjoy . . . would require something on the order of a tenfold

34. Comm. to Improve the Availability of Legal Servs., Final Report to the Chief Judge of the State of N.Y. 17 (1990).

35. Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. Rev. 337, 382-83 (1978).

36. *Id.*

37. *Id.* at 380; *see also* Hazard et. al, *supra* note 3, at 1091-92; Rhode, *supra* note 2, at 49.

38. Bellow & Kettleson, *supra* note 35, at 380; *see* Rhode, *supra* note 2, at 49.

39. Bellow & Kettleson, *supra* note 35, at 380.

40. *Id.*

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increase in the size of the entire bar."[41]

Given these limits, any effort to make significant progress toward equal justice would at least require other changes in the legal system.[42] One obvious place to look is the courts.

V. MAKING JUDGES RESPONSIBLE FOR REDRESSING FAILURES IN THE MARKET FOR JUSTICE

The potential for the courts to equalize justice has received far less attention from bar leaders than proposals for providing more lawyers for the poor in civil cases and more resources for the criminal defense of indigents.[43] State courts, together with commentators such as Jonah Goldschmidt, Russell Engler, Deborah Rhode, and Richard Zorza, have focused their efforts on assisting parties without lawyers in the courts.[44] In the context of providing justice to these parties, courts and commentators have considered or implemented proposals to place self-represented parties who cannot afford a lawyer on more equal footing by providing them with basic information on the law and procedures, as well as with forms and sometimes assistance in drafting pleadings and other court papers. Commentators have also suggested expanding the use of small claims courts and alternative dispute resolution where the proceedings are less formal and legal expertise is less important.[45]

Within these proposals, disagreement exists as to how far the court may go in assisting the self-represented party. The range of views includes limiting the assistance to the self-represented to providing forms without elaboration, providing information but not advice, allowing court clerks but not judges to provide assistance, and having both clerks and judges provide generous assistance.[46]

Russell Engler and Richard Zorza, in particular, argue that judges should shift from serving as passive umpires to active umpires with responsibility for keeping the process fair where one or more parties is self-represented.[47] Engler argues that "[t]he judge bears the 'heavy responsibility' for presiding over a 'fair' proceeding, which includes not only what occurs at trial itself,

41. *Id.* (italics omitted).

42. Bellow and Kettleson take a different tack than that explored in this Essay. Like other commentators, they urge a change in lawyer norms "to protect weak parties from being exploited by more powerful opponents." *Id.* at 387. For more developed perspectives of this kind, see Luban, *supra* note 4; Rhode, *supra* note 4; and Simon, *supra* note 4.

43. Zorza, *supra* note 4, at 423; *see infra* app.

44. Rhode, *supra* note 1, at 81-86; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 Fam. Ct. Rev. 36 (2002); Zorza, *supra* note 4, at 423.

45. *See supra* note 44.

46. Engler, *supra* note 44, at 1992-2021; Zorza, *supra* note 4, at 435.

47. Engler, *supra* note 44; Zorza, *supra* note 4. Commentators have made similar arguments in the context of mediation. *See, e.g.*, Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 Wash. U. L.Q. 47 (1996).

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but outcomes produced by the more common result of settlement."[48] This entails making the judge responsible for "'develop[ing] a full and fair record,'"[49] including providing "assist[ance to] the unrepresented litigant on procedure to be followed, presentation of evidence, and questions of law," as well as "call[ing] witnesses and conduct[ing] direct or cross-examinations" on the court's initiative.[50] Zorza's approach does not go quite as far, but does make the judge responsible for ensuring that the self-represented party has "the greatest possible opportunity to be heard,"[51] including explaining the proceedings at every step and making sure that the parties understand the explanation, describing what the parties need to prove, explaining relevant evidentiary issues and establishing whether foundations exist, preventing a lawyer from taking advantage of a self-represented party, and referring a self-represented party for advice to a self help center or other expert where appropriate.[52] Both Engler and Zorza emphasize that they intend these proposals to maintain and improve the adversary system by correcting process errors resulting from the ignorance of unrepresented parties.[53]

Proposals like Zorza's are part of a larger trend toward increasing the managerial role of judges in the adversary system. In his classic 1976 article, *The Role of the Judge in Public Law Litigation*,[54] Abram Chayes described the rise of a "public law litigation model" where the judge "is active, with responsibility . . . for organizing and shaping the litigation to ensure a just and viable outcome."[55] This approach spread self-consciously to mass tort cases, as well as to federal litigation generally where, as Judith Resnik described in her famous article, *Managerial Judges*, judges controlled pre-trial proceedings and encouraged settlements.[56] Recently, state courts have begun experiments with specialized courts in areas like drug treatment and domestic violence where judges manage the proceedings as leaders of a "problem-solving team" that includes the parties and social services providers[57] and serve as monitors of court sanctions.[58]

48. Engler, *supra* note 44, at 2028.

49. *Id.* (quoting Lashley v. Sec'y of Health and Human Servs., 708 F.2d 1048, 1051 (6th Cir. 1983) (quoting McConnell v. Schweiker, 655 F.2d 604, 606 (5th Cir. 1981))).

50. *Id.* Engler draws on precedents developed in small claims courts and administrative social security proceedings. *See id.* at 2016-18, 2028-31.

51. Zorza, *supra* note 4, at 442.

52. *Id.* at 442-45.

53. Engler, *supra* note 44, at 2022-27; Zorza, *supra* note 4, at 429 n.15. Zorza distinguishes his proposals, which are aimed at improving the adversary system from a similar approach grounded in the values of the inquisitorial system. *Id.* (contrasting his view with that of Jonah Goldschmidt).

54. Chayes, *supra* note 11.

55. *Id.* at 1302.

56. Resnik, *supra* note 10, at 379-80. Where Chayes expressed enthusiasm about these developments, Resnik urged caution. S*ee* Chayes, *supra* note 11; Resnik, *supra* note 10, at 380, 414-45.

57. Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 Hastings L.J. 851, 862 (1997); *see also* Greg Berman & John Feinblatt, Judges and Problem-Solving Courts (2002).

These trends, together with the developments in providing assistance to self-represented parties, point toward an effective means of reducing inequality under law. Rather than limit these approaches to particular courts, particular cases, or particular parties, we can extend their underlying principle to all cases and all courts. Rather than serving as a passive umpire, judges should be active umpires responsible for remedying process errors that would deprive the court of relevant evidence and arguments and that would ensure informed consent to settlements.[59] For example, if a party, whether represented or not, was unable to master the evidence rules necessary to enter relevant evidence, the judge should ask questions to determine whether the evidence is admissible and, if so, accept it. Similarly, the court should raise relevant legal issues the parties have missed.[60] Although some judges do some of these things some of the time on an ad hoc basis,[61] making the judge an active umpire would change what is now ad hoc and unofficial into a standard and officially sanctioned procedure.

A number of challenges to this approach will arise. First, supporters of the pure adversary system model will oppose deviations from the passive umpire role. [62] As described above, in addition to the arguments from the needs of equal justice and the evolution of the judge's role, as a practical matter some judges do precisely what this Essay proposes. While making little change for those judges, this Essay's proposal would make this conduct systemic and transparent. Second, supporters of the adversary system model may argue that the active umpire model represents a change to the inquisitorial system. True, the active umpire does take more control from the parties than a passive umpire. But the process remains party-controlled unless process failures require judicial correction. This system is different than the inquisitorial system, in which the expert judge has control of all aspects of litigation.[63] Third, supporters of the adversary system model may assert that the active umpire model increases the danger that judicial bias or incompetence will influence the outcome. Judicial bias and incompetence are problems whether the judge is passive or active. While the more active role of the judge will arguably increase the effect of these problems on the outcome, it will also make the problems more visible and

58. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 Yale L. & Pol'y Rev. 125 (2004); *see* Berman & Feinblatt, *supra* note 57. *See generally* Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 Am. Crim. L. Rev 1501 (2003); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 Vand. L. Rev. 831 (2000).

59. *See supra* note 53.

60. This proposal tracks the suggestions Engler and Zorza make for cases with self-represented parties. *See supra* notes 47-53 and accompanying text.

61. I would like to thank my colleague Jim Cohen for making sure I included this point.

62. *See, e.g.*, Robert M. Daniszewski, *Coping with the* Pro Se *Litigant*, N.H. B. J., Mar. 1995, at 46, 48; Resnik, *supra* note 10, at 380, 414-45; Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 St. Louis U. L.J. 553, 558 (1992).

63. *See supra* notes 51-52.

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therefore more susceptible of melioration.

CONCLUSION

This Essay does not purport to offer the last word on the market for justice and unequal justice under law. It does draw on Deborah Rhode's excellent work to suggest that the bar should openly and honestly acknowledge that justice today is largely bought and sold through the market for legal services. The Essay recommends that the market distribution of legal services circumscribes strategies designed to provide some poor people with a lawyer. At best, they are properly described as efforts to mitigate harms and not as significant steps toward equal justice under law. More likely, to provide such a significant step would be making judges active umpires responsible for correcting process failures. But stating the problem and acknowledging the key role of judges are only first steps. Exactly how to make judges active umpires is a task requiring much further consideration.[64]

64. This elaboration would include consideration of the role of court employees, *see, e.g.*, Engler, *supra* note 44, at 2031, as well as delineation of the circumstances requiring, and the appropriate forms of, judicial intervention.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TURNER *v.* ROGERS ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 10–10. Argued March 23, 2011—Decided June 20, 2011

After a South Carolina family court ordered petitioner Turner to pay $51.73 per week to respondent Rogers to help support their child, Turner repeatedly failed to pay the amount due and was held in contempt five times. For the first four, he was sentenced to 90 days' imprisonment, but he ultimately paid what he owed (twice without being jailed, twice after spending a few days in custody). The fifth time he did not pay but completed a 6-month sentence. After his release, the family court clerk issued a new "show cause" order against Turner because he was $5728.76 in arrears. Both he and Rogers were unrepresented by counsel at his brief civil contempt hearing. The judge found Turner in willful contempt and sentenced him to 12 months in prison without making any finding as to his ability to pay or indicating on the contempt order form whether he was able to make support payments. After Turner completed his sentence, the South Carolina Supreme Court rejected his claim that the Federal Constitution entitled him to counsel at his contempt hearing, declaring that civil contempt does not require all the constitutional safeguards applicable in criminal contempt proceedings.

Held:

1. Even though Turner has completed his 12-month sentence, and there are not alleged to be collateral consequences of the contempt determination that might keep the dispute alive, this case is not moot, because it is "capable of repetition" while "evading review," *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 498, 515. A case remains live if "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U. S. 147, 149. Here, the "challenged ac-

tion," Turner's imprisonment for up to 12 months, is "in its duration too short to be fully litigated" through the state courts (and arrive here) prior to its "expiration." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U. S. 765, 774. And there is a more than "reasonable" likelihood that Turner will again be "subjected to the same action" because he has frequently failed to make his support payments, has been the subject of several civil contempt proceedings, has been imprisoned several times, and is, once again, the subject of civil contempt proceedings for failure to pay. *DeFunis* v. *Odegaard*, 416 U. S. 312, and *St. Pierre* v. *United States*, 319 U. S. 41, distinguished. Pp. 5–7.

2. The Fourteenth Amendment's Due Process Clause does not *automatically* require the State to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration. In particular, that Clause does not require that counsel be provided where the opposing parent or other custodian is not represented by counsel and the State provides alternative procedural safeguards equivalent to adequate notice of the importance of the ability to pay, a fair opportunity to present, and to dispute, relevant information, and express court findings as to the supporting parent's ability to comply with the support order. Pp. 7–16.

(a) This Court's precedents provide no definitive answer to the question whether counsel must be provided. The Sixth Amendment grants an indigent criminal defendant the right to counsel, see, *e.g., United States* v. *Dixon*, 509 U. S. 688, 696, but does not govern civil cases. Civil and criminal contempt differ. A court may not impose punishment "in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Hicks* v. *Feiock*, 485 U. S. 624, 638, n. 9. And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free. *Id.*, at 633. The Due Process Clause allows a State to provide fewer procedural protections in civil contempt proceedings than in a criminal case. *Id.*, at 637–641. Cases directly concerning a right to counsel in civil cases have found a presumption of such a right "*only*" in cases involving incarceration, but have not held that a right to counsel exists in *all* such cases. See *In re Gault*, 387 U. S. 1; *Vitek* v. *Jones,* 445 U. S. 480; and *Lassiter* v. *Department of Social Servs. of Durham Cty.*, 452 U. S. 18. Pp. 7–10.

(b) Because a contempt proceeding to compel support payments is civil, the question whether the "specific dictates of due process" require appointed counsel is determined by examining the "distinct factors" this Court has used to decide what specific safeguards are needed to make a civil proceeding fundamentally fair. *Mathews* v. *Eldridge*, 424 U. S. 319, 335. As relevant here those factors include

(1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]." *Ibid.*

The "private interest that will be affected" argues strongly for the right to counsel here. That interest consists of an indigent defendant's loss of personal liberty through imprisonment. Freedom "from bodily restraint" lies "at the core of the liberty protected by the Due Process Clause." *Foucha* v. *Louisiana*, 504 U. S. 71, 80. Thus, accurate decisionmaking as to the "ability to pay"—which marks a dividing line between civil and criminal contempt, *Hicks, supra*, at 635, n. 7—must be assured because an incorrect decision can result in a wrongful incarceration. And because ability to comply divides civil and criminal contempt proceedings, an erroneous determination would also deprive a defendant of the procedural protections a criminal proceeding would demand. Questions about ability to pay are likely to arise frequently in child custody cases. On the other hand, due process does not always require the provision of counsel in civil proceedings where incarceration is threatened. See *Gagnon* v. *Scarpelli,* 411 U. S. 778. To determine whether a right to counsel is required here, opposing interests and the probable value of "additional or substitute procedural safeguards" must be taken into account. *Mathews, supra*, at 335.

Doing so reveals three related considerations that, taken together, argue strongly against requiring counsel in every proceeding of the present kind. First, the likely critical question in these cases is the defendant's ability to pay, which is often closely related to his indigence and relatively straightforward. Second, sometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un*represented by counsel. A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would "alter significantly the nature of the proceeding," *Gagnon, supra*, at 787, creating a degree of formality or delay that would unduly slow payment to those immediately in need and make the proceedings *less* fair overall. Third, as the Federal Government points out, an available set of "substitute procedural safeguards," *Mathews, supra*, at 335, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. These include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information from him; (3) an opportunity at the hearing for him to respond to statements and questions

about his financial status; and (4) an express finding by the court that the defendant has the ability to pay.

This decision does not address civil contempt proceedings where the underlying support payment is owed to the State, *e.g.,* for reimbursement of welfare funds paid to the custodial parent, or the question what due process requires in an unusually complex case where a defendant "can fairly be represented only by a trained advocate," *Gagnon, supra*, at 788. Pp. 10–16.

3. Under the circumstances, Turner's incarceration violated due process because he received neither counsel nor the benefit of alternative procedures like those the Court describes. He did not have clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. And the trial court did not find that he was able to pay his arrearage, but nonetheless found him in civil contempt and ordered him incarcerated. P. 16.

387 S. C. 142, 691 S. E. 2d 470, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ROBERTS, C. J., and ALITO, JJ., joined as to Parts I–B and II.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–10

MICHAEL D. TURNER, PETITIONER *v.* REBECCA L. ROGERS ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

[June 20, 2011]

JUSTICE BREYER delivered the opinion of the Court.

South Carolina's Family Court enforces its child support orders by threatening with incarceration for civil contempt those who are (1) subject to a child support order, (2) able to comply with that order, but (3) fail to do so. We must decide whether the Fourteenth Amendment's Due Process Clause requires the State to provide counsel (at a civil contempt hearing) to an *indigent* person potentially faced with such incarceration. We conclude that where as here the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support). But we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order.

I

A

South Carolina family courts enforce their child support

orders in part through civil contempt proceedings. Each month the family court clerk reviews outstanding child support orders, identifies those in which the supporting parent has fallen more than five days behind, and sends that parent an order to "show cause" why he should not be held in contempt. S. C. Rule Family Ct. 24 (2011). The "show cause" order and attached affidavit refer to the relevant child support order, identify the amount of the arrearage, and set a date for a court hearing. At the hearing that parent may demonstrate that he is not in contempt, say, by showing that he is not able to make the required payments. See *Moseley* v. *Mosier*, 279 S. C. 348, 351, 306 S. E. 2d 624, 626 (1983) ("When the parent is *unable* to make the required payments, he is not in contempt"). If he fails to make the required showing, the court may hold him in civil contempt. And it may require that he be imprisoned unless and until he purges himself of contempt by making the required child support payments (but not for more than one year regardless). See S. C. Code Ann. §63–3–620 (Supp. 2010) (imprisonment for up to one year of "adult who wilfully violates" a court order); *Price* v. *Turner*, 387 S. C. 142, 145, 691 S. E. 2d 470, 472 (2010) (civil contempt order must permit purging of contempt through compliance).

B

In June 2003 a South Carolina family court entered an order, which (as amended) required petitioner, Michael Turner, to pay $51.73 per week to respondent, Rebecca Rogers, to help support their child. (Rogers' father, Larry Price, currently has custody of the child and is also a respondent before this Court.) Over the next three years, Turner repeatedly failed to pay the amount due and was held in contempt on five occasions. The first four times he was sentenced to 90 days' imprisonment, but he ultimately paid the amount due (twice without being jailed, twice

after spending two or three days in custody). The fifth time he did not pay but completed a 6-month sentence.

After his release in 2006 Turner remained in arrears. On March 27, 2006, the clerk issued a new "show cause" order. And after an initial postponement due to Turner's failure to appear, Turner's civil contempt hearing took place on January 3, 2008. Turner and Rogers were present, each without representation by counsel.

The hearing was brief. The court clerk said that Turner was $5,728.76 behind in his payments. The judge asked Turner if there was "anything you want to say." Turner replied,

> "Well, when I first got out, I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn't get straightened out off the dope until I broke my back and laid up for two months. And, now I'm off the dope and everything. I just hope that you give me a chance. I don't know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me." App. to Pet. for Cert. 17a.

The judge then said, "[o]kay," and asked Rogers if she had anything to say. *Ibid.* After a brief discussion of federal benefits, the judge stated,

> "If there's nothing else, this will be the Order of the Court. I find the Defendant in willful contempt. I'm [going to] sentence him to twelve months in the Oconee County Detention Center. He may purge himself of the contempt and avoid the sentence by having a zero balance on or before his release. I've also placed a lien on any SSI or other benefits." *Id.*, at 18a.

The judge added that Turner would not receive good-time or work credits, but "[i]f you've got a job, I'll make you eligible for work release." *Ibid.* When Turner asked why he could not receive good-time or work credits, the judge said, "[b]ecause that's my ruling." *Ibid.*

The court made no express finding concerning Turner's ability to pay his arrearage (though Turner's wife had voluntarily submitted a copy of Turner's application for disability benefits, cf. *post*, at 7, n. 3 (THOMAS, J., dissenting); App. 135a–136a). Nor did the judge ask any followup questions or otherwise address the ability-to-pay issue. After the hearing, the judge filled out a prewritten form titled "Order for Contempt of Court," which included the statement:

> "Defendant (was) (was not) gainfully employed and/or (had) (did not have) the ability to make these support payments when due." *Id.*, at 60a, 61a.

But the judge left this statement as is without indicating whether Turner was able to make support payments.

C

While serving his 12-month sentence, Turner, with the help of *pro bono* counsel, appealed. He claimed that the Federal Constitution entitled him to counsel at his contempt hearing. The South Carolina Supreme Court decided Turner's appeal after he had completed his sentence. And it rejected his "right to counsel" claim. The court pointed out that civil contempt differs significantly from criminal contempt. The former does not require all the "constitutional safeguards" applicable in criminal proceedings. 387 S. C., at 145, 691 S. E. 2d, at 472. And the right to government-paid counsel, the Supreme Court held, was one of the "safeguards" not required. *Ibid.*

Turner sought certiorari. In light of differences among state courts (and some federal courts) on the applicability

of a "right to counsel" in civil contempt proceedings enforcing child support orders, we granted the writ. Compare, *e.g.*, *Pasqua* v. *Council*, 186 N. J. 127, 141–146, 892 A. 2d 663, 671–674 (2006); *Black* v. *Division of Child Support Enforcement*, 686 A. 2d 164, 167–168 (Del. 1996); *Mead* v. *Batchlor*, 435 Mich. 480, 488–505, 460 N. W. 2d 493, 496–504 (1990); *Ridgway* v. *Baker*, 720 F. 2d 1409, 1413–1415 (CA5 1983) (all finding a federal constitutional right to counsel for indigents facing imprisonment in a child support civil contempt proceeding), with *Rodriguez* v. *Eighth Judicial Dist. Ct.*, *County of Clark*, 120 Nev. 798, 808–813, 102 P. 3d 41, 48–51 (2004) (no right to counsel in civil contempt hearing for nonsupport, except in "rarest of cases"); *Andrews* v. *Walton*, 428 So. 2d 663, 666 (Fla. 1983) ("no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support"). Compare also *In re Grand Jury Proceedings*, 468 F. 2d 1368, 1369 (CA9 1972) *(per curiam)* (general right to counsel in civil contempt proceedings), with *Duval* v. *Duval*, 114 N. H. 422, 425–427, 322 A. 2d 1, 3–4 (1974) (no general right, but counsel may be required on case-by-case basis).

II

Respondents argue that this case is moot. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 480 (1923) (Article III judicial power extends only to actual "cases" and "controversies"); *Alvarez* v. *Smith*, 558 U. S. __, __ (2009) (slip op., at 4) ("An actual controversy must be extant at all stages of review" (internal quotation marks omitted)). They point out that Turner completed his 12-month prison sentence in 2009. And they add that there are no "collateral consequences" of that particular contempt determination that might keep the dispute alive. Compare *Sibron* v. *New York*, 392 U. S. 40, 55–56 (1968) (release from prison does not moot a *criminal* case because "collateral consequences"

are presumed to continue), with *Spencer* v. *Kemna*, 523 U. S. 1, 14 (1998) (declining to extend the presumption to parole revocation).

The short, conclusive answer to respondents' mootness claim, however, is that this case is not moot because it falls within a special category of disputes that are "capable of repetition" while "evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). A dispute falls into that category, and a case based on that dispute remains live, if "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975) *(per curiam).*

Our precedent makes clear that the "challenged action," Turner's imprisonment for up to 12 months, is "in its duration too short to be fully litigated" through the state courts (and arrive here) prior to its "expiration." See, *e.g.*, *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 774 (1978) (internal quotation marks omitted) (18-month period too short); *Southern Pacific Terminal Co.*, *supra*, at 514–516 (2-year period too short). At the same time, there is a more than "reasonable" likelihood that Turner will again be "subjected to the same action." As we have pointed out, *supra*, at 2–3, Turner has frequently failed to make his child support payments. He has been the subject of several civil contempt proceedings. He has been imprisoned on several of those occasions. Within months of his release from the imprisonment here at issue he was again the subject of civil contempt proceedings. And he was again imprisoned, this time for six months. As of December 9, 2010, Turner was $13,814.72 in arrears, and another contempt hearing was scheduled for May 4, 2011. App. 104a; Reply Brief for Petitioner 3, n. 1. These facts bring this case squarely within the special category of

cases that are not moot because the underlying dispute is "capable of repetition, yet evading review." See, *e.g.*, *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546–547 (1976) (internal quotation marks omitted).

Moreover, the underlying facts make this case unlike *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974) *(per curiam)*, and *St. Pierre* v. *United States*, 319 U. S. 41 (1943) *(per curiam)*, two cases that respondents believe require us to find this case moot regardless. *DeFunis* was moot, but that is because the plaintiff himself was unlikely to again suffer the conduct of which he complained (and others likely to suffer from that conduct could bring their own lawsuits). Here petitioner himself *is* likely to suffer future imprisonment.

St. Pierre was moot because the petitioner (a witness held in contempt and sentenced to five months' imprisonment) had failed to "apply to this Court for a stay" of the federal-court order imposing imprisonment. 319 U. S., at 42–43. And, like the witness in *St. Pierre,* Turner did not seek a stay of the contempt order requiring his imprisonment. But this case, unlike *St. Pierre,* arises out of a state-court proceeding. And respondents give us no reason to believe that we would have (or that we could have) granted a timely request for a stay had one been made. Cf. 28 U. S. C. §1257 (granting this Court jurisdiction to review *final* state-court judgments). In *Sibron*, we rejected a similar "mootness" argument for just that reason. 392 U. S., at 53, n. 13. And we find this case similar in this respect to *Sibron,* not to *St. Pierre*.

III

A

We must decide whether the Due Process Clause grants an indigent defendant, such as Turner, a right to state-appointed counsel at a civil contempt proceeding, which may lead to his incarceration. This Court's precedents

provide no definitive answer to that question. This Court has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a *criminal* case. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). And we have held that this same rule applies to *criminal contempt* proceedings (other than summary proceedings). *United States* v. *Dixon*, 509 U. S. 688, 696 (1993); *Cooke* v. *United States*, 267 U. S. 517, 537 (1925).

But the Sixth Amendment does not govern civil cases. Civil contempt differs from criminal contempt in that it seeks only to "coerc[e] the defendant to do" what a court had previously ordered him to do. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 442 (1911). A court may not impose punishment "in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Hicks* v. *Feiock*, 485 U. S. 624, 638, n. 9 (1988). And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free. *Id.*, at 633 (he "carr[ies] the keys of [his] prison in [his] own pockets" (internal quotation marks omitted)).

Consequently, the Court has made clear (in a case not involving the right to counsel) that, where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case. *Id.*, at 637–641 (State may place the burden of proving inability to pay on the defendant).

This Court has decided only a handful of cases that more directly concern a right to counsel in civil matters. And the application of those decisions to the present case is not clear. On the one hand, the Court has held that the Fourteenth Amendment requires the State to pay for representation by counsel in a *civil* "juvenile delinquency" proceeding (which could lead to incarceration). *In re Gault*, 387 U. S. 1, 35–42 (1967). Moreover, in *Vitek* v.

Jones, 445 U. S. 480, 496–497 (1980), a plurality of four Members of this Court would have held that the Fourteenth Amendment requires representation by counsel in a proceeding to transfer a prison inmate to a state hospital for the mentally ill. Further, in *Lassiter* v. *Department of Social Servs. of Durham Cty.*, 452 U. S. 18 (1981), a case that focused upon civil proceedings leading to loss of parental rights, the Court wrote that the

> "pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.*, at 25.

And the Court then drew from these precedents "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.*, at 26–27.

On the other hand, the Court has held that a criminal offender facing revocation of probation and imprisonment does *not* ordinarily have a right to counsel at a probation revocation hearing. *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973); see also *Middendorf* v. *Henry*, 425 U. S. 25 (1976) (no due process right to counsel in summary court-martial proceedings). And, at the same time, *Gault, Vitek,* and *Lassiter* are readily distinguishable. The civil juvenile delinquency proceeding at issue in *Gault* was "little different" from, and "comparable in seriousness" to, a criminal prosecution. 387 U. S., at 28, 36. In *Vitek,* the controlling opinion found *no* right to counsel. 445 U. S., at 499–500 (Powell, J., concurring in part) (assistance of mental health professionals sufficient). And the Court's statements in *Lassiter* constitute part of its rationale for *denying* a right to counsel in that case. We believe those statements are best read as pointing out that the Court previously had found a right to counsel "*only*" in cases

involving incarceration, not that a right to counsel exists in *all* such cases (a position that would have been difficult to reconcile with *Gagnon*).

B

Civil contempt proceedings in child support cases constitute one part of a highly complex system designed to assure a noncustodial parent's regular payment of funds typically necessary for the support of his children. Often the family receives welfare support from a state-administered federal program, and the State then seeks reimbursement from the noncustodial parent. See 42 U. S. C. §§608(a)(3) (2006 ed., Supp. III), 656(a)(1) (2006 ed.); S. C. Code Ann. §§43–5–65(a)(1), (2) (2010 Cum. Supp.). Other times the custodial parent (often the mother, but sometimes the father, a grandparent, or another person with custody) does not receive government benefits and is entitled to receive the support payments herself.

The Federal Government has created an elaborate procedural mechanism designed to help both the government and custodial parents to secure the payments to which they are entitled. See generally *Blessing* v. *Freestone*, 520 U. S. 329, 333 (1997) (describing the "interlocking set of cooperative federal-state welfare programs" as they relate to child support enforcement); 45 CFR pt. 303 (2010) (prescribing standards for state child support agencies). These systems often rely upon wage withholding, expedited procedures for modifying and enforcing child support orders, and automated data processing. 42 U. S. C. §§666(a), (b), 654(24). But sometimes States will use contempt orders to ensure that the custodial parent receives support payments or the government receives reimbursement. Although some experts have criticized this last-mentioned procedure, and the Federal Government believes that "the routine use of contempt for non-

payment of child support is likely to be an ineffective strategy," the Government also tells us that "coercive enforcement remedies, such as contempt, have a role to play." Brief for United States as *Amicus Curiae* 21–22, and n. 8 (citing Dept. of Health and Human Services, National Child Support Enforcement, Strategic Plan: FY 2005–2009, pp. 2, 10). South Carolina, which relies heavily on contempt proceedings, agrees that they are an important tool.

We here consider an indigent's right to paid counsel at such a contempt proceeding. It is a civil proceeding. And we consequently determine the "specific dictates of due process" by examining the "distinct factors" that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair. *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976) (considering fairness of an administrative proceeding). As relevant here those factors include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]." *Ibid.* See also *Lassiter*, 452 U. S., at 27–31 (applying the *Mathews* framework).

The "private interest that will be affected" argues strongly for the right to counsel that Turner advocates. That interest consists of an indigent defendant's loss of personal liberty through imprisonment. The interest in securing that freedom, the freedom "from bodily restraint," lies "at the core of the liberty protected by the Due Process Clause." *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992). And we have made clear that its threatened loss through legal proceedings demands "due process protection." *Addington* v. *Texas*, 441 U. S. 418, 425 (1979).

Given the importance of the interest at stake, it is obviously important to assure accurate decisionmaking in respect to the key "ability to pay" question. Moreover, the fact that ability to comply marks a dividing line between civil and criminal contempt, *Hicks*, 485 U. S., at 635, n. 7, reinforces the need for accuracy. That is because an incorrect decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding. See, *e.g.*, *Dixon*, 509 U. S., at 696 (proof beyond a reasonable doubt, protection from double jeopardy); *Codispoti* v. *Pennsylvania*, 418 U. S. 506, 512–513, 517 (1974) (jury trial where the result is more than six months' imprisonment). And since 70% of child support arrears nationwide are owed by parents with either no reported income or income of $10,000 per year or less, the issue of ability to pay may arise fairly often. See E. Sorensen, L. Sousa, & S. Schaner, Assessing Child Support Arrears in Nine Large States and the Nation 22 (2007) (prepared by The Urban Institute), online at http://aspe.hhs.gov/hsp/07/assessing-CS-debt/report.pdf (as visited June 16, 2011, and available in Clerk of Court's case file); *id.*, at 23 ("research suggests that many obligors who do not have reported quarterly wages have relatively limited resources"); Patterson, Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison, 18 Cornell J. L. & Pub. Pol'y 95, 117 (2008). See also, *e.g.*, *McBride* v. *McBride*, 334 N. C. 124, 131, n. 4, 431 S. E. 2d 14, 19, n. 4 (1993) (surveying North Carolina contempt orders and finding that the "failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent").

On the other hand, the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened. See *Gagnon*, 411 U. S.

778. And in determining whether the Clause requires a right to counsel here, we must take account of opposing interests, as well as consider the probable value of "additional or substitute procedural safeguards." *Mathews*, *supra*, at 335.

Doing so, we find three related considerations that, when taken together, argue strongly against the Due Process Clause requiring the State to provide indigents with counsel in every proceeding of the kind before us.

First, the critical question likely at issue in these cases concerns, as we have said, the defendant's ability to pay. That question is often closely related to the question of the defendant's indigence. But when the right procedures are in place, indigence can be a question that in many—but not all—cases is sufficiently straightforward to warrant determination *prior* to providing a defendant with counsel, even in a criminal case. Federal law, for example, requires a criminal defendant to provide information showing that he is indigent, and therefore entitled to state-funded counsel, *before* he can receive that assistance. See 18 U. S. C. §3006A(b).

Second, sometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un*represented by counsel. See Dept. of Health and Human Services, Office of Child Support Enforcement, Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State 5, 6 (2004) (51% of nationwide arrears, and 58% in South Carolina, are not owed to the government). The custodial parent, perhaps a woman with custody of one or more children, may be relatively poor, unemployed, and unable to afford counsel. Yet she may have encouraged the court to enforce its order through contempt. Cf. Tr. Contempt Proceedings (Sept. 14, 2005), App. 44a–45a (Rogers asks court, in light of pattern of nonpayment, to confine Turner). She may be able to provide the court

with significant information. Cf. *id.*, at 41a–43a (Rogers describes where Turner lived and worked). And the proceeding is ultimately for her benefit.

A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would "alter significantly the nature of the proceeding." *Gagnon*, *supra*, at 787. Doing so could mean a degree of formality or delay that would unduly slow payment to those immediately in need. And, perhaps more important for present purposes, doing so could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive. The needs of such families play an important role in our analysis. Cf. *post*, at 10–12 (opinion of THOMAS, J.).

Third, as the Solicitor General points out, there is available a set of "substitute procedural safeguards," *Mathews*, 424 U. S., at 335, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. See Tr. of Oral Arg. 26–27; Brief for United States as *Amicus Curiae* 23–25. In presenting these alternatives, the Government draws upon considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders. See *supra*, at 10. It does not claim that they are the only possible alternatives, and this Court's cases suggest, for

example, that sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient. Cf. *Vitek*, 445 U. S., at 499–500 (Powell, J., concurring in part) (provision of mental health professional). But the Government does claim that these alternatives can assure the "fundamental fairness" of the proceeding even where the State does not pay for counsel for an indigent defendant.

While recognizing the strength of Turner's arguments, we ultimately believe that the three considerations we have just discussed must carry the day. In our view, a categorical right to counsel in proceedings of the kind before us would carry with it disadvantages (in the form of unfairness and delay) that, in terms of ultimate fairness, would deprive it of significant superiority over the alternatives that we have mentioned. We consequently hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).

We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody. See *supra*, at 10. Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative. Cf. *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938) ("[T]he average defendant does not have

the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel*" (emphasis added)). And this kind of proceeding is not before us. Neither do we address what due process requires in an unusually complex case where a defendant "can fairly be represented only by a trained advocate." *Gagnon*, 411 U. S., at 788; see also Reply Brief for Petitioner 18–20 (not claiming that Turner's case is especially complex).

IV

The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. He did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. The court did not find that Turner was able to pay his arrearage, but instead left the relevant "finding" section of the contempt order blank. The court nonetheless found Turner in contempt and ordered him incarcerated. Under these circumstances Turner's incarceration violated the Due Process Clause.

We vacate the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 10–10

MICHAEL D. TURNER, PETITIONER *v.* REBECCA L. ROGERS ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

[June 20, 2011]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom THE CHIEF JUSTICE and JUSTICE ALITO join as to Parts I–B and II, dissenting.

The Due Process Clause of the Fourteenth Amendment does not provide a right to appointed counsel for indigent defendants facing incarceration in civil contempt proceedings. Therefore, I would affirm. Although the Court agrees that appointed counsel was not required in this case, it nevertheless vacates the judgment of the South Carolina Supreme Court on a different ground, which the parties have never raised. Solely at the invitation of the United States as *amicus curiae*, the majority decides that Turner's contempt proceeding violated due process because it did not include "alternative procedural safeguards." *Ante*, at 15. Consistent with this Court's longstanding practice, I would not reach that question.[1]

I

The only question raised in this case is whether the Due Process Clause of the Fourteenth Amendment creates a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. It does not.

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[1] I agree with the Court that this case is not moot because the challenged action is likely to recur yet is so brief that it otherwise evades our review. *Ante*, at 5–7.

A

Under an original understanding of the Constitution, there is no basis for concluding that the guarantee of due process secures a right to appointed counsel in civil contempt proceedings. It certainly does not do so to the extent that the Due Process Clause requires "'that our Government must proceed according to the "law of the land"—that is, according to written constitutional and statutory provisions.'" *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 589 (2004) (THOMAS, J., dissenting) (quoting *In re Winship*, 397 U. S. 358, 382 (1970) (Black, J., dissenting)). No one contends that South Carolina law entitles Turner to appointed counsel. Nor does any federal statute or constitutional provision so provide. Although the Sixth Amendment secures a right to "the Assistance of Counsel," it does not apply here because civil contempt proceedings are not "criminal prosecutions." U. S. Const., Amdt. 6; see *ante*, at 8. Moreover, as originally understood, the Sixth Amendment guaranteed only the "right to employ counsel, or to use volunteered services of counsel"; it did not require the court to appoint counsel in any circumstance. *Padilla* v. *Kentucky*, 559 U. S. ___, ___ (2010) (SCALIA, J., dissenting) (slip op., at 2); see also *United States* v. *Van Duzee*, 140 U. S. 169, 173 (1891); W. Beaney, The Right to Counsel in American Courts 21–22, 28–29 (1955); F. Heller, The Sixth Amendment to the Constitution of the United States 110 (1951).

Appointed counsel is also not required in civil contempt proceedings under a somewhat broader reading of the Due Process Clause, which takes it to approve "'[a] process of law, which is not otherwise forbidden, . . . [that] can show the sanction of settled usage.'" *Weiss* v. *United States*, 510 U. S. 163, 197 (1994) (SCALIA, J., concurring in part and concurring in judgment) (quoting *Hurtado* v. *California*, 110 U. S. 516, 528 (1884)). Despite a long history of courts exercising contempt authority, Turner has not identified

any evidence that courts appointed counsel in those proceedings. See *Mine Workers* v. *Bagwell*, 512 U. S. 821, 831 (1994) (describing courts' traditional assumption of "inherent contempt authority"); see also 4 W. Blackstone, Commentaries on the Laws of England 280–285 (1769) (describing the "summary proceedings" used to adjudicate contempt). Indeed, Turner concedes that contempt proceedings without appointed counsel have the blessing of history. See Tr. of Oral Arg. 15–16 (admitting that there is no historical support for Turner's rule); see also Brief for Respondents 47–48.

B

Even under the Court's modern interpretation of the Constitution, the Due Process Clause does not provide a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. Such a reading would render the Sixth Amendment right to counsel—as it is currently understood—superfluous. Moreover, it appears that even cases applying the Court's modern interpretation of due process have not understood it to categorically require appointed counsel in circumstances outside those otherwise covered by the Sixth Amendment.

1

Under the Court's current jurisprudence, the Sixth Amendment entitles indigent defendants to appointed counsel in felony cases and other criminal cases resulting in a sentence of imprisonment. See *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963); *Argersinger* v. *Hamlin*, 407 U. S. 25, 37 (1972); *Scott* v. *Illinois*, 440 U. S. 367, 373–374 (1979); *Alabama* v. *Shelton*, 535 U. S. 654, 662 (2002). Turner concedes that, even under these cases, the Sixth Amendment does not entitle him to appointed counsel. See Reply Brief for Petitioner 12 (acknowledging that

"civil contempt is not a 'criminal prosecution' within the meaning of the Sixth Amendment"). He argues instead that "the right to the assistance of counsel for persons facing incarceration arises not only from the Sixth Amendment, but also from the requirement of fundamental fairness under the Due Process Clause of the Fourteenth Amendment." Brief for Petitioner 28. In his view, this Court has relied on due process to "rejec[t] formalistic distinctions between criminal and civil proceedings, instead concluding that incarceration or other confinement triggers the right to counsel." *Id.,* at 33.

But if the Due Process Clause created a right to appointed counsel in all proceedings with the potential for detention, then the Sixth Amendment right to appointed counsel would be unnecessary. Under Turner's theory, every instance in which the Sixth Amendment guarantees a right to appointed counsel is covered also by the Due Process Clause. The Sixth Amendment, however, is the only constitutional provision that even mentions the assistance of counsel; the Due Process Clause says nothing about counsel. Ordinarily, we do not read a general provision to render a specific one superfluous. Cf. *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general"). The fact that one constitutional provision expressly provides a right to appointed counsel in specific circumstances indicates that the Constitution does not also *sub silentio* provide that right far more broadly in another, more general, provision. Cf. *Albright* v. *Oliver*, 510 U. S. 266, 273 (1994) (plurality opinion) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims" (internal quotation marks omitted)); *id.,* at 281 (KENNEDY,

J., concurring in judgment) ("I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process"); *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. ___, ___ (2010) (opinion of SCALIA, J.) (slip op., at 16) (applying *Albright* to the Takings Clause).

2

Moreover, contrary to Turner's assertions, the holdings in this Court's due process decisions regarding the right to counsel are actually quite narrow. The Court has never found in the Due Process Clause a categorical right to appointed counsel outside of criminal prosecutions or proceedings "functionally akin to a criminal trial." *Gagnon* v. *Scarpelli*, 411 U. S. 778, 789, n. 12 (1973) (discussing *In re Gault*, 387 U. S. 1 (1967)). This is consistent with the conclusion that the Due Process Clause does not expand the right to counsel beyond the boundaries set by the Sixth Amendment.

After countless factors weighed, mores evaluated, and practices surveyed, the Court has not determined that due process principles of fundamental fairness categorically require counsel in any context outside criminal proceedings. See, *e.g.*, *Lassiter* v. *Department of Social Servs. of Durham Cty.*, 452 U. S. 18, 31–32 (1981); *Wolff* v. *McDonnell*, 418 U. S. 539, 569–570 (1974); see also *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 307–308, 320–326 (1985); *Goss* v. *Lopez*, 419 U. S. 565, 583 (1975). Even when the defendant's liberty is at stake, the Court has not concluded that fundamental fairness requires that counsel always be appointed if the proceeding is not criminal.[2] See, *e.g.*, *Scarpelli*, *supra,* at 790 (proba-

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[2] "Criminal contempt is a crime in the ordinary sense"; therefore,

tion revocation); *Middendorf* v. *Henry*, 425 U. S. 25, 48 (1976) (summary court-martial); *Parham* v. *J. R.*, 442 U. S. 584, 599–600, 606–607, 610, n. 18 (1979) (commitment of minor to mental hospital); *Vitek* v. *Jones*, 445 U. S. 480, 497–500 (1980) (Powell, J., controlling opinion concurring in part) (transfer of prisoner to mental hospital). Indeed, the only circumstance in which the Court has found that due process categorically requires appointed counsel is juvenile delinquency proceedings, which the Court has described as "functionally akin to a criminal trial." *Scarpelli*, *supra*, at 789, n. 12 (discussing *In re Gault*, *supra*); see *ante*, at 9.

Despite language in its opinions that suggests it could find otherwise, the Court's consistent judgment has been that fundamental fairness does not categorically require appointed counsel in any context outside of criminal proceedings. The majority is correct, therefore, that the Court's precedent does not require appointed counsel in the absence of a deprivation of liberty. *Id.*, at 9–10. But a more complete description of this Court's cases is that even when liberty is at stake, the Court has required appointed counsel in a category of cases only where it would have found the Sixth Amendment required it—in criminal prosecutions.

II

The majority agrees that the Constitution does not entitle Turner to appointed counsel. But at the invitation of the Federal Government as *amicus curiae*, the majority holds that his contempt hearing violated the Due Process Clause for an entirely different reason, which the parties

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criminal contemners are entitled to "the protections that the Constitution requires of such criminal proceedings," including the right to counsel. *Mine Workers* v. *Bagwell*, 512 U. S. 821, 826 (1994) (citing *Cooke* v. *United States*, 267 U. S. 517, 537 (1925); internal quotation marks omitted).

have never raised: The family court's procedures "were in adequate to ensure an accurate determination of [Turner's] present ability to pay." Brief for United States as *Amicus Curiae* 19 (capitalization and boldface type deleted); see *ante*, at 14–16. I would not reach this issue.

There are good reasons not to consider new issues raised for the first and only time in an *amicus* brief. As here, the new issue may be outside the question presented.[3] See Pet. for Cert. i ("Whether . . . an indigent defendant has no constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration"); see also *ante*, at 4–5 (identifying the conflict among lower courts as regarding "the right to counsel"). As here, the new issue may not have been addressed by, or even presented to, the state court. See 387 S. C. 142, 144, 691 S. E. 2d 470, 472 (2010) (describing the only question as whether "the Sixth and Fourteenth Amendments of the United States Constitution guarantee [Turner], as an indigent defendant in family court, the right to appointed counsel"). As here, the parties may not have preserved the issue, leaving the record undeveloped. See Tr. of Oral Arg. 49, 43 ("The record is insufficient" regarding alternative procedures because "[t]hey were raised for the very first time at the merits stage here; so, there's been no development"); Brief for Respondents 63. As here, the parties may not address the new issue in this Court, leaving its boundaries untested. See Brief for Petitioner 27, n. 15 (reiterating that "[t]he particular constitutional violation

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[3] Indeed, the new question is not one that would even merit certiorari. See this Court's Rule 10. Because the family court received a form detailing Turner's finances and the judge could not hold Turner in contempt without concluding that he could pay, the due process question that the majority answers reduces to a factbound assessment of the family court's performance. See *ante*, at 14–16; Reply Brief for Petitioner 14–15 ("[I]n advance of his hearing, Turner supplied to the family court just such a form").

that Turner challenges in this case is the failure of the family court to *appoint* counsel"); Brief for Respondents 62 (declining to address the Government's argument because it is not "properly before this Court" (capitalization and boldface type deleted). Finally, as here, a party may even oppose the position taken by its allegedly supportive *amicus*. See Tr. of Oral Arg. 7–12, 14–15 (Turner's counsel rejecting the Government's argument that any procedures short of a categorical right to appointed counsel could satisfy due process); Reply Brief for Petitioner 14–15.

Accordingly, it is the wise and settled general practice of this Court not to consider an issue in the first instance, much less one raised only by an *amicus*. See this Court's Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court"); *Adarand Constructors, Inc.* v. *Mineta*, 534 U. S. 103, 110 (2001) *(per curiam)* ("[T]his is a court of final review and not first view" (internal quotation marks omitted)); *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981) (declining to consider an *amicus*' argument "since it was not raised by either of the parties here or below" and was outside the grant of certiorari). This is doubly true when we review the decision of a state court and triply so when the new issue is a constitutional matter. See *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940) ("[I]t is only in exceptional cases, and then only in cases coming from the federal courts, that [this Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below"); *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969) ("[T]he Court will not decide federal constitutional issues raised here for the first time on review of state court decisions").

The majority errs in moving beyond the question that was litigated below, decided by the state courts, petitioned to this Court, and argued by the parties here, to resolve a

question raised exclusively in the Federal Government's *amicus* brief. In some cases, the Court properly affirms a lower court's judgment on an alternative ground or accepts the persuasive argument of an *amicus* on a question that the parties have raised. See, *e.g.*, *United States* v. *Tinklenberg*, 563 U. S. ___, ___ (2011) (slip op., at 13). But it transforms a case entirely to vacate a state court's judgment based on an alternative constitutional ground advanced only by an *amicus* and outside the question on which the petitioner sought (and this Court granted) review.

It should come as no surprise that the majority confines its analysis of the Federal Government's new issue to acknowledging the Government's "considerable experience" in the field of child support enforcement and then adopting the Government's suggestions *in toto*. See *ante*, at 14–15. Perhaps if the issue had been preserved and briefed by the parties, the majority would have had alternative solutions or procedures to consider. See Tr. of Oral Arg. 43 ("[T]here's been no development. We don't know what other States are doing, the range of options out there"). The Federal Government's interest in States' child support enforcement efforts may give the Government a valuable perspective,[4] but it does not overcome the strong reasons behind the Court's practice of not considering new issues, raised and addressed only by an *amicus*, for the first time in this Court.

III

For the reasons explained in the previous two sections, I would not engage in the majority's balancing analysis. But there is yet another reason not to undertake the

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[4] See, *e.g.*, Deadbeat Parents Punishment Act of 1998, 112 Stat. 618; Child Support Recovery Act of 1992, 106 Stat. 3403; Child Support Enforcement Amendments of 1984, 98 Stat. 1305; Social Services Amendments of 1974, 88 Stat. 2337.

Mathews v. *Eldridge* balancing test here. 424 U. S. 319 (1976). That test weighs an individual's interest against that of the Government. *Id.*, at 335 (identifying the opposing interest as "the Government's interest"); *Lassiter*, 452 U. S., at 27 (same). It does not account for the interests of the child and custodial parent, who is usually the child's mother. But their interests are the very reason for the child support obligation and the civil contempt proceedings that enforce it.

When fathers fail in their duty to pay child support, children suffer. See Cancian, Meyer, & Han, Child Support: Responsible Fatherhood and the Quid Pro Quo, 635 Annals Am. Acad. Pol. & Soc. Sci. 140, 153 (2011) (finding that child support plays an important role in reducing child poverty in single-parent homes); cf. Sorensen & Zibman, Getting to Know Poor Fathers Who Do Not Pay Child Support, 75 Soc. Serv. Rev. 420, 423 (2001) (finding that children whose fathers reside apart from them are 54 percent more likely to live in poverty than their fathers). Nonpayment or inadequate payment can press children and mothers into poverty. M. Garrison, The Goals and Limits of Child Support Policy, in Child Support: The Next Frontier 16 (J. Oldham & M. Melli eds. 2000); see also Dept. of Commerce, Census Bureau, T. Grall, Custodial Mothers and Fathers and Their Child Support: 2007, pp. 4–5 (2009) (hereinafter Custodial Mothers and Fathers) (reporting that 27 percent of custodial mothers lived in poverty in 2007).

The interests of children and mothers who depend on child support are notoriously difficult to protect. See, *e.g.*, *Hicks* v. *Feiock*, 485 U. S. 624, 644 (1988) (O'Connor, J., dissenting) ("The failure of enforcement efforts in this area has become a national scandal" (internal quotation marks omitted)). Less than half of all custodial parents receive the full amount of child support ordered; 24 percent of those owed support receive nothing at all. Custodial

Mothers and Fathers 7; see also Dept. of Health and Human Services, Office of Child Support Enforcement, FY 2008 Annual Report to Congress, App. III, Table 71 (showing national child support arrears of $105.5 billion in 2008). In South Carolina alone, more than 139,000 noncustodial parents defaulted on their child support obligations during 2008, and at year end parents owed $1.17 billion in total arrears. *Id.*, App. III, Tables 73 and 71.

That some fathers subject to a child support agreement report little or no income "does not mean they do not have the ability to pay any child support." Dept. of Health and Human Services, H. Sorensen, L. Sousa, & S. Schaner, Assessing Child Support Arrears in Nine Large States and the Nation 22 (2007) (prepared by The Urban Institute) (hereinafter Assessing Arrears). Rather, many "deadbeat dads"[5] "opt to work in the underground economy" to "shield their earnings from child support enforcement efforts." Mich. Sup. Ct., Task Force Report: The Underground Economy 10 (2010) (hereinafter Underground Economy). To avoid attempts to garnish their wages or otherwise enforce the support obligation, "deadbeats" quit their jobs, jump from job to job, become self-employed, work under the table, or engage in illegal activity.[6] See Waller & Plotnick, Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research, 20 J. Pol'y Analysis & Mgmt. 89, 104 (2001); Assessing Arrears 22–23.

Because of the difficulties in collecting payment through

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[5] See Deadbeat Parents Punishment Act of 1998, 112 Stat. 618 (referring to parents who "willfully fai[l] to pay a support obligation" as "[d]eadbeat [p]arents").

[6] In this case, Turner switched between eight different jobs in three years, which made wage withholding difficult. App. 12a, 18a, 24a, 47a, 53a, 136a–139a. Most recently, Turner sold drugs in 2009 and 2010 but paid not a penny in child support during those years. *Id.*, at 105a–111a; App. to Brief for Respondents 16a, 21a–24a, 29a–32a, 37a–54a.

traditional enforcement mechanisms, many States also use civil contempt proceedings to coerce "deadbeats" into paying what they owe. The States that use civil contempt with the threat of detention find it a "highly effective" tool for collecting child support when nothing else works. Compendium of Responses Collected by the U. S. Dept. of Health and Human Services Office of Child Support Enforcement (Dec. 28, 2010), reprinted in App. to Brief for Sen. DeMint et al. as *Amici Curiae* 7a; see *id.*, at 3a, 9a. For example, Virginia, which uses civil contempt as "a last resort," reports that in 2010 "deadbeats" paid approximately $13 million "either before a court hearing to avoid a contempt finding or after a court hearing to purge the contempt finding." *Id.*, at 13a–14a. Other States confirm that the mere threat of imprisonment is often quite effective because most contemners "will pay . . . rather than go to jail." *Id.*, at 4a; see also Underground Economy C–2 ("Many judges . . . report that the prospect of [detention] often causes obligors to discover previously undisclosed resources that they can use to make child support payments").

This case illustrates the point. After the family court imposed Turner's weekly support obligation in June 2003, he made no payments until the court held him in contempt three months later, whereupon he paid over $1,000 to avoid confinement. App. 17a–18a, 131a. Three more times, Turner refused to pay until the family court held him in contempt—then paid in short order. *Id.*, at 23a–25a, 31a–34a, 125a–126a, 129a–130a.

Although I think that the majority's analytical framework does not account for the interests that children and mothers have in effective and flexible methods to secure payment, I do not pass on the wisdom of the majority's preferred procedures. Nor do I address the wisdom of the State's decision to use certain methods of enforcement. Whether "deadbeat dads" should be threatened with in-

carceration is a policy judgment for state and federal lawmakers, as is the entire question of government involvement in the area of child support. See Elrod & Dale, Paradigm Shifts and Pendulum Swings in Child Custody, 42 Fam. L. Q. 381, 382 (2008) (observing the "federalization of many areas of family law" (internal quotation marks omitted)). This and other repercussions of the shift away from the nuclear family are ultimately the business of the policymaking branches. See, *e.g.*, D. Popenoe, Family in Decline in America, reprinted in War Over the Family 3, 4 (2005) (discussing "four major social trends" that emerged in the 1960's "to signal a widespread 'flight'" from the "nuclear family"); Krause, Child Support Reassessed, 24 Fam. L. Q. 1, 16 (1990) ("Easy-come, easy-go marriage and casual cohabitation and procreation are on a collision course with the economic and social needs of children"); M. Boumil & J. Friedman, Deadbeat Dads 23–24 (1996) ("Many [children of deadbeat dads] are born out of wedlock . . . . Others have lost a parent to divorce at such a young age that they have little conscious memory of it").

* * *

I would affirm the judgment of the South Carolina Supreme Court because the Due Process Clause does not provide a right to appointed counsel in civil contempt hearings that may lead to incarceration. As that is the only issue properly before the Court, I respectfully dissent.

Post-9/11 Veterans: Welcoming Them Home as Colleagues and Clients

PATRICIA E. ROBERTS*

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I. INTRODUCTION

The almost 2.7 million veterans who have deployed to Iraq, Afghanistan, and other combat zones are returning to our communities and to our classrooms.[1] These veterans face multiple challenges in reintegrating with their families and communities, from the impact of disabilities and moral injuries sustained during war and the

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1. Phillip Carter, *Foreword* to OLIVER GOULD ET AL., THE MISSION CONTINUES: A CASE STUDY OF THE WELL AFTER SERVICE MODEL, VOICES FROM THE FIELD 5 (2014), *available at* http://www.cnas.org/sites/de-fault/files/publications-pdf/CNAS_WellAfterServiceCaseStudy_VoicesFromTheField_updated.pdf.

demands of their rehabilitation, to finding appropriate training opportunities and employment, to addressing their unmet legal needs. They are returning to a grateful nation, but one hardly impacted on a day-to-day basis by the sacrifices being made by the approximately 1% of our population who serve.[2] It is incumbent on us as a society to assist veterans in their return to civilian life, to embrace them in our communities, to seek to understand and appreciate their sacrifices, and to aid them in their continued struggles. They are our heroes, and they deserve nothing less.

With the increased number of veterans taking advantage of the Post-9/11 GI Bill and the expansion of the Yellow Ribbon Program, educators will see more veterans in their classrooms. Law schools are likely to enroll an increased number of veterans, due to the justice-oriented mission that will resonate with veterans who voluntarily chose a life of duty, honor, and country, and the need for law schools to broaden their applicant pool in a time of shrinking enrollments. In addition to welcoming veterans onto our campuses and into our classrooms as colleagues, law schools and their graduates will also welcome veterans as clients. Whether law schools encounter service members and veterans through the ever-increasing number of law school clinics and pro bono programs devoted to them, or law school graduates encounter those who served when they are in practice, law students and lawyers will need to understand the legal, psychological, and medical needs of this burgeoning client population. Law schools should prepare their faculty, staff, and students to be culturally competent when it comes to our veterans, so that they can effectively support them on campus as colleagues, and in the community as clients.

Part II of this Article generally discusses our post-9/11 veterans, the Post-9/11 GI Bill and post-9/11 veterans as students. Part III discusses the importance of cultural competence, as veterans have a distinct and unique subculture. An understanding of this subculture can help relations between civilians and veterans, aiding integration of veterans onto our campuses and increasing the effective

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2. ELLEN SCHELL, BATTERED WOMEN'S JUSTICE PROJECT, MILITARY & VETERAN CULTURAL COMPETENCE FOR ATTORNEYS & ADVOCATES: WHY YOU NEED TO KNOW 5 (Apr. 25, 2012), *available at* http://www.bwjp.org/files/bwjp/files/Military_and_Veteran_Cultural_Competence_for_Attorneys_and_Advocates.pdf (containing PowerPoint slides from a webinar put on by Ellen Schell).

representation of them as clients. Part IV delves into the characteristics of military and veteran culture. Part V discusses why student veterans are at risk and suggests how to meet the needs of student veterans, examining the U.S. Department of Veterans Affairs' "8 Keys to Veterans' Success." Part VI identifies some of the legal needs likely to impact veteran clients, including disability claims, educational challenges, employment obstacles, and health benefits. Part VII details how lawyers and law schools can aid veterans' legal needs, and part VIII goes into some of the unique aspects of working with veterans, both as colleagues and clients. The article concludes with a reminder that law schools and the lawyers they train must be prepared to serve both the student veteran population and veterans in need of legal assistance; our civilian communities will be richer because of our veteran colleagues and clients.

II. OUR POST-9/11 VETERANS

An all-volunteer force currently protects our nation. Unlike the drafts of the past, our current service members choose to serve, making this sacrifice for their country under a sense of duty and honor rather than requirement. There are currently nearly 1.4 million active duty military personnel in the United States and 1.3 million in the National Guard and Reserves.[3] The 84% male and 16% female service members currently serving constitute less than 1% of our U.S. population.[4] More than half of this brave force is married, and almost half have children; their average age is 28 years old.[5] Even when considering the family members who support our all-volunteer force, it is still a mere 5% of the population directly impacted by our current conflicts that are making incalculable sacrifices for the entire nation.[6]

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3. OFFICE OF THE DEPUTY ASST. SEC. DEF., U.S. DEP'T OF DEF., 2013 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 3 (2013), *available at* http://www.militaryonesource.mil/12038/MOS/Reports/2013-Demographics-Report.pdf.

4. *Id.* at 6; Schell, *supra* note 2, at 5.

5. 2013 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY *supra* note 3, at 8; Schell, *supra* note 2, at 6.

6. Howard Schultz & Rajiv Chandrasekaran, *Want to Help Veterans? Stop Pitying Them*, WASH. POST (Oct. 31, 2014), http://www.washington

Our current service members face multiple deployments in what is now our longest war in history.[7] After September 11, 2001, almost 2.7 million men and women deployed to Iraq, Afghanistan, and other war zones, constituting the highest number of combat veterans since the war in Vietnam.[8] More than one-third of all service members deployed were deployed more than once; as of 2012, nearly 37,000 Americans deployed more than five times, and 400,000 service members completed three or more deployments.[9]

More than 1.5 million post-9/11 veterans have re-entered civilian life, and experts predict another 1 million will return to the civilian community over the next several years.[10] The reintegration to civilian life for post-9/11 veterans is often plagued with challenges.

> [Forty-four percent] of post-9/11 veterans say their readjustment to civilian life was difficult. By contrast, just 25% of veterans who served in earlier eras say the same. About half (48%) of all post-9/11 veterans say they have experienced strains in family relations since leaving the military, and 47% say they have had frequent outbursts of anger.[11]

Complicating reintegration for veterans is the increasing disconnect between veterans and the civilian population on whose behalf they serve. As then-Secretary of Defense Robert M. Gates told a group of students at Duke University, although veterans from Iraq and Afghanistan were embraced when they came home, "for most

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post.com/opinions/want-to-help-veterans-stop-pitying-them/2014/10/31/1885e0-88-5eb9-11e4-9f3a-7e28799e0549_story.html.

7. Rajiv Chandrasekaran, *After the Wars: A Legacy of Pain and Pride*, WASH. POST (Mar. 29, 2014), http://www.washingtonpost.com/s-f/national/2014/03/29/a-legacy-of-pride-and-pain/.

8. OLIVER GOULD ET AL., *supra* note 1, at 5.

9. Chris Adams, *Millions Went to War in Iraq, Afghanistan, Leaving Many with Lifelong Scars*, MCCLATCHY DC (Mar. 14, 2013), http://www.mcclatchydc.com/2013/03/14/185880/millions-went-to-war-in-iraq-afghanistan.html.

10. Schultz & Chandrasekaran, *supra* note 6.

11. PAUL TAYLOR ET AL., PEW RESEARCH CENTER, THE MILITARY-CIVILIAN GAP: WAR AND SACRIFICE IN THE POST-9/11 ERA 1 (Oct. 5, 2011), *available at* http://www.pewsocialtrends.org/files/2011/10/veterans-report.pdf.

Americans the wars remain an abstraction—a distant and unpleasant series of news items that do not affect them personally."[12] He went on to say that "in the absence of a draft, for a growing number of Americans, service in the military, no matter how laudable, has become something for other people to do."[13] Veterans made up 13.7% of the population in 1970, but currently only make up around 7%.[14] According to Dr. J. Michael Haynie, Vice Chancellor of Syracuse University and former Air Force officer,[15] "the vast number of Americans don't have that shared experience with that small minority who have served, particularly . . . during a time of war . . . . It creates a social and cultural divide . . . ."[16]

Many of our service members and veterans are in crisis, as evidenced by the staggering suicide rate in the military, which rose by more than 80% between 2002 and 2009—and in 2012, more service members took their own lives than were lost in combat.[17] The suicide rate for male veterans age thirty and younger jumped another 44% between 2009 and 2011, and military suicides since the start of the current conflicts in Iraq and Afghanistan passed 1,000 in 2013.[18] We must seek to understand our veterans and proactively support their reintegration if we are to stop this tragic trajectory. Given that many veterans are returning to higher education or have unmet legal needs, or both, law school faculty, staff, and students, as well as lawyers, are likely to encounter an increasing number of veterans as

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12. Elisabeth Bumiller, *Gates Fears Wider Gap Between Country and Military*, N.Y. TIMES (Sept. 29, 2010), http://www.nytimes.com/2010/09/30/us/30military.html.

13. *Id.*

14. Clifford Davis, *Vets Suffer Growing Disconnect with Public; Experts Say Gap Needs to Be Narrowed*, JACKSONVILLE.COM (Nov. 10, 2014, 7:02 PM), http://jacksonville.com/news/2014-11-10/story/vets-suffer-growing-disconnect-public-experts-say-gap-needs-be-narrowed.

15. Dr. Haynie also serves as Executive Director of Syracuse University's Institute for Veterans & Military Families, which he founded, and as the Barnes Professor of Entrepreneurship at the Syracuse University Whitman School of Management. *About J. Michael Haynie, Ph.D.*, SYRACUSE U., http://vets.syr.edu/ivmf_people/mike-haynie/#h2TG6k4mDe5ydZdp.99 (last visited Apr.2, 2015).

16. Davis, *supra* note 14.

17. YOCHI DREAZEN, THE INVISIBLE FRONT: LOVE AND LOSS IN AN ERA OF ENDLESS WAR, at xiv (2014).

18. *Id.*

colleagues and as clients. Understanding military and veteran culture, their challenges in reintegration, and becoming more aware of symptoms to watch for that may indicate disabilities, learning challenges, or suicidal ideation will be critical to getting help for those veterans who are in crisis.

A. Post-9/11 GI Bill

Just as the 1944 Servicemen's Readjustment Act, referred to as the "GI Bill," provided access to college and vocational programs to millions of veterans after World War II,[19] the Post-9/11 GI Bill offers our current conflict veterans even more significant opportunities to pursue postsecondary education and training.[20] According to the U.S. Department of Veterans Affairs ("VA"), "[f]or approved programs, the Post-9/11 GI Bill provides up to 36 months of education benefits, generally payable for 15 years following [the veteran's] release from active duty."[21] The GI Bill includes a diverse list of training opportunities such as entrepreneurship training, flight training, undergraduate and graduate degrees, distance learning, vocational training, and licensing and certification reimbursement.[22]

The VA celebrated the 70th anniversary of the GI Bill in 2014.[23] "In fiscal [year] 2014, the VA provided more than $10.8 billion in Post-9/11 GI Bill benefits to service members, veterans,

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19. SUZANNE METTLER, SOLDIERS TO CITIZENS: THE GI BILL AND THE MAKING OF THE GREATEST GENERATION 6 (2005).

20. *See generally* VETERANS BENEFITS ADMIN., DEP'T OF VETERANS AFFAIRS, PAMPHLET 22-09-01, POST-9/11 GI BILL (2012), *available at* http://www.benefits.va.gov/gibill/docs/pamphlets/ch33_pamphlet.pdf (listing the benefits of the current Post-9/11 GI Bill to include tuition and fees and a monthly housing allowance).

21. *Post-9/11 GI Bill*, U.S. DEPT. VETERANS AFF., http://www.benefits.va.gov/gibill/post911_gibill.asp (last visited Apr. 2, 2015).

22. *Id.* The information provided on the VA's web page regarding Post-9/11 GI benefits notes that the benefits may be available to those who "have at least 90 days of aggregate active duty service after Sept. 10, 2001, and are still on active duty," who are "honorably discharged," and those who "were discharged with a service-connected disability after 30 days." *Id.*

23. *See* METTLER, *supra* note 19 (pointing out 1944 as the founding date of the GI Bill).

and their families."[24] As of December 1, 2014, "more than $47 billion has been paid to more than 1.3 million Post-9/11 GI Bill participants" since the bill's start in 2009.[25] It is estimated that the expenditures from the first ten years of Post-9/11 GI Bill benefits will reach $90 billion.[26] Former Secretary of Veterans Affairs General Eric Shinseki noted in a speech to veterans in 2011, "[t]he Post-9/11 GI Bill has every potential of transforming our country in globally significant ways. . . . As you pursue your degrees, you are preparing yourselves for leadership—of your communities and our country."[27] The Post-9/11 GI Bill benefits will not only aid veterans who take advantage of them, but may also help significantly reduce the anticipated national shortage of workers with postsecondary degrees by 2018.[28]

Post-9/11 GI benefits can be used, as noted earlier, in a variety of educational and skill training programs, and they are available for both undergraduate and graduate-level study.[29] One program of study that is likely to see an increase in veteran enrollment is law school, particularly given the tremendous decrease in applications to law schools among more traditional-aged students,[30] and the fact that the generous Post-9/11 GI Bill provides thirty-six months of ed-

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24. George W. Reilly, *Veterans Journal: After 2014 Woes, Veteran's Administration Headed in Right Direction for 2015*, PROVIDENCE J. (Jan. 11, 2015, 8:26 PM), http://www.providencejournal.com/news/veterans/20140111-after-2014-woes-va-headed-in-right-direction-for-2015.ece?template=printart.

25. *Id.*

26. Libby Sander, *With GI Bill's Billions at Stake, Colleges Compete to Lure Veterans*, CHRON. HIGHER EDUC. (Apr. 27, 2012), http://chronicle.com/article/With-GI-Bills-Billions-at/131723/.

27. CHARLOTTE CAHILL ET AL., COUNCIL FOR ADULT & EXPERIENTIAL LEARNING, INVESTING IN VETERANS: THE NEED FOR CAREER AND EDUCATION ADVISING 4 (2013), *available at* http://www.cael.org/pdfs/cael-investing-in-veterans-2013.

28. *Id.* at 5.

29. *Post–9/11 GI Bill*, *supra* note 21.

30. *See* James Langford, *Law School Enrollment Drop May Hit 5th Year, LSAT Data Hints*, LAWDRAGON CAMPUS (July 27, 2014, 1:05 PM), http://campus.lawdragon.com/2014/07/27/law-school-enrollment-drop-may-hit-5th-year-lsat-data-hints/ ("Declines in U.S. law school enrollment are poised to stretch into a fifth straight year after the number of people taking the Law School Admissions Test, a gauge of applicant interest, dropped during the first 2014-15 session.").

ucational support, the same duration as a traditional law degree curriculum.[31] In 2011, more than 920,000 veterans took part in VA educational programs, which is more than double the number who did in 2001, and although the department does not track veterans by those who chose law school, they did report that "about 8% of the most recent group used the benefits to attend graduate school."[32]

The legal academy is likely to see more veterans in the classroom as this new pool of potential applicants return home and leave active duty service, particularly in light of troop drawdown. Even the most elite law schools are waiving application fees and closing gaps in expenses between the Post-9/11 GI Bill and a veteran's actual cost. Some schools are pledging to cover half the remaining tuition and fees, with the other half covered by the VA[33] under a government-matching program called the Yellow Ribbon Program.[34] Given the justice-oriented mission that is likely shared among our volunteer service members, those pursuing graduate degrees using these generous educational benefits are likely to seriously consider law school as an option.

Pursuit of undergraduate and graduate degrees can aid veterans in their transition from military to civilian careers, helping to reduce their risk of unemployment. The unemployment rate for all post-9/11 veterans in 2013 was 9%; 24.3% of male veterans ages eighteen to twenty-four were unemployed; this figure is nearly 10% higher than the figure for their non-veteran peers.[35] While education is desirable to many veterans as a way to transition to a non-military

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31. U.S. DEP'T VETERAN AFFAIRS, SUMMARY OF VA EDUCATION BENEFITS 3 (2012), *available at* http://benefits.va.gov/BENEFITS/benefits-summary/SummaryofVAEducationBenefits.pdf.

32. Jennifer Smith, *Law Schools Step in to Help War Veterans*, WALL ST. J. (Apr. 1, 2013, 2:08 PM), http://www.wsj.com/articles/SB10001424127887323361804578390643512992844.

33. *Id.*

34. *Id.* Some degree-granting institutions elect to be part of the Yellow Ribbon Program which, for veterans at the 100% level of Post-9/11 GI Bill eligibility, "allows approved institutions of higher learning and the VA to partially or fully fund tuition and fee expense that exceed the established thresholds under the Post-9/11 GI Bill." *Post 9/11 GI Bill Yellow Ribbon FAQs*, U.S. DEP'T VETERAN AFF., http://www.benefits.va.gov/gibill/docs/factsheets/2012_Yellow_ Ribbon_Student_FAQs.pdf (last visited Apr. 3, 2015).

35. Economic News Release, Bureau of Labor Statistics, Employment Situation of Veterans Summary (Mar. 20, 2014).

career, and much more attainable because of the new GI Bill, it is also a huge culture shock for veterans to enter the unstructured world of higher education. "I felt like I was on another planet," reported Brian Hawthorne, a veteran of two tours in Iraq who enrolled at George Washington University as a 23-year-old junior.[36] He went on to say that it was jarring "going from an environment where people around you are dying every day and trying to kill you," to a campus full of people unconnected to the military or its service members in any way.[37]

Funding educational opportunities for veterans, without further assistance and assimilation to their new student status, can result in low retention and graduation rates. A 2010 report by Senator Tom Harkin considered 16 specific for-profit education companies and found attending students had an average dropout rate of 57% following their first year.[38] Unsuccessful efforts under the new GI Bill fosters increased frustration and delayed reintegration for veterans, as well as significant expense to the federal government that fails to achieve its goal of improving veteran transition to the civilian workforce. There is particular concern about the proliferation of for-profit institutions and programs that are catering to veterans who have the benefit of the Post-9/11 GI Bill.[39] This is because the cost of such programs is often higher than the benefits available from the GI Bill, which means extensive debt for the veterans,[40] whether they complete the program or not. In addition, the report found that between 2006 and 2010, the amount paid in combined education benefits from the Department of Defense and the VA to twenty for-

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36. Sandra G. Boodman & Kaiser Health News, *Veterans Find Their Transition from Combat to College Can Be Difficult*, WASH. POST (Nov. 28, 2011), http://www.washingtonpost.com/national/health-science/veterans-find-that-their-transition-from-combat-to-college-can-be-difficult/2011/10/20/gIQAugW54N_story.html.

37. *Id.*

38. TOM HARKIN, BENEFITTING WHOM? FOR-PROFIT EDUCATION COMPANIES AND THE GROWTH OF MILITARY EDUCATIONAL BENEFITS, S. Doc. No. 111-99850, at 12 (2010).

39. The University of San Diego viewed the problem as so significant that they created a veterans' legal clinic focused on problems created by for-profit institutions taking advantage of veterans. *See generally Veterans Legal Clinic: Defending Your GI Bill*, U. SAN DIEGO, http://www.sandiego.edu/veteransclinic/ (last visited Apr. 3, 2015).

40. HARKIN, *supra* note 38, at 12.

profit education companies increased by 683%, from $66.6 million in 2006 to a projected $521.2 million in 2010.[41] While the focus of this article is on those veterans who ultimately choose to attend law schools, and the support, services, and cultural competency necessary to maximize student veteran success in that setting, the strategies suggested could be transferable in a wide variety of educational settings, including for-profit institutions.

B. The Post-9/11 Student Veteran

The student veterans who will appear on our campuses and in our classrooms are "emotionally mature, goal-oriented, mission-driven, experienced leaders. . . . They are self-sufficient . . . [willing to] sacrifice for the greater good . . . and protective of those around them. They think globally and bypass most things trivial or trendy."[42] They are a highly diverse group that may only have in common their willingness to serve their country on a volunteer basis. They are men, women, spouses, parents, sons, daughters, single, married, non-traditional aged students, and they represent many cultures, religions, sexual orientations, nationalities, socioeconomic backgrounds, races and ethnicities. When they leave the military, they report "feeling not just disoriented, but deeply alienated from the rest of America; not just sad over the loss of friendships, but devastated over the loss of brothers and sisters; not just a temporary destabilizing of identity, but a complete identity crisis" that has been compared to the experiences of laid-off workers.[43] When they are thrust into a group of younger, less mature classmates who cannot understand or comprehend the experience of war, they feel even more isolated. The transition from a very "regimented life in the military" to "the looser atmosphere on campus can be jarring, even overwhelming," and it sometimes creates anger towards those students who are ignorant of the world and the impacts of military service on veterans.[44]

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41. *See id.* at 9.

42. Alison Lighthall, *Ten Things You Should Know About Today's Student Veteran*, NAT'L EDUC. ASS'N, http://www.nea.org/home/53407.htm (last visited Apr. 3, 2015).

43. *Id.*

44. Boodman, *supra* note 36.

One characteristic that appears to define the post-9/11 veterans is their commitment to service and their communities—a commitment that goes beyond their military service. Studies considering these veterans note that 92% consider serving their community important to them; 70%, while on active duty, still volunteered in their communities; and 95% want to serve wounded veterans.[45] Executive Director of the Bob Woodward Foundation, Anne Marie Dougherty, reports that "[e]ven when they take off the uniform, veterans want a sense of purpose and meaning."[46] Jake Wood, a Marine sniper who served in Afghanistan, underscored this idea saying, "war rarely leaves us . . . When I left the Marines, even while pursuing an MBA, I was deathly afraid of a life void of purpose."[47] Eric Greitens, a Navy SEAL veteran who founded an organization that helps provide veterans with nonprofit opportunities, explained, "[w]e want the legacy of this generation of veterans to be serving with courage when the country called on them to serve overseas and then, when they came back, making the country stronger through continued service here at home."[48] Higher education institutions should facilitate ways that student veterans can continue to serve others, either through degree and career advising for professions of service, for instance law school, or by providing extracurricular community service opportunities.

In addition to the problems associated with adapting to the less regimented lifestyle of higher education and the younger and inexperienced student body, many veterans utilizing the Post-9/11 GI Bill return from deployments with service-related injuries. Between 2001 and 2014, typically as a result of their being exposed to blast events that are frequent in the current conflicts, 230,000 service members and veterans were identified as suffering from mild traumatic brain injury ("TBI").[49] A Rand Corporation study estimated

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45. *American Sniper Shows Glimpse of Growing Trend Among Today's Vets*, BOB WOODRUFF FOUND. (Jan. 12, 2015, 8:08 PM), http://bobwoodrufffoundation.org/american-sniper-shows-glimpse-into-emerging-trend-among-todays-vets/.

46. *Id.*

47. *Id.* (alteration in original).

48. Schultz & Chandrasekaran, *supra* note 6.

49. Caroline Alexander, *Blast Force: The Invisible War on the Brain*, NAT'L GEOGRAPHIC, http://www.nationalgeographic.com/healing-soldiers/blast-force.html (last visited Apr. 3, 2015).

"that nearly [twenty] percent of recent veterans reported depression or post-traumatic stress disorder, while [nineteen] percent said they had suffered a traumatic brain injury."[50] These injuries also complicate a successful transition to higher education for our veterans, and yet veterans can be unaware that they are suffering from such injuries and uninformed of the impact they may be having on their learning.[51] Failure to log in blast exposures during the early years of the current conflicts in Afghanistan and Iraq, as well as symptoms that could be dismissed as post-traumatic stress or simply stress-related, have resulted in less than complete diagnoses of TBIs that may be impacting a veteran's abilities in the classroom.[52] Veterans do not see themselves as victims and are reticent to ask for help, so difficulties concentrating, headaches, ringing in the ears, memory and cognitive difficulties, and mood regulation may all be readily dismissed rather than considered as potential symptoms of a war injury, despite the fact that 1-in-5 post-9/11 veterans suffers from TBI, post-traumatic stress or depression.[53]

Of the vibrant, skilled, diverse, mature, purposeful, altruistic veterans we will welcome to our campuses and classrooms, 20% will suffer from TBI, post-traumatic stress or depression, and others will struggle with combat trauma and moral injury.[54] Witnessing traumatic events, for instance a fellow soldier and friend being killed, floods the brain's center for emotions (the amygdala) with chemicals and compounds that can cause long-term physical, psychological, and emotional distortions, and normalization from such combat trauma can take months or even years.[55] Moral injury is defined as "[p]erpetrating, failing to prevent, bearing witness to, or

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50. Boodman, *supra* note 36.

51. Alexander, *supra* note 49. Veteran Robert Anetz experienced a blast force on patrol in Iraq in 2009 and thought he was ok: "There was no blood, so he thought he was good." *Id.* Seven months after his return from deployment he suffered a seizure while driving, then suffered a grand mal seizure months later. *Id.* He's currently a student and was taking 15 medications at one point, now is taking three, and continues to battle headaches and migraines. *Id.*

52. *Id.*

53. Boodman, *supra* note 36.

54. *Id.*

55. Lighthall, *supra* note 42.

learning about acts that transgress deeply held moral beliefs and expectations."[56] The veteran's perceived moral wrongdoing as a result of a transgression by self or others can result in guilt, shame, remorse, regret, and self-blame and can lead to self-condemnation, which can impair physical and mental health and relationships.[57]

Although post-traumatic stress can have similar symptoms, it is distinguishable from moral injury because it is rooted in fear, while events associated with moral injury are largely based on shame and guilt and result in mental anguish that necessitates different treatment.[58] Neither the military nor the Department of Defense formally recognizes moral injury;[59] however, the VA recognizes moral injury in a web page they have devoted to post-traumatic stress.[60] The VA notes that moral injury can manifest itself in anomie, withdrawal and self-condemnation, self-harming, self-handicapping behaviors, and the re-experiencing, emotional numbing, and avoidance symptoms of post-traumatic stress disorder.[61] In addition to grave suffering, these manifestations of moral injury may impair employment and harm relationships with loved ones and friends,[62] further complicating successful reintegration for veterans in the classroom and in their communities.

Post-traumatic stress is a psychological injury that develops in response to an extreme traumatic event, or series of events; it causes intense fear or helplessness, resulting in significant hormonal and chemical changes in the brain, and it will also plague some of

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56. Brett T. Litz et al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCHOL. REV. 695, 700 (2009).

57. *See* Everett L. Worthington, Jr. & Diane Langberg, *Religious Considerations and Self-Forgiveness in Treating Complex Trauma and Moral Injury in Present and Former Soldiers*, 40 J. PSYCHOL. & THEOLOGY 274, 274–75 (2012).

58. Kent D. Drescher et al., *An Exploration of the Viability and Usefulness of the Construct of Moral Injury in War Veterans*, 17 TRAUMATOLOGY 8, 8–9 (2011).

59. David Wood, *A Warrior's Moral Dilemma: Healing*, HUFFINGTON POST (Mar. 20, 2014), http://projects.huffingtonpost.com/moral-injury.

60. *See* Shira Maguen & Brett Litz, *Moral Injury in the Context of War*, U.S. DEP'T VETERANS AFF., http://www.ptsd.va.gov/professional/co-occurring/moral_injury_at_war.asp (last visited Apr. 2, 2015).

61. *Id.*

62. *Id.*

our student veterans.[63] For both TBI and post-traumatic stress, there are numerous cognitive challenges that can affect academic performance, including difficulties with concentrating and paying attention, accessing information, learning and remembering, abstract reasoning and problem solving, planning, insight, and sequencing.[64] Veterans experiencing these difficulties in the classroom, or the flashbacks and nightmares associated with the traumatic events, will be under additional stress that can further hamper their educational success. The recent photographic and audio exploration of the lasting wounds on our veterans, Healing Soldiers, included the following observation by Sandra McNair, mother to Marine Cpl. Chris McNair (Ret.): "He'll live the rest of his life with the nightmares, the images, and that's what the military can't fix."[65] Further complicating the recovery and reintegration for veterans with the signature injuries of post-traumatic stress and TBI, as well as moral injury and depression, is the fact that they are generally invisible injuries to those of us who encounter veterans outside their home. As Army First Sgt. David Griego noted, "[s]ometimes you find yourself saying, I wish . . . I would have lost a body part, so people will see—so they'll get it."[66]

Suicide has reached staggering numbers among our service members and veterans, and many of the veterans who join our campus communities will bring that risk with them. In a study of veterans who served and left the military between 2001 and 2007, the suicide rate was "50% higher than the rate among other civilians with similar demographic characteristics."[67] Recent veterans are reported to have committed suicide at a much higher rate than those who did not serve, with veterans in the current study committing suicide at one per day, with the highest rates during the first three

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63. AM. COUNCIL ON EDUC. ET AL., ACCOMMODATING STUDENT VETERANS WITH TRAUMATIC BRIAN INJURY AND POST-TRAUMATIC STRESS DISORDER 3 (2010).

64. *Id.*

65. Caroline Alexander, *Behind the Mask: Revealing the Trauma of War*, NAT'L GEOGRAPHIC, http://www.nationalgeographic.com/healing-soldiers/ (last visited Apr. 3, 2015).

66. *Id.* (second alteration in original).

67. Alan Zarembo, *Detailed Study Confirms High Suicide Rate Among Recent Veterans*, L.A. TIMES (Jan. 14, 2015, 6:53 PM), http://www.latimes.com/nation/la-na-veteran-suicide-20150115-story.html.

years of separation from the military.[68] The first three years of separation is also when higher education institutions are likely to see veterans enroll, as veterans leaving military service seek additional education in order to aid their reintegration to their communities and increase their civilian employment opportunities.

A 2010 study of 525 student veterans found that 46% had contemplated suicide, and 20% of them had a suicide plan, an indication of intent; this was compared with 6% of nonmilitary students in a survey the same year by the American College Health Association.[69] Veterans face solitude and isolation following their separation from service, as well as a loss of "friendships, purpose, identity, structure, and income," and for combat veterans, there is often guilt that they survived when others did not, as well as a feeling of loss over the adrenaline that kept them engaged during war.[70] In addition to these feelings of loss and sorrow, veterans may be suffering from physical or cognitive injuries, may face challenges in reconnecting with civilian family and friends, may be frustrated by the inability of civilians to understand their experiences, and are likely to face obstacles in obtaining successful post-military education, employment, and financial security. Any combination of these challenges may cause a veteran to feel hopeless. At the 2015 Student Veterans of America National Conference, Marine Corporal Kyle Carpenter, the second living Marine to receive the Medal of Honor in Afghanistan, reminded veterans that there will be low points, or valleys, in life and that student veterans need to be resilient, reminding them that "[y]ou cannot be Superman every day."[71]

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68. *Id.* Surprisingly, the same study found that the suicide rate for veterans who did not deploy to Afghanistan or Iraq was 16% higher than those who did. *Id.*

69. Boodman, *supra* note 36.

70. Lighthall, *supra* note 42.

71. Damien Bertolo, "*You Can't Be Superman Everyday*", MILITARY.COM, http://www.military.com/benefits/veterans-health-care/you-cant-be-superman-everyday.html (last visited Apr. 3, 2015); *see also Medal of Honor: Corporal Kyle Carpenter*, U.S. MARINE CORPS, http://www.marines.mil/moh/Citation.aspx (last visited Apr. 3, 2015).

III. CULTURAL COMPETENCE

In order "to take full advantage of the diversity in law school classes, or to address [law] student preparation for the multicultural legal needs of our changing world,"[72] law schools should encourage "cultural sensibility . . . 'an openness to emotional impressions, susceptibility, and sensitiveness' that allows" change based on interactions and experiences "with people from different cultural backgrounds."[73] The cultural context within which we should teach and our students should learn "includes not only the values, norms, experiences, and beliefs that stem from one's culture, ethnicity, race, religion, nationality, gender, sexual orientation, and other identity markers, but also . . . one's life experiences."[74] Cultural competency includes cultural knowledge, cultural sensitivity, and cultural skill, all of which can enhance the comfort level of service providers to veterans, and veterans' responsiveness to service providers. [75]

As discussed, it is likely that the number of student veterans enrolled in our law schools will increase as a result of more veterans taking advantage of Post-9/11 GI Bill benefits, particularly when one considers that the post-9/11 military is made up of proportionately more high school and college graduates than prior generations.[76] Given declining law school applications nationally, and a desire among law schools to enroll students with "leadership and teamwork skills, character, structure and discipline, expertise, ability to perform and make decisions in a dynamic environment, the

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72. Mary A. Lynch et al., *Teaching the Newly Essential Knowledge, Skills, and Values in a Changing World, Section E: Intercultural Effectiveness*, *in* BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 1–2 (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558863.

73. Andrea A. Curcio et al., *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177, 188 (2014) (quoting Niranjan S. Karnik & Nisha Dogra, *The Cultural Sensibility Model: A Process-Oriented Approach for Children and Adolescents*, *in* 19 CHILD AND ADOLESCENT PSYCHIATRIC CLINICS OF NORTH AM. 719, 723 (2010)).

74. Lynch et al., *supra* note 72, at 5.

75. *Id.* at 6.

76. TAYLOR ET AL., *supra* note 11, at 4.

ability to 'get the job done,' resiliency and loyalty,"[77] law schools are likely to have more veterans in their midst as troop drawdown continues.[78] James Fallows reports in his article, "The Tragedy of the American Military," that universities consider military students "a better version of foreign students," because they are hard workers, often pay full tuition, and have no language difficulties,[79] so recruitment of veterans is likely to increase as higher education seeks to meet enrollment goals.

As veterans join our student population and diversify our classrooms in a new way, faculty will need to "honor and demonstrate the value of diversity and support the caring inclusion of all students' relevant experiences and perspectives," as well as "build trust and connection with each student . . . to navigate the often messy conversations that arise at the intersection of different lived-experiences and corresponding worldviews."[80]

Law schools should infuse cultural competency into classes in order to ensure an inclusive and non-threatening learning environment that enriches the learning experience for all students, including our veteran and other non-majority students. Cultural competence towards veterans is increasingly important when considering that more than one-third of all active-duty personnel in 2009 were minorities,[81] and 16% of our active-duty military today are women.[82] As a result, our student veterans are more likely to be minorities than they were two decades ago, and more likely to be women, further evidence that our law school classrooms will need continued focus on embracing diversity and being culturally sensitive to this population.

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77. Jeffrey Cropsey, *Our Country's Best Deserve Nothing Less: Five Elements to Effectively Meet the Higher Education Needs of Veterans*, EVOLLLUTION, http://www.evolllution.com/community_programs/our-countrys-best-deserve-nothing-less/ (last visited Apr. 3, 2015).

78. At William & Mary Law School, 2013 saw the highest number of active duty and student veteran enrollment in the last five years. Email from Faye F. Shealy, Assoc. Dean for Admission, William & Mary Law Sch., to author (Jan. 26, 2015, 8:41 AM) (on file with author).

79. James Fallows, *The Tragedy of the American Military*, ATLANTIC (Jan./Feb. 2015), http://www.theatlantic.com/features/archive/2014/12/the-tragedy-of-the-american-military/383516/.

80. Lynch et al., *supra* note 72, at 11–12.

81. TAYLOR ET AL., *supra* note 11, at 4.

82. OFFICE OF THE DEPUTY ASST. SEC. DEF., *supra* note 3, at 6.

Law schools should include cultural competency in their curricula to prepare students to work with future clients, some of whom are likely to be veterans. For some law students, representation of military or veteran clients may happen before graduation because an increasing number of law schools are starting clinics that provide legal services to veterans and service members.[83] Whether law faculty and students encounter veterans in the classroom, in the clinic, or as clients after graduation, it is necessary for those of us who did not serve to be culturally competent and compassionate towards those who did:

> In preparing students for the world in which they will live and practice, faculty should assist students in developing a career-long commitment to engaging in efforts to enhance their awareness and sensibilities around real and perceived differences. . . . [T]he core value at the heart of effective functioning across cultures and geographic space is that of universal human dignity: a basic, foundational appreciation for the common humanity of oneself with and among all others . . . .[84]

"[S]ociety must be ready to accept the realities of war, listen to veterans' stories, and . . . 'embrace the real stories of our American heroes.'"[85] By being sensitive to the unique needs and issues of

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83. *See* Terry Carter, *ABA House Urges Law Schools to Create Veterans' Law Clinics*, ABA J. (Aug. 11, 2014, 9:51 PM), http://www.abajournal.com/news/article/aba_house_urges_law_schools_to_create_veterans_law_clinics. More than 40 law schools now have clinics that focus on assisting service members or veterans according to information compiled by the Puller Clinic in February 2015 (results on file with author), and the American Bar Association House of Delegates adopted a policy urging all law schools to create veterans law clinics. Brock Vergakis, *Law School Clinics Help Veterans Escape Benefits Backlog*, HUFFINGTON POST (May 27, 2013, 7:27 PM), http://www.huffingtonpost.com/2013/05/27/law-school-clinics-veterans-backlog_n_3343559.html; *see also* Carter, *supra*.

84. Lynch et al., *supra* note 72, at 6.

85. Holly Seesel et al., *Consequences of Combat*, 1 VETERANS L. REV. 254, 264 (2009) (internal quotation marks omitted) (reviewing DARYL S. PAULSON & STANLEY KRIPPNER, HAUNTED BY COMBAT: UNDERSTANDING PTSD IN WAR VETERANS INCLUDING WOMEN, RESERVISTS, AND THOSE COMING BACK

veterans, professors, lawyers and other service providers can improve the efficacy of their efforts at aiding this population.[86] President Obama recently called on the Departments of Defense, Veterans Affairs, and Health and Human Services to collaborate on the education of community-based providers in cultural competency in order to familiarize them with the unique needs of the military, veterans, and their family members.[87] This emphasis on cultural competency further underscores the importance of service providers, arguably including higher education professionals and lawyers, in developing the skills necessary to meet the needs of members of this distinct culture, and the necessity to earn their trust.

IV. MILITARY AND VETERAN CULTURE

The following excerpt from the Soldier's Creed states important military values for all branches of the military, not just the Army, demonstrating the Warrior Ethos of those who serve: "I will always place the mission first. I will never accept defeat. I will never quit. I will never leave a fallen comrade."[88] This ethos offers a view into military culture that distinguishes it from civilian life, and it demonstrates one of the reasons that veterans and civilians may have difficulties integrating successfully. While the integration may prove challenging, successful integration of veterans on our campuses, in our classrooms, and in our practice of law will enrich the experiences of veterans and non-veterans alike.

"As a country, America has been at war nonstop for the past 13 years. As a public, it has not. . . . [A]bout 2.5 million Americans, roughly three-quarters of 1 percent, served in Iraq or Afghanistan at

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FROM IRAQ (2007); ILONA MEAGHER, MOVING A NATION TO CARE: POST-TRAUMATIC STRESS DISORDER AND AMERICA'S RETURNING TROOPS (2007)).

86. TERRI TANIELIAN ET AL., RAND CORP., READY TO SERVE: COMMUNITY-BASED PROVIDER CAPACITY TO DELIVER CULTURALLY COMPETENT, QUALITY MENTAL HEALTH CARE TO VETERANS AND THEIR FAMILIES 2 (2014).

87. *Id.* at 22; Press Release, Office of the Press Sec'y, White House, FACT SHEET: President Obama Announces New Executive Actions to Fulfill our Promises to Service Members, Veterans, and Their Families (Aug. 26, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/0 8/26/fact-sheet-president-obama-announces-new-executive-actions-fulfill-our-p.

88. *Warrior Ethos*, U.S. ARMY, http://www.army.mil/values/warrior.html (last visited Apr. 7, 2015).

any point in the post-9/11 years, many of them more than once."[89] The current conflicts require deployments in combat areas, resulting in the shared experience of combat for a significant number of our veterans, an experience which shapes their culture. As a result of discussions with veterans who served in Vietnam, one author described combat veterans as focused on "finding meaning and justification in having survived, and in having fought and killed. That is, as [survivors they] must, consciously or unconsciously, give some form to the extreme experience of war, in order to be able to find meaning in" their civilian lives afterwards.[90]

While combat can be a source of trauma that informs veteran culture, additional traumatic events, such as military sexual trauma or losing a fellow soldier, can become threads in the fabric of the veteran shared experience. Regardless of whether veterans experience trauma while serving, there is "an unspoken understanding that [a veteran] frequently find[s] among other veterans."[91] Keynan Hobbs, a combat veteran and psychiatric/mental health clinical nurse, notes that "[v]eteran culture exists according to established definitions and the behavior of its members. It is . . . a culture . . . that crosses ethnic and socioeconomic boundaries;" veterans have their own language, symbols, and shared systems of belief.[92]

The ever-increasing military-civilian cultural divide creates obstacles to achieving the cultural competence necessary to maximize our effectiveness at supporting student veterans and veteran clients. Whether or not one agrees with the values, rules, world view, and functionality of the military, or the politics behind the current conflicts, one needs to understand military culture in order to effectively engage those who were a part of it.[93] This is especially true

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89. Fallows, *supra* note 79.

90. *Testimony Before S. Subcomm. on Veterans Affairs* (1970) (statement of Dr. Robert Lifton, Prof. of Psychiatry, Yale Univ. Sch. of Med.), *as reprinted in* DEP'T MED. & SURGERY, VETERANS ADMIN., THE VIETNAM VETERAN IN CONTEMPORARY SOCIETY: COLLECTED MATERIALS PERTAINING TO YOUNG VETERANS IV-29 (1972).

91. Keynan Hobbs, *Reflections on the Culture of Veterans*, 56 AM. ASS'N OCCUPATIONAL HEALTH NURSES J. 337, 338 (2008) (emphasis omitted).

92. *Id.* at 337, 339.

93. *See generally* Schell, *supra* note 2, at 39–40.

because veterans may continue to consider themselves as part of the military and have a lack of trust of civilians.[94]

Higher education faculty and students and civilian attorneys, must work to bridge this military-civilian divide by being culturally competent in their interactions with veterans; this cultural competence requires engagement, informed study, and "an appreciation for the human cost" of those who serve.[95] The widening gap between those who served and civilians can be further explained when one considers that while 2.5 million have served in Iraq or Afghanistan, 8.7 million served in Vietnam, and the majority of those who served in Vietnam had mothers and fathers who served in some way in World War II, Korea, or both.[96] A senior Navy fellow at the Atlantic Council, Mark Seip, concludes that "[t]he disconnect [between the military and civilians] is real but not irreversible. . . . [A] renewed focus on the nuances of each side and the values that underpin service will create a better understanding and bridge the gap between the military and those it serves."[97]

Military culture enables the military to effectively engage and succeed in combat; the military absolutely requires "codes of conduct, values, methods, procedures, and organizations characterized by what we might . . . term the 'military virtues,' including Duty, Honor, Patriotism, Courage, Discipline, Commitment, Strength, Integrity, Trust, and Resolve."[98] "The military is a hierarchical system based on rank and respect;" rank is clearly visible as a result of uniforms, and rank affects the level of authority, scope of responsibility, and rules and punishment that are possible.[99] Military culture is the antithesis of the higher education environment, where there is no clear chain of command, no one giving orders or charting the path forward, no prescribed social system, and a great deal of autonomy. Because of this stark contrast between the military culture and the higher education environment, law schools

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94. *Id.* at 39.

95. Mark Seip, *What Fallows Missed About the Military-Civilian Gap*, DEF. ONE (Jan. 15, 2015), http://www.defenseone.com/ideas/2015/01/what-fallows-missed-about-military-civilian-gap/103014.

96. *Id.*

97. *Id.*

98. John Hillen, *The Future of American Military Culture: Must U.S. Military Culture Reform?*, 43 ORBIS 43, 45 (1999).

99. Schell, *supra* note 2, at 25.

should make sure student veterans have the support necessary to succeed in the starkly different academic setting.

V. MEETING THE NEEDS OF OUR STUDENT VETERANS

Student veterans are at risk, and higher education institutions must support them as they would other at-risk populations.[100] Without "military virtues" and the clues that uniforms and rank provide to behavior and navigating interaction with others, veterans may find it difficult to integrate with students who are younger and less experienced than they are, who are potentially more self-absorbed, and who thrive in the "unstructured, sometimes frivolous, college [and law school] atmosphere."[101] Unlike the period after World War II, when veterans in 1947 made up 49% of U.S. college enrollment,[102] in a 2011-2012 study, veterans constituted just 4% of the undergraduate population.[103] In the classroom, faculty and fellow students may be unaware of the students who are veterans, as many higher education institutions do not know how many student veterans they have on campus,[104] and veterans may be wary of self-disclosure.[105] Student veterans are typically older and more experienced than their student peers, and they often support themselves or a family.[106] They are adjusting to being students rather than wage earners, and they are likely concerned about the recession and their opportunities for employment.

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100. JENNIFER L. STEELE ET AL., SERVICE MEMBERS IN SCHOOL: MILITARY VETERANS' EXPERIENCE USING THE POST-9/11 GI BILL AND PURSUING POSTSECONDARY EDUCATION 48 (2010).

101. Boodman, *supra* note 36.

102. *History and Timeline*, U.S. DEP'T VETERANS AFF., http://www.benefits.va.gov/gibill/history.asp (last visited Apr. 7, 2015).

103. AM. COUNCIL ON EDUC., HIGHER ED SPOTLIGHT: UNDERGRADUATE STUDENT VETERANS (2014), *available at* http://www.acenet.edu/news-room/Documents/Higher-ed-spotlight-undergraduate-student-veterans.pdf

104. Boodman, *supra* note 36.

105. Higher education institutions are being encouraged to track this data in an effort to measure outcomes for veterans under the Post-9/11 GI Bill and Department of Defense Tuition Assistance Grants. *See Tracking Veterans*, TOOLKIT FOR VETERAN FRIENDLY INSTITUTIONS, https://vetfriendly toolkit.acenet.edu/create-a-successful-program/Pages/Tracking-Veterans.aspx (last visited Apr. 7, 2015).

106. STEELE ET AL., *supra* note 100, at 48.

They are also typically reluctant to seek help when they need it, a characteristic of military culture and the warrior mentality that follows them into their post-military education.[107] Student veterans describe "feeling both conspicuous and isolated, put on the spot when they are singled out in class by well-meaning faculty members who solicit their views on foreign policy," and they often "want it both ways: [They] don't want to be singled out, but want respect, and for people to know what they've been through."[108] They are self-sufficient, wary of the stigma of being in need, and sometimes have a distrust of those who did not serve or those agencies and offices tasked with providing them assistance. They are anxious about the questions that may come from their classmates—questions that evoke memories of traumatic events that already burden their hearts and that they do not want to talk about, or that underscore the inability of their peers to understand the gravity of their experiences. In addition to their difficulties adjusting to the more relaxed culture of higher education and the alienation many feel amongst non-student veteran peers, post-9/11 veterans are also likely to be experiencing injuries or disabilities from service that further complicate their success on campus.

In considering how best to address the challenges faced by student veterans returning to education, the VA has identified "8 Keys to Success" for veterans, and they request that education institutions pledge to implement those practices.[109] As of March 2015, 1,542 colleges and universities made the commitment.[110] There are also "Principles of Excellence" listed to serve as guidelines of best practices for those institutions receiving funding from the VA.[111]

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107. Boodman, *supra* note 36.

108. *Id.* (alteration in original) (quoting Paul Tschudi, a Vietnam veteran and faculty adviser to George Washington University Veterans) (internal quotations omitted).

109. *8 Keys to Success: Supporting Veterans, Military and Military Families on Campus*, U.S. DEP'T EDUC., http://www.ed.gov/blog/2013/08/8-keys-to-success-supporting-veterans-military-and-military-families-on-campus/ (last visited Apr. 8, 2015).

110. *8 Keys to Veteran's Success Sites*, U.S. DEP'T EDUC., http://www.ed.gov/veterans-and-military-families/8-keys-success-sites (last visited Apr. 8, 2015).

111. *See 8 Keys to Veterans' Success*, U.S. DEP'T EDUC., http://www.cvent.com/events/8-keys-to-veteran-s-success/event-summary-

The 8 Keys will serve as a framework for the remainder of this section of the Article in order to provide undergraduate and graduate institutions, including law schools, suggestions for maximizing the success of their student veterans.

A. Create a Culture of Trust and Connectedness Across the Campus Community to Promote Well-being and Success for Veterans

A combination of the recommendations noted will serve as an excellent foundation for trust and connectedness, including suggestions such as individual advisors for student veterans, designated spaces for veterans to study or socialize, counseling services, and cultural competence training for law school administration, faculty and staff. Additionally, programming to introduce non-veteran law students to military culture and law, as well as events and activities that instill in them a sense of appreciation for those who served, can aid this trust and connectedness.

Institutions seeking to give student veterans the academic skills they will need to succeed in higher education might consider hosting the Warrior-Scholar Project on their campus for veterans returning to the classroom. This intensive workshop of either one or

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9d85142eae7e422786691f9a4e0f3c50.aspx?RefID=8%20Keys%20to%20Success (last visited Apr. 8, 2015). The "Principles of Excellence" guidelines are as follows:

> 1. Provide students with a personalized form covering the total cost of an education program.
> 2. Provide educational plans for all military and Veteran education beneficiaries.
> 3. End fraudulent and aggressive recruiting techniques and misrepresentations.
> 4. Accommodate Service members and Reservists absent due to service requirements.
> 5. Designate a point of contact to provide academic and financial advice.
> 6. Ensure accreditation of all new programs prior to enrolling students.
> 7. Align institutional refund policies with those under Title IV, which governs the administration of federal student financial aid programs.

Id.

two weeks started at Yale University in 2012 and now includes Harvard and the University of Michigan.[112] The academic boot camp prepares veterans for the academic challenges of elite universities while easing their transition from the military to the classroom by providing them an early social network of fellow student veterans.[113] The curriculum is taught by a different professor every day, and it focuses on reading, writing, and discussion skills centered on themes of democracy, freedom, and equality.[114] There are ten additional universities considering adoption of the Warrior-Scholar Project that shadowed the program in 2014;[115] such early indoctrination and assimilation for student veterans can significantly increase their chance of succeeding in higher education.

In an effort to build connectedness in campus communities between those who served and those who did not, law schools can integrate military and veteran topics throughout the curriculum, whether in courses devoted exclusively to military-related topics or including military related issues in existing courses. For instance, in an elder law or disability course or clinic, veterans benefits could be among the topics addressed; in an employment law course, the rights of deployed service members could also be explored; when discussing the impact of domestic violence on victims, the topic of military sexual trauma could be explored.

Additionally, higher education institutions should consider providing opportunities for engaging veterans in extracurricular activities that can aid their integration on campus and often, help them to heal. For instance, the College of William & Mary established the Center for Veterans Engagement, a nonprofit organization that "enables . . . students and faculty to create, launch, and execute initiatives for veterans and military families throughout Virginia."[116] This includes "[p]rogramming that focuses on creative activities,

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112. Amabel Karoub, *Warrior-Scholar Project Helps Vets Transition from Military to Academic Life*, MICH. DAILY (July 26, 2014), http://michigandaily.com/news/warrior-scholar-project-helps-vets-transition-military-academic-life.

113. *Id.*

114. *Id.*

115. *Id.*

116. *About William & Mary Center for Veterans Engagement*, FACEBOOK, https://www.facebook.com/wmcve/info?tab=page_info (last visited Apr. 13, 2015).

such as writing, music, and stand-up comedy classes," and "[p]rogramming that assists veterans with their transition into civilian life, such as professional development and personal finance classes."[117]

Law schools and universities should support establishing a Student Veterans of America chapter as a way to encourage interconnectedness among the veteran population. There are 950 chapters nationally, and their "mission is to provide military veterans with the resources, support, and advocacy needed to succeed in higher education and after graduation."[118] Law schools can encourage creation of a military and veterans law society to sponsor programs of interest to its members by bringing in service members to discuss leadership characteristics or veterans who can discuss their transition from active-duty service to civilian employment. Similar groups comprised of student veterans or students who have family members serving can operate as a support group to alleviate some of the loneliness and isolation student veterans sometimes feel when they return to the classroom.

Law schools can also encourage connections with university ROTC chapters to offer student veterans the opportunity to serve as mentors to the officers-in-training; such a connection can also offer student veterans opportunities to re-engage the familiar military culture they may be missing as civilian students. Additionally, mentorships can be arranged with new student veterans as mentees. Peer advising by experienced student veterans can increase the likelihood of a new student veteran's success and improve his or her comfort level as a student and member of the law school community.

Veterans Day offers a time every year for law schools to stop and consider the sacrifices our men and women in uniform make for our nation and to plan programming that helps the entire law school community reflect on those sacrifices. For instance, each year William & Mary Law School gathers mid-day for remarks from the Dean and various military leaders. Festivities conclude with cake and a sparkling cider toast to those who have served and those who have fallen. William & Mary also has a tradition of service member and veteran students and faculty wearing their military uniforms on

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117. *Id.*

118. *FAQs*, STUDENT VETERANS AM., http://www.studentveterans.org/index.php/chapter/faqs (last visited Apr. 13, 2015).

Veteran's Day for an official photo.[119] This year, William & Mary Law School also held a Thanksgiving food drive for a local veteran family facing financial struggles.[120] These types of activities and events raise awareness of the sacrifices of those who served or are serving, hopefully helping to lessen the isolation of student veterans and the cultural divide between them and civilian members of the campus community.

In addition to the workshops, organizations, mentorships, activities, and events already discussed, law schools can create pro bono opportunities to assist student veterans and veterans from the community with their legal needs by creating clinical opportunities, externships, pro bono programs, and attorney training programs.[121] Taking away the stress of unmet legal needs for veterans, while also teaching student veterans and their non-veteran peers how to meet these needs, is another way to create a campus culture of trust and connectedness between veterans and their non-veteran peers and help ensure veteran success.

B. Ensure Consistent and Sustained Support from Campus Leadership

The recommendations in this article for supporting student veterans will all take a sustained commitment from campus leadership, particularly in those areas that require funding. Whether it is providing relief time for a faculty or staff member to serve as an individual advisor to veterans, or hiring a new staff member for that purpose, or creating dedicated student veteran space, or hiring additional counseling staff and ensuring that the campus community is trained in military and veteran culture, the decision to make systemic rather than isolated changes in support of veterans will require

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119. For a photo from the 2014 Veterans Day event, see https://www.facebook.com/VeteransBenefitsClinic/photos/a.383157855035268.94959.117000394984350/942649955752719/?type=1. The author has attended all of the Veterans' Day commemorations at William & Mary Law School since 2008.

120. Hayley Geiler, *Law Students Collect 4,114 Food Items to Help Local Community*, WM. & MARY L. SCH. (Nov. 24, 2014), http://law.wm.edu/news/stories/2014/law-students-collect-more-4,114-food-items-for-local-community.php ("This year, the school's Puller Veterans Benefits Clinic also hosted a food drive to collect holiday food items for the family of a local veteran.").

121. *See supra* Part II.B (discussing veterans' commitment to service and their legal needs).

campus leadership willing to devote resources to this population of students. Campus leadership will also be instrumental in the coordination and centralization of available support services for veterans, so that they can be seamlessly provided rather than provided on an ad hoc and less effective basis.

C. Implement an Early Alert System to Ensure All Veterans Receive Academic, Career, and Financial Advice Before Challenges Become Overwhelming.

1. Advising

Assignment of an individual advisor to each accepted student veteran would serve as an ideal start to ensuring that struggling veterans are assisted quickly and efficiently. Studies have shown that academic advising improves retention and graduation rates, noting that "[a]dvisors teach students to negotiate the higher education maze, to make effective and thoughtful decisions about their futures, to adapt their life skills to the new academic world, and to cultivate the academic skills and knowledge needed to succeed."[122] A pilot study of 200 veterans demonstrated that veterans with access to on-campus support systems and services, including advising, have higher grades and retention and graduation rates than their non-veteran peers.[123] Advisors can be particularly useful to veterans who no longer have people telling them what to do; an advisor can provide more structure, guidance, and a defined path towards degree or training completion.[124] Ideally, an institution's advisor would work with a veteran after acceptance, but prior to enrollment, to ensure that the institution will meet the veteran's educational and career goals before a veteran's limited GI Bill or Yellow Ribbon funding is exhausted.

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122. Jayne K. Drake, *The Role of Academic Advising in Student Retention and Persistence*, ABOUT CAMPUS, July–Aug. 2011, at 8, 9, 11 (emphasis omitted).

123. WENDY A. LANG ET AL., PAT TILLMAN FOUND. & OPERATION COLL. PROMISE, COMPLETING THE MISSION: A PILOT STUDY OF VETERAN STUDENTS' PROGRESS TOWARD DEGREE ATTAINMENT IN THE POST 9/11 ERA 11 (2011), *available at* http://www.operationpromiseforservicemembers.com/Com-pleting_the_Mission_Nov2011.pdf.

124. CAHILL ET AL., *supra* note 27, at 7.

The Council for Adult and Experiential Learning recommends a comprehensive career and education advising program for veterans that includes skill and interest assessments, review of military training and experience for potential academic credit or career prerequisites, career exploration and planning, evaluation of learning style and potential need for accommodations, and knowledge about educational benefits.[125] In addition, having a one-on-one advisor meet regularly with student veterans will enable the advisor to monitor how the student veteran is doing academically, emotionally, and socially in their transition to higher education.

An advisor for student veterans can serve as a "home base" for the veteran, ensuring that they stay on track for degree requirements and career pathways and coordinate with other offices on campus, including the Dean of Students and disability services. Given that veterans are generally resistant to seeking help and less engaged in the campus community than their civilian counterparts, having an advisor that they must see at regularly scheduled intervals to help them meet educational and career goals serves the added purpose of alerting the institution when a veteran is at risk in any way. With permission from veteran advisees, an advisor can also keep in touch with family members or ask that family members alert the advisor in the event there are signs of distress or changes in behavior off-campus. An advisor can then encourage the veteran to seek assistance from the counseling or health center when appropriate, and he or she can intervene with specific administrators or faculty when and if a veteran is struggling academically.

Law school is traditionally an educational program that lacks advisors. While some guidance may be provided regarding coursework, and an office of career services aids in employment matters, law students are, after their first-year of required courses, left largely to their own planning. Law schools enrolling veterans should appoint a faculty or staff member to serve as an advisor for all enrolled veterans or appoint several advisors across the student veteran population. This advisor could help with academic support, coordination of accommodations in the classroom or on exams, curricular and career planning, and help ensure that the veteran can achieve graduation within the prescribed three years. If possible, the as-

125. *Id.* at 7–8.

signed advisor should be a veteran, in order to achieve the immediate connection shared by all who served. If not, the advisor(s) should receive cultural competency training in veteran culture,[126] and establish checklists, guidance and clearly defined procedures that will provide confidence to each veteran, and ensure all veterans receive the same level of support while working towards their law degree.

2. Counseling

Nationwide, counseling centers at higher education institutions already face limited resources and capacity, which means delays in appointments, waitlists, and more limited treatment available to students.[127] A 2011 National Survey of Counseling Center Directors noted that 91% of directors reported a trend towards a greater number of students with severe psychological problems and 77% or more saw increases in immediate crises, and more students arriving to campus already taking psychiatric medication.[128] In a study of Midwest universities considering students' increased demands, researchers found that "many counseling programs are failing to meet the nationally accepted standards for counselor-to-student ratios," and that many had not implemented the recommendations made following the 2007 and 2008 campus tragedies at Virginia Tech and Northern Illinois University, respectively.[129] "There are more students presenting to college mental health centers year by year, and

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126. *See, e.g.*, *Understanding Military Culture*, COMMUNITY PROVIDER TOOLKIT, http://www.mentalhealth.va.gov/communityproviders/military_culture.asp#sthash.7drrHVVR.dpbs (last visited Apr. 13, 2015) (providing access to the "Military Cultural Competence Online Course" and the "Understanding Military Cultural Course" that were developed by the National Center for PTSD).

127. *See* Martha Anne Kitzrow, *The Mental Health Needs of Today's College Students: Challenges and Recommendations*, 41 J. STUDENT AFF. RES. & PRAC. 167, 170 (2003), *available at* http://isites.harvard.edu/fs/docs/icb.topic920416.files/mental%20health-%20counseling-1.pdf ("The increased demand for services without a corresponding increase in resources is a major challenge and concern . . . .").

128. ROBERT P. GALLAGHER, AM. COLL. COUNSELING ASSOC., NATIONAL SURVEY OF COUNSELING CENTER DIRECTORS 4 (2011), *available at* http://collegecounseling.org/wp-content/uploads/2011-NSCCD.pdf.

129. Pam Dempsey & Brant Houston, *Stressed: Demands, Counselor Shortages Strain Midwest Campus Mental Health Systems*, INVESTIGATIVE

those students have more severe mental health issues at a time that budgets are shrinking and cost savings are being implemented," noted Chris Brownson, Associate Vice President of Student Affairs and Director of the Counseling and Mental Health Center at the University of Texas at Austin.[130]

In addition to this increased demand on campus counseling centers from traditional-aged students, with the influx of veterans to higher education institutions with the Post-9/11 GI Bill benefits, "many colleges and universities are struggling to find appropriate means of responding to the . . . veterans."[131] This is troubling in light of the high incidence of post-traumatic stress, TBI, depression, and suicidal ideation that may accompany some post-9/11 veterans to campus. Counseling center staff at higher education institutions should be trained in cultural competency to support their work with veterans, as well as more advanced training in evidence-based practices for treating post-traumatic stress and suicide prevention.[132] In 2013, the American Council on Education and the Center for Deployment Psychology collaborated to provide workshops to train as many as 750 college and university counselors.[133] Training included military culture and service to student veterans in recognition of the fact that "[t]he availability of mental health resources on college

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JOURNALISM EDUC. CONSORTIUM (Feb. 4, 2012), http://ijec.org/2012/02/04/stressed-demands-counselor-shortages-strain-mid-west-campus-mental-health-systems/.

130. Boodman, *supra* note 36.

131. CAHILL ET AL., *supra* note 27, at 11.

132. Evidence-based practices are defined as "interventions that have undergone rigorous evaluation and demonstrated positive outcomes." *Section I: Evidence-Based Programs*, SUICIDE PREVENTION RESOURCE CENTER, http://www.sprc.org/bpr/section-i-evidence-based-programs (last visited Apr. 14, 2015); *Section 4: Evidence Based Approaches for Prevention, Outreach, Assessment, Diagnosis, and Treatment*, NAT'L COUNCIL ON DISABILITY, http://www.ncd.gov/publications/2009/March042009/section4 (last visited Apr.14, 2015).

133. *ACE, CDP to Train College Mental Health Counselors to Aid Student Veterans*, AM. COUNCIL ON EDUC. (Feb. 27, 2013), http://www.acenet.edu/news-room/Pages/ACE-CDP-Train-College-Mental-Health-Counselors-Aid-Veterans.aspx.

campuses can play a vital role in helping veterans achieve their education goals that in turn lead to successful futures."[134]

Veterans may first seek assistance in the counseling center for difficulties they are having with coursework or feelings of being overwhelmed in the classroom environment. A counselor trained in TBI and post-traumatic stress will know that a veteran's academic performance might be impacted by cognitive difficulties such as attention and concentration difficulty; information processing challenges; memory or learning problems; slowed abstract reasoning; and executive functions, such as problem solving, planning, and sequencing.[135] Veterans may also experience difficulties with sleeping or time management and experience panic attacks or flashbacks.[136] A counselor trained for work with veterans will also be vigilant about exploring such things as potential depression, suicidal ideation, and the heightened stress that can occur for student veterans on campus when they may be faced with, for instance, unexpected loud noises, or the anxiety of windowless classrooms.[137]

Counselors can also ensure that veterans are aware of any accommodations that they may be entitled to as a result of disabilities—such as physical, learning, or cognitive disabilities or psychological health injuries[138]—by working closely with the campus office of disability services and the veteran's advisor to help veterans accept any warranted accommodations and to come to terms with their new challenges. The counseling center staff should also work closely with the university health center in the event there are injuries or illnesses that would benefit from medical, as well as psychological, treatment. Law students already avail themselves of campus counseling centers in significant numbers; the Socratic method and single exam grading, recession in the legal employment market, high debt loads, quests for clerkships, selectivity and membership

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134. *Id.* (quoting Anne Marie Dougherty, Executive Director of the Bob Woodruff Foundation).

135. *See* AM. COUNCIL ON EDUC. ET AL., *supra* note 63, at 3.

136. *Id.*

137. *Id.* at 4.

138. For two federal disability antidiscrimination laws that are applicable to colleges and universities and which would apply to those veterans meeting the definition of an individual with a disability, see Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2012) and Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012).

on competitive teams and journals, and class rank all combine to raise the anxiety level and depression of law students.[139] "Although law students enter school with fairly normal rates of depression (about 8-9 percent), upon matriculation, the rate of depression more than quadruples (to about 40 percent) . . . ."[140] Given that the law school population is already prone to increased depression, veterans who attend law school may be even more at risk due to the additional challenges they face when compared to their more traditional-aged civilian law school peers. Law schools should undertake intentional efforts to prepare counseling center staff to respond adequately to the needs of law school students who are veterans in light of the stress of the current legal recession and the influx of post-9/11 veterans to higher education.

D. Coordinate and Centralize Campus Efforts for All Veterans, Together with the Creation of a Designated Space for Them (Even if Limited in Size)

1. Veterans Center

An on-campus veteran center, even a modest one, can allow student veterans a space to study or gather socially with other veterans. Given the alienation and loneliness veterans can feel on campus, this can be a place where they can relax with others who may also feel overwhelmed by the lack of structure and the younger student population.[141] It can also offer a place for a Student Veterans of America chapter to operate,[142] which can provide additional peer support to newer student veterans. Having a dedicated veteran space can also be helpful to those veterans who live off campus, perhaps some distance away, as a result of family obligations.

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139. *See* Kate Mayer Mangan, *Law School Quadruples the Chances of Depression for Tens of Thousands: Some Changes That Might Help*, HUFFINGTON POST (Aug. 28, 2014, 2:40 PM), http://www.huffingtonpost.com/kate-mayer-mangan/law-school-quadruples-dep_b_5713337.html.

140. *Id.*

141. *About Us*, STUDENT VETERAN HOUSE, http://studentveteranhouse.org/about-us/ (last visited Apr. 14, 2015) (noting that 85% of student veterans are at least twenty-four years old).

142. *See FAQs*, *supra* note 118. The mission of Student Veterans of America is "to provide military veterans with the resources, support, and advocacy needed to succeed in higher education and after graduation." *Id.*

Arizona State University opened the Office for Veteran Military Academic Engagement two years ago, coordinating with the existing Pat Tillman Veterans Center and academic departments from a variety of disciplines throughout the campus.[143] While the existing Pat Tillman Veterans Center focused on one-stop advising, the more expansive initiative encourages veterans to tell their stories to faculty who then use those stories in their research and teaching throughout the campus in different departments, schools, and colleges.[144] In addition, student veterans are being brought together to study arts and humanities in creative ways, such as discussion of literature involving wartime narratives or through music, films, and writing.[145] The assistant to the director of the Office for Veteran Military Academic Engagement, Nancy Dallett, hopes that "in the long term both veterans and non-veterans will have a better sense of how to engage with one another and understand military culture" through communication and breaking down barriers.[146] This increased level of engagement benefits not only the veterans but also enriches the campus community as they get to know more about veterans and their experiences.

A designated veteran space can also be effective at law schools. For those law schools that are located on a university campus where a veteran center or lounge could be shared by all students of the university, a separate law school veteran space may not be needed. But for those law schools located away from the main university, having a dedicated space for veterans within the law school is recommended.

In addition to establishing a dedicated veteran center on university and law school campuses to encourage peer support, exploration of veteran topics, and a respite from the unstructured nature of the educational environment, higher education institutions might consider creating student veteran designated housing.[147]

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143. Joey Hancock, *New ASU Office Helps Transition, Use Veterans in Classroom*, ST. PRESS (Jan. 14, 2015, 5:26 PM), http://www.statepress.com/2015/01/14/new-asu-office-helps-transition-use-veterans-in-classroom/.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See, e.g.*, *About Us*, Student Veteran House, *supra* note 141 ("Our mission is to provide accessible living environments on college campuses that enable

2. Coordinated Services

Higher education institutions, including law schools, should consider, if their veteran enrollment warrants, some veteran-only orientations and open houses. These distinct sessions automatically give veterans access to peers with whom they may feel more comfortable and who can later serve as a support system, particularly if more experienced student veterans are included in the sessions. Veteran-focused sessions also allow the diverse needs of veterans to be considered, such as financial aid matters through the GI Bill and Yellow Ribbon Program, academic support issues related to learning or disability challenges, credit transfer issues either from other institutions or for military experience, and career services that will take into account their military experience and translate it into skills that are desirable in the civilian workforce. Additionally, veteran-specific programming can be offered in such areas as résumé and cover letter drafting, study skills, and academic advising (that could then be followed up with an individual advisor).[148]

In the law school setting, designating a particular career services counselor, utilizing individual advisors to aid curricular decisions, and familiarizing the law school registrar with issues related to translation of credits and military experience can all assist law school student veterans in reaching graduation. The curriculum, career services, and credit transfer issues are all unique enough at the law school level to require services apart from the university. Disability and financial aid services are most likely centrally located on the main university campus and could be shared with law school student veterans rather than duplicated at the law school. Nonetheless, it would be ideal for someone at the law school—for instance a dedicated student veteran advisor—to provide veterans with a checklist of instructions for which offices to visit on main campus for particular purposes, along with any applicable deadlines. In these university-wide offices, one individual could be tasked with handling all veteran inquiries so that the person responding to student veteran issues is familiar with veteran culture and can readily

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veterans with disabilities to excel as they pursue higher education."); *OSU Veterans House*, OHIO ST. U., http://veterans.osu.edu/future-students/locating-housing/osu-veterans-house/ (last visited Apr. 14, 2015); *Veteran Student Housing*, SAN DIEGO ST. U., http://arweb.sdsu.edu/es/veterans/stud_housing.html (last visited Apr. 14, 2015).

148. *See supra* Part V.C.2 (discussing the need for veteran counseling).

respond with answers, and can also be familiar with VA procedures related to educational benefits.

E. Collaborate with Local Communities and Organizations, Including Government Agencies, to Align and Coordinate Various Services for Veterans

In 2010, the Office of the Chairman of the Joint Chiefs of Staff published *Sea of Goodwill: Matching the Donor to the Need*.[149] The white paper called for community action teams to address the "reintegration trinity" of education, employment, and access to health care, and identified these areas as the most dominant needs for veterans and their families in successful reintegration.[150] A follow-up white paper to the *Sea of Goodwill* noted that "[n]ow is the time to create a national structure—characterized by functional cooperation, cross-sector collaboration, and an integrated network—to establish a no-wrong-door capacity that allows our country to reintegrate effectively veterans and their families as a matter of course."[151] The "no-wrong-door" approach helps veterans and their families avoid sorting through the thousands of organizations created to support veterans by encouraging organizations initially contacted about services they do not perform to provide a "warm-handover" to another organization with a complementary or different purpose.[152]

While law schools and universities can meet some of the needs of student veterans, there are many governmental and community organizations that can complement and supplement the services offered by educational institutions. Educational institutions should establish contacts at these organizations and become familiar with the wealth of services offered in their communities in order to

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149. JOHN W. COPELAND & DAVID W. SUTHERLAND, SEA OF GOODWILL: MATCHING THE DONOR TO THE NEED, *available at* http://www.jcs.mil/Portals/36/Documents/CORe/SOGW_donor_to_need.pdf.

150. *Id.* at 4–5.

151. OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, AFTER THE SEA OF GOODWILL: A COLLECTIVE APPROACH TO VETERAN REINTEGRATION 2 (2014) (emphasis omitted), *available at* http://www.veteranscorp.org/wp-content/uploads/2014/12/After_the_Sea_of_Goodwill.pdf.

152. *Id.* at 2 n.5.

provide informed recommendations to student veterans.[153] Because colleges and universities typically have leadership roles, convening power and credibility in their communities, they can "cultivate early support and resources from, and conduct effective outreach to, the community."[154] Often they also have pre-existing relationships with community service providers, which can speed up the responsiveness when particular student veterans need help and a referral off campus.[155] In order to streamline the educational benefits, educational institutions should also work closely with the VA, so the student veteran is not without funds, and if needed, will have access to medical care or evaluation beyond the capacity of the university health and counseling centers.

Another way law schools and universities can aid their student veterans is to get them involved with organized community service events. Our post-9/11 veterans are part of an all-volunteer force, and for many of these veterans, "service is core to their identity and the way they define purpose in their lives."[156] Redeployment of veterans into community service "provides them with a renewed sense of purpose in life, a stronger social network, professional development support and the broader health benefits of serving others by volunteering."[157] Such service opportunities can also provide veterans with confidence in the civilian workforce and leadership and networking opportunities, while also offering them the camaraderie they miss from service.

Recognizing the interest in service for veterans, law schools can make sure to include student veterans in organized community

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153. A new resource that can aid higher education institutions in finding veteran service providers is the National Association of Veteran-Serving Organizations , created to provide a national collaborative association for the Nation's more than 40,000 veteran-/military-serving organizations. For a detailed overview of this organization, see *About*, NAVSO, http://www.navso.org/about (last visited Apr. 14, 2015).

154. NANCY BERGLASS & MARGARET C. HARRELL, CTR. FOR A NEW AM. SEC., WELL AFTER SERVICE: VETERAN REINTEGRATION AND AMERICAN COMMUNITIES 29 (2012), *available at* http://www.cnas.org/files/doc uments/publications/CNAS_WellAfterService_BerglassHarrell.pdf.

155. *Id.*

156. GOULD ET AL., *supra* note 1, at 7; *see also supra* notes 45–48 and accompanying text.

157. GOULD ET AL., *supra* note 1, at 7.

service or pro bono efforts of faculty, staff, and students. In addition, law schools can encourage student veterans to initiate their own community service projects for the benefit of other veterans—for instance, helping build a Habitat for Humanity house for the family of a veteran. Students may find ideas and assistance with community service projects through The Mission Continues, a national nonprofit organization that provides opportunities for veterans to assist a nonprofit of their choice as a funded fellow or as part of a service platoon where a team of veterans helps solve local community challenges.[158] Providing law school support for such an endeavor, planned by student veterans, allows those students to exercise leadership in giving back to others who served and encourages their interaction with their civilian student peers who also seek to volunteer.

F. Utilize a Uniform Set of Data Tools to Collect and Track Information on Veterans, Including Demographics, Retention, and Degree Completion

As more of our post-9/11 veterans utilize the generous GI Bill and Yellow Ribbon Program and the country continues to support these well-deserved and costly benefits to those who served and their families, it is important that institutions collect data to determine the efficacy of this investment of federal funds in aiding successful reintegration of veterans. With supporting data, institutions can be transparent with veterans regarding their retention and degree completion rates, enabling veterans to make informed decisions about the institution or program in which to enroll. Such data would also allow veterans to consider the size of an institution's veteran population when deciding where to attend. In addition, data that tracks the success of the veterans who are receiving these federal education benefits will allow for their continuation into the future at a time when the government is looking for cost-cutting measures. In order to assist veterans in making decisions, the VA created the GI Bill Comparison Tool,[159] and the Iraq and Afghanistan Veterans

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158. *Id.* at 6–7. Recognizing that recent veterans sought to continue their service at home, former Navy SEAL Eric Greitens founded The Mission Continues. *Id.* at 6.

159. *See About this Tool*, U.S. DEP'T VETERANS AFF., http://www.benefits.va.gov/gibill/comparison_tool/about_this_tool.asp (last visited Apr. 14, 2015).

of America created the GI Bill Benefits Calculator,[160] both of which calculate the amount of benefits a veteran may be eligible for after answering a series of questions about their service and the program they wish to attend. These, and similar tools, along with institutional transparency in veteran retention and completion, will help veterans choose the right educational pathway.

G. Provide Comprehensive Professional Development for Faculty and Staff on Issues and Challenges Unique to Veterans

This key can be met by providing training in cultural competence as previously discussed. Institutions of higher education should make available to their faculty and staff training regarding military and veteran culture, the challenges faced by student veterans when they return to campus following service, and ways in which they can support student veterans. One creative initiative started at Virginia Commonwealth University is the "Green Zone."[161] "The Green Zone program identifies faculty and staff volunteers . . . who have received special training and are knowledgeable about student veteran issues and resources," and whose outward identification as a member of this supportive group encourages student veterans and others on campus to seek assistance they know will be informed and culturally sensitive.[162] A "Green Zone" could easily be established at other universities and law schools, demonstrating an institution's commitment to student veterans and increasing the competence with which faculty and staff respond to student veterans.

When teaching veterans, faculty should be aware that there might be undiagnosed or invisible injuries, some of which may be

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160. *See New GI Bill Benefits Calculator*, NEWGIBILL.ORG, http://www.newgibill.org/calculator/ (last visited Apr. 14, 2015).

161. *See Green Zone*, VA. COMMONWEALTH U., http://www.enrollment.vcu.edu/rar/veterans-certification/green-zone-program/ (last visited Apr. 14, 2015). Participants in the Green Zone:

> Attend a workshop that provides information and resources related to issues faced by student veterans[;]
>
> Display the Green Zone sticker outside their office door to let others know they are available to provide support and information about resource[s] for student veterans[;]
>
> Be a resource to other faculty, staff or students who may have questions about student veteran issues.

Id.

162. *Id.*

impacting a student veteran's performance in the classroom. Faculty members may be the first ones to notice challenges, such as memory issues or organizational difficulties, the need for frequent breaks, lethargy in class, excessive absences, or incomplete assignments. Anxiety can also be a challenge for veterans returning from combat; they may experience anxiety during the discussion of particular topics, while seated in windowless classrooms or with assigned seating that is located far from an exit, in the event of loud and unexpected noises, or at crowded events. Some veterans with post-traumatic stress exercise vigilance even when there is no actual threat. Such veterans then engage in a protection strategy against nonexistent threats, which further raises their anxiety, resulting in heightened vigilance again.[163] Faculty who notice veterans in distress can make sure that they get to the appropriate support services, on or off campus.

Faculty should also be intentional about not taking political positions regarding current or past wars or military engagement when discussing such topics as national security, our current conflicts, international war crimes, mental health issues, and other areas that may skirt issues of military service or veteran experiences. Faculty should avoid singling out veterans for questions or comments related to military service or war unless the veterans choose to self-identify and proactively comment to the class or the faculty member gets the student's permission in advance.

As with all students, faculty should be conscious of signs of academic struggle, distress, or depression, and communicate any such signs to the Dean of Students for his or her follow-up. Allowing tape recording of class sessions, laptops, and using adequate volume when teaching can help those veterans who returned with hearing problems or now experience cognitive difficulties. Also posting notes, outlines, or PowerPoint slides can be useful, not just to student veterans, but other students who may have learning disabilities or differing learning styles.

Finally, as more veterans are in our law school classes, we should be sensitive to the fact that they may have unexpected triggers in our classes that raise their anxiety or frustration. Whether it

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163. DARYL S. PAULSON & STANLEY KRIPPNER, HAUNTED BY COMBAT: UNDERSTANDING PTSD IN WAR VETERANS INCLUDING WOMEN, RESERVISTS, AND THOSE COMING BACK FROM IRAQ 27 (2007).

is a guest speaker who addresses the war or national security, a lecture on mental health issues, or a discussion about sexual trauma, faculty may wish to warn veterans who have self-identified in advance of such events so that they are prepared, or, alternatively, notify the entire class when it is anticipated that potentially sensitive topics will be addressed. The faculty member could then recommend that students contact the faculty member privately if they feel unable to attend the particular class or event. Faculty might also consider developing ground rules for classroom discussion in the event there are potentially hot-button topics for student veterans or others in the class. "A useful strategy is to invite students to co-create a learning community by agreeing on rules, such as letting each speaker finish, giving each other both full attention and the benefit of the doubt, staying calm . . . and listening respectfully."[164] All of these rules can help model civil discourse so that students learn how to engage controversial topics.

H. Develop Systems That Ensure Sustainability of Effective Practices for Veterans

Recognizing the expertise and value of the military experience that veterans bring to higher education, institutions of higher education should carefully consider how they might develop curricula and provide credit for competencies across disciplines that align with military competencies, "such as leadership, cross-cultural awareness and communication, inter-cultural communication, fluency in multiple languages, written and oral communication, [and] quantitative reasoning," among others.[165] Allowing for maximum transfer credit for prior college courses and military training can also help veterans to complete their degree more efficiently, and it helps compensate for the fact that "[t]he average service member attends multiple institutions of higher education before completing a degree."[166] Finally, offering flexible courses such as evening and weekend opportunities is particularly useful to the student veteran, given that 48% of them are married and 47% are raising children.[167]

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164. Lynch et al., *supra* note 72, at 13.

165. Kelly Otter, *How Higher Education Needs to Change to Better Serve Veterans*, EVOLLLUTION, http://www.evolllution.com/community_programs/how-higher-education-needs-to-change-to-better-serve-veterans/ (last visited Apr. 15, 2015).

166. Cropsey, *supra* note 77.

167. *Id.*

Law schools should track the efficacy of any of the foregoing recommendations they choose to adopt, as discussed in relation to the VA's 8 Keys to Veteran Success. For those practices and strategies that help improve student veteran success, law schools should incorporate them into the law school culture, curriculum, and administration, and they should work to ensure their sustainability.

VI. VETERANS AS CLIENTS

A. Legal Needs of Veterans

The VA has identified legal needs as among the most significant unmet needs of homeless and poor veterans.[168] Multiple deployments can result in financial and housing matters that require legal assistance,[169] as well as legal matters such as divorce, custody, estate planning, accessing public benefits, guardianship, and criminal record expungement.[170] The top unmet needs among homeless veterans were found to be legal in nature, and they include eviction or foreclosure proceedings, child support issues, restoring driver's licenses, and outstanding warrants and fines.[171] There are studies that "have found a significant association between [post-traumatic stress disorder] and arrest and incarceration."[172] This is an alarming statistic because among the 900,000 post-9/11 veterans treated at

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168. *Veterans Legal Corps to be Largest Deployment of Lawyers Serving Veterans*, EQUAL JUST. WORKS, http://www.equaljusticeworks.org/news/06-26-13-Veterans-Legal-Corps (last visited Apr. 15, 2015).

169. *See* U.S. DEP'T VETERANS AFF., PROJECT CHALENG—IDENTIFYING AND MEETING THE NEEDS OF HOMELESS VETERANS 2 (2014), *available at* http://www.va.gov/homeless/docs/CHALENG_2013_Fact_Sheet_05072014.pdf

170. Will A. Gunn et al., *Serving Those Who Served: Meeting Veterans' Unmet Legal Needs*, 23 EXPERIENCE, 2014, at 8, 10.

171. *See* CATHERINE ABSHIRE ET AL., COMMUNITY HOMELESSNESS ASSESSMENT, LOCAL EDUCATION AND NETWORKING GROUPS (CHALENG) FOR VETERANS FISCAL YEAR (FY) 2011, at 12 (2011), *available at* http://www.va.gov/HOMELESS/docs/chaleng/2011_CHALENG_Report_FINAL.pdf.

172. Gunn et al., *supra* note 170, at 9. One study found that 45.7% of Vietnam veterans with current post-traumatic stress had been arrested or jailed more than once, compared with 11.6% for those veterans without post-traumatic stress. *Id.*; *see also* RICHARD A. KULKA ET AL., TRAUMA AND THE VIETNAM WAR GENERATION: REPORT OF FINDINGS FROM THE NATIONAL VIETNAM VETERANS READJUSTMENT STUDY 186–87 (1990).

VA hospitals and clinics, 31.8% were treated for post-traumatic stress disorder.[173]

Although the Legal Services Corporation began an initiative focused on improving access to justice for low-income military veterans and for military families in 2010,[174] there are limitations on the types of cases they can take. The American Bar Association, through their Military Pro Bono Project and ABA Home Front,[175] and Veterans' Claims Assistance Network,[176] are tapping into the generosity of private attorneys willing to provide pro bono assistance to veterans, as are many state and local bar associations. Equal Justice Works, through its Veterans Legal Corps, has undertaken funding three years of fellows and law students who will assist veterans with their civil legal issues, including disability claims.[177] Despite these generous and organized efforts to aid veterans in need of legal assistance but unable to afford it, there remains a significant

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173. Gunn et al., *supra* note 170, at 9.

174. *Serving Veterans and Military Families*, LEGAL SERVICES CORP., http://www.lsc.gov/about/about-legal-aid/serving-veterans-and-military-families (last visited Apr. 16, 2015).

175. Am. Bar Ass'n, MILITARY PRO BONO PROJECT, http://www.military-probono.org/ (last visited Apr. 16, 2015) ("The ABA Military Pro Bono Project accepts case referrals from military attorneys on behalf of junior-enlisted, active-duty military personnel and their families with civil legal problems, and it places these cases with pro bono attorneys where the legal assistance is needed. The Project is also the platform for Operation Stand-By, through which military attorneys may seek attorney-to-attorney advice to further assist their servicemember clients."). In addition, ABA Home Front keeps (1) a directory of programs with a state-by-state guide of legal resources available to service members, veterans, or military family members and (2) an information center to find information on legal topics. *Id.*

176. *For Attorneys*, AM. BAR ASS'N, http://www.americanbar.org/portals/public_resources/aba_home_front/Military_Pro_Bono/aba-veterans-claims-and-assistance-network/attorneys.html (last visited Apr. 17, 2015). The ABA works in coordination with the VA to connect veterans with legal service providers and lawyers who will help the veterans complete their claims packages pro bono for expedited review by the VA. *Id.*

177. *See Veterans Legal Corps to be Largest Deployment of Lawyers Serving Veterans*, *supra* note 168 ("Veterans Legal Corps Fellows and law students will provide legal assistance to low-income and homeless veterans with issues related to disability benefits claims, barriers to housing and employment, debt, family law, and other legal issues.").

unmet need in a variety of legal issues facing veterans, some of which are detailed below.

1. Disability Claims Are Increasingly Complex

As of March 31, 2014, there were over 970,000 disability claims registered with the VA from post-9/11 veterans with post-traumatic stress disorder and TBI being the "signature wounds" of the current conflicts.[178] In addition, veterans from our prior wars are aging, and disability is more likely; "45% of World War II veterans, 24.8% of Viet Nam [sic] veterans, and 16.3% of the Gulf and Iraq War veterans are disabled."[179] Only about half of veterans who are disabled apply for VA benefits, which—when one considers that disability significantly increases the veteran poverty rate to nearly twice that of the non-veteran disabled population—is distressing.[180]

The complexity of the VA disability compensation process for those veterans suffering from an injury or illness resulting from their active duty service causes many veterans to seek out legal assistance in obtaining the benefits they earned. In order for an agent, attorney, or representative to provide assistance to veterans in seeking their disability benefits, that person must be accredited by the VA,[181] which requires completion of a detailed form, review and approval by the VA's Office of General Counsel, and completion of three hours of qualifying continuing legal education (CLE) "during

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178. ROSEMARY R. FRENCH & NORMA BAYES, GUIDE TO VETERANS LEGAL ISSUES 7–8 (2nd ed. 2014), *available at* http://www.benchmarkinstitute.org/t_by_t/substantive/guide_to_veterans_legal_issues.pdf.

179. *Id.* at 8.

180. *Id.* at 7–8.

181. 38 U.S.C. §§ 5901–5902, 5904 (2012); 38 C.F.R. § 14.629 (2014); 38 C.F.R. § 14.636(c).

> By law, no person or organization may charge claimants a fee for assistance in preparing applications for VA benefits or presenting claims to VA. VA-accredited agents and attorneys may charge fees for assistance on a claim for VA benefits only after VA has issued a decision on a claim, a Notice of Disagreement has been filed initiating an appeal of that decision, and the agent or attorney has complied with the power-of-attorney requirements in 38 C.F.R. § 14.631 and the fee agreement requirements in 38 C.F.R. § 14.636(g).

Accreditation, U.S. DEP'T VETERANS AFF., http://www.va.gov/ogc/ac-creditation.asp (last visited Apr. 17, 2015) (citations omitted).

the first 12-month period following the date of initial accreditation by VA," and "follow-up CLE not later than 3 years from the date of the initial accreditation and every 2 years thereafter."[182]

Because the VA considers the claims process non-adversarial in nature, attorneys and agents accredited by the VA may only charge fees after the Agency of Original Jurisdiction (the Regional Office) issues an initial decision on a claim and the veteran files a Notice of Disagreement.[183] As a result, veterans must typically prepare their initial claims regarding eligibility and compensation and resultant notices of disagreement without legal assistance. Pro bono assistance may be provided at the initial claims level, but fees are prohibited.[184] The fee prohibition, along with the additional VA accreditation requirements, serve as a disincentive to many attorneys. The attorney fee prohibition in the initial stages of a claim arises out of the VA's historically paternalistic system where the agency has a "duty to assist" claimants in obtaining evidence to substantiate their claims.[185] This paternalistic approach is significantly less tenable given the increasing complexity of veteran claims resulting from multiple deployments to combat zones, increased incidence of PTSD and TBI, the extraordinary delays in the VA's adjudication of claims,[186] and the overly burdened regional offices adjudicating an unprecedented number of claims.[187]

Without attorney assistance at the initial stages of a VA claim, veterans are often unaware of the evidence necessary to support their request for benefits. Compounding this, the VA has less

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182. *Accreditation Frequently Asked Questions*, U.S. DEP'T VETERANS AFF., http://www.va.gov/ogc/accred_faqs.asp (last visited Apr. 17, 2015) (quoting 38 C.F.R. § 14.629(b)(1)(iii)).

183. *Id.*

184. *Id.*

185. 38 U.S.C. § 5103A.

186. As of February 21, 2015, 45.9% of the initial entitlement claims for service-connected disability have been pending at the VA for more than 125 days. *Veterans Benefits Administration Reports*, U.S. DEP'T VETERANS AFF., http://benefits.va.gov/REPORTS/detailed_claims_data.asp# (download the "February 23, 2015" spreadsheet; then choose the "Transformation" tab at the bottom of the spreadsheet to find the "Compensation and Pension Rating Bundle Totals" data table).

187. *Id.* ("VBA employees are completing more compensation claims than ever before. More than three million claims were processed in the past three fiscal years, three times the amount completed in 2000.").

capacity to provide assistance in claims development given the backlog and increase in claims.[188] When veterans are unaware of the evidentiary requirements or type of evidence necessary for a successful claim, or, as a result of their disabilities, are unable to effectively acquire appropriate evidence in support, their claims are more likely to be denied. With a VA national average of 204 days to complete a rating claim,[189] there is an extraordinary delay before a veteran even has the opportunity to hire an attorney and begin the long road to appealing an initial entitlement or ratings decision.

Veterans need pro bono legal assistance to ensure they are aware of the benefits to which they may be entitled and the evidence necessary to support a claim for such benefits. In addition, they often need assistance in filing their initial claims and when necessary, assistance in preparing the notice of disagreement and potential appeal to the Board of Veterans' Appeals or the Court of Appeals for Veterans Claims ("CAVC"). William & Mary Law School's Lewis B. Puller, Jr. Veterans Benefits Clinic ("Puller Clinic") provides pro bono legal assistance at the initial claims level for complex claims and at each subsequent phase, including appeals through the CAVC.[190] The Puller Clinic focuses the majority of its efforts on the signature wounds of the current conflicts and in other difficult to prove claims, for instance military sexual trauma, where legal and factual investigation and persuasive advocacy are necessary.[191]

Although veterans will continue to need attorney assistance at the CAVC, veterans have more options for attorney representation at that level because attorneys can obtain fees for such cases.[192] By utilizing pro bono legal assistance earlier in the process, veterans

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188. The VA instituted mandatory overtime to deal with the backlog. Jackie Maffucci, *VA Backlog Drops ~2,500 Claims in the First Week of 2015*, IAVA (Jan. 12, 2015), http://iava.org/blogs/va-backlog-drops-2500-claims-in-the-first-week-of-2015/ ("Disability compensation claims processors work 20 hours of overtime per month in addition to their regular work week.").

189. *See Aspire Benefits*, U.S. DEP'T VETERANS AFF., http://www.app.hospitalcompare.va.gov (expand the "Compensation" cell) (last visited Apr. 4, 2015).

190. *See Lewis B. Puller, Jr. Veterans Benefits Clinic*, WM. & MARY L. SCH., www.law.wm.edu/veterans (last visited Apr. 17, 2015).

191. *See generally id.*

192. *See* 38 C.F.R. § 14.636(b)–(c) (2014). Fees are available from the VA to pay veterans' attorney fees for cases won on appeal at the CAVC. Stacy L.Z. Edwards, Comment, *The Department of Veterans Affairs' Entitlement Complex: Attorney Fees and Administrative Offset After* Astrue v. Ratliff, 63 ADMIN. L. REV. 561, 563 (2011) (citing 28 U.S.C. § 2412(b), (d) (2006)).

can submit a more comprehensive and persuasive initial claims package or first-level appeal, reducing the likelihood that their claims will be denied or improperly rated. If claims are decided more accurately at the initial stages, it will reduce the burden on the appeals process, veterans will have access to their compensation benefits years earlier, and the backlog in claims will not just be kicked down the road, to later become part of an increasing appeals backlog.

2. Education Challenges

With the proliferation of for-profit institutions readily available to veterans with the generous Post-9/11 GI Bill, veterans can use assistance with eligibility and in comparing benefits, institutions, and training programs to find those institutions with the highest completion and graduation rates. Once enrolled, veterans may need assistance in navigating the accommodations to which they may be entitled under the Americans with Disabilities Act and the Rehabilitation Act,[193] and, in those unfortunate circumstances where veterans are taken advantage of through their post-9/11 GI bill benefits, veterans will need legal assistance obtaining relief from usurious debts and unregulated programs intent on profit rather than veteran success.[194]

3. Employment Obstacles

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") requires that employers of National Guard and Reserve service members continue to employ them once they return from active duty.[195] Despite this legal protection, Post-9/11 Reservists and National Guard members returning from deployment are finding their employers are violating these statutory protections. In fact, nearly 11,000 were denied prompt reemployment; more than 22,000 lost seniority, pay, and other benefits; more than 15,000 did

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193. *See* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2012); Americans with Disabilities Act of 1990 § 202, 42 U.S.C. § 12132 (2012).

194. The University of San Diego Law School Veterans Clinic focuses on veterans who were taken advantage of through their post-9/11 GI benefits. *See Veterans Legal Clinic: Defending Your GI Bill*, *supra* note 39.

195. 38 U.S.C. § 4311 (2012).

not receive training required for their former jobs; almost 11,000 were denied the return of health insurance; and 23% of Reservists and National Guardsmen surveyed in 2006 said that they were unemployed because their prior employer did not follow USERRA and rehire them.[196] Reservists and National Guard members returning from deployment can use legal assistance when their prior employment is not reinstated with the same seniority, status, and pay rate as they had before deployment.[197] Veterans and those covered under USERRA may also need assistance in obtaining unemployment benefits.[198]

Just as veterans with disabilities may need legal assistance in obtaining the accommodations they require under the Americans with Disabilities Act while pursuing their education, they may also need assistance with accommodations at their place of employment, where "employers must make 'reasonable accommodations' for [veterans] with disabilities."[199]

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196. FRENCH & BAYES, *supra* note 178, at 12.

197. *See infra* Part IV.B. While current service members have access to legal counsel about these issues through Judge Advocate Generals ("JAG") at their respective service's Legal Service Centers, veterans using their post-9/11 GI Bill benefits are not entitled to legal services provided by JAG officers on base. *See infra* Part IV.B.

198. *See* FRENCH & BAYES, *supra* note 178, at 13. The Unemployment Compensation for Ex-service members program provides benefits for those formerly on active duty and who left under honorable conditions. *Id.* The law of the state where the claim is filed governs benefits. *Id.*

199. CIVIL RIGHTS DIV., U.S. DEP'T JUSTICE, ADA: KNOW YOUR RIGHTS 3 (2010), *available at* http://www.ada.gov/servicemembers_adainfo.pdf.

> The ADA uses different standards than the military and the Department of Veterans Affairs in determining disability status. The ADA covers people with a physical or mental impairment that substantially limits one or more major life activities such as walking, speaking, lifting, hearing, seeing, reading, eating, sleeping, concentrating, or working. Major life activities also include the operation of major bodily functions such as brain, immune system, respiratory, neurological, digestive, and circulatory functions. Businesses and State and local government agencies must take reasonable steps to make it possible for people with disabilities to be their employees or customers.

Id. at 2.

4. Health Benefits

Veterans and their families may need assistance in obtaining health benefits, either from the VA if they are eligible, or through Medicaid or the Children's Health Insurance Program. Over a million veterans—or one in 10 under age 65—and nearly a million of their family members lack health insurance coverage; a Harvard/Cambridge Hospital Study Group found there were 1,700,000 veterans with no health coverage.[200] Even for those with health coverage, they may find the wait for evaluation and treatment to be too great,[201] or that they require a second opinion or a medical opinion that can be used to support their disability compensation claim.[202] In addition, indigent, disabled, senior veterans may be eligible for a VA pension, and for those receiving a pension, they may also be entitled to aid and attendance or housebound benefits for care provided to the veteran by others.[203] A lawyer can assist veterans in obtaining these additional benefits when warranted.

Medical treatment is particularly difficult to obtain for veterans with mental health issues because those disabilities are traditionally more difficult to diagnose and manage, as well as more time-consuming and resource-intensive to treat.[204] Some veterans are able to receive assistance through medical-legal partnerships, often between law school clinics and healthcare providers. As previously discussed, William & Mary's Puller Clinic has, since its inception, partnered with graduate psychology clinics at other Virginia institutions so that veteran clients can get the legal assistance needed in their disability compensation claims, but also the psychological evaluation, diagnosis, and treatment necessary to support

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200. FRENCH & BAYES, *supra* note 178, at 15.

201. *See* Matthew Daly, *VA Medical Facilities Audit Finds More Veterans Forced to Wait 30 Days than Previously Reported*, HUFFINGTON POST (June 19, 2014, 8:42 PM), http://www.huffingtonpost.com/2014/06/19/va-medical-facilities_n_5513464.html. More than 56,000 veterans waited more than 90 days for an initial appointment, while 46,400 never received an appointment at all. *Id.*

202. William & Mary's Puller Clinic has had numerous veteran clients report that their VA physician would not write a letter of opinion in support of their claim due to an alleged conflict of interest between the Veterans Health Administration and the Veterans Benefits Administration, despite no record of any such conflict in existing regulations and directives.

203. FRENCH & BAYES, *supra* note 178, at 17–18.

204. *Id.* at 15.

their claim and recovery. Virginia Commonwealth University's Center for Psychological Services and Development, the Center for Psychological Services at George Mason University, and the Center for Assessment and Psychological Services at Radford University have all been instrumental in providing low-cost comprehensive evaluations and diagnostic reports that serve as evidence in complex psychological claims for disability compensation for the Puller Clinic's veteran clients.[205] Attorneys assisting veterans in need of health care or medical evidence in support of claims should consider collaborating with medical professionals or graduate-level clinical programs at higher education institutions, where veterans may be able to receive the evaluation, diagnosis, and treatment they require more quickly and potentially at a reduced rate.

B. Meeting the Needs of Veteran Clients

Both lawyers and law schools can aid veterans in meeting their legal needs and should be encouraged to do so. Although active-duty military members and their family have access to free legal help for some personal civil legal matters, many of the legal needs of our veterans remain unmet, particularly because "the VA has no statutory authority to provide or directly pay for legal services for veterans."[206] There are numerous ways that pro bono attorneys and law schools can assist our veterans with their legal needs. In addition to noting many of these opportunities, this section will go on to make recommendations regarding the cultural competency and client relationship skills that should be utilized when representing veterans.

1. Volunteer Services in Lawyer's Area of Practice

Lawyers seeking to provide pro bono services to veterans can start by registering with one of the American Bar Association

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205. *See generally Center for Psychological Services*, GEO. MASON U., http://psyclinic.gmu.edu/ (last visited Apr. 17, 2015); *Center for Psychological Services and Development*, VA. COMMONWEALTH U., http://www.cpsd.vcu.edu/ (last updated Apr. 8, 2015); *Program Resources*, RADFORD U., http://www.radford.edu/content/chbs/home/psychology/programs/school/resources.html (last visited Apr. 17, 2015).

206. Gunn et al., *supra* note 170, at 10.

initiatives,[207] or with their state and local bar association referral networks, many of which now include an emphasis on veterans.[208] A practicing or retired attorney can provide legal services on a pro bono or reduced fee basis and can do so in the areas of law in which they are already experienced. The National Veterans Legal Services Program,[209] any legal aid office, or a Veterans Justice Outreach ("VJO") specialist[210] can help a lawyer identify those legal areas for which nearby veterans are in need and facilitate a referral to the volunteer attorney.[211] In addition, lawyers can offer their pro bono services to the ever-increasing number of law school veteran clinics, being available for referrals of veterans with legal needs outside of the scope of the clinic.[212]

2. VA Medical Center Legal Clinics

Since 2008, VA Medical Centers have provided space for pro bono legal service providers to work with veterans on-site. As of 2014, there were forty-six legal service providers in forty-three different VA healthcare facilities; they include services provided by legal aid organizations, law school clinics, law firms, and volunteer

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207. *See supra* notes 174–77 and accompanying text.

208. Organizations like Swords to Plowshares focus on veterans issues within a particular community. *See About*, SWORDS TO PLOWSHARES, www.swords-to-plowshares.org/about (last visited Apr. 17, 2015); *see also* Linda Seely, *MALS' Responds to Needs of Veterans*, MEM. LAW., Nov.–Dec. 2014, at 22, 22–23, *available at* http://www.flipsnack.com/MemphisBar/memphis-lawyer-november-december-2014.html.

209. *See About Us*, NAT'L VETERANS LEGAL SERVICES PROGRAM, http://www.nvlsp.org/about-us (last visited Apr. 17, 2015).

210. *See Homeless Veterans*, U.S. DEP'T VETERANS AFF., http://www.va.gov/homeless/vjo.asp#contacts (last visited Apr. 17, 2015). There is a VJO Specialist assigned to each VA Medical Center. *See id.*

211. *See* James T. O'Reilly & Donald D. Black, *What You Can Do for Your Country: Cross-Generational Support for Today's PTSD Veterans*, 23 EXPERIENCE, 2014, at 14, 17.

212. For instance, in conjunction with the Puller Clinic, a graduate of William & Mary Law School recently started an initiative to get family law attorneys in Virginia to each agree to take one veteran family law case at a reduced fee or on a pro bono basis. *See generally* Patty Roberts, *Welcome!*, VETERANS L. & BENEFITS BLOG (Oct. 30, 2014, 10:09 AM), http://vetlawandbenefits.org/2014/10/ ("In short, the law school veterans' clinic community, working together, is creating an army of volunteer attorneys . . . .").

attorneys.[213] Another opportunity for volunteer attorneys to assist veterans, particularly those who are homeless, is for the attorneys to volunteer to provide advice and counsel at homeless shelters or take part in "Homeless Stand Downs."[214] Stand downs are one- to three-day events that provide services to homeless veterans through collaboration between VA medical centers, other government agencies, and community agencies, and they typically provide homeless veterans with food, counseling, clothing, health screenings, benefits counseling, employment and housing assistance, substance abuse treatment, and, when volunteer attorneys are available, legal services.[215]

3. Veteran Treatment Courts

Founded in 2008, Veteran Treatment Courts[216] emphasize helping veterans obtain treatment rather than be incarcerated, particularly when substance abuse or mental health issues are involved, and utilize interdisciplinary teams that assist the courts.[217] Judges, prosecutors, and defense counsel can all play a part in establishing or supporting veteran treatment courts as a way to help veterans recover from the wounds of serving, and thereby, more successfully reintegrate into their families and communities. There are more than one hundred formal veteran treatment courts or veteran specific dockets nationwide, and that number is rapidly growing.[218]

4. Disability Compensation Benefits

For those attorneys in good standing with a state bar who are willing to step into the challenging area of disability benefits, they can apply for accreditation with the VA utilizing Form 21a and, once

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213. Gunn, et al., *supra* note 170, at 10.

214. *Events/Stand Downs*, U.S. DEP'T VETERANS AFF., http://www.va.gov/homeless/events.asp (last visited Apr. 17, 2015).

215. Gunn et al., *supra* note 170, at 11.

216. *The History*, JUST. FOR VETS, http://www.justiceforvets.org/vtc-history (last visited Apr. 17, 2015). Veterans treatment courts were modeled initially after mental health and drug courts that use an interdisciplinary collaborative approach that offers treatment options and alternatives to incarceration in order to help defendants rehabilitate and avoid recidivism. *Id.*

217. *Id.*

218. *See id.*

certified, complete three hours of continuing legal education in the area of veterans benefits law within twelve months and at least two additional hours every two years thereafter.[219] While there are non-attorney veteran service organizations that can also be very helpful to veterans in pursuing their disability compensation claims, "they lack a lawyer's insight to push the system for personal attention to the special needs of the one individual veteran whom [the lawyer] will be helping at any particular moment."[220] In addition, while many veteran service organizations are well versed and experienced in traditional disability compensation claims, some of the more complex claims that require extensive medical evidence and legal and factual analysis, such as claims involving PTSD, TBI, and military sexual trauma, can benefit significantly from the skills of an attorney.

Recent news has focused on the backlog of disability compensation claims at the VA awaiting an initial decision at the regional office level.[221] For those appealing initial decisions, or seeking an increased rating or additional benefit, the opportunity exists to go to the Board of Veterans' Appeals. "There are now more than 250,000 of those claims before the Board of Appeals. These may take an average of four years to decide, said Glenn Bergmann, a former VA lawyer who now represents veterans seeking compensation from the department."[222] Causing further delay to veterans is the fact that a tremendous number of decisions at the Board of Veterans' Appeals involve a remand; in 2012, "almost *half* of the 44,000 Board decisions issued were remands . . . . The VA estimates that the average additional wait time in a remanded case is 445 days, or

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219. Gunn et al., *supra* note 170, at 12.

220. O'Reilly & Black, *supra* note 211, at 17.

221. *See* Leo Shane, III, *2015 Goal for VA Claims Backlog Appears out of Reach*, MIL. TIMES (Dec. 31, 2014, 12:10 PM), http://www.militarytimes.com/story/veterans/2014/12/31/2015-va-claims-backlog/21097689/. The "backlog" is defined as the number of first-time benefit claims unresolved for more than four months; at the end of 2014, that figure was reported as 245,000. *Id.* This figure does not include administratively appealed claims or claims appealed to the federal courts. *See id.*

222. Bryant Jordan, *Congress to Press VA on Claims Appeals Process*, MILITARY.COM (Sept. 5, 2014), http://www.military.com/daily-news/2014/09/05/congress-to-press-va-on-claims-appeals-process.html.

a little over a year."[223] Those veterans who take their appeal beyond the Board of Veterans' Appeals, to the U.S. Court of Appeals for Veterans Claims, will wait 321 days for a decision, many of which will also include a remand to the regional office, taking even more time.[224]

The extraordinary increase in pending disability compensation claims and resultant delays in VA decisions demonstrate the need for attorney involvement at the beginning, when the initial claim is filed or disagreed with, at the regional office level. In the event someone with legal skills and training can not only assert a veteran's claims, but also provide the requisite factual and medical evidence in support of those claims, the VA can make their decisions more quickly and efficiently. Thus, the veteran can receive a decision more promptly. Volunteer attorneys can be a part of the solution to the backlog, by "making the case" for the veteran in the most persuasive and comprehensive manner initially, in order to increase the speed and accuracy of the resultant decision. Having attorneys help veterans navigate the complex disability compensation process and increase their likelihood of success would go a long way toward alleviating the stress, depression, and frustration that can accompany the claims process, and ameliorate the current attitude among veterans that the VA is trying to "[d]elay, deny, wait till I die."[225]

5. Law Schools Serving Veterans

In 2008 there were approximately half a dozen law schools with clinics, programs, or initiatives focused on the legal needs of service members and veterans; in 2012 there were 25.[226] Now there are more than forty.[227] Although they represent a variety of models–

223. Amy F. Odom, *Navigating the VA Disability Claims Process*, 23 EXPERIENCE, 2014, at 19, 22.

224. *Id.* at 19–20.

225. Aaron Glantz, *Number of Veterans Who Die Waiting for Benefits Claims Skyrockets*, CENTER FOR INVESTIGATIVE REPORTING (Dec. 20, 2012), http://cironline.org/reports/number-veterans-who-die-waiting-benefits-claims-skyrockets-4074.

226. K.N. BARRETT ET AL., FINAL REPORT: LEWIS B. PULLER, JR. VETERANS BENEFITS CLINIC app. at 9 (2012).

227. As of the date of this article, the author is aware of a clinic, public service initiative, program, or externship that focuses on the needs of the military or veterans either in operation or in development at the following law schools:

–some are volunteer efforts, others are for academic credit, some are in partnership with other legal services organizations, and others are in partnership with medical centers or schools—they are all taking advantage of the time, talent, and passion of our nation's law students. Law students today are eager to learn to work with clients and find working with those who served or are serving our country to be rewarding and fulfilling. William Burke, a third-year student in William & Mary Law School's Lewis B. Puller, Jr. Veterans Benefits Clinic, noted:

> Already in the short time I've been a part of the Puller Clinic, three veterans have explained how much it means to them to have someone on their side. This

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James E. Rogers College of Law at the University of Arizona; University of Baltimore School of Law; Baylor Law School; UC Berkeley School of Law; Case Western Reserve University School of Law; Chapman University School of Law; Chicago Law School; University of Detroit Mercy School of Law; Duquesne University School of Law; Emory University School of Law; George Mason University School of Law; Georgetown University Law Center; Golden Gate University School of Law; Harvard Law School; Marquette University Law School; The Maurice A. Deane School of Law, Hofstra University; University of Missouri School of Law; North Carolina Central University School of Law; NOVA Southeastern University Shepard Broad Law Center; Ohio State University Moritz College of Law; Phoenix School of Law; University of Pittsburgh School of Law; University of San Diego School of Law; UC Davis School of Law; UCLA Law; Southern Illinois University School of Law; Stetson University College of Law; SUNY Buffalo Law School; Syracuse University College of Law; The University of Texas at Austin School of Law; Thomas Jefferson School of Law; Touro Law Center; Vermont Law School; Washburn University School of Law; West Virginia University College of Law; Widener Law School; William & Mary Law School; William Mitchell College of Law; University of Miami School of Law; University of Wisconsin Madison Law School; University of Wyoming College of Law; and Yale Law School. The number of law school clinics are expected to continue to increase, partially in response to the August 2014 American Bar Association House of Delegates' Resolution 104(A), which adopted a policy urging all law schools to create veterans law clinics. *See* Terry Carter, *ABA House Urges Law Schools to Create Veterans' Law Clinics*, ABA J. (Aug. 11, 2014, 9:51 PM), http://www.abajournal.com/news/article/aba_house_urges_law_schools_to_create_veterans_law_clinics.

> is especially meaningful to me because I am a veteran: helping other vets helps me get back a pride of service I haven't felt since I left the Navy.

Another student wrote in their evaluation of their Puller Clinic experience:

> It has impacted me on a personal level by connecting with my clients and learning of the injustices/battles that our veterans face in their disability claims. It also impacted me professionally by increasing my confidence working with clients and learning a new area of law and being able to become comfortable strategizing and working on real cases.

While the Puller Clinic[228] and numerous other law school clinics focus on disability compensation claims, appeals, and discharge upgrades related to a veteran's disabilities,[229] any of the ways that attorneys can volunteer to work with veterans would benefit from student involvement as well, so long as the students are working under a licensed attorney or professor with expertise in the field. Some law school clinics help active duty service members with their civil legal needs,[230] are involved in veteran treatment courts,[231] or aid veterans in other unmet legal needs;[232] there are also law schools that take a more systemic approach to improving the VA's treatment of veterans through litigation or legislation and policy drafting.[233]

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228. *See Lewis B. Puller, Jr. Veterans Benefits Clinic*, WM. & MARY L. SCH., http://www.law.wm.edu/veterans (last visited Apr. 17, 2015).

229. *See, e.g.*, Michael Wishnie et al., *Veterans Legal Services Clinic*, YALE L. SCH., http://www.law.yale.edu/academics/veteranslegalservicesclinic.htm (last visited Apr. 17, 2015); *Veterans Advocacy Clinic—Legal Help for Veterans*, STETSON L., http://www.stetson.edu/law/veterans/legal-help-for-veterans.php (last visited Apr. 17, 2015); *Veterans Clinic*, U. MO. SCH. L., http://law.missouri.edu/jd/skills/veterans-clinic/ (last visited Apr. 17, 2015).

230. *See, e.g.*, *Mason Veterans and Servicemembers Legal Clinic*, GEO. MASON U. SCH. L., http://mvets.law.gmu.edu/ (last visited Apr. 17, 2015).

231. *See, e.g.*, *Veterans Legal Support Center & Clinic*, J. MARSHALL SCH., http://www.jmls.edu/veterans/clients/index.php (last visited Apr. 17, 2015).

232. *See, e.g.*, *Clinic Descriptions*, TOURO L., http://www.tourolaw.edu/Academics/clinics-descriptions (last visited Apr. 17, 2015).

233. *See, e.g.*, Wishnie et al., *supra* note 229.

From one-day advice, counsel sessions, and participating in a local stand down,[234] to visiting homeless shelters or a VA healthcare center to offer legal services,[235] to working with a volunteer attorney[236] or a legal aid organization in the community who works with veterans,[237] there are limitless ways for students to get involved, showing one veteran at a time that we are glad they are home and we are eager to help.

In an effort to further encourage law schools to develop programs aiding veterans, and to "provide a unified voice to identify and advance the needs of the law school veterans' clinics and, more importantly, the veterans they serve," the National Veterans Law School Clinic Coalition was created.[238] The Coalition's mission statement states:

> Law schools across the nation are tasked with equipping future attorneys with the skills necessary to zealously represent their clients' interests as well as instill a sense of service for the greater good. As a result of this distinct background, law schools and its students are uniquely suited to serve U.S. military veterans in a way that distinguishes them from the vast majority of other types of organizations serving veterans. At this point in our nation's history, the

234. *See, e.g.*, *About Project SALUTE*, U. DET. MERCY SCH. L., http://www.law.udmercy.edu/index.php/component/content/article/20-project-salute/172-who-we-are (last visited Apr. 17, 2015).

235. *See, e.g.*, *Health Rights Clinic*, U. MIAMI SCH. L., http://www.law.miami.edu/clinics/health-rights/?op=5 (last visited Apr. 17, 2015).

236. *See, e.g.*, *Veterans Law Institute*, STETSON L., http://www.stetson.edu/law/veterans/ (last visited Apr. 17, 2015).

237. *See, e.g.*, *Veterans Law*, NOVA SOUTHEASTERN U., https://www.nsulaw.nova.edu/clinics/vlc.cfm (last visited Apr. 17, 2015).

238. Nat'l Veterans Law Sch. Clinic Coal., Mission Statement (2015) (unpublished mission statement prepared by Duane Morris LLP, Holland & Knight, and Nixon Peabody) (on file with the author).

> need among veterans for legal services is overwhelming and will remain so for the foreseeable future.[239]

VII. WORKING WITH VETERANS AS COLLEAGUES AND CLIENTS

Whether we are educating veterans in our law school classrooms, representing them as clients through law school programs, or training our non-veteran law school students and volunteer attorneys how to work with veteran clients, our veterans are a population that require cultural competency, understanding, and respect. They are warriors, not victims, and they are used to hierarchy and rank and a level of order and discipline to which civilians are unaccustomed. This section is intended to help non-military legal educators or service providers in providing culturally competent education and representation.

It is appropriate and respectful to refer to someone who is currently serving or formally retired by their rank; veterans who did not formally retire are not addressed by their rank and can instead be called "sir" or "ma'am," as a way of showing respect. Familiarizing oneself with the branches of service and ranks in the military before meeting with a service member or veteran will help to understand their role as part of the broader military service, and may provide useful insight to their challenges in the classroom or obstacles to effective representation. Finding out the service member's or veteran's military specialty can also help provide context to challenges in reintegration or service-related injuries, which may be impacting the student veteran or veteran client.

When representing veterans it is important to see their actions "through the lens of conditioning;" for instance, "empathize

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239. *Id.* The Coalition is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans. The Coalition's mission is to gain support and advance common interests with the U.S. Department of Veterans Affairs, U.S. Congress, and other federal entities for the benefit of veterans throughout the country. *Id.* The Coalition is assisted on a pro bono basis by the law firms of Duane Morris LLP, Holland & Knight, and Nixon Peabody.

with a veteran without excusing unacceptable behaviors."[240] In addition, it is critical to be ready for the service member or veteran to tell their story, in their time. Whether serving as a teacher or as a lawyer for a veteran, be prepared when a veteran does speak freely, to "constructively react to hearing about killing, death, racism, sexism, or other situations and attitudes that are uncommon or unacceptable in society. Never ask, 'Have you ever killed anyone?'"[241] Listen carefully and empathetically, and be prepared that with the prevalence of military sexual trauma,[242] one may find that a service member or veteran student or client is the victim of a sexual assault, a crime that in military culture is devastating not only in its violent defilement, but in its emotional harm because the perpetrators are the victim's fellow service members, or brothers- and sisters-in-arms. The Department of Defense reported that sexual assaults in the military are up 97% since 2006;[243] sexual assault in the military is likely to result in post-traumatic stress for the victims, among other injuries.

In some ways, attorneys may be in the position of "first responders" because veterans seeking legal help may be unaware of their own symptoms of post-traumatic stress or TBI, and stress and anxiety resulting from upcoming legal matters or the delay of compensation benefits may trigger these symptoms.[244] This "first responder status arises from the legal counselor's uncommon access to the client's decision processes, personal history, and behavior, a

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240. LAUREN PEACH & LEO FLOR, REPRESENTING WASHINGTON VETERANS: BASIC LEGAL AND CULTURAL CONCEPTS 20 (2012).

241. *Id.*

242. *See generally* Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. TIMES (May 1, 2014), http://www.nytimes.com/2014/05/02/us/military-sex-assault-report.html?_r=0 ("In 2012, a confidential Pentagon survey estimated that 26,000 men and women were sexually assaulted. Of those, 3,374 cases were reported. In contrast, 5,061 cases were reported [in 2013].").

243. *See* John Lasker, *Military Sexual Trauma: Is This How We Treat Women in the Military?*, COLUMBUS FREE PRESS (Sept. 27, 2013), http://columbusfreepress.com/article/military-sexual-trauma-how-we-treat-women-military.

244. Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 147, 151 (2009).

combination of which can easily reveal PTSD symptoms or influence the client's evaluation of the attorney's advice."[245] In addition, the legal matters themselves may aggravate or reveal post-traumatic stress symptoms.[246] Those working with veterans must familiarize themselves with the symptoms of mental health issues and other prevalent disabilities experienced by this population as well as the signs of suicide and resources to contact if a veteran is at risk of suicide. Law school professionals, peers, or attorneys representing veterans may end up being a "first responder" to a veteran's signs of suicidal ideation. It is not uncommon for veterans to tell their attorneys things they do not even tell their family members, so attorneys have a unique view into a veteran's state of mind and should be trained to recognize an impending risk of harm to their veteran clients or others when a veteran is struggling significantly.[247]

Those who are working closely with service members or veterans who suffered trauma, something more likely with our post-9/11 veterans, some of whom are repeatedly deployed into combat zones, should familiarize themselves with the symptoms of PTSD and TBI. Some of these symptoms include: difficulty concentrating or processing information; challenges in learning or with memory; sluggish abstract reasoning; and slowed problem solving, planning, and insight/awareness sequencing.[248] Once the symptoms are recognized, the law school professional, peer, or attorney can recommend that the veteran seek medical assistance. Any impact on the service member or veteran's law school studies or ability to participate in his or her legal representation should also be considered, with steps taken to address any deficiencies, preferably in concert with a mental health professional.

For veterans facing legal and medical challenges, law schools and attorneys can seek out possibilities for medical-legal

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245. *Id.* at 147.

246. *Id.* at 162.

247. In the event a veteran you are working with is in crisis, contact the VA's Veterans Crisis Line, which connects veterans and their families and friends with qualified, caring VA responders through a confidential, toll-free hotline, online chat, or text. Veterans and their loved ones can call 1-800-273-8255 and Press 1, chat online at http://www.veteranscrisisline.net, or send a text message to 838255 to receive confidential support 24 hours a day, 7 days a week, 365 days a year.

248. *See* AM. COUNCIL ON EDUC. ET AL., *supra* note 63, at 3.

partnerships where "doctors and attorneys work together to achieve better outcomes for their patients/clients."[249] Such initiatives are succeeding on behalf of veterans at the Miami Medical-Legal Partnership, a collaboration between the Miami VA Healthcare System, the University of Miami School of Law, and the Miller School of Medicine, and at the West Haven Medical-Legal Partnership, a collaboration between the VA Connecticut Healthcare System's Errera Community Care Center and the Connecticut Veterans Legal Center, among others.[250] Legal service providers can aid veterans by connecting them with health care providers who can opine as to a veteran's medical condition and recommended treatment and can help support a comprehensive claim for disability compensation benefits by providing evidence of disabilities and a connection to active duty service.

William & Mary's Puller Clinic was the first legal clinic in the country to address veterans needs holistically by combining legal and psychological assistance in representation of veterans in their disability compensation claims. This is accomplished by working with higher education partners such as Virginia Commonwealth University's Center for Psychological Services and Development and George Mason University's Center for Psychological Services.[251] Working under attorney supervision, Puller Clinic law students interview veterans, analyze medical records, communicate with health care providers, and craft strategies to help clients obtain their benefits. Working with the psychologists and other medical

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249. Gunn et al., *supra* note 170, at 10.

250. *Id.* at 10–11.

251. Suzanne Seurattan, *General Assembly Includes Funding for W&M's Puller Clinic in State Budget*, WM. & MARY L. SCH. (Mar. 3, 2015), https://law.wm.edu/news/stories/2015/general-assembly-includes-funding-wm-puller-clinic-in-state-budget.php. Inspired by these successful collaborations and their positive impact on veteran client representation, in 2015 the Puller Clinic will have a part-time psychologist on staff to supervise doctoral psychology students from VCU and GMU in-house as they provide assessments to veteran clients, as well as at least one doctoral student utilizing the Puller Clinic as their practicum placement for the year. *See* Mike Gooding, *Senate Urges V.A. to Work More Closely with Law School Clinics Over Vets Benefits*, 13 NEWS NOW (Mar. 20, 2015, 8:18 PM), http://www.13newsnow.com/sto-ry/news/military/2015/03/20/senate-urges-va-to-work-more-closely-with-law-school-clinics-over-vets-benefits/25108481/.

professionals, the Puller Clinic obtains the medical evaluation, diagnosis, treatment, and evidence necessary for a comprehensive benefits claim. In pairing law and psychology students, the Puller Clinic is cross-training them in veterans benefits law and the injuries suffered by veterans, but also encouraging learning and collaboration across disciplines. Approximately 400 pro bono hours are provided by legal and psychology professors and students in each PTSD or TBI claim.

Those working with veterans should also consider whether a student veteran or veteran client needs assistance with employment, housing, or finances in order to "durably improve their overall stability,"[252] and refer veterans to community service providers or social workers who may be able to provide assistance with those resources.

Finally, while many have embraced the idea of thanking our service members and veterans for their service, "[f]or recently returned veterans, 'Welcome home,' or 'Glad to have you back,"' may be more suitable;"[253] veterans often feel uncomfortable when being thanked for what they consider was their fulfillment of their duty to serve. "For any veteran (or person), 'I'd like to learn about your experience if you feel comfortable discussing it,' may more effectively connect an advocate and client without expressing judgment. Most veterans would rather be heard than thanked."[254]

VIII. CONCLUSION

It is critical that we "show the next generation of Americans that military service is noble and worthwhile—and that when you sacrifice for your fellow citizens, you will find strong support when you come home."[255] Our post-9/11 veterans often have decades of employment ahead of them, and many of them are taking advantage of the generous educational benefits under the Post-9/11 GI Bill to pursue additional education and training in order to improve their

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252. PEACH & FLOR, *supra* note 240, at 21.

253. *Id.*

254. *Id.*

255. George W. Bush, Remarks at the Bush Institute's Empowering Our Nation's Warriors Summit (Feb. 19, 2014) (transcript available at http://www.bushcenter.org/remarks-president-george-w-bush-bush-institute's-empowering-our-nation's-warriors-summit).

post-military employment opportunities. "Among those [post-9/11 veterans] under age 30, more than one-third (37%) are full-time students, and 8% go to school part time."[256] As law schools teaching student veterans to be lawyers and teaching non-veteran students the skills they will need to adequately represent the unmet legal needs of our nation's veterans, we have an obligation to infuse military and cultural competence into our pedagogy. This increased awareness of the specific needs of service members and veterans—and our efforts to meet those needs for student veterans and for veteran clients—will help to ensure their success in reintegrating to civilian life.

Our efforts at successfully integrating veterans on our campuses and in our communities will reap rewards not just for veterans but also for those of us who will work alongside them. As Harvard University President Drew G. Faust told the inaugural class of veterans in the Warrior-Scholar Project, "[y]ou have such important messages and lessons to bring to our communities in your role as warrior-scholars."[257] President Faust continued, "I hope that as you become scholars, you don't entirely abandon your role and your experiences as warriors, but that you bring the richness of that experience to the communities which you will be entering."[258]

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256. *See* TAYLOR ET AL., *supra* note 11, at 57.

257. Ivan B.K. Levingston & Tyler S.B. Olkowski, *Warrior-Scholar Project Hosts Inaugural Program at Law School*, HARV. CRIMSON (Aug. 18, 2014), http://www.thecrimson.com/article/2014/8/18/warrior-scholar-program-inaugural/?page=single.

258. *Id.*

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FROM THE "WAR ON POVERTY" TO PRO BONO: ACCESS TO JUSTICE REMAINS ELUSIVE FOR TOO MANY, INCLUDING OUR VETERANS

PATRICIA E. ROBERTS*

Abstract: Fifty years ago, President Lyndon B. Johnson launched the War on Poverty. The Legal Services Program of 1965, along with the Legal Services Corporation formed in 1974, considerably increased civil legal aid to America's poor. Yet today, there is only one legal aid attorney for every 6,415 people living in poverty. Veterans, comprising 4.6% of those living in poverty, often suffer additional obstacles and extensive legal needs, including assistance in obtaining benefits to which they are entitled. While encouraging additional pro bono service among attorneys incrementally increases the availability of legal services to the poor, law school clinics across the country enroll students eager to address the legal needs of the poor. A concerted effort by law schools and higher education institutions to provide legal services to veterans in particular will foster a greater sense of social responsibility towards the men and women who served our country and will make significant strides toward equal access to justice for our nation's underserved poor.

INTRODUCTION

There is a vast justice gap in America. This gap exists despite Justice Powell's reminder to us that:

> [e]qual justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists . . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status.[1]

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[1] Lewis Powell, Jr., U.S. Supreme Court Justice, as quoted in *Collected Quotes Pertaining to Equal Justice*, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/News/Equal_Justice_Quotes (last visited May 4, 2014).

America has the most lawyers of any country, yet one of the least adequate legal assistance systems.[2] Although legal issues are just one of the myriad of challenges faced by those in poverty, the lack of representation by an attorney in facing civil legal issues can exacerbate those challenges. Lack of access to representation often has an impact on basic human needs such as safe and secure living arrangements, employment, custody of children, and opportunities to obtain benefits, such as pensions and insurance.[3] Reductions in funding to legal aid initiatives and greater restrictions on client eligibility, the economic recession, resultant unemployment, increased levels of poverty, and scant pro bono legal services all contribute to a shocking number of individuals unable to access lawyers. Veterans seeking benefits related to injuries and deployments comprise a significant percentage of those individuals who are unable to access justice.[4]

The number of veterans currently living in the United States is estimated at over twenty-two million; each year additional veterans return from our current conflicts.[5] There has been a significant increase in the number of disability claims filed with the Department of Veterans Affairs ("VA"), and a shameful backlog of pending disability claims is causing unacceptable wait times for adjudication of those claims.[6] The first five years of William & Mary Law School's Lewis B. Puller, Jr. Veterans Benefits Clinic demonstrate that higher education faculty and students can assist in the preparation of veterans' claims, aid in reducing the backlog and wait times for claims at the regional office level, and more quickly and efficiently obtain benefits for veterans.[7] Law school clinics across the country can and should aid in lessening the justice gap for veterans seeking the benefits they were promised by our nation. The soldiers who bravely and selflessly sacrificed so much for all of us deserve our assistance.

Attempts at addressing the justice gap, or the difference between what people living in poverty can afford and the civil legal representation available

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[2] Deborah Rhode, Remarks at "Ethics at Noon" Presentation, *Equal Justice Under Law*, SANTA CLARA UNIV. (Jan. 17, 2012), https://www.scu.edu/ethics/publications/submitted/rhode/equal-justice.html.

[3] REBECCA L. SANDEFUR, AM. B. FOUND., CIVIL LEGAL NEEDS AND PUBLIC LEGAL UNDERSTANDING 1 (2011), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_-_civil_legal_needs_and_public_legal_understanding_handout.pdf.

[4] *See* YALE LAW SCHOOL VETERANS LEGAL SERVICES CLINIC, http://www.law.yale.edu/academics/veteranslegalservicesclinic.htm (last visited Feb. 14, 2014).

[5] OFFICE OF THE ACTUARY, DEP'T OF VETERANS AFFAIRS, VETERAN POPULATION PROJECTIONS: FY2010 TO FY2040 (2011), *available at* http://www.va.gov/vetdata/docs/QuickFacts/Population_quickfacts.pdf.

[6] *See* Steve Vogel, *Veterans in Maryland Seeking Disability Benefits Can Face a Perilous Wait*, WASH. POST, Feb. 3, 2013, at A1.

[7] *See Lewis B. Puller Jr. Veterans Benefits Clinic*, WILLIAM & MARY LAW SCH., http://law.wm.edu/academics/programs/jd/electives/clinics/veterans/ (last visited May 4, 2014).

to them, have persisted since the early 1960s.[8] Part I of this article will address legal services provided as part of the "War on Poverty," and the eventual creation of the Legal Services Corporation ("LSC"). Part II will consider the efficacy of the LSC and other efforts currently aimed at narrowing the justice gap, with a focus on the unmet legal needs of veterans. Part III will explore pro bono efforts as a partial solution to addressing the justice gap. Part IV will explore the role of law school clinics in meeting the civil needs of those living in poverty. Finally, Part V will discuss how clinics like the Puller Clinic can address the unmet legal needs of veterans.

I. THE WAR ON POVERTY & LEGAL SERVICES

In the early 1960s, President Kennedy shifted the welfare conversation from one of handouts to the poor to one of helping the poor to succeed.[9] On the premise of "Give a hand, not a handout," his administration wanted to focus on training and employment that would lead to self-sufficiency.[10] To this end, he implemented the Public Welfare Amendments of 1962 and the Manpower Development and Training Act.[11] The Public Welfare Amendments constituted a considerable revision to the 1935 Public Welfare program, and included incentives to reduce dependency and encourage productivity, as well as increased federal funds for the aged, blind, and disabled.[12] The Manpower Development and Training Act provided for skills training for unemployed workers, allowances for family support during that training, and guidance in career and training selection.[13]

During President Johnson's first nine months in office he continued his predecessor's quest to encourage independence rather than provide handouts. He signed the first antipoverty bill, The Economic Opportunity Act, in August of 1964.[14] Some of the initiatives included in the Act included the Job Corps, the Neighborhood Youth Corps, Work-Study Programs, the Adult Basic Education Program, the Work Experience Program, Volunteers in Service to America

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[8] *See* Marshall M. Mansfield & Louise G. Trubek, *New Roles to Solve Old Problems: Lawyering for Ordinary People in Today's Context*, 56 N.Y. L. SCH. L. REV. 367, 368 (2011–12).

[9] CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980, at 22 (2d ed. BasicBooks 1994) (1984).

[10] *Id.* at 22–23.

[11] *Id.* at 23.

[12] President John F. Kennedy, Statement by the President Upon Approving the Public Welfare Amendments Bill, (July 26, 1962), *available at* http://www.presidency.ucsb.edu/ws/?pid=8788.

[13] President John F. Kennedy, Statement by the President Upon Signing the Manpower Development and Training Act (Mar. 15, 1962), *available at* ,http://www.presidency.ucsb.edu/ws/?pid=9106 (last visited March 6, 2014).

[14] MURRAY, *supra* note 9, at 23.

("VISTA"), and Community Action Programs.[15] Additional "national emphasis" programs, so called for their popularity, included Project Head Start, the Foster Grandparents Program, Comprehensive Health Services, Upward Bound, and, most pertinent to this article, Legal Services.[16] The Office of Economic Opportunity ("OEO"), part of the Executive Office of the President, ran these programs.[17] Within five years, no fewer than seventeen programs implemented ten thousand projects which addressed employment and skills training needs for the poor.[18]

Early in the crafting of the War on Poverty, Justice Arthur Goldberg supposedly asked President Johnson to include legal services in the initiatives, but the President said no.[19] Nonetheless, with some modest funding from the Ford Foundation, Jean and Edgar Cahn started a Legal Services Program similar to one that Jean Cahn previously created in New Haven, Connecticut.[20] Sargent Shriver, the director of OEO and an attorney, opined early on that the Legal Services Program would potentially be the most significant program in the War on Poverty.[21] Shriver noted that "making provision for attorneys to represent the poor and for the courts to recognize rights of the poor never before recognized would have a far-reaching and continuing effect on the distribution of power in the society."[22]

Before a successful legal services program could be created, the Cahns recognized that they had to get the organized bar to support the initiative.[23] At that time, the American Bar Association (ABA) had its own legal aid program that spent five million dollars annually to aid the poor.[24] The legal profession already had a long history of providing services to the poor: bar associations operated charitable legal aid programs since the 1800s, and the first formalized legal aid began in New York City in 1876.[25] By the 1960s, when the federal Legal Services Program was being proposed, there were 236 legal aid offices and one hundred public defender offices in operation; just like today, attorneys in those offices were underpaid and struggled with overwhelming caseloads.[26]

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[15] MICHAEL L. GILLETTE, LAUNCHING THE WAR ON POVERTY: AN ORAL HISTORY, at xix (2d ed. 2010).

[16] *Id.* at xix–xx.

[17] ROBERT F. CLARK, THE WAR ON POVERTY: HISTORY, SELECTED PROGRAMS AND ONGOING IMPACT 13 (2002).

[18] MURRAY, *supra* note 9, at 83.

[19] GILLETTE, *supra* note 15, at 295.

[20] *Id.* at 294–95.

[21] *Id.* at 296.

[22] *Id.*; JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, *R. Sargent Shriver*, http://www.jfklibrary.org/JFK/The-Kennedy-Family/R-Sargent-Shriver.aspx (last visited Apr. 1, 2014).

[23] GILLETTE, *supra* note 15, at 296–97.

[24] *Id.*

[25] CLARK, *supra* note 17, at 178.

[26] *Id.* at 179–80.

The ABA sent representatives to negotiate with the Cahns over what the ABA saw as "federal interference in the private practice of law" and "a threat to the integrity of the profession . . . ."[27] Ultimately, the ABA and the National Legal Aid and Defenders Association supported a federal Legal Services Program, and the Program was created over some vehement objections from select state and local bar associations.[28] The Legal Services Program began in 1965 and was placed under the authority of the Community Action Program.[29] In 1969, Stephen J. Pollak explained the impact of Legal Services:

> The poor by and large did not have access to lawyers. Where they had good arguments, they weren't able to present them. Where they needed laws to protect them, our system requires lawyers to move the legislation along, and the poor didn't have lawyers. So this Legal Services Program changed the equation very greatly, and it still is.[30]

The 1966 amendments to the Economic Opportunity Act ("EOA") granted legislative authority to the Legal Services Program to provide legal advice and representation to those who could not afford such representation.[31] In 1967, amendments to the EOA included Legal Services as a separate program under "Special Programs and Assistance."[32] Initially, Legal Services often took on class action suits that resulted in "major social reforms."[33] As appropriations increased, Legal Services obtained national support centers to provide legal research and support for the Legal Services attorneys handling family and juvenile law, consumer protection, landlord and tenant issues, public housing challenges, and issues related to welfare and other benefit programs.[34]

In 1974, Congress established the LSC to protect the Legal Services Program from political pressures.[35] LSC distributes funding from the federal government to nonprofits providing civil legal services to the poor.[36] The impetus for the creation of LSC was Congress's recognition that there is a need to provide equal access to the system of justice in our nation for those who would be

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[27] GILLETTE, *supra* note 15, at 297.

[28] *Id.* at 300.

[29] *Id.* at 295; Kenneth F. Boehm, *The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform And Unnecessary*, 17 ST. LOUIS U. PUB. L. REV. 321, 333 (1998).

[30] GILLETTE, *supra* note 15, at 300–01.

[31] CLARK, *supra* note 17, at 183.

[32] *Id.* at 177.

[33] *Id.*

[34] *Id.* at 184.

[35] *See* CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., LEGAL SERVICES CORPORATION: BACKGROUND AND FUNDING 1 (2013) [hereinafter BACKGROUND & FUNDING], *available at* http://mspbwatcharchive.files.wordpress.com/2013/10/legal-services-corporation-background-and-funding-aug-29-2013.pdf.

[36] CLARK, *supra* note 15, at 177.

otherwise unable to afford adequate legal counsel.[37] LSC is still in operation forty years later, despite repeated political challenges, reductions in funding, restrictions on services and clientele, and burgeoning caseloads.

II. LEGAL SERVICES CORPORATION & THE JUSTICE GAP

The LSC is a private, nonprofit, federally funded corporation that manages and distributes congressionally appropriated funding to civil legal services providers addressing the needs of low-income clients in all 50 states, Washington, D.C., and the U.S. territories.[38] The LSC does not provide the legal services, but instead funds local legal service providers.[39] In 2012, the LSC provided forty percent of all civil legal services funding for the American poor.[40] It is the largest single source of funding for civil legal services, but local legal services providers sometimes procure additional government and private funding.[41] In 2012, government and private funding for civil legal services for the poor totaled $882.9 million.[42]

Congress restricts organizations with LSC funding from engaging in "lobbying; political activities; class actions except under certain conditions; assisted suicide activities; and cases involving abortion, school desegregation, and draft registration or desertion from the military."[43] Additional restrictions include litigation involving partisan redistricting, attempts at influencing government or LSC activities, efforts to reform welfare, and representation of prisoners in litigation.[44]

The LSC limits services in its funded organizations to those individuals with civil legal needs who have household incomes of less than 125% of the federal poverty guidelines.[45] In 2007, 50.8 million Americans qualified.[46] Following the economic downturn in 2012, nearly one in five Americans, 61.8

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[37] *See* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 5 (2009) [hereinafter JUSTICE GAP], *available at* http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=381&Itemid=98.

[38] BACKGROUND & FUNDING, *supra* note 35, at Summary.

[39] *Id.* at 1.

[40] *Id.* at Summary.

[41] *Id.*

[42] *Id.* at 17.

[43] *Id.* at 3.

[44] *Id.* Previously there was a prohibition against LSC funded attorneys claiming or collecting attorney's fees, but the Consolidated Appropriations Act of 2010 eliminated that prohibition. *See* Pub. L. No. 111-117, 123 Stat. 3034, 3297–3310 (2009) (codified in scattered sections of U.S.C.).

[45] BACKGROUND & FUNDING, *supra* note 35, at Summary (showing that with limited exceptions, local programs can provide services for some households whose income is up to 200% of the federal poverty guidelines).

[46] LEGAL SERVS. CORP., 2012 FACT BOOK 7 (2012), *available at* http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/2012_Fact%20Book_FINALforWEB.pdf [hereinafter FACT BOOK].

million, qualified as having an income less than the LSC threshold—$13,963 for individuals and $28,813 for a family of four.[47] The 134 LSC-funded legal aid programs with 807 offices served 1,996,860 people and closed 809,830 cases in 2012 despite having a full-time staff of only 8056 assisted by about one hundred thousand private attorneys.[48] That same year more than one-third of all cases closed were family law cases, with housing, income maintenance, and consumer cases adding an additional fifty percent.[49] In 2012, more than two-thirds of LSC clients were women, and the vast majority of all clients were between the ages of eighteen and fifty-nine.[50] In addition to closing approximately one million cases annually for the last several years, LSC grantees also teach communities about the law, provide legal materials to pro se litigants, provide referrals, and assist with mediation.[51]

LSC provided these legal services with an appropriation of $348 million in the 2012 fiscal year—a decrease of 13.9% from the 2011 appropriation.[52] The LSC's current need for additional funding is not just reflective of the cuts from federal appropriations; LSC also suffers from reduced private, state, and Interest on Lawyer Trust Account (IOLTA) funding as a result of the recession.[53] Between 2010 and 2012, LSC grantees eliminated more than ten percent of their staff, including 385 attorneys, due to reductions in funding, yet the unmet legal needs among persons living in poverty continue to rise. [54]

Despite the efforts of the federal government and the LSC to provide civil legal services to those unable to afford private representation, the justice gap remains huge. At a time when the number of individuals and households in poverty is reaching catastrophic proportions, LSC-funded legal aid programs are rejecting almost one million cases per year because of insufficient resources.[55] This translates into one person being turned away for every one client served by an LSC-funded program.[56] When the LSC was established, the initial goal was to provide the legal services equivalent of one attorney for every 5,000 people living in poverty, a goal briefly achieved in 1980.[57] Instead, in the most recently collected data, there was one legal aid attorney for every 6,415 people living in poverty;[58] conversely, for those not living in poverty,

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[47] *Id.*
[48] *Id.* at 1.
[49] *Id.* at 18.
[50] *Id.* at 25.
[51] *Id.* at 29–30.
[52] BACKGROUND & FUNDING, *supra* note 35, at 4.
[53] *Id.* at 5.
[54] LEGAL SERVS. CORP., 2012 ANNUAL REPORT 2 (2012), *available at* http://www.lsc.gov/about/annual-report [hereinafter ANNUAL REPORT].
[55] JUSTICE GAP, *supra* note 37, at 9.
[56] *Id.* at 1.
[57] BACKGROUND & FUNDING, *supra* note 35, at 5.
[58] JUSTICE GAP, *supra* note 37, at 19.

there is one attorney for every 429 people.[59] The same 2009 LSC report also found that at least eighty percent of people eligible for LSC services do not end up with access to an LSC, private, or pro bono attorney.[60] Not surprisingly, state and local courts are seeing an increasing number of pro se litigants, particularly in the areas of family law and housing issues.[61]

In addition to these staggering unmet needs amongst those in poverty, our nation's veterans, many of whom are also facing poverty, are facing significant legal challenges. According to a report from the U.S. Congress Joint Economic Committee, the percentage of veterans living in poverty rose from 5.4 to 7% between 2007 and 2010.[62] There are more than 1.4 million veterans living in poverty, and more than one million more at risk of slipping into poverty.[63] Veterans serving after 9/11 suffer the highest poverty rates.[64] "Multiple and prolonged deployments for members who leave civilian jobs and families behind without a military base structure drive these [legal] needs."[65] Deployment can result in creditor and eviction challenges that require legal assistance, as well as divorce, custody, and estate planning needs resulting from the strain of military service and deployments.[66]

The Department of Veterans Affairs identified legal needs as among the most significant unmet needs of homeless and poor veterans.[67] The LSC started an initiative in 2010 focused on improving access to justice for low-income military veterans and for military families.[68] Nevertheless, LSC grantees are limited in the types of cases they are allowed to take and are already turning away one million cases annually. Moreover, more than 700,000 veterans are in the corrections system, with eighty percent of those struggling with a substance abuse issue.[69] While LSC and programs like Veterans Legal Corps Fellows address issues related to disability benefits claims, housing and employment, debt, and family law, they are not authorized to address criminal issues and homelessness. A 2009–2010 VA profile of homeless veterans noted na-

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[59] BACKGROUND & FUNDING, *supra* note 35, at 5.

[60] *Id.*

[61] JUSTICE GAP, *supra* note 37, at 1–2.

[62] ANNUAL REPORT, *supra* note 54, at 19–20.

[63] *Id.*

[64] *Id.* (12.4% of post 9/11 veterans were living in poverty in 2010).

[65] VETERANS OUTREACH CTR., INC., COMING HOME TO CARING COMMUNITIES: A BLUEPRINT FOR SERVING VETERANS & FAMILIES 34 (2012), *available at* http://nyshealthfoundation.org/resources-and-reports/resource/coming-home-to-caring-communities-a-blueprint-for-serving-veterans-families.

[66] *Id.*

[67] *Veterans Legal Corps to be Largest Deployment of Lawyers Serving Veterans*, EQUAL JUSTICE WORKS, June 26, 2013, http://www.equaljusticeworks.org/news/06-26-13-Veterans-Legal-Corps (last visited May 4, 2014).

[68] *Serving Veterans and Military Families*, LEGAL SERVS. CORP., http://www.lsc.gov/about/about-legal-aid/serving-veterans-and-military-families (last visited May 13, 2014).

[69] *The Impact*, JUSTICE FOR VETS, http://www.justiceforvets.org/vtc-impact (last visited May 13, 2014).

tional estimates of more than 130,000 homeless veterans on a particular night in 2009, a figure that rose to more than 140,000 in 2010.[70] For homeless veterans, three of their top ten unmet needs were found to be legal in nature.[71]

In an attempt to meet the overwhelming unmet legal needs among those living in poverty, more than 650 civil legal aid societies across the country, including law school clinics, supplement legal aid to the poor.[72] These organizations rely on private and government funding. According to recent state studies considering the legal problems experienced by low-income populations, data indicates that low-income households experience up to three legal needs per year, and that an attorney helps with only one in five of the legal problems suffered by this population.[73] While many argue that low-income individuals do not seek assistance from an attorney for monetary reasons, surveys indicate other reasons such as resignation to their problems, a lack of awareness that their justice problems are legal in nature or that an attorney would be appropriate, and a conscience decision to handle the issue outside of the justice system.[74]

The majority of those individuals who refrain from obtaining legal representation do so because they are unable to afford it.[75] Although a large portion of those people qualify for legal aid, often legal aid comprises only advice and counsel rather than direct representation due to limited available resources.[76] Without representation, case outcomes suffer and justice is at risk.[77] William T. Robinson, III, then President of the ABA, wrote in a letter to the editor of The New York Times, "The American Bar Association strongly agrees that our nation must expand access to justice for low-income Americans" and that "more funding is needed for legal assistance for the poor."[78]

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[70] DEP'T OF VETERANS AFFAIRS, PROFILE OF SHELTERED HOMELESS VETERANS FOR FISCAL YEARS 2009 AND 2010, at 2 (2012), *available at* http://www.va.gov/vetdata/docs/SpecialReports/Homeless_Veterans_2009-2010.pdf.

[71] *See* CATHERINE ABSHIRE ET AL., COMMUNITY HOMELESSNESS ASSESSMENT, LOCAL EDUCATION AND NETWORKING GROUPS (CHALENG) FOR VETERANS FISCAL YEAR (FY) 2011, at 12 (2011), *available at* http://www.va.gov/HOMELESS/docs/chaleng/2011_Chaleng_Report_FINAL.pdf.

[72] Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79, 83–84 (2007).

[73] JUSTICE GAP, *supra* note 37, at 13.

[74] *See* Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 117–18.

[75] *See* JUSTICE GAP, *supra* note 37, at 24.

[76] *See id.*

[77] *See id.* at 26.

[78] William T. Robinson III, *Legal Help for the Poor: The View from the A.B.A.*, N.Y. TIMES, Aug. 31, 2011, at A26.

III. PRO BONO EFFORTS AS A PARTIAL SOLUTION FOR NARROWING THE JUSTICE GAP

The civil legal assistance system in the United States is inadequate in providing low-income individuals, including veterans, access to representation. As a partial solution to make lawyers more accessible to the poor, public and private employers should develop more robust pro bono services.

A. *The Need for More Legal Assistance*

In an attempt to more fully understand the scope of unmet legal needs of those in poverty, to identify gaps in those services, and to make more strategic allocations of scarce resources, the U.S. Department of Justice created the Access to Justice Initiative in 2010.[79] Soon thereafter, Congress created the Consortium on Access to Justice to promote research and teaching on access to justice issues and encourage academics to engage in these efforts.[80] This initiative is particularly important given that the LSC's Research Institute lost funding in the 1980s, and that there had not been a national study regarding legal needs and civil justice since a study by the ABA in 1994.[81] In the ABA survey of low- and middle-income households in the United States, roughly half of those surveyed were experiencing at least one civil legal problem that was potentially actionable.[82] More recent data from a handful of state surveys found that about a quarter of middle-income individuals and between one-fifth and one-half of low-income individuals took no action in response to legal problems.[83] Even more disturbing, the 2011 World Justice Project Index found that the United States ranked fifty-second out of the sixty-six countries examined in relative cost and availability of civil legal assistance and twenty-first regarding inaccessibility to disadvantaged groups.[84] Moreover, the Index noted a significant gap between rich and poor individuals regarding use of and satisfaction with the civil courts.[85]

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[79] *See* Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 532 (2013).

[80] *Id.*

[81] *See id.* at 533–34.

[82] *See* AM. BAR ASS'N CONSORTIUM ON LEGAL SERVS. AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, at tbl.1 (1994), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf [hereinafter A SURVEY OF AMERICANS].

[83] Rhode, *supra* note 79, at 534.

[84] MARK DAVID AGRAST ET AL., WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2011, at 23 (2011), *available at* http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf.

[85] *Id.*

Given that there was no central organization systematically and comprehensively collecting data concerning unmet civil legal needs,[86] the American Bar Foundation, Friends of Legal Services, and LSC partnered to fund Access Across America: First Report of the Civil Justice Infrastructure Mapping Project in October 2011.[87] The Report indicates that the civil legal assistance infrastructure consists of many small-scale public-private partnerships.[88] Furthermore, the diversity and fragmentation of those programs cause large inequalities between and within states, leading to service availability based on geographic location.[89] The Report goes on to note that although conservative estimates by the ABA suggest that public and private civil legal assistance received $1.3 billion in funding in a recent year, the criminal justice system received an estimated $228 billion in 2007.[90] There is no constitutional right to counsel in civil court proceedings,[91] yet litigants who cannot afford representation regularly face issues that involve a financial, medical, family, or housing crisis.[92] These civil issues involve basic human needs that can become catastrophic for low-income individuals and their families.

For veterans seeking assistance with their benefits claims, there is an additional impediment to getting legal assistance early in the process. By law, no person or organization may charge veterans a fee for assistance in preparing initial applications or presenting initial claims to the VA.[93] Fees for assistance may only be charged once the Department has issued a decision on a claim, a Notice of Disagreement has been filed to appeal that decision, and the agent or attorney has complied with the power-of-attorney requirements in 38 C.F.R. § 14.631 and the fee agreement requirements in 38 C.F.R. § 14.636(g).[94] Moreover, the VA must accredit agents, attorneys, or representatives of a VA-recognized veteran's service organization to assist in the preparation, presentation, and prosecution of a claim for benefits.[95] With limited opportunity for attorney's fees at the initial stage in veteran benefits claims and additional accreditation and continuing education requirements, the majority of attorneys are not likely to represent veterans on a pro bono basis. Without legal assistance, veterans will often submit incom-

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[86] Rhode, *supra* note 79, at 533.

[87] *See* REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT, at ix (2011), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf.

[88] *Id.* at 9.

[89] *Id.*

[90] *Id.* at 17.

[91] *See* Sandefur, *supra* note 72, at 79.

[92] *See* Mansfield & Trubek, *supra* note 8, at 372.

[93] *Accreditation*, U.S. DEP'T OF VETERANS AFFAIRS: OFFICE OF THE GEN. COUNSEL, http://www.va.gov/ogc/accreditation.asp (last visited Jan. 30, 2014).

[94] 38 U.S.C. § 5904(c)(1) (2012); 38 C.F.R. § 14.636(c) (2012).

[95] *See* 38 U.S.C. §§ 5901–5902, 5904; 38 C.F.R. § 14.629; *Accreditation*, *supra* note 93.

plete claims packages at the initial, regional office stage, creating more of a burden on the claim reviewers and increasing the likelihood of delay and error in the processing of a veteran's claim.

B. *Pro Bono Work: Narrowing the Justice Gap*

While there is widespread agreement that there is a significant justice gap in the United States that requires attention, the question of how to narrow that gap is up for debate. One solution is to increase the amount of pro bono civil legal services provided by private attorneys. Such an increase would add to the Private Attorney Involvement ("PAI") requirement, in effect since the early 1980s, that LSC-funded organizations use at least 12.5% of their LSC funding to encourage private attorney pro bono involvement.[96] Following implementation of the PAI requirement, the number of pro bono programs increased from 88 in 1980 to more than 500 by 1985, and 900 in 1990.[97] Significant efforts are still being devoted to increasing pro bono services by all lawyers. Under LSC's 2007 action plan entitled, "Help Close the Justice Gap, Unleash the Power of Pro Bono," more than one hundred LSC-funded programs adopted local resolutions supporting greater private attorney involvement.[98] LSC's August 2011 Pro Bono Task Force brought together judges, general counsel, bar leaders, technology experts, leaders of pro bono programs, legal services organizations, law firms, government lawyers, and law school deans to discuss the need for additional pro bono legal services.[99]

While concerted efforts are underway to increase pro bono efforts among the private bar, Rule 6.1 of the ABA Model Rules of Professional Conduct already states that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico [sic] legal services per year."[100] Rule 6.1 further holds that "a substantial majority of the (50) hours" should be to persons of limited means or to organizations that support the needs of persons of limited means.[101]

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[96] *See* MEREDITH MCBURNEY, AM. BAR ASS'N, THE IMPACT OF LEGAL SERVICES PROGRAM RECONFIGURATION ON PRO BONO 1 (Apr. 2003), *available at* https://apps.americanbar.org/legalservices/probono/impact_reconfiguration.pdf.

[97] *Id.*

[98] JUSTICE GAP, *supra* note 37, at 27.

[99] LEGAL SERVS. CORP., REPORT OF THE PRO BONO TASK FORCE, at i (2012), *available at* http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf [hereinafter PRO BONO TASK FORCE].

[100] MODEL RULES OF PROF'L CONDUCT R. 6.1 (2006), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service.html.

[101] *Id.*

An ABA study found that the average annual amount of pro bono service provided by attorneys in 2011 was 56.5 hours, with a median amount of 30 hours.[102] The foregoing averages included attorneys who did not provide any such service.[103] When only considering those attorneys who performed some sort of pro bono service, the average was 70.91 hours.[104] Eleven percent of the lawyers surveyed provided no pro bono work at all during 2011.[105] Only one-third of lawyers met the aspirational goal of fifty hours of annual service—or less than one hour a week.[106] For those attorneys who do engage in pro bono efforts, the good news is that the majority of respondents in *Supporting Justice III* reported doing more pro bono work in 2011, despite the depressed economy.[107] The Standing Committee on Pro Bono and Public Service, which published the report, noted it would work with LSC and its Pro Bono Task Force to build strong pro bono initiatives and perform empirical studies to aid in enhancing attorney commitment to pro bono efforts.[108]

LSC's Pro Bono Task Force made several recommendations to the LSC and its grantees to encourage the development of strong pro bono programs: (1) serve as an information clearinghouse and source of coordination and technical assistance to grantees; (2) revise its Private Attorney Involvement regulation; (3) launch a public relations campaign recognizing the importance of pro bono; and (4) create a fellowship program to foster lifelong commitments to pro bono.[109] The Task Force also asked various bar association leaders and the judiciary to recruit, support, and applaud pro bono efforts; amend attorney practice, judicial ethics, and Continuing Legal Education ("CLE") rules to be more supportive of pro bono; and create or strengthen state access to justice commissions.[110] Among the recommendations for helping to alleviate the estimated eighty percent of unmet civil needs among the low-income population, the Task Force suggested engaging non-lawyers, including law students as well as encouraging retired lawyers, to engage in pro bono initiatives.[111]

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[102] These figures represent those services provided for free, without expectation of fee, to persons of limited means or organizations who assist them, and included full case representation, limited scope representation, legal advice and mediation representation. *See* JANET BUCZEK ET AL., AM. BAR ASS'N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 5 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_Supporting_Justice_III_final.authcheckdam.pdf.

[103] *Id.*

[104] *Id.* at vi n.2.

[105] *Id.* at 34.

[106] *Id.*

[107] *See id.* at vi.

[108] *Id.* at 34–35.

[109] PRO BONO TASK FORCE, *supra* note 99, at ii–iii.

[110] *Id.* at iv.

[111] *See id.* at 2–10.

As of December 31, 2010, the number of attorneys in the U.S. and all its possessions and territories stood at 1,225,452,[112] an increase of 2% over 2010, and 17% since 2001.[113] While efforts to increase the pro bono services provided by the nation's attorneys is a laudable goal that should continue to be pursued, it is unrealistic to expect that those efforts will narrow the justice gap more than incrementally:

> Pro bono currently accounts for at most 1–2% of legal effort in the country; even if every lawyer in the country did 100 more hours a year of pro bono work, this would amount to an extra thirty minutes per U.S. person a year, or about an hour per dispute-related . . . problem per household.[114]

Unfortunately, there are rarely disputes that require only one hour of an attorney's time to be resolved. In addition, it is implausible to imagine that every attorney would give one hundred hours with only the current aspirational Model Rule. The provision of pro bono services by private attorneys is a critical supplement to those services provided by legal aid. Pro bono work in any amount, however, is not by itself enough to close or significantly reduce the justice gap.

Challenges to increasing the amount of pro bono efforts provided by private attorneys include the need for training, and sometimes oversight, of volunteer attorneys unfamiliar with the subject matter. Training is required particularly in the areas with the most need for civil legal services: family law, housing, income maintenance, and consumer issues.[115] Attorneys surveyed regarding the provision of pro bono services noted that time was the biggest obstacle to their providing such services.[116] Suggestions for addressing these challenges included the provision of mentoring and co-counsel opportunities with legal aid attorneys or law school clinics, the provision of support and resources from employers for pro bono services to be accomplished during the work day, and the development of rules and policies that allow for limited representation and scope of services.[117]

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[112] James Podgers, *State of the Union: The Nation's Lawyer Population Continues to Grow, but Barely*, AM. B. ASS'N JOURNAL (July 1, 2011), http://www.abajournal.com/magazine/article/state_of_the_union_the_nations_lawyer_population_continues_to_grow_but_bare/.

[113] *Id.*

[114] Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 152 (2010).

[115] *See* FACT BOOK, *supra* note 46, at 18.

[116] BUCZEK ET AL., *supra* note 102, at viii.

[117] *Id.* at 33–34.

IV. LAW SCHOOL CLINICS CAN, & SHOULD, HELP

The idea of law school clinics providing legal services to those in poverty is not new. In fact, such a concept helped shape President Johnson's War on Poverty fifty years ago.[118] Prior to the creation of the OEO's legal services program, the Ford Foundation funded anti-poverty neighborhood legal services programs that resulted in the creation of the Council on Legal Education for Professional Responsibility ("CLEPR").[119] CLEPR recognized that law students could learn skills and develop a professional identity that fostered continued social responsibility while simultaneously aiding those in need of legal assistance.[120] Despite the synergy between legal services programs and early clinical education, by the mid-1970s each individual initiative instead focused on its own survival in the face of political pressures, funding challenges, and resistance to change within the academy.[121]

As noted in Part II, federal LSC funding is considerable. While existing funding is inadequate to meet the immense demand, and is still subject annually to potential reductions, LSC funding nonetheless plays an essential role in the provision of civil legal services currently being provided to those in poverty. LSC persists as the largest single source of funds for civil legal assistance and sets the standards for legal assistance providers.[122]

Clinical legal education, on the other hand, is an increasingly emphasized component of legal education. In particular, the Carnegie Report, "Educating Lawyers—Preparation for the Profession of Law," emphasized the educational value of law clinics.[123] Students and schools increasingly favor clinical education due to the current enrollment and employment challenges for the nation's law schools. In a recent survey of 156 law schools, there were a total of 1036 distinct live-client law clinics, with an average of 6.6 per law school.[124] Nearly 80% of the respondent schools noted that demand for live-client clinics increased during the prior five years, 19% reported the demand remained constant during that time period, and fewer than 1% noted a decrease in demand.[125]

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[118] *See* Jeanne Charn & Jeffrey Selbin, *Legal Aid, Law School Clinics and the Opportunity for Joint Gain*, MGMT. INFO. EXCH. J., 28, 28 (Winter 2007) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126444.

[119] *Id.*

[120] *Id.*

[121] *See id.*

[122] POVERTY, HEALTH AND LAW 56–57 (Elizabeth Tobin Tyler et al., eds., 2011).

[123] *See* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS—PREPARATION FOR THE PROFESSION OF LAW 9 (2007).

[124] DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., THE 2010–11 SURVEY OF APPLIED LEGAL EDUCATION 7 (2012).

[125] *Id.* at 11.

The Carnegie Report studied the way that law schools develop legal understanding and form professional identity.[126] The report emphasized that legal educators must link their interests with the needs of legal practitioners and the public the profession takes an oath to serve.[127] In making their recommendations for legal educators, the report noted that "[t]he existing common core of legal education needs to be expanded to provide students substantial experience with practice as well as opportunities to wrestle with the issues of professionalism."[128] To this end, the report suggested a "capstone" opportunity to engage students in advanced clinical training.[129]

This is a challenging time in legal education, a time when there is a confluence of perplexing circumstances facing law schools, those in need of legal services, and law graduates. The crisis in access to justice necessitates an emphasis on social justice and public service in the professional training of lawyers.[130] The number of law students graduating from law schools far exceeds the available legal employment.[131] Professor and former Dean of Northeastern School of Law, Emily A. Spieler, theorized that "the future success of law schools is inextricably tied to the ability of our profession to provide adequate legal assistance to people without significant means."[132] She noted that equal access under law is necessary for maintaining the rule of law, promoting social justice, ensuring the economic well-being of law school graduates, and safeguarding the future of legal education.[133] The role of legal educators is key to instilling lawyers with the skills and sense of social responsibility required to uphold freedom and equality.[134]

Law schools can, and should, provide their students with clinical education experiences. Law clinic students practice their skills and reflect on their professional development and role as lawyers under the mentoring of a professor while aiding those unable to afford legal services. Although future attorneys are taught the skills and professionalism that the practice of law will require, they can "see, first hand, how law is practiced, and what the barriers are to achieving social justice through the law."[135] This knowledge of inequality

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[126] *See* SULLIVAN ET AL., *supra* note 123, at Summary.

[127] *See id.*

[128] *Id.* at 9.

[129] *Id.*

[130] *See* Rhode, *supra* note 2.

[131] On the national level, there were nearly twice as many bar exam passers (53,508) in 2009 than openings (26,239). *See* Joshua Wright, *Data Spotlight: New Lawyers Glutting the Market (Updated)*, ECON. MODELING SPECIALISTS INT'L (June 22, 2011), http://www.economicmodeling.com/2011/06/22/new-lawyers-glutting-the-market-in-all-but-3-states/ (last visited May 13, 2014).

[132] Emily A. Spieler, *The Paradox of Access to Civil Justice: The "Glut" of New Lawyers and the Persistence of Unmet Need*, 44 U. TOL. L. REV. 365, 366 (2013).

[133] *Id.*

[134] *See* SULLIVAN ET AL., *supra* note 123, at 11.

[135] Spieler, *supra* note 132, at 396.

and injustice can enrich their legal education and inspire future pro bono service to underserved constituencies.[136]

Some argue that law school clinics can contribute only minimally to meeting the legal needs of the underserved because they have a low faculty-student ratio and require intensive supervision and reflection. Clinics are small, costly, and provide services to only a very limited number of people.[137] Nationwide, however, more than one thousand faculty teach and supervise clinic students in increasingly diverse fields.[138] Moreover, clinic students at all ABA-accredited law schools in the 2009–2010 academic year provided over 1.38 million hours of free civil legal services and represented almost thirty thousand civil clients.[139] In addition to this significant number of pro bono hours and clients represented by law school clinics, law students who enroll in a clinic have the benefit of experiential learning that aids in their professional development, as well as increased awareness of social justice and the inequalities inherent in our judicial system. While enriching their professionalism and skills training, clinic students also reap the intrinsic rewards of representing those struggling with access to justice.

Although it is argued that law school clinics can make only a modest dent in the justice gap, providing 1.38 million pro bono hours to thirty thousand clients is a considerable contribution.[140] If one were measuring those hours relative to the aspirational goal of fifty pro bono hours per year prescribed in Model Rule 6.1, it would take 27,600 attorneys performing fifty hours annually to match this contribution from law school clinic students.[141] In addition, clinic students provide legal services in areas of law in which they receive training and supervision; pro bono attorneys are often asked to assist with cases in areas of law with which they are completely or relatively unfamiliar. Thus, pro bono attorneys may require more time and encounter more obstacles to achieving a successful case resolution than supervised clinic students.

Furthermore, sixty-one percent of the LSC's case services in 2012 consisted of counseling and advice rather than more extensive services such as litigation and court and agency representation.[142] Were law school clinics to add more counseling and advice to their already extensive and protracted representation, it is likely that the total number of clients served annually by law

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[136] *See id.*

[137] *See* Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL'Y 571, 613 (2011).

[138] Charn & Selbin, *supra* note 118, at 29.

[139] SANTACROCE & KUEHN, *supra* note 124, at 20.

[140] *See id.*

[141] *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (2006), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service.html; SANTACROCE & KUEHN, *supra* note 124, at 20.

[142] FACT BOOK, *supra* note 46, at 17.

students would increase considerably. In addition, law school clinics could adopt some of the suggestions made by the LSC's Pro Bono Task Force for increasing pro bono efforts and the legal services available to the poor. For example, some clinical programs include free CLE training for private attorneys in exchange for a commitment to handle a pro bono case; an increasing number of law students engage in rural outreach, spring break, and summer programs that provide access to legal services; and law school technology support can be expanded to aid in pro bono efforts.[143]

Law school clinics also could supplement existing LSC Programs by providing community legal education presentations, workshops to aid pro se litigants, help desks at courts, referrals to other civil legal service providers or pro bono attorneys, referrals to non-legal community service providers, and web resources to aid with civil legal issues.[144] In 2012, LSC programs aided more than one million people by providing some of the foregoing services, exponentially increasing the people they were able to help by providing services more limited than individual client representation.[145] By collaborating with LSC and non-LSC legal services programs to assist in providing these educational services to the poor, law school clinics can unburden the legal services attorneys, making them available for more extensive individual representation. At the same time, law students would learn valuable skills (i.e., research, writing, presentation skills, interviewing, and counseling) while expanding available legal assistance to those in need.

Law school clinics alone cannot solve the justice gap, any more so than LSC-funded programs, other programs, and pro bono efforts can do it independently. A concerted effort to increase clinical programs, however, can address the shared objectives of legal education and the justice system: to prepare future attorneys to be ethical and skilled practitioners, and to provide civil legal services to those unable to afford such representation themselves. Both objectives will further the goal of "Equal Justice Under Law."

V. A Model of Access to Justice for Veterans: Clinic Assistance in Obtaining Their Earned Benefits

The William & Mary Law School's Lewis B. Puller, Jr. Veterans Benefits Clinic ("Puller Clinic") aids veterans in obtaining their earned benefits while training law students in skills and professionalism and fostering the moral duty we owe to those who served our country.[146] Law students in a clinic setting are

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[143] *See* PRO BONO TASK FORCE, *supra* note 99, at 2–29.

[144] *See* FACT BOOK, *supra* note 46, at 30.

[145] *See id.*

[146] *See Lewis B. Puller Jr. Veterans Benefits Clinic*, WILLIAM & MARY LAW SCH., http://law.wm.edu/academics/programs/jd/electives/clinics/veterans/ (last visited May 4, 2014).

ideally suited to aid veterans in their VA claims for disability and compensation claims. Due to the scarcity of legal representation for veterans, law clinic efforts are particularly needed at points in the claims process where attorney's fees are unavailable.

The Puller Clinic was the first legal clinic in the country to address veterans' needs holistically. The Puller Clinic combines legal and psychological assistance in representation of veterans by partnering with higher education partners such as Virginia Commonwealth University's Center for Psychological Services and Development. Under attorney supervision, Puller Clinic law students interview veterans, analyze medical records, communicate with health care providers, and craft strategies to help clients obtain their benefits. By working with clinical psychologists and other medical professionals, Puller Clinic students secure the medical evaluation, diagnosis, treatment, and evidence required to address a veteran's medical needs and support a comprehensive benefits claim. These goals are accomplished while also training graduate students in these complex areas of law and medicine, and instilling in them a sense of responsibility to our nation's heroes.

The Puller Clinic typically handles complex cases at the Department of Veterans Affairs' regional office level that require extensive factual and legal research, and for which an attorney would not be paid. Because the Puller Clinic submits claims that are persuasively prepared, well organized, comprehensive, and complete, the VA is able to adjudicate them more quickly and accurately than incomplete and unsupported claims. This saves the VA considerable time, which it can use to process additional claims. Well-prepared claims also benefit the veterans by improving accuracy in claims decisions and reducing wait time for those decisions.

The Puller Clinic also aids veterans by regularly training pro bono attorneys in veterans' benefits law and partnering those attorneys with law students to present education and outreach sessions at homeless shelters throughout Virginia. At these outreach sessions, pro bono attorneys and students provide advice and counsel on site and take on veterans as clients for longer term representation.

Since its inception in 2009, the Puller Clinic has represented more than sixty-five veteran clients in hundreds of claims for disabilities; provided advice and counsel to hundreds of indigent and homeless veterans; trained dozens of pro bono attorneys and more than 140 law students in veterans' benefits law; inspired multiple Puller Clinic alumni to provide pro bono services to veterans; and provided pro bono legal services valued at more than $425,000 annually to veteran clients. The Puller Clinic specializes in the complex claims that are most difficult for veterans to prove, such as post-traumatic stress, traumatic brain injury, and military sexual trauma. Compared to pre-Puller Clinic representation levels, Puller Clinic clients received 120% more benefits, 45% more

disabilities connected to service, and 25% higher disability ratings. Furthermore, through psychological and neurological evaluations by higher education partners, sixteen veterans obtained mental health diagnoses for previously undiagnosed conditions and nine veterans received corrections in prior misdiagnoses. To date, veteran clients have received close to $700,000 in back benefits they were owed, with a present value of more than $12 million in future earned benefits over the lifetime of current clients.

For a comprehensive and successful claims package, Puller Clinic attorneys and students must provide medical evidence and proof of a service-connection in support of a veteran's disability claim, after extensive factual and legal investigation and analysis. The Puller Clinic relies on other institutions of higher education and their faculty and students for reduced or no cost evaluation, diagnosis, treatment, and evidentiary support of veteran claims—evidence which typically makes the difference between a claim being successful or not. In working with the Puller Clinic's medical partners in support of their claim, some veteran clients are addressing their service-connected traumas and mental health issues for the very first time. The evaluation and treatment that these veterans receive from Puller Clinic partners can have a profoundly healing effect on the veteran.

The Puller Clinic's inter-professional and inter-institutional partnerships educate Clinic students in the skills and benefits of collaboration, while providing pro bono or reduced fee evaluation and treatment to veteran clients. The success of these efforts with our first inter-professional partner, Virginia Commonwealth University's Center for Psychological Services and Development,[147] led to the creation of the Puller Veterans Clinic Consortium, which currently counts nineteen Virginia higher education institutions, and several out of state institutions, among its partners. These higher education partnerships have been so successful in aiding veteran clients and educating students that the Puller Clinic plans to pilot a medical-legal partnership with a medical student free clinic in Norfolk, Virginia beginning in 2014.[148]

There is an extraordinary need among veterans for legal assistance with their benefits claims. The VA has a monumental backlog of previously filed claims and increased volume in new claim filings, and rarely do veterans have the benefit of legal representation at the regional office initial filing and adju-

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[147] The Center for Psychological Services and Development was a Puller Clinic partner from the Clinic's inception, and to date, their faculty and students have provided services to more than thirty referred veterans, or forty-five percent of Puller Clinic clients.

[148] The Health Outreach Partnership with EVMS Students ("H.O.P.E.S") Free Clinic is staffed by Eastern Virginia Medical School's students, residents, and physicians, and serves uninsured citizens of Norfolk with long term and specialty care. The 2014 MLP pilot will focus on veterans. *See H.O.P.E.S Clinic*, E. VA. MED. SCH., http://www.evms.edu/education/additional_resources/community_outreach_service_learning/community_outreach/community_outreach_programs/hopes/ (last visited May 4, 2014).

dication stages. By supporting the creation of law school clinics in veterans' benefits law, law schools can supplement the work of LSC legal aid programs, the VA, and pro bono attorneys. Law school clinics increase the quality of claims, thus enabling more timely, efficient, and accurate adjudication, and train pro bono attorneys in veterans' benefits law. As Senator Mark Warner (D-VA) noted recently when discussing the Puller Clinic's work:

> This is a win-win-win: veterans get quicker approval for benefits they have earned, the VA can move quicker through its backlog because it will be receiving more complete and accurate claims, and William & Mary law students will develop new legal skills as well as a respect for *pro bono* service.[149]

According to the LSC, the 34,498 veteran clients that they served in 2012 comprised 4.5% of all LSC clients that year; proportionally, veterans comprise 4.6% of the total national poverty population.[150] In addition to assistance with benefit claims, law school clinics can engage in a number of alternative initiatives that support unmet veteran legal needs. Law clinics, pro bono attorneys, and legal aid offices are increasingly engaging in civil legal representation of veterans in areas of their most significant needs, such as housing, employment, and consumer and family law issues. Law clinics are also assisting veterans involved in the criminal justice system through participation in newly developed Veterans Treatment Courts.[151]

The Puller Clinic is the first law school clinic to be certified by the VA as a national "best practice" and a Community of Practice Partner.[152] The Puller Clinic is training law students to advise, counsel, and represent veterans without access to justice, provide education and outreach for veterans in the community, and train pro bono attorneys. In addition, William & Mary Law School encourages and trains additional law schools and higher education institutions across the country to replicate the Puller Clinic model.[153] Helping our nation's

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[149] Press Release, Office of Mark Warner, Sen. Warner Announces Dep't of Veterans Affairs Certification for William & Mary Puller Clinic as a National Model (Aug. 21, 2013), *available at* http://www.warner.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=0ae06281-8e7d-41aa-a49c-24cc69469bee.

[150] FACT BOOK, *supra* note 46, at 26.

[151] *See* JUSTICE FOR VETS, *What Is a Veterans Treatment Court?*, http://www.justiceforvets.org/what-is-a-veterans-treatment-court (last visited May 13, 2014). According to Justice for Vets, there are 130 veteran courts already up and running in the United States, with hundreds more being planned. "The Veterans Treatment Court model requires regular court appearances . . . as well as mandatory attendance at treatment sessions and frequent and random testing for substance use (drug and/or alcohol). Veterans respond favorably to this structured environment given their past experiences in the Armed Forces." *Id.*

[152] Press Release, Office of Mark Warner, *supra* note 149.

[153] William & Mary Law School hosted the National Conference on Law Clinics Serving Veterans in April 2014, where more than 125 attendees representing more than forty universities and law

veterans access the benefits they earned at great personal sacrifice is an obligation we all share, and law school clinics are uniquely suited to address this unmet need.

CONCLUSION

There exists a right to free counsel for indigent felony defendants and those facing appeals and misdemeanors where conviction includes possible jail time. Those who face civil legal challenges (with limited exceptions) and who cannot afford to hire an attorney have no similar right.[154] Despite the efforts of private legal aid organizations as early as 1876, the first federal legal services program in 1965, and the creation of the LSC in 1974,[155] there remains an overwhelming unmet need for civil legal services for those in poverty. The LSC's 2009 "Justice Gap" report noted that LSC programs turn away more than half of all eligible applicants, fewer than twenty percent of the civil legal needs of those with low-income are being met, and there is only one legal aid lawyer for every 6,415 people in poverty.[156] Fifty years after the War on Poverty began its efforts to increase legal services for the poor, there remains a dangerous and desperate unmet need for millions of people annually. Among those with unmet legal needs is a significant portion of our nation's veterans, many of them homeless or at risk of homelessness.

The LSC, the ABA, and state and local bar associations encourage private attorneys to provide at least fifty hours per year of pro bono civil legal services to those unable to afford them.[157] While a significant number of attorneys met the goal of Model Rule 6.1 in 2011, eleven percent of lawyers provided no pro bono services at all that year, and only one-third of those lawyers engaged in pro bono services met the rule's fifty hour aspiration.[158] Efforts should continue to increase the amount of pro bono services provided by our nation's more than one million attorneys, but that alone cannot make up the difference between those currently able to access civil legal aid assistance and those who cannot.

At the same time that we are failing to meet the civil legal needs of an extraordinary percentage of our population living in poverty, law schools are fac-

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schools were introduced to the Puller Clinic model and alternative pro bono models from other law clinics and law firms. Attendees were encouraged to replicate these pro bono models at their own institutions.

[154] POVERTY, HEALTH AND LAW, *supra* note 122, at 52–53.

[155] *Id.* at 54–55.

[156] JUSTICE GAP, *supra* note 37, at 1.

[157] MODEL RULES OF PROF'L CONDUCT R. 6.1 (2006), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service.html.

[158] BUCZEK ET AL., *supra* note 102, at 34.

ing turbulent times. Recent years have seen a "dramatic drop in law school applications combined with the collapsing job market and escalating student debt . . . ."[159] Students are increasingly seeking experiential learning opportunities while in law school to further prepare them for practice opportunities that now involve less mentorship and on-the-job training, such as small and solo firm practice. The ABA, the LSC, and the Association of American Law Schools also encourage law schools to advance social justice and public service ideals to create a culture of pro bono service among law students before they graduate. Student participation in law school clinics is increasingly encouraged in legal education because students can learn practical skills and professionalism while exploring those skills and social justice issues with a reflective faculty member. The legal services provided by law students in the increasing number of law school clinics nationwide can help ameliorate the justice gap through direct client representation, education and outreach to the community, and training and support of pro bono and legal aid attorneys.

One successful example for addressing a portion of the justice gap that involves focusing on the unmet legal needs of our veteran population is William & Mary Law School's Puller Clinic and its inter-professional partnerships with other higher education institutions. In providing pro bono legal and psychological services in the direct representation of veterans with disability claims, particularly when attorney's fees are disallowed, the Puller Clinic assists hundreds of veterans and their families with the complex benefits process annually. Over a two-year period, the Puller Clinic provides approximately four hundred hours of pro bono legal and psychological services to each represented veteran having a post-traumatic stress or traumatic brain injury claim. The Puller Clinic develops comprehensive claims packages with pertinent legal and factual analysis as well as supporting medical evidence from higher education partners. These comprehensive claims packages offer the VA the opportunity to adjudicate Puller Clinic claims more quickly and efficiently, thereby saving time and money and helping to reduce the VA's backlog of claims. The Puller Clinic further assists the VA by weeding out veteran claims that are not compensable. Engaging higher education institutions to assist in addressing the unmet legal needs of veterans taps into the expertise and energy of students and faculty while allowing them experiential learning opportunities. Such efforts can go a long way towards narrowing the justice gap for our nation's veterans.

Although the country has made tremendous progress since the early 1900s in providing civil and criminal legal services to those unable to afford

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[159] Tamar Birckhead, *Clinical Legal Education and the Future of the Academy*, PRAWFSBLOG (July 11, 2013, 12:32 AM), http://prawfsblawg.blogs.com/prawfsblawg/2013/07/clinical-legal-education-and-the-law-school-crisis.html (last visited May 13, 2014).

them, civil aid programs account for less than one percent of legal expenditures and lawyers contribute less than one percent of their hours to pro bono service.[160] Equal justice under the law should remain our primary aspiration and not just decorate our courthouse doors, but guide what happens inside them.[161] There remains much work to be done to reach this basic premise of our justice system, and law schools can play an essential role in achieving that goal.

[160] *See* Rhode, *supra* note 2.
[161] *Id.*

Americans' Experience with Civil Justice Problems and the Role of Civil Legal Assistance

Talking points from a research presentation to the inaugural meeting of the White House Legal Aid Interagency Roundtable, US Department of Justice, February 29, 2016

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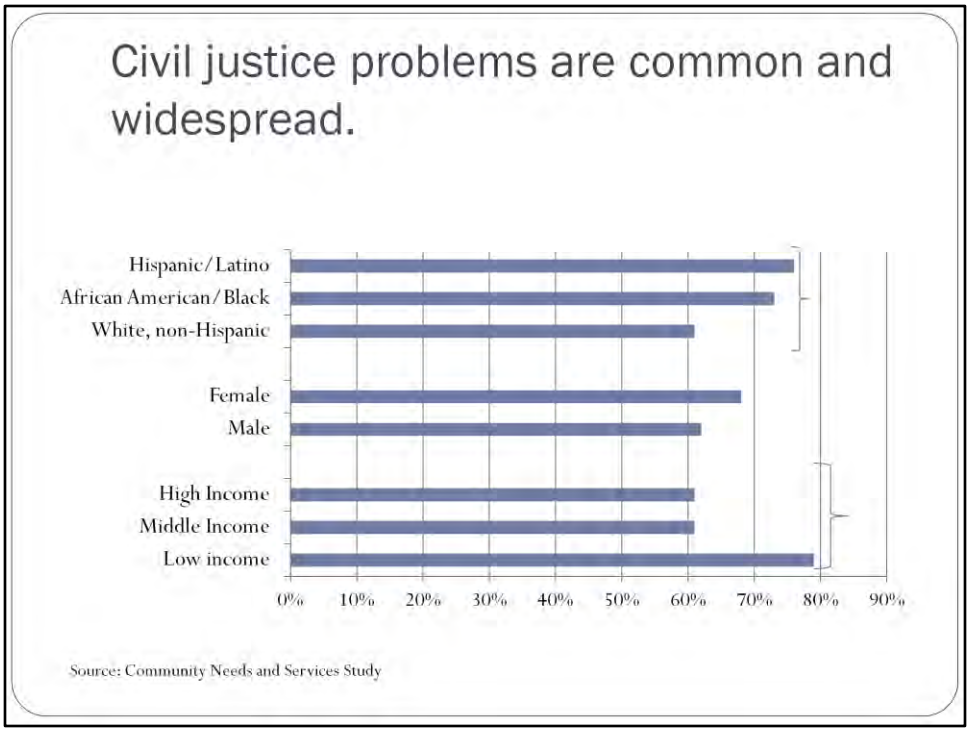
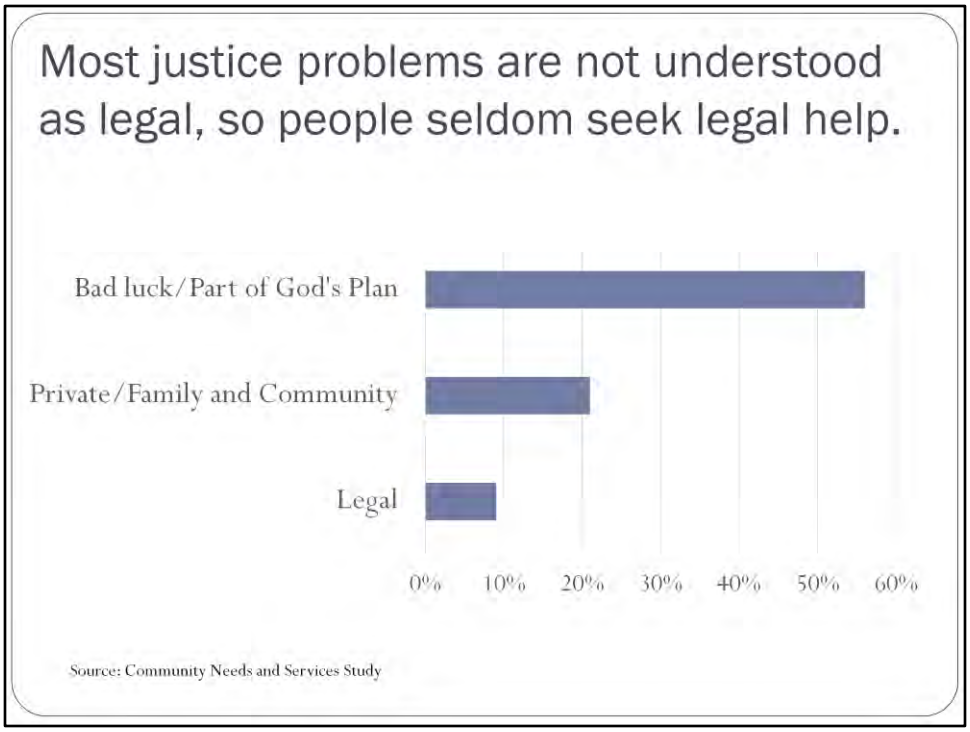


Scientific population surveys suggest that somewhere between half and two-thirds of Americans are experiencing at least one civil justice problem every year to 18 months. These are events that have civil legal aspects, raise civil legal issues, and have consequence shaped by the civil law.[1]

These problems emerge in people's lives at the "intersection of civil law and everyday adversity" – they involve shelter, livelihood, debt, and the care and custody of dependent children and adults.[2]

Though all groups are at risk of experiencing civil justice problems, evidence suggests some groups are more vulnerable than others. For example, poor people and racial and ethnic minorities more commonly report justice problems than do whites and nonpoor people.[3]

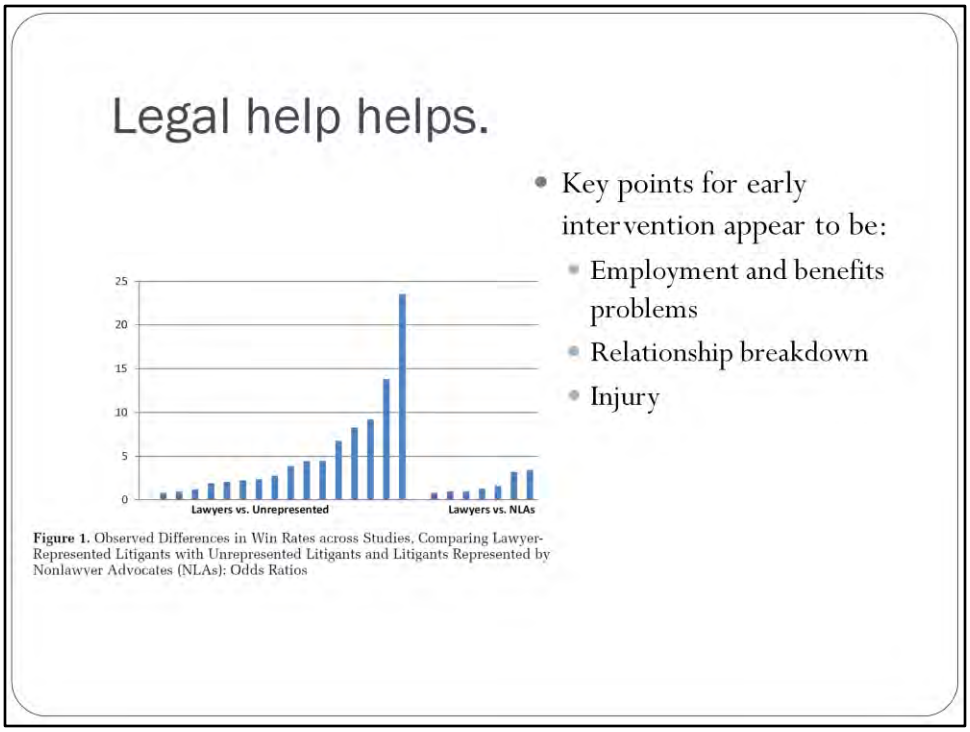


Less than a quarter of Americans' civil justice problems ever involve lawyers or courts[4], typically because people do not understand their justice problems to be legal problems and so do not consider lawyers, legal aid or courts as a source of assistance. Rather, people understand their justice problems as "bad luck" or "part of God's plan" for them. People describe a notable proportion of justice problems in ways that suggest that they may not believe third-party inventions are appropriate, -- that is, as problems that perhaps their group or they themselves should handle – problems that are "private" or "family and community" problems[5]

Justice problems can cascade in costly ways.

- Research from the UK finds that justice problems can trigger one another, and can precipitate
  - Homelessness, and consequent recourse to shelters.
  - Ill health, and consequent use of medical services.
  - Lost employment, and consequent use of public benefits.
- Disability and other indicators of vulnerability appear to accelerate cascades of problems.

Civil justice problems often lead to more problems, which can be costly both for the people who experience them and society at large. Research in the US and the UK finds that people report losing money, jobs and housing, as well as health problems as a result of justice problems.[6]



A range of types of evidence suggests that legal assistance can have impact. One way to see this is to examine the outcomes of justice problems that become cases. A meta-analysis (study of studies) looking outcomes in over 18,000 cases in areas such as eviction, welfare and social security benefits, and unemployment, among others, documented enormous potential impacts of legal assistance, even after accounting for selection into representation.[7]

Studies of public experience with justice problems find that when people get legal assistance, it increases people's chances of resolving their problems to their satisfaction, and it also reduces the impact of not knowing one's rights on justice problems' outcomes.[8]

Particularly for disadvantaged groups, interventions can be most helpful when they combine legal with nonlegal assistance, and when they are come early in the development of problems. Research from the UK and Australia suggests that key points for intervention include when people have problems with employment, when they experience the breakdown of important relationships, and when they are injured, whether at work or because of accidents or crime.[9]

Legal assistance appears to help prevent or stop costly cascades.

Notes

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8. Pleasence *et al.* 2014, *Reshaping Legal Assistance Services*.
9. *Id.*

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INNOVATION & COLLABORATION FOR COLLECTIVE IMPACT

CENTER DIRECTOR PARTICIPATES IN BOSTON REVIEW FERGUSON PANEL

January 7, 2015

Full Participation Report For The Yale Law Journal

CISC Director Susan Sturm released an independent report on diversity of the Yale Law Journal, including challenges concerning gender, race, and class.

"Home-Grown Social Capital": A Report

CISC Director Susan Sturm and College and Community Fellowship Executive Director Vivian Nixon co-authored the newly-released study, "Home-Grown Social Capital."

Celebrating Leaders With Conviction

CISC was proud to join with long-time partner JustLeadershipUSA in celebrating the graduation of the 2015 cohort of the Leading with Conviction Program.

Protests have been brewing in large cities across the United States and in other parts of the world hinging on the injustice of Brown's death — and the similar police killings of other young black men, including Eric Garner, a New York man choked to death. The protests have also become, as Glenn Loury, an economist at Brown University, points out, a rallying point for civil rights leaders looking to start "a national debate over issues of race, order and social justice."

Loury recently opened a Boston Review forum debate among a number of political thinkers around the topic of whether or not the Ferguson events can change the political landscape — by arguing that the protests are "an unfortunate and unproductive state of affairs." Loury's argument hinges on the fact that any dialogue emerging from the Michael Brown shooting is constrained by the specifics of the events.

Susan Sturm, Director of the Center for Institutional & Social Change and Professor of Law and Social Responsibility at Columbia University, responded to Loury by suggesting there may be a different lens through which to see the protests. Sturm says that Loury's analysis hinges on a view of the world in which community order takes primacy over community safety, and that we may in fact be at a point in time

Center Director Participates In Boston Review Ferguson Panel

Lawyering For Change Podcast: Episode Two

Lawyering For Change Podcast Launches

Creating Connections Consortium (C3) Summit

Architecture Of Full Participation Key Note At NC DIP Annual Conference

Educate Don't Incarcerate: Reversing The School To Prison Pipeline

Register Now For Pathways And Passports To Education: Telling The Narrative Of Reentry Education

where the corrosive polarity between public order and the trust needed for individual protections might finally be overcome.

Sturm makes four key points:

1. Both community leaders and the mainstream media have done a surprisingly good job of making the fairly sophisticated connections between the specifics of the Ferguson events to the broader issue of systemic patterns of "overly aggressive policing in communities of color."

2. Those involved in the protests have come from myriad social and racial backgrounds.

3. In some ways, the protests have already worked: "new venues for public engagement and problem solving" have been established, including recently launched commissions and research collaborations around the subject.

4. The protests have grown in tandem with a rising pool of talented and effective leadership groups in affected communities, including the New York Reentry Education Network, JustLeadershipUSA, and Boston-based Ten Point Coalition.

Ultimately, says Sturm, if community members "have the opportunity to shape the agenda," they can generate

approaches that "bridge the tension between order and respect that frames Loury's commentary." And protest, it seems, is the prerequisite for building the public concern required to bring the community together to do so.

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HOME-GROWN SOCIAL CAPITAL

HOW HIGHER EDUCATION FOR FORMERLY INCARCERATED WOMEN FACILITATES FAMILY AND COMMUNITY TRANSFORMATION

Susan Sturm and Vivian Nixon

CENTER FOR INSTITUTIONAL & SOCIAL CHANGE

College & Community Fellowship

ASCEND THE ASPEN INSTITUTE

ABOUT THE AUTHORS

Susan Sturm is the George M. Jaffin Professor of Law and Social Responsibility and the founding director of the Center for Institutional and Social Change at Columbia Law School. Her work focuses on building "the architecture of full participation," making education central for communities affected by the justice system, institutional change, and transformative leadership. She has researched and written extensively about multi-level change, and collaborates with a wide variety of higher education and community based organizations and networks, including Aspen Ascend Network, Hostos Community College, JustLeadershipUSA, the New York Reentry Education Network, and College and Community Fellowship. She is the principal investigator on Ford Foundation and Aspen Ascend grants, aimed at building multi-generational pathways to education in under-served communities, particularly those affected by incarceration, and developing learning communities to inform and support institutional and community transformation and build leadership needed to advance educational access and success.

Vivian Nixon is executive director of College and Community Fellowship, an organization committed to removing individual and structural barriers to higher education for women with criminal record histories and their families. She identifies her most valued and life-changing experience as the time she spent as a peer educator in the adult basic education program at Albion State Correctional Facility in New York. Rev. Nixon is ordained by the African Methodist Episcopal Church (AMEC) and currently serves as an associate minister at Mt. Zion AMEC in New York City. She is currently a Columbia University Community Scholar and has received multiple honors and awards, including the John Jay Medal for Justice, the Ascend Fellowship at the Aspen Institute, the Soros Justice Fellowship, and the Petra Foundation Fellowship. Her leadership activities include co-founding the Education Inside Out Coalition, a collaborative effort to increase access to higher education for justice-involved students, and serving on the Advisory Board of JustLeadershipUSA. Rev. Nixon holds a bachelor of science degree from the State University of New York Empire College.

PARTNER ORGANIZATIONS

The **Center for Institutional and Social Change at Columbia Law School** (CISC) builds the capacity of networks, institutions and individuals to understand the multi-level systems that limit access and full participation, and to identify strategies and leverage points for catalyzing and sustaining change. CISC engages in collaborative action research projects with institutional and community leaders involved in systems change, particularly in the areas of education, justice, and community development. We foster collaborations across multiple institutions to develop frameworks, build knowledge, expand organizational capacities, cultivate leadership, and support broader institutional and public policy change. CISC brings a multi-disciplinary approach to this work through strategic visioning and inquiry, multi-method research, institutional capacity building, systems-level assessment, and education.

The mission of **Community and College Fellowship** (CCF) is to eliminate individual and structural barriers to higher education, economic security, long term stability, and civic participation for women who have criminal convictions (including those currently and formerly incarcerated) and their families. The services, programs and projects of CCF exist to eliminate individual and structural barriers to higher education, economic security, long term stability, and civic participation for women who have criminal convictions (including those currently and formerly incarcerated) and their families. CCF guides women seeking to reclaim their lives through the stages of higher education while promoting their leadership, self-advocacy, artistic expression, and long term success.

Ascend at the Aspen Institute is the national hub for breakthrough ideas and collaborations that move children and the adults in their lives toward educational success and economic security. We take a two-generation approach to our work and embrace a commitment to gender and racial equity lenses. Vivian Nixon is an Aspen Institute Ascend Fellow, and CISC and CCF are members of the Ascend Network, a national network of organizations pioneering two-generation approaches for children and the adults in their lives.

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Photos courtesy of Community and College Fellowship.

EXECUTIVE SUMMARY

The United States may be at a turning point in its approach to growing inequality and record-level incarceration rates. Over the last few years, new policies have begun to elevate education's role in breaking the cycle of cross-generational poverty.

Building educational opportunities for families and communities affected by incarceration requires holistic support for individuals and families; this goal cannot be achieved one person at a time because these educational pathways include challenges and barriers that are built into the settings people occupy. Many of these families live in communities that have experienced decades of educational disinvestment and public indifference to the daunting challenges associated with poverty. They must navigate systems and policies that discourage people from pursuing education and make prison more likely than college in some communities. They must also contend with the stigma of incarceration, often in communities that disproportionately bear the brunt of mass incarceration policies. Meaningful change requires transforming the institutions and communities that shape families' opportunity networks. But the multigenerational effects of incarceration and poverty make school- and community-wide change challenging.

Research suggests that a single-generation approach cannot on its own break the cycle of poverty in families and communities. Simultaneously addressing the educational needs of parents and children is a key strategy for alleviating poverty and strengthening communities.

THE ROLE OF MULTIGENERATIONAL FAMILIES IN PROVIDING SOCIAL CAPITAL FOR EDUCATIONAL ADVANCEMENT

Access to social capital proves particularly critical (and often in short supply) for the educational success of people living in poor communities with struggling schools, low levels of educational achievement, and high incarceration rates. Changing these entrenched mobility patterns requires an understanding of how and why families and communities play such a pivotal role in educational success or failure.

This narrative is largely a story of social capital; relationships often formed outside of school provide crucial information, developmental opportunities, and personal supports needed to aspire to, access, and succeed in college. Social capital is the resources people derive from relationships, and it is transmitted through formal and informal networks of individuals who provide information and access to opportunity, and who convey social norms. These networks enable individuals to access economic

resources, increase their cultural capital through contacts with experts, and access institutional resources and opportunities. Education profoundly affects — and is affected by — access to social capital. Relationships provide the information, developmental opportunities, and social supports needed to navigate the educational pathway.

This study expands the two-generation lens to reflect the way women and men in communities affected by incarceration actually experience family relationships. Family can best be understood not as a fixed concept based only on biological or legal relationships, but rather as a dynamic concept informed by enduring relationships of commitment and support that serve as sustained sources of social capital enabling educational access and persistence. This lens draws on a growing literature supporting a community-centered, multigenerational definition of family. This expanded definition also grows out of interviews and focus groups with women enrolled in College and Community Fellowship (CCF), a program that provides academic support, social capital development, community building, and tuition aid to help justice-involved women successfully complete their college education. Through this inquiry, we learned about formerly incarcerated women's experiences of family, the mutual needs and barriers that they and their family members share, and where and how they get support as they pursue their education.

The women we interviewed define families and caretaker relationships in diverse ways that incorporate multigenerational, extended family, friends, and community members

who may or may not live in the same household, as well as other relationships with people who are in the same generation, such as siblings, cousins, housemates, and partners. This broader conception of family also reflects the realities of family structure in communities affected by incarceration, and illuminates the durable relationships that serve as sources of social capital within families and communities. Our research suggests that students who have experienced incarceration form ties and bonds that flow from experiencing trauma, rebuilding lives after prison, and sharing a commitment to giving back to their communities. This social capital can be mobilized to maximize the success of individuals within the network.

THE PIVOTAL ROLE OF INTRA- AND INTERGENERATIONAL RELATIONSHIPS

Every woman interviewed described the pivotal role of relationships with extended family members in enabling them to pursue college, navigate transitions, and persist in the face of hardship. Relationships with extended family and organizational brokers powerfully contributed to a critical shift in women's expectations

about college. Each of the women described a pivotal moment when she formed a sense of hope that she could go to college, and an expectation that she would follow through on that hope. Relationships with others in their family or community were pivotal in facilitating that shift in identity from formerly incarcerated person to student.

The interviews also showed that the sharing of resources and support flowed in many different directions, not just from parent to child. Educational support moved from adults to children and from children to adults. Women also received inspiration and support from their children, as well as concrete help with schoolwork and homework. Women give and receive support between generations, and this knowledge-sharing strengthens lessons learned, especially around the importance of education.

As they have succeeded in their education and rebuilt their lives, many of the women interviewed have become a source of social capital in their families and communities. Also apparent in the interviews is the women's willingness to share their social capital far beyond their immediate families and communities through networks that facilitate the sharing of that social capital. What emerges is a strategy for leveraging the educational success of formerly incarcerated women who are themselves deeply embedded in and committed to their families and communities.

Community-based organizations play a key role in facilitating that success. They are acting as brokers of social capital, connecting women to each other and to key resources in the community, and scaffolding the success of women as they move along the educational trajectory.

PROGRAM AND POLICY RECOMMENDATIONS

1. Engage preexisting social, professional, and cultural networks. To fully realize the benefits of the strategies that are already being employed informally by people reentering the community, program models should promote the engagement of preexisting social, professional, and cultural networks for necessary supports. At the same time, these programs should generate new opportunities to build networks across socioeconomic segregation through peer relationships, mentoring, apprenticeships, and other bridging methods.

2. Refine family and community to include relation networks with social capital supporting education. This research shows that physical or biological proximity is a poor proxy for identifying relationships with resources related to education. Social characteristics grounded in shared experience and commitments provide a strong basis for identifying relationships that provide social capital relating to education, particularly when individuals come from communities with low levels of education. Therefore we recommend that programs and policy explore new definitions of family and community that more accurately track the available social capital in relationship networks.

3. Foster strengths-based networks of women with convictions and their families. To be effective, organizations must successfully foster the ability of women with criminal convictions and their families to identify their own strengths while bridging them to other closed networks that have been engaged

by program staff and leadership. These connections include local, state, and federal government; other nonprofits; private foundations; donors; corporations; and the faith-based community.

4. Offer gatekeepers professional development about cultivating social capital. CCF participants said that a key factor in their well-being is their ability to increase social networks and recognize their own social capital. Organizations that aim to build social capital and social networks should offer professional development opportunities to staff in gatekeeping roles, from correctional officers to reentry specialists. Proper training increases social networks among employees, which translates to expanded networks for program participants.

5. Use policy and funding initiatives to foster multigenerational, cross-sector collaborations and networks. Funders and policymakers are in a position to facilitate cross-sector collaboration by supporting networks designed with a multigenerational lens. They can also redefine "family" in key initiatives related to education to foster and support multigenerational relationships that provide social capital to families and communities affected by incarceration.

6. Pursue collaborative research designed to advance knowledge, effective practice, and policy innovation. This report represents a small but growing body of research focused on the assets and strategies for building social capital in communities affected by incarceration. More research is needed to understand multigenerational needs, interactions, and strategies related to education. This research should be done in close collaboration with people directly affected. Collaborative, multi-method research poses questions that reflect the interests, needs, and knowledge of those directly affected. It provides firsthand perspectives about the sources and strategies for building social capital in families and communities. In the process, this research builds collaborations and partnerships between researchers and community leaders.

These findings will hopefully catalyze further research, activism, and policy aimed at building support for postsecondary education for formerly incarcerated women and men, [and] connect that support to families.

- Susan Sturm and Vivian Nixon

These findings will hopefully catalyze further research, activism, and policy aimed at building support for postsecondary education for formerly incarcerated women and men, connect that support to families, and enable organizational brokers like CCF to facilitate the development of these resource networks. These strategies will build the homegrown social capital needed to rebuild families and communities affected by incarceration.

INTRODUCTION

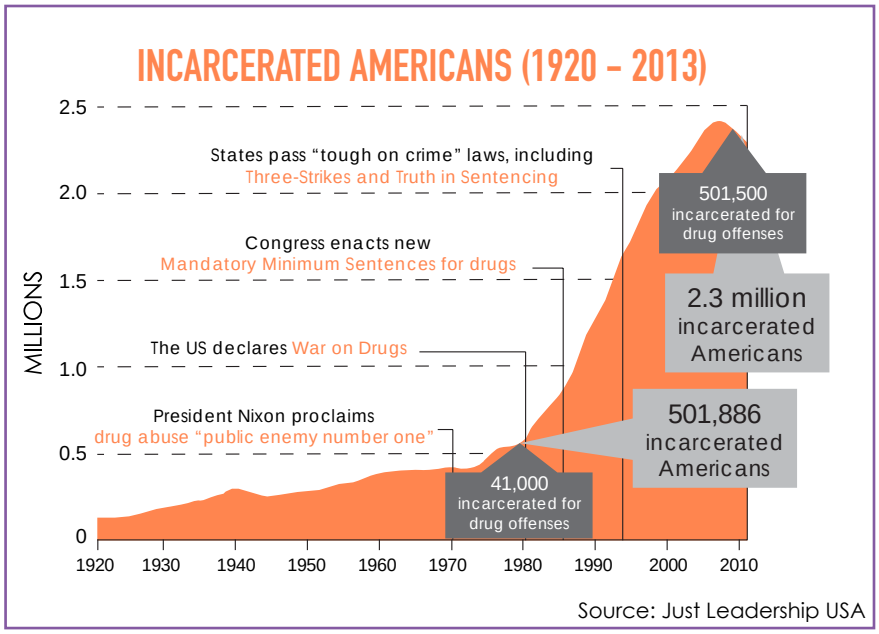
The United States may be at a turning point in its approach to growing inequality and record-level incarceration rates. Leaders and policymakers who have been involved in this work for decades describe a new sense of energy and possibility. As communities, leaders, and policymakers grapple with the consequences of mass incarceration, advocates and policymakers are searching for effective ways to shift public priorities from incarceration to education.

Over the last few years, new policies have begun to elevate education's role in breaking the cycle of cross-generational poverty. Among many others, My Brother's Keeper, the Opportunity Youth Initiative, and the Young Men's Initiative focus long-overdue attention on improving the achievement of those left out of the American Dream.[1] The Department of Education, with the support of President Obama and Department of Education Secretary Arne Duncan, has made education for people with criminal histories part of its policy agenda. The overarching goal proposes that "by 2020 the U.S. would again have the world's highest proportion of college graduates and the most competitive workforce, and every American will complete at least one year of postsecondary education or training."[2]

These initiatives must face the consequences of decades-long policies of under-investment in education and over-investment in incarceration.[3] With policies that have produced the highest incarceration rate in world, the United States is now home to a critical mass of people of different races, classes, and backgrounds who have experienced direct contact with the criminal justice system. Many of the intended beneficiaries of these emerging innovations reside in communities with high incarceration rates and little hope of prosperity, success, and upward mobility, no matter how hard they work. The obstacles facing these communities, including policy barriers like the revocation of Pell grant eligibility for incarcerated students, inhibit opportunity and mobility for the next generation.[4] Incarceration's reach has now grown too big to ignore; stratification researchers identify incarceration as a powerful "engine of social inequality."[5]

Communities of color have borne the brunt of this emphasis on incarceration at the expense of education, as evidenced by the phenomenon of "million dollar blocks." The Justice Mapping Center has charted the concentration of incarceration rates in disadvantaged communities around the country, highlighting "the millions of dollars per neighborhood being spent to imprison residents of these communities."[6]

Researchers have documented the disproportionate incarceration of people of color, particularly black men.[7] While people of color make up about 30 percent of the U.S. population, they account for more than 60 percent of those imprisoned.[8] According to a report published by the National Council on Crime and Delinquency, "African Americans were newly admitted to custody at a rate 5.7 times the rate for Whites. Hispanics were admitted 1.9 times and Native Americans 4.3 times the rate for Whites." Admission rates for Native-American and African-American women were over six times and four times, respectively, the rate for white women.[9]



Source: Just Leadership USA

At the same time, disinvestment in education has reduced social mobility and limited access to social capital needed for educational advancement.[10] Social capital is the resources people derive from relationships,[11] and it is transmitted through formal and informal networks of individuals who provide information and access to opportunity, and who convey social norms. These networks enable individuals to access economic resources, increase their cultural capital through contacts with experts, and access institutional resources and opportunities.[12] Education profoundly affects — and is affected by — access to social capital.[13] Relationships provide the information, developmental opportunities, and social supports needed to navigate the educational pathway.[14]

In our culture, educational institutions and social policy rely heavily on family relationships to provide crucial aspects of the resources needed for educational success. Yet, many individuals belong to families that, if traditionally defined, do not have the educational background and resources necessary to fulfill this role. In 2011, 62 percent of children under 18 lived in families where the highest level of education among adults was high school or less.[15] Researchers have also documented a "geography of opportunity," meaning that the quality and extent of educational resources and social supports turn on where you grow up.[16] People of color are more likely to grow up in communities with low levels of educational attainment and high poverty that do not offer adequate opportunities to develop capabilities.[17] Add to these challenges the fact that communities with high incarceration rates face considerable challenges in rebuilding family relationships interrupted by incarceration.[18]

Building educational opportunities for families and communities affected by incarceration requires holistic support for individuals and families; this goal cannot be achieved one person at a time because these educational pathways contain challenges and barriers that are built into the settings people occupy.

Many of these families live in communities that have experienced decades of disinvestment in education and public indifference to the daunting challenges associated with poverty.[19] They must navigate systems and policies that discourage people from pursuing education and make prison more likely than college in some communities. They must also contend with the stigma of incarceration, often in communities that disproportionately bear the brunt of mass incarceration policies. Meaningful change requires transforming the institutions and communities that shape families' opportunity networks.[20] But the multigenerational effects of incarceration and poverty make school- and community-wide change challenging.

The resurging interest in two-generation approaches to social issues, fueled by philanthropy, offers a promising avenue for simultaneously supporting individuals and transforming the settings they occupy. Two-generation approaches focus on meeting the needs of children and parents together. They build on the insight that families play a central role in shaping children's well-being and mobility. Support for education within families offers the potential to grow social capital at home and in communities, embedding it in long-term relationships. A two-generation lens forces concrete reconfiguration of existing policies and strategies to link supports for family members, while providing the platform, capacity, and momentum for more transformative change at community and system levels.[21]

Much of the research on social capital relating to educational advancement has defined individuals as the unit of analysis; research that does focus on families has often taken a deficits approach, examining differential educational outcomes based on demographic characteristics, such as being in a single-parent family without college education.[22] Emerging research has begun to explore how organizational and policy design can influence access to resource networks, as well as resource-sharing patterns that go beyond traditional parent-child relationships.[23] Yet, little is known about how programs and policies designed to advance education for adults can serve to support the educational advancement of other family members, including children.

Organizations and researchers have started strategizing ways to more meaningfully integrate these services and systems.[24] As a leader in that work, Ascend at the Aspen Institute brings together community organizations, service providers, researchers, and policymakers to think critically about how a two-generation approach to education, economic security, and social capital can create opportunities for and address the needs of poor parents and their children together.[25]

Ascend has spurred a national conversation around the two-generation strategy. Yet, activists and researchers have much work ahead of them. While several organizations throughout the country are focused on improving educational opportunities for vulnerable children and women with children, many of those efforts are pursued in isolation or, at the very least, are not strategically coordinated to fully reach their transformative potential.[26] Gaps exist in the literature and in the field concerning the multigenerational dynamics affecting

educational access, particularly for families affected by incarceration, and the role of organizations and networks that serve these families in brokering relationships that build a two-generation approach within their core organizational missions. Further, additional research is needed to understand more fully the impact of multigenerational relationships and the mechanisms accounting for positive outcomes on the lives of both women and their families.

This study takes a step forward in building knowledge about how social capital develops and flows within multigenerational families. It explores what families look like for people who have previously experienced incarceration and seek to pursue postsecondary education, and how multigenerational relationships affect educational access and advancement. To realize the promise of the two-generation approach, it is crucial to understand how families actually function in these programs' target communities, particularly in families where individuals with criminal justice involvement pursue postsecondary education. This inquiry seeks to understand the relationship between the educational development of different family members who care for one another. As a previous Ascend publication noted, these interrelationships provide the mechanisms by which families "build education, economic supports, social capital, and health and well-being" and thus "create a legacy of economic security that passes from one generation to another."[27]

OVERVIEW OF THE STUDY

This study focuses on understanding family and community interactions involving women with criminal justice involvement who have pursued

postsecondary education. It also highlights how these interactions support educational persistence and success for those women and their families. It uses a strengths-based framework and explores the relationship and resources embedded in women's families and communities, and their relationship to multigenerational educational success.

The participants of the study are women enrolled in College and Community Fellowship (CCF), a program that provides academic support, social capital development, community building, and tuition aid to help justice-involved women successfully complete their college education. CCF typically serves about 180 active program participants; between 15 and 30 women each year earn postsecondary degrees with the support of CCF. Since 2000, CCF students have earned 286 degrees: 61 associate's, 142 bachelor's, 81 master's, one JD, and one PhD.[28] CCF has cultivated a community of women committed to the mutual success of women and their families, as well as a wide network

of organizational and government partners and networks that currently provide support to CCF's constituents.

Through a series of interviews and focus groups, we have gathered firsthand accounts of the processes by which formerly incarcerated women gain access to resources and relationships: tools that helped them navigate and persist in the face of obstacles and stresses. We interviewed 38 women who are enrolled in CCF; they were all pursuing their postsecondary education and have all experienced prison. We asked them about their family experiences, the needs and barriers that they and their family members share, and where and how they get support as they pursue their education.

The study shows the key role of relationships in enabling women to develop aspirations and concrete plans to go to college. Relationships also proved critical in obtaining information about how to navigate their own schooling and the schooling of the children they cared for, and the developmental opportunities that can help them thrive in school. In the process, these women become crucial sources of social capital for people in their relationship networks.

Our research also provides considerable evidence that formerly incarcerated students, transformed by their educations, provide crucial home-grown support for education to their extended families and community. Extended families play a particularly important role in shaping educational aspirations and trajectories. Community-based organizations (CBOs) serve as another critical support system as these women navigate the pathway to higher education. CBOs help the women marshal useful resources within their families, communities, and institutional environments, allowing them and their families to persist and succeed in their educational aspirations.

A MULTIGENERATIONAL LENS FOR UNDERSTANDING FAMILIES IN THE CONTEXT OF EDUCATION

The research presented in this study examines the role of families as sources of social capital relating to education. That research led us to employ a definition of family that builds on and extends the two-generation approach, which offers a powerful response to conventional approaches to reducing poverty through education, employment, and social capital development. Most education programs that are developed as a strategy for poverty alleviation have focused on supporting a single generation, most often targeted to the K-12 student population.

Research suggests that a single-generation approach cannot on its own break the cycle of poverty in families and communities. Learning at home and in the community supports

educational engagement and success in school; the educational experiences of one generation thus affect those of another.[29] Lack of educational opportunities and viable educational pathways to family-sustaining careers for parents are central barriers limiting the educational success of their children. Simultaneously addressing the educational needs of parents and children is a key strategy for alleviating poverty and strengthening communities.[30]

Ascend at the Aspen Institute has become the national hub for developing two-generation approaches, "which focus on creating opportunities for and meeting the needs of vulnerable children and their parents together."[31] This lens invites the development of policy and programs that consider how people in families interact with and affect each other's development, as well as how they face common barriers that interfere with their ability to thrive and support each other.

We have built on this base of insight and research, and expanded it to reflect the way women and men in communities affected by incarceration actually experience family relationships. Family is best understood not as fixed concept based only on biological or legal relationships, but rather as a dynamic concept informed by enduring relationships of commitment and support that serve as sustained sources of social capital enabling educational access and persistence. This lens draws on a growing literature supporting a community-centered, multigenerational definition of family. It recognizes that family is not solely defined by biological or nuclear family relationships and that more than two generations may live in one household. Moreover, the women we interviewed define families and caretaker relationships in diverse ways that can incorporate multigenerational extended family, friends, and community members who may or may not live in the same household, and other interactions among people who are in the same generation, such as siblings, cousins, housemates, and partners.

This broader conception of family also reflects the realities of family structure in communities affected by incarceration and highlights the durable relationships that serve as existing sources of social capital within families and communities. Our research suggests that students who have experienced incarceration form bonds that flow from experiencing trauma, rebuilding lives after prison, and sharing a commitment to giving back to their communities. This social capital can be mobilized to maximize the success of individuals within the network.

This redefinition of family also takes account the context of promoting and enabling educational access and success. We learned that the meaning of family depends upon the function that families are called upon to serve. More concretely, people in a variety of roles fulfill the family function of providing education-related social capital by providing ongoing information, support, and opportunities for educational development, including mentoring, providing mutual support with homework, tutoring, building a culture of college-going in the household, providing encouragement when students hit roadblocks, and celebrating accomplishments. These roles may be performed by parents, siblings,

extended family members, or kinship communities; they do not necessarily require living together or serving as a legal guardian. Indeed, children provide social capital to adults, as well as to each other.

These multigenerational families serve as a support network for women in their reentry experiences, which include rebuilding family relationships, caring for multiple members of the family, pursuing education, navigating employment, securing housing, and serving their communities. What distinguishes these relationships as familial in nature is a sustained level of commitment, along with continuity and resilience of these relationships. Understanding what family actually means to formerly incarcerated women helps us better support women in their educational access and success and facilitate their social capital and economic security.

Yet, the biological, two-generational frame has limited the availability of support for nontraditional families that provide multigenerational support for education. The biological and legal definition is often used in policies and programs to define eligibility for benefits, guardianship, and participation related to education. Berger & Bzostek (2014) contend that family does not necessarily function as a cohesive unit between a married couple, although social policies assume that it does. Existing family policies tend to target specific categories of families and use family definitions based on "consuming unit," "assistance unit," or "tax filing unit" that may not capture the everyday reality of adults and children.[32] In a similar vein, social policies with respect to child support, custody, visitations, school, and health care are based on an outdated family model. Revising policies would be the next step in accommodating a growing number of nontraditional, multiple-partner, complex families.[33]

This project shows the value of expanding the lens by sharing insights and experiences from women who are directly impacted by criminal justice and other government systems about how they and their families (as they define them) navigate their education pathways. Through an Ascend grant, we have expanded this research to include participants in organizations serving youth, men, and fathers to advance their education. These organizations are part of a network that aims to make education central for individuals, families, and communities affected by criminal justice involvement. Through this research, we plan to provide concrete knowledge about how policymakers and program leaders can support families with a multigenerational strategy that will both improve programmatic outcomes and expand educational opportunities for the family members of those they serve.

A SOCIAL CAPITAL FRAMEWORK FOR UNDERSTANDING CROSS-GENERATIONAL EDUCATIONAL ADVANCEMENT

Education, particularly postsecondary education, is key to building an intergenerational cycle of opportunity.[34] It provides the wherewithal to learn, solve problems, and critically engage the world. It facilitates social citizenship and political participation. It also has become a prerequisite for most decent-paying jobs.[35]

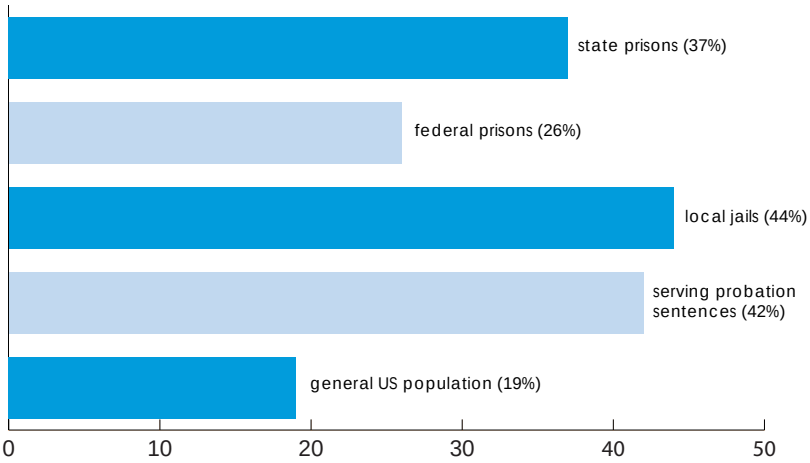
Education's influence on economic and social status is particularly visible among those who have not experienced quality education. Low levels of educational opportunity and achievement correlate strongly with poverty rates. According to a Child Trends study, "Among adults living in poverty, almost two-thirds have a high school diploma or less and only 10.4 percent of them have a bachelor's degree or higher. By contrast, 39.5 percent of adults living above the poverty line have a bachelor's degree or higher."[36]

The Relationship of Education and Criminal Justice Involvement

Education bears a significant relationship to families' involvement with the criminal justice system, particularly families of color. People without a high school education are far more likely to become enmeshed in the criminal justice system. An estimated 37 percent of people incarcerated in state prisons, 26 percent in federal prison, 44 percent in local jails, and 42 percent serving probation sentences have not completed high school or its equivalent, compared with 19 percent of the general U.S. population 16 and older.[37] Among those incarcerated in state prisons nationwide as of 2004, only 17 percent have completed any postsecondary education, compared with 51 percent of the general population, and a mere 2 percent have a college degree.[38]

PEOPLE WITHOUT A HIGH SCHOOL EDUCATION ARE FAR MORE LIKELY TO BECOME ENMESHED IN THE CRIMINAL JUSTICE SYSTEM

Percentage of those in criminal justice system without a high school education compared with general US populations



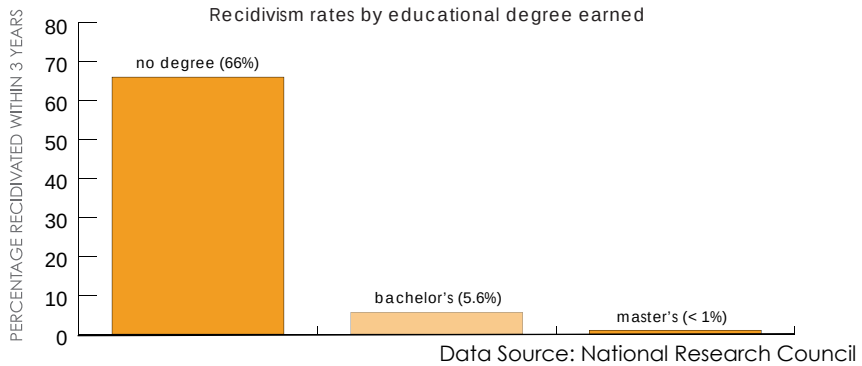
Data Source: US Bureau of Justice Statistics

Children of parents with less than a high school degree face significant likelihood of experiencing parental incarceration. A 2009 study shows that 15 percent of white children, 17 percent of Hispanic children, and 65 percent of African-American children whose parents had not completed high school experienced parental incarceration by age 17.[39] Half of the people in prison have children under the age of 18, and 45 percent of those parents lived with their children at the time they were incarcerated. Close to 2.6 million children (roughly one in 25 minors) had a parent in jail or prison in 2012. One in nine African-American children has a parent incarcerated on any given day.[40] U.S. Bureau of Justice statistics show that African-American, Hispanic,

and Native-American parents face an increased risk for incarceration compared to their representation in the population as a whole.[41]

Just as lack of educational opportunity increases the likelihood of poverty and incarceration, access to high-quality education plays a critical role in reducing recidivism and facilitating mobility. Education's transformative role becomes particularly apparent for people who have had criminal justice involvement. A recent Rand study that conducted a meta-analysis of high-quality research found that "on average, inmates who participated in correctional education programs had 43 percent lower odds of recidivating than inmates who did not."[42] According to the National Research Council, "While 66 percent of incarcerated non-degree earners nationwide are likely to return to prison within three years of release, the likelihood drops to 5.6 percent for Bachelor's degree recipients and less than 1 percent for Master's degree recipients."[43] Increased educational attainment, associated with increased human capital, skill development, and literacy, in turn, correlates with increased income and decreased crime rates.[44] Postsecondary education also provides greater access to supportive social networks and positive norms, which social capital theory predicts would increase positive social behavior.[45] College completion provides an effective means of overcoming the stigma associated with criminal records.[46]

ON AVERAGE, INCARCERATED PARTICIPANTS IN CORRECTIONAL EDUCATION PROGRAMS HAD 43% LOWER ODDS OF RECIDIVATING



Data Source: National Research Council

The Role of Community and Family in Educational Access and Success

Access to high-quality education in the United States correlates strongly with place, race, and parental education. Data show that parents' education, in particular if they have postsecondary education, is a strong predictor of economic mobility.[47] Where you live strongly predicts whether you will have access to high-quality education and whether you will be on the track to enter and complete college.[48] Overall, the wealth of neighborhoods contributes to largely static mobility patterns for whole communities.

Those opportunities are also racially stratified; African American and Latino students are far more likely to go to schools with fewer resources, lower rates of graduation, and an absence of college-going cultures. The Education Trust found that African-American and Latino students "are still attending college at lower rates than their white peers." They are also "more likely than white students to begin college in either a for-profit or community college, where their chances of earning a degree are lower."[49]

About 69 percent of Native-American high school students graduate in four years, compared with about 83 percent of white students. Only 52 percent of Native students who graduated in 2004 enrolled in college immediately after high school, compared with 74 percent of white students. Of all Native students who enrolled in a four-year institution

in the fall of 2004, only 39 percent completed a bachelor's degree by 2010, compared with 62 percent of white students.[50]

Efforts to change these entrenched mobility patterns require an understanding of how and why families and communities play such a pivotal role in the experience of educational success or failure. This narrative is largely a story of social capital; relationships often formed outside of school provide crucial information, developmental opportunities, and personal supports needed to aspire to, access, and succeed in college. Research demonstrates the critical role of social capital in helping people navigate educational pathways, beginning with early childhood education and continuing through postsecondary education.[51]

Relationships, particularly relationships among people who interact regularly, are the primary mechanisms influencing human development.[52] They influence how people see themselves and how they interact at critical junctures, thereby shaping their trajectory. Relationships profoundly affect expectations for educational achievement — whether a person grows up thinking of college as a natural step in their life's progression, and that educational success is within their grasp. Relationships provide the opportunity to develop habits and skills conducive to educational success. Research has also shown that relationships are critical to accessing the timely and usable information needed to transition to the next educational milestone. Students' success depends upon information tailored to their situation about matters affecting their college-going choices, including financial aid, deadlines, requirements, and graduation rates.[53] Social capital also proves crucial to educational success: It can provide access to material resources necessary to cover the expenses associated with education and to weather life's predictable stresses.[54]

A recent study comparing the experience of students at Yale University in New Haven, Connecticut, with the experience of students at nearby Southern Connecticut State University underscores the critical role of expectations: "Students do better in school when their families expect it, when their teachers expect it, when their friends expect it, and when they themselves come to expect it."[55]

Researchers have also drawn a distinction between parental expectations for college and direct parental involvement with students' college planning. Cabrera and La Nasa (2000a) argue that "parental support is necessary for predisposition of students of color to college, but their definition of parental involvement includes more direct guidance with students' college plans (such as guidance regarding appropriate courses and applying to colleges). Parental involvement among first generation parents of color is often hampered because parents, who have not attended college, have more difficulty offering specific and tailored advice for students with college plans."[56] Ample research demonstrates the positive impact of parents' education on their own and their children's well-being.[57] College education increases earnings, improves parenting practices, and offers social network opportunities that accrue economic and social benefits.[58]

Access to social capital proves particularly critical (and often in short supply) for the educational success of people living in poor communities with struggling schools, low levels of educational achievement, and high incarceration rates. In addition to the universal challenges built into our current system of educational advancement, people in under-resourced communities must learn to persist in the face of traumas and stresses that inevitably accompany poverty and contact with the criminal justice system. Poor health, inadequate housing, trauma from exposure to violence, and the consequences of parental incarceration comprise some of the major barriers to educational success.[59] People facing these challenges are disproportionately people of color and immigrants, who must also contend with racial stratification and bias that pose additional hurdles limiting educational success. Research also shows that relationships of trust at critical junctures — and the resources they provide — enable people to persist in the face of those barriers.[60]

Understanding Complex Families as Core Providers of Social Capital

Theorists, empiricists, and policymakers have determined that families are a core provider of the social capital enabling education persistence, resilience, and success. As Patrick Sharkey argues in his book *Stuck in Place*, "human lives are linked together in various complex ways, but most notably through families."[61] Recent scholarship documents the idea of linked lives, meaning that "advantages and disadvantages accumulated over a lifetime — the human and cultural capital acquired, the physical and mental health status of an individual, the resources that an individual obtains and works to protect" are "transmitted, at least in part to the next generation."[62]

Much of the research and policy linking education, family, and social capital focuses on the nuclear family as the baseline for research and policy. An intact family has frequently been defined as two married parents and their children. Through this lens, families that depart from the two-parent, married prototype have deficits in their ability to supporchildren and achieve economic stability. Broad trends reveal a stark relationship between family composition and indicators of well-being. Single-parent families are more likely to experience poverty and low levels of educational completion.

The two-generation approach grows out of a realization that this two-parent, nuclear family lens oversimplifies and under-appreciates the complex family structures that operate in every community, and particularly in low-income communities and communities of color. As William Tierney, a respected educational researcher, observed: "Researchers have based their definitions on the 20th century ideal of a nuclear family: a mother, a father, and two or three children. Although such a definition was never appropriate for numerous groups, it is increasingly problematic in the 21st century."[63]

Students do better in school when their families expect it, when their teachers expect it, when their friends expect it, and when they themselves come to expect it.

- S. Mettler

To capture the complexity of contemporary families, scholars have begun to examine complex families in which one biological parent of at least one biological child lives outside the home, and the parent who lives in the same home is either single or repartnered, which is more prevalent among the socio-economically disadvantaged.[64] Marriage rates have declined substantially, and in communities of color and poor communities, two-parent, married families have become the minority. Drawing on the nationally representative SIPP data (between 1984 and 2008), research shows that Hispanic children experienced the greatest decline in two-biological-parent families and the highest level in sibling complexity.[65] African-American children continue to experience the highest level of family complexity living in single-parent homes. A racial gap remains between unmarried women: In 2010, 36 percent of white babies, 72 percent of black babies, and 53.4 percent of Hispanic babies were born to unmarried women.[66]

An exclusive focus on parent-child relationships, however, obscures other important interactions that occur within families, including the role of grandparents, siblings, extended family, and constructed families. In African-American, Latino, and other immigrant cultures, extended families nested in communities of caring and struggle have deep and enduring histories.

The pervasive impact of incarceration on families and communities underscores the limits of the biological parent as the organizing family narrative. Incarceration necessarily interrupts the traditional parent-child relationship. Frequently, grandparents

and other family members step in when parents, particularly mothers, are separated from their children because of incarceration.[67] Preliminary research the Center for Institutional and Social Change (CISC) is conducting with fatherhood initiatives suggests that education can operate as a strategy for connecting noncustodial parents with their children and, in the process, advance educational goals and supports for both.[68]

The biological parent framework also deflects attention from identifying the sources of social capital development and revitalization that now exist in families and communities. Specifically, resources and relationships that facilitate educational advancement demand consideration as significant sources of social capital. Families with the same composition viewed through a biological or legal lens may comprise widely divergent kinds of relationships and contain members with various challenges and support needs. Researchers have noted how little we actually know about the ways extended families operate and about the mechanisms that facilitate

the mobilization of social capital in families, particularly those related to educational advancement in particular.[69] We do know that siblings, grandparents, and other extended family members can and do share social capital with "proximal" children, and these relationships can be equally important to facilitating young people's educational advancement. We also know that in immigrant communities and communities of color, relationships of trust are particularly important in the transmission of information and support to first-generation college students.[70]

The relationship between families and social capital in poor communities and communities of color also must be rethought to better reflect when, and in what sequence, people in those communities pursue their education. Many of the programs seeking to increase high school and college completion assume that parents' educational level is static, that college students are between the ages of 18 and 22 (or 25), and that adult education is primarily vocational and remedial. Yet, many adults over the age of 22 or 25 pursue college careers.[71] In reality, for incarcerated people coming from communities that did not afford them easy access to college, prison has sometimes offered their first opportunity to pursue education in a meaningful way.[72]

Thus, many adults with low levels of education are in a position to pursue their own education at the same time as the children in their lives. This reality suggests that adults and students are likely to face overlapping challenges and milestones, providing promising opportunities for multigenerational approaches to educational advancement. St. Pierre et al. describe the approach as a set of programs that adopts "a strategy which recognizes the multi-generational, multi-dimensional aspects of family poverty, and which sets out to attack it on several fronts simultaneously by using key features of child and adult centered programs."[73] King et al. define dual-generation strategies as those that "stress simultaneous services to children and their parents, providing them with quality developmental opportunities of demonstrated effectiveness and the supports needed for them to take full advantage."[74] Ascend similarly explains that two-generation approaches "focus on creating opportunities for and addressing needs of both vulnerable children and their parents."[75]

A multigenerational approach provides simultaneous support for education, social capital development, and economic security for children and their families. It also recognizes the impact that family members have on each other, particularly when it comes to educational expectations. In families and communities of color, family

members and other relationships of trust play a particularly important role in providing the information and support necessary to succeed in education. Students of color and first-generation low-income students often get their information and college knowledge from non-parental relationships. Research by William Tierney found that "Siblings can play an important role in students' college choice process, in particular when an older sibling has attended college."[76] Peers, especially those who are high-achieving, can provide significant support and information about college application, enrollment, and persistence.[77]

Family Involvement Must Be a Core Program Component

Many programs seeking to increase the involvement of parents of first-generation college students in supporting their children's education continue to treat parental education as static and fixed. As an Ascend report observes:

> *Programs that provide education and skills training to adults often view children as a barrier to participation, rather than designing models that engage whole families. Meanwhile, programs focused on children often see parents as merely facilitators of children's education, rather than seeking opportunities for parents to increase their own education attainment and marketable job skills.*[78]

Efforts to include family involvement generally operate as an add-on to existing programs. Evaluations of these programs find that they have limited success in engaging parents of first-generation students. Parents without direct exposure to college find it difficult to support their children in pursuing a college degree because of lack of knowledge, confidence, and time. Studies have shown that parents who have not themselves attended college are less likely to believe in their capacity to provide effective support for their children, and this expectation undermines their involvement.[79]

These more static approaches to family involvement also fail to account for the growing knowledge about the importance of context in shaping whether social capital can be mobilized to support educational success, particularly in communities lacking robust relationships of support. Researchers such as Mario Small, Patrick Sharkey, and Robert Sampson have demonstrated that organizations and spaces play a significant role in facilitating the development of social capital. Strategic use of organizational brokers and network catalysts can facilitate access to social capital for individuals and intensify the impact of actors in a position to bridge relationships.

Family members, including grandparents and siblings, who have experienced and recovered from the impact of incarceration and attained educational success are well-positioned to play these bridging and brokering roles. Research also shows that civic and community-based organizations in a position to broker relationships help build collective efficacy by mobilizing action for shared purpose.[80] Collective efficacy in turn enhances the capacity of individuals and families to support educational success as a community endeavor.

To be effective, multigenerational strategies for educational advancement must understand

and support families as they actually function in their communities. These strategies must also identify the sites and sources of social capital that exist within complex families and communities, so that they can be supported and enhanced. As part of this effort, it is crucial to explore the patterns of education-related interaction within and across generations and among families and communities — where they happen, how they develop, and what they enable. This line of inquiry will push forth the development of a strengths-based approach to tackling the significant challenges facing communities that have endured decades of disinvestment in education and over-investment in incarceration.

This research provides a basis for better understanding the common struggles, family interactions, and strategies of a group of women who have experienced postsecondary educational success under extremely challenging conditions and against the odds, given their demographic background and histories. The study also provides an opportunity to consider the social capital networks and interactions of women who have successfully pursued postsecondary education post-prison and to re-theorize family, community, and social capital development with a strengths-based approach, informed by the experiences of people engaged deeply in rebuilding their lives and the experiences of their families and communities. Their experiences in supporting — and being supported by — family and community members are instructive in developing and testing new strategies for pursuing multigenerational educational advancement.

FINDINGS

We first provide data showing the kinds of families the women described and how they define and experience those relationships, particularly as they relate to educational access and success. We then describe the shared histories of struggle and trauma that the women had to overcome to enter and persist in college. Finally, we explore the ways that social capital related to education flows through the family relationships.

DIVERSE AND COMPLEX FAMILY SYSTEMS AND EDUCATIONAL LEVELS

The women participating in the interviews described their families as varied and complex. Of the 182 people who were active CCF program participants in 2013, 71 percent were single, 11 percent were married, 75 percent had children, 53 percent had children under the age of 18, and 50 percent were single mothers. The demographics of the group participating in the interviews were comparable. Most of the women interviewed were in complex families and relationship networks that were not captured by the conventional labels of single mother or married parent.

Most of the women interviewed — about 64 percent (25 out of 38) — had children and were not married.[81] Twelve out of 38 women (about 32 percent) were married, and 10 of the 12 married women were living with their husbands. The husbands of two of the 12 married women were currently incarcerated. Three of the 10 women living with their husbands were also in multigenerational or blended families and were living with grandchildren or stepchildren. The following table summarizes the

configuration of relationships among the 38 women who participated in the study:

Single woman, no biological children	1
Biological child and foster children under 18 in household	2
Biological child and nephew under 18 in household	2
Single mother with biological children under 18 in household	6
Mother with children under 18 and partner in household	4
Grandparent with caretaking responsibilities for child under 18	10
Married with spouse and children under 18 in household	7
Single living with adult children	1
Married with adult children/ stepchildren not in household	2
Biological children under 18 not in household	3
TOTAL	38

Of the 38 women interviewed, 12 were grandmothers who either lived with their children and grandchildren or had significant caretaking responsibilities for their grandchildren. Grandmothers and siblings emerged in many of the interviews as playing particularly important roles in the lives of the women and their biological children. The grandmothers we interviewed described strong relationships and regular caretaking interactions. Some were providing direct childrearing support for their grandchildren. For example, many of the grandmothers picked up their grandchildren from school every day or cared for them while their mothers worked or attended school. As one grandmother described, "I have informal care . . . they're there with me; they're with their mom, whichever. Either way I'm with them every day on a full-time basis." For some, this role involves providing direct childrearing to help support children with incarcerated parents:

I have a five-year-old granddaughter. Her father is incarcerated, and I try to make up for her father not being there. [My granddaughter] stays with us during the week, and she goes home on the weekend.

Many of the women talked about the central role their own mothers played in keeping their families together while they were incarcerated:

My mom was a phenomenal mom when I was incarcerated. She made sure my children came to see me every two weeks . . . She took my kids places. She did things with my children. She made sure they knew that I was still their mom. And anything that needs to be done, they still had to ask me could they do it. So I know that you can be a mom from inside.

Other women described grandparents as integral parts of the support structure in their lives and the lives of their children:

Their grandparents have impacted them in many different ways. My mother-in-law is with them practically every day because they stay with her when school is out. So we see her often. My mom is still alive, and they see her every now and then. And each grandparent spends a lot of time with my children.

These grandmothers saw themselves playing important roles akin to parenting. For them, "parenting is parenting, whether you're a grandparent or not."

We also learned that the biological relationships did not necessarily predict women's level of interaction or caretaking responsibilities. Seventeen of the 38 women interviewed had child care responsibilities for children with whom

they did not live. Many had children who were in foster care while they were incarcerated. Four women lived with or cared for nieces or nephews. Five women reported having significant child care responsibilities for people to whom they were not biologically related, such as foster children, godchildren, or neighbors:

They feel like I'm their grandmother, so their real father and their biological grandmother don't pay them any attention . . . I know that when they come to my house, they think I'm grandma, and they think my son is their father, and they think my mother is their great-grandmother . . . We have two extra children.

Extended family members — mothers, aunts and uncles, and siblings — also played a role in providing child care for women while they were juggling work and college. Siblings emerged as important sources of support for women in both caring for their children and in providing access to information and support for women's educational development. This support was also described as critical to women's ability to stay in school:

My sister keeps my daughter, and my niece is there to keep my daughter company since they're the same age. And it just works out perfectly. Again, I can't stop saying how blessed I am and how fortunate I am to have the circle of family and friends that I have.

These interviews suggest that the "single mother" category oversimplifies the experience and support structures these women have. Of the 24 women who fit the category of single mother, about one-quarter function as "single parents" — they did not have others they considered part of their "family" or constellation of ongoing supportive relationships and were really on their own in supporting their children. These women also reported that they found it quite difficult to persist with their education and to support their children over time.

However, many "single mothers" in the cohort had relationships with other members of a group they regard as family, and those relationships figured prominently in the network of support upon which they relied. Five of the 16 were in stable relationships; eight were single grandmothers with significant relationships with their children or grandchildren. Most reported relationships with family members who provided significant support:

I'm a single mom, so it's tough, but I have a lot of family around me who help me, support me. So I take advantage of that for paving the way of going to school and doing whatever I'm supposed to do.

A significant subset of the women who would be classified as single mothers described a richer and more diverse set of relationships that provided key forms of support:

Her father is my son. And I try to make up for him not being there — take her places, do things with her on the weekend.. . . And it's really hard. My mom helps me out. My daughter helps me out; my other son helps me out. So it's like everybody helps out with this. It is a team.

My entire family lives really close. So she has older cousins, she has younger cousins, and I have family support — a lot of it. It's a double-edged sword, but I have a lot of family support around [my daughter] and around other issues as well.

Many of the women interviewed also served as a resource for other family members who were at different stages of their education. Twenty of the 38 people for whom we have reliable information were in situations involving multigenerational child care responsibilities. Other women who are not themselves grandmothers described important roles being played by grandmothers, siblings, aunts, uncles, nieces, nephews, cousins, and stepparents. These extended family relationships played critical roles that mirror those assumed to be performed by the nuclear family.

Many of the women described relationships of support in which they influenced other family members but did not assume a caretaking role. Some of the relationships were long-distance. One woman had a high school-aged daughter in another state and a close relationship with her sister's family in another state.

It is important to keep these various levels of relationships in mind when developing strategies for a multigenerational approach. Some strategies and supports, like in-person meetings and activities, may be appropriate for primary or dual caretakers, whereas informational supports may be more beneficial for those who have meaningful long-distance relationships.

Evolving Family Relationships

The interviews also showed that family relationships were not static; they evolved over time. As women developed their own educational success, strength, and support structures, they described dramatic shifts in their roles as mothers and family members, enabling them now to provide support to their children, grandchildren, and family members that they were not in a position to provide when they were younger:

Although I do have two other kids, I wasn't really there because I had a drug problem. So I wasn't there actively. This is really the first time me being an active parent, so I'm just trying to go with the flow. If somebody suggests something to me, I take it into consideration. Is this appropriate for him and his age and what's going on with his life?

I felt like I was a bad parent to [my older daughter] because I used to drink, and alcohol was number one in my life. I don't drink anymore, and I feel like with [my son] this is my second chance to be a good parent, and I really, like, want to be a good parent.

Educational persistence and success went hand-in-hand with family re-engagement; education also provided a vehicle for noncustodial parents to connect with children. This pattern is evident in current CISC research concerning the role of education in enabling fathers to reconnect with their children after incarceration.

Peers and Community-Based Organization Staff Are Included in the Definition of Family

Finally, many of the women interviewed included under the rubric of "family" key relationships with peers or people in community-based organizations that provided significant support, including CCF:

[My daughter] grew up with us in CCF. She used to come with me to my theater group meetings, so all of the women that I know at CCF that are in the theater group with me, when I'll go to an event or something, if she is with me, they'll grab her and say, "Hey, what's going on? What you doing? You being good?" It's like she has a whole bunch of mothers. And she's really close to the ones that I'm close to.

A lot of my, I'm going to say friends, [are my source of support] because it's been many years since I've been in prison, and a lot of people who I know are members of CCF now were also my bunkies in prison, and I know they have children. And I know they're going through the same things.

What distinguished these relationships as familial in nature was the level of commitment, along with their continuity and regularity and the resilience of the relationships. Women described the involvement of extended family members as critical to their ability to stay in school and still care for their children. They also described overlapping educational needs and challenges that they shared with their family members.

OVERLAPPING STAGES OF EDUCATION FOR WOMEN AND THEIR FAMILY MEMBERS

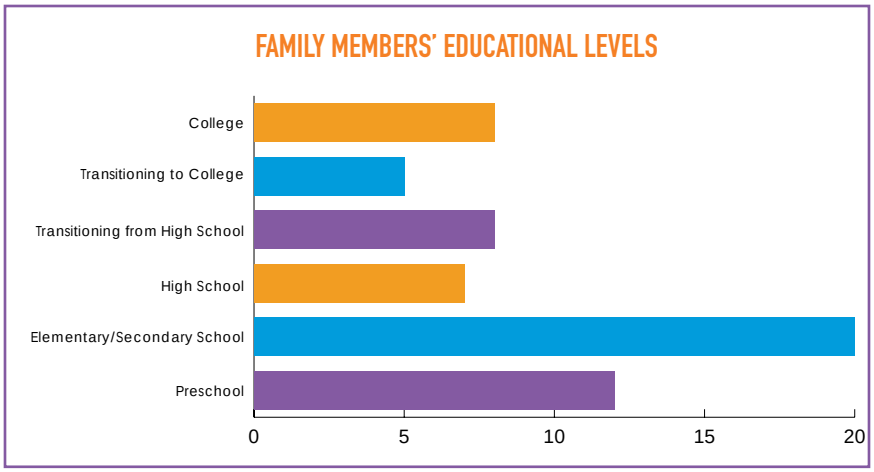
The women interviewed are at many different stages in their educational careers. The following table reports the highest educational level attained by the participating women:

Enrolled in or completed master's program	10
Completed BA	3
Completed associate's, enrolled in BA program	2
Enrolled in BA program	12
Completed associate's, not currently enrolled in BA program	1
Enrolled in associate's program	7
Some college credit	3

Most of the women interviewed also had responsibilities for family members enrolled in or planning to enroll in school. The figure below presents the stages of education for the family members that the women cared for, supported, and influenced: pre-kindergarten, elementary and junior high school (kindergarten through eighth grade); high school (ninth through 12th grade); transitioning from high school (leaving high school), transitioning to college (intending to or in the process of enrolling in college); and college (currently enrolled in college).

Women reported caring for children who were as young as a year and

a half as well as supporting family members who had been out of school for years but are thinking about returning to college. About half of the women reported some overlap between their own educational level and that of a family member they interacted with on a regular basis. Five of the women had siblings who had graduated from college.



Shared Histories of Family and Community Struggle and Trauma

At first glance, the women's experiences echo the challenges and deficits emphasized in both the demographic data and the policy discourse. They share a common experience of families facing huge hardships, often linked to limited resources and support because of underinvestment in the communities they face.

Most of the woman interviewed described serious challenges in their own backgrounds or communities that contributed to their involvement with the criminal justice system. Many described families of origin that were complex and extended; they themselves grew up in families that would be called "single-parent," and many experienced the incarceration of a family member. One woman summarized this pattern:

My life was my life because of my history and my family's life. . . . I have a big family. Everybody went to jail almost. The only ones who didn't were my sisters. All the boys went to prison and me.

For some women, their families communicated a theme of growing up with a sense of inevitability, hopelessness, and limited exposure to possibilities for transforming their lives and communities. Most of the women interviewed grew up in communities with struggling schools plagued by low graduation rates, high levels of interaction with the criminal justice system, and few, if any, students who went on to college. Many left high school as teenagers and became involved in activities or relationships that led to their criminal convictions and some period of incarceration. Most of the women participating in the study entered prison without a college degree. At least two had started college before prison, but left before completing a degree. Some had not completed high school before entering prison.

One of the women, now in college, communicated the relentlessness of the negativity and low expectations communicated by family members, teachers, and peers while she was growing up:

Everything in my life has always been like, "You ain't never going to amount to nothing; you won't be nobody." Nothing positive, all negative. And that, for a long time, that's what I was. I was nobody; I was nothing spectacular, and I was not doing the greatest of things.

A theme running throughout the interviews involved significant and

recurring experiences — in school, with police, or in other contexts — that left them with a sense that, in part because of their race and their low-income status, their well-being and ability to thrive did not really count.

After Catholic school, I went to public school, which was shell-shock for me, and then I went to the local high school. I dropped out of high school at 11th grade. I believe that . . . this community is . . . one of the highest places where people are incarcerated and coming back into the community as well. And I think that the community is very, very powerful in capturing negativity as opposed to positivity . . . There still is a lot of drug use, a lot of robberies, at least a lot of people who are on public assistance. It's a community that doesn't have a lot of hope.

The women also described a series of interrelated challenges: poor health care, housing, and access to transportation, and a general acceptance of limited resources to support a decent quality of life in the community. Many women described various kinds of trauma that they experienced before and during prison, including sexual abuse, exposure to drug involvement, and violence.

POST-INCARCERATION CHALLENGES ASSOCIATED WITH POVERTY

The barriers and challenges described in the interviews illustrate the patterns documented in the scholarly literature. Most people returning to their communities from prison or jail face significant and well-documented challenges, including insufficient income and access to employment, gaps in academic skills and preparation, physical and mental health concerns, unstable housing, disrupted family relationships, and parole compliance.[82] Recent studies estimate the unemployment rate for formerly incarcerated adults at 60 percent, and 89 percent for those who violate the terms of their parole or probation.[83]

Financial barriers

Not surprisingly, financial barriers posed an overarching difficulty for all the women participating

in the study. Financial constraints prevented women from meeting basic family needs, as they juggled multiple responsibilities with limited resources and support, impacting their educational performance and goals. For example, lack of financial resources precluded a single mother of two children from having a computer at home, which required her to stay late to use the college's computer. This impacted her educational experiences and family responsibilities: "That was one of the reasons I used to get home at 1:00 in the morning. I have to take transportation back home, and some of the trains stopped running. So it was really a challenge in getting home at 3:00 in the morning, getting home so late, kids sleeping, with a few hours to go to work the next day." In addition, a family's financial challenges affect children's educational performance, particularly in single-mother households with no family support.

Housing

Many of those interviewed reported having difficulties finding housing after prison. At least three of the women interviewed lived in shelters; some lived in temporary homes ("three-quarter homes"); others experienced non-habitable conditions, including no heat and hot water during the winter; some had to move from one place to another, in search of affordable and habitable housing while caring for children and being enrolled in school. Lack of housing precluded some women from focusing on their education. One of the women who previously lived in a shelter shared her experience:

You can't concentrate in school and classwork if you're not sure where you're going to sleep at or rest at the following day and things like that. And I know from experience because I was faced with that years ago before I actually became employed. I lived in a shelter.

Unstable housing undermined women's and children's health and education, particularly when the women were single mothers who cared for small children in unsafe housing conditions with no family support.

Women reported sometimes feeling overwhelmed in their educational pursuits as they tried to balance their primary caretaking responsibilities, schoolwork, health issues, and job(s).

Challenges Related to Caring for Children

The interviews identified challenges connected to the well-being and struggles facing the children they cared for, many of which mirrored the challenges that they had faced in their own childhood. Many of those with responsibility for children described significant challenges with the quality of the elementary and secondary schools their children attended. They faced recurring problems caused by the schools' low expectations for their children, lack of support, and the absence of a college-going culture. Some women reported that their children were diagnosed with such learning disabilities as ADHD, ADD, dyslexia, and dysthymic disorder, and one child was diagnosed with autism. Learning disabilities posed challenges to children's academic performance and consequently had an impact on their mothers' educational goals as they strove to provide quality educational opportunities for their children.

Women with young children need help caring for them and planning

for preschool. Quality child care surfaced as a pervasive challenge. Some women worried about the expense of child care:

I have to look for child care. . . . But, oh God, I can't afford it."

One woman described her struggle with various child care centers because of their lack of quality care:

In the day, I watch my son because last semester I was doing work-study, and I put my son in the child care center a block away from me. And he was sick . . . throughout the whole semester. So I decided this semester I'm not going to do the work-study, and I'm not going to put him in the child care center.

She was unsure who would watch her son during her upcoming summer semester. Grandparents underscored the absence of child care options for their grandchildren as well.

Fragile Health and Mental Health Status

Women also identified health, mental health, and financial hardships that placed considerable stress on their families. Most experienced significant health issues (including drug and alcohol addiction) and difficulty finding adequate access to health care. Many women reported seeking therapy/mental health counseling to make sense of past and ongoing traumas, which included substance, physical, and sexual abuse; domestic violence; and disconnection from children and family members. Several women struggled with ongoing depression. One woman reported that she had found it necessary to work through her "negative behavior" to succeed in school. She spoke of the mental health support she received as making a critical difference to the success of her higher education career. Another woman struggled to stay in school after her mother passed away.

Both women and their family members need emotional support to overcome the effects of past incarceration. Incarceration took an emotional toll on women, their children, and other family members. As one woman stated, "When we are incarcerated, our children are incarcerated with us." One woman commented that while her oldest children had never struggled emotionally in school, her youngest daughter had several behavioral issues affecting her education. She felt it was because her daughter was young when she was incarcerated, and the separation affected her the most. Another woman noted that her son is "still mad; he's still angry" and recently told someone he was depressed. The effects of incarceration are not limited to the parent-child relationship. One grandmother commented on her grandson's behavior:

Me not being there in the early years hurt him.. . . I don't think he developed as much as I would have liked him to because [his mother] didn't know what to do as a young mother.

Educational Needs and Barriers Shared with Family Members

Several points of intersection between the educational needs of CCF women and their family members emerged from the interviews. Women and family members all have overlapping needs for academic support, particularly in reading and math. Both groups struggle with foundational concepts and identifying resources for help.

Some women have had success seeking support from their professors, but others have not. For example, when one woman turned to her professor for help, she said:

She was talking over my head. . . . I went to her office and by the time, when she finished talking with me, I was looking out the window because I wasn't understanding her; and I don't think she understood why I didn't understand.

While many women identified tutoring programs at their school, many were unable to take advantage of the extra help because the tutoring is scheduled at a time when they need to take care of their children or work. Some have relied on their grandchildren and children to tutor them. Others have found for-profit learning centers or reached out to professors and other students. But many women are currently searching for more consistent academic help.

Similarly, while some women reported that they felt their children's school or other sources of support provided academic help, many were uncertain about the resources available for support. For example, after acknowledging her daughters' struggle in reading and math, one interviewee expressed frustration about the organization of her children's school. She said, "It's so much fighting going on over this way that the teacher . . . she can't teach." Another woman said her daughter is failing two subjects, but when she tried to communicate with the teachers, "they [didn't] really have time for talking." Other women reported that their family members were struggling to read or complete classes at grade level. All of the women with responsibilities for school-age children expressed their desire for tutoring and academic support for their family members.

Some CCF women and their family members have shared the need for support around transitioning into and succeeding in college. Many had family members preparing to attend, struggling to apply to, or already enrolled in college. Several women described the difficulty they had beginning college. One woman struggled with not having the skills to pass her GED. After taking the test twice and failing, she said, "I gave up on myself, and I was very honest and I said, 'I can't do this.'" Eventually, she turned to the teachers at her daughters' school, and they helped her pass the test before her college program started. Many of the family members of the CCF women also need support around beginning college and managing responsibilities, academic advising, and financial aid. They also have similar academic needs.

Women frequently identified the difficulties they had navigating large higher education bureaucracies. One woman described her registration experience:

My first semester when I went to go register and everything, it was so discouraging. It was so crazy . . . . [There were] long lines [and] student confusion [and] go here, go there, do this or do that . . . . And so I didn't even register.

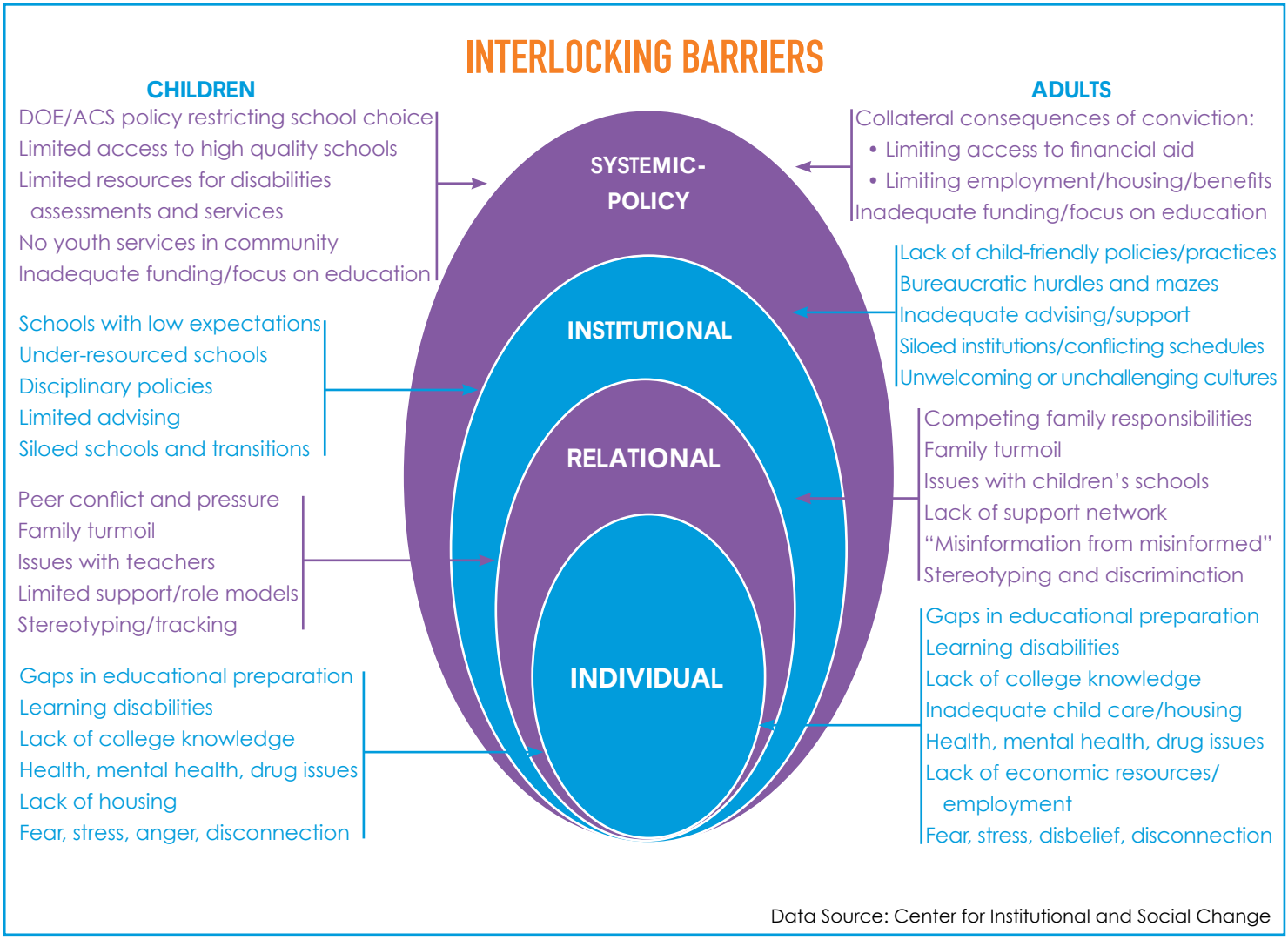
Several women identified problems with their colleges accepting former college credits. Many of the women expressed dissatisfaction with the academic advising at their schools. After explaining that she had picked her courses herself ever since she started school, one interviewee said, "[The colleges] have too many students per academic advisor." Many women reported turning to sources for advising outside of their colleges, like CCF.

Women with responsibility for family members transitioning into college reported similar educational challenges. Many family members need help with financial aid. One woman reported that her niece recently dropped out of college because she had trouble with her loans; another woman reported the same for her daughter. One interviewee said that her daughter's college was too expensive, so she was transferring next semester to the school the CCF woman currently attends. Other women said that their children need academic or advising support in college. One woman mentioned that her daughter is thinking about attending graduate school.

Finally, women and their family members need help with meaningful educational planning overall. Many women described themselves and their family members struggling with transitions in their educational careers. While they recognize the importance of selecting the right school or networking with the right people, many of them wanted or needed more support navigating next steps. Women also struggled to navigate their family members' transitions from one educational stage to the next. Many of the women also described difficulties and opportunities stemming from their children's school placement and choice. The women responsible for children who were transitioning or had just transitioned into high school reported the difficulties of navigating the high school selection process. Women responsible for young children were struggling to find preschools. One commented on how expensive top preschools were; the other said she had not thought much about where to send her son, and she did not know where to find out information about preschools. Finally, women described family members that needed help with transitioning to college.

Justice-involved women and their families thus face a set of overlapping and interlocking barriers, operating on multiple levels, which are summarized in the diagram on the next page.

The "Interlocking Barriers" chart that follows highlights the multilevel arenas where adults and children experience similar challenges and struggles. For example, at the relational level, adults experience "misinformation from the misinformed." Many of the women interviewed reported interactions with people in gatekeeping positions, such as admissions and financial aid officers, who gave them incorrect information about the impact of their criminal involvement on their eligibility for resources and programs. CCF has found that many of the women with criminal involvement it serves "falsely



assume that they are not eligible for need-based federal or state student aid (TAP and Pell Grants)."[84] Adults and children alike received limited guidance on programs that would encourage them or family members to strive for college. This contributed to the lack of college knowledge and aspiration among both adults and children at the individual level.

Similarly, adults and children attended "siloed institutions" in which offices addressing different functions had little or no knowledge of each other, let alone relationships with the institutions that students were coming from or going to next. For example, high schools and high school equivalency programs did not understand or have relationships with college programs that could smooth the pathway and provide realistic goals for college readiness. This pattern affected the educational aspirations of both adults and the children in their families.

Health issues and mental health challenges associated with poverty and incarceration also figured prominently in the cross-generational landscape. Trauma seemed like an everyday occurrence for many of the women interviewed and the children in their lives. Yet, the educational institutions charged with serving them generally lacked the awareness or wherewithal to offer a trauma-informed approach. In their accounts, women frequently recounted disengagement or punishment of boys and girls in their care, in reaction to the behavioral

manifestations of trauma. Access to understanding and care to support these women and their family members depended upon the availability of relationships with people committed to the success of the women and their families.

Resiliency and Success Despite Barriers

But the story of struggle and trauma, though certainly part of the shared experience, is not the overarching narrative of the formerly incarcerated women we interviewed. Nor do their educational outcomes correspond to those that would be predicted based on the challenges they face. These women are experiencing a level of educational success and leadership that would not be expected based on their demographic categories, opportunities, and experiences. Their commitment and struggle related to education binds them together, as one woman recounted:

Education for us, and I like to speak for all the women of CCF, is our lifeline. Education to us is every breath that we breathe. That's how much it means to us. And that's what we have in common. And that's what has linked us, beside the pain in everything that we suffered. And we support each other because of it. And I think that's our common bond, that we want to learn.

What also emerges from these stories is that many of these women are embedded in — and provide critical supports for — social capital networks that facilitate their access, persistence, and success in college in the face of tremendous obstacles, and these networks cut across generations. Family, broadly defined, is an important element of these social capital networks. Most women identified family as the most important source of support and resources in pursuing their postsecondary education. But family for those interviewed did not correspond to the conventional nuclear definitions of family, and the conventional roles of adults and children did not define who provided critical dimensions of support.

MULTIDIRECTIONAL AND MUTUAL MOBILIZATION OF SOCIAL CAPITAL RELATED TO EDUCATIONAL ADVANCEMENT

The previous discussion about family composition and structure lays the foundation for exploring how these families, defined to reflect women's experience, share social capital relating to educational advancement for themselves and for their family members. By expanding our focus to explore the interactions between women and the full range of people to whom they connect regularly, we were able to explore the various forms that social capital development and mobilization take.

The Pivotal Role of Intra- and Intergenerational Support

CCF women consistently described the power and importance of education for themselves and their family members. As one woman explained, "I'm just very, very serious about my education and my children's education . . . because I know you can't go [anywhere] without it."

Every woman interviewed described the pivotal role of relationships with extended family members in enabling them to pursue college, navigate transitions, and persist in the face of hardship. Trusted family and community members were able to provide them with information about higher education in ways they could hear, and at times when were ready to act on that information. Some women described relationships that

provided them with information about the application process for college or about how to navigate their children's educational environments. Women described the sharing of crucial forms of social capital in their extended family relationships.

Relationships with extended family and organizational brokers powerfully contributed to a critical shift in women's expectations about college. The women each described a pivotal moment when they formed a sense of hope that they could go to college, and an expectation that they would follow through on that hope. Relationships with others in their family or community were pivotal in facilitating that identity shift from formerly incarcerated person to student.

For example, women described receiving encouragement from parents, siblings, cousins, peers, and children that enabled them to shift their own expectations about college, and then to communicate similar college-going expectations to others in their families.

[M]y mom, in particular, she always expresses to me how she's happy that I'm in college and . . . she is very encouraging of me going to school. And so I let her know that these were my grades for the first semester . . . and I'm just going to do better. And I want you to know that I'm going to do better.

Women described playing a similarly encouraging role with their own family members:

We're planting the seed. And now that I'm back in school, it's helping my son to get back in school; it's helping my daughter to think about going to school. My daughter said to me, "Well if you can do it at 48, I definitely can do it at 29."

As women experience higher education for themselves, they describe ways in which that experience has enabled them, often for the first time, to become concretely and actively involved in supporting the educational success of family members. Some women were preparing for college at the same time as another family member, and they discovered that they were better able and committed to advancing their family member's education as a result of their own educational advancement. As one interviewee powerfully explained:

I was a motivator for [my daughter] to go to college because I've always told her (we both had kids young) . . . education is empowering, and we can come [out] of those low-level entry positions. And with an education, we become more intelligent. So as a matter of fact, she just emailed. She said, "If you didn't give me anything else, thanks for determination and motivation." So I inspired her to do everything that I didn't do with my life. So she

hasn't had a life like mine at all. And education, indeed, has been a part of that . . . . The same thing with my grandson.

In addition to influencing their parents and their children to achieve their educational goals, CCF women influence siblings and extended family members. At least five women have siblings they have encouraged to go to school. One interviewee explains:

[My sister] never really expressed that she wanted to go to college, but being that I'm in college now, I talk to her about college. And I tell her, 'Oh I learned this, and I got this on my paper, and this professor is really good, and I really don't like this class.' So I put her into the conversation, and she has been saying about a year now . . . that she's going to go to college. . . . She's going to register.

Some women identified important mentoring relationships with their nieces, nephews, and in-laws. For example, one interviewee reported that she encouraged her nephew to complete his GED while he was in a drug program. Largely because of her encouragement, he is planning to enroll, with her help, in the college she attends. Two women have daily supportive relationships with their daughters-in-law who attend college.

Other sources of familial support the interviewees identified included husbands, godmothers or goddaughters, aunts and uncles, and a stepfather. Some women described long-lasting relationships of informal support with individuals and groups that extended beyond family ties. Two women identified long-term mentoring relationships they formed through reentry organizations, particularly CCF. One woman described an ongoing relationship with a woman she met through a networking event at CCF a few years ago. The mentor has encouraged her to go to college, directs her to various academic support services, checks in with her frequently to discuss school, and is helping her find child care. Another woman described turning to two women she had originally met at CCF and another reentry organization for advice and support about her education, her career, and

her children's education over the span of several years.

The interviews also showed that the sharing of resources and support flowed in many different directions, not just from parent to child. Educational support actually moved from adults to children and from children to adults. Women also received inspiration and support from their children, as well as concrete help with schoolwork and homework. Women give and receive support between generations, so that intergenerational knowledge-sharing strengthens lessons learned, especially around the importance of education.

The intergenerational support system included family members who served as academic counselors and tutors. For example, several women spoke about their siblings and cousins — who are not in a traditional family relationship — providing the necessary educational guidance and support. A CCF woman discussed the importance of the support a sibling gave as an academic counselor and tutor:

She was able to get me on the right track if something was going on with the papers or whatever. . . . My sister is very prompt, good in writing and everything, but she always tried to show me where I went wrong with the papers and whatever, and what needs to be changed and what I needed to go about doing it.

Similarly, another CCF woman's cousin offered emotional and academic support while she was pursuing school full-time, doing an internship, and simultaneously caring for her child. Feeling overwhelmed, the young woman stayed connected with her cousin, who encouraged and supported her as she juggled competing demands:

I was speaking to my cousin, who's also like an academic advisor to me at times as well. And she's like, "Just don't think about it; just do it! Just go, like, just do it. You're young; you're strong; you can do it."

The intergenerational support was similarly visible in the relationships between aunts and their nieces/nephews. CCF women's siblings also provided educational support and tutoring to the CCF women's children. Another CCF woman explained that her sister was involved in her daughter's education and shared in the caretaking responsibilities while she was enrolled in college full time.

What emerges is a strategy for leveraging the educational success of formerly incarcerated women who are themselves deeply embedded in and committed to their families and communities.

- Susan Sturm and Vivian Nixon

KEY ROLES PROVIDING SUPPORT FOR ACADEMIC ACCESS AND SUCCESS

The data revealed a variety of roles at work in the intergenerational support system. About a quarter of the women had shared caretaking responsibilities for family members, meaning that they shared the responsibility of supporting children with another person like a daughter or, in one woman's case, an ex-spouse.

Many of the women we interviewed serve as academic role models. One woman described her relationship with her daughter: "I just got an email

from her. But it looks like my baby's going to college. She said that I'm her inspiration and that I'm the best role model ever." Another woman described how she encouraged her younger sister to pursue college education to help her advance in her career:

My younger sister, she's not into school right now because she's working seven days. But I think she's just throwing her talents away. Because she's very smart. . . . So I'm trying to help her; I'm trying to talk to her, so she can encourage herself, so she can at least do her associate's.

The women also lay the foundation of the college-going culture at home. CCF women are determined for their children to finish high school and pursue college. They instill college motivation in their children. Many of them act as role models for their children by working hard in college and bringing their children to college classes and graduation ceremonies. For example, one CCF woman spoke about how she cultivates the college-going culture in her household:

Every time I graduate I take them to the graduation, so they can see it. . . . So I'm pushing it to her to keep going to school because that's the first thing.

Mutual cross-generational mentoring included not only educational support but also the sharing of knowledge and skills learned in school. Many women spoke about using their own knowledge and experience to advise people coming up behind them about how to plan their schedule, get financial aid, and navigate the system. A number of CCF women noted that their children or grandchildren helped them in their educational pursuits by tutoring them in reading and writing and helping them with computer skills and email communication. Women with college-aged family members described applying lessons learned or using their networks of support to help family transition into or thrive in college. For example, one woman is helping three of her children enroll in her college. Another woman reports helping her daughter and nephew enroll in her college. One mother, with the help of her long-term mentor, worked with her daughter to develop a list of colleges to apply to for the upcoming year, and then helped her with the applications. At least four women report using the information they have received from CCF and other organizations to help their own children navigate application and enrollment processes.

Another woman illustrated an example of mutual cross-generational academic support between grandparent and grandchild:

And I think we've inspired one another. We do homework together; we do research together. She loves for me to check her papers, and I'm not the best at writing a paper, but I do write better than she does. And I love for her to do math because she's good at math. She does very well at math. So she helps with the math. And so I think that turns my grandchildren on — watching us do homework. It helps inspire them to do their homework.

Sharing educational experiences, when family members go to school and college simultaneously, reinforces mutual success. One of the women reported how sharing her college-going experience within her family motivated her son to pursue college education:

His girlfriend goes to school in the college I go to. So she's going and I'm going. . . . and my daughter, the 18-year-old, wants to go straight to college. . . . So I said [to my son], "You're going to be the only one, the black sheep of the family not going to school?" So he said he's going. So that's what motivated him, and his girlfriend's on top of it.

Finally, some women enrolled in college report creating routines and accountability for each other that encourage persistence and success. They regularly do homework with the children they care for, create ongoing learning experiences, and mutually support each other's progress. We learned of women who work closely with their grandchildren to cultivate excitement about reading. Similarly, one CCF woman who took care of her five-year-old granddaughter regularly discuss their schoolwork:

And me and my granddaughter have conversations. She says, "So how was school, grandma?" And I ask her, "How was school for you?" And when I tell her, "Fine," she says, "So what did you do?" . . . So that stops me. OK, let me stop and say to her, "So today this is what I did in school." If I tell her I had a test, she says, "So how do you think you did on your test, grandma?"

These routines developed around homework, school, and learning build mutual accountability about keeping up and doing well.

LEVERAGING HOME-GROWN SOCIAL CAPITAL

As they have succeeded in their education and rebuilt their lives, many of the women interviewed have become a source of social capital in their families and communities. We have identified several patterns that enable formerly incarcerated college goers to leverage their social capital.

A common theme among the women interviewed is the desire to "pay it forward." Many of the women spoke directly about how the support from others who came before them is contributing to their success, and how they want to give back to the community and bring others along:

I found a passion of wanting to help people and be a beacon of light to them. Because from past history through incarceration and myself with drug use, having no clue and being hopeless, [thinking] that I would never be clean, that I would be worth nothing. And so it's really intriguing to me when I first meet someone in this field that I work in and they're hopeless; life is meaningless; they don't have a clue; they don't believe in themselves. And so what I do is I just give the information, and I educate them so that they can be able to learn it for themselves. And this flower that came in, that had driveled away, starts to blossom. So that's what I love.

Also apparent in the interviews is the women's willingness to share their social capital far beyond their immediate families and communities, and the existence of networks that facilitate the sharing of that social capital. What emerges is a strategy for leveraging the educational success of formerly incarcerated women who are themselves deeply embedded in and committed to their families and communities.

The women interviewed are a part of a larger community in New York City that they described as robust and containing long-standing relationships. Many of them formed relationships of mutual support during their time in prison, some of them afforded by opportunities to pursue college while in prison. Many of the women said this set of relationships has facilitated the sharing of social capital among women in the network and their families. That sharing of resources was further facilitated by a shared sense of community-mindedness among the women interviewed. Most of them expressed with great fervor a commitment to give back to the community and to do what they can to make life better for the next generation. Many of the women are involved in work relating to social service, leadership, or public service.

CCF has cultivated a community of women committed to the mutual success of women and their families, as well as a wide network of organizational and government partners and networks that currently provide support to CCF's constituents. Some of these partners also provide educational and other kinds of support to families and children.

Many women saw themselves as an integral source of information and support for other formerly incarcerated women and emphasized their commitment to networking and helping women in need. Some had or were currently volunteering or working for organizations like the Women's Prison Association. Others network and provide support in more informal ways. One woman explained, "Being incarcerated for so many years and so many people coming to me asking me for advice, 'How do you do this? How do you do that?' And I've learned how to communicate with people. I've learned how to research. On my own I've learned how to help people . . . . And I really have a passion for it; I really love it." She further explained that she attends seminars through reentry organizations to find out how to help women who are transitioning back into their communities. She is working to build an organization now. She wants to "set up a support system for people who come out to sit down and talk about what they're going through, what they're feeling, what happened. Support systems and groups are a network; you share

information." Her experience is similar to what many other women described.

Community-based Organizations Can Help Broker Social Capital

Community-based organizations play a key role in facilitating success. They act as brokers of social capital, connecting women to each other and to key resources in the community and scaffolding the women's success as they move along the educational trajectory. As Mario Small argued in *Unanticipated Gains*, "people's social capital depends fundamentally on the organizations in which they participate routinely," and "through multiple mechanisms, organizations can create and reproduce network advantages in ways their members may not expect or even have to work for."[85]

The women interviewed identified several ways in which CCF builds their social capital and facilitates their roles as brokers of social capital. All of the women mentioned the community meetings. Many women explicitly discussed turning to CCF for academic advising. One woman who is transitioning into a master's program is consulting with CCF advisors to explore degree programs and schools and talk through application and testing requirements. Women also discussed information and classes as well as participation in the Theater for Social Change. Through CCF, a number of women found mentors who became crucial sources of academic and career support.

The engine of social capital development for communities affected by incarceration can come from making higher education possible for formerly incarcerated women and their families. The engine is also fueled by cultivating organizational brokers who are in a position to support women in effectively sharing the social capital with their families and communities.

CONCLUSION

This research shows how formerly incarcerated women can become crucial sources of social capital for their families and communities. The families of formerly incarcerated women have been able to support these women in navigating social and legal systems post-incarceration, and, in turn, have enabled these same women to support educational access and success in their families and communities.

Our research has identified possible ways to provide more intentional support for cultivating social capital in multigenerational families to support education. We have observed the tremendous value in cultivating and supporting peer support and brainstorming by those already playing those roles. Our research also noted programmatic opportunities for integrating multigenerational family members in learning activities, including orientations, college visits, and graduations.

CCF program participants have shown us that families who include postsecondary education aspirations as part of their strategy for overcoming poverty and incarceration develop new sources of social capital. Families dealing with the challenges of criminal conviction depend on networks of individuals with similar experiences and challenges, while scaffolding those supports with new relationships formed in school, at work, in faith communities, in activist organizations, and in bridge programs like CCF. This research shows that strong social networks that offer mutual support and aid social interactions, along with the sharing of knowledge and resources, have a tremendous impact on the ability of women with criminal convictions and their families to access education and persist into and through college.

A critical step in expanding this multigenerational impact, exemplified by CCF's increased focus on supporting families, involves finding ways to have programs currently designed for one generation embrace a multigenerational mindset and strategy. Many programs now designed for one generation are already strapped for resources, so the successful integration of a multigenerational mindset will require new configurations that facilitate collaborations and partnerships.

Strong Anchor Organizations Can Sustain Multigenerational Partnerships

Larger systemic issues also play a role in enabling or preventing healthy collaborations and communities. Housing, public buildings, recreational facilities, parks, and other public spaces that are safe, well-resourced, and offer locations for social and political dialogue are essential to sustaining long-term, cross-sector work. CCF has played this intermediary role throughout its 15 years serving as a core institution for women who have been involved in the justice system and who are looking to redefine themselves and redirect the trajectory of their family's future. Multigenerational strategies might be further cultivated by identifying anchor institutions in communities, such as community schools or colleges or housing projects, that could collaborate with organizations like CCF to provide cross-generational interactions, such as tutoring or college counseling,

that could be provided to family members.

Economic opportunity that allows community members to participate fully in the life of the community is also essential. CCF participants have indicated that incentives and stipends, while not the primary motivation for engagement, are helpful in allowing them to participate fully without the added concern of the cost involved in education itself. Incentives also allow them to participate in CCF's community-oriented activities. Documenting their role in providing social capital to families and communities offers a justification for allocating these resources.

Engage Participants as Thought Partners

CCF's model brings together the full range of resources that all participants have to offer. The focus groups conducted as part of this research illustrated that the women who have developed the resilience to persist and support their families have creative and practical ideas for how to build on their experiences. As demonstrated by both the peer-to-peer exchanges that happen informally and formally and the educational components, such as conferences, coalition meetings, and graduation celebrations, effective programs can unite diverse audiences with different economic status around common concerns. This fosters networking across groups and boosts benefits to all participants. Inclusivity helps bridge social capital and also demonstrates that so-called "disadvantaged" populations are quite resourceful — useful in explaining why investments in these populations are necessary and well spent.

PROGRAM AND POLICY RECOMMENDATIONS

1. Engage preexisting social, professional, and cultural networks. To fully realize the benefits of the strategies that are already being employed informally by people reentering the community, program models should promote the engagement of preexisting social, professional, and cultural networks for necessary supports. At the same time, these programs should generate new opportunities to build networks across socioeconomic segregation through peer relationships, mentoring, apprenticeships, and other bridging methods.

2. Refine family and community to include relation networks with social capital supporting education. This research shows that physical or biological proximity is a poor proxy for identifying relationships with resources related to education. Social characteristics grounded in shared experience and commitments provide a strong basis for identifying relationships that provide social capital relating to education, particularly when individuals come from communities with low levels of education. Therefore, we recommend that programs and policy explore new definitions of family and community that more accurately track the available social capital in relationship networks. These policies could be based on actions and outcomes related to educational support and success.

3. Foster strengths-based networks of women with convictions and their families. To be effective,

organizations must successfully foster the ability for a strong social network of women with criminal convictions and their families to identify their own strengths while bridging them to other closed networks that have been engaged by CCF staff and leadership. These connections include local, state, and federal government; other nonprofits; private foundations; donors; corporations; and the faith-based community.

4. Offer gatekeepers professional development about cultivating social capital. CCF participants said that a key factor to their well-being is their ability to increase social networks and recognize their own social capital. This is the way in which CCF staff supports and interacts with them for strength-based planning. Organizations that serve their constituents with the goal of increasing their independence through the building of social capital and social networks should offer professional development opportunities for staff in gatekeeping roles, from correctional officers to reentry specialists. Proper training increases social networks among employees, which translates to expanded networks for program participants.

5. Use policy and funding initiatives to foster multigenerational, cross-sector collaborations and networks. Funders and policymakers are in a position to facilitate cross-sector collaboration by supporting networks designed with a multigenerational lens, and by redefining families in key initiatives related to education to foster and support multigenerational relationships that provide social capital to families and communities affected by incarceration.

6. Pursue collaborative research designed to advance knowledge, effective practice, and policy innovation. This report represents a small but growing body of research focused on the assets and strategies for building social capital communities affected by incarceration. Up to now, much of this research has either involved small samples, or large-scale studies have focused on identifying needs and deficits of people in nontraditional families. More research is needed to understand multigenerational needs, interactions, and strategies related to education. This research should be done in close collaboration with people directly affected. Collaborative, multi-method research serves multiple purposes: It enables research to pose questions that reflect the interests, needs, and knowledge of those directly affected. It provides firsthand perspectives about the sources and strategies for building social capital in families and communities, and thus draws on the multiple roles of directly affected communities as researchers and as resources within and across communities closest to the issues. In the process, this kind of research builds collaborations and partnerships between researchers and community leaders.

These findings will hopefully catalyze further research, activism, and policy aimed at building support for postsecondary education for formerly incarcerated women and men, connect that support to families, and enable organizational brokers like CCF to facilitate the development of these resource networks. These strategies will foster the homegrown social capital needed to rebuild families and communities affected by incarceration.

APPENDIX A: METHODOLOGY

This study grew out of the participation of CCF's director, Vivian Nixon, as an Aspen Ascend fellow. A research team from the Center for Institutional and Social Change (CISC) at Columbia Law School collaborated with CCF on research designed to gain a full understanding of the pathway into and through education for justice-involved women and their families, as well as the opportunities for leveraging the resources, relationships, knowledge, and networks already present in the families and communities they inhabit. Research questions and interview guides were developed collaboratively, informed by the experience of CCF staff and formerly incarcerated leaders and by the literature on social capital networks, complex families, and the experiences of communities affected by incarceration. The study also considers strategies for educational advancement for first-generation students and students of color.

Researchers conducted semi-structured interviews and focus groups with 38 women who have participated in CCF's programs. Each interview lasted about an hour and a half. The interviews and focus groups were transcribed and systematically coded using a set of codes identified collaboratively with CCF leadership. CISC researchers prepared analytical memos, removing all identifying information. These memos were shared with Vivian Nixon, and we then jointly generated themes and core findings from the data.

Sampling Strategy

The sampling strategy for selecting interviewees was "purposeful" or "theoretical" sampling, the dominant sampling strategy used in qualitative research, where the aim is to illuminate and understand rather than to predict or determine causation.[86] Specifically, we selected a sample that was likely to maximize variation.

CCF and CISC wanted to ensure that women with various types of families and caretaking responsibilities were included in the initial interviews. Accordingly, we did not communicate that we were looking for a particular kind of caregiver (e.g., mothers and grandmothers). Instead, we asked for interview participants that "are currently enrolled in CCF programs, who have children or care for children, 18 years or younger." We advertised the opportunity through CCF's listserve, at CCF's office, and at a CCF community meeting. The first 15 women who replied were chosen and contacted to arrange an interview time.

Interview and Focus Group Process and Protocols

The research questions that guided this inquiry focused on understanding how women experience family, relationships of support, and community as they attempt to navigate their own educational advancement and to support those they care for. Three main objectives guided the pilot interview process. The first objective was to gather substantive and in-depth information on how women defined their families, what their mutual educational needs were, and what networks of support they turned to in order to meet those needs. The second objective was to involve the women in a brainstorming process about how CCF could support a meaningful multigenerational approach to

education. The third objective was to use the information to inform the next data-gathering phase of the project and suggest tools and strategies for future research.

In order to support these objectives, CISC and CCF collaboratively developed an interview protocol, organized around four buckets of inquiry: (1) How do women experience family? (2) What mutual needs and barriers related to educational advancement do family members share? (3) What are the relationships, spaces, and strategies that support educational advancement for women and their families? (4) How do those relationships provide support, and what are the program and policy opportunities to enhance the impact of those relationships? The specific interview questions were designed to solicit information from the interviewees that provided insight into these larger questions.

We asked the CCF women we interviewed to describe their families and the interactions with people they support and take care of and with the people who take care of and support them. We asked about these interactions of support in general and with regard to education, as well as how these women have navigated barriers, turning points, and challenges they have faced in their educational pathways and in the pathways of the children they care for.

Confidentiality

This study was conducted in accordance with the Human Subjects approval process. All participants were informed about the benefits and risks accompanying participation in the research, in accordance with the protocols approved by the Columbia Institutional Review Board for this project. We took particular care to protect the confidentiality of all interviewees. When necessary to preserve confidentiality, we omitted potentially identifying information, such as the gender or status of the interviewee, or aggregated data.

Coding and Analysis of Interview Data

We followed a standard qualitative-data coding and analysis procedure involving overlapping phases, beginning with "open coding," which entailed assigning descriptive codes to each line of the transcribed interviews; then "axial coding," whereby codes were aggregated into larger concepts and themes; and, finally, conceptualization, which involved an iterative process of mapping and remapping concepts and themes, their properties and dimensions, and their interrelationships, until a coherent narrative tightly linked to the data emerged.[87]

To indicate the weight of evidence for any given finding, we chose to use adjectives such as "most," "many," and "some" to convey the prevalence of a theme (i.e., a coded account, experience, or view) across the interviews rather than reporting exact percentages of people mentioning the theme in their interview. References to particular themes are technically countable, but reporting percentages would lend a false precision to the data; in addition, percentages do not take into account the strength of people's statements. Instead, we use "most" to denote the vast majority of interviewees. We refer to "many" to indicate about half of the interviewees. "Some" people means that, although the theme was not

representative of the referent group as a whole, it was shared by more than a few people, suggesting a noteworthy pattern. Every finding presented in the report had multiple sources of support. No quotation was included if it expressed a unique point of view.

Study limitations

Several important limitations of the research include the lack of a control group, the relatively small pool and sample size, and the self-selection of participants in CCF's program. We interviewed 38 out of 182 (20.87 percent) active CCF participants. These limitations prevent this research from demonstrating causal linkages between the strategies used by CCF or the women and the educational and other outcomes they achieve. We also do not claim to have interviewed a representative sample of women with criminal justice involvement. The interviews were, of course, volunteer, and those who volunteered to participate in the study are likely to be among the more active and engaged students and CCF participants. We did not have the opportunity to interview women who were no longer active in CCF or in pursuing their education.

ENDNOTES

[1] The American Dream is a widely shared ethos of opportunity and prosperity regardless of social background and has been traced to the right to "Life, Liberty, and the Pursuit of Happiness" set forth in the Declaration of Independence. Recent studies suggest an erosion of confidence in the American Dream among young people. See Hostetter, C., Sullenberger, S., Williamson, & Wood, L. (2015). All these people who can do things that I can't: Adolescents' reflection on class, poverty, and the American Dream. Journal of Poverty, 19, 133.

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LEGAL SERVICES CORPORATION

REPORT OF THE PRO BONO TASK FORCE

OCTOBER 2012

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EXECUTIVE SUMMARY

The United States has one of the best justice systems in the world, but unfortunately millions of Americans cannot access it because they cannot afford to do so.[1] There has been a sharp rise in demand for legal services over the past few years, as economic turbulence has caused the number of people living below the poverty line to soar.[2] In these difficult times, many people are seeking legal services for the first time. Some face homelessness because of an eviction or foreclosure. Others are seeking protection from an abusive spouse, or are fighting for custody of an abused child. They may be Iraq or Afghanistan war veterans who have returned home to economic strain and unique legal issues of their own. Or they may be elderly citizens who have fallen victim to fraud and have lost their life savings.

Yet more and more people are faced with the prospect of navigating the legal system alone.

The Legal Services Corporation (LSC) is the largest single funder of civil legal services in the country. Its grantees, along with a network of other legal services non-profits, face the challenging task of providing legal counsel to tens of millions of Americans who cannot otherwise afford a lawyer. Despite the sharp increase in those seeking assistance in recent years, LSC and its grantees are under considerable budgetary strain because of reductions in funding from a number of sources.

In the face of this great demand, and in light of the budgetary pressures on legal aid, one critical means of increasing the supply of legal services is through assistance from pro bono counsel. Large and small firm lawyers, government attorneys, in-house counsel, retired lawyers, law students, and even many non-lawyers are eager to assist by donating their time. And, although pro bono volunteers cannot replace the excellent work of legal services lawyers, many of whom are subject-matter experts in the unique issues faced by the poor, the private bar can make important contributions to closing the justice gap.

In August 2011, LSC created a Pro Bono Task Force comprised of judges, corporate general counsel, bar leaders, technology experts, leaders of organized pro bono programs, law firm leaders, government lawyers, law school deans, and the heads of legal services organizations, to consider how to effectively increase pro bono involvement by all lawyers. (For a list of Task Force members, see page 30). The Task Force divided into five working groups: Best Practices Urban; Best Practices Rural; Obstacles; Technology; and Big Ideas. Each working group spent months conducting interviews, identifying significant practices, and sharing ideas, and ultimately, the Task Force reported its findings and recommendations to the LSC Board of Directors. This report presents those findings and recommendations and suggests steps that LSC, its grantees, and the legal profession can take to help shape pro bono programs into a reliable, organized system that will efficiently deploy additional resources to the core civil legal issues impacting low-income Americans.

Specifically, the Task Force has compiled the following recommendations to LSC and its grantees, as well as a set of requests for the legal profession as a whole. In reviewing these recommendations and requests, readers should keep in mind that pro bono programs will not be effective without significant infrastructure, guidance, and support from legal services agencies. Thus, although pro bono programs can be an effective means of narrowing the justice gap, they cannot exist unless legal services organizations are adequately funded to support them.

Recommendations to LSC and Its Grantees

Recommendation 1

LSC Should Serve as an Information Clearinghouse and Source of Coordination and Technical Assistance to Help Grantees Develop Strong Pro Bono Programs. Specifically, LSC should:

1. **Create a professional association specifically for pro bono managers at LSC grantees.** In collaboration with organizations like the National Association of Pro Bono Professionals, LSC should bring these professionals together for training, relationship-building, and support.

2. **Recommend that Congress create a Pro Bono Innovation/Incubation Fund**, modeled on the successful Technology Initiative Grant (TIG) program, and aimed at encouraging innovations and best practices in pro bono. We recommend that this grant be a newly funded program, with mechanisms for evaluation built in, and that funding for it not be taken out of critically needed, existing funds for LSC grantees. We also recommend that private donors consider supporting this program.

3. **Develop a Pro Bono Toolkit** which includes noteworthy practices in pro bono and provides high-level, web-based training to LSC grantees' pro bono managers and program directors. This toolkit should build on existing resources for pro bono programs, be focused on making pro bono a reliable and sustained resource for the community, and:

   a. **Include a plan for evaluating pro bono programs, including guidance on best practices in metrics and evaluation.** LSC can do this by helping to create clear data collection standards and methods; creating systems for grantees to share best practices for data collection and analysis; and educating grantees and program evaluators on how to use metrics and evaluation to their benefit (for example, to secure new funding for full-time pro bono staff).

   b. **Provide guidance on offering effective volunteer support**, such as quality screening, training, mentoring, and recognition of volunteers.

   c. **Help grantees provide a range of pro bono opportunities to engage all segments of the bar**, including small firm and solo practitioners; emeritus, senior, and inactive lawyers; government lawyers; and in-house counsel, with attention to the differences between lawyers in rural, suburban, and urban areas. This tailoring should focus first on client need.

   d. **Include mechanisms for engaging non-lawyers as pro bono volunteers**, including law students, paralegals, administrative personnel, students in other professional schools, and others.

   e. **Use pro bono lawyers to assist pro se litigants.**

   f. **Encourage collaboration and resource sharing among pro bono programs**, including those at LSC grantees, other providers of legal aid, law firms, government lawyers, the judiciary, bar pro bono programs, and in-house legal departments.

   g. **Use technology to support pro bono programs** by encouraging immediate, systemic adoption of up-to-date technology by all of its grantees. LSC could help in this process by encouraging:

      i. Innovation through competition, such as through newly funded competitive challenge grants;

      ii. The creation and sharing of collaborative environments that can serve as virtual legal networks, or "one-stop-shops," enabling pro bono lawyers to volunteer for and coordinate work on cases, obtain training and access to case management tools, and provide services to clients online, even from a distance; and

      iii. Efficiency and resource-sharing by developing collaborative, statewide pro bono platforms.

   h. **Use pro bono to decrease overall demand for funded legal services.**

   i. **Offer guidance on developing a strong pro bono culture**, including by hiring full-time pro bono managers and establishing advisory committees to help oversee and support pro bono programming.

   j. **Encourage efforts to ensure that pro bono programs are adequately resourced**, both at the federal and state level and also through private sources.

Recommendation 2

LSC Should Revise its Private Attorney Involvement (PAI) Regulation to Encourage Pro Bono. Potential changes to the regulation, which requires LSC grantees to spend 12.5% of their funding in support of pro bono legal services, should focus on providing greater flexibility in how the regulation governs: (a) resources spent supervising and training law students, law graduates, deferred associates, and others, especially in "incubator" programs; (b) resources invested to enhance screening, advice, and referral programs, even when those programs do not result in cases for LSC grantees, but when they support pro bono programs; and (c) the application of LSC case-handling requirements to PAI matters referred to pro bono attorneys.

Recommendation 3

LSC Should Launch a Public Relations Campaign on the Importance of Pro Bono. To begin, LSC should convene a small committee, perhaps including Task Force members, to examine the feasibility of such a campaign, as well as to answer questions related to scope, funding, and implementation. In doing so, LSC should partner with other national stakeholders who also are interested and invested in this issue.

Recommendation 4

LSC Should Create a Fellowship Program to Foster a Lifelong Commitment to Pro Bono. Specifically, LSC should work with law schools and law firms to create a new civil legal services fellowship program for recent graduates designed to bridge the gap between firms and legal services organizations. It also should consider the feasibility of a similar program for senior or emeritus lawyers. Again, LSC should begin by convening a small group to develop a work plan and garner support.

Requests for Assistance from the Legal Profession

The Task Force recognizes that, although LSC has an important leadership role to play in encouraging pro bono, none of the recommendations in this report can be implemented without strong support from bar leaders, the judiciary, policymakers and, indeed, the legal profession as a whole. We therefore call for assistance from all of these stakeholders to encourage and support efforts to effectively engage the private bar. As members of the Task Force, we also recognize that our work begins rather than ends with this report – and we remain enthusiastically committed to assisting LSC and its grantees in carrying out these recommendations.

Specifically, we ask of:

1. **Bar leaders and the judiciary:**
   a. **To the Extent Permitted, Recruit Pro Bono Lawyers. Support and Applaud Their Pro Bono Efforts**. We ask that judges and bar leaders use their influence, consistent with applicable judicial rules of conduct, to recruit new pro bono lawyers, especially in rural areas and among solo practitioners, to draw attention to the crisis in legal services, to applaud the effort of pro bono lawyers, and to advocate for additional funding at the state and federal levels.
   b. **Use Bar Associations to Encourage, Support, and Celebrate Pro Bono.**
   c. **Amend Attorney Practice, Judicial Ethics, and CLE Rules to Support Pro Bono**, for example, by providing CLE credit for pro bono (as is already done in some states), permitting judges to ethically advocate for pro bono involvement, allowing private lawyers to take on limited-representation matters, relaxing certain conflict of interest rules, and allowing certain lawyers (e.g., government, in-house, and emeritus attorneys) to provide pro bono support in jurisdictions other than where they are admitted to practice.
   d. **Create or Strengthen State Access to Justice Commissions** (AJC's) to consolidate and support pro bono efforts.
2. **The legal profession as a whole:** Recognize the importance of providing every American with access to our justice system and the role that pro bono lawyers can play in offering that access. At the same time, recognize the cost of developing and maintaining effective pro bono programs and ensure that legal services agencies are adequately funded for that purpose.

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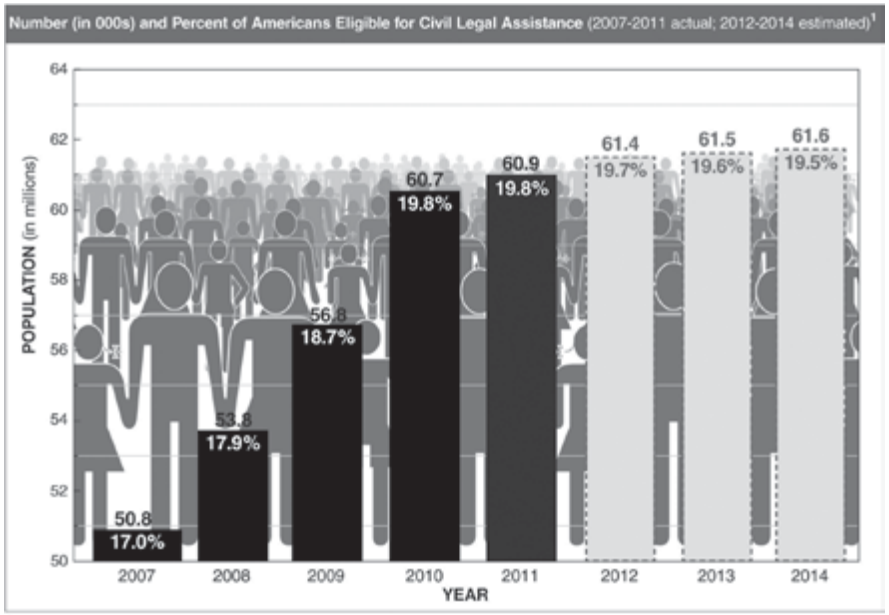
I. Introduction: The Current Crisis in Legal Services

Harry Korrell of Davis Wright Tremaine LLP, Pro Bono Task Force Co-Chair

This country's system for providing civil legal services to the poor is in the midst of a perfect storm. The United States is now five years into the worst financial crisis since the Great Depression. An estimated 61.4 million Americans – nearly one in five – will qualify for civil legal assistance funded by the Legal Services Corporation (LSC) in 2012.[3] These families earn less than $28,813 per year for a family of four.[4] The number of people qualifying for civil legal aid has increased by over 10 million since 2007. There has been a significant increase in the demand for legal services in specific areas, such as foreclosure,[5] and also in the number of people who are seeking free legal services for the first time. Many Iraq and Afghanistan war veterans also are turning to legal services agencies for help as they return home to new economic and personal challenges.[6]

In short, there has been an explosion in the demand for legal services. Yet, although the United States has one of the best justice systems in the world, millions of Americans cannot access this system because they cannot afford to do so.[7] Despite a network of government and non-profit agencies dedicated to providing free civil legal services to the poor, including those funded by the LSC,[8] at least 50% of people seeking help from LSC-funded organizations – and eligible to receive it – are turned away because



[1] Eligible persons are those with incomes at or below 125% of the Federal Poverty Guideline for each year. Census data and projections are for populations with incomes below 125% of the Federal Poverty Guidelines.

Sources: Data for 2009, 2010 and 2011: U.S. Bureau of the Census, Current Population Survey, Annual Social and Economic Supplements. Table 6. People Below 125 Percent of Poverty Level and the Near Poor: 1959 to 2010. Accessed at: http://www.census.gov/hhes/www/poverty/data/historical/people.html. Data for 2012, 2013 and 2014: LSC estimates based on changes in the total U.S. population and the125% rates and population sizes during 2007-2011 period.

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of insufficient resources.[9] Other studies have found that 80% of the civil legal needs of low-income people go unmet.[10]

Recent revenue reductions for legal services have exacerbated these problems. In 2011, LSC-funded organizations alone reduced their headcount by 661 full-time-equivalent (FTE) positions, including 241 attorneys, and anticipate shedding an additional 724 FTE staff in 2012, including 333 attorneys.[11] These cuts have serious consequences for the poor, as studies consistently show that access to legal counsel makes a significant difference for litigants.[12]

In the midst of this perfect storm, assistance from the private bar is critical. Pro bono cannot replace the enormous contributions of full-time legal aid programs, either in terms of volume or expertise. But it is an essential mechanism for narrowing the justice gap, especially where efforts to engage pro bono lawyers are adequately resourced and supported. Of course, there are many excellent existing programs for lawyers who wish to volunteer their time and services, and many lawyers in the profession have answered the call to give back, especially in light of the current crisis. But the effective engagement of the private bar is uneven across the country and there is a need for significant energy, innovation, and attention to pro bono delivery by the entire profession, including the courts, bar associations, Access to Justice Commissions (AJCs), private attorneys, government attorneys, corporate counsel, law schools, legal services organizations, and, of course, LSC itself.

This report considers how LSC, its grantees, and other stakeholders can narrow the justice gap through the regular and effective engagement of pro bono lawyers. It is the outcome of many months of work by a dedicated and distinguished Pro Bono Task Force convened by LSC's Board of Directors and made up of leaders from legal services organizations, major law firms, law schools, bar associations, in-house legal departments, the government, and the courts. Specifically, the Task Force focused on ways in which pro bono can be used consistently to increase the supply of lawyers and others available to provide legal services, while also engaging pro bono lawyers to reduce demand for those services – for example, by recruiting them to tackle systemic issues that generate legal problems for the poor. The Task Force also considered ways in which pro bono volunteers could be better and more efficiently matched with client need. The resulting report focuses chiefly on what LSC and its grantees can do to encourage increased and effective pro bono participation. But it also contains requests of others, including the judiciary, bar associations, law schools, in-house lawyers and legal departments, and firm lawyers.

One major theme of this report is collaboration. In making its recommendations, the Task Force recognizes that there currently are other significant efforts underway to address the justice gap, including those of the National Legal Aid and Defender Association (NLADA), as detailed in its 2011 report, *A Blueprint for Action,* as well as those of the American Bar Association, through its Center on Pro Bono and its Pro Bono Summit, which took place in late 2011.[13] There likely will be significant overlap in these efforts. Collaboration is key to addressing the legal services crisis and the Task Force welcomes the chance to work with these bodies in implementing their collective recommendations.

Finally, the Task Force recognizes that developing and supporting effective pro bono programs requires the investment of valuable time and resources by already strapped legal aid organizations. To put it simply: pro bono is not free. The Task Force therefore encourages funders to make infrastructure investments to facilitate the engagement of pro bono volunteers.

II. Recommendations to the Legal Services Corporation and Its Grantees

Recommendation 1: LSC Should Serve as an Information Clearinghouse and Source of Coordination and Technical Assistance to Help Grantees Develop Strong Pro Bono Programs.

Every LSC grantee is required to devote a portion of its resources to engaging private lawyers, but there is great variation among grantees in terms of the size, quality, efficiency, and effectiveness of their pro bono programs. Good pro bono programs require solid infrastructure, and there is an opportunity for LSC to engage with and support its grantees by offering training, resources, and guidance on how to build that infrastructure.

Of course, there already are many great resources on pro bono,[14] like those found on the ABA Center for Pro Bono's website[15] and its Clearinghouse Library[16] (which is in the process of an extensive update).[17] The Task Force recommends that LSC work collaboratively to bring together and complement those

existing resources so that its grantees can make the most of their pro bono programs. Specifically, LSC should:

1. **Create an Association of Pro Bono Professionals Who Work at LSC-Funded Organizations,** in partnership with existing networks, including the National Association of Pro Bono Professionals (NAPBPro), the Association of Pro Bono Counsel (APBCo), and the ABA Center for Pro Bono. We recognize that these organizations already have excellent resources available for legal services agencies; however, what we propose is partnering with them to create a sub-group specifically for pro bono professionals working at LSC grantees in support of specific LSC-oriented issues. Through this association, LSC could create the means for its professionals to develop relationships with one another – for example, by providing them with an LSC listserv, offering training via webinar on effective pro bono infrastructure, and setting up regular conference calls. Where possible, LSC also could facilitate in-person meetings, for example, at the annual ABA/NLADA Equal Justice Conference. The association would offer these pro bono managers a forum for discussing and sharing innovative ways to utilize PAI funds and build strong pro bono cultures within their organizations. LSC also should encourage the professionalization of the role of the pro bono manager within grantees.

2. **Recommend that Congress create a Pro Bono Innovation/Incubation Fund.** LSC should recommend that Congress or LSC, through funds raised independently from the private bar or interested foundations, create a challenge grant, as has been done through the successful Technology Initiative Grants (TIG) program, aimed at encouraging innovations and best practices in pro bono. We specifically recommend that this challenge grant be a newly-funded program, and that resources not be taken from critically-needed existing funds for LSC grantees.

3. **Develop a Pro Bono Toolkit.** LSC should work with other stakeholders, such as the ABA Center for Pro Bono, to develop and maintain a comprehensive pro bono toolkit, which would accumulate and report on best practices, and provide high-level training, curricula, and resources to legal services agencies in a number of areas, including in the art and skill of managing volunteers. This toolkit should contain guidance on how to evaluate pro bono programs effectively, as described in more detail below, should complement rather than recreate already existing resources, and should build upon LSC's own strengths, such as in the area of technological innovations for legal services. We recognize that, to be done right, this recommendation requires the infusion of significant resources required to support and leverage pro bono time. Congress, foundations, and other interested donors should consider funding such an effort, including by supporting a full-time staff position at LSC to oversee the project. This support should be in addition to, and not in lieu of, other critically needed funding for legal services.

This report lays out the components of such a toolkit by identifying the key elements of a successful pro bono program,[18] including:

- Strong evaluation and metrics that go beyond counting the number of cases or matters handled to ensure that pro bono programs are serving clients and engaging pro bono volunteers effectively;
- Volunteer support, including effective case screening, training, mentoring and oversight, recognition, and malpractice insurance;
- A range of opportunities that reflect the particular interests of and challenges faced by certain segments of the bar, including

Left to right: John G. Levi of Sidley Austin LLP, LSC Board Chairman; Martha Minow of Harvard Law School, Pro Bono Task Force Co-Chair; and Jim Sandman, LSC President

in-house lawyers, law firm lawyers, small-firm and solo practitioners, inactive and senior lawyers, and government lawyers. Of course, this always should be done with the overall goal of effectively serving client needs;

- Mechanisms to engage non-lawyers, including law students, paralegals, administrative personnel, students at other professional schools, and other non-lawyers;
- Mechanisms for involving pro bono volunteers in providing limited assistance to pro se litigants, and otherwise empowering pro se parties;
- Collaborations among legal services organizations, courts, law schools, bar associations, firms, in-house legal departments, and other members of the bar to increase efficiency across systems and to make the most of limited resources for pro bono;
- A system that incorporates best practices and innovations in technology – an area where LSC already has been a leader;
- Pro bono projects aimed at decreasing overall demand for legal services, such as by engaging private lawyers to tackle systemic issues faced by the poor;
- A strong pro bono culture within the LSC grantee organization; and
- A fundraising strategy, as pro bono programs require the investment of time and resources by legal services staff.

We include more detailed findings about each of these categories below.

a. **Evaluating Pro Bono Programs**

Over the past decade, the philanthropic sector and, more recently, government funders, have pushed grantees in all social service sectors to collect data, evaluate performance, and assess outcomes. This has been a challenge for the non-profit sector, especially at a time when concern about diverting funds away from services is particularly acute and justified. Nonetheless, metrics and evaluation are very important and should be included in every pro bono program.

Current efforts to evaluate pro bono programs are very much a work in progress. To the extent grantees collect data, most are focused on basic case processing, such as the number of clients served or hours donated, with some use of client or volunteer surveys. Efforts to develop more sustained and rigorous evaluation of client outcomes and program effectiveness, particularly in partnership with academic institutions, are in their early stages. LSC and its grantees should focus on this issue by developing more robust standards for evaluating pro bono programs, not only in response to funders, but to guide program development, maximize efficient use of limited resources, better understand client needs, and increase public awareness of the social and economic value of legal services. LSC can then train its program reviewers on using these standards to meaningfully evaluate grantee pro bono efforts, as well as grantee executive directors on how to put evaluations to use in creating stronger programs.

Evaluation should be done with careful consideration of the results, starting with the question of what the pro bono program hopes to achieve and then developing methods of measurement designed to assess whether the program has met its goals. Grantees should measure and evaluate all program areas, including limited representation and pro se assistance services. The resources for such efforts should not come at the expense of funding for client services.

Ms. Jones needed help. She could not find employment because of a 30-year-old misdemeanor on her record and, as a result, had no way to support her family. She wanted to clear her record, but did not know where to start. Fortunately, she learned of an expungement clinic hosted by the Legal Aid Society of Cleveland, where she met attorney Christopher Murray, one of Legal Aid's 1,600 *pro bono* volunteers. After getting guidance at the clinic, Ms. Jones filed a *pro se* expungement with Bedford Municipal court, which was granted within days. She was able to obtain employment and is now proud to be supporting her family.

The Honorable Dick Thornburgh, former U.S. Attorney General and former Governor of Pennsylvania

To improve evaluation of pro bono activities by LSC-funded organizations, the Task Force recommends that LSC:

- Explore the most effective means of evaluating programs, and provide grantees with support, training, and guidance so that they can do the same. In particular, the legal services community would benefit from the establishment of standards concerning research, assessment, and data collection;
- Provide technical support and training to help grantees implement improved data gathering and outcome measurement. This would include education of executive directors on strategic planning, outcome measurement, and program design and evaluation in order to create quality processes for the assessment of pro bono projects; and
- Consider enlisting business schools, public administration schools, and consulting firms to help develop effective evaluation systems for grantees.

LSC should work collaboratively with others already considering these issues, including the American Bar Association, NLADA, the Pro Bono Institute, APBCo, law schools, law firms, Interest on Lawyers Trust Accounts (IOLTA) programs, AJCs, the judiciary, and researchers. Examples of some organizations with efforts already underway can be found here.

b. **Offering Volunteer Supports**

Private attorneys who undertake pro bono work want: (a) a clear sense of the merits of the case; (b) training; (c) a commitment that there is someone at the legal aid organization they can call for advice and encouragement; (d) malpractice insurance coverage;[19] (e) an up-front indication of the professional development opportunities the case will provide; and (f) a sense of timing of the case, as well as potential costs. Placing pro bono matters is more competitive now that law firm pro bono management, particularly in large firms, is more prevalent. As a result, efforts to recruit private lawyers have to be well-managed and offer quality referrals and support. The kinds of matters that LSC grantee attorneys historically encounter generally do not change – they most frequently involve housing, domestic violence/family law, benefits, veterans, and consumer issues. While creating high-quality training and materials on substantive areas of law for pro bono lawyers involves an initial time investment, that investment results in a resource that can be used for a long time, and the benefits can be substantial. Additionally, engaging pro bono lawyers to help develop training materials is an excellent way to use volunteers in a manner that has a continuing impact.

Grantees that appoint a full-time, skilled pro bono manager (sometimes incorporating training or development responsibilities) find that they can identify and follow through on pro bono opportunities more effectively than grantees that make pro bono recruitment part of everyone's (and therefore no one's) job duties. A pro bono volunteer who gets the support outlined above is likely to continue to take cases, may recommend that others do the same, and may even make a financial contribution to the organization.

c. **Providing a Range of Pro Bono Opportunities to Engage All Segments of the Bar**

Not all lawyers have the time or resources to take on major litigation, and many transactional lawyers would prefer not to do so. Similarly, private lawyers, whether in-house, in the government, or at a large or small firm, often face conflicts that make it impossible for them to take on certain types of civil matters. Many of these lawyers still wish to contribute their time and energy. Therefore, effective pro bono programs should include creative opportunities for limited representation, projects that require only a finite time commitment, and matters that do not pose actual or positional conflicts.

Of course, in designing these programs, the first priority should be fulfilling client need. Too often, other pro bono opportunities are perceived as being more glamorous and thus garner a larger share of the available resources, while poor people struggle to find help addressing legal problems that threaten basic human survival. Great pro bono programs are able to communicate the importance of basic civil legal services and then match the interests and skills of volunteer lawyers with that client need.

The following is a brief outline of the unique challenges facing certain groups of lawyers, including: (1) small firm and solo practitioners, (2) rural lawyers, (3) emeritus/senior and inactive lawyers, (4) government lawyers, and (5) corporate counsel – as well as suggestions for better engaging each group.

Left to right: George H. Hettrick of Hunton & Williams LLP, and The Honorable Deanell Reece Tacha of Pepperdine University School of Law

1. ***Small Firm and Solo Practitioners*:** Lawyers at small and medium firms often lack the institutionalized support, resources, and infrastructure that large firms have. Particularly in rural areas or for solo practitioners, covering out-of-pocket costs can also be a challenge. Yet small and solo firm practitioners are the mainstays of many LSC grantee programs. To the extent possible, LSC grantees wishing to engage these groups thus may consider assisting with out-of-pocket expenses, such as travel costs, legal research, deposition transcripts, and expert witness fees, and should investigate other ways to provide the same types of institutional supports available to larger firm lawyers. To see a few examples of how LSC grantees and other agencies are effectively engaging lawyers at little and medium firms, click here.

2. ***Rural Lawyers*:** Engaging lawyers to serve clients in rural areas can be particularly challenging for a variety of reasons. There often are large geographic distances and sometimes natural barriers (mountains, deserts, forests, and impassable roads) between lawyers, clients, and the courthouses that make representation difficult. The limited number of lawyers in a given area also can create issues. Where lawyers are present, they typically are solo practitioners or at very small firms with little support staff and few resources. There may be a mismatch between rural lawyers' practice expertise and rural clients' legal needs, and clients may face issues in accessing technology or transportation. Finally, rural lawyers may require technical expertise to work with special populations, such as migrant farm workers or the Native American community.

Legal services organizations that operate in rural areas are familiar with these challenges, so their participation is critically important to developing and maintaining effective pro bono programs in rural communities. Under their leadership, several things can be done to successfully engage the private bar to serve rural areas, including:

- Engaging the local judiciary and bar leaders to actively support pro bono efforts;
- Offering free training for CLE credit (which can be particularly valuable for solo and small firm practitioners in rural areas) in exchange for a commitment to handle a pro bono case. This training can

Legal Services of Northwest Jersey (LSNWJ), an LSC funded program in a suburban setting, recruits solo practitioners and lawyers from small firms at the local courthouse. LSNWJ later matches those volunteers with clients based on practice area and interest. This informal technique reaches lawyers that LSNWJ's other recruitment efforts might not. LSNWJ lawyers also take advantage of their suburban setting by connecting personally with their volunteers and as a result, have had success in asking those volunteers to step in in times of trouble – for example, by asking them to help relieve the caseload of a staff attorney who had to go out on medical leave.

be specialized to focus on uniquely rural legal issues, such as how to draft Indian wills;

- Building urban-to-rural bridges. Urban agencies can offer volunteers, expertise, technology, sample forms, model pleadings, legal research, volunteer law students, and guidance on law firm pro bono practices. Rural organizations can, in turn, provide cultural training and local counsel support. Rural programs should not overly rely on urban lawyers, however, as distances and cultural divides can create problems;
- Taking advantage of student rural outreach programs and spring break and summer programs;
- Using local resources, such as libraries, faith-based groups, and social service agencies, to reach client populations and gather volunteers;
- Creating local and county-level pro bono task forces that include community leaders, such as town mayors, county executives and council members, community and religious leaders, directors of social services agencies, and bar leaders;
- Engaging the law departments of corporations located in rural areas;
- Offering opportunities for limited representation or finite time commitments;
- Creating local pro se assistance programs that can be staffed by pro bono lawyers;
- Using technology to share resources among agencies, reach clients in remote locations, and train volunteers (while recognizing that technology cannot begin to cover what local lawyers or legal services agencies do on behalf of clients); and
- Encouraging stakeholders to look at access to justice issues on a statewide level, so that systems are developed and resources allocated to rural as well as urban populations. This concept is discussed in further detail below.

A few examples of programs that are effectively operating in rural communities can be found here.

With over twenty offices and only fifty staff lawyers, California Rural Legal Assistance (CRLA) covers thousands of miles of the agricultural and migrant areas of California. It does not cover any big cities with large law firms, but the organization has built relationships with large urban law firms to assist in rural field offices. CRLA also works with local bar associations and sponsors clinics and workshops to train private attorneys in unfamiliar areas of law. In 2010, CRLA served 48,617 people, including 31% of migrant cases handled by LSC organizations nationwide.

Left to right: Terry M. Hamilton of Lone Star Legal Aid, Ronald S. Flagg of Sidley Austin LLP, and Mark B. Childress, formerly of the U.S. Department of Justice Access to Justice Initiative

3. ***Emeritus/Senior and Inactive Lawyers***: By 2020, retirees will account for almost one-half of all lawyers.[20] Programs engaging senior and retired lawyers in pro bono work have existed for many years, but interest in mobilizing them has sharpened as a result of the enormous growth to come in this segment of the profession. Inactive lawyers also are a potentially significant resource, as they include not only senior lawyers, but also those who are not working as lawyers but still wish to be engaged, as well as law professors who are not otherwise practicing.

While there have been some innovative projects for engaging inactive lawyers, no model has emerged to date that has proven to be scalable. Due to varying state emeritus rules, senior lawyers also may face obstacles to doing pro bono work.[21] Some suggestions for effectively engaging them include:

- Providing access to resources, including office space, support staff, mentors, and research materials;
- Providing training, supervision, and mentoring;
- Creating opportunities that accommodate flexible schedules and allow attorneys to work from home;
- Informing would-be volunteers that malpractice insurance is available to them; and
- Amending state practice rules to encourage and remove obstacles to participation (further discussed in the state practice rules section below).

For examples of programs that have effectively engaged senior and inactive lawyers, click here.

4. ***Government Lawyers***: Well over 100,000 attorneys work for the federal government, and thousands more are employed by state and local governments.[22] Government lawyers are potentially a major resource for pro bono assistance, but they also face unique obstacles. Unlike law firm volunteers, government attorneys generally cannot handle pro bono cases during work time and cannot rely on their employers to provide clerical support or cover out-of-pocket costs. Federal government lawyers frequently are not members of the bar in the jurisdictions in which their offices are located. Both federal and state government lawyers cannot handle cases that might put them at odds with their employer and are subject to additional statutory conflict of interest restrictions that may prevent them from taking on certain types of cases. There also can be a perception that because their full-time jobs are public service, they have a lesser (or no) obligation to perform pro bono work. Some also believe that allowing government attorneys to perform pro bono work during business hours is a misuse of public dollars.

There are, however, proven strategies for addressing the challenges government lawyers face. There has been significant growth in recent years in the involvement of government lawyers in pro bono work.[23] For example, the District of Columbia has a special exception to its unauthorized practice of law rule, D.C. Appellate Rule 49(c)(9)(C), that allows federal government attorneys in good standing in another jurisdiction but not admitted in the District to undertake pro bono cases under the auspices of a free legal services provider, if they are supervised by an active member of the D.C. Bar.[24] Additionally, in several states that exempt government attorneys from bar fees or CLE requirements as long as they do not practice law outside of their government jobs, the rules explicitly state that pro bono work does not waive the exemption.[25]

After 45 years in private practice, Howard Goffen retired from the full-time practice of law and began volunteering for LAF (Legal Assistance Foundation) in Chicago. Since that time, he has become their most committed, talented, dedicated, and selfless pro bono volunteer, contributing over 7,000 hours of his time and representing hundreds of LAF clients. As a result of his years of experience, he also has served as a guide and mentor to many of LAF's staff. Mr. Goffen received the coveted ABA Pro Bono Publico Award for his service in August 2012.

Left to right: John E. Whitfield of Blue Ridge Legal Services, Nan Heald of Pine Tree Legal Assistance, and Diana C. White of Legal Assistance Foundation of Metropolitan Chicago

In the District of Columbia, nine federal agencies staff the D.C. Bar's monthly Saturday morning walk-in Advice & Referral Clinics and accept more cases for representation from the D.C. Bar's Advocacy & Justice Clinic than any participating law firm. Over 200 federal government lawyers also have been trained to draft wills through LSC-grantee Neighborhood Legal Services Program's Wills Clinic.

In general, the most successful pro bono programs for government lawyers: (i) do not require bar membership in the jurisdiction; (ii) involve matters that are not adverse to a government entity; and (iii) require only finite time commitments outside of work. To see a few examples of such programs, click here.

5. ***Corporate Counsel***: There has been a significant increase in the number of in-house departments engaging in pro bono work over the past few years.[26] Engaging corporate counsel can have many benefits beyond the client services they provide, as corporate counsel can leverage their law firm contacts to bring even more lawyers into the fold. Some corporate law departments even include specific questions about pro bono when soliciting law firms for billable work and in their overall evaluation of law firms. Many legal departments also provide financial support for civil legal services.

In engaging corporate legal departments, it is important to understand the motivations that guide corporate counsel, as well as the special constraints under which they work. Many corporate departments wish to create pro bono programs that tie into their corporate responsibility (CR) efforts. Thus, if the company's CR policies focus on homelessness, the in-house lawyers may wish to focus their pro bono work on homelessness. In-house lawyers also often use pro bono as a means of team-building within their legal departments, and therefore wish to involve staff as well as lawyers on pro bono projects.

Working with corporate counsel also presents challenges similar to those involved in working with government lawyers. Many in-house lawyers are not located in the jurisdictions in which they are admitted, may face conflicts as a result of their particular practice, and likely do not have malpractice insurance. In addition to amending state practice rules to address these issues (as discussed in further detail elsewhere in this report), opportunities to overcome these obstacles include:

- Making pro bono matters more manageable by partnering in-house lawyers with law firms and other outside organizations;
- Creating projects that are time-limited and predictable in nature, such as pro bono clinic opportunities or limited scope engagements;

Left to right: Lee Miller and Lisa Dewey of DLA Piper

- Encouraging in-house counsel to venture outside of their primary practice areas by providing quality training, mentoring, and support;
- Using technology to interact remotely with pro bono clients, where appropriate; and
- Creating in-house pro bono teams so that colleagues can step in if scheduling conflicts or workload issues develop.

Finally, engendering support for pro bono programs at the general counsel or other senior level is essential for an effective program, both to reinforce that pro bono is highly valued and to help resolve workload issues. For examples of programs that engage in-house counsel, click here.

d. **Engaging Non-Lawyers as Pro Bono Volunteers**

One LSC grantee pro bono manager interviewed for this report told us that she receives many calls from paralegals and law students who want to volunteer, but that she does not know how to engage them. This likely is a common issue, and yet there are ways in which non-lawyers, particularly law students and paralegals, can make real contributions. LSC and its grantees should collect examples of the engagement of non-lawyer volunteers – including law students,[27] paralegals, administrative staff, and others, as well as pro se litigants – and educate grantees about how to utilize them effectively, and the limitations of using non-lawyers and pro se models. The following is a brief summary of the Task Force's findings with regard to these groups.

1. ***Law Students***: The engagement of future lawyers in pro bono work can instill an early commitment to and support for pro bono. Law schools take varying approaches to pro bono. Some schools, such as Columbia, Harvard, Loyola University Los Angeles, University of Pennsylvania, and Roger Williams University make it a mandatory requirement for graduation. Others, such as NYU and Stanford, achieve high levels of participation by actively promoting pro bono.[28] Of course, many schools engage students through clinical education. Others are considering new ways to involve law students, such as through law school Cyber Clinics,[29] which offer credit to law students for developing content for statewide legal aid websites. To see other examples of how law students are being engaged, click here.[30]

Developed by representatives at Symantec, HP, and Apple in 2009, the Bay Area Corporate Pro Bono Co-operative (the Co-op) assists corporate legal departments with doing pro bono work. The Co-op helps engage employees, facilitates training, and provides a web-based attorney sign-up system. To become involved, a corporate legal department simply contacts the Co-op coordinators (two volunteer firm attorneys) to develop a pro bono program tailored to the department's needs. The Co-op organizes organizes training, helps with logistics, and provides continuing support to the volunteers. After attending a training session, volunteers can register for pro se advice clinics run by Bay Area legal services providers using an online reservation system. Since its establishment, the Co-op has gained additional members, including Cisco, Adobe, SAP, Google and NetApp, and has partnered with three local legal services agencies to provide staffing for clinics and later mentoring on cases.

Since 1982, the Minnesota Justice Foundation (MJF) has coordinated a unique collaboration of Minnesota's four law schools. As a result, more than 150 statewide legal services providers work with a single point of entry into the law student volunteer pool. During the 2011-2012 school year, MJF created and filled two thousand law student volunteer placements.

Of course, using law students, especially outside of a clinical setting, is complicated by their lack of experience, limitations on their ability to practice law, and the lack of a coordinated effort to guide student advocates toward areas of practice where the need is greatest. These constraints must shape any effort to engage law students and necessitate a special premium on training and supervision.

LSC also should consider looking beyond law schools for pro bono help, by possibly involving business, public administration, medical, social work, or undergraduate schools, or within paralegal training programs. These students, for example, could advise LSC grantees on non-profit management, help them create strategic plans, or assist with intake at a legal clinic. By creating early bridges within these communities, budding community and financial leaders will learn about the importance of legal services and, we hope, make a lifetime commitment to the issue.

2. ***Paralegals and Administrative Personnel***: In addition to engaging private attorneys, LSC grantees should consider ways in which they can involve other members of the law firm community in pro bono – including paralegals and other administrative staff. These staff members often have a wealth of knowledge about the legal profession, an enormous amount of experience, and a desire to give back to the community. With the right training and supervision, they can be a tremendous resource.

3. ***Other Non-Lawyers***: Several federal programs permit non-lawyers to serve clients, including applying for Medicaid, food stamps, housing, Social Security, immigration relief, and veterans benefits. The Colorado Cross Disability Coalition (CCDC), for example, uses non-lawyers to file benefits applications, appear in administrative law proceedings, present evidence, prepare and file briefs, or simply listen to client stories. The Benefit Bank (TBB) provides another online model for engaging non-lawyers. A proprietary web-based resource, TBB provides web-based guidance to help volunteers conduct eligibility assessments and file applications for programs such as the Supplemental

Left to right: Frank B. Strickland of Strickland Brockington Lewis LLP, Sharon L. Browne, Robert J. Grey, Jr. of Hunton & Williams LLP

Nutrition Assistance Program (SNAP, otherwise known as Food Stamps), Medicaid, Medicare Part D, child care subsidies, Temporary Assistance for Needy Families (TANF), and various other federal programs. To learn more about CCDC and TBB, click here.

e. **Using Pro Bono Lawyers to Assist Pro Se Litigants**

Pro se drop-in clinics, help desk programs, and online resources are an important means of empowering those who otherwise would not have legal assistance. At the same time, these models offer a limited-representation opportunity to lawyers who may not be able to make a larger commitment of time or resources – including government, in-house, or rural lawyers and solo practitioners. In Chicago, for example, the Coordinated Advice and Referral Program for Legal Services (CARPLS) uses paid and volunteer staff to screen and refer more than 60,000 cases a year. CARPLS also provides self-help materials to empower callers to proceed pro se. The Volunteer Lawyers Network (VLN) in Minneapolis recruits and trains lawyers to staff a local self-help center. VLN provides onsite staff support, recruits student volunteers, and provides screening, forms, and informational materials. Finally, a number of comprehensive websites and tutorials aimed at empowering pro se litigants also exist, such as the Connecticut Network for Legal Aid.[31] You can read more about programs working to empower pro se litigants here.

f. **Encouraging Collaboration and Resource Sharing Among Pro Bono Programs**

A recent report issued by the American Bar Foundation found that the network of non-profits and other agencies providing legal services across the country lacks coordination. Hence, the overall quality of legal services delivery varies greatly on a state-by-state and region-by-region basis.[32] LSC and its grantees have a real opportunity to change that trend by bringing together key stakeholders, both at a state and local level, to address access to justice issues in a more coordinated and efficient manner. Led by LSC, these collaborative efforts should include LSC grantees, the judiciary, bar associations, law schools, and the private sector.

There are so many ways in which members of the legal community can

The Chicago Bar Foundation (CBF) has developed a "prescription pad," which lists all the help desks in state and federal courts in Cook County, and describes the types of cases they handle, the degree of help they offer, and their hours of operation. Many local legal aid organizations use the "prescription pad" to make referrals. In 2011, the various help desks in the city collectively helped more than 65,000 people – all of whom were already in court and in desperate need of assistance.

Left to right: Teresa W. Roseborough of The Home Depot, JoAnne A. Epps of Temple University Beasley School of Law, and David A. Kutik of Jones Day

work together to address the justice gap and promote pro bono. They can collaborate on fundraising and drafting grant proposals. They can work together to train pro bono lawyers or combine recruiting efforts. Individual lawyers and law firms can partner to tackle critical systemic issues facing LSC grantees' clients, as they have in Richmond, Virginia, where a consortium of ten law firms has developed the "Firms in Service" model to facilitate collaboration rather than competition for pro bono projects among firms. Community members can work together to publicize the need for civil legal services and the importance of doing pro bono work. They can share the cost of hosting events to recognize volunteers. And community stakeholders can form partnerships to tackle tough problems in the community, such as a judge teaming up with a local legal aid program and a corporate in-house department to create and staff a help desk at a local court.

The Pro Bono Collaborative in Rhode Island is one great example of how much can be accomplished through collaboration. That organization uses a staff of two part-time attorneys to act as an intermediary and form partnerships among non-profit community organizations, law firms, and law schools to work on pro bono matters together.

With recent changes in technology, in particular, there is great potential for people to work together through virtual legal networks, which can match pro bono lawyers with opportunities to volunteer, offer training and mentoring, highlight pro bono successes, and provide administrative support, all in a single, on-line platform. Such networks also can offer legal services organizations the chance to reduce their own costs by sharing resources and empowering pro se litigants by arming them with information.

Illinois Legal Aid Online (ILAO), for example, offers a library for would-be pro bono lawyers and pro se litigants, a list of volunteer opportunities, a calendar of upcoming trainings, and opportunities for mentorship. It also highlights successful pro bono and legal aid lawyers on its home page and is working to create a statewide online platform for legal aid providers so that they do not each have to shoulder the expense of creating their own.

John G. Levi of Sidley Austin LLP, LSC Board Chairman

Many other legal services organizations are collaborating to share one IT platform for screening and placing cases, which creates a one-stop shop of options for clients and volunteers, tracks needs and outcomes on a system-wide basis, and saves the cost of developing and maintaining duplicate platforms. This is what legal aid providers in Philadelphia are doing, working together to develop a common case-management software system that allows one organization to screen a case, refer it to another without rescreening, and even track outcomes and trends after services are provided.

Additional examples of terrific collaborative efforts around the country can be found here.

The Bar Association of San Francisco's Volunteer Legal Services Program (VLSP) and LSC-grantee Bay Area Legal Aid (BayLegal) worked together to set up a toll-free number for intake. BayLegal handles the first intake interview and enters information into a database that addresses both BayLegal's and VLSP's requirements. The information in the database then enables VLSP to run a conflict check and follow-up with a short (usually ten minute) second-level intake interview. This process allows the two entities to share information and results in better referrals to pro bono lawyers without a lengthy follow-up interview.

Martha Minow of Harvard Law School, Pro Bono Task Force Co-Chair

g. **Using Technology to Support Pro Bono Programs**

The greatest change in the practice of law over the past thirty years has been the revolution in information technology. Since 2000, when Congress first appropriated special funds for its Technology Initiative Grants (TIG) program, LSC has been a leader in the development and use of technology among its grantees, including for use in administering their pro bono programs. In 2008, LSC issued a report entitled *Technologies That Should Be in Place in a Legal Aid Office Today*[33] (commonly referred to as the "Baselines Report"), which addresses best practices in technology related to the management of client and case data, intake and telephone advice, support for private attorneys, data security, and training. The Baselines Report continues to serve as an important resource for the civil legal aid community.

New technologies have emerged since the Baselines Report was issued, however, with the development of tools such as cloud computing, the rise of social media and the virtual office, and new means of data storage and information sharing. LSC should update its *Baselines Report* to include those technologies and to make recommendations on how to use technology collaboratively at the state and local levels.[34]

LSC grantees should, to the extent possible, have in place for the management of their pro bono programs:

- **A Pro Bono Website**: Early in its work, TIG developed two website templates, eliminating the need for LSC and other legal services organizations to undertake their own web development. Grantees and other organizations in the vast majority of states and territories use one of these two templates, and they currently are being adapted for mobile browsing. Ideally, every website should:[35]
    - Allow pro bono lawyers to review available cases and volunteer to take them online. At the very least, case opportunities should be sent to volunteers via e-mail. A pro bono computer program currently in development, LawGives, attempts to recommend specific pro bono opportunities to lawyers that are most in line with their practice areas, geography, and expressed interests;
    - Include calendars for training opportunities;
    - Provide online training and resource materials for pro bono lawyers. This should include access to recorded trainings and, where allowed under state rules, the opportunity to obtain CLE credit for viewing them, as well as sample pleadings and forms;
    - Provide live online help for volunteers. Several states' pro bono sites now use such a "live chat" feature, through which pro bono managers can

Following a study by bar associations in the Twin Cities, the private bar and leading legal services providers in the area created Call for Justice LLC, a comprehensive telephone referral system. Call for Justice builds on existing infrastructure by using the United Way's 211 system. The 211 information and referral specialists are trained about existing community legal resources and are given real-time information on availability, priority, and eligibility for services. The technology used by 211 also permits extensive data collection to facilitate ongoing assessment of the program.

take turns being available to respond to questions that pop up on their computers while they are doing other work; and

- Have the ability to push information out through an RSS feed.[36] Programs such as Outlook and Google have RSS readers that users can subscribe to. Subscribers then are notified automatically when new information is posted to the website rather than having to go to the website to find it. The GeorgiaAdvocates.org site, for example, pushes out material posted on its news page to subscribers using this method.

- **A Case Management System (CMS) for Pro Bono Cases:** Generally, LSC grantees' case management systems are used for keeping track of cases reported to LSC and recording time, but they can be used to facilitate pro bono as well. A pro bono manager can use a CMS to match a prospective client with an attorney by searching for selected criteria. For example, the manager could look for a lawyer with no open pro bono cases who speaks Spanish to take on a divorce case in a particular county. The system might even do some of the work for the manager. Rather than having to do a search, when the manager clicks the "Assign Case" button, only those attorneys who match the criteria are selected as possibilities. Other CMS features that might facilitate pro bono work include:

  - The ability to integrate, modify, and personalize form e-mails and other correspondence. Some CMS systems allow for the creation of a complete referral packet consisting of letters to the client and pro bono attorney, any documents the client has supplied, and legal information on the case type with links to automated forms, any of which can be tailored for a particular type of case.

  - The ability to collect information pertinent to the client's legal problem. Volunteer lawyers can then access that information

The Legal Services National Technology Assistance Project (LSNTAP) began in 2001 with funding from LSC's TIG program. Originally housed at the Legal Aid Society of Orange County, LSNTAP's mission was to help legal aid programs across the US improve client services through effective and innovative use of technology. Now housed at the Northwest Justice Project, LSNTAP continues to serve as a national support center and clearinghouse for technology. It provides a full online portal for attorneys seeking technology training, online technology resources, and social media networking, including a listserv and blog.

Left to right: David M. Pantos of Legal Aid of Nebraska, Mary K. Ryan of Nutter McClennen & Fish LLP, and The Honorable James D. Moyer, Magistrate Judge, U.S. District Court for the Western District of Kentucky

Left to right: JoAnne A. Epps of Temple University Beasley School of Law, Teresa W. Roseborough of The Home Depot, Lisa C. Wood of Foley Hoag LLP, and Martha Minow of Harvard Law School

via a secure log-in and record case notes and time records so they are all stored in one place.

- The ability to monitor the progress of a case, track expenditures, and record attorney time.
- The ability to designate a given case as a pro bono matter, type in a short description, and directly push that information to a website, post it on social media such as Facebook, and send it to volunteers via e-mail. Some CMS programs can even tailor opportunities so they only go to specific volunteers and control how many of these e-mails an attorney receives in a specified period of time.

- **Voice over Internet Protocol (VoIP) with Remote Log In:** As discussed above, one way to increase participation is to provide pro bono opportunities that require a limited time commitment, such as the chance to give advice and brief services over the phone. Phone systems can be set up so that a volunteer can log into a CMS to show availability, and then calls can be routed to the volunteer. If the volunteer is trained to do an eligibility screen, callers can be routed to the volunteer initially – even on the basis of case type and/or language capability. This capability can be added by using a hardware Session Initiating Protocol (SIP) Phone,[37] by using a software solution known as a softphone, or by routing to a cell phone. Many cloud-based PBX providers (a phone system that lives in the cloud, not at the office) offer these features.

- **Social Media:** The use of social media, including blogs, Twitter, Facebook, and LinkedIn, has grown exponentially over the past five years,[38] and these tools can help attract potential volunteer lawyers. Social media is particularly useful for generating new ideas, facilitating conversations, and collecting feedback from volunteers.[39] LSC itself can be found on Twitter under the handle @LSCTweets.[40] The ABA Center for Pro Bono (which itself maintains an excellent blog[41] about pro bono) recently documented current and potential uses for social media

In 2011, Legal Aid of Nebraska attorney Pat Ford suffered a debilitating stroke. Pat's entire caseload involved legal services for homeless and near-homeless Nebraskans. The day after Pat's stroke, the president of the Nebraska State Bar Association sent an email to over 1,000 lawyers throughout the state requesting volunteers to help take on Pat's caseload. By the end of the week, all of Pat's remaining cases were placed with private attorneys working for free.

in support of pro bono service delivery, focusing on five areas in which social media can assist in supporting or strengthening a program: marketing, recruitment, fundraising, intelligence gathering, and extending accolades.[42] Social media also can be used to:

- Inform the public and lawyers of pro bono news and upcoming events, such as clinics and training. The State Bar of Alabama Volunteer Lawyers Program uses Twitter during the annual ABA Pro Bono Celebration. The ABA Center for Pro Bono uses Twitter to highlight pro bono news and events across the country.
- Fundraise and recruit additional volunteers,[43] including those (like many emeritus lawyers) who lack office space or work from a virtual office. The State Bar of Georgia Pro Bono Project tweets links to its online volunteer pledge forms and to the subscription page of its statewide volunteer lawyers support website.
- Recognize volunteers and highlight success stories, as Pro Bono Net does via Twitter.
- Include members of the pro bono community in local, regional, or national pro bono events by broadcasting event highlights, news, and resource links.
- Mobilize lawyers and the community. For example, the State Bar of Georgia Pro Bono Project uses Twitter to send updates about how lawyers may assist following a disaster.
- Provide practice support to pro bono lawyers in remote clinics or other service settings.
- Stage and support virtual pro bono training and conferences.
- Deliver legal information and resources directly to clients.
- Inform the public about the importance of pro bono and civil legal services.
- Conduct community surveys to assess client need.
- Create virtual legal networks of courts, foundations, local bar associations, and other potential community partners.

- **Mobile Computing, Smartphones, and Texting.** Between May 2011 and February 2012, smartphone ownership among adults earning less than $30,000 per year went from 22% to 34%.[44] Even those who do not have smartphones often have the ability to send and receive text messages. There is great potential, therefore, for LSC grantees to use smartphone and texting technologies to reach clients and engage pro bono lawyers. Several grantees already are building apps for their volunteers, such as those offered by the Arkansas Access to Justice Foundation, Illinois Legal Aid Online, and Pinetree Legal Assistance in Maine. Ideally, as they are developed, these apps will be integrated with agencies' case management systems so that legal services lawyers can designate a case for pro bono placement, type a short description of the case, and then have that case displayed on an available case list, all without accessing a computer. Placing automated forms on these apps (through online forms generation software, like LawHelp Interactive)[45] has the potential to make brief services models even more efficient. Coupled with the e-filing systems used by many courts today, documents can potentially be e-filed right from brief services clinics without ever generating paper copies.

Text messaging technology could, if integrated into a CMS, also be very helpful in addressing the issue of clients failing to make their appointments (which can be very discouraging to would-be pro bono volunteers) by providing reminders, directions, and a list of documents that the client needs to gather in advance of the appointment. Texts also can

Left to right: Michael L. Monahan of the State Bar of Georgia Pro Bono Project / Georgia Legal Services Program, David M. Pantos of Legal Aid of Nebraska

William T. Robinson III, Immediate Past President of the American Bar Association

be used to remind clients of court dates. These reminders can even be integrated into a CMS and sent automatically.

- **Collaborative Pro Bono Platforms:** Keeping up with cutting-edge technology requires time and resources, and thus presents a perfect opportunity for collaboration. Although there are some promising partnerships out there, too often organizations are working independently to create the same systems within a given city, state, or region, and are not sharing information with each other as they do so. LSC and its grantees should consider where they can partner with other legal aid organizations and with the private bar to create systems that operate across users. Examples of where this is being done can be found here. This is one area in which LSC can and should be a leader, ultimately encouraging the development of a portal to which all parties in the community could connect. For example, LSC might consider spearheading the development of a single CMS for all of its grantees, so that everyone would be under a single system.

Finally, LSC should consider either using challenge grants to spur innovations in technology or seeking pro bono assistance from technology companies to further legal pro bono. Under the America Competes Reauthorization Act of 2010, Congress made $45 billion in funding available for challenge grants to foster innovations in science, technology, and education. Since 2010, agencies across the federal government have issued more than 150 challenges, with many of them seeking the development of mobile applications and other broadband technology to solve vexing problems.[46] In the first year alone, thirty-six agencies were awarded prizes of over $38 million.[47] LSC should explore the feasibility of conducting and funding its own such challenge to build an integrated platform for its grantees. Once again, any resources for such a grant should not come at the expense of existing funding.

h. Using Pro Bono to Decrease Demand for Legal Services

Pro bono lawyers are a great potential resource for reducing demand for legal services. Pro bono lawyers can be well-positioned to take on larger projects or litigation that LSC grantees themselves may not be able to handle, conduct background research, or add a powerful voice in support of reform. LSC grantees therefore should consider potential opportunities to engage volunteers at the systemic level.

The Legal Aid Society of the District of Columbia, for example, created an Appellate Advocacy Project to address issues that contributed to ongoing concentrated poverty in the District. Through the project, lawyers collaborate with other members of the civil legal services community to identify emerging or unresolved issues, to develop cases that can present those issues, and to monitor the docket of the D.C. Court of Appeals for amicus opportunities. The project has won important decisions concerning the rights of tenants, persons with disabilities, and victims of domestic violence. Such appellate work can be a fruitful area for pro bono partnerships between legal services providers and private firms. Examples of other organizations that have successfully used private lawyers to reduce demand for legal services can be seen here.

i. Creating a Pro Bono Culture

A successful pro bono program requires support from the top. Good pro bono programs cannot exist without legal aid lawyers, and the leadership of legal aid organizations must commit to pro bono in order for it permeate an organization's culture. There are several steps leaders can take to show that support.[48] First, leaders themselves should actively participate in pro bono programs. They should encourage and celebrate it, while being honest (in a positive way) about some of the challenges of working with pro bono lawyers. They should ensure that well-respected staff members view private involvement as an important part of their jobs, and hold up examples of those lawyers' successful support of pro bono efforts. They should encourage staff to be creative in recruiting and managing pro bono volunteers, assign a capable and well-respected lawyer to manage the organization's pro bono program, and make themselves available to that manager. LSC can play a role in supporting these efforts by directing some of the information and resources contemplated in the toolkit recommendation above to sharing successful efforts among grantee leadership to shape and create pro bono cultures. Grantees looking to strengthen their pro bono cultures also can take advantage of the ABA Center for Pro Bono's Peer Consulting Project, which enlists volunteers to conduct a

Left to right: Diana C. White of the Legal Assistance Foundation of Metropolitan Chicago, Nan Heald of Pine Tree Legal Assistance, John E. Whitfield of Blue Ridge Legal Services, and Colleen M. Cotter of the Legal Aid Society of Cleveland

An elderly Shenandoah County, Virginia, widow needed money to repair her car. In desperation, she took out a payday loan at an interest rate of over 200%. After making monthly payments of between $200-$500 out of her Social Security check of $624 for nearly three years, she still owed more than she had borrowed. Finally, she sought help from Blue Ridge Legal Services. Pro Bono attorney Grant Penrod challenged the legality of the loans under Virginia's usury laws, and ultimately won before the Virginia Supreme Court, which unanimously outlawed the payday industry practice of "flipping" loans each month to evade interest ceilings, a practice that created what the court called "a vicious cycle of debt."

two-day, onsite evaluation and then reports on potential improvements to the organization's pro bono program.

Organizations also should consider, if appropriate, establishing a special advisory committee, composed of key organization staff and private lawyers, corporate counsel, bar leaders, and law school representatives, to help manage their pro bono programs. This group could help set policy or guidelines, develop program goals and priorities, champion legal services in the community, create new connections to increase the pool of available volunteers, help fundraise for the organization's pro bono program, and ensure adequate attention to systems and issues. Finally, as noted above, LSC itself can support pro bono managers at its grantee organizations by providing them with a professional organization through which they can connect, find support, and highlight their successes.

j. Adequately Resourcing Pro Bono Programs

Creating a quality pro bono program requires a commitment of time and money. Many of the recommendations in this report would be costly – much beyond the 12.5% of their grant money that LSC requires its grantees to spend on Private Attorney Involvement (PAI) – and thus especially challenging to implement in light of the current economic environment. There are several steps that LSC and its grantees can take, however, to adequately resource their programs:

- To the extent they are not already doing so, LSC and its grantees should participate in groups, such as state AJCs, that are studying and recommending ways to create new funding sources, including new fees, such as *pro hac vice* fees, or voluntary contribution check-offs on dues forms; and
- LSC should provide guidance and training to development professionals and executive directors in fundraising. LSC also can advocate with potential funders, including foundations and the legal community, about the importance of supporting pro bono programs.[49]

Recommendation 2: LSC Should Revise Its Private Attorney Involvement (PAI) Regulation to Encourage Pro Bono.

LSC's Private Attorney Involvement (PAI) regulation, promulgated in its current form in 1985, directs grantees to expend 12.5% of their basic field grants to encouraging "the involvement of private attorneys in the delivery of legal assistance to eligible clients."[50] Specifically, it provides that private attorney involvement "shall be an integral part of a total local program undertaken" to further the "statutory requirement of high quality economical and effective client-centered legal assistance to eligible clients."[51] Decisions about how to implement the "substantial involvement" requirement rest with the local LSC grantees and their boards, but those decisions are subject to "review and evaluation" by LSC.[52]

The PAI regulation has resulted in increased collaboration between LSC grantees and private attorneys; however, because of changing realities in the legal market, there are certain areas where the regulation might productively be revised to ensure that LSC grantees can use their grants to foster pro bono participation. Section 1614.3 of the regulation describes the range of activities that may be counted toward the PAI requirement and the ways costs related to the PAI effort are identified and accounted for. In practice, the regulation poses complications in certain areas for LSC grantees. LSC therefore should reexamine the regulation in the following areas:

(a) Resources spent supervising and training law students, law graduates, deferred associates, and others should be counted toward grantees' PAI obligations, especially in "incubator" initiatives. Because they are not considered "private attorneys," contributions of law students or graduates not yet admitted to the bar do not count toward grantees' PAI requirements.[53] Contributions from law school clinics can be counted only if a private attorney supervises the students (including a professor because the professor is considered a "private attorney").[54] Engaging students and instilling a lasting commitment to pro bono work is wholly consistent with the aims of the PAI regulation. The LSC Board therefore should consider amending the regulation to allow grantee organizations to count as PAI expenses the funds they expend on training and supervising law students.

Similarly, in recent years there has been a large increase in the number of private attorneys and law graduates who are not employed, and many of them have sought to gain experience while giving back to their communities through pro bono work. Although these lawyers are a great potential resource, engaging them requires time and resources on the part of LSC grantees. For example, one LSC grantee wanted to create an "incubator" program under which it would train attorneys and recent graduates and then pay them to take cases after they left the program (and in the case of the recent graduates, after they passed the bar). The program was designed to benefit the attorneys by giving them a start in practice, to benefit the grantee by providing trained attorneys to handle cases for a modest payment, and to benefit low-income clients by increasing the supply of available lawyers. In Advisory Opinion 2009-1007, LSC held that payments to the lawyers after they left the "incubator" could count toward the grantee's PAI obligation only if the payments were not more than 50% of the lawyers' total compensation. Whether the funds were counted therefore depended on whether the lawyer was able to find another job. As a practical matter, this makes the use of PAI funds for these programs very difficult since attorneys who are not otherwise employed are unlikely to know how much of their income will come from the grantee and how much from other sources until the end of the year. This leaves the grantee uncertain about whether its payments count as PAI until the end of the year as well.

Left to right: The Honorable James E. Doyle of Foley & Lardner LLP, and Ronald S. Flagg of Sidley Austin LLP

When Mrs. P., a Spanish-speaking, 74 year-old victim of domestic violence, sought assistance with a divorce, Bay Area Legal Services referred her to a bilingual pro bono attorney in the area. Mrs. P. had been married in 1953. Her husband had a gambling problem and, one day when Mrs. P. went to the local casino to find him, he grabbed her by her blouse, lifted her and pushed her against the wall. He was arrested after the police saw the attack on the the casino's videos. Mrs. P. later found out that her husband had been taking all of her Social Security checks. The volunteer attorney who took Mrs. P.'s case succeeded in obtaining a divorce for her and obtained a court order that she was to receive half of the monthly benefit from Mr. P.'s Florida Retirement System Pension and half of Mr. P.'s military retirement benefits via Qualified Domestic Relations Orders (QDROS). The pro bono attorney secured the services of another volunteer experienced with QDROS to help with that process. The pro bono lawyer was so inspired by her experience that she shared them with the Tampa Bay Hispanic Bar Association, and encouraged others to take on cases of their own.

(b) Grantees should be allowed to spend PAI resources to enhance their screening, advice, and referral programs that often attract pro bono volunteers while serving the needs of low-income clients. Currently, LSC grantees cannot count money spent to support centralized screening and referral services as PAI, even where those referral services are needed to support pro bono programs. In Advisory Opinion 2009-1004, for example, one LSC grantee used non-LSC funds to pay for a statewide hotline that provided advice and referrals. After being screened through the hotline, LSC-eligible clients were referred back to one of the four LSC-funded organizations in the state. LSC concluded that the organization that funded the hotline could not count the expense toward its PAI obligation because the legal aid lawyers who staffed it received more than 50% of their compensation from the LSC-funded agency that housed the hotline, and none of the organizations that accepted referrals from the hotline could count them as PAI cases either.

The same issue arose again in Advisory Opinion 2011-001, where an LSC grantee was not permitted to count the staff salaries it paid a centralized screening and referral unit as PAI expenditures. This unit screened cases before referring them to a network of volunteer attorneys in the grantee's service area. The clients served met LSC's eligibility guidelines, but they were not counted as part of the grantee's caseload and the grantee did not take responsibility for determining the outcome of the referrals.

The Task Force has reported on how efficient it is to have integrated intake and referral systems and how difficult it is to find outside funding for them. The LSC Board of Directors thus should consider amending the regulation to allow such models.

(c) LSC should reexamine the rule that mandates adherence to LSC grantee case handling requirements, including that matters be accepted as grantee cases in order for programs to count toward PAI requirements. LSC grantees are under strict guidelines about what cases they can and cannot handle. Furthermore, resource constraints often force grantees to make tough decisions about what types of cases that meet the guidelines they can take. Yet, under the PAI regulations, grantees cannot count placement of any cases that they are not themselves able to accept. The regulation poses challenges to effective pro bono collaborations, as illustrated by Advisory Opinion 2008-1001. There, an LSC-funded organization serving a large rural area in the Midwest provided organizational assistance and technical support to a number of walk-in clinics (sponsored by churches, local bar associations, and government social welfare agencies). These clinics did not screen clients for LSC eligibility and, at the insistence of the organizations that supported the clinics, the LSC-funded organization did not treat the people who came to the clinics as its own clients. The program, which is located in an area with few private attorneys and where it has been very difficult to establish successful PAI programs in the past, sought to count the cost of the organizational assistance and technical support against its PAI requirement. LSC found that the people served by the clinics had to be screened for LSC eligibility, determined to be eligible, and accepted as clients of the LSC-funded organization before the costs of the program could count for PAI purposes.

As noted elsewhere in this report, such collaborative efforts are only possible with the support and substantive

Left to right: Esther F. Lardent of the Pro Bono Institute, and Frank B. Strickland of Strickland Brockington Lewis LLP

expertise of legal aid lawyers. Thus, a degree of flexibility is required in the rule.

In summary, the PAI regulation poses challenges as local organizations attempt to develop innovative programs to promote efficiency and effectiveness in their partnerships with others. The Task Force therefore recommends a thoughtful effort to reexamine the regulation to ensure that it effectively encourages pro bono participation.

Recommendation 3: LSC Should Launch a Public Relations Campaign on the Importance of Pro Bono.

Members of the private bar can help alleviate the justice gap, but many either do not know about the justice gap or do not know how they can help. Lawyers may not know about the extraordinary need for their pro bono contributions. Policymakers often are not aware of the importance of legal aid. Leaders in the legal community therefore should work together to increase public awareness of these issues.

As a starting point, LSC should convene a small group to explore launching a national public relations campaign to: (1) raise awareness, both within and outside of the legal profession, about the continuing crisis in legal aid for the poor; (2) encourage members of the bar to help solve that crisis by taking on pro bono matters and donating to legal aid organizations; and (3) generally promote and celebrate the accomplishments of legal aid lawyers across the country.[55]

The idea of educating the public about the importance of legal aid is not new. Over the past ten years, several organizations – most notably NLADA, the Center for Law and Social Policy, and statewide AJCs – have done important work in this area. A number of states also have launched statewide campaigns aimed at increasing pro bono work among private attorneys. This includes the One Campaign,[56] a statewide campaign in Florida with the message that every lawyer in the state should take on *one* pro bono case; Maryland's Access to Justice Commission media kit entitled, *My Laws, My Courts,*

Alaska's *Early Resolution Program* schedules a number of divorce cases in a single court on one afternoon and then brings in pro bono lawyers to represent both sides. In its first year, 80% of cases resulted in settlements.

Members of the Pro Bono Task Force at their inaugural meeting

In 2009, the Indiana Supreme Court announced a campaign to train more than 700 Indiana judges, mediators, and lawyers on handling foreclosure cases. The Court offered scholarships to private attorneys for the training if they agreed to handle one mortgage foreclosure case on a pro bono basis.

My Maryland[57]; and similar programs in Arkansas, Illinois, Texas, and Washington. The ABA[58] and National Celebration of Pro Bono[59] websites both provide speeches, videos, and other resources for launching a public relations campaign. Furthermore, there is a developing trend among individual legal aid organizations either to hire a marketing professional or to include marketing in their development staff's list of responsibilities.

The largest such campaign to date was launched in 2001 by NLADA and the Center for Law and Social Policy. They conducted a series of ten focus groups and a national survey to determine what Americans knew and thought about legal aid, as well as what messages would work with the public, and then issued a toolkit that included a review of its research findings, recommendations about the type of messages that could best be used to promote civil legal aid, and ad prototypes for national, state, and local communications efforts. Although much great work was done after the toolkit was released, eventually funding for the project ended. Thus, while the materials from that campaign are still largely relevant and useful, they are not currently being used and provide an excellent starting point for further action.

Our recommendation is to build upon the excellent work already done by these organizations, starting with the report issued by NLADA and the Center for Law and Social Policy, and work with a small group of key national stakeholders (including representatives of organizations like LSC, NLADA, the Pro Bono Institute, and the ABA) to launch and coordinate a national campaign based on the findings and recommendations contained in that report. This group will need to begin by addressing a number of challenges and open questions, including how to pay for the campaign, who the audience should be, and how to administer and implement the campaign.

Recommendation 4: LSC Should Create a Fellowship Program to Foster a Lifelong Commitment to Pro Bono.

One of the working groups that the Task Force convened for purposes of this report was tasked with developing "Big Ideas" for greatly increasing involvement by pro bono lawyers. This Big Ideas Working Group suggested that LSC develop a prestigious, national fellowship program for recent law school graduates, comprised of incoming associates at participating law firms who would, under the

supervision of more senior firm and LSC grantee lawyers, devote their first year to handling cases from and building relationships with host LSC grantees. This fellowship proposal is unique in that its focus would be on building lifelong commitments to civil legal services and long-lasting connections between LSC grantees and law firm pro bono lawyers.

We envision that interested law students would apply and be selected for the fellowships by both the firm and the host LSC grantee shortly after their second year summer programs with participating firms. Fellows would select a legal focus area for their fellowship, such as domestic violence or housing, which would allow them to develop subject matter expertise within their firms. Incoming fellows would prepare during their final year of law school by taking part in relevant clinics, externships, or coursework so that they could begin the fellowship with some level of familiarity with their chosen subject area. We hope that law schools, in turn, would make relevant education, such as providing clinical and experiential learning programs, a priority. After graduation, fellows would join their law firms at the same time as the other incoming associates; however, they would not go into practice groups or do billable work. Rather, they would devote their first year to pro bono work under the supervision of firm lawyers and lawyers at the local LSC grantee, gaining valuable practice skills and building subject matter expertise within their firms, referring cases to their colleagues, coordinating training, and offering continued support as others take on cases. Although they would be considered firm employees, eligible for firm benefits, their salaries would be commensurate with the salaries of Equal Justice Works fellows or employees of LSC grantees. They would participate in regular firm training and, as firm employees, the firms could count the fellows' pro bono hours when reporting to outside sources. At the end of the year, fellows would join their firms as second-year associates, but remain a point of connection between the firm and the grantee throughout their careers.

Left to right: The Honorable John T. Broderick, Jr. of the University of New Hampshire School of Law, The Honorable Sven E. Holmes of KPMG LLP, and George H. Hettrick of Hunton & Williams LLP

Of course, there are a number of open questions to be considered before such a proposal becomes a reality, including: who will administer the program and recruit firms to participate;[60] where will the fellows be housed; who will supervise the fellows' work; and how can the program be used to benefit grantees in rural areas. Other possibilities are to create similar fellowship programs to engage emeritus/senior lawyers, law student summer interns, or recent college graduates to work at LSC grantees. We recommend that LSC convene an exploratory working group to address these open questions, examine existing fellowship programs, and make these proposals a reality.

III. Requests for Assistance from the Legal Profession (Not Directed at LSC Board)

a. **Requests of Bar leaders and the Judiciary:**

1. **To the Extent Permitted, Recruit Pro Bono Lawyers. Support and Applaud Their Pro Bono Efforts.**

The judiciary, consistent with applicable judicial conduct rules, should use its influence to recruit new pro bono lawyers, especially in rural areas and among solo practitioners, to draw attention to the crisis in legal services, and to advocate for additional funding at the state and federal level.

Courts have a unique ability to recruit and inspire lawyers to give back through pro bono. In New York, for example, Chief Judge Jonathan Lippman's announcement about a pro bono service requirement for new lawyers illustrates the impact that creative and forward-thinking judicial leadership can make.

New York State's new prerequisite will require prospective lawyers to show they have performed at least 50 hours of pro bono service before being licensed to practice law in the state. Chief Judge Lippman announced the new pro bono service requirement on Law Day, May 1, 2012, noting that it is intended to instill and foster a culture of service among members of the bar and reinforce the ethical and social responsibility of lawyers to volunteer time and resources to provide legal services for those in need. The requirement will address the state's urgent access to justice gap, while helping prospective attorneys build valuable skills and imbuing in them the ideal of working toward the greater good.

An Advisory Committee on New York State Pro Bono Bar Admission Requirements is working on implementation of the new prerequisite, seeking input from all of the affected constituencies in New York State, including the legal services providers that will be called upon to support these law student and new lawyer volunteers, and will provide its recommendations to the Chief Judge and the Presiding Justices of the four Appellate Departments, whose respective Committees on Character and Fitness oversee and approve all admissions to the bar.

New York's experience will provide a template for other states considering a similar requirement for bar admission, and an opportunity for legal services offices to engage students in their work. We look forward to the release of the new rules and the potential impact it will have on other states.

With assistance from the National Center for State Courts (NCSC),[61] the Conference of Chief Justices (CCJ), the Conference of State Court Administrators (COSCA),[62] State Bar leaders, the ABA Judicial Section, and other similar resources, judges can play a number of other roles in addressing this crucial issue. The judiciary can ensure adoption of rules that facilitate access to justice. They can, where appropriate, actively recruit pro bono volunteers, publicly recognize volunteer contributions,[63] write and speak about the importance of pro bono, act in an advisory capacity to pro bono programs, issue resolutions encouraging pro bono, consider asking state legislatures to increase funding for civil legal services organizations (which was successful in Texas), consider special procedural or scheduling accommodations for pro bono lawyers, and reorganize their own operations to better accommodate programs and help pro se litigants. They can emulate efforts by courts around the country to create innovative court-based programs, like self-help desks for pro se litigants, that create limited opportunities for pro bono participation in their jurisdictions. For examples of such initiatives, click here.

Even simple actions by courts can make an enormous difference. For example, when the Illinois Supreme Court sent a letter to all lawyers in the state encouraging them to take a pro bono case, Land of Lincoln Legal Aid saw a 10% increase in its volunteer rate.

The local judiciary can be particularly important in encouraging, promoting, and rewarding pro bono work in rural communities. LSC, its grantees, and others wishing to engage judges and bar leaders in rural areas and elsewhere can:

- Meet in person with members of the judiciary to actively enlist their support – emphasizing the importance of pro bono not only to the client population but to the efficient functioning of the judiciary – and also ask them to enlist other judges;
- Ask judges to serve on AJCs or local pro bono committees;
- Invite judges to speak about pro bono;
- Enable judges to personally recognize those involved in pro bono. This can be as simple as thanking pro bono attorneys from the bench, or as formal as the 7th Circuit Bar Association's Annual Pro Bono Awards, given at a formal dinner every year; and
- Encourage the judiciary to adopt rules and procedures that support pro bono lawyers and help pro se litigants.

2. **Use Bar Associations to Encourage, Support, and Celebrate Pro Bono.**

Bar associations are a critical resource for pro bono programs, and many contribute considerable energy to support and celebrate pro bono involvement by their members. Bar associations can be important sources of training for pro bono lawyers. They can offer funding for legal services, as is done by the Chicago Bar Foundation. They can develop and maintain new pro bono programs, such as in New York City, where the City Bar Justice Center runs a dozen programs to enlist and engage pro bono lawyers. They can provide a platform to educate others about legal services and the importance of pro bono work, as is done by the ABA through its National Celebration of Pro Bono,[64] and can recognize pro bono contributions of their members through awards. And they can provide collaborative environments where their various constituents can come together in support of pro bono. We applaud these contributions, and encourage bar associations to continue their creative and energetic support for pro bono programs going forward.

3. **Judges and Bar Leaders Should Amend Attorney Practice, Judicial Ethics, and CLE Rules to Support Pro Bono.**

i. **Provide CLE Credit for Pro Bono Work**

One way of encouraging pro bono work is to provide CLE credit for that work. A number of states have adopted rules that do just that, and the Task Force recommends that these rules be expanded and adopted in other states.[65] Specifically, based on the state programs surveyed, we recommend drafting a proposed model rule that would:

- Minimize the number of administrative hurdles for lawyers seeking CLE credit for pro bono;[66]
- Provide a manageable ratio of pro bono hours to CLE credit awarded. Otherwise, lawyers will find it much easier to simply watch a webinar or attend a short course;
- Provide ethics or professionalism credit; and
- To address concerns that it will hurt MCLE providers financially or replace traditional CLE, limit the number of CLE credits that can be obtained by performing pro bono.

ii. **Revise Judicial Codes of Conduct**

Some judges abstain from encouraging pro bono efforts out of concern that doing so violates ethical norms. By revising codes of judicial conduct, state high courts can offer judicial leaders more leeway to encourage lawyers to take on pro bono matters.

Rule 3.7 of the ABA's Model Code of Judicial Conduct expressly allows judges to encourage lawyers to provide pro bono legal services, and comments to that rule state that, in addition to appointing lawyers to serve as counsel, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono, if in doing so the judge does not employ coercion or abuse the prestige of judicial office. According to the comment, the encouragement may include providing lists of available programs, training lawyers to perform pro bono legal work, and participating in events that recognize lawyers for pro bono service. Many states have adopted or proposed identical or similar rules, allowing their judges to encourage pro bono service.[67]

Those courts that do permit more extensive judicial involvement in the promotion of pro bono demonstrate not only that a robust judicial role is ethical conduct, but also that leadership by the judiciary greatly advances the goal of increased access to justice for indigent citizens.

iii. **Other State Rule Changes**

There are other changes that can be made to state practice rules that would encourage additional pro bono work by the private bar. For example, allowing lawyers, especially in-house, government, and military lawyers, to provide pro bono services in jurisdictions where they are not admitted to practice, in limited circumstances (such as after a major disaster), could erase huge barriers to pro bono.[68] Other rule changes could permit lawyers who are retired or inactive to provide pro bono services without having to pay bar dues or fulfill CLE requirements.[69]

Many states' rules allow for unbundling of legal services or limited scope representations.[70] Under these rules, lawyers can perform some, but not all, of the tasks commonly included in full-service representation. This allows lawyers to provide valuable services without having to commit to long-term representation of the client. Other states relax conflicts rules for lawyers participating in legal service hotlines or other short-term representation programs.[71]

Finally, State Bars can play a role in promoting pro bono services by requiring or encouraging lawyers to report their pro bono hours or communicating expectations that lawyers should provide pro bono services.[72] At the very least, these rules help to put pro bono in front of lawyers on a regular basis and, ideally, will cause some to act.

4. **Create or Strengthen State Access to Justice Commissions**

Many states' high courts have created AJCs or similar statewide entities to address legal services for indigent clients on a statewide level.[73] They usually are composed of bar representatives, judges (including retired judges), legal aid providers, professors and law students, and other stakeholders. These commissions may, among other things, conduct studies on legal needs, produce reports and recommendations, hold educational and media campaigns to raise awareness, engage local corporate law departments, create task forces, hold conferences, and provide training for legal aid staff and volunteers. Some also work to improve access to courts for pro se litigants.[74] The ABA has compiled significant resources for states seeking to create their own AJCs.[75]

Successful AJCs have consistent participation from state supreme court justices, are accountable to multiple institutions, rather than just the judiciary or the bar, and have a full-time executive director or other staff. When carried out effectively, these AJCs can bring together stakeholders to coordinate and encourage innovation in legal services, including pro bono, and can create a broad-based pro bono culture within a state.

As one of the largest funders of civil legal aid in many states, LSC and its grantees have a special obligation to participate in and support these state-level approaches. Additionally, states that do not have AJCs should consider creating them, and those that do should invest resources into making them strong and innovative centers for leadership in the justice community.

Left to right: Lisa C. Wood of Foley Hoag LLP, Gloria Santona of McDonald's Corporation, E. Paige Sensenbrenner of Adams and Reese LLP

b. **Requests of the Legal Profession: Recognize the Importance of Pro Bono.**

This report would not be complete without a word about the dire need to fund legal services. A high quality pro bono system is dependent upon sufficient resources for legal services. Recent cuts in funding have cut resources – including those needed to develop an effective pro bono infrastructure – to the bone.

The legal profession as a whole should recognize the importance of providing every American with access to our justice system, the role that pro bono lawyers can play in offering that access, and the cost of developing and maintaining effective pro bono programs.

Every legal service provider has been affected by the economic downturn, as foundations have cut back their giving, IOLTA has plummeted as a result of falling interest rates (exacerbated by the dearth of real estate transactions with escrowed funds held in IOLTA accounts), and funding has been drastically cut both at the federal and state levels.[76]

In some states, LSC grantees and others have launched active campaigns to raise additional dollars from the private bar, including from their pro bono partners. State AJCs and other groups have successfully recommended adoption of new fees, such as *pro hac vice* fees, or voluntary contribution check-offs on bar dues forms, with all new revenues going to legal services organizations.

The stakeholders who participate in these efforts should be applauded. We encourage others to help to the extent they can. General counsels, firm leaders, and bar leaders should speak out about the need for funding, and contribute, where possible. LSC grantees also should consider launching fundraising campaigns and exploring new sources of funding.[77] Everyone should recognize that while pro bono lawyers can help, they cannot do so without the support, expertise, and time of legal aid lawyers.

IV. Summary of Recommendations and Conclusion

The foregoing recommendations are meant to create a roadmap for LSC, its grantees, and the legal community to effectively engage the private bar to address the justice gap in the United States. LSC and its grantees will require resources to make the recommendations contained in this report a reality. The Task Force is committed to assisting in these efforts.

LSC should take the following next steps:

- Work collaboratively with national stakeholders (such as the ABA Center for Pro Bono, NAPBPro, APBCo, the Pro Bono Institute, and NLADA) to serve as a source of information, coordination, and technical assistance for the creation of strong pro bono programs at its grantees. LSC should start by:
    - Bringing these national stakeholders together to assess what already exists and what needs to be done;
    - In partnership with others, creating a comprehensive toolkit for building strong pro bono programs, including by providing guidance on how to evaluate those programs;
    - Facilitating LSC grantee access to and use of existing technologies that enable volunteers to take on and coordinate work on cases, training, case management, and provision for services from a distance, all online;
    - Hiring a full-time staff person at LSC responsible for helping grantees develop and strengthen their own pro bono programs.
    - Considering ways in which LSC and its grantees might reduce demand for legal services;
    - Working with existing groups to create a professional organization specifically for pro bono coordinators at LSC-funded organizations; and
    - Recommending that Congress create a new Pro Bono Innovation/Incubation Fund modeled on the successful Technology Initiative Grants (TIG) program.
- Task a committee with recommending revisions to LSC's Private Attorney Involvement regulation to better encourage pro bono;
- Convene a small group of knowledgeable stakeholders to investigate and develop a public relations campaign about the importance of legal services and pro bono; and
- Convene a small group of law firm, legal services, and law school leaders to explore the feasibility of launching a fellowship program for new graduates and emeritus lawyers focused on LSC matters. These programs should be designed with the goal of strengthening overall support for civil legal services and pro bono within firms, law schools, and the profession as a whole.

Left to right: JoAnne A. Epps of Temple University Beasley School of Law, David A. Kutik of Jones Day, The Honorable James E. Doyle of Foley & Lardner LLP, and Joseph Genereux of Dorsey & Whitney LLP

Finally, the Task Force recognizes that none of the efforts above can be effective unless they are carried out collaboratively with members of the private bar and other stakeholders. We therefore request that:

Bar leaders and the judiciary:

- Work through organizations such as the National Center for State Courts and, to the extent permitted by ethics rules, use their influence to support pro bono efforts and to recruit pro bono lawyers;
- Speak and write about the crisis in legal services and the critical need for pro bono assistance; and

- Where possible, advocate for additional funding for civil legal services at the state and federal levels.

State Bar leaders and judges should examine ways in which state practice and ethics rules can be revised to encourage pro bono, including by:

- Offering CLE credit for pro bono;
- Permitting judges to ethically recruit and recognize pro bono attorneys;
- Allowing opportunities for limited-representation and unbundling of services;
- Relaxing conflicts of interest rules for brief service models, such as hotlines and clinics;
- Allowing lawyers to take on pro bono matters in jurisdictions other than those in which they are admitted to practice; and
- Considering other creative and ambitious solutions, such as Chief Justice Lippman's recent move to require pro bono service by all new lawyers in New York.

State and federal policymakers, funders, and the legal profession as a whole, should recognize that using pro bono lawyers to address the crisis in legal services can only be accomplished with adequate funding.

Little can be done without providing LSC and legal services organizations, which are tasked with running pro bono programs, with the necessary resources for doing so. And, of course, all stakeholders should recognize that pro bono lawyers cannot do it all. They will never replace the tireless efforts of legal aid lawyers, who are experts in what they do and who work on the front lines every day. Policymakers should fund programs to support pro bono involvement, but this should not come at the expense of adequately funding legal services.

The Task Force is committed to helping in these efforts going forward, and to doing what it can to make sure that the price of entry does not prohibit accessing the justice system in the United States.

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[1] According to the 2011 World Justice Project Index, the civil justice system in the United States is independent and free of undue influence, but it remains inaccessible to disadvantaged groups, ranking 21st out of 66 countries examined, http://worldjusticeproject.org/sites/default/files/wjproli2011_0.pdf, *at* 23. With regard to the relative cost and availability of civil legal assistance, the United States ranked 52nd out of the 66 countries examined. *Id.*; http://www.abajournal.com/magazine/article/unequal_justice_u.s._trails_high-income_nations_in_serving_civil_legal_need/, citing http://worldjusticeproject.org/rule-of-law-index/ (discussing the findings of the World Justice Project Index).

[2] Associated Press, *Poverty in United States Soars to Levels Not Seen Since 1960s*, Fox News Latino, July 22, 2012, http://latino.foxnews.com/latino/news/2012/07/22/poverty-in-united-states-soars-to-levels-not-since-since-160s/; Editor, *How America's Losing the War on Poverty*, Tri States Public Radio, Aug. 4, 2012, http://www.tristatesradio.com/post/how-americas-losing-war-poverty.

[3] U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2011, at 18 (Sept. 2012). http://www.census.gov/prod/2012pubs/p60-243.pdf.

[4] Legal Services Corporation 2012 Income Guidelines, Appendix A to 45 C.F.R. Part 1611, 77 Fed. Reg. 4909 (Feb. 1, 2012). http://www.lsc.gov/sites/default/files/LSC/pdfs/45CFRPart1611AppendixA2012Income%20Guidelines.pdf

[5] *See, e.g.,* Melanca Clark & Maggie Barron, Foreclosures: A Crisis in Legal Representation (Brennan Ctr. For Justice, 2009); Laura Arenschield, *Funds for Free Legal Aid Sink as Need Rises*, The Columbus Dispatch, Aug. 5, 2012, http://www.dispatch.com/content/stories/local/2012/08/05/funds-for-free-legal-aid-sink-as-need-rises.html.

[6] Quil Lawrence, *A New Generation of Vets Faces Challenges at Home*, NPR, Aug. 3, 2012, http://www.npr.org/2012/08/03/157658364/a-new-generation-of-vets-faces-challenges-at-home.

[7] *See supra*, note 1.

[8] *See Legal Services Corporation: America's Partner for Equal Justice, LSC,* http://www.lsc.gov/.

[9] Legal Services Corp., Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low Income Americans 2-3 (Sept. 2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

[10] Laura K. Abel & David Pedulla, *Reform Federal Civil Justice Policy to Meet the High-Stakes Legal Needs of Low-Income People*, Brennan Ctr. for Justice at the NYU Sch. of Law Blog, (Jan. 5, 2007), http://www.brennancenter.org/blog/archives/reform_federal_civil_justice_policy_to_meet_the_high_stakes_legal_needs_of/.

[11] *See Legal Services Corp., Summary of Results of LSC Survey Grantees Re Impact of 2012 Budget Cuts on LSC Grantees' Finances and Services,* http://www.lsc.gov/sites/default/files/LSC/lscgov4/SUMMARY_OF_RESULTS_OF_LSC_SURVEY_GRANTEES_RE_IMPACT_OF_2012_BUDGET_CUTS.pdf

[12] The Boston Bar Association, for example, recently documented that in eviction cases, having some form of legal assistance, including full representation in targeted cases, substantially increased tenants' likelihood of staying in their homes and even receiving a damage award. Boston Bar Assoc. Task Force on the Civil Right to Counsel, *The Importance of Representation in Eviction Cases and Homeless Prevention*, March 2012, http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf; *see also* Howard H. Dana, *Report to the House of Delegates: ABA Resolution on Civil Right to Counsel 2006*, 15 Temp. Pol. & Civ. Rts. L. Rev. 507, 517-18 (2006) (citing Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 Hofstra L. Rev. 533 (1992)); Carroll Seron *et. al*, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Soc'y Rev. 419 (2001).

[13] For information on the ABA's Pro Bono Summit, see *ABA President to National Pro Bono Summit: Progress is What We're Here for*, Oct. 25, 2011, *available at* http://www.abanow.org/2011/10/aba-president-to-national-pro-bono-summit-progress-is-what-we%E2%80%99re-here-for/.

[14] Existing resources for building an effective pro bono program include:

- LSC's own Performance Criteria, http://www.lsc.gov/sites/default/files/LSC/pdfs/LSCPerformanceCriteriaReferencingABAStandards.pdf.
- The ABA Center for Pro Bono's, "Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means," http://apps.americanbar.org/legalservices/probono/standards.html.
- LSC Program Letter 07-2: Guidance to LSC Programs for the Development of Enhanced Private Attorney Involvement, http://lsc.gov/sites/default/files/LSC/pdfs/ProgramLetter07-2.pdf.
- The Michigan Nonprofit Association's "Basic Infrastructure Checklist," http://mnaonline.org/CMDocs/MNA/Principles&Practices/checklist.pdf.
- PILnet's "Pro Bono Clearinghouse Manual: Resources for Developing Pro Bono Legal Services," http://pilnet.org/public-interest-law-resources/52-pro-bono-clearinghouse-manual-resources-for-developing-pro.html.
- Emerging from the California Pro Bono Summit, the development of a 7 chapter best practices guide reflecting basic how to concepts for legal services and private law firms on the development and administration of pro bono best practices.
- Training related to infrastructure sometimes is offered in national conferences. For example, a nuts and bolts pre-conference for new pro bono managers is offered annually at the Equal Justice Conference, in addition to "Beyond the Basics," coordinated by the National Association of Pro Bono Professionals (or NAPBPro) for more experienced pro bono coordinators and directors.

[15] *Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, ABA,* http://www.americanbar.org/groups/probono_public_service.html

[16] ABA Standing Comm. on Pro Bono & Public Serv., *Center for Pro Bono Clearinghouse Library*, http://67.29.152.234/dbtw-wpd/searchcpb.htm

[17] LSC's own website contains some resources, but they are limited and reportedly not well-trafficked.

[18] The ABA Standards for Pro Bono Programs, which is in the process of being revised, also is a terrific resource for those working to build effective pro bono programs, see ABA Standing Comm. on Pro Bono & Public Serv., *Standards, Division for Legal Services*, https://www.americanbar.org/groups/probono_public_service/policy/standards.html

[19] The availability of malpractice insurance is often cited as a concern of would-be pro bono volunteers. Grantees should advertise that professional liability insurance is available at

affordable rates to the sponsoring entity that reflects the exposure and risk involved in the types of cases undertaken and, except for solo practitioners, often at no cost to pro bono volunteers. NLADA offers professional liability insurance to PAI volunteers, bar association sponsored pro bono programs, private firms offering pro bono services, other nonprofit projects, and solo practitioners. The coverage extends to any volunteer performing pro bono services on behalf of the policyholder. For information on the NLADA insurance program, *see NLADA Insurance Program*, http://www.nlada.org/Insurance/Insurance_Home.

[20] Marc Galanter, *"Old and in the Way:" The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 Wisc. L. Rev. 1081, 1085 (1999).

[21] These obstacles include limitations on the ability to practice after formal retirement, age, licensure, bar dues, CLE requirements, filing fees, and malpractice insurance requirements.

[22] *See* Fedscope, http://www.fedscope.opm.gov/. "Legal positions" includes attorneys as well as administrative law judges, various administrative and managerial positions, and paralegals.

[23] Presidential Executive Order 12988, issued in 1996, directs federal agencies to develop appropriate programs to encourage and facilitate pro bono legal service by federal government employees. The order designated the Department of Justice to lead the effort and to convene the Interagency Pro Bono Working Group comprised of representatives from each federal agency that adopts a pro bono policy and establishes a pro bono program. The American Bar Association's Standing Committee on Pro Bono and Public Service has an excellent web page devoted to the issue of government attorneys and pro bono, *available at* http://apps.americanbar.org/legalservices/probono/government_attorneys.html.

[24] *See* Rule 49: Unauthorized Practice of Law, D.C. Courts, *available at* http://www.dccourts.gov/internet/documents/rule49.pdf. Thirty-seven federal agencies in D.C. have established pro bono programs. Fifteen of those agencies recently have adopted policies that grant administrative leave to lawyers performing pro bono legal work. Pro Bono Net has a useful website that includes a compilation of existing pro bono policies from various federal agencies, information on malpractice insurance, links to information on practices in other states and jurisdictions, and other useful information for federal attorneys seeking pro bono opportunities in Washington, D.C., see Government Volunteers, Probono.net/dc, http://www.probono.net/dc/about/#Policies.

[25] *See, e.g.*, Hawaii Supreme Court Rule 17; State Bar of California Rule 2.54(b).

[26] *See, e.g.*, *Best Practice Profiles*, Corp. Pro Bono, http://www.cpbo.org/resources/best-practice-profiles/. and David P. Hackett, Ed., *Pro Bono Service by In-House Counsel*, Practicing L. Inst. (2010), for examples of robust in-house corporate pro bono programs.

[27] For a discussion of recommended changes to the PAI rules affecting LSC grantees' use of law students, see Recommendation 2.

[28] The ABA Center on Pro Bono has a content-rich website for and about law school pro bono programs, including guidance and resources for creating or enhancing a program, information about the various models in use, and contact information for the relevant personnel at each school. *See* ABA Standing Comm. on Pro Bono & Public Serv *Law School Public Interest and Pro Bono Programs*, http://apps.americanbar.org/legalservices/probono/lawschools/home.html.

[29] *IIT Chicago-Kent to Develop eBook for National Cyber Clinic Pilot Program, May 11, 2012,* http://www.kentlaw.iit.edu/news/iit-chicago-kent-to-develop-ebook-for-national-cyber-clinic-pilot-program.

[30] Whether faculty members do pro bono work typically is a matter of individual choice, but the additional capacity faculty can add (whether as inspirational leaders, advocates, or supervisors) suggests that this is an area that might be encouraged. Faculty members are typically expected to perform (and are evaluated on) service activities, which could include pro bono activities, including support for law student and legal services work. For a discussion of current law school efforts, see *Law School Public Interest and Pro Bono Programs, supra* note 28.

[31] *See* Connecticut Network for Legal Aid, http://ctlawhelp.org/.

[32] U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2011, at 18 (Sept. 2012). http://www.census.gov/prod/2012pubs/p60-243.pdf

[33] Technologies That Should Be in Place in a Legal Aid Office Today, LSC, Nov. 2008, http://grants.lsc.gov/sites/default/files/Grants/Grants_Reference_Materials/technologybaselinereport.pdf

[34] LSC recently convened its 2012 Technology Summit on the Use of Technology to Expand Access to Justice, which looked at many ways in which new technologies can be used to promote legal services. White Papers from the Summit will be published by the *Harvard Journal of Law and Technology*.

[35] For examples of other pro bono websites, see the online version of this report at http://lsc.gov.

[36] RSS (originally RDF Site Summary, often dubbed Really Simple Syndication) is a family of web feed formats used to publish frequently updated works – such as blog entries, news headlines, audio, and video – in a standardized format. An RSS document (which is called a "feed," "web feed," or "channel") includes full or summarized text, plus metadata such as publishing dates and authorship.

[37] SIP phones connect to the Internet to place and receive calls. Each device has a unique IP address so calls can be routed to it.

[38] There has been much written about the use of social media by lawyers, including by legal aid lawyers. A 2010 report, *Using Social Media to Engage Your Supporters*, highlights the social media efforts of several legal aid and pro bono entities. Kate Bladow & Joyce Raby, available at http://lsntap.org/training_social_media_support_2010. Finally, the Legal Services National Technology Assistance Project (LSNTAP) provides an online listing of legal aid programs that have self-reported their social media presences at http://lsntap.org/Legal_Aid_Social_Media_List. Katherine Bladow & Joyce Raby, *Using Social Media to Support Self-Represented Litigants and Increase Access to Justice*, Future Trends in State Courts, at 35 (2011), *available at* http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/ctmedia&CISOPTR=29.

[39] Lisa W. Borden, *Social Media and Pro Bono* (June 8, 2011), http://thepbeye.probonoinst.org/2011/06/08/guest-blog-social-media-and-pro-bono.

[40] In 2010, Technola, a technology blog for legal aid and public interest advocates, published a blogroll listing legal aid and pro bono programs and staff who maintained public interest blogs, http://www.techno.la/promo/blogroll/. It also published a 2009 "Twitter List of Legal Aid & Pro Bono Organizations," http://www.techno.la/2009/11/articles/technologies/social-networks/twitter-list-of-legal-aid-pro-bono-organizations/.

[41] ABA Center for Pro Bono Exchange (Blog), http://centerforprobono.wordpress.com/

[42] Social Media and Pro Bono: An Essential for Program Success, ABA Dialogue (Fall 2011) http://www.americanbar.org/content/newsletter/publications/dialogue_home/dialogue_archive/ls_dial_fa11_probono1.html.

[43] For example, pro bono programs should consider encouraging volunteers to complete the section on LinkedIn that asks users to include "Volunteer Experience & Causes" in their profile. A pro bono program's loyal volunteers could use that tool to send a message to their LinkedIn colleagues about how they value pro bono in their legal careers. More information about the "Volunteer Experience & Causes" field in LinkedIn can be found at: http://press.linkedin.com/node/870.

[44] Aaron Smith, *Nearly Half of American Adults are Smartphone Owners*, Pew Internet (Mar. 1, 2012), http://pewinternet.org/Reports/2012/Smartphone-Update-2012/Findings.aspx.

[45] https://lawhelpinteractive.org/

[46] The American Recovery and Reinvestment Act also provided funds to expand broadband access in the United States through the Broadband Technologies Opportunities Program (BTOP). *See Broadband USA: Connecting America's Communities*, NTIA, http://www2.ntia.doc.gov/about. Some of these resources already have been spent on legal services. In 2010, BTOP provided $1.9 million to North Carolina Central University School of Law to "upgrade broadband services and deploy videoconferencing in five legal assistance facilities," and $4.1 million to the EdLab Group Foundation to "expand the capacity of local public computing centers," including "five rural courts . . . where residents can apply for public assistance, access online legal resources, . . . and seek the help of legal volunteers." *See* http://www2.ntia.doc.gov/grantee/north-carolina-central-university; http://www2.ntia.doc.gov/grantee/edlab-group-foundation-formerly-known-as-the-puget-sound-center-foundation-for-teaching-lear.

[47] These crowd-sourcing contests are detailed more fully in www.Challenge.gov.

[48] One excellent resource for leaders looking to build a good pro bono culture is Betty B. Stallings, *12 Key Actions of Volunteer Program Champions: CEO's Who Lead the Way* (2005), which identifies the importance of leadership support in creating a pro-volunteer culture in an organization, http://www.bettystallings.com/newbook/pdf/5-219-12KeyActions.pdf

[49] The Management Information Exchange annual fundraising conference is one such source of training. The ABA Resource Center on Access to Justice Initiatives is another valuable source of technical support. *See Legal Aid Funding: Resources and Technical Assistance*, ABA Standing Comm. on Legal Aid & Indigent Rights, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/funding_civil_legal_services.html.

[50] 45 C.F.R. § 1614.2(a).

[51] 45 C.F.R. § 1614.2(c).

[52] *Id.*

[53] External Opinion 2005-1001.

[54] *Id.*

[55] LSC already has retained a media consultant to produce a public service announcement (PSA) for LSC-grantees, which 20 LSC programs have signed on to use thus far.

[56] http://onepromiseflorida.org/

[57] http://mdcourts.gov/mdatjc/pdfs/mediakit.pdf

[58] ABA Standing Comm. on Legal Aid to Indigent Defendants, *Resource Center for Access to Justice Initiatives*, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/communications_resources.html

[59] *Resources*, Celebrate Pro Bono: Nat'l Pro Bono Celebration, http://www.probono.net/celebrateprobono/resources/folder.323461-Civic_Speeches

[60] One possibility is that firms would pay a per fellow fee to some centralizing body, possibly LSC, to underwrite the cost of administering the program.

[61] NCSC is a tremendous resource for data and information on efforts by state courts to increase pro bono participation.

[62] CCJ and COSCA, comprised of the judicial and administrative leaders of state courts, are influential organizations that can impact widespread change and garner significant support for specific policies or programs. The CCJ has issued resolutions highlighting the importance of pro bono representation and urging state courts to take steps to increase pro bono service by their bar members. *See* CCJ, *Resolution 7: Encouraging Pro Bono Service in Civil Matters,* (Feb. 1997) http://apps.americanbar.org/legalservices/probono/doc/resolutionvii.pdf; CCJ, *Resolution 23: Leadership to Promote Equal Justice*, (Jan. 2001) http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol23Leadership.html.; CCJ, *The Importance of Funding for the Legal Services Corporation from the Perspective of the Conference of Chief Justices and the Conference of State Court Administrators* (February 2012), http://ccj.ncsc.dni.us/pdfs/LSC_WHTPR.pdf *;* ABA Standing Comm. on Pro Bono & Public Serv*., Judicial Promotion of Pro Bono*, http://apps.americanbar.org/legalservices/probono/judicial/resolutions.html.

[63] For example, Colorado's Supreme Court recognizes on its web site those law firms, solo practitioners and in-house counsel groups who make a voluntary commitment to devoting 50 hours of pro bono legal services per year. *See* Colorado Supreme Court, *Pro Bono Legal Service Commitment and Recognition Program*, http://www.courts.state.co.us/Courts/Supreme_Court/Pro_Bono.cfm. Similarly, the District of Columbia courts recognize those who have provided more than 50 pro bono hours per year on the Capital Pro Bono Honor Roll. *See* D.C. Courts, *Pro Bono Honor Roll*, http://www.dccourts.gov/internet/about/probonohonorroll/main.jsf.

[64] *Celebrate Pro Bono: National Pro Bono Celebration Home*, http://www.probono.net/celebrateprobono/

[65] For a list of states which provide CLE credit for pro bono work, *http://apps.americanbar.org/legalservices/probono/clerules.html.*

[66] Otherwise, such rules have not been effective. For example, Washington State adopted a CLE for pro bono rule that also required that lawyers undergo a certain amount of training before they could obtain CLE credit for their pro bono work. Lawyers did not take advantage of the rule because it was difficult, especially for lawyers in rural areas, to access that training.

[67] ABA Standing Comm. on Pro Bono & Public Serv., *Judicial Promotion of Pro Bono*, http://apps.americanbar.org/legalservices/probono/judicial/statejudicialconduct.html#SI_KS.

[68] *See, e.g.,* Rule XXII of the Rules Governing Admission to the Bar of Texas, http://www.supreme.courts.state.tx.us/miscdocket/10/10917100.pdf (allowing military lawyers allowed to represent service members and their families); D.C. App. Rule 49, http://www.dccourts.gov/internet/documents/rule49.pdf (dealing with federal government lawyers); ABA Standing

Comm. on Client Protection, *State Implementation of ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*, http://www.americanbar.org/content/dam/aba/migrated/2011_build/probono_public_service/katrina_chart_2011.authcheckdam.pdf (allowing for temporary admission for out-of-state lawyers rendering pro bono after a major disaster); Corporate Pro Bono, *Multijurisdictional Practice: In-House Counsel Pro Bono*, http://www.cpbo.org/wp-content/uploads/2012/05/MJP-Article-May-2012.pdf (discussing in-house counsel); ABA House of Delegates Resolution 108, http://www.abanow.org/2012/01/2012mm108/ (encouraging state and local bars to allow military spouses to practice in other jurisdictions).

[69] ABA Commission on Law & Aging. *State Emeritus Pro Bono Practice Rules* (April 4, 2011), http://www.americanbar.org/content/dam/aba/migrated/legalservices/probono/emeritus.authcheckdam.pdf

[70] *See* ABA Model Rule 1.2; *see also* ABA chart on variations of Rule 1.2 among states, http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1_2.authcheckdam.pdf.

[71] *See* ABA Model Rule 6.5; *see also* ABA chart of variation of Rule 6.5 among states: http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/6_5.authcheckdam.pdf.

[72] ABA Model Rule of Professional Conduct 6.1 states that every lawyer has a professional responsibility to provide legal services to those unable to pay for them and should aspire to provide at least 50 hours of pro bono service each year. A majority of states have adopted Rule 6.1 in whole or in part and many states specify an annual pro bono hours target within their rule. *See* ABA Standing Comm. on Pro Bono & Public Service, *State-By-State Pro Bono Service Rules*, http://apps.americanbar.org/legalservices/probono/stateethicsrules.html; ABA Standing Comm. on Pro Bono & Public Service, *Overview of State Pro Bono Reporting Policies*, http://www.americanbar.org/groups/probono_public_service/policy/reporting_of_pro_bono_service.html.

[73] Robert Echols, *Examples of State Access to Justice Commissions: Creation, Structure and Accomplishments*, http://www.law.stanford.edu/sites/default/files/event/266627/media/slspublic/Examples%20of%20ATJ%20MIE%202008_1.pdf. *See also* ABA Standing Comm. on Legal Aid & Indigent Defendants, *State Access to Justice Commissions: Lists and Links*, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html.
There are statewide Access to Justice Commissions in 25 states and the District of Columbia (AL, AR, CA, CO, CT, HI, KY, ME, MD, MA, MN, MS, NV, NH, NM, NY, NC, SC, TN, TX, VT, WA, WV, WI, WY).

[74] *See* ABA Resource Center for Access to Justice Initiatives, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions_resources.html.

[75] *See* ABA Standing Comm. on Legal Aid & Indigent Defendants. *State Access to Justice Commissions: Resources on Structure, Development and Leadership,* http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/ state_atj_commissions_resources.html.

[76] Singsen, Gerry, *PAI – A Time for Reflection*, Management Information Exchange Journal, 29, 26-31 (Spring 2005).

[77] Some training, such as the Management Information Exchange annual fundraising conference is available, but even more tools and support are needed to grow this effort. The ABA Resource Center on Access to Justice Initiatives is one valuable source of technical support in this fundraising area. ABA Standing Comm. on Legal Aid & Indigent Defendants, *Resource Center for Access to Justice Initiatives*, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html.

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LEGAL SERVICES CORPORATION

REPORT OF THE PRO BONO TASK FORCE

OCTOBER 2012

United States Bankruptcy Court
Central District of California

Access to Justice: Self-Represented Parties and the Court

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FOREWORD

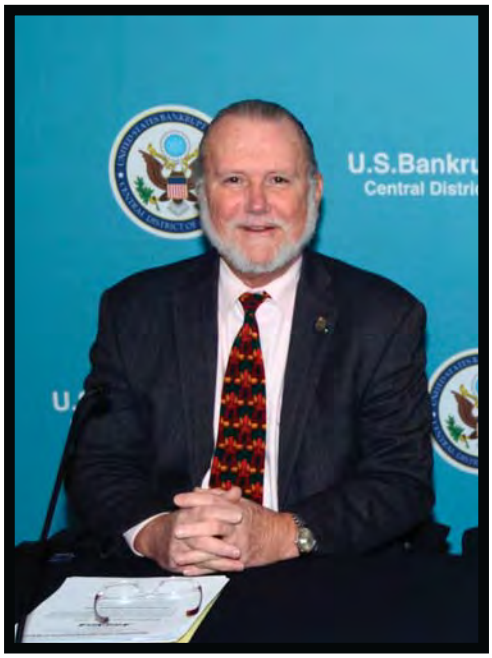
Although total case filings have dropped dramatically in the last few years, the percentage of debtors who represent themselves remains constant. This report reviews the outcome of self-represented cases and compares them to results seen in attorney-represented cases. Chapter 13 debtors who represent themselves fail at a much greater rate than either attorney-represented chapter 13 debtors or self-represented chapter 7 debtors. Chapter 13 trends are therefore more closely examined this year than in past reports.

Once again, you will see the extraordinary efforts made by our *pro bono* partners and volunteers. Their efforts provide essential services to economically vulnerable people who otherwise would not have adequate access to the Court. These efforts provided 6,780 people last year with necessary legal advice and representation. The ability to provide access to the Court expanded in 2014 through the addition of a clinic in the Coachella Valley, online chat functions and a free Internet-based petition preparation program.

Low-income debtors lost one of their biggest champions, and our court lost one of its kindest advocates shortly after 2014 came to a close. James T. King, a dedicated consumer bankruptcy attorney and a tireless *pro bono* volunteer, lost his battle to cancer on February 9, 2015. Jim helped with many projects at the court to increase access to justice. He began by volunteering to represent low income debtors through the Los Angeles County Bar Debtor Assistance Project. Later, Jim's assistance was invaluable in developing bankruptcy self-help clinics in the district. Jim was instrumental in establishing the Earle Hagen Memorial Golf Tournament seven years ago, the proceeds from which continue to increase the funding for *pro se* resources. We will all miss him terribly. This report is dedicated to Jim, a true warrior for access to justice.

Maureen A. Tighe
United States Bankruptcy Judge
Central District of California
Chair, *Pro Se* Resources Committee

In Memoriam:



James T. King
Aug. 13, 1948 - Feb. 9, 2015

I. INTRODUCTION

This report includes a lot of numbers summarizing what happened in cases, how many *pro bono* volunteers there were, and how many litigants received assistance. These summaries, unfortunately, do not enable the Court to measure the success of the access to justice programs in the district. The numbers provide a piece of the puzzle, but causation between *pro bono* or self-help services and "success" in a given case is not possible to study in any reliable or extensive way. An increase or decrease in the *pro se* level does not tell us whether those who filed needed to file or whether they filled out the many required forms correctly. The filing and *pro se* numbers are tied to many factors that cannot be measured. Even the numbers explaining dismissal and discharge rates do not tell us if the debtor was still able to save a home or a car, or whether there were non-dischargeable debts they did not realize would still be with them. We do know that 6,780 individuals who believed they could not afford counsel received legal advice from knowledgeable bankruptcy attorneys instead of turning to unlicensed petition preparers, random Internet advice or worse. We know from previous studies that many of these people also did not file bankruptcy after learning more. If they did choose to file, they were more likely to file the correct chapter, be aware of what a filing could and could not successfully address, and to actually obtain a discharge of debts.

The details gathered in this report may provide more information for academic professionals and others to evaluate self-represented parties in bankruptcy. We need to know much more about how to adequately address self-represented litigants in the bankruptcy courts. With the limited knowledge we do have, the Court's goal is to provide proper access for all parties, whether represented or not. Our case filing system is limited in what reports it can produce, and the following section provides the only "hard data" available at this time to learn how self-represented debtors fared in 2014. It will be instructive to see whether broader access to both Electronic Self-Representation (eSR) and Debtor Electronic Bankruptcy Noticing (DeBN) will increase successful outcomes for *pro se* debtors. While the ultimate goal is to have *pro se* debtors find quality bankruptcy attorneys to represent them, improving electronic access to the Court for *pro se* debtors enables them to better manage their cases on their schedule – helping to bridge the gap in access to the Court between represented parties and *pro se* debtors.

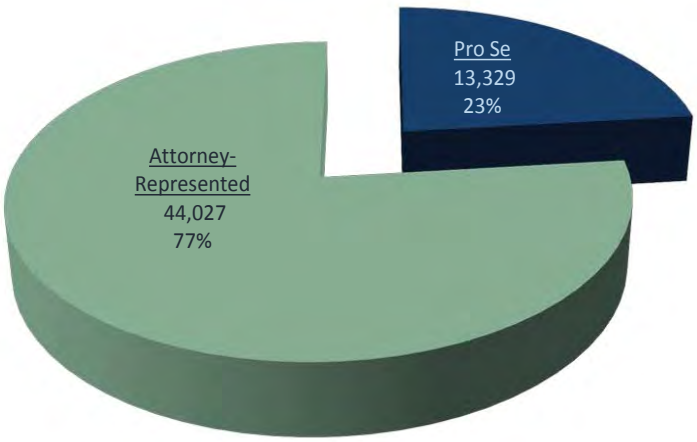
II. SELF-REPRESENTED PARTIES – THE NUMBERS

a. New Filings in 2014

In 2014, even with a substantial decline in its overall number of filings, the Central District of California continued to lead the nation with over 57,000 filings. More than 23 percent of these filings were filed without an attorney (self-represented or *pro se*), approximately 16.1 percent of the nation's total *pro se* bankruptcy filings. The total percentage of *pro se* filings nationwide was approximately 8.8 percent. The District has more than twice the number of *pro se* filings as the bankruptcy court with the next highest number of total *pro se* filings, the Middle District of Florida.

Figure 1

U.S. Bankruptcy Court - Central District of California
CY 2014

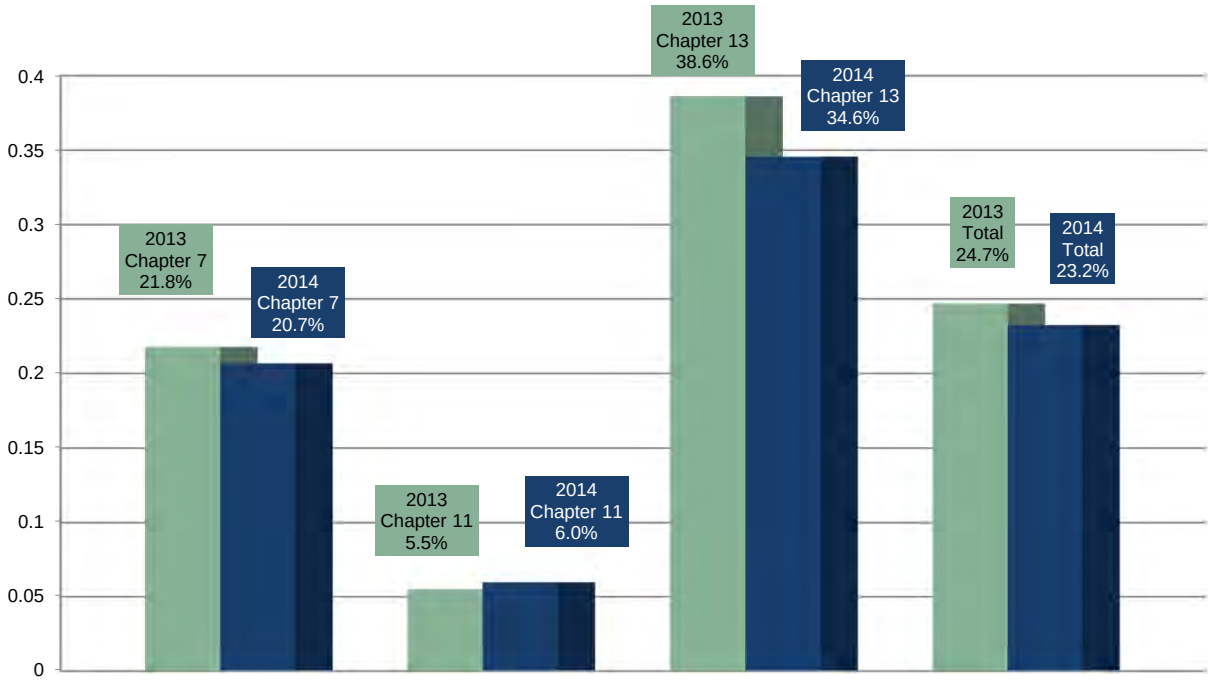


**Total filings include chapter 9, 12, and 15 filings*

Figure 1 shows the breakdown between represented and *pro se* debtors in all chapters filed in 2014. This does not include the numerous *pro se* creditors whom our case filing system cannot track. In 2014, the Court's *pro se* rate remained relatively about the same as the previous year: 23.2 percent, compared to 24.7 percent in 2013.

Figure 2

U.S. Bankruptcy Court - Central District of California
2013 vs. 2014 Percentage of *Pro Se* Debtors by Chapter



**Total filings include chapter 9, 12, and 15 filings*

Almost 80 percent of all bankruptcy cases filed in the Central District were chapter 7 cases. Figure 2 shows that over one-fifth of the Court's chapter 7 cases were filed by self-represented parties in 2014 – a sizeable portion of the Court's largest segment of filings.

The second most filed bankruptcy chapter in the District was chapter 13. As shown by Figure 2, chapter 13 has a higher rate of *pro se* debtors than in chapter 7. This may be due to the *pro se* debtors seeking a cost savings in obtaining the automatic stay, as the actual filing fee of $310 is slightly less than the chapter 7 fee of $335. This could also be the result of foreclosure mitigation schemes using chapter 13 as a means to obtain a stay without the oversight of a chapter 7 trustee. The breakdown of how many debtors filed each chapter, and whether represented or not, is detailed in Table 1.

i. Cases Reaching Final Disposition in 2014

The graphs in this section illustrate the incidence of significant bankruptcy case events (e.g. confirmation, discharge, dismissal and closing) within the calendar year of 2014. The calendar year approach used in previous reports failed to present a complete picture for a small number of cases. For example, if a case is filed in December 2014, it will not have progressed to the point of having a plan confirmed or receiving a discharge or dismissal within the calendar year.

Table 1

Representation in All Bankruptcy Filings
12-Month Period Ending 12/31/14

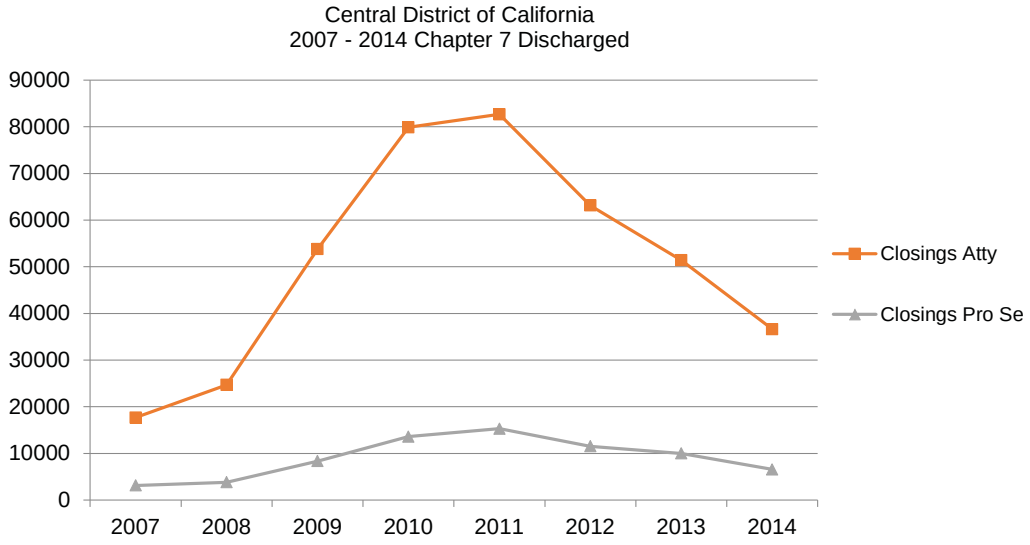
	Represented	***Pro Se***	**Total**
Ch. 7	36,263	9,447	45,710
Ch. 9	0	0	0
Ch. 11	472	30	502
Ch. 12	3	0	3
Ch. 13	7,289	3,851	11,140
Total	**44,027**	**13,329**	**57,356**
	76.8%	23.2%	

Totals include chapter 15s.

The revised method in this report accounts for the fact that many bankruptcy cases continue into subsequent years before the case reaches a final disposition. Even with the limitations of the data presented based on cases filed within a calendar year, used in past reports, we found no significant variation from the conclusions reached when analyzing the same data based on the cases closed.

As shown in Figure 3, every year a far larger number of chapter 7 debtors hire attorneys for representation. The number of self-represented cases closed with a discharge was significantly lower than for the attorney-represented cases, especially in the years from 2009 to 2011. The steep curve of the attorney-represented line reflects a peak in the number of filings following the Great Recession of 2008. A slight lag time in the number of discharges following the 2008 filings may have been due to the Clerk's Office catching up on a backlog of cases to discharge

Figure 3



from these peak filings. The number of self-represented chapter 7 debtors who received a discharge did not increase in proportion to the number of self-represented cases filed over peak filing years. This, once again, underscores the relatively poor success rate of self-represented debtors in chapter 7.

Pro se cases represented nearly a third of the chapter 7 cases that were dismissed. The percentage of attorney-represented chapter 7 cases that were dismissed, on the other hand, was miniscule (Figure 4). For all chapters, *pro se* cases were dismissed at an even higher rate, approaching almost half of the dismissed cases for the year (Figure 5). At 13.7 percent, dismissals of attorney-represented cases were only a slightly higher rate, when considering all chapters, than for chapter 7, alone (Figure 5).

Figure 4

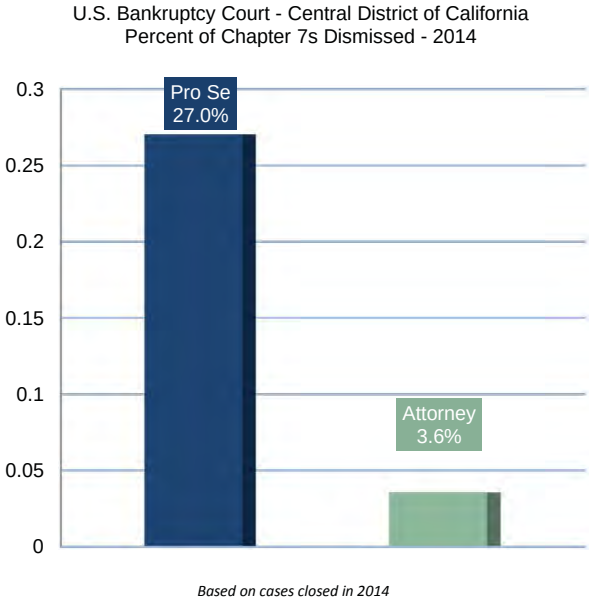
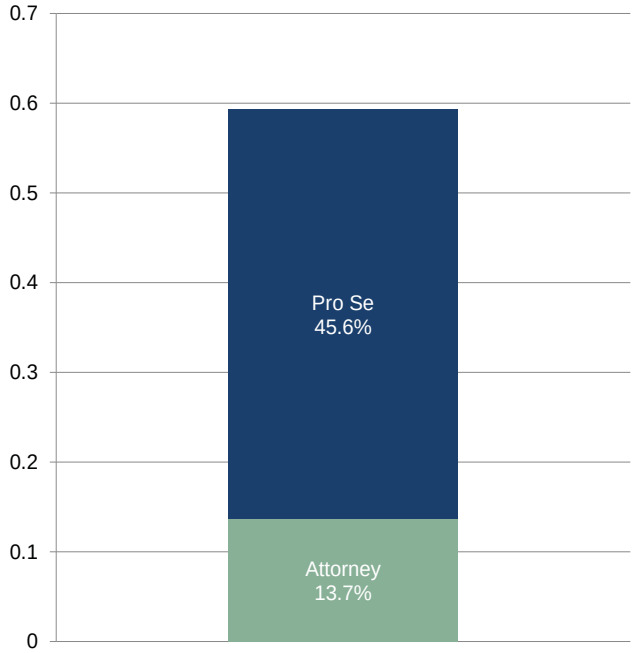


Figure 5

U.S. Bankruptcy Court - Central District of California
2014 Dismissals - All Chapters



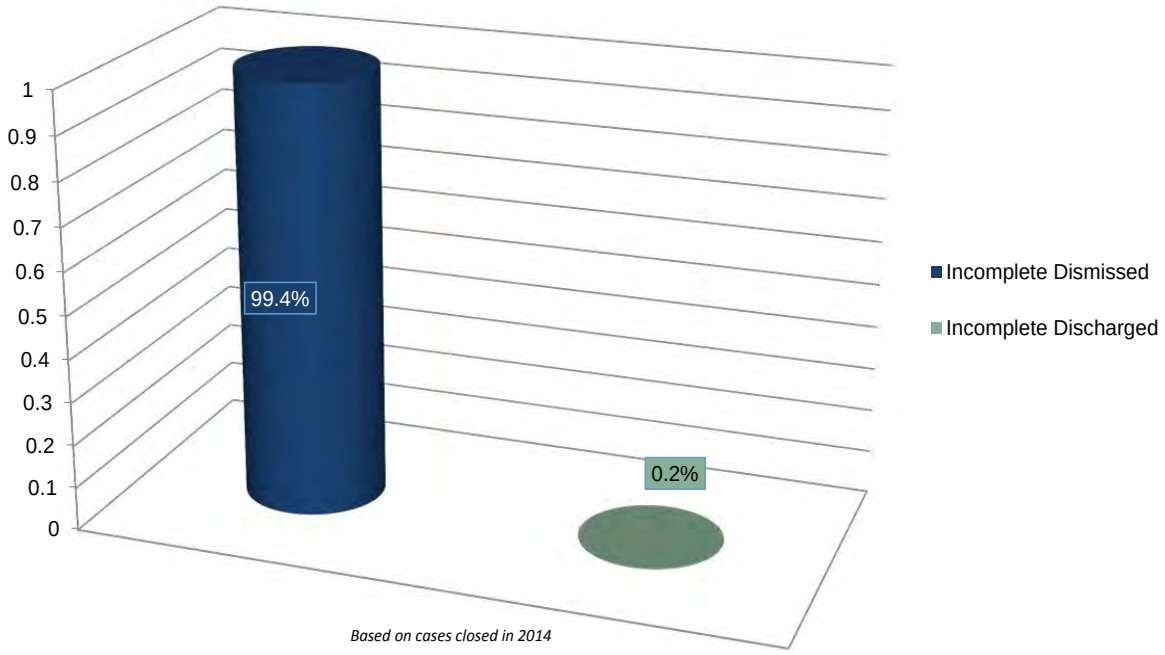
Based on cases closed in 2014

Incomplete cases are those cases filed without all required schedules and the statement of financial affairs. When everything required under Federal Rule of Bankruptcy Procedure 1007 is not filed, the case is typically dismissed after 14 days (See 11 U.S.C. § 521). This may be due to filers hastily seeking the protection of the automatic stay to forestall events such as imminent foreclosures or evictions. In their haste, these debtors may neglect to file the correct papers or meet the necessary deadlines for filing schedules. The debtor may obtain the protection of the automatic stay for a couple of weeks, but fail to receive a discharge of debts and raise a presumption of abuse in future filings (See 11 USC § 362(b)(21)).

Dismissal is almost a certainty for self-represented parties who do not file a complete petition package. Figure 6 shows that the percentage of *pro se* cases filed with incomplete information that were dismissed was over 99 percent. More incomplete cases are filed by *pro se* debtors (over 21 percent) as compared to about three percent of attorney-represented cases (Figure 7). Figure 8 illustrates the rate of incomplete cases in 2014, compared to the total rate of dismissed *pro se* cases in each bankruptcy chapter for that year.

Figure 6

U.S. Bankruptcy Court - Central District of California
Percent of *Pro Se* Incomplete Closings Dismissed vs. Discharged
2014 - All Chapters



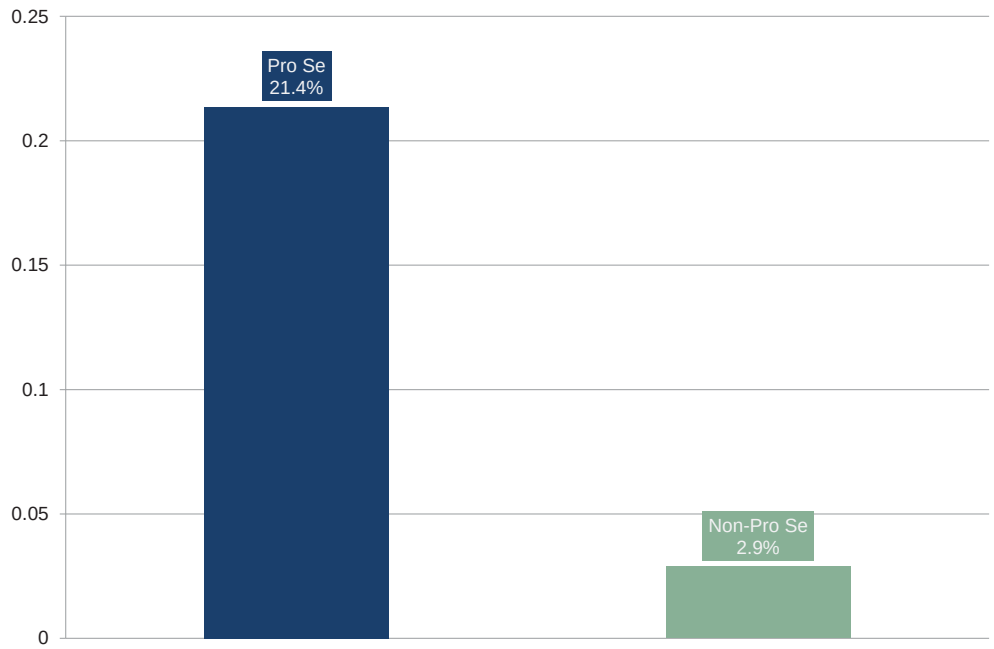
Based on cases closed in 2014

In 2014, nearly twice the number of *pro se* chapter 7 cases were dismissed as attorney-represented cases. A similar trend emerges regarding the number of incomplete chapter 7 *pro se* cases that were dismissed as compared to attorney-represented incomplete cases (Table 2).

Given that attorneys filed almost four times the number of chapter 7 cases as self-represented parties (Table 1), the higher number of *pro se* cases that were dismissed is especially striking (Table 2).

Figure 7

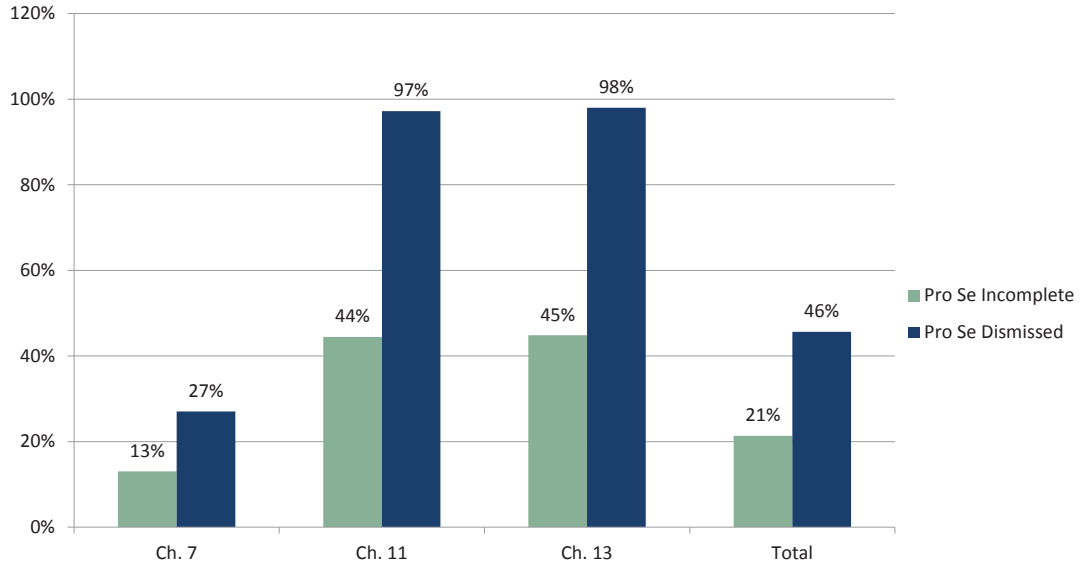
U.S. Bankruptcy Court - Central District of California
2014 Percent of Incomplete Closings - All Chapters



Based on cases closed in 2014

Figure 8

2014 Percentage of *Pro Se* Cases
Dismissed or Incomplete - All Chapters

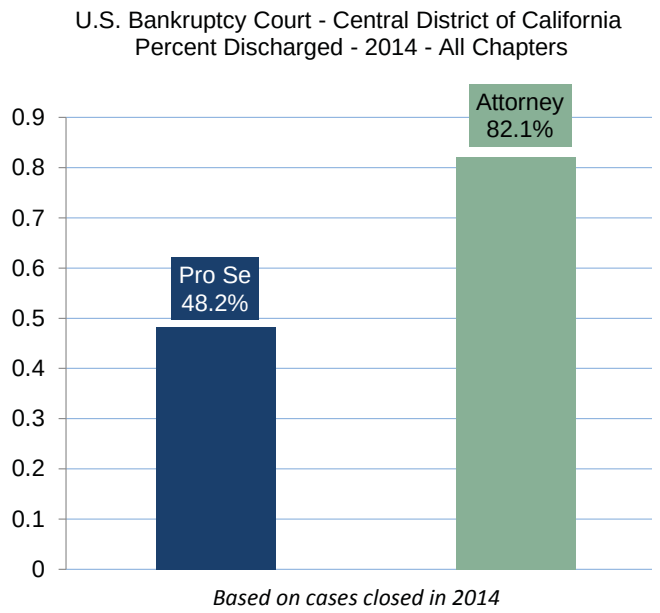


Based on cases closed in 2014

Table 2			
2014 Chapter 7 Cases			
	Attorney-Represented	***Pro Se***	**Total**
Dismissed	1,410	2,737	4,147
Incomplete Dismissed	595	1,307	1,902
Percent Dismissed Of Total Cases	3.6%	27.0%	8.3%
Discharged	36,638	6,589	43,227
Incomplete Discharged	36	5	41
Percent Discharged Of Total Cases	92.6%	65.1%	87.0%
Total Cases	39,575	10,122	49,697

Based on cases closed in 2014

Figure 9

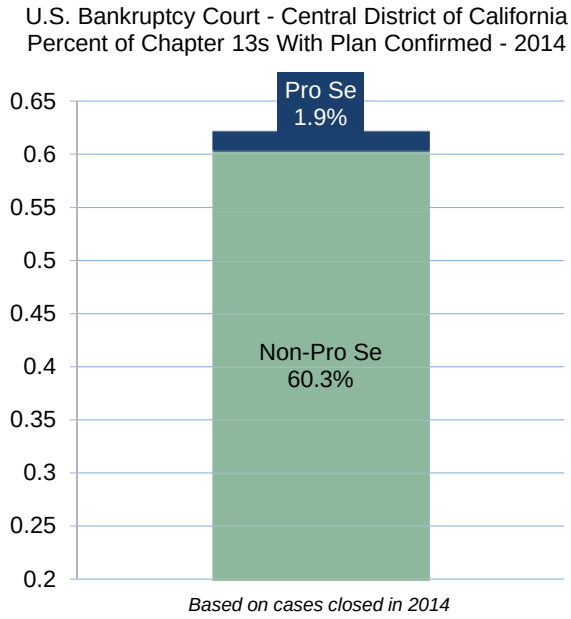


b. Chapter 13 Updates

This year, we discovered a programming error in the national bankruptcy case filing system, CM/ECF, which caused the chapter 13 confirmation rate to be slightly under-reported for 2013 and 2014. The programming error was reported to the Administrative Office of the United States Courts (AO) and corrected. In the last report, we stated that there were only three plan confirmations out of the chapter 13 self-represented filings in 2013. There were actually 25 confirmations from chapter 13 self-represented filings, as compared to 2,810 plans confirmed for chapter 13 attorney-represented filings in 2013. In 2012, of chapter 13 self-represented filings, there were 33 instead of 24 confirmed plans. These 33 confirmed plans, were dwarfed in number compared to the 3,842 plans confirmed for chapter 13 attorney-represented cases.

The corrected numbers did not change the conclusion drawn in previous reports, which is still that an extremely small percentage of the self-represented chapter 13 filings reach plan confirmation (Figure 10). This abysmal success rate continues every year, illustrating why representing oneself in chapter 13 is either a mistake or a tactical decision. As the attorney fee can be paid through the plan over three to five years, any debtor that is seriously seeking the advantages of chapter 13 should consult a chapter 13 attorney. Instead, over the peak filing years between 2009 and 2013,

Figure 10



such as in 2011, the number of pro se filings hovered around half of chapter 13 filings. (Figure 11).

Less than half of all pro se cases closed in 2014 received a discharge, while over 82 percent of attorney-represented cases received a discharge (Figure 9). Although more than half of self-represented filers receive no financial relief from the process, their credit reports still reflect that they have filed for bankruptcy.

Figure 11

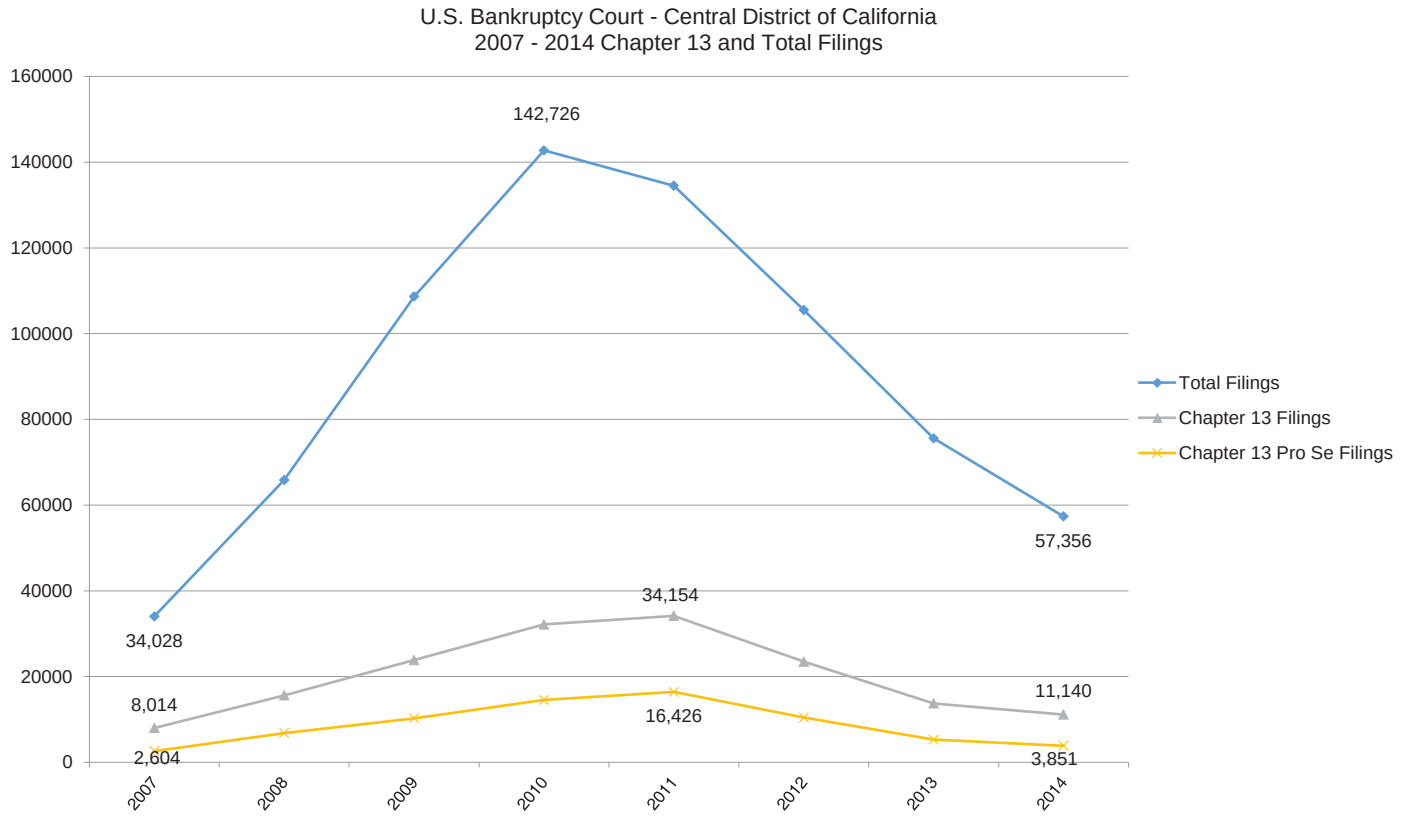
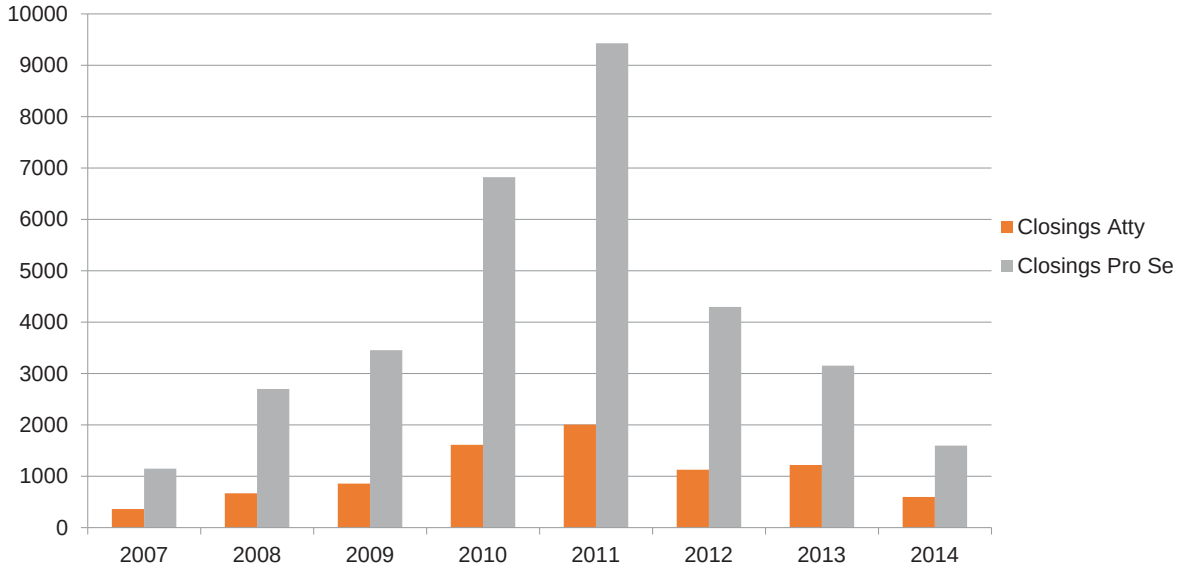


Table 3 Central District of California 2007 - 2014 Chapter 13 Discharges		
	Attorney	Pro Se
2007	1,207	25
2008	489	10
2009	652	6
2010	515	12
2011	624	8
2012	696	4
2013	1,932	16
2014	2,907	28

Based on cases closed in each year

Figure 12

Central District of California
2007 - 2014 Chapter 13 Incomplete Dismissed



Based on cases closed in each year

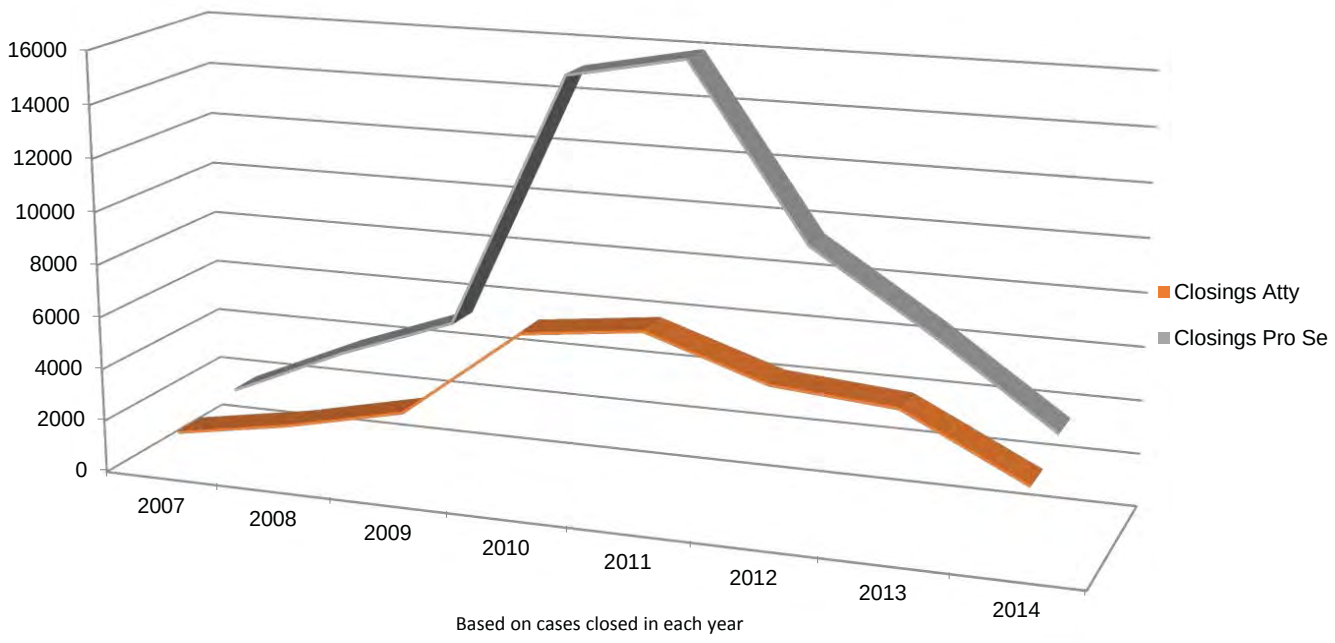
Table 4 Central District of California 2007 - 2014 Percent of *Pro Se* Chapter 13 - Dismissed After Plan Confirmation		
Plan Confirmed	Dismissed After Plan Confirmed	% Plan Confirmed - Dismissed
39	10	25.6%
47	29	61.7%
43	27	62.8%
75	58	77.3%
49	35	71.4%
40	34	85.0%
70	51	72.9%
68	37	54.4%

The above bar graph emphasizes the overwhelming number of chapter 13 incomplete *pro se* cases dismissed each year, as compared to the number of attorney-represented incomplete chapter 13s. Just as in chapter 7, self-represented parties are more likely to have their incomplete chapter 13 cases dismissed than attorney-represented debtors. This trend is consistent year after year.

The number of *pro se* cases that were dismissed prior to plan confirmation in 2014 remains notably higher than attorney-represented cases also dismissed prior to plan confirmation (Figure 13). Even for *pro se* cases that make it through plan confirmation, the number that gets dismissed remains high (Table 4). This trend is also consistent year after year, demonstrating that even savvy *pro se* debtors are perhaps encountering difficulty administering their own chapter 13 cases (e.g., knowing whether to file motions to modify the plan, object to claims, or strip liens).

Figure 13

Central District of California
2007 - 2014 Chapter 13 Cases
Dismissed Prior to Plan Confirmation



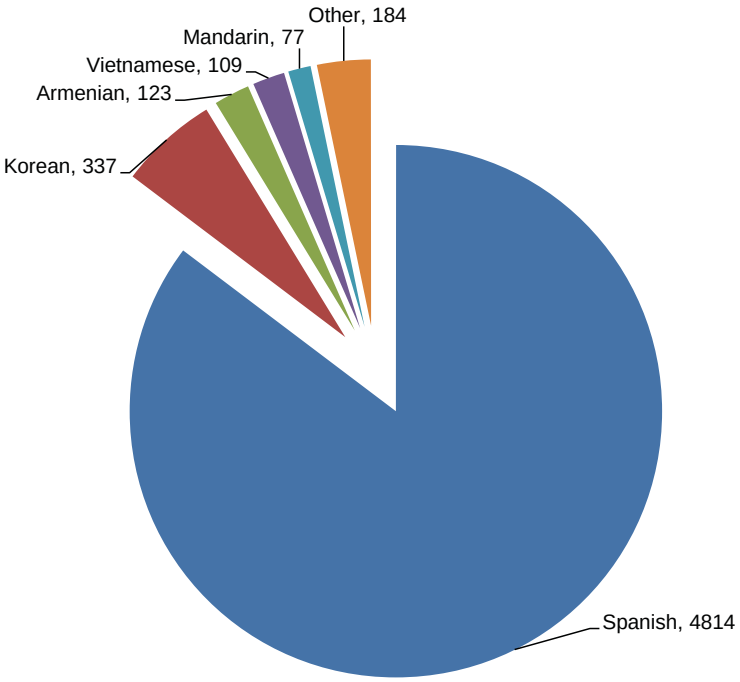
c. Language Barriers

The Central District of California remains one of the most racially and culturally diverse districts in the nation. Figure 14 is drawn from the United States Trustee Program's Language Assistance Summary, and shows the variety of language requests serviced in the District.

A lack of English language proficiency in the region presents yet another obstacle to both Court accessibility and to obtaining services for these parties. In total, data collected from the United States Trustee's Language Assistance Program (January – December 2014) identifies foreign language interpretation service requests for a total of 32 different languages, with Spanish being requested most often.

Figure 14

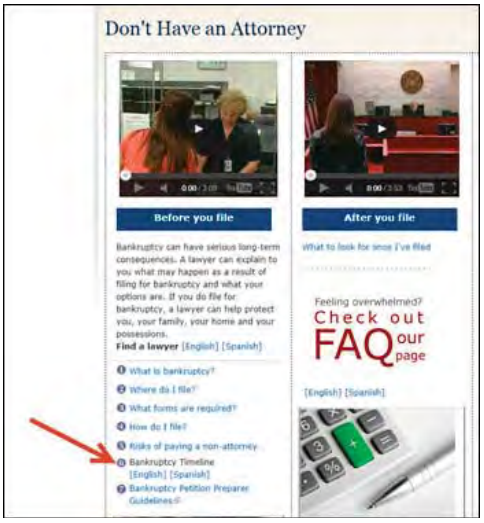
U.S. Trustee Program
Language Assistance Summary Statistics for 2014



III. EXISTING PROGRAMS AND SERVICES

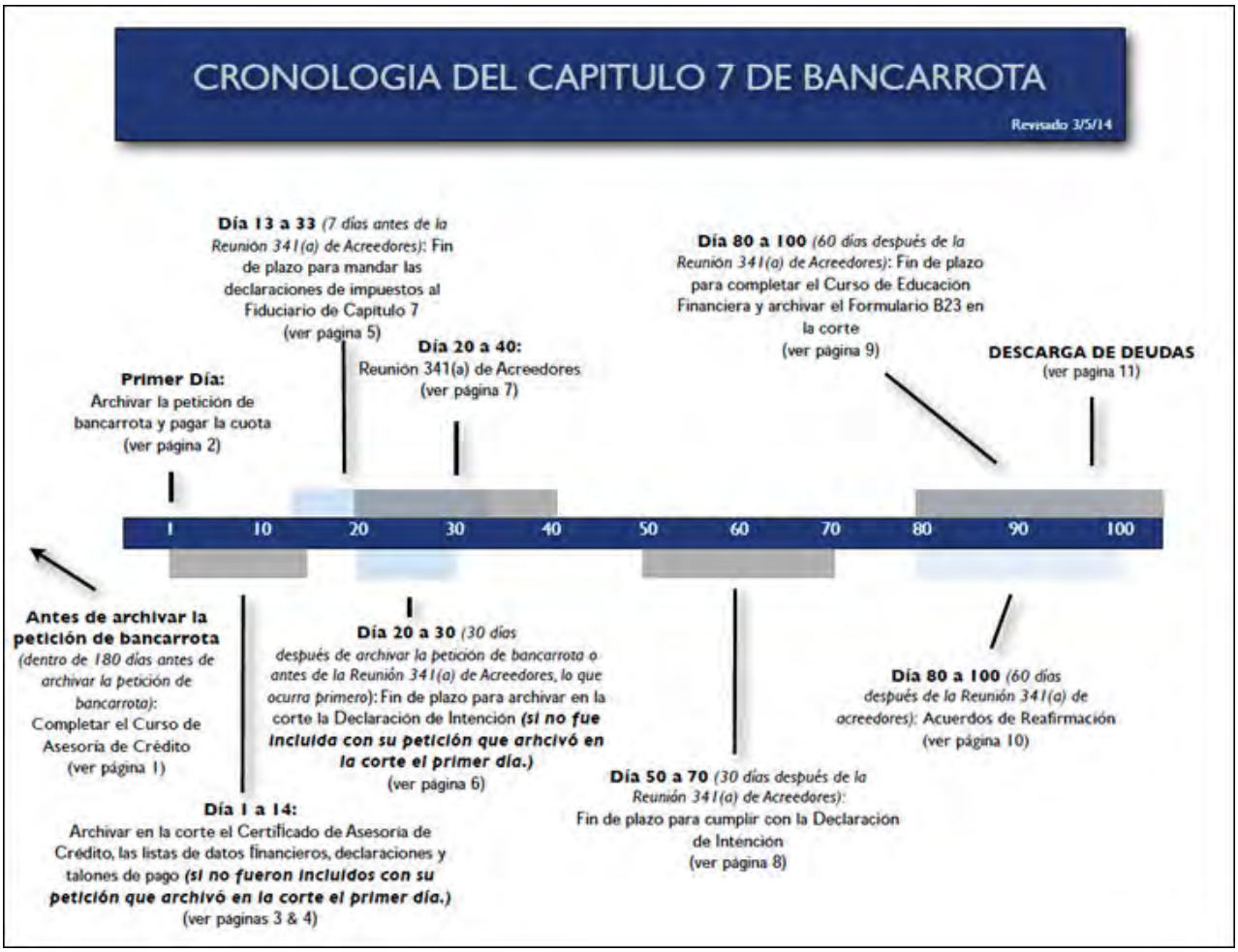
a. Online Resources

As mentioned in the 2013 report, the Court has added a wide array of resources for self-represented parties visiting the Court's website and Intake areas. The "Don't Have an Attorney" page on the Court's website is a one-stop page providing self-help guidance. It includes information geared toward those who have yet to file and those who have already filed. Both at the window and online, the Court provides petition packets that include instructions and examples for filling out the petition, schedules, and statement of financial affairs. The Court website has long displayed judge-specific information, trustee office locations, FAQ's for a broad range of bankruptcy questions (in both Spanish and English), links to approved credit counseling agencies and financial management courses, bankruptcy fees, and download ready rules and forms. Additionally, the Court distributes State Bar pamphlets, and other flyers specifically troubleshooting the common problems that arise in cases filed by those without an attorney.



The Court's "Don't Have an Attorney" web page serves as a centralized place for self-represented parties to locate information specific to their needs, such as the hours for self-help clinics and seminars offered at each division, and contact information for free or low cost bankruptcy attorneys.

In 2014, the Court began reviewing data to analyze how website visitors accessed this information. Based on its analysis of the website's Google analytics, the *Pro Se* Committee began planning a website task force to observe use of the website by self-represented debtors visiting the Court's self-help desks. This task force will analyze how the web page is currently used in order to update the location of information so that the links used more frequently, such as the "For Debtors" link, will access the most informative web page on that topic in the future.



i. Spanish Timeline

In 2014, the Court expanded its interactive, virtual timeline of chapter 7 bankruptcy with a version translated into Spanish. Viewable on the "Don't Have An Attorney" web page, the timeline visually represents a typical sequence of events for chapter 7 bankruptcy -- beginning with the pre-filing credit counseling course, and ending with the bankruptcy discharge. Debtors can click on each event in the timeline to find more information on specific requirements, deadlines, and links to useful resources. The timeline gives debtors critical information in manageable segments focused on the aspect of the bankruptcy case they need.

ii. Online Chat

The Court's Online Chat was developed in 2013 to make it easier for court users to find answers to their procedural questions. In its initial phase, the chat feature was only available to filers using CM/ECF, which is largely used by attorneys. This included online instant messaging with a Court representative to answer case-specific questions and obtain links to frequently requested forms, motions, and orders.

In 2014, the Court's online chat was made available to all visitors surfing the Court's website and to self-represented litigants through the Court's "Don't Have an Attorney" web page. Approximately 1,730 chats came in from the Court's website in 2014 (excluding January when the chat feature was not yet available on the website).

A review of quarterly chat reports showed the number of chats received from the general public is generally two to three times higher than chat requests from CM/ECF users. However, chat requests from the website may also include attorneys in addition to creditors and debtors. Chat users are not restricted from using the general public access to chat and are not required to identify themselves, so the Court is unable to track the type of chat user making the request.

Common questions received concern the location of 341(a) meetings and continuance dates; the status of orders and motions, reaffirmations, audio/transcript requests and the amount of fees; general questions regarding discharge, closings, and dismissals; and general case information about credit counseling courses, as well as how to obtain copies and certifications. Also, Court representatives have anecdotally mentioned that they frequently receive inquiries from self-represented parties as to where they may electronically file documents.

While self-represented parties may not file documents through CM/ECF, the eSR software featured in the next section may provide some additional convenience to self-represented parties. Both eSR and chat may be especially helpful to parties in remote locations and disabled parties who have difficulty visiting our onsite self-help desks detailed later in this report. Online chat is available Monday through Friday from 9:00 a.m. to 4:00 p.m., excluding federal holidays and other published Court closures.

iii. eSR and Self-Help Resource Center

eSR electronic Self-Representation

An attorney is HIGHLY recommended if you:

Have tax debts or student loans, own your own business, are facing foreclosure, are filing Chapter 13, or have previously filed bankruptcy.

1. Thinking about filing bankruptcy?
2. Don't want to pay a non-attorney simply to type your paperwork?
3. Comfortable using a computer?

Give *electronic Self-Representation* a try!

Filing bankruptcy can have serious long-term legal and financial consequences. Potential debtors are encouraged to consult a competent bankruptcy attorney for legal advice before making the decision to proceed with the filing.

This computer program is offered to individuals who reside in the Central District of California who have made the decision to file a bankruptcy case without the representation of an attorney. eSR allows self-represented debtors to electronically prepare and submit an individual Chapter 7 bankruptcy petition. A paper petition is not required if eSR is used to file the bankruptcy petition. eSR users are asked to answer a series of questions and enter personal information to create the data that automatically populates official bankruptcy forms required for filing bankruptcy.

Interested? Email Sabrina Palacio-Garcia at Sabrina_Palacio-Garcia@cacb.uscourts.gov

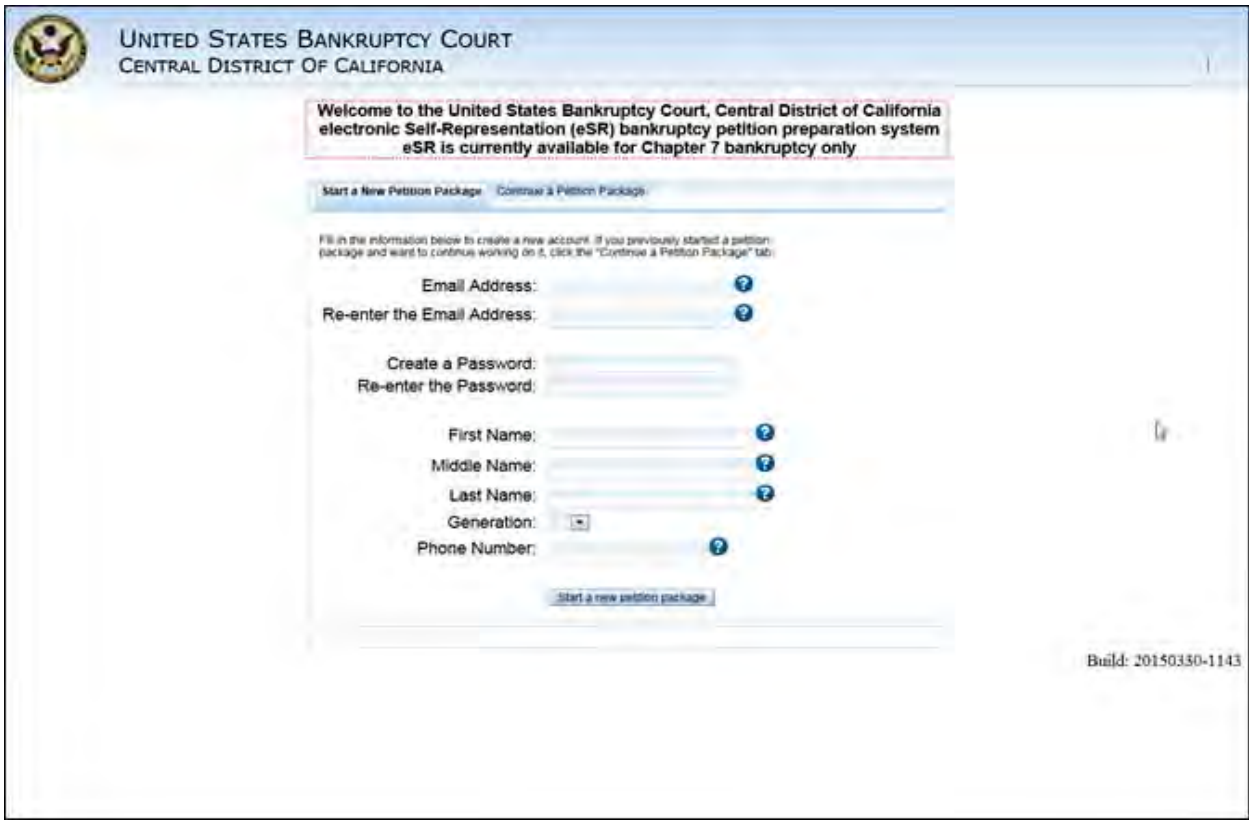
You may also provide your contact information to any Clerk's Office employee.

On March 31, 2014, the Central District of California became the first of three test courts to install the electronic Self-Representation (eSR) software successfully in the live environment. eSR is an online tool to help individuals prepare a chapter 7 bankruptcy petition when they have decided to file bankruptcy without an attorney. Judge Maureen A. Tighe has led the Court's participation over the past several years in developing this tool as part of a national pathfinder initiated by the Administrative Office of the United States Courts.

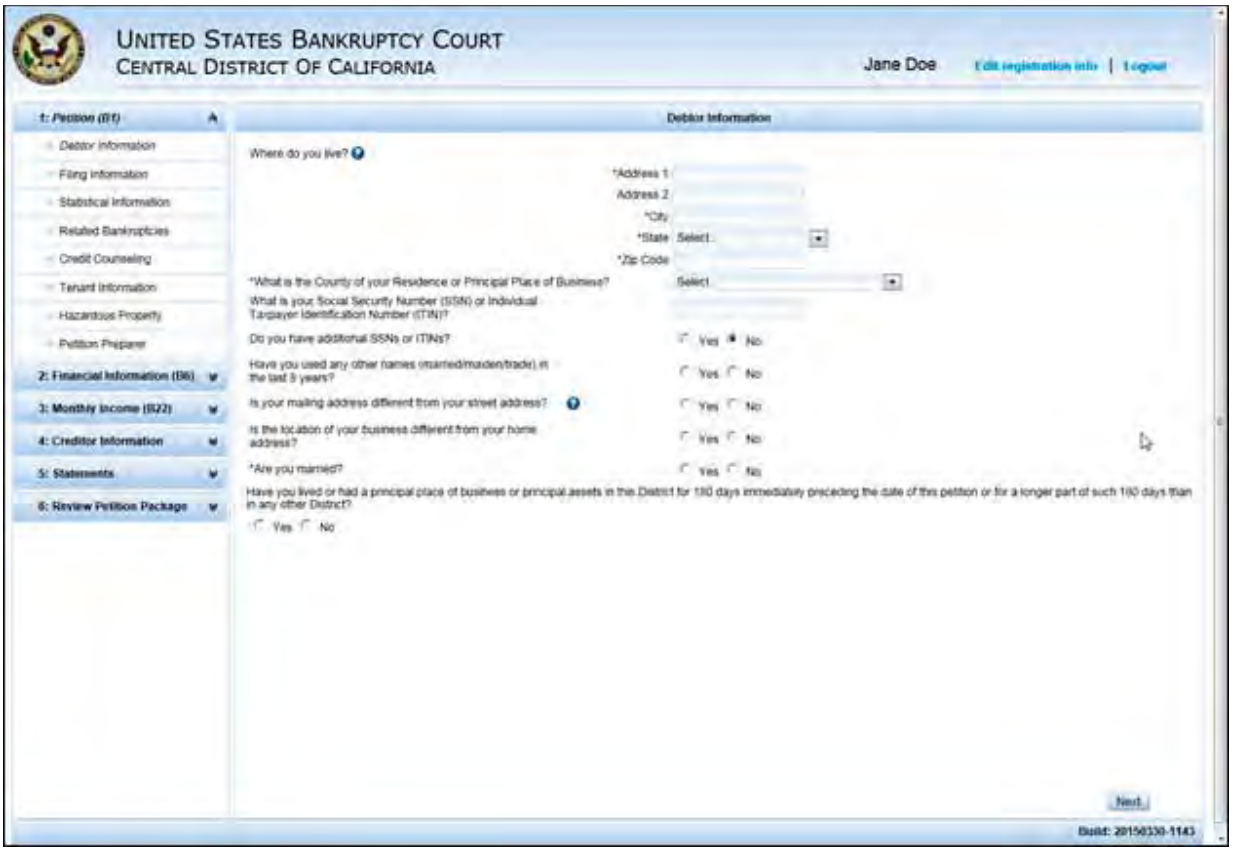
Initially, eSR was only available at the Los Angeles Division. Debtors were screened for moderate typing skills, literacy in English, and to determine if they were preparing a chapter 7 consumer debt filing that was non-emergency. Screening was completed by Public Counsel after attending a chapter 7 bankruptcy seminar held twice a month at Public Counsel's office. A similar collaboration was established with Public Service Law Corporation at the Riverside self-help clinic.

The Los Angeles Division had its first official eSR debtor file for bankruptcy on April 16, 2014, making the Court the first in the nation to have an eSR filing. District-wide, intake staff was trained on how the eSR software works and on case processing. Additionally, attorneys volunteering in the self-help clinics also received an overview of eSR and case processing in order to be equipped to answer questions from those using the eSR software to prepare petitions.

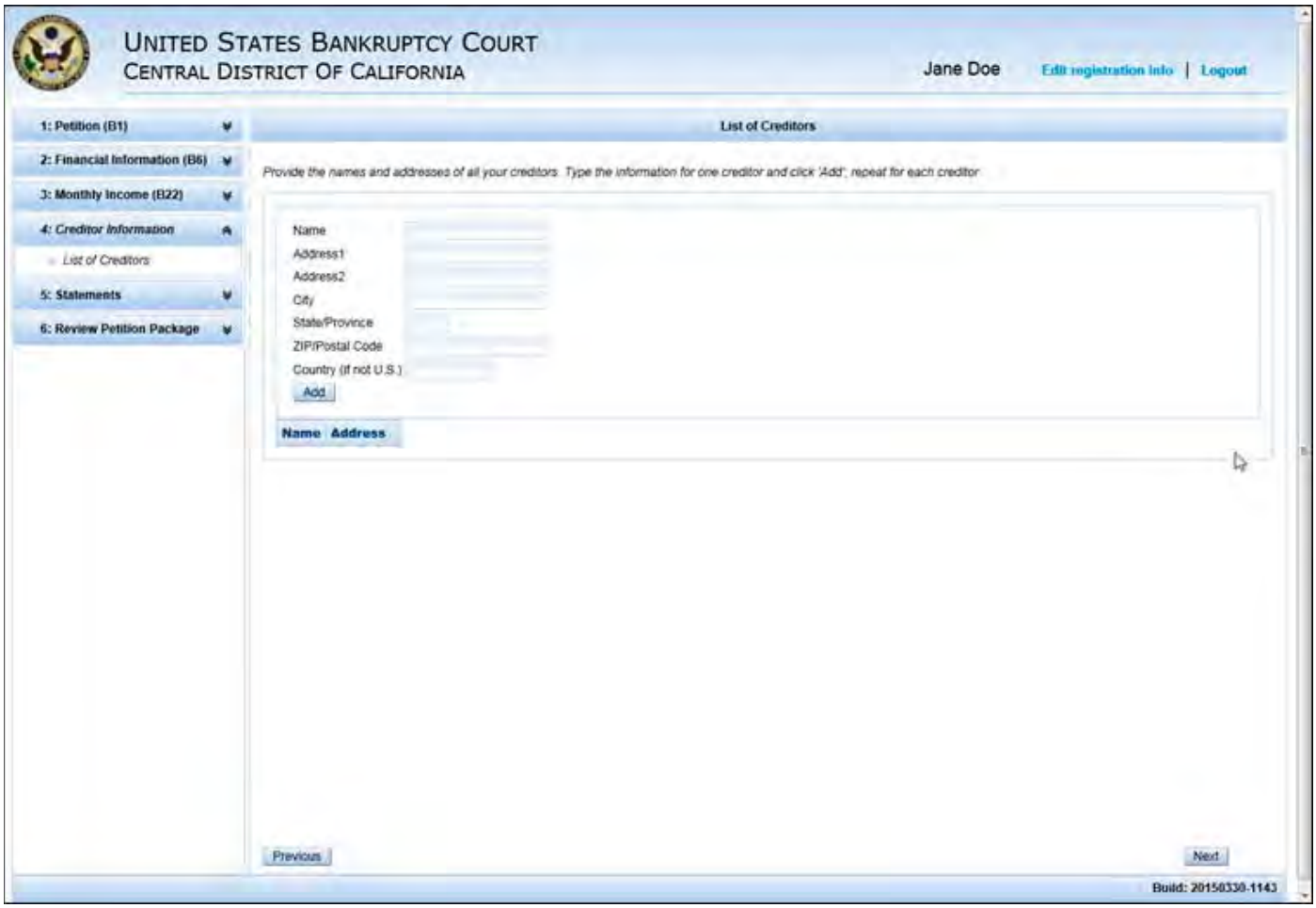
INITIAL SCREEN BEFORE SIGN IN:



SECOND SCREEN AFTER SIGN IN

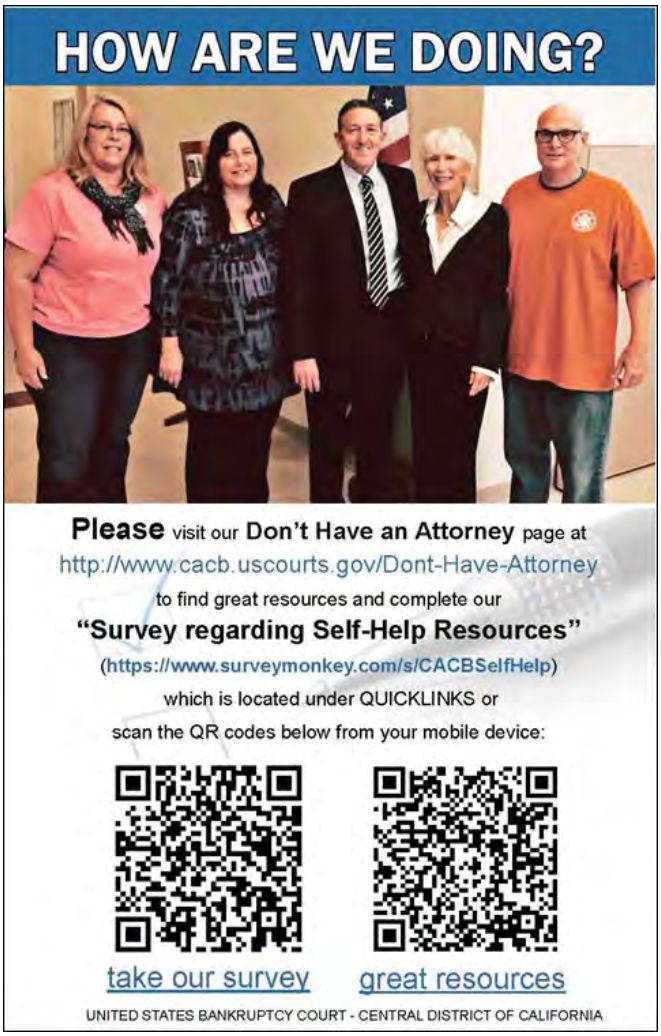


LIST OF CREDITORS



All divisions now have at least one computer dedicated for the public to use eSR for preparing their filings and one computer to use as a resource to research bankruptcy information or to find credit and financial management courses. The Los Angeles and Riverside divisions' self-help desks received valuable suggestions from the staff and eSR debtors during this period. Many users suggested expanding the software's help feature and adding edit functionality to modify information already entered throughout the module.

After integrating suggestions from initial software users, on Wednesday, September 24, the Court soft-launched the eSR software on the Internet for general access by the public – a major milestone in the project. The software is accessible via the eSR homepage located on the Court's website at http://www.cacb.uscourts.gov/esr. In addition to a link to eSR, the homepage has eSR frequently asked questions, links to additional forms to be completed and filed with an eSR petition, and also an electronic bankruptcy petition checklist to assist debtors with gathering all the required documents before getting started on a petition. The first two debtors who used eSR to submit and subsequently file for chapter 7 bankruptcy successfully received their discharge in 2014. There were a total of 15 eSR filings in 2014. This is a significant step forward in making the Court fully accessible electronically to self-represented users.



iv. Survey Results

In the Spring of 2014, the Court began distributing a self-help flyer with a QR code to link to a new survey and self-help resources. The survey examines the demographics and experience of those using the Court's self-help resources. Survey responses have been overwhelmingly positive regarding the services provided on the Court's website, as well as the services provided by Court staff and self-help desk representatives.

Survey participants were largely in the age range of 51-65; and most listed English as their primary language. Every survey participant listed the wait time to receive guidance with an attorney volunteer was as at least "good." Many survey participants visited a self-help desk and said they would visit the self-help desk and bankruptcy court website in the future. Many survey participants also mentioned that medical bills/health, job loss/unemployment, or credit card debt led them to file bankruptcy. An example of comments received is shown on the next page. We continue to seek new avenues for feedback from self-represented parties so that we can assist them in obtaining advice of counsel for the information they need.

CACB Self-Help Survey

Thank you for helping the court improve its services by briefly answering the following questions

1. Please choose your primary language from the list below.

- English
- Spanish
- Arabic
- Mandarin
- Japanese
- Armenian
- Vietnamese
- Russian
- Korean
- Farsi
- Other (please specify):

2. Please choose your age from the selection below:

- [18-35]
- [36-50]
- [51-65]
- [66+]

3. When did you visit the free self-help center or clinic?

I visited on: MM / DD / YYYY HH : MM AM/PM

4. Which self-help location did you visit?

- Los Angeles Self-Help Resources Center
- San Fernando Valley Self-Help Desk

Comment: "Received helpful, thorough information and assistance with knowledge and understanding of debtor's problems n [sic] anxieties. The individuals assisting are patient, courteous and generous with their expertise."

b. Court Resources and *Pro Bono* Partnership

i. San Fernando Valley Reaffirmation Breakfast

Reaffirmation hearing volunteers at the San Fernando Valley Division. (From left to right: Steve Hoffman; Hon. Martin R. Barash; Michael Gottfried; Hon. Victoria S. Kaufman; R. Grace Rodriguez; George Dulgeryan, Ilsa Klavir; Stella Havkin; Hon. Geraldine Mund; and Gayle Higgins)

Public Counsel started the reaffirmation hearing clinic program in 1998 under the leadership of two private attorneys, Jeff Krause and Tom Walper. The program was first implemented in the Los Angeles Division in conjunction with Public Counsel. The program was so successful that Public Counsel later worked with the San Fernando Valley Division, as well as local consumer bankruptcy bar associations and law firms in the Woodland Hills area, to staff the clinic on a monthly basis. In Woodland Hills, the judges host breakfast for the volunteers and any other attorneys appearing for reaffirmation 30 minutes before the volunteers are scheduled to provide counsel and advice to debtors that day. After breakfast, the volunteer attorneys then meet with the debtors on calendar before the hearings.

ii. *Pro Bono* Volunteers Honored (*Pro Bono* Breakfast)

Hon. Peter H. Carroll provides remarks at the Court's Pro Bono Breakfast Reception

Hon. Maureen A. Tighe speaking at the Court's Pro Bono Breakfast Reception

Celebrate Pro Bono
www.celebrateprobono.org
National Pro Bono Celebration
October 19 - 25, 2014

From left to right: Middle District of Florida Bankruptcy Clerk Lee Ann Bennett, Hon. Vincent P. Zurzolo, and Clerk of Court Kathleen J. Campbell attending the 2014 Pro Bono Breakfast Reception.

Clockwise left to right: Hon. Thomas Donovan, Public Counsel Supervising Senior Staff Attorney Magdalena Reyes-Bordeaux; Dr. Maureen Conner, Michigan State University Judicial Administration Program Director; and guests attending the Court's Pro Bono Breakfast Reception.

On October 20, 2014, the Court hosted a breakfast reception for the *pro bono* volunteers listed in its 2014 Honor Roll. The Court also published its annual Honor Roll update to commemorate the beginning of the American Bar Association's National *Pro Bono* Celebration week, which took place October 19-25. Clerk of Court Kathleen J. Campbell and Judges Neil W. Bason, Thomas B. Donovan, Sandra R. Klein, Maureen A. Tighe and Vincent P. Zurzolo mingled with over 40 guests, including volunteers, judiciary staff, and guests from the United States Trustee's Office who were treated to breakfast pizza, hashbrowns and muffins. The event was made possible by funds provided by the Central District's Attorney Admission Fund.

Chief Judge Peter H. Carroll made remarks in appreciation of the Court's *pro bono* volunteers, noting that the Central District is still the only bankruptcy court to participate in the national *pro bono* celebration. Judge Maureen A. Tighe then shared words of inspiration from her recent introduction to Supreme Court Justice Sonia Sotomayor, who also champions *pro bono* work, emphasizing the impact volunteers have made in the District. Volunteers in attendance were provided certificates of recognition, "celebrate *pro bono*" lapel pins and pens, and copies of the 2013 Report, *Access to Justice: Self-Represented Parties and the Court*. Certificates for those volunteers who were unable to attend the celebration were distributed to the *pro bono* organization with which they served. To view the list of honorees, the 2014 Honor Roll is posted on the Court's website under Programs & Services>*Pro Bono* Volunteers Honored.

IV. FUNDING SOURCES FOR NON-COURT SERVICES

a. Attorney Admission Fund

The self-help desks at the Los Angeles, Santa Ana, and Riverside Divisions are funded, in part, by the Attorney Admission Fund managed by the Attorney Admission Fund Board. Continued annual funding by the Attorney Admission Fund of the clinics and self-help desks throughout the District depends heavily on the ability of each clinic to show that it has sought and obtained funding from other sources to meet its obligations. The self-help desks are also supported through their independent fundraising efforts, grants, and by local bar associations, as described in the next section of this report.

b. Bar Support and Holiday Parties

i. Orange County

The Court thanks the Orange County Bar Association's Commercial Law and Bankruptcy Section and its members for their generous contribution to the Santa Ana Self-Help Desk facilitated by Public Law Center (PLC). In September 2014, PLC fundraising, through the hard work of a few and the generosity of many, raised over $42,000 for the self-help desk located on the second floor of the Ronald Reagan Courthouse at the Santa Ana Division. The local bar and colleagues of the section in Los Angeles and Riverside were very generous despite the financial impact of the decline in filings on firms practicing bankruptcy law. This funding will go a long way to facilitate continued funding of PLC's self-help desk by the Attorney Admission Fund in the future.

ii. Los Angeles

1. Holiday Event at Mr. C's

Bar associations in Los Angeles hosted a holiday party at Mr. C's in Beverly Hills on December 8, 2014. Sponsors included the following organizations: Los Angeles Bankruptcy Forum; Central District Consumer Bankruptcy Attorney Association; Financial Lawyers Conference; and Southern California Turnaround Management Association.

Jeffrey Krause, Esq. speaking at the LABF holiday party

Hon. Vincent P. Zurzolo speaking at the LABF holiday party

Hon. Geraldine Mund speaking at the LABF holiday party

Hon. Alan M. Ahart and Kenneth Sulzer, Esq.

Front Row (left to right): Public Counsel Supervising Senior Staff Attorney Magdalena Reyes-Bordeaux, Hon. Sandra R. Klein, Hon. Alan M. Ahart, LABF President Elissa Miller, Esq. Back Row (left to right): Attorneys Eric Israel, John Tedford, Zev Shechtman, and Ben Logan.

2. California Bankruptcy Forum

With the support of the California Bankruptcy Forum (CBF), Public Counsel was able to purchase new items needed for the self-help desk.

Public Counsel Staff Attorney Christian Cooper using laptop purchased with CBF donation.

c. Golf Tournament

Left to right: Peter Gurfein, Esq.; Hon. Vincent P. Zurzolo; Public Counsel Supervising Senior Staff Attorney Magdalena Reyes-Bordeaux; Public Counsel President and CEO Hernán Vera

Left to right: Hon. Maureen A. Tighe; Hon. Catherine E. Bauer; Hilda Montes de Oca, law clerk; and Marisa Hawkins

Silent Auction

Left to right: Hon. Robert N. Kwan; Hon. Catherine E. Bauer; Hon. Sheri Bluebond; Ray Aver, Esq.; Jonathan Hayes, Esq., Bob Hessling, Esq.

Left to right: Hon. Peter H. Carroll; Public Counsel Supervising Senior Staff Attorney Magdalena Reyes Bordeaux; James King, Esq.; and Public Counsel Staff Attorney Christian Cooper holding a huge $38,292.64 check for the Debtor Assistance Project from the Earle Hagen Memorial Golf Tournament.

d. Run for Justice

Public Counsel is an official charity of the ASICS LA Marathon, and the Run for Justice raises money to support Public Counsel's *pro bono* assistance programs. On March 8, 2014, the orange T-shirts of Public Counsel's Run for Justice once again colored the LA Big 5K race as *pro bono* attorneys, Public Counsel staff, representatives from local law firms and court staff attended the event. Participants also enjoyed coffee, food, and a photo booth at the Third Base Club inside Dodger Stadium hosted by Public Counsel.

Left to right: Bankruptcy Court staff pictured at the Run for Justice: Front row: Veronica Magno, Jennifer Harmon, and Sandi Brask; Back row: Michele Downing, Leanne O'Brien, Jan Zari, Wendy Jackson, and Jennifer Wright.

e. Leslie Cohen 5K

The Leslie Cohen Law (LCL) 5K was held April 27, 2014 at Santa Monica's Reed Emerson Park. In 2014, the LCL 5K raised $7,500 to support Public Counsel's Debtor Assistance Project (DAP).

Front Row (left to right): Law Clerks Albert Sheen, Angella Yates, Lily Tran; Hon. Julia W. Brand; Hon. Catherine E. Bauer; Law Clerk Jennifer Leinbach. Back Row (left to right): Law Clerks Jeff Tchakarov, Lovee Sarenas; Extern Jamie Lopez, and Law Clerk Kristin Smith.

V. PROJECT UPDATES AND FUTURE ENHANCEMENTS

a. Electronic Self-Representation (eSR)

The electronic filing project will continue to improve as we see how the public interacts with Electronic Self-Representation (eSR). The Court will be increasing its outreach efforts so that more debtors learn of this free service.

b. Limited Scope of Representation

An August 2014 Ninth Circuit BAP decision, *DeLuca v. Seare*, addressed ethical concerns regarding limited scope of representation, prompting Judge Maureen A. Tighe and Judge Meredith A. Jury to establish a bench-bar committee to reconsider the Court's limited scope rules in relation to the California Rules of Professional Conduct and the *Seare* decision. (See *DeLuca v. Seare*, BAP No. NV-13-1196-KiTaJu (B.A.P. 9th Cir. Aug. 25, 2014.)) The committee had its first meeting in December 2014, and plans to continue through 2015. A new rule addressing limited scope representation should be considered in 2015 enabling more clarity as to when a party is self-represented.

VI. CONCLUSION

Those who seek assistance are generally able to find some guidance, either through the self-help desks or a clinic. Despite these efforts, the indisputable conclusion is that it is better to be represented by qualified counsel. The disparity in outcomes between self-represented debtors and those who have an attorney is vast. While many gaps have been plugged and many debtors are able to succeed without counsel, the Court's goal is still to encourage attorney representation wherever possible.

The Court has provided appropriate resources physically and online to assist litigants in seeking relief at the Court properly and competently. Our ongoing initiatives will continue to reduce staff time spent processing incorrect filings, allowing staff to focus efforts on offering services providing the greatest benefit to all litigants, represented or not. We will continue to measure whether our existing systems and programs are effective in addressing the needs of self-represented litigants, to evaluate whether the Court is utilizing ever-shrinking resources efficiently, and to tailor programs and services more precisely in the future.

VII. APPENDIX

The following section contains reports received from our public interest partners throughout the District.

a. Number of Self-Represented Litigants Served/Services Provided

Self-Help Desks on location at the Los Angeles, San Fernando Valley, Northern, Santa Ana, and Riverside Divisions help the Court and the public they serve within the Central District of California by:

- providing free legal advice and programs for self-represented filers;
- reducing the burden on judges and staff from filers who cannot afford the legal assistance necessary to navigate a complicated bankruptcy process;
- reducing delays for all parties that result from self-represented filers requiring additional time and assistance from judges and staff;
- improving access to the bankruptcy process for all parties, regardless of income;
- enabling referral by Court staff who are prohibited from providing legal advice to those at the self-help desk that can provide it; and
- offering an alternative to non-attorneys who sometimes provide illegal and overpriced services.

Total	**PRO BONO SERVICES BY DIVISION** **Total Debtors Served** (January – December 2014)				
	Los Angeles	Riverside	Santa Ana	Northern	San Fernando Valley
6,780	3,268*	1,563	912	230	807
*This number includes pro bono services from Bet Tzedek and Legal Aid Foundation of Los Angeles.					

1. Los Angeles Division

In 2014, the Los Angeles Division was served by several *pro bono* organizations including Public Counsel's Debtor Assistance Project (DAP), Bet Tzedek Legal Services, and the Legal Aid Foundation of Los Angeles. In the following sections, a summary of the number of visitors served accompanies each organization.

Self-help information and materials are coordinated district-wide through Public Counsel's Debtor Assistance Project (DAP). The DAP began as the Court's first effort to make *pro bono* programs available to the public within its jurisdiction, and has become the umbrella committee and resource for projects for all self-represented parties throughout the District.

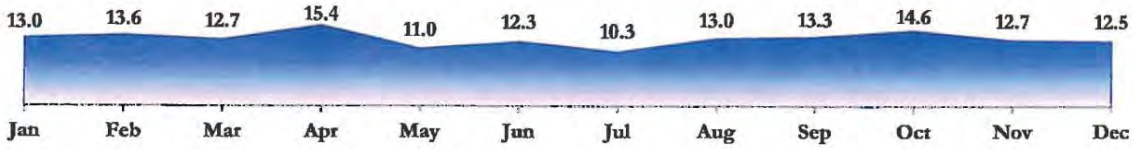
Despite its name, the DAP addresses the needs of self-represented creditors as well as those of debtors. Each participating nonprofit organization serves its dedicated clientele, but all self-help desks using Court space must provide service to any party who visits the Court.

The DAP holds bi-monthly meetings at the Court, bringing together representatives of public interest law firms, volunteer attorneys, chapter 7 and 13 trustees, bankruptcy judges, the Clerk's Office, and the Office of the U.S. Trustee. The DAP raises funds for and awareness of its programs, provides training for *pro bono* attorneys, and exchanges information on trends and issues related to providing *pro bono* and self-help assistance, as well as best practices.

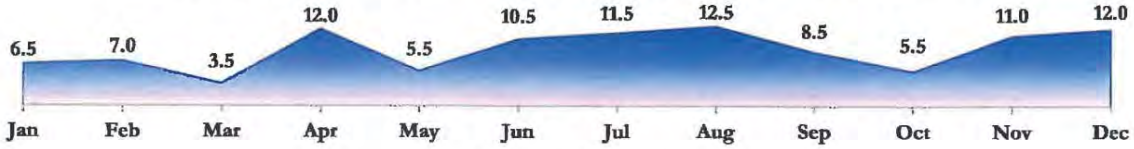
Over 2,846 Debtors Served By Public Counsel in 2014	
Incoming Hotline Calls and Debtor Inquiries	**591**
Debtors assisted at Los Angeles Bankruptcy Self-Help Desk and Pro Se Clinic:	**1,102**
Debtors who attended Chapter 7 Bankruptcy Pro Se Clinics:	**173**
Debtors counseled before reaffirmation hearings in Los Angeles:	**747**
Debtors counseled before reaffirmation hearings in Woodland Hills:	**233**
DAP placed cases (full representation by an attorney)	**50**
TOTAL	**2846**
Chapter 7, adversary proceeding and reaffirmation hearing volunteers:	**72**
L.A. Bankruptcy Self-Help Desk volunteers:	**77**
Chapter 7 Pro Se Clinic volunteers:	**43**
Translation volunteers	**9**
TOTAL	**201**

Public Counsel
Debtor Assistance Project
2014 Statistics

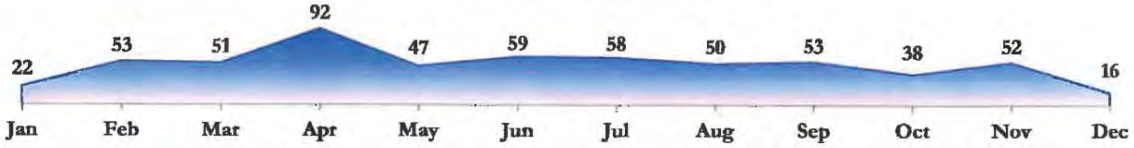
Average Daily Visits to L.A. Bankruptcy Self-Help Desk



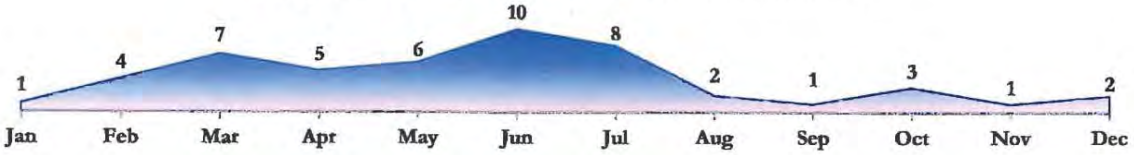
Average Number of Attendees per Chapter 7 Bankruptcy Clinic



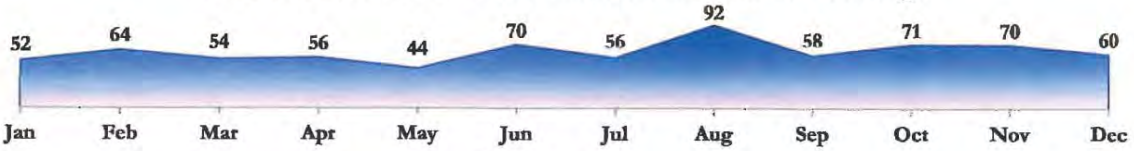
Incoming Calls to DAP Hotline



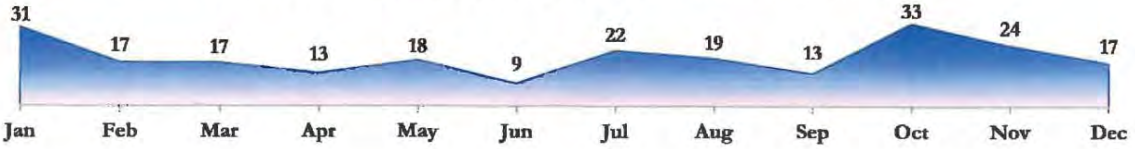
Chapter 7 Cases Placed with Pro Bono Attorneys



Debtors Counseled Before L.A. Reaffirmation Hearings



Debtors Counseled Before W.H. Reaffirmation Hearings



Services offered at the L.A. Self-Help Desk:

- Preparing answers to adversary proceedings
- Amending bankruptcy petitions
- Reporting attorney misconduct
- Motions to vacate bankruptcy case dismissal
- Answering Chapter 7 bankruptcy questions
- Chapter 13 bankruptcy feasibility analysis
- Preparing responses to motions for relief from stay
- Creditor is suing me
- Creditor rights
- Credit repair
- Debt collection/creditor harassment
- Eviction
- Food and housing assistance
- Foreclosure issues
- Identity theft
- Loan modification referrals
- Reporting petition preparer fraud
- Preparing proofs of claim
- Assisting with reaffirmation agreements and rescissions
- Preparing motions to reopen cases to file the financial management certificate
- Review of chapter 7 petition before filing

At the December 2014 DAP meeting, Public Counsel Supervising Senior Staff Attorney Magdalena Reyes Bordeaux reported that the numbers served at the Los Angeles Self-Help Desk had significantly dropped. In 2014, Public Counsel assisted approximately 56 percent of the number of debtors it assisted at Reaffirmation hearings, as compared to 2013. The decreased number of visitors made case placement easier to complete, although the number of complex cases increased.

General Overview of Reaffirmation Program in Los Angeles and Woodland Hills

Public Counsel and *pro bono* volunteers counsel clients before reaffirmation hearings at the bankruptcy courts in Woodland Hills and Downtown L.A. about the pros and cons of signing reaffirmation agreements, mainly for vehicle loans.

Volunteer attorneys find their *pro bono* volunteer contributions to be very rewarding as people often come to the hearings worried that they are going to lose their cars. After volunteers counsel them, they are usually much more relieved, and in most cases can keep their cars if they have complied with the requirements of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), and the client is current on both the loan and insurance.

As of 2014, the volume of reaffirmation hearings each month had subsided in both divisions along with the reduction in chapter 7 filings. In the Los Angeles Division, there were approximately 50-60 matters on calendar (mostly on vehicles and some real property). In the San Fernando Valley Division, there were 25-35 matters on calendar (mostly on vehicles and real property, as well). The programs are very similar in both divisions, but there are a few differences noted below.

Los Angeles

The program in Los Angeles takes place once a month and the date and location of the hearings rotate each month. Public Counsel receives a six-month calendar for hearings set for the following

six-month period. Participation in the program is voluntary by bankruptcy judges in the Los Angeles Division and there are judges in this division who “opt out” of the program and hear reaffirmations as part of a regular calendar where no volunteers are present.

When Public Counsel receives the calendar, they solicit volunteers for the program and work with the Court to coordinate the logistics of rooms, check-in tables, and conference rooms for that day at least a week in advance of the hearing. Public Counsel has reported the logistical assistance provided by the Court has been very helpful at these hearings, especially when there is a large calendar.

The Court gives notice to debtors appearing at the hearings and advises them to arrive an hour prior to their scheduled hearing to receive counseling. On the day of the hearings, there are typically five to six volunteers available to counsel debtors and each judge has their own procedure regarding how they would like to handle the reaffirmation hearings. For example, some judges will wait until all debtors have been counseled before they start the calendar, while other judges prefer to start on time and make general announcements before allowing uncounseled debtors to obtain individual counseling from a volunteer attorney.

Public Counsel trains all new volunteers by giving them materials in advance of the program and also having them shadow an experienced attorney on their first day. In addition, Public Counsel provides volunteers with parking information so that they will be able to find affordable parking in the surrounding area. Public Counsel also encourages new volunteers to stay and observe the hearings so that they can see what a difference their counseling makes for the judge and for the client. After a debtor is counseled by a volunteer, the reaffirmation hearing moves more quickly and is accompanied by less back and forth between the judge and the debtor when a reaffirmation agreement is denied.

Woodland Hills

The reaffirmation clinic program in Woodland Hills (San Fernando Valley Division) is scheduled for a specific date every month. On the third Tuesday of the month, the San Fernando Valley Division bundles the reaffirmation hearings of all of the judges in the Division. In this Division, there is also a comparatively small calendar and there are usually more than enough volunteers to counsel debtors at the hearings. Given that the parking at the San Fernando Valley Division is free, volunteers may be less discouraged to participate than at the Los Angeles Division where parking fees are borne by volunteers.

Attorney Feedback

Attorneys really enjoy this program because the time commitment is limited and it provides them with hands on experience with counseling debtors. Public Counsel also provides malpractice coverage to all of their *pro bono* attorneys. This has never been an issue, but Public Counsel advises all of their *pro bono* attorneys about this in advance.

Bankruptcy Basics MCLE:

Fifty-nine attorneys and support staff attended a three-hour Bankruptcy Basics training on August 7, 2014 for MCLE credit. The training covered the nuts and bolts of chapter 7 bankruptcy. The following topics were included: the client interview;

bankruptcy basics

Public Counsel — an introduction to chapter 7 consumer bankruptcy law

panelists:

Jim King, Esq. — King & Associates

Erik Clark, Esq. — Bernstein & Clark

Moderator

Christian Cooper, Esq. — Public Counsel

date: Thursday, August 7, 2014
time: 9:00 a.m. – 12:00 p.m.
location: Roybal Federal Building, 255 E. Temple Street, 12th Floor, Assembly Room 1268, Los Angeles, CA 90012

YOU MUST SIGN UP FOR A TWO-HOUR *PRO BONO* COMMITMENT TO REGISTER FOR THE PROGRAM

If you are interested in attending, please complete a brief questionnaire at surveymonkey.com/s/bkbasics to determine your *pro bono* options. You must sign up for your *pro bono* hours before you can register for the program. The program is approved for three hours of MCLE credit. **Space is limited.**

This program is cosponsored by ***ediebua*** *and the* ***United States Bankruptcy Court for the Central District of California***

Refreshments generously provided by **Short Modify, Inc.**

settlement agreements:

Public Counsel — what you need to know for state and bankruptcy courts

panel:

Hon. Thomas B. Donovan — U.S. Bankruptcy Court

Stella Havkin, Esq. — Havkin & Shrago

Raymond H. Aver, Esq. — Law Offices of Raymond H. Aver, A Professional Corporation

Moderator

Christian Cooper, Esq. — Public Counsel

date: Tuesday, November 4, 2014
time: 9:00 a.m. – 12:00 p.m.
location: Roybal Federal Building, 255 E. Temple Street, 12th Floor, Assembly Room 1268, Los Angeles, CA 90012

YOU MUST COMPLETE A TWO-HOUR *PRO BONO* COMMITMENT BEFORE ATTENDING THE PROGRAM

If you are interested in attending the program, please complete an online survey at www.surveymonkey.com/s/bkbasics to determine your *pro bono* options. You must complete your *pro bono* hours before the date of the program. This program is approved for three hours of MCLE credit. **Space is limited.**

Program co-sponsored by ***ediebua*** *and the* ***United States Bankruptcy Court for the Central District of California***

Refreshments generously provided by **CIN Legal**

preparing and filing the petition; preparing for the meeting of creditors; and issues that may arise after the meeting of creditors.

Settlement Agreements MCLE Program:

Fifty-four attorneys came to a three-hour Settlement Agreements program on November 4, 2014 for MCLE credit. The panelists reviewed the fundamentals of settlement agreements for bankruptcy and state court, from the perspective of plaintiff's counsel and defense counsel.

Funding sources supporting Public Counsel programs are discussed elsewhere in this report and include the following: the Attorney Admission Fund; Earle Hagen Memorial Golf Tournament; Leslie Cohen Law 5K; Run for Justice; Los Angeles Bankruptcy Forum Holiday Party; Mr. C's Annual Holiday Party; and the California Bankruptcy Forum.

Bet Tzedek

In 2014, nine volunteers assisted Bet Tzedek's Debtors' Rights and Bankruptcy Project, including one full-time attorney working through the Berkeley Law Public Interest Fellowship program. Project staff also worked closely with the advocates and dozens of volunteers assigned to Bet Tzedek's Community Outreach Project. Project volunteers conducted one-on-one client interviews, reviewed financial documents, prepared chapter 7 bankruptcy petitions, wrote letters to creditors and collectors, helped clients respond to bank levies and wage garnishments, and assisted victims of identity theft. Volunteers also helped clients understand and exercise their rights under the fair debt collection laws, review and correct credit reports, and respond to judgment enforcement actions. Volunteers evaluated each visitor's circumstances and, when appropriate, filed chapter 7 bankruptcy petitions in the Los Angeles and Woodland Hills Divisions. On a more limited basis, clients were given assistance on debts resulting from identity theft, government offsets from public benefits and lastly, student loan discharge applications.

Bet Tzedek also played a key role in securing the California State Bar's ethics opinion which concluded that it is not a conflict of interest for lawyers and firms who represent banks and other businesses who provide credit, to represent individuals in simple, no-asset chapter 7 bankruptcies. This opinion clears the way for thousands of California attorneys to provide *pro bono* assistance to debtors without jeopardizing their own practices. See Cal 2014-191: *In Rem* Bankruptcy Proceedings at http://ethics.calbar.ca.gov/Ethics/Opinions.aspx.

Bet Tzedek provided representation and/or general counseling on debtors' rights and bankruptcy to 422 clients. Of those, the majority specifically requested assistance with bankruptcy. For a variety of reasons, the majority of visitors decided not to proceed with a chapter 7 bankruptcy.

Bet Tzedek assisted 422 clients in 2014
and
educated more than 500 Individuals
on bankruptcy, credit and other related topics.

Reasons that mitigated against filing included; the clients' age, income and assets made filing unnecessary; filing for bankruptcy would not grant the relief sought; discovery that they were ineligible to file; or waiting to file at a later date could provide a greater benefit. Debtors were assisted at one of six Debtors' Rights Clinics held at Bet Tzedek's office, each assisting between 35 and 40 people. Those who sought assistance but were not able to attend a clinic were referred to an outreach site for a one-on-one consultation. The outreach sites included senior centers throughout Los Angeles County, St. Francis Medical Center, St. Vincent Medical Center, and SOVA food pantries. In 2014, Bet Tzedek also introduced a new presentation for the community titled "How to Protect and Improve Your Credit." Overall, Bet Tzedek provided bankruptcy/debtor rights' educational services to more than 500 individuals. This was all accomplished even while bankruptcy assistance was closed during the final months of the year while staff was on leave.

Legal Aid Foundation of Los Angeles

The Legal Aid Foundation of Los Angeles (LAFLA) is a Legal Services Corporation funded organization. In 2014, LAFLA participated in Loyola Law School's bankruptcy practicum. The course was taught by Erik Clark and Barry Borowitz. With the help of five law students and three LAFLA staff, twenty clients were provided pro bono assistance with completing their bankruptcy petitions. Unfortunately, LSC funding has steadily decreased over the years. Despite the success of the bankruptcy practicum, LAFLA will not be able to continue to host the program in the 2015-2016 term.

Bet Tzedek	
Training:	Bet Tzedek conducts one-on-one training to volunteers.
Funding:	Several sources provided funding for this project in 2014, including: base funding from Bet Tzedek's general fund (donations), the American College of Bankruptcy, and the California Attorney General's National Mortgage Settlement Fund.

LAFLA assisted 20 bankruptcy clients in 2014

2. San Fernando Valley Division

Neighborhood Legal Services 2014					
Total Visitors	Chapter 7 Seminars:	Questions & Answers	Total Creditors:	Total Attendees for Seminars:	Total Attendees for Q&A's
807	49	48	21	247	279

As mentioned in previous reports, the San Fernando Valley Division opened the Court's first onsite self-help desk in 2007. The self-help desk is operated by Neighborhood Legal Services of Los Angeles, the Central District Consumer Bankruptcy Attorneys Association, and the San Fernando Valley Bar Association. *Pro bono* attorneys from the two bar associations continue to hold weekly seminars and provide free legal information on bankruptcy, including a variety of self-help resources, videos, seminars, and one-on-one workshops for self-represented litigants. Topics commonly covered include bankruptcy filing requirements, the difference between chapter 7 and chapter 13, and where to find a bankruptcy attorney. In 2014, approximately 807 visitors were assisted by the self-help desk and its programs. The number of visitors has decreased as result of reduced clinic hours due to funding cuts. Neighborhood Legal Services does not provide a formal training program, but new volunteers come in to observe the programs for training purposes. Approximately 15 volunteers came in to observe as a part of their training in 2014.

3. Northern Division

Northern Division Consumer Debt Clinic Assisted 230 individuals in 2014

Consumer Debt Clinic

Serving Santa Barbara, San Luis Obispo, and Ventura counties, a Consumer Debt Clinic was formed and began operation in 2009 in Lompoc before moving to the Northern Division in 2010. The clinic is operated by the Legal Aid Foundation of Santa Barbara County (LAFSBC) on Friday mornings between 10 a.m. to 12 p.m., with a Spanish language clinic held the first Friday of every month. The clinic provides legal advice regarding consumer debt and bankruptcy matters. In 2014, the clinic was served by seven volunteers assisting 230 visitors, including between 5-14 people each day, with approximately 85 percent having chapter 7 questions. Depending on prior experience, training for new volunteers consists of on-site training, where new volunteers "shadow" current volunteers until they are comfortable being at the clinic on their own and knowledgeable to handle the debt- and bankruptcy-related questions.

The Northern Division's Clerk's Office also hosts a Resource Center in its first floor lobby. The Resource Center is staffed by a Court clerk during clinic hours and provides forms and filing information. The Center also maintains a set of bankruptcy resource materials that clinic attendees may check out.

Reaffirmation Agreement Clinic

Since the Fall of 2000, reaffirmation assistance has been provided at the Northern Division in Santa Barbara to counsel debtors on their rights prior to reaffirming debt owed for property, such as an automobile. Instead of an organized clinic, the Santa Barbara County Bar Association arranges for volunteer attorneys to coordinate with chambers and meet with self-represented debtors before each reaffirmation agreement hearing.

4. Santa Ana Division

Approximately 912 Debtors Served in 2014	
Chapter 7 debtors (with some chapter 13 and creditors):	576
Reaffirmation:	162
Total:	738
Total Cases Placed with Volunteer Attorneys in 2014	34

Legal Clinic

At the Santa Ana Division, an on-site legal clinic operated by Public Law Center (PLC) operates two days a week. Funding for the clinic comes from the Attorney Admission Fund, the American College of Bankruptcy Foundation, and donations from numerous lawyers and law firms in Orange County. PLC also provides *pro bono* representation in chapter 7 cases with attorneys from the local bar, when available. In 2014, 149 volunteer attorneys, paralegals, and law students provided 738 consultations to self-represented parties through 97 chapter 7 clinics and 12 reaffirmation clinics. The clinic opened 95 cases in-house and closed 94 cases (some of these, but not all overlap). PLC volunteers attended one training in 2014, "Basic Chapter 7 Bankruptcy," with approximately 45 attendees. The training was free in exchange for volunteers donating two hours to the chapter 7 bankruptcy clinic.

The legal clinic is co-sponsored by the Orange County Bar Association, Orange County Bar Association – Commercial Law and Bankruptcy Section, and the Orange County Bankruptcy Forum. Orange County Legal Aid also holds a weekly chapter 7 clinic and assists debtors in filing on their own if it is a no asset case.

<u>Reaffirmation Agreement Clinic</u>

The Santa Ana Division also has a Reaffirmation Agreement Clinic similar to the one in Los Angeles and the San Fernando Valley. The clinic is operated by the Public Law Center with volunteers from the local bar.

5. Riverside

Public Service Law Corporation held two quarterly public chapter 7 workshops in Riverside and two in the Coachella Valley, where visitors were provided information and instructions on how to file a chapter 7, including page-by-page instructions on the forms. The Federal *Pro Se* Clinic held at the Riverside Division on Tuesdays and Thursday between 10 a.m. and 2 p.m. generally sees 19-20 clients each day.

In addition to their quarterly Chapter 7 workshops, Public Service Law Corporation received an American College of Bankruptcy Foundation grant that enabled it to provide bankruptcy services in the Coachella Valley area. They held the first clinic January 27, 2014 from 10:30 a.m. to 2:30 p.m. Since its first workshop, the clinic opens for four hours on every fourth Monday of each month at the Cathedral City Library. The library provides its main room and private conference rooms for the new clinic. On the first day of the Coachella Valley clinic, two volunteers saw eight clients.

Public Service Law Corporation 2014	
24 volunteers donated a total of 1057.2 hours, including **675.5 *pro bono*** direct representation hours.	
Riverside:	1459 total visits (1434 debtors, 129 creditors)
Coachella Valley:	104 (all debtors)

The organization also provides extensive on-the-job training by having volunteers shadow our experienced attorneys until supervising attorneys are satisfied the volunteers are ready to work independently. Some of the volunteers also attended Public Counsel's bankruptcy training in Los Angeles or the IEBF conferences. Volunteers are welcome to view State Bar approved bankruptcy basics CLE programs on CDs and free/low-cost PLI online webinars.

Most of the funding for the Riverside Clinic came from the Court's Attorney Admission Fund, along with donations from the FBA Inland Empire Chapter. The Coachella Valley Clinic was funded primarily by a grant from the American College of Bankruptcy and the American College of Bankruptcy Foundation.

2014 HONOR ROLL OF PRO BONO VOLUNTEERS

National Pro Bono Celebration

October 19-25, 2014

Public Counsel's Debtors Assistance Project
Chapter 7, Adversary Proceeding & Reaffirmation Hearing Volunteers

Carolyn Afari
Andrew Aholtz
Martin Barash
James Beirne
Nan Blitman
Cliff Bordeaux
Ted Boxer
Mark E. Brenner
Christopher D. Cantore
Corey Carter
Ellen Cheney
Laura Claveran
Joseph Collier
Natalie Daghbandan
Jill David
Lesley Davis
Aaron de Leest
Dana Douglas
Suzette Douglas
Shawn Eldridge
Douglas Flahaut
Faith S. Ford
Norma Garcia
Henry Glowa
Michael I. Gottfried
David S. Hagen
Stella Havkin
Marisa H. Hawkins
M. Jonathan Hayes
Carmel Herr
Keith Higginbotham
Gail Higgins
Steve Hoffman
Jim King
Ilyse Klavir
Michael Kwasigroch
Jonathan Leventhal
Peter Lively
Osheen Lucasian
René López de Arenosa Jr.
Eva Malholtra
Richard E. McGuire
Juanita Miller
Susan I. Montgomery
Roksana D. Moradi
Jason Murai
Sandra Nutt
Philomena Nzegge
Lisa Oh
Shai Oved
Louis Park
Leonard Pena
Monica Reider
Niloofar Rezvanpour
Todd Roberts
R. Grace Rodriguez
Selena Rojhani
Siovash Rokni
Lauren Ross
Allan Sarver
Zev Shechtman
Salvatore Sciortino
Claire Shin
Jennifer Skornik
Marla Tauscher
Meghan Triplett
Thomas Ure
Jason Wallach
Steven Wolvek
Regina Zeltser
Aleksandra Zimonjic
Roye Zur

Interpreters:
Sunny Cardona
Gabriela Denicke
Cesar Hernandez
Carlos Herrera
Marcela Von Ins
Evelyn Lemus
Patricia Paredes
Patricia Cruz Peffer
Leticia Salisbury

Los Angeles Bankruptcy Self Help Desk & Clinic Volunteers

Danny Agai
Maryam Azizi
Matthew Baker
Elissa Barratt
Sheila Bayne
Saman Behnam
Jim Beirne
Pravin Bhambri
Shirlee Bliss
Nan Blitman
James Boyd
Deana Brown
Kim Bui
Diana Butler
Austin Cheng
Joseph Chou
Atyria Clark
Randi Cooper
Brady Cox
Jill David
David Delgado
Faith Disbrow
Shannon Doyle
Chike Emenike
Shehade Fakhoury
A'Lisha Fall
John Farmer
Erin Flynn
Alexandra Garchie
Claudia Garcia
Marisela Garcia
Norma Garcia
Sarah Garrett
Henry Glowa
Mario Gomes
Stephen Greenstein Katz
Hillary Grosberg
Sinda Hamon
David Hiller
Huang Ho
Tien Ho
Thi Huyen
Erin Huyn
Jorge Isla
Ivan Kallick
Melina Karamian
Bert Kawahara
Lindsay Kawahara
Kelly Kim
John Kim
Patricia Kossitch
Jun Lee
Simon Lee
Kevin Liu
Dolores Lopez
Tom Lucero
David Marh
Agnes Martin
Lindsay McMenamin
Shawna Melton
Andrew Menotti
Eric Mercaldo
Ramit Mizrahi
Arpi Mnatsakanyan
Adriana Montia
Negah Mouzoon
Susan Murphy
Edward Navarro
Matt Nawrocki
Julie Nong
Krista Ocon
Lisa Oh
Calvin Park
Kathryn Parry
Rene Pena
Kenneth Perry
Chiquitha Prescott
Louretta Randell
Niloofar Rezvanpoor
Judy Rodriguez
David Rowe
Daren Schlechter
Stanley Shar
Tony Shields
Evelina Shpoylansky

Los Angeles Bankruptcy Self Help Desk & Clinic Volunteers (cont.)

Michael Smith
Angela Swan
Diana Ta
Newton Tak
Yogesh Tendulkar
Dianna Ter-Vardanyan
Laura Thatcher
Holly Trief
Mitchell Tsai
Kevin Van Hout
Carolyn Walter-Burch
Youchen Wang
Vanessa Widener
Sunghyun Yang
Andy Yoo
Sloan Youkstetter
Ana Zuniga

San Fernando Valley Division Self-Help Desk Volunteers

Anil Bhartia
James Bierne
Nan Blitman
Mark Brenner
M. Jonathan Hayes
Gail Higgins
Yi Sun Kim
James King
Ilyse Klavir
Jonathan Leventhal
René L pez de Arenosa Jr
Roksana D. Moradi
Todd Roberts
Pat Said

Law Student: George K. Dulgeryan

Bet Tzedek Legal Services Debtors' Rights and Bankruptcy Program Volunteers

Attorney Volunteers:
Harrison Flanagan
Mark Gordon
Arthur Wilner
Jonathan Zweig

Additional Volunteers:
Tim Christian
Karen Getelman
Merle Gould
John Joy
Elizabeth Kim
Gagan Khan
Natalie Minev
Limor Mojdehiazad
Faramarz Nabavi
Christian Ochoa
Kathryn Podsiadlo
Kenneth Star

Legal Aid Foundation of Santa Barbara County Consumer Debt Clinic Volunteers

Uchechi Egeonuigwe
Chris Gautschi
Christopher Harshman
Carissa Horowitz
Reed Olmstead
Monica Robles
Jennifer Smith
Natalie Spilborghs
Randall Sutter

Paralegal Volunteer(s): Jean Lynn

Public Service Law Corporation (Riverside Legal Aid)
Riverside & Coachella Valley Volunteers

K. Steven Blake
Ruben Escalante
Sheppard Mullin Richter & Hampton, LLC
Jennifer Lemm-Spere
Donald McKay
Manfred Schroer

David Egli
Benjamin Heston
Amelie A. Kamau
Summer Shaw
Hanover & Shaw

Orange County Bar and Public Law Center Volunteers

Michael Allison
Anerio Altman
Gary Angotti
John Au-Yeng
Nora Aponte-Woodring
Dan Bane
Andrew Bisom
Laily Boutaleb
David Boyer
David Boyle
Steve Burnell
Richard Brunette
Brad Calvin
Paul Cambio
Jeffrey Cancilla
Steve Cardoza
Cathrine Castaldi
Dan Chambers
Christina Chan
Steven Chang
Angela Chappus
Heath Chim
Daniel Cornelious
Jeff Crowe
David D'Amour
Caroline Djang
Brian Dow
Alyssa Dowding
Angelo DuPlantier
Andy Epstein
Elyza Eshaghi
Brian Farrell
Robert Farrell
Joshua Finkelstein
Erin Fitzgerald
Aimee Flanagan
Elizabeth Fleming
Ken Fox
Alan Friedman
Bernard Frimond
Rob Garretson
Selene Geoppo
J Victor Giongco
Rob Goe
Kathleen Goldberg
Ronald Gomez
Mark Gordon
Jacqueline Gottlieb
Christian Graham
Michael Green
Richard Green
John Grieffendorf
Jason Guyser
Cara Hagan
James A. Hayes, Jr.
Arnold Hernandez
Benjamin Heston
Halli Heston
Richard Heston
Matthew Holbrook
Thi Huyen
Misty Perry Isaacson
Casey Jensen
Michael Jones
Mark Karpe
Les Kaufman
Bridget Kelly
Eugene Kim
Soon Kim
Leslie Klott
Casey Koone
Kristine Kyllander
Elizabeth LaRocque
Debby Le
Adrienne Lee
Megan Lencek
Sonia Linnaus
Doug Luther
Solida Ly
Kerri Lyman
Kevin Macnamara
Anthony Madu
Aaron Malo
Amanda Malutzky
Alan Martin
Lynn Matus
-Collins
Michael McMahon
Jennifer McNabb
Shawna Melton
Jessica Mercado
Angela Mestre
Abby Meyer
Harlene Miller
Anthony Modarelli
Alexandra Morgan
Justin Morgan
Amir Nader
RJ Naples
Chris Navarro
Joann Nguyen
Esther Ngounly
Rosemary Nguyen
Ashleigh Noda
Henry Nunez
Sean O'Connor
Sean O'Hair
Carolyn Olson
Angelica Ornelas
Bryan Owens
Suresh Pathak
James D. Perry
Fred S. Peters
Gary Polston
Tina Rad
Stephanie Ramirez
Brett Ramsaur
Peter Rasla
Daniel Rios
Constance Rogers
Matthew Rosene
Fatima Saleh
Mohammed Saleh
Filemon Kevin Samson
Bruce Schweitzer
Amir Seyadhashi
Jennifer Lee Siegert
Sheniece Smith
Michael Spector
Mark Swirt
Steve Swytak
Chris Taylor
Raphaela Taylor
Robert Taylor
Ashley Teesdale
Sara Tidd
M. Silvina Tondini
Krystina Tran
Lydia Tse
Adanna Ukah
Fermin Valencia
Eric Vinje
Michael Wallin
Robert Wishner
Bruce White
Eric Wilson
Helen Wong
Jeff Wong
Kelly Zinser
Pamela Zylstra

Law Student Volunteers:

Yashina Burns
Morgan Davis
Christopher Fisher
Samantha Goates
Leah Kaufman
Scott Laes
Calvin Love
Ashton Massey
Myrna Miranda
Cyrus Moslemi
Katherine Neal
Michael Olson
Rahul Sajnani
Hollie Washington
Donna Woo

Paralegal Volunteers: Lori Gauthier

The New York Times | http://nyti.ms/1Hz9kAI

STUDENT LOANS

Judges Rebuke Limits on Wiping Out Student Loan Debt

Your Money

By TARA SIEGEL BERNARD JULY 17, 2015

On a typical day in her last job, Janet Roth left home at 4 a.m. each day and drove 40 miles to a tax preparation office in Glendale, Ariz. When she finally got back home, she had less than an hour before starting her 6 p.m. shift decorating cakes at Walmart. She worked until midnight, giving her just a few hours to sleep before starting all over again.

Ms. Roth, 68, worked in many jobs over the years, but she never made quite enough to pay back the $33,000 she borrowed years earlier for an education degree she couldn't afford to complete, and certainly not the $95,000 it ballooned to in default.

She filed for bankruptcy, wiping out five figures in medical debts. But erasing student loans requires initiating a separate legal process, where borrowers must prove that paying the debt would cause an "undue hardship."

To prepare her case, she copied down statutes at a local law library and watched episodes of "Law and Order." Her efforts paid off: Ms. Roth's loans were discharged in 2013.

That Ms. Roth, now living on Social Security, managed to succeed in what is known as a notoriously difficult process is not even the most remarkable aspect of her case. Instead, the ruling captured the attention of other judges and legal scholars

because of a judge's bluntly worded written opinion that rebuked the widely adopted hardship standard used to determine whether a debtor is worthy of a discharge.

The judge, Jim D. Pappas, in his concurring opinion for the bankruptcy appellate panel decision in the United States Court of Appeals for the Ninth Circuit, said the analysis used "to determine the existence of an undue hardship is too narrow, no longer reflects reality and should be revised."

He added: "It would seem that in this new, different environment, in determining whether repayment of a student loan constitutes an undue hardship, a bankruptcy court should be afforded flexibility to consider all relevant facts about the debtor and the subject loans." But the current standard, he wrote, "does not allow it."

Judge Pappas isn't the only critic. Although plenty of cases still hew closely to a strict interpretation of the test, some judges and courts have signaled in recent years that they believe the rigid standard — known as the Brunner test — should be reconsidered, even if they are still bound to it now.

"The world has changed," said Michael B. Kaplan, a federal bankruptcy judge for the District of New Jersey, who criticized the standard in an opinion article. "Certainly, the costs of education and the level of student loan indebtedness has exploded."

Because the bankruptcy code never defined "undue hardship," the courts needed to develop their own definition. Most courts adopted the Brunner test, which originated from a precedent-setting ruling in 1987, in which a woman named Marie Brunner filed for a discharge of her debt less than a year after she completed a master's degree.

To stop debtors from trying to prematurely cancel their debts, the case laid out a three-pronged test: Individuals must prove they made a good-faith effort to pay the loan by finding work and minimizing their expenses. Debtors must also show they could not maintain a minimal standard of living based on their income and expenses if they had to repay the debt.

But then, in arguably the most challenging prong, the court must consider whether that situation is likely to persist for a significant part of the repayment period — which essentially requires the judge to predict the debtor's future, ensuring what some courts have described as a "certainty of hopelessness."

"How do you prove things won't change for the better in the future?" said Daniel A. Austin, associate professor at Northeastern University School of Law.

Bankruptcy scholars and judges said the test made sense at the time it was adopted because even if debtors could not pass the test, their debts — which were far more modest then — would automatically be discharged in bankruptcy five years after their repayment period started.

But the legal landscape has changed substantially since then. Before 1977, student loans could be discharged in bankruptcy alongside other debts like credit card balances. Congress toughened the law in 1976, adding the five-year period, and again in 1990, when the waiting period was extended to seven years.

In 1998, the waiting period was eliminated. So now, all debtors must prove undue hardship to erase their student debts. (In 2005, Congress added private student loans to the mix of federal education debt that could not be discharged, even though the loans are not backed by the government.)

"You can see why courts would have developed a harsh standard in those cases where consumers had sought discharge of loans soon after they came due, without waiting five or seven years," said John Rao, a lawyer with the National Consumer Law Center. "But it is kind of ridiculous to be applying the same standard now when there is no longer a right to an automatic discharge."

Another noteworthy case, also from 2013, involved a "destitute" paralegal named Susan Krieger, then about 53, who lived in a rural area of Illinois with her mother, according to court documents. Ms. Krieger received a bachelor's degree in legal studies and a paralegal certificate, graduating when she was 43. But after a decade-long search, she couldn't find a job.

The Educational Credit Management Corporation, the guaranty agency hired to battle student debtors in court, argued that Ms. Krieger should enroll in an income-based repayment program, even though she probably wouldn't end up paying anything. Ms. Krieger's remaining balance of about $25,000 was eventually discharged.

But it was the written opinion of a well-regarded judge in the Krieger case, questioning the application of the Brunner test, that has been repeatedly cited by other judges. In the ruling, Frank H. Easterbrook, then chief judge for the United States Court of Appeals for the Seventh Circuit, seemed to signal that requiring debtors to prove their futures were "hopeless" was taking the undue hardship standard too far.

He wrote that it was important not to allow "judicial glosses," like the language in the Brunner case, "to supersede the statute itself."

Rafael I. Pardo, a bankruptcy law professor at Emory Law, said Judge Easterbrook's opinion was a reminder to other courts that carried a lot of weight. "If this highly respected, highly cerebral conservative judge is saying this, that is a big deal," he added. "It is a clarion call that some judges should be more forgiving when applying the law."

Judge Easterbrook and Judge Pappas weren't the first to criticize the Brunner standard. That distinction may belong to Judge James B. Haines Jr., who spent 25 years as federal bankruptcy judge in Maine before retiring in 2013. In an opinion in 2000, he said that some courts reach too far in trying to define undue hardship.

He said he never felt shackled by Brunner's three-prong test because the higher court in his jurisdiction never adopted that standard, leaving him free to consider another standard, whereby judges can consider the "totality of the circumstances."

"Throughout my time on the bench, I heard many student loan cases," said Judge Haines, now a professor at Maine University School of Law. "The totality of the circumstances test gave me sufficient structure, with a fair ability to balance all pertinent facts."

Many of those facts have become more dire over the last decade. Among debtors filing for bankruptcy with student loans, the average amount of student debt has doubled to nearly $31,000 in 2014 from $15,350 in 2005, according to an analysis by Professor Austin of Northeastern. But perhaps more important, student loans as a percentage of the filer's annual gross income have also increased substantially. In 2014, 16 percent of all bankruptcy filers had student loans that totaled more than 50 percent of their annual income, compared with 5.4 percent in 2005.

This year, President Obama instructed several governmental agencies to review, by Oct. 1, whether the treatment of student loans in bankruptcy should be altered. Congress could tweak the bankruptcy code, perhaps reinstating a waiting period before debts can be canceled. Judge Kaplan, in New Jersey, said perhaps 10 or 15 years was the right number. Otherwise, the existing hardship standard could be overridden if a circuit court hears a case en banc, meaning all of the judges in a circuit decide together.

All of those are long shots, for the time being. A larger part of the problem is that only a tiny percentage of debtors attempt to discharge their student loans in bankruptcy, perhaps because of the perception that it isn't possible or is too hard.

But debtors' best chance at having their student loans wiped away may simply be to try.

Kitty Bennett and Alain Delaquérière contributed reporting.

A version of this article appears in print on July 18, 2015, on page B1 of the New York edition with the headline: Chained to Unpayable Debt.

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Entered on Docket
February 10, 2016
EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

The following constitutes the order of the court. Signed February 10, 2016

Charles Novack
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re: KEVIN FRANCIS BARRETT, Debtor.	Case No. 14-43516 CN Chapter 7
KEVIN F. BARRETT, Plaintiff, vs. UNITED STATES DEPARTMENT OF EDUCATION DIRECT LOAN SERVICING CENTER, RESURGENT CAPITAL SERVICES AND LVNV FUNDING LLC, Defendants.	Adversary No. 14-4161 CN **MEMORANDUM DECISION AFTER TRIAL**

On January 6, 2016, this court conducted a trial in the above adversary proceeding. All appearances were made on the record. Plaintiff Kevin Barrett ("Barrett") seeks to discharge more than a quarter million dollars in student loan debt under Bankruptcy Code § 523(a)(8) on the ground that payment would constitute an undue hardship. The United States Department of Education ("DOE") contends that Barrett has not met the onerous *Brunner* elements, and that he therefore cannot discharge his student debt. For the reasons stated below, Barrett is entitled to a full discharge of his student loan debt. The following constitutes this court's findings of fact and conclusions of law under Federal Rule of Bankruptcy Procedure 7052.

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

THE FACTS

Barrett is 56 years old and an attorney licensed to practice in the State of California. He is not married, and has no children or other dependents. Barrett filed his Chapter 7 bankruptcy on August 26, 2014, and received his Chapter 7 discharge on December 10, 2014. Barrett, who represented himself herein, filed this adversary proceeding on November 3, 2014 against several defendants, including the DOE. Barrett dismissed defendants Resurgent Capital Services and LVNV Funding by stipulation, and proceeded to trial against only the DOE.

Barrett seeks to discharge $264,056.41 in consolidated student loan debt owed to the DOE.[1] These loans helped to finance a) his college education (he received a B.S. in business administration from San Diego State University in 1982), b) his law school education (he received a J.D. from the University of San Diego School of Law in 1987), and c) his business school education (he received an M.B.A. from UCLA in 1995). Barrett has been a practicing attorney since 1988. Despite these educational achievements, he has had, to say the least, an uneven legal career.

After receiving his law degree, Barrett worked for an insurance defense firm in Los Angeles until 1993, when he left voluntarily to attend UCLA's graduate business school. After receiving his MBA, Barrett returned to the practice of law by doing "temp" legal work in 1995 and 1996. In the Spring of 1996, Barrett was hired by the Miller, Mailliard & Culver firm in Southern California as an associate to do securities registration work. Miller, Mailliard dissolved in 1997, and he then worked for the Evans, Hendrickson firm for a year doing similar securities work. That firm dissolved in 1998 or 1999. Barrett then was hired by Davis, Wright & Tremaine, a large Seattle based firm. Barrett worked in its Sacramento, California office doing securities registration work. Davis Wright terminated him after one year, and Barrett then moved to New York City to find legal work. In New York, Barrett again resorted to "temp" legal work in the securities field. He never found permanent work, and he moved to Oakland, California in 2001 to reduce his living expenses and be closer to family.

[1] This amount is as of January 6, 2015, and interest accrues at $38.89 per day. If the DOE retains a collection agency to pursue this debt, the amount due will increase by a collection fee of $64,195.61.

For the next several years, Barrett was an independent contractor for a series of New York law firms (again doing securities registration work) until that work ended in 2005. He was unemployed for several months until he started doing independent contractor securities work for a Southern California law firm in 2006. Sometime in 2006, Barrett moved to Colorado in search of more permanent legal work and to reduce his living expenses. Barrett sustained himself by continuing his independent contractor work for the Southern California law firm. Despite considerable effort, Barrett never received an offer from a Colorado law firm, and his work with the Southern California law firm ended in the summer of 2006. He was unemployed for the next several months.

Barrett's income tax returns for the years while working as an independent contractor show a modest income. His 2005 federal income tax return states that his adjusted gross income (i.e., his income after deducting his business costs) was $37,115, and that he owed the IRS $3,011 in taxes. His 2006 federal income tax return states that his adjusted gross income was $39,249, and that he owed the IRS $8,302 in taxes.

In February 2007, Barrett was hired by the Sacramento, California office of the Bullivant, Houser & Bailey law firm. Barrett was retained to do securities registration work at an annual salary of $165,000. This job barely lasted a year, as the onset of the "Great Recession" dramatically reduced the need for his "PIPE" (private investment/public equity) securities work.

Over the next two and one-half years, Barrett supported himself with a smattering of independent contractor legal work and unemployment insurance. His 2009 federal tax return indicates that he had negative $1,962 in net business income, and negative $1,372 in adjusted gross income. His 2010 tax return shows $12,434 in net business income and an adjusted gross income of $9,617.[2]

In May 2011Barrett was hired by the Gilbert Kelly Crowley & Jennett law firm in San

[2] On cross examination, the DOE focused on Barrett's gross business receipts for these tax years (2005, 2006, 2009 and 2010) to demonstrate that Barrett was generating gross annual income of anywhere from a low of $27,441 (2009) to a high of $79,246 (2006). The DOE did not question, however, the propriety of the business expenses that Barrett incurred and deducted from his business income on Schedule C of his federal tax returns.

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Francisco to do insurance defense work at an annual salary of $98,000. This job lasted until August 2013, when Gilbert Kelly terminated him as part of the firm's downsizing. Since then, Barrett has done independent contractor work representing applicants before the Social Security Disability Appeals board. He is paid $35 per hour for this work. This work has generated little income. His 2014 federal tax return shows a negative $138 in net business income, and an adjusted gross income of $5,218. His 2015 federal tax return shows net business income of $8,238, and an adjusted gross income of $7,665. Barrett testified that he has made significant but unsuccessful efforts to generate legal work (or secure employment) since being terminated by Gilbert Kelly. He has sought to build a legal practice through extensive networking efforts, seminar participation and resume mailing, and he has demonstrated a willingness to enter new areas of law in order to make a living. His efforts have not been fruitful, and he has little confidence that this will change. Barrett attributes his employment problems to his age. He believes that he will work for another ten years.

Barrett lives a spartan life. His Bankruptcy Schedule I indicates that he is a self-employed attorney generating $700 in gross income, which he supplements with $175 in food stamps each month. His Bankruptcy Schedule J states that he has $1775 in monthly living expenses, including $750 for rent (he shares an Alameda, California house with two roommates) and $220 for food and housekeeping. Barrett's monthly expenses exceed his monthly income by $875. Barrett has pared his personal and business expenses by, *inter alia*, discontinuing his malpractice insurance and his New York, D.C., Colorado, Washington, Idaho, and Utah state bar dues.[3] Barrett spends little, if anything, for recreation. He has been driving the same car since 2003, and has no savings or retirement accounts. Despite this frugal lifestyle, Barrett is behind on his utilities and car insurance payments.[4]

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[3] Barrett maintains his law office in his rented residence.

[4] Barrett's "First Supplemental Responses " to the DOE's first set of interrogatories also lists his monthly personal expenses. These responses indicate that he is renting the Alameda residence for $2,000/month, and has two roommates, who pay collective rent of $1625. Barrett, however, pays all "utilities, wi-fi and other household expenses." His Supplemental Response provide that his monthly personal and business expenses (excluding rent, but including utilities and certain household supplies) total $1,324. See DOE Exhibit "P." These monthly expenses exceed his monthly income during the same period of time. See DOE Exhibit "U."

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Barrett also has no assets that he could liquidate to repay his DOE debt. He does not own any real estate, and his Bankruptcy Schedule B indicates that his only marketable assets are five shares of Marriott stock valued at $80.00.

Barrett borrowed $74,333.00 to finance his education. These loans took the form of Stafford subsidized and unsubsidized loans, a National Direct Student loan, and SLS Supplemental loans. His first student loan dates from October 30,1979, and he received his last student loan on October 20, 1994. Barrett actively managed his student loan debt. All told, Barrett (and his family) made more than twelve years worth of monthly student loan payments exceeding $40,000.[5] He fully satisfied three of his smaller Stafford Subsidized loans that he incurred to attend law school, sought and obtained payment deferrals or forebearances when necessary, and consolidated his subsidized and unsubsidized loan balances in 2004 with the DOE to help manage the debt.[6] The evidence indicates that Barrett made loan payments when he was employed by a law firm and had steady income, and made irregular payments when he was self-employed.

Barrett has paid $16,252.17 to the DOE since he consolidated his student loan debt in 2004, and his last payment was made on July 25, 2013. As of January 6, 2016, Barrett's DOE student loan balance was $264,056.41. Barrett's consolidated DOE loans carry a 6.6% interest rate, and the monthly interest alone is $1,166.

Barrett has not, however, pursued one of the DOE's income contingency repayment plans. If Barrett's income remains at its 2015 level, the DOE contends that Barrett will not be required to make monthly payments under the DOE's Income-Based Repayment (the "IBR") plan or its new Revised Pay As You Earn Repayment (the "Repay") plan. The Repay plan will require that Barrett first make two consecutive monthly payments of at least $5.00. The value of the Repay plan is that the loan will no longer be in default. Both plans last at least twenty years[7], and if completed, the remaining debt will be forgiven. Using Barrett's 2015 tax return as its guide, the DOE estimates that

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[5] See Barrett Exhibits "1" and "2."

[6] The DOE became the holder of his student loan debt when Barrett consolidated his student loan debt in 2004.

[7] See DOE Exhibit "M."

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$703,228.08 in student loan debt will be forgiven under the IBR plan, and $456,638.19 will be forgiven under the Repay plan. Barrett does not anticipate working for another 25 years, and he is concerned with the tax implication of the significant debt forgiveness provisions under either plan.[8]

THE LAW

Bankruptcy Code § 523(a)(8) provides that an educational loan cannot be discharged "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents…" 11 U.S.C. § 523(a)(8). In *In re Pena*, 155 F.3d 1108, 1112 (9th Cir. 1998), the Ninth Circuit adopted the "undue hardship" test established in *Brunner v. New York State Higher Educ. Servs. Corp.,* 831 F.2d 395 (2nd Cir. 1987). Under the *Brunner* test, a finding of "undue hardship" requires a debtor to establish, by a preponderance of the evidence, that (1) Barrett cannot maintain, based on current income and expenses, a "minimal" standard of living for himself if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of his student loans; and (3) Barrett has made good faith efforts to repay the loans. *Brunner, supra,* at 396 (2d Cir. 1987).

Barrett satisfies the first *Brunner* element. This element requires that Barrett establish that he cannot maintain a minimal standard of living based on his current income and expenses. *See Rifino v. United States (In re Rifino)*, 245 F.3d 1083, 1088 (9th Cir. 2001). Barrett has a minimal standard of living, and he cannot maintain it. His monthly expenses exceed his income, and he is behind on his utilities and cannot afford malpractice insurance. A student loan payment of any amount would simply send him deeper into insolvency.

Barrett faces a more difficult challenge in satisfying the second element of the *Brunner* test. The Ninth Circuit recognizes "that courts have found it difficult to predict future income. Consequently, courts have required debtors to present "additional circumstances" to prove that their

[8] The DOE's Exhibit "E" is Barrett's "Federal Direct Consolidation Loan/Application and Promissory Note." The application required Barrett to chose a repayment plan, and it indicates that Barrett chose the "Income Contingent" plan. Despite this, the parties apparently agree that Barrett never applied for an income contingent payment plan. Moreover, neither party testified regarding the remaining term of the consolidated loan, and the Promissory Note portion of Exhibit E also does not expressly address this. Given the length of the DOE's income-driven repayment plans (see DOE Exhibit "M"), the court presumes that Barrett's DOE loans have at least a twenty year term.

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present financial situation will persist well into the future, preventing them from making payments through a substantial portion of the loans' repayment period. . . . These "additional circumstances" are meant to be objective factors that courts can consider when trying to predict the debtor's future income; the debtor does not have a separate burden to prove "additional circumstances," beyond the inability to pay presently or in the future, which would justify the complete or partial discharge of her student loans." *Nys v. Educ. Credit Mgmt. Corp. (In re Nys)*, 446 F.3d 938, 945 (9th Cir. 2006). Moreover, this court cannot "presume that a debtor's present inability to make loan payments will continue indefinitely." *Id.* at 946. Instead, Barrett must introduce evidence establishing "circumstances, beyond the mere current inability to pay, that show that the inability to pay is likely to persist for a significant portion of the repayment period. The circumstances need be 'exceptional' only in the sense that they demonstrate insurmountable barriers to the debtor's financial recovery and ability to repay." [citation omitted]. *Id.* These additional circumstances include 1) serious mental or physical disability affecting the debtor's employment or advancement; 2) a debtor's obligation to care for dependents; 3) lack of, or severely limited education; 4) poor quality of education; 5) lack of usable or marketable job skills; 6) underemployment; 7) maximized income potential in the chosen educational field; and no other more lucrative job skills; 8) limited number of years remaining in the debtor's work life to allow payment of the loan; 9) age or other factors that prevent retraining or relocation as a means for payment of the loan; 10) lack of assets, whether or not exempt, which could be used to pay the loan; 11) potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income; or 12) lack of better financial options elsewhere. *Id*. at 947. The *Nys* court noted that "the determinative question is whether the debtor's inability to pay will, given all we know about the salient features of [his] existence, persist throughout a substantial portion of the loan's repayment period." *Id*. at 946.

Barrett is a relatively healthy 56 year old attorney with two graduate degrees. He has been practicing law since 1988, and briefly held two well-paying associate positions. He intends to work for another ten years, and has no dependents. At first glance, Barrett would not be a good candidate to satisfy this *Brunner* element. Yet, the preponderance of the evidence demonstrates that Barrett's dismal circumstances will persist. Barrett's law firm employment history has been irregular at best,

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and he believes that no firm will hire him because of his age.[9] Barrett has arrived at this conclusion after making substantial efforts to find a law firm position. He also has shown little ability in developing a solo practice, and he has no assets he can liquidate to pay his loans. Given this, Barrett argues that he will not have the income to repay any portion of his DOE debt in the remaining years left on this obligation.

This court finds him to be a credible witness on this point. Simply, a law degree and years of practice do not equate to a living wage, and the DOE does not suggest that he will be more successful if he abandons his legal career. In addition, if Barrett has been unable to establish a viable law practice after 28 years of practice, it is a fool's errand to presume that his 29th or 30th year will be any different. "Additional circumstances" are, as described by the *Nys* court, those that a debtor "cannot reasonably change." *Id*. at 946, ft. 7. No one has suggested what changes Barrett should make to become a prosperous attorney at this stage in his career.

Finally, Barrett has made a good faith effort to repay his loans. "Good faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses" (internal quotation marks omitted). *In re Mason*, 464 F.3d 878, 884 (9th Cir. 2006). Courts examine several factors in making this determination, including whether the debtor made any payments before filing for bankruptcy; whether the debtor sought deferments or forebearances; the timing of the debtor's attempt to have the loan discharged; and whether the debtor's financial condition resulted from factors beyond his reasonable control. *See Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 917 (Bankr. 9th Cir. 2013). "Courts will also consider a debtor's effort - or lack thereof - to negotiate a repayment plan, although a history of making or not making payments is, by itself, not dispositive." *In re Mason, supra,* at 884.

As discussed above, Barrett's efforts to obtain employment, maximize income, and minimize

[9] Barrett testified on this point, and also sought to introduce into evidence several law firm employment ads found on craigslist (Barrett Exhibits "12" and "13"). The DOE's hearsay objection to these exhibits is sustained. The DOE 's hearsay objection to Barrett Exhibit "15" is overruled, as this exhibit is not being offered for the truth of the matter stated therein, but instead demonstrates Barrett's ongoing efforts to locate clients. The DOE's also objects to the introduction of Barrett's medical records in Barrett Exhibit "21" on the ground that they are hearsay The court sustains this objection.

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expenses are unassailable. The DOE does not question that his legal degree is his best option to make a living, and Barrett has cris-crossed the country, passed several bar exams, extensively networked and sent out hundreds of resumes in an effort to obtain legal work, either as an employee or as an independent contractor. His monthly business and personal expenses are, to say the least, modest, and despite his simple lifestyle, he still is behind on his utilities and car insurance. In addition, Barrett has made more than twelve years of student loan payments[10], actively managed his student loan debt, and paid more than $16,000 towards his consolidated DOE obligations. While the DOE correctly argues that this court must consider Barrett's failure to apply for one its income-based repayment plans, such inaction is insufficient, standing alone, for this court to find against him on this final *Brunner* factor (particularly where no payment is forecast). *See*, *In re Roth, supra*, at 919. Given Barrett's other good faith efforts, his failure to pursue an income contingent repayment plan is not damning. An income contingent payment plan is not the functional equivalent of a Chapter 7 discharge, particularly given the possibility that a debtor may face a substantial tax liability when the student debt is forgiven.

Barrett has demonstrated by a preponderance of the evidence that he is entitled to discharge his student loan debt. This court will therefore enter judgment in his favor.

*** * * END OF ORDER * * ***

[10] See Exhibit "1."

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COURT SERVICE LIST

Kevin F. Barrett
621 Arlington Isle
Alameda, CA 94501

Other Recipients are ECF participants

Positive
As of: April 19, 2016 12:46 PM EDT

Educ. Credit. Mgmt. Corp. v. Jorgensen (In re Jorgensen)

United States Bankruptcy Appellate Panel for the Ninth Circuit

July 19, 2012; September 11, 2012, Filed

BAP No. HI-12-1055-JuHPa

Reporter
479 B.R. 79; 2012 Bankr. LEXIS 4303; Bankr. L. Rep. (CCH) P82,340; 68 Collier Bankr. Cas. 2d (MB) 237

In re: STACY MARIE JORGENSEN, Debtor.EDUCATIONAL CREDIT MANAGEMENT CORPORATION, Appellant, v. STACY MARIE JORGENSEN, Appellee.

Prior History: **[**1]** Appeal from the United States Bankruptcy Court for the District of Hawaii. Honorable Robert J. Faris, Bankruptcy Judge, Presiding. Bk. No. 10-03328, Adv. No. 11-90016. *Jorgensen v. Educ. Credit Mgmt. Corp. (In re Jorgensen), 2012 Bankr. LEXIS 254 (Bankr. D. Haw., Jan. 19, 2012)*

Core Terms

bankruptcy court, expenses, student loan, repayment, cancer, circumstances, minimum standards, Graduate, prong, repay, undue hardship, good faith, monthly, partial, food, new car, clothing, loans, orthodontic, geography, clearly erroneous, monthly expenses, faith effort, contends, anemia, paying

Case Summary

Procedural Posture
Appellant creditor challenged a ruling of the U.S. Bankruptcy Court for the District of Hawaii granting, per *11 U.S.C.S. § 523(a)(8)* and *11 U.S.C.S. § 105*, a partial discharge of student loan debt owed by a Chapter 7 debtor on the ground of undue hardship. At issue was whether the bankruptcy court erred when it found that debtor had met all three prongs of the test in In re Brunner.

Overview
Debtor won partial discharge on a showing that she suffered from chronic medical conditions related to pancreatic cancer, including anemia and high blood pressure, which conditions interfered with her ability to work full time and that she also had significant ongoing medical expenses. While finding that debtor had met all of the Brunner criteria, the bankruptcy court had found that debtor was entitled only to a partial discharge based on debtor's purchase of a new car prior to leaving to teach in France for a semester and that certain housing expense savings were properly applied to her student loan debt. On appeal, the panel affirmed. It found that the bankruptcy court did not clearly err in not requiring debtor to reduce expenses challenged by appellant as excessive as her food expense directly reflected her medical condition and as her clothing expense was reasonable given the substantial weight loss that she suffered due to her illness. Nor did the bankruptcy court clearly err in finding that debtor's future employment prospects were uncertain. Finally, though it presented a "close question," the panel refused to disturb the bankruptcy court's finding of good faith.

Outcome
The panel held that the bankruptcy court's findings were not clearly erroneous and that the bankruptcy court correctly applied the Brunner test. It thereupon affirmed the ruling below.

LexisNexis® Headnotes

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN1 A U.S. bankruptcy appellate panel reviews de novo a bankruptcy court's application of the legal standard in determining whether a student loan debt is dischargeable under *11 U.S.C.S. § 523(a)(8)*.

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Bankruptcy Law > ... > Judicial Review > Standards of Review > Abuse of Discretion

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN2 A U.S. bankruptcy appellate panel reviews a bankruptcy court's exercise of its equitable powers under *11 U.S.C.S. § 105(a)* for abuse of discretion. It applies a two-part test to determine whether a bankruptcy court abused its discretion. First, it reviews de novo whether the bankruptcy court identified the correct legal rule to apply the relief requested. Second, it determines whether the trial court's application of the correct legal rule was illogical, implausible, or without support in the record.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Commencement of Adversary Proceedings

HN3 Under *11 U.S.C.S. § 523(a)(8)*, student loan debt is presumed nondischargeable unless the debtor establishes that repayment would impose an undue hardship. The Bankruptcy Code does not define undue hardship. A court applies the three part test in In Re Brunner to determine if repayment would impose an undue hardship. Under the Brunner test, the debtor must prove that: (1) she cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if required to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and (3) the debtor has made good faith efforts to repay the loans. The debtor bears the burden of proof on all three elements.

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

HN4 Bankruptcy courts may exercise their equitable authority under *11 U.S.C.S. § 105(a)* to partially discharge student loans. The bankruptcy court has discretion in determining the amount and terms of payment of a partial discharge. However, a bankruptcy court's discretion to grant a partial discharge is not unlimited. In each case, the bankruptcy court must find that all three prongs of the Brunner test were satisfied as to the portion of debt discharged.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

HN5 Bankruptcy courts, in applying the In Re Brunner test in the context of discharge of student loans under *11 U.S.C.S. § 523(a)(8)*, have struggled to fashion a partial discharge around the third prong of the Brunner test because good faith, by its very nature, applies broadly to debtors regardless of their financial circumstances. In contrast, the first prong of the Brunner test allows the bankruptcy court to determine the amount of student loan debt that prevents the debtor from maintaining a minimal standard of living and discharge only that amount.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Commencement of Adversary Proceedings

HN6 Under the first prong of the Brunner test that is applied by bankruptcy courts to determine if repayment of student loans would impose an undue hardship on a debtor within the meaning of *11 U.S.C.S. § 523(a)(8)*, a debtor must prove that she cannot maintain a minimal standard of living if she were required to repay the loans. The debtor must show more than simply tight finances. In defining undue hardship, courts require more than temporary financial adversity, but typically stop short of utter hopelessness.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

HN7 The calculation of cost reductions available to a debtor who is seeking discharge of student loans under *11 U.S.C.S. § 523(a)(8)* are factual in nature and, as such, is a matter properly left to the discretion of the bankruptcy court. Accordingly, a U.S. bankruptcy appellate panel that is reviewing a bankruptcy court's decision on such a discharge request will not disturb those findings unless they are clearly erroneous. In this context, a finding is ″clearly erroneous″ when the bankruptcy court's interpretation of the facts was illogical, implausible, or without support in the record.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

HN8 The second prong of the Brunner test that is applied by bankruptcy courts to determine if a debtor's student loans are properly discharged under *11 U.S.C.S. § 523(a)(8)* requires the debtor to show that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans. Additional circumstances are any circumstances that show the inability to repay is likely to persist for a significant portion of the repayment period. The circumstances need be ″exceptional″ only in the sense that they demonstrate insurmountable barriers to the debtor's financial recovery and ability to pay. A court may consider a number of factors not limited to the following: the debtor's age, training, physical and mental health, education, assets, and ability to obtain a higher paying job or reduce expenses.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

HN9 The third and final prong of the Brunner test that is applied by bankruptcy courts to determine if a debtor's student loans are properly discharged under *11 U.S.C.S. § 523(a)(8)* requires the debtor to prove that she made good faith efforts to repay the loans or show that the forces preventing repayment are truly beyond her control. To determine good faith, the court measures the debtor's

efforts to obtain employment, maximize income, minimize expenses, and negotiate a repayment plan. Whether a debtor made payments prior to filing for discharge is also a persuasive factor in determining whether she made a good faith effort to repay her loans.

Counsel: Adam C. Trampe, Esq. argued for Appellant Educational Credit Management Corporation.

Stacy Marie Jorgensen argued Pro se.

Judges: Before: JURY, HOLLOWELL, and PAPPAS Bankruptcy Judges.

Opinion by: JURY

Opinion

[*83] JURY, Bankruptcy Judge:

Debtor Stacy Marie Jorgensen (″Jorgensen″) sought to discharge student loan debt owed to Educational Credit Management Corporation (″ECMC″) as an undue hardship under *§ 523(a)(8)*.[1] The bankruptcy court granted a partial discharge of the debt. ECMC appeals, contending that the bankruptcy court erred in finding that Jorgensen met all three prongs of the undue hardship test set forth in *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner), 46 B.R. 752 (Bankr. S.D.N.Y. 1985)* aff'd, *831 F.2d 395 (2d Cir. 1987)*. We AFFIRM.

I. FACTS

Jorgensen is forty-four years old with no dependents. She earned a bachelor of science degree in wildlife biology from the University of Montana in 1992, a master of science degree in botany **[**2]** from the University of Georgia in 1996, and a Ph.D. in geography from the University of Georgia in 2002.

Jorgensen financed her graduate education partly with student loans. She made timely payments on her loans from January 2002, when payments first became due, until June 2010. She obtained a forbearance beginning in July 2010. She has made no payments since the forbearance period ended. The loan is currently payable at $270.07 per month. As of November 17, 2011, she owed ECMC $36,284.81 plus interest at six percent per annum.

From January 2002 until June 2004, Jorgensen worked as a visiting assistant professor of geography at Ohio University. From August 2004 to the present, she has worked as an assistant professor of geography at the University of Hawai'i at Manoa. She applied for jobs with the federal government, but was unsuccessful.

In early 2010, a blood test revealed that Jorgensen suffered from stage IIB pancreatic adenocarcinoma. Initial blood tests in Hawaii failed to correctly identify the cancer. Jorgensen elected to seek treatment at the M.D. Anderson Cancer Center in Houston, Texas (″MDACC″). MDACC has substantially more experience and expertise with pancreatic cancer than **[**3]** any facility in Hawaii.

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, ***11 U.S.C. §§ 101-1532***.

After undergoing chemotherapy and radiation treatments to reduce the size of the tumor, Jorgensen underwent a pylorus-preserving pancreaticoduodenectomy. Surgeons removed the head of her pancreas, her gall bladder, a section of her duodenum, and thirty-five lymph nodes. She returned to Hawaii and underwent further chemotherapy from July to October 2010. She receives quarterly checkups at MDACC to look for cancer recurrence.

Reports from Jorgensen's doctors show that she ″is doing quite well″ and that she ″[is] free of disease after completing an additional four cycles of chemotherapy.″ Jorgensen does not challenge her doctor's reports.

In the wake of her cancer, however, Jorgensen suffers from several other ailments that affect her ability to work. For example, she testified that she suffers from pancreatic enzyme insufficiency, high blood pressure, and anemia. As a symptom of her anemia, she experiences serious fatigue. The fatigue forced a reduction in her workload by twenty-five percent for the 2010-2011 academic year. In the 2011-2012 academic year, Jorgensen resumed a full workload, but she became so **[*84]** fatigued that another professor took over her teaching duties **[**4]** for one of her two classes in the middle of the fall semester. Jorgensen asserts that maintaining a full-time workload would not be possible because her anemia treatments over the past two years have been unsuccessful.

Jorgensen filed her chapter 7 bankruptcy petition pro se on October 29, 2010. On February 4, 2011, Jorgensen filed a complaint to discharge her student loan debt under *§ 523(a)(8)*. She alleged that the student loans imposed an undue hardship on her.

In her petition, Jorgensen listed $2,804 in net monthly income. At the January 10, 2012 trial, Jorgensen revised her schedules. Jorgensen's net monthly income increased to $3,750 for the academic year 2011-2012. Jorgensen testified that her income increased because she returned to full-time work after her cancer treatment. Jorgensen's petition listed $2,920 in monthly expenses. Jorgensen's revised monthly expenses were $4,092 as of January 2012. Jorgensen testified that she revised her expenses because she neglected to include several expenses when she drafted her original schedules.

Jorgensen pays $1,450 per month for rent. Jorgensen testified that she had not searched for cheaper housing because she moved into her current **[**5]** apartment weeks before being diagnosed with cancer. She also testified that she will be giving up her apartment in January 2012 because she will be teaching in Paris for the spring semester. Jorgensen admitted that she will not pay rent while she is in Paris as an apartment will be provided for her. Jorgensen plans on putting her rental savings towards her car payments.

Jorgensen testified that she spends an average of $800 per month for medical expenses. Because of her cancer, she must complete quarterly check-ups for three to five years.[2] After three to five years, she can reduce her checkups at MDACC from quarterly to annual.

In addition to her monthly medical expenses, Jorgensen incurred a one-time expense in summer 2011 of $4,699 for orthodontic treatment. She testified that the orthodontic treatment was necessary to resolve a problem with her bite, which was deteriorating. Jorgensen's insurance company determined

[2] Jorgensen asserted that returning to MDACC for follow-up care was essential because the facility had pertinent knowledge of her medical history and has an expertise in treating her type of cancer.

that the treatment was not cosmetic and contributed $1,000 to pay for the **[**6]** treatment. She admitted to paying for her orthodontic care with a summer salary grant. She testified that she used the remaining portion of her summer grant to pay her monthly expenses; until that time her parents helped her make up for her monthly deficit.

In late 2011, Jorgensen purchased a new 2011 Mazda 2 subcompact. Jorgensen testified that her previous vehicle, a 2001 Honda CRV with 90,000 miles, was in a state of disrepair. In 2009, Jorgensen spent $3,000 in repairs on her Honda CRV. She testified that she was facing thousands of dollars in additional repairs to fix the vehicle's alignment, air conditioning, and electronic windows. In light of these repairs, Jorgensen made the decision to purchase a new car. Jorgensen financed the vehicle at a rate of $362.73 per month over five years. Jorgensen bought the car in Texas where it was substantially cheaper and left it there with her sister until she returned from Paris.

Jorgensen spends $625 per month for food. Jorgensen originally listed $500 per **[*85]** month for food in her petition. Jorgensen testified that her revised food expenses were higher because before her petition was filed, she spent twenty-two weeks in Texas where food is cheaper. **[**7]** Jorgensen spends $150 per month for clothing. Jorgensen testified that her clothing expenses increased by $50 per month because she lost a substantial amount of weight as a result of her cancer treatment.

At the January 10, 2012 trial, Jorgensen admitted that ECMC offered her a payment plan (″Graduate Repayment Option″) to reduce her monthly student loan payment. Under the Graduate Repayment Option, Jorgensen would make payments of $180 per month for 25 years. Jorgensen testified that she rejected the Graduate Payment Option because she did not have any surplus funds available. She also testified that the Graduate Payment Option was not acceptable because it was based on her income, not her expenses.

The bankruptcy court issued a memorandum decision applying the three-prong test established in Brunner, which was adopted by the Ninth Circuit in *United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1112 (9th Cir. 1998)*, to determine undue hardship under *§ 523(a)(8)*.

The bankruptcy court found that Jorgensen met all of the elements of the Brunner test. The bankruptcy court determined that Jorgensen's monthly income is $350 less than the monthly expenses she must pay to maintain **[**8]** a minimal standard of living. The bankruptcy court also found that Jorgensen's financial woes are likely to persist for the rest of her life. Finally, the bankruptcy court found that despite her decision to receive orthodontic treatment, which may not have been medically essential, in the totality of circumstances she acted in good faith to repay her student loan debt.

Nevertheless, the bankruptcy court refused to discharge all of Jorgensen's student loan debt. The bankruptcy court determined that Jorgensen's rent savings accruing from her semester in Paris were not necessary to maintain a minimal standard of living. The bankruptcy court also found that Jorgensen did not satisfactorily explain her purchase of a vehicle before going to Paris rather than after she returned. On January 19, 2012, the bankruptcy court entered a judgment in which it refused to discharge $8,045.02 of Jorgensen's student loan debt. ECMC filed a timely appeal.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to *28 U.S.C. §§ 1334* and *157(b)(1)*. This Panel has jurisdiction under *28 U.S.C. § 158*.

III. ISSUE

Whether the bankruptcy court erred in granting Jorgensen a partial discharge of her student loan **[**9]** debt.

IV. STANDARD OF REVIEW

HN1 We review de novo the bankruptcy court's application of the legal standard in determining whether a student loan debt is dischargeable. *Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087 (9th Cir. 2001)*.

HN2 We review the bankruptcy court's exercise of its equitable powers under *§ 105(a)* for abuse of discretion. *Missoula Fed. Credit Union v. Reinertson (In re Reinertson), 241 B.R. 451, 454 (9th Cir. BAP 1999)*. We apply a two-part test to determine whether a bankruptcy court abused its discretion. *United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)*(en banc). First, we review de novo whether the bankruptcy court identified the correct **[*86]** legal rule to apply the relief requested. Second, we determine whether the trial court's application of the correct legal rule was illogical, implausible, or without support in the record. *Id. at 1262*.

We review the bankruptcy court's factual findings for clear error. *Educ. Credit Mgmt. Corp. v. Mason (In re Mason), 464 F.3d 878, 881 (9th Cir. 2006)* (quoting *Miller v. Cardinale (In re DeVille), 361 F.3d 539, 547 (9th Cir 2004))*.

V. DISCUSSION

HN3 Under *§ 523(a)(8)*, student loan debt is presumed nondischargeable unless **[**10]** the debtor establishes that repayment would impose an undue hardship. The Bankruptcy Code does not define undue hardship. *Educ. Credit Mgmt. Corp. v. Nys (In re Nys), 446 F.3d 938, 944 (9th Cir. 2006)*. We apply the three part test established in Brunner to determine if repayment would impose an undue hardship. See *In re Pena, 155 F.3d at 1112* (adopting the ″Brunner test″ from *In re Brunner, 46 B.R. at 753*). Under the Brunner test, the debtor must prove that: (1) she cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if required to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and (3) the debtor has made good faith efforts to repay the loans. *Id. at 1111*. The debtor bears the burden of proof on all three elements. *In re Rifino, 245 F.3d at 1087-88*.

A. Partial Discharge

HN4 Bankruptcy courts may exercise their equitable authority under *§ 105(a)* to partially discharge student loans. *Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168, 1173 (9th Cir. 2003)*. The bankruptcy court has discretion in determining **[**11]** the amount and terms of payment of a partial discharge. *Bossardet v. Educ. Credit Mgmt. Corp. (In re Bossardet), 336 B.R. 451, 457 (Bankr. D. Ariz. 2005)*.

However, a bankruptcy court's discretion to grant a partial discharge is not unlimited. In each case, the bankruptcy court must find that all three prongs of the Brunner test were satisfied as to the portion of

debt discharged. *In re Saxman, 325 F.3d at 1174*. ***HN5*** Bankruptcy courts have struggled to fashion a partial discharge around the third prong of the Brunner test because good faith, by its very nature, applies broadly to debtors regardless of their financial circumstances. See *Hedlund v. Educ. Res. Inst., Inc., 468 B.R. 901 (D. Or. 2012)*, *Ristow v. Educ. Credit Mgmt. Corp. (In re Ristow), BAP No. AZ-11-1376-DJuPa, 2012 Bankr. LEXIS 1289, 2012 WL 1001594 (9th Cir. BAP March 26, 2012)*. In contrast, the first prong of the Brunner test allows the bankruptcy court to determine the amount of student loan debt that prevents the debtor from maintaining a minimal standard of living and discharge only that amount.

In this case, the bankruptcy court did not abuse its discretion when issuing a partial discharge. The bankruptcy court refused to discharge $6,050 because **[**12]** Jorgensen received a windfall by not paying rent while she was in Paris. During Jorgensen's five and one-half months in Paris her income exceeded her expenses by $1,100, for a total of $6,050. The bankruptcy court found that Jorgensen did not satisfactorily explain why the excess $6,050 was necessary to maintain a minimal standard of living. The bankruptcy court also refused to discharge $1,995.02 because Jorgensen purchased a vehicle prior to her trip to Paris. The bankruptcy court found Jorgensen's car payment while she was in **[*87]** Paris was not necessary to maintain a minimal standard of living.

Nevertheless, the bankruptcy court found that, as to the remainder of Jorgensen's debt, each prong of the Brunner test was satisfied.

B. Minimal Standard of Living

HN6 Under the first prong of the Brunner test the debtor must prove that she cannot maintain a minimal standard of living if she were required to repay the loans. *Id. at 1088*. The debtor must show more than simply tight finances. *United Student Aid Funds v. Nascimento (In re Nascimento), 241 B.R. 440, 445 (9th Cir. BAP 1999)*. ″In defining undue hardship, courts require more than temporary financial adversity, but typically stop short of utter **[**13]** hopelessness.″ Id.

Here, the bankruptcy court found that Jorgensen's average monthly income was $3,750. The bankruptcy court also found that Jorgensen's necessary average monthly expenses were $4,100. The bankruptcy court concluded that Jorgensen's expenses were ″essential . . . due to the nature of her employment and her serious health issues.″

ECMC contends that the bankruptcy court's conclusion is erroneous because Jorgensen's budget contains unnecessary items such as a new car, extravagant food spending, new clothes, dry cleaning, travel, and miscellaneous expenses. ECMC contends that Jorgensen's budget does not constitute a minimal standard of living.

ECMC argues that courts have declined to discharge student loan debt where the debtor's budget included a new car, high clothing expenses, and extravagant food expenses. See *In re Nascimento, 241 B.R. at 445* (holding that a debtor's expenses were not minimal because they included a hairdresser, chiropractor, and $544 car payment); *Chapelle v. Educ. Credit Mgmt. Corp. (In re Chapelle), 328 B.R. 565, 570 (Bankr. C.D. Cal. 2005)* (finding that a debtor's $100 recreation and $100 clothing expenses were ″modest but perhaps not reasonable **[**14]** given [her] student loan obligation and lack of full-time employment″).

While a number of courts have declined to discharge student loans in similar circumstances, the bankruptcy court's refusal to require Jorgensen to further reduce her expenses in this case is not clearly erroneous. *In re Rifino, 245 F.3d at 1088*. ***HN7*** The calculation of cost reductions are factual in nature and, as such, ″is a matter properly left to the discretion of the bankruptcy court.″ *In re Pena, 155 F.3d at 1112*. Accordingly, we will not disturb those findings unless they are clearly erroneous. *Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane), 287 B.R. 490, 496 (9th Cir. BAP 2002)*. A finding is clearly erroneous when the reviewing court's interpretation of the facts was illogical, implausible, or without support in the record. *Hinkson, 585 F.3d at 1262*.

Here, the evidence supports Jorgensen's purchase of a new car. Her old vehicle lacked proper alignment, functional air conditioning, and automatic windows. Her new vehicle is a reliable and inexpensive subcompact with a warranty.

Jorgensen's $650 monthly food expense is directly related to her health problems. Jorgensen testified that she doesn't digest **[**15]** fats properly because she suffers from pancreatic enzyme deficiency. Moreover, this Panel is not in a position to evaluate food expenses in Hawaii; that determination falls within the bankruptcy court's proper discretion.

Jorgensen's clothing expense is the result of her fluctuating weight after cancer. Once again, we refuse to opine about the **[*88]** clothing expenses for a professional female in Hawaii. ECMC challenged several of Jorgensen's other expenses, all of which were de minimus.[3]

Accordingly, the bankruptcy court correctly determined that Jorgensen's expenses exceeded her income by $350.

C. Additional Circumstances

HN8 The second prong of the Brunner test requires the debtor to show ″that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans.″ *In re Brunner, 831 F.3d at 396*. Additional circumstances are any circumstances that **[**16]** show the inability to repay is likely to persist for a significant portion of the repayment period. *In re Nys, 308 B.R. at 444*. ″The circumstances need be 'exceptional' only in the sense that they demonstrate insurmountable barriers to the debtor's financial recovery and ability to pay.″ Id. A court may consider a number of factors not limited to the following: the debtor's age, training, physical and mental health, education, assets, and ability to obtain a higher paying job or reduce expenses. Id.

Here, the bankruptcy court concluded that ″there is a significant chance her income will fall; she may be denied tenure and lose her current job, or her health may preclude her from working full time.″ ECMC contends that Jorgensen's cancer is not likely to return. ECMC, however, has not challenged Jorgensen's various other health problems that imposed, and will continue to impose, a significant obstacle to her financial recovery. In addition, ECMC did not dispute Jorgensen's dubious employment circumstances.

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[3] For example, ECMC challenges Jorgensen's $50 per month travel expense to see her family once a year. ECMC also challenges Jorgensen's $85 miscellaneous expense which she uses for unpredictable expenses that arise throughout the year (new suitcases for example).

ECMC contends that Jorgensen is the archetype of good health. ECMC cites Jorgensen's medical records which indicate she is free of disease and doing quite well with no evidence of recurrence. **[**17]** ECMC argues that Jorgensen did not satisfy her burden to show that recurrence is a probability, not a mere possibility. ECMC's challenge to Jorgensen's health is not persuasive because it does not address her overall health as an obstacle to financial improvement. For example, Jorgensen suffers from anemia which has reduced her energy levels. Jorgensen's doctor suggested that her energy may never return to normal. Jorgensen testified that when she returned to full-time employment she became increasingly fatigued. Consequently, Jorgensen asked her superiors to be relieved from one of her classes. Anemia is not Jorgensen's only ailment. Jorgensen takes prescription medication for hypothyroidism and high blood pressure.

In addition to her health concerns, Jorgensen's future employment prospects are uncertain. Jorgensen testified that she has had a ″rough time″ in her current position at the University of Hawai'i at Manoa. Jorgensen's research requires a lab which took her university four years to provide and had ″a negative impact″ on her. Jorgensen testified that her department split 50-50 on her recommendation for tenure.

The bankruptcy court considered all of these factors when determining **[**18]** that Jorgensen met the second prong. Its findings are not clearly erroneous.

[*89] D. Good Faith

HN9 The third and final prong of the Brunner test requires the debtor to prove that she made good faith efforts to repay the loans or show that the forces preventing repayment are truly beyond her control. *In re Brunner, 46 B.R. at 755*. To determine good faith, the court measures the debtor's efforts to obtain employment, maximize income, minimize expenses, and negotiate a repayment plan. In re Mason, 464 at 884. Whether a debtor made payments prior to filing for discharge is also a persuasive factor in determining whether she made a good faith effort to repay her loans. *In re Pena, 155 F.3d at 1114*.

Here, the record supports the bankruptcy court's finding that Jorgensen is optimally employed and maximized her income. After obtaining her Ph.D. in geography, she worked as a visiting assistant professor of geography at Ohio University. Two years later, she started her current position as an assistant professor of geography at the University of Hawai'i at Manoa. While Jorgensen has applied for federal jobs, where she might increase her income, her efforts have been unsuccessful.

The record also supports **[**19]** the bankruptcy court's finding that Jorgensen made loan payments before filing for discharge and that she negotiated a repayment plan in good faith. Jorgensen made timely payments on her student loans from January 2002 until she entered forbearance in June 2010. ECMC offered to reduce her payment to $180 per month for 25 years through the Graduate Repayment Option. Jorgensen rejected the Graduate Payment Option because she did not have the funds available to make the payments. She also testified that the Graduate Payment Option was not acceptable because it was based on her income, not her expenses. In an effort to resolve the matter, Jorgensen offered to pay ECMC $180 for 18 months. ECMC refused.[4]

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[4] At oral argument ECMC argued that Jorgensen's failure to accept the Graduate Repayment Option was de facto evidence of a lack of good faith. To accept this argument would write ***§ 523(a)(8)*** out of the Code and bestow ECMC with absolute discretion to forgive debt without judicial review.

Turning to the expense factor, Jorgensen's decision to purchase a new car before she went to Paris and her decision to obtain orthodontic treatment both weigh against a finding of good faith.[5] To be clear, **[**20]** Jorgensen's purchase of a new car was not improper; she certainly needed a new car and purchased a relatively inexpensive and economical vehicle. Her decision to purchase the vehicle before she left for Paris, however, was imprudent. As a result, she incurred several thousand dollars of a car payment expense without using the vehicle. The bankruptcy court properly accounted for her error by finding that the extraneous expense could not be discharged.

Jorgensen's decision to use her summer grant to pay for orthodontic treatment instead of paying her loans also weighs against minimizing her expenses. While Jorgensen testified that she had a problem with her bite, she did not introduce any evidence that the treatment was medically necessary. The bankruptcy court's memorandum of decision, however, reflects that the court weighed this unwise decision against all other factors to determine whether the debtor made a good faith effort to repay.

[*90] While this case presents a close question on good faith, after **[**21]** considering all of the circumstances, we will not disturb the bankruptcy court's determination that Jorgensen made good faith efforts to repay her student loans.

VI. CONCLUSION

Having determined the bankruptcy court's factual findings are not clearly erroneous and the bankruptcy court correctly applied the Brunner test, we AFFIRM.

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[5] ECMC also challenges several of Jorgensen's living expenses. As discussed earlier, the majority of these expenses are the result of her health problems, and therefore, beyond her control.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In re **RITA GAIL EDWARDS**, Debtor.	)	Chapter 7 Proceedings Case No: 3:14-bk-16806-PS Adversary No. 3:15-ap-26-PS
RITA GAIL EDWARDS, Plaintiff, v. **EDUCATIONAL CREDIT MANAGEMENT CORPORATION**, Defendant.	)	**UNDER ADVISEMENT ORDER** (Not for Publication)

Before this Court is the complaint of Plaintiff, Rita Gail Edwards ("Debtor"), to determine the dischargeability, under 11 U.S.C. § 523(a)(8),[1] of student loans owed by Debtor to Defendant, Educational Credit Management Corporation ("ECMC" or "Defendant"), in the amount of $243,506.35.[2] The Court now finds Debtor's obligations to Defendant are wholly dischargeable.[3]

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[1] Unless otherwise indicated, all Chapter, Section and Rule references are to the Bankruptcy Code ("Code"), 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[2] This aggregate balance is claimed by Defendant to be owed as of December 11, 2015. While Debtor does not agree with this amount, this issue is not contested by Debtor in this Adversary Proceeding.

[3] This Order sets forth the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

I. BACKGROUND

A. Procedural History

Debtor filed her voluntary chapter 7 bankruptcy petition on November 10, 2014 ("Petition Date"). She filed her Schedule F reflecting an unsecured, undisputed obligation to Defendant's predecessor-in-interest in the amount of $227,499.00 (Administrative Docket Number ("Adm. DE") 22). On January 12, 2015, Plaintiff commenced this adversary proceeding with the filing of her Complaint (DE 1)[4] to determine the dischargeability of Debtor's student loans. An Answer was filed on February 12, 2015 (DE 11). Defendant Nelnet Loan Servicing was replaced as a party Defendant by the State of Colorado, Department of Higher Education, Colorado Student Loan Program dba College Assist ("College Assist") by order of the Court dated March 5, 2015 (DE 18). Defendant U.S. Department of Education was dismissed from this Adversary Proceeding on April 14, 2015 (DE 28). Defendant College Assist was replaced by ECMC as party defendant, pursuant to this Court's order of January 16, 2016 (DE 53).

The parties filed their Joint Pretrial Statement ("JTPS") (DE 42) on December 10, 2015. On January 19, 2016, the Court entered its order (DE 54) approving the parties' agreed motion (DE 49) to amend the JTPS. On February 16, 2016, the Court held a trial on this matter. At the conclusion of the trial, the Court took this matter under advisement.

B. The Evidence

Two witnesses testified at trial: Jennifer Skerbinc and Debtor.

1. Jennifer Skerbinc. Ms. Skerbinc is a Litigation Specialist for ECMC. She testified that the amount owed by Debtor to Defendant totaled $245,327. She reviewed Debtor's adjusted gross income, as reflected in Debtor's 2015 federal tax return

[4] DE shall hereafter refer to docket entries in the adversary file in this case.

(Exhibit 8)[5]. Ms Skerbinc then reviewed the "REPAYE" and Income Based Repayment ("IBR") student loan repayment programs. Both of these student loan repayment programs call for an annual review of an obligor's income and expenses. Absent such proof, each program assumes a 5% annual increase in the obligor's earnings. Both "programs" call for a 25 year repayment program and both call for forgiveness of indebtedness of an obligor's student loans if she successfully completes 25 years of payments. The primary differences between these two programs are that the IBR program requires proof of the obligor's hardship and calls for payment of 15% of the obligor's discretionary income. The REPAYE program requires no proof of hardship and calls for payment of 10% of obligor's discretionary income.

Based on Debtor's presumed 2015 adjusted gross income of $30,622, Ms. Skerbinc testified that Debtor's initial payments under the REPAYE program would be $56 per month but would be $84 per month for the first 12 months under the IBR program.

2. Rita Gail Edwards. Debtor is an intelligent, well-spoken, 56-year-old single woman with two adult children. The eldest, Regina Sebert, is a 34-year-old single woman who suffers from type 1 diabetes, a disease which has caused blindness, failing kidneys, and a failing pancreas. She lives on her own and receives $844 per month in public assistance, which amount is insufficient to cover her living expenses and medical needs. Debtor's other child is Seth Sebert, a 32-year-old transwoman known as "Asia." Asia is a convicted felon, has bipolar disorder, post-traumatic stress and a host of other maladies. Asia has lived with Debtor since November 2014, but has spent the bigger end of the past 15 years in correctional institutions. Although Asia receives food stamps, she has been denied disability benefits. However, Debtor is hopeful that Asia's disability appeal will reverse this denial. According to Debtor, Asia is intelligent but is

[5] It is the Court's understanding that this tax return, while signed by the Debtor on January 11, 2016, had not been filed as of the date of the trial.

so debilitated by her numerous psychological challenges that, for the foreseeable future, she is not likely to produce any meaningful support for herself or her mother's household. The father of Regina and Asia died in 1990.

Debtor has three degrees from Ottawa University, in Secondary Education (B.A. 1996), Education (Masters 2000) and Professional Counseling (Masters 2002). The student loans at issue were obtained to pay for Debtor's education and living expenses while pursuing these degrees at Ottawa.

Debtor's post-graduate employment includes jobs in education and various forms of counselling for wages ranging from $16 to $28 per hour. Debtor and her then husband both lost their jobs during the recession in 2009. In 2009, Debtor formed a sole proprietorship named SET Counselling ("SET") which provides a host of counselling services in Northern Arizona. Her tax returns from 2010 to 2014 reflect annual income ranging from $26,625 to $638 for an average annual income of $14,157.80. In 2015, Debtor generated adjusted gross income of $30,622. At the time of trial, Debtor's monthly take home income was generally about $2,200 per month and her expenses were around $2,500 per month.[6] Defendant challenges the reasonableness of certain expenses of the Debtor including recreation ($50 per month), term insurance ($27) and two payments ($403 per month) related to her 2015 purchase of a 2006 Toyota with 115,000 miles. One of the car loans calls for a monthly payment of $153 to an arm's-length creditor but another $250 per month is due to Debtor's mother and step-father who, post-petition, released their lien against a vehicle Debtor traded in so she could acquire the Toyota. Debtor has approximately 1.5 years of payments left on each of these loans.

. . .

[6] While the JTPS reflects an agreed gross income of $2,840 per month for the past six months and expenses of $2,504 per month, the Debtor's testimony made it clear that these figures failed to include her income tax bills of about $600 per month.

Debtor has applied for numerous jobs in the past four years, to no avail. Her SET employment enables her to be relatively close to her children so she can attend to their needs while also providing the flexibility to take them to medical appointments and provide for their other daily demands. Regina, of course, cannot drive. Debtor receives no governmental aid nor does she receive income from any source beyond her work with SET.[7]

Debtor's student loans were consolidated in 2006 after which time she requested and obtained several forebearances. See Exhibits 31 (dated December 16, 2010) , 32 (dated February 13, 2010) and 34 (dated February 22, 2011). Debtor made loan payments on her student loans in 2011 (at least four, totaling $143.47), 2012 (at least 9, totaling $201.39), 2013 (at least 13, totaling $333.40) and 2014 (at least 7, totaling $179.62) for an aggregate of at least 33 payments totaling $857.88. Although Debtor made these loan payments, she failed to pay her income taxes between 2012 and 2015. She now owes unpaid taxes in excess of $16,000, a portion of which she is repaying at the rate of $150 per month.

Debtor lives with Asia in a tiny mobile home in Cornville, Arizona. She bought this mobile home for $37,500 in April 2011 and pays $494 per month towards the mortgage. Prior to acquiring the mobile home, she lived for two years in a 20-year-old fifth wheel trailer with her then husband. At her current residence she sometimes turns off the water heater for several months at a time in order to trim expenses. Debtor has no health insurance but is being assessed for health insurance under the Affordable Health Care Act. Although her 2015 tax return (Exhibit 8) has apparently not yet been filed, she expects it will produce an additional federal tax bill in excess of $6,000.[8]

. . .

[7] Debtor has been divorced twice but neither former spouse pays her support of any kind. Asia does receive food stamps totaling $190 per month.

[8] This amount is part of the $16,000 tax debt referred to above.

II. JURISDICTION

This adversary proceeding is a core matter over which the Court has jurisdiction. 28 U.S.C. §§ 157(B)(2)(1) and 1334.

III. ISSUE

Has Debtor proven by a preponderance of the evidence that her student loans owed to Defendant are to be wholly or partially discharged under § 523(a)(8) of the Code?

IV. LAW

Section 523(a) of the Code states in relevant part, as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt— . . .
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
> (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

Although § 523(a)(8) references "undue hardship," that term is not defined in the Code. The Southern District of New York announced its definition of undue hardship in *Brunner*, 46 B.R. 752 (S.D.N.Y. 1985) (Aff'd by 831 F.2d 395(2nd Cir. 1987)). The Ninth Circuit, in turn, adopted *Brunner's* three-prong undue hardship test in the case of *In re Pena*, 155 F.3d 1108 (9th Cir. 1998).

The *Brunner* test is as follows:

1. The Debtor is not presently capable of maintaining a "'minimal' standard of living for herself and her dependents if forced to repay the [student] loans." *Brunner*,

831 F.2d at 396;

2. "That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans." *Id.*; and

3. "That the debtor has made good faith efforts to repay the [student] loans . . . ." *Id.*

Debtor "bears the burden of proving by a preponderance of the evidence, all of the" three prongs of the *Brunner* test. *In re Birrane*, 287 B.R. 490, 494 (9th Cir. B.A.P. 2002). *See also In re Refino*, 245 F.3d 1083, 1087 (9th Cir. 2001).

Discharge litigation under § 523(a)(8) is not necessarily a winner-takes-all proposition. "Bankruptcy courts may exercise their equitable authority under § 105(a) to partially discharge student loans." *In re Jorgensen*, 479 B.R. 79, 86 (9th Cir. B.A.P. 2012); *see also In re Saxman*, 325 F.3d 1168, 1173 (9th Cir. 2003). The Court's discretion extends to both the amount discharged and the repayment terms for the undischarged portion. *Jorgensen*, 479 B.R. at 86. However, even if the student loan discharge is partial, the Debtor still must satisfy all three prongs of the *Brunner* test. *Id.* and *Saxman*, 325 F.3d at 1174.

A. *Brunner* Prong No. 1 – Minimal Standard of Living

To satisfy the first prong of the *Brunner* test, Debtor must demonstrate more than that she is experiencing tight finances. *In re Nascimento*, 241 B.R. 440, 445 (9th Cir. B.A.P. 1999). "In defining undue hardship, courts require more than temporary financial adversity but typically stop short of utter hopelessness." *Id.*

B. *Brunner* Prong No. 2 – Additional Circumstances

In describing the second prong of the *Brunner* test, the Ninth Circuit B.A.P. has noted:

> Additional circumstances are any circumstances beyond the more current inability to pay, that show the inability to repay is likely to persist for a significant portion of the repayment period. *In re Nys*, 308 B.R. at 444. "The circumstances need be 'exceptional' only in the sense that they demonstrate insurmountable barriers to the debtor's financial recovery and ability to pay." *Id.* A court may consider a number of factors not limited to the following: the debtor's age, training, physical and mental health, education, assets, ability to obtain a higher paying job or reduce expenses. *Id.*

Jorgensen, 479 B.R. at 88. The "additional circumstances" test is, "by its nature, case-by-case." *Nys*, 308 B.R. 436, 444 (9th Cir. B.A.P. 2004) aff'd 446 F.3d 938 (9th Cir. 2006). The *Nys* court cites a non-exclusive list of twelve factors to review in determining whether a debtor has satisfied the second prong of the *Brunner* test:

1. Serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement; *Brunner*, 831 F.2d at 396;
2. The debtor's obligations to care for dependents; *Id.*;
3. Lack of, or severely limited education; *Pena*, 155 F.3d at 1114;
4. Poor quality of education[9];
5. Lack of usable or marketable job skills; *Birrane*, 287 B.R. at 497;
6. Underemployment;
7. Maximized income potential in the chosen educational field, and no other more lucrative job skills;
8. Limited number of years remaining in work life to allow payment of the loan; *Brunner*, 831 F.2d at 396;
9. Age or other factors that prevent retraining or relocation as a means for payment of the loan;
10. Lack of assets, whether or not exempt, which could be used to pay the loan;
11. Potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income;
12. Lack of better financial options elsewhere.

[9] *See Pena*, 155 F.3d at 1114 (educational training for a job in an over-saturated market); *Cota*, 298 B.R. at 418 (school's incompetency); *Speer v. Educ. Credit Mgmt. Corp* (*In re Speer*), 272 B.R. 186, 187 (Bankr. W.D. Tex. 2001) (trade school had improperly trained debtor and few graduates obtained jobs).

Nys at 446-447.

C. *Brunner* Prong No. 3 – Good Faith

In reviewing the third prong of the *Brunner* test, the Ninth Circuit B.A.P. has stated that:

> To determine good faith, the court measures the debtor's efforts to obtain employment, maximize income, minimize expenses, and negotiate a repayment plan. *In re Mason*, 464 F.3d 878, 884 (9th Cir. 2006). Whether a debtor made payments prior to filing for discharge is also a persuasive factor in determining whether she made a good faith effort to repay her loans. *In re Pena*, 155 F.3d at 1114.

In re Jorgensen, 479 B.R. at 89.

In his concurring opinion in *In re Roth*, 490 B.R. 908, 920-923 (9th Cir. B.A.P. 2013) Judge Pappas acknowledges that courts in the Ninth Circuit are bound by *Brunner* and *Pena* but makes impassioned and persuasive arguments as to why the Ninth Circuit should revisit this outdated test. Loyola Law School Prof. Anne Wells takes up Judge Pappas' torch and provides further background into the history of student loan dischargeability policies, statutes, case law and changed conditions in the market place. Ann E. Wells, Replacing Undue Hardship With Good Faith: An Alternative Proposal for Discharging Student Loans in Bankruptcy, 33 Cal. Bankr. J. 313-344 (2016). Among other things, Prof. Wells notes that, as of March 13, 2015, student loan debt in the United States totaled more than $1.25 trillion. *Id.* This amount is more than the combined national debts of Austria and Belgium. *Id.* At the end of 2012, Americans in their 50's owed $112 billion and those in their 60's owed $43 billion. *Id.* at 319. In short, student loan debt is a gigantic issue in the United States, and not just for students in their 20's.

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. . .

V. ANALYSIS

A. Minimum Standard of Living

At present, Debtor is not just living hand to mouth, she is barely eeking out an existence. She lives in a tiny mobile home in a small but affordable Northern Arizona town. Her vehicle, while apparently serviceable, is an old high mileage compact car. Debtor does not live an extravagant life. She periodically shuts off her water heater in an effort to reduce expenses.

Defendant criticizes several of Debtor's monthly expenditures (e.g., recreation, term insurance and car payments). This Court, however, finds each of these expenses to be reasonable under the Debtor's circumstances. Debtor's term insurance provides an appropriate safety net for her children should Debtor pass away. The insurance premiums are nominal ($27 per month). Debtor's $50 per month entertainment expenses are hardly lavish. Debtor's car payments reflect the fact that she could not afford to buy a car for cash, that she had an outstanding balance on her trade-in, and that two lien payments were necessary to acquire the Toyota Corolla. Despite her efforts to minimize expenses, Debtor has been unable to timely pay her income tax bills. Debtor cannot presently maintain a minimal standard of living if she were forced to repay her student loans.

Debtor's financial difficulties are not merely a temporary state of affairs. Debtor's tax returns since 2010 reveal the prolonged nature of her financial hardship. These returns do not reveal that her two children have long suffered from their current ailments and both are dependent upon financial assistance which their mother supplies. For quite some time in the past and for the foreseeable future could not and will not be able to maintain a minimal standard of living if she were forced to repay her student loans.

. . .

B. "Additional Circumstances"

This Court will address the second prong of the *Brunner* test by walking through the twelve steps program announced by the Ninth Circuit B.A.P. in *Nys*.

1. Disabilities of Debtor or Her Dependents. The Debtor is not physically or emotionally handicapped. In view of her monumental life challenges, this Court was impressed by how diligent, stable and well-adjusted she appeared to the Court. That said, Debtor is very restricted by the demands of motherhood and the realities of her income earning potential. Although Regina receives some state assistance, it is not enough to cover her cost of care. Debtor has for years been supplementing Regina's modest revenue and will need to continue doing so for the remainder of her life. As to Asia, at present, she appears to be wholly dependent upon her mother's income. Asia may be physically capable of performing some level of work but this Court was persuaded by Debtor's credible testimony to the effect that Asia is so affected by psychological issues that she is not likely to generate any meaningful income for a long time, maybe for the rest of her life. Regina's and Asia's conditions do not prevent Debtor from working but their needs have inhibited and will continue to inhibit Debtor's working hours and geographical location.

2. Caring for Dependents. See paragraph 1, above.

3. Educational Limitations. Debtor is well educated. For years she has been actively employed in her field of education. However, under the very best of circumstances, Debtor's education would not likely qualify her for a lucrative salary. The Court finds Debtor is making a reasonable level of income with the education and training she has acquired.[10]

. . .

[10] The more puzzling question is how Debtor ever qualified for $250,000 in student loans to pursue a course of study that was never likely to enable her to produce sufficient income to service her student loans. This, of course, is part of the student loan crisis addressed in Prof. Wells' article and Judge Pappas' concurrence referenced above.

4. Quality of Education. Debtor holds one undergraduate and two graduate degrees from Ottawa University. Ottawa is not exactly a name brand university but this Court was not supplied with evidence which would enable the Court to criticize the merits of the education supplied by this non-profit university.

5. Job Skills. Debtor has usable and marketable job skills but there is a limit to the earning capacity these skills can produce. Debtor could admittedly make more money in a bigger market place (e.g. Phoenix), but her expenses would also increase dramatically. Moreover, Debtor would not be in a position to care for her dependent[11] children as she is presently.

6. Underemployment. Debtor is somewhat underemployed at present. She does, however, periodically apply for regional jobs as they become known to her. Her underemployment is through no fault of her own. Nor, as Defendant suggests, has Debtor chosen to do less than she is capable of doing in the workplace.

7. No More Lucrative Job Skills. Debtor is and has long been actively employed in her chosen educational field. She is not likely to earn more anytime soon, especially since she must care for her two children. Unfortunately, Debtor does not possess other skills which would qualify her for more lucrative employment in another discipline.

8. Work Years Remaining. Debtor is 56 years old, a year younger than the author of this opinion. While some would say the 50's are the new 40's, we all know otherwise. Debtor likely has another eight years of maximum earning potential and maximum job performance. Our culture has long pegged age 65 as the logical retirement age. This Court anticipates Debtor will likely retire at 65. The student loan repayment programs discussed by defendant's witness, Ms. Skerbinc, call for a 25-year

[11] Although Regina cannot be claimed as a dependent for tax purposes, this Court finds she is nevertheless materially (albeit partially) dependent on her mother's care and income.

payment regimen.[12]

9. Retraining Prospects. Debtor is already highly trained and skilled in her chosen field. To suggest she change careers at age 56 is not reasonable. More importantly, piling on additional student loan debt would be the Debtor's only means of acquiring new skills. Accumulating more student loans is the last thing Debtor needs. Devoting one to three more years in study would also be unwise if Debtor has only eight working years left in her.

10. Lack of Assets. Debtor owns a very modest home, a well-worn vehicle and an education that produces a minimal standard of living. She lacks the assets or means to pay all or even most of her student loans.

11. Increasing Expenses. Debtor has done a remarkable, even heroic, job trimming her expenses. There is no evidence that her mobile home will appreciate in value but this Court is well aware that Cornville has long been a sleepy rural community and that 600 sq. ft. mobile homes do not generally appreciate, nor do 10-year old Toyota Corollas.

12. Lack of Better Options Elsewhere. As noted in section V(B)(5) above, Debtor could and likely would earn more in a major metropolitan area, if a 56-year old woman could find the right job. However, her living expenses would also increase and she would likely need to find and pay for a replacement caregiver for Regina. Debtor is also convinced that the distractions of a bigger city will cause Asia to once again find herself in trouble with the law. Phoenix surely does hold a greater number of distractions than does Cornville.

In hindsight, it is a shame that Debtor ever incurred these student loan debts. While her Ottowa University education may have given her the tools and credentials to

[12] Even if Debtor were required to adhere to a 25-year repayment schedule (a prospect this Court finds unreasonable to expect of a 56-year old woman), the discharge she could receive under these programs would leave her with significant debt forgiveness income. *See Roth*, 490 B.R. at 923.

work in an emotionally satisfying role and may have provided a well needed skilled counselor in her rural community, the predictable economic reward was never likely to justify the massive economic burden she incurred. Debtor, of course, is not blameless in this regard. She signed these loan obligations and promised to pay the balances. However, she was married and may very well have reasonably anticipated a different overall financial future for her and her family.

In summary, Debtor does not satisfy each and every one of the twelve *Nys* factors, but she does satisfy most of them. This Court finds that additional circumstances do exist in Debtor's life such that her grim financial circumstances are likely to persist for the remainder of her life. Short of acquiring a winning Powerball ticket, this Court finds the Debtor's dire financial straits will persist through and beyond the date she turns 65.

C. <u>Debtor's Good Faith Repayment Efforts</u>

Since the student loans at issue were consolidated in 2006, Debtor made at least 33 payments on these loans. One could call these payments nominal but they were in accordance with her agreement with Defendant's predecessor(s) and those payments were in accordance with her financial means. Significantly, while Debtor was making these student loan payments, she was unable to pay her income taxes. She now owes $16,000 in non-dischargeable tax debt. Debtor should not be forced to repay her student loans if doing so causes her to amass unpaid income tax liability. Debtor has satisfied the third prong of the *Brunner* test.

Defendant notes in the JTPS at page 22, that Debtor's home loan will be fully matured in 2021,[13] assuming she does not refinance or buy a replacement home before then. Debtor will be 62 years old at that time. Her $494 monthly payment may then be concluded but it is not unreasonable to believe she will need to commit that monthly

[13] This is not a stipulated fact under the JTPS nor does the Court recall this "fact" being introduced into evidence.

financial freedom to other obligations, including deferred maintenance to the mobile home, a newer car, etc.

VI. CONCLUSION

Debtor has satisfied her burden of proof on each of the three *Brunner* tests. Moreover, this Court concludes a partial discharge is not appropriate under the circumstances as this Court finds that Debtor does not, and most likely will not, have the capacity to repay any portion of her student loans. The Court, therefore, wholly discharges the student loans at issue under 11 U.S.C. § 523(a)(8).

So ordered.

Dated: March 31, 2016

DANIEL P. COLLINS
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing mailed by the BNC to:

Interested Parties

UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO

In Re: **Elizabeth M. McDowell,** **Debtor.**	**Bankruptcy Case No. 10-40845-JDP**
Elizabeth M. McDowell, **Plaintiff,** **vs.** **Education Credit Management Corporation, and U.S. Department of Education,** **Defendants.**	**Adv. Proceeding No. 14-08005-JDP**

MEMORANDUM OF DECISION

Appearances:

Stephen A. Meikle, Idaho Falls, Idaho Attorney for Plaintiff.

Thomas E. Dvorak, Givens, Pursley LLP, Boise, Idaho Attorney for Defendant Education Credit Management Corporation.

Introduction

In this adversary proceeding, chapter 7[1] debtor Elizabeth Margaret McDowell ("Plaintiff") asks this Court to declare that the student loan debts she owes Education Credit Management Corporation ("ECMC") and the U.S. Department of Education ("DOE") should be discharged in her bankruptcy case because the obligation to repay them will impose an undue hardship upon her. *See* § 523(a)(8); Dkt. Nos. 1, 10. Defendants, ECMC and DOE, contested discharge of the student loans arguing that Plaintiff can not establish undue hardship. *See* ECMC Pretrial Br. at 2, Dkt. No. 62; DOE Pretrial Br. at 2, Dkt. No. 70.

A trial in the adversary proceeding was conducted by the Court on

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[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 – 1532, and all references to "Rules" are to the Federal Rules of Bankruptcy Procedure, 1001-9037.

December 3 and 4, 2015, at which the parties appeared and offered testimony and evidence; closing arguments were to be submitted later via briefs. Dkt. No. 80.

Prior to the filing of the briefs, DOE and Plaintiff reached a compromise allowing the discharge of a portion of the DOE debt; the deal was evidenced by a stipulation as well as a consent judgment entered by the Court. Dkt. Nos. 81, 82.[2]

Unable to resolve their disagreement, Plaintiff and ECMC filed their

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[2] Plaintiff's debts to DOE are for a Federal Direct Plus Loan for funds she borrowed to pay expenses for her daughter's undergraduate education. *See* DOE Stipulation and Consent Judgment at 2, Dkt. No 81. The original principal balance was comprised of a $4,329 disbursement made in August 2009, and a $4,238 disbursement made in January 2010, upon which interest was to accrue at 7.9% per annum. *Id.* As of December 21, 2015, Plaintiff owed approximately $12,591.17 on this debt, which included unpaid principal of $8,477 and accrued interest of approximately $4,115.17. *Id.*

Under the stipulated judgment, Plaintiff will partially discharge this debt, leaving her with a balance of $10,000, "which includes the original principal of $8,477 and capitalized interest of $1,523, with an interest rate of 7.9 percent per annum." *Id.* at 3. Plaintiff is obligated to make monthly payments of $94.99 commencing in March 2016, for 15 years or until the judgment debt is paid in full. *Id.* The judgment also provides that Plaintiff may not participate in any income-driven repayment plans or any other payment programs normally available for student loans. *Id.*

posttrial briefs, Dkt. Nos. 91, 94, 98, and the issues were taken under advisement.

The Court has now considered the record, evidence and testimony, the parties' arguments and briefs, as well as the applicable law. This Memorandum sets forth the Court's findings of fact, conclusions of law, and its decision concerning the issues. Rules 7052; 9014.

Status of the Case

Plaintiff filed her chapter 7 petition commencing the bankruptcy case on May 14, 2010. *In re McDowell*, No. 10-40845-JDP, Dkt. No. 1 (Bankr. D. Idaho May 14, 2010). A discharge was entered, and the bankruptcy case was closed on September 7, 2010. *McDowell*, Dkt. Nos. 20, 21. Plaintiff did not seek to discharge her student loans while the case was open.

On May 24, 2013, Plaintiff filed a motion to reopen the bankruptcy case to address the student loans. *McDowell*, Dkt. No. 25; Ex. No. 310. On May 31, 2013, the Court granted her motion. *McDowell*, Dkt. No. 27; Ex. No. 311.

On January 3, 2014, Plaintiff filed the complaint commencing this adversary proceeding. Dkt. No. 1. She filed an amended complaint on November 17, 2014. Dkt. No. 21. Defendants filed answers. Dkt. Nos. 29, 30.

Facts[3]

1. The ECMC Student Loans and Plaintiff's Repayment Efforts

As of April 2015, the balance due on Plaintiff's various student loans still in dispute with ECMC, including accrued interest, totaled approximately $93,000, with interest accruing at seven percent per annum. Klisch Aff. at 3, Ex. 250. The amounts Plaintiff originally borrowed, roughly $56,000, financed her undergraduate and graduate college degrees in social work, which she received from Idaho State University and Walla Walla University in 2005 and 2006 respectively. Ex. 220 at 2.

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[3] Of course, the Court had the opportunity to observe the witnesses and their demeanor while they testified at trial. To the extent it was a factor, this recitation of the facts reflects the Court's assessment of the credibility of the witnesses' testimony. And, in the case of expert testimony, these fact-findings also reflect the Court's decisions concerning the evidentiary weight to be afforded to the opinions expressed by those witnesses.

Following graduation, Plaintiff consolidated her loans in June 2007.[4] Klisch Aff. at 2, Ex. 250. From that time until her bankruptcy closed in September 2010, Plaintiff's loans were continuously in forbearance or deferment. *Id.* at 3; Ex. E to Klisch Aff. at 1, Ex. 250.

After bankruptcy, Plaintiff attempted to repay the loans through a so-called "Income Based Repayment Plan" ("IBR plan"). *See* Ex. 212 at 1. However, the IBR plan was terminated when she was granted forbearance from making payments from April 2012 until March 2013. *Id.* Following that period, Plaintiff's request for further forbearance was denied because she had exhausted the maximum forbearance allotted by her lender. Exs. 212, 214. Shortly thereafter, in April 2013, Plaintiff applied and qualified for another IBR plan, under which her monthly payments were to be $357.22. Ex. 217. The Court is unaware of the current repayment status of

[4] Plaintiff consolidated her loans through lender Wells Fargo with Northwest Educational Loan Association ("NELA") as the guarantor. When Plaintiff filed for bankruptcy in May 2010, the consolidated loan was transferred to NELA by operation of the loan guaranty. NELA assigns its accounts that are in dispute in bankruptcy to ECMC for servicing. Klisch Aff. at 203, Ex. 250; *see also* Ex. 221.

Plaintiff's loans or the IBR plan. However, as of April 2015, ECMC estimates that, given her total loan balance of approximately $93,000, under a repayment plan of 30 years, with seven per cent interest per annum, Plaintiff's monthly payment would be approximately $620. Ex. F to Klisch Aff. at 2, Ex. 250.

ECMC's records concerning Plaintiff's student loans reflect that Plaintiff has paid a total of only $1,534.04 towards the debt.[5] Klisch Aff. at 3, Ex. 250. Not really disputing this, Plaintiff testified that she only made a few payments because, even under the IBR plans, the monthly payments were too high, and she could not afford them.

Plaintiff testified that she also made attempts to receive repayment assistance through the National Health Service Corporation ("NHSC"). In 2012, she briefly left her job at Eastern Idaho Regional Medical Facility ("RMF") to work for a community agency affiliated with NHSC, but

[5] Aside from this aggregate amount of Plaintiff's payments, little information regarding the timing and amounts of Plaintiff's payments was offered by the parties.

Plaintiff returned to RMF after only three weeks because she was not getting the client contact hours originally promised to her and could not financially afford to work as little as she was. Pl.'s Sept. 2014 Dep. at 36-37, Dkt. No. 343. Plaintiff testified she again attempted to receive repayment assistance through NHSC when she began working for the Idaho Department of Health and Welfare ("DHW") in 2013, but she apparently was ineligible for the program because she was not current on her loan payments. *See also* Pl.'s Resp. to ECMC's Interrog. No. 27, Ex. 230; Pl.'s Resp. to ECMC's Req. for Produc. No. 19, Ex. 230.

In its posttrial brief, ECMC explained that on December 17, 2015, the DOE launched a Revised Pay As Your Earn, or REPAYE plan. ECMC's Posttrial Br. at 21-22, Dkt. No 94.[6] Under this program, Plaintiff's monthly payments would be limited to no more than 10 percent of the amount that her adjusted gross income exceeds 150 percent of the poverty guidelines

[6] The terms of this program can be found at Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 67204-01, 67239 (Oct. 30, 2015) (to be codified at 34 C.F.R. § 685.209(c)).

applicable to her family size for the month.[7] 80 Fed. Reg. at 67239 (to be codified at 34 C.F.R. § 685.209(c)). Additionally, under this program, if Plaintiff's adjusted monthly payments are insufficient to cover the interest that accrues each month, depending on the type of loan, she will be charged only a portion of any interest that exceeds her payment. *Id.* (to be codified at 34 C.F.R. § 685.209(c)(iii). While not reducing the principal balance due, this feature of the program would reduce the rate at which Plaintiff's loan balance would increase due to unpaid interest each month.

2. Plaintiff and Her Children

Plaintiff is forty-three years old, single, and the mother of two children. She was married to her first husband, the father of her daughter, from January 1991 until June 1997, when they divorced. Pl.'s Resp. to ECMC's Interrog. No. 25, Ex. 224. She married her second husband, the

[7] ECMC provided estimates of Plaintiff's monthly payments under this program, but they are likely inaccurate because they were based on a family size of three. ECMC's Posttrial Br. at 21, Dkt. No. 94.

father of her son, in March 1999, and they divorced in December 2007. *Id.* Plaintiff testified that her second husband worked while she attended college, and that their divorce, which occurred shortly after she graduated and began working full-time, created challenges for her and was one of the reasons she applied for deferments on repayment of her student loans as long as she could. *See also* Pl.'s Mar. 2015 Dep. at 44-45, Ex. 342 (*i.e.,* when asked about her bankruptcy filing in 2010, Plaintiff responded that her divorce was bad financially for her).

Plaintiff's fifteen-year-old son resides with her and depends upon her for his support. When asked during her deposition if the father contributed towards the son's support, Plaintiff responded, "we don't have child support, but we share custody of him. So, he often helps not with monetary expenses, but just if he needs something or he feeds him, of course. I pay the medical insurance and take care of all his material needs, too." Pl.'s Sept. 2014 Dep. at 79–80, Ex. 343.[8]

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[8] This testimony may be somewhat inconsistent with Plaintiff's tax returns, which indicate she has not always claimed the son as her dependent.

Plaintiff has a twenty-three-year-old daughter ("Daughter") who resided with her until June of 2015, when Plaintiff deeded the family home to the bank in lieu of foreclosure. While Daughter lived with Plaintiff, Plaintiff paid all of the housing costs. Pl.'s Mar. 2015 Dep. at 11, Ex. 342. She also paid for many of Daughter's other expenses including, but not limited to, her cell phone (estimated to be about $75 per month), most of her groceries, and for Daughter's medical costs when necessary. *Id.* at 13-14. *See also* Pl.'s Sept. 2014 Dep. at 61, 62, and 65, Ex. 343 (indicating Plaintiff also covered Daughter's expenses for entertainment, car insurance, and computer software for school); Pl.'s Am. Resp. to ECMC's Req. for Produc. at 00666, Ex. 344 (listing Daughter's monthly expenses at $189.45 per month).

Daughter was a full-time college student from fall 2009 until she

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See, e.g., Exs. 206, 207. This apparently was because Plaintiff's divorce decree required the parents to alternate claiming the exemption. Ex. 343 at 79-80. However, the divorce decree was never offered into evidence, and Plaintiff's 2008 tax return was amended to remove her son as a dependent because "he resided with his father for over ½ of the year and his father provided half of [his] support." 2008 Am. Tax Return at 2, Ex. 204.

graduated with a bachelor's degree in psychology in August 2014. Daughter's Transcripts, Ex. 329. Daughter began working in December 2014. Pl.'s Mar. 2015 Dep. at 15, Ex. 342. As of February 2015, Daughter was earning a net income of approximately $1,500 per month. *Id.* at 11; Daughter's Pay Statements, Ex. 238. Despite this, Plaintiff continued to help cover Daughter's expenses because she felt much of Daughter's income was necessary to pay Daughter's car and student loan payments, as well as medical expenses. Pl.'s Mar. 2015 Dep. at 13-14, Ex. 342.

Plaintiff testified that, as of trial, Daughter was financially independent aside from being included on Plaintiff's health insurance policy and cell phone plan. Plaintiff testified she planned to remove Daughter from both soon. However, Plaintiff also testified she and Daughter occasionally help each other make ends meet because their paychecks are staggered. *See, e.g.,* Pl.'s Bank Statements at 00114, 00153, Ex. 318 (deposits from Daughter); Pl.'s Bank Statements at 00114, Ex. 318 (withdrawal to Daughter).

The amount of financial support Daughter has received from either her biological father, or her step-father, is not apparent from the record. However, Plaintiff testified at trial that, prior to Daughter purchasing a car post-graduation, Daughter had been using a car provided by her "father."

Plaintiff testified that the loans she obtained from DOE, the subject of the stipulation and consent judgment, were used to finance Daughter's first year of college. Plaintiff testified she felt it was necessary to obtain these loans because Daughter did not qualify for financial aid when she began college. As previously noted, Plaintiff has now agreed to repay this loan in monthly installments of $94.99 for the next 15 years. Stipulation and Consent Judgment at 3, Dkt. No. 81.

3. Plaintiff's Employment History and Income

Plaintiff is a licensed Clinical Social Worker, licensed Clinical Supervisor, and holds a "Designated Examiner Certificate," which Plaintiff testified qualifies her for a variety of occupations in the social work field. Pl.'s Resp. to ECMC's Interrog. No. 6, Ex. 224. Plaintiff has been employed

doing social work almost continuously since she obtained her master's degree in December 2006. *See* Pl.'s Resp. to ECMC's Interrog. No. 1, Ex. 225.

In March 2007, Plaintiff obtained a position as a clinical social worker at RMF. *Id.* Plaintiff testified that after holding that position for almost six years, she also started working part-time as an assessment referral coordinator at RMF. Eventually, Plaintiff began working solely as a full-time assessment referral coordinator, but after about one year, in August 2013, she voluntarily took on a less demanding position as part of an adult mental crisis team at DHW's Behavioral Health Division. *See Id.*

Plaintiff's annual income increased steadily throughout the early years of her employment, from a low of $40,000 in 2007, to a high of $58,000 in 2013. *See* Tax Returns, Exs. 201, 204, 205, 206, 207, 211, 213. However, when Plaintiff left RMF in 2013, she took a pay cut from $29.17 per hour to $24.00 per hour at DHW. Pl's Pay Statement at 00536, Ex. 330. Since then, she has received two pay increases, the last coming in April

2015, to $24.89 per hour. *Compare* Pl.'s Pay Statement, Ex. 107 *with* Pl.'s Pay Statements, Exs. 108, 238.

Following the job change, Plaintiff testified she supplemented her income on the weekends by working part-time "on-call" shifts at her previous position. She testified she worked only one or two such shifts between August 2013 and April 2014, and then stopped because the job was too physically demanding while she was working full-time for DHW. *See also* Ex. 344 at 00666; Pl.'s Resp. to ECMC's Interrog. No. 1, Ex. 224 (showing Plaintiff's start date at DHW as August 2013, while her end date at RMF was not until April 2014).

Plaintiff's income has recently decreased because she has reduced the number of hours she works per week. In April 2015, due to her continuing health concerns, and at the recommendation of her supervisor,[9] Plaintiff applied for relief under the Family Medical Leave Act ("FMLA").

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[9] Plaintiff testified that her supervisor likely recommended this course because Plaintiff was experiencing difficulty waking up in the morning, taking naps at lunch time, requesting a lot of time off for doctor's appointments, and otherwise not being as productive at work as she should be.

Pl.'s Resp. to DOE's Interrog. No. 20, Ex.314. Plaintiff testified her application was approved and she began a reduced work schedule of 32 hours per week in June 2015. Despite the reduction in hours, Plaintiff testified her salary had yet to decrease because she was using accrued sick and vacation leave to make up for her weekly day off. However, she testified that only about 15 hours of leave time remained, and her leave benefits would soon be exhausted because they accrued more slowly than she was using them. *See also* Pl.'s Pay Statements at 00992-00997, Ex. 356 (showing that from August until October 2015, Plaintiff's accrued paid vacation and sick leave had decreased from just over 80 hours to about 45 hours and that she only accrues about 8 hours per two-week pay period).

While Plaintiff earns less in her position at DHW than she earned at RMF, her new position provides various benefits to Plaintiff. For example, Plaintiff testified that at DHW, the cost of her medical insurance premiums, as well as deductibles, are lower. However, Plaintiff testified the driving factor behind her moving to the position with DHW was to

preserve and improve her physical and mental health. At the time she moved to DHW, no medical professional had recommended that she leave her job at RMF,[10] but Plaintiff testified that her job, assessing possibly suicidal or homicidal patients for admission to the hospital, and the responsibility of insuring the safety of the staff, as well as the patients, was too physically and emotionally demanding for her to perform. Plaintiff further testified that, apparently due to staffing issues and the many responsibilities of her position, she often worked long weeks, had an unpredictable schedule, and had infrequent, or sometimes no breaks during her shifts. She testified that while she felt overwhelmingly stressed doing the job alone, her requests to RMF management for extra help went unheeded.

Plaintiff's working conditions at DHW appear to be improved. Plaintiff testified she now has a set schedule, has a full lunch hour, and can take a break when she needs to. She also testified she now works on a

[10] Pl.'s Sept. 2014 Dep. at 40-41, Ex. 343.

team that can provide help when she needs it. However, while she has benefitted from better working conditions, Plaintiff testified that she felt her overall health condition has not improved, and indeed may have even become worse. *See also* Pl.'s Mar. 2015 Dep. at 24-25, Ex. 342 (indicating Plaintiff was unsure her new job had decreased her stress level or helped her physically since she was still working with people with mental health issues). Plaintiff explained that she has experienced little relief even working 32 hours per week because she spends her days off at various doctors' appointments. She also explained that, because she is using her paid leave to supplement her decrease in income, she has no leave time available to accommodate any prolonged absence from work.

Plaintiff testified that she has attempted to obtain other less demanding employment in her field. She regularly researches job listings but has found that most open positions come with reduced or uncertain pay. She testified she was offered a counseling position in the private sector, but that it included no health insurance benefits, and the pay was

lower and uncertain. She also testified she applied and interviewed for a job at RMF that would not involve the direct care of patients, but she was not offered that position.

Plaintiff also entertained the notion of becoming a photographer, an occupation she thinks she would enjoy. While she underwent some training for that occupation (discussed below), she has since discovered that switching to that field would likely result in a significant and unacceptable reduction in pay.[11] Because of this, she seems to have abandoned any plans to enter this occupation.

In sum, at her current wage of $24.89 per hour, assuming Plaintiff works 32 hours per week, her gross pay is roughly $3,450 per month.[12] *See also* Estimated Schedule I at 2, Ex. 110 (indicating a slightly lower figure of

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[11] Plaintiff apparently came to this realization when she learned that the first opening for a photographer for which she felt she was qualified paid $16 per hour.

[12] This figure was calculated by multiplying her hourly wage of $24.89 by the 32 hours for her gross weekly wage, multiplying that by 52 weeks for her annual gross salary, and dividing that by 12 to reach her gross monthly wage.

$3,424.46). If she were able to work a 40-hour work week, her income would be closer to $4,300 per month.[13] Schedule I at 2, Ex. 108.

On her most recent schedule I, filed in the bankruptcy case November 12, 2015, Plaintiff's approximate $4,300 gross monthly income translated to about $3,215 in take-home pay. Ex. 108. The payroll deductions Plaintiff used to calculate this figure includes not only taxes, but also a monthly contribution to a retirement fund of almost $300, medical and dental insurance premiums of approximately $200, and life insurance benefits for herself[14] and her son for approximately $60.[15] *Id.*

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[13] The equation in footnote 12 was used, substituting 40 hours per week for 32.

[14] Plaintiff testified she opted for the life insurance coverage at three times her annual income, the highest amount available to her, because of her health concerns.

[15] ECMC points out that an additional $115.13 on line 5(e) of schedule I is likely a duplicate. ECMC's Posttrial Brief at n. 2, Dkt. No. 94. Even if so, it is inconsequential as this sum is not included in the overall payroll deductions on line 6. Morever, at trial, using Plaintiff's pay statements, DOE's lawyer established that the amount represented on line 6 of Plaintiff's current schedule I is an accurate representation of Plaintiff's current monthly deductions. *See* Schedule I at 2, Ex. 108. As these deductions are the same on the estimated schedule I, aside from the smaller tax liability, the Court finds line 6 on Plaintiff's

Using these same deductions, and a commensurately smaller tax liability that Plaintiff calculated, Plaintiff's estimated monthly gross pay for a 32 hour work week of $3,450 equals approximately $2,525 monthly take-home pay. *See* Estimated Schedule I at 2, Ex. 110 (listing monthly deductions of approximately $925) .

4. Plaintiff's Expenses

As should be expected, Plaintiff has significant monthly living expenses. Her most current schedule J, filed in November 2015, Ex. 109, lists them at $3,555.46, including:

Rent: $700
Utilities: $540.40
Food and Housekeeping Supplies: $667
Clothing, Laundry, and Dry Cleaning: $95.33
Medical and Dental Expenses: $379.49
Transportation: $151.24
Entertainment: $70
Vehicle Insurance: $55.19
Car Payment: $330
Other Installment Payments: $481.40

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estimated schedule I to be accurate as well. *Compare* schedule I at 2, Ex 108 *with* estimated schedule I at 2, Ex 110.

Other Expenses: $85.01[16]

Id. at 2. Plaintiff testified that these amounts represent an average of those she paid during either the three or six months prior to filing this schedule.

At the time of trial, Plaintiff was renting a 3,400 square foot house for only $700 per month from a friend who was attempting to sell it. *Id.* at 3. Once the home is sold, though, Plaintiff will have to vacate the house, and she expects that she will have to pay at least $200 more each month in rent to find suitable housing. Plaintiff acknowledged she might be able to locate less expensive rental housing, but she was concerned that might require her and her son to live in an unsafe neighborhood.

Plaintiff's utilities expense includes her cell phone and internet costs. She estimates this expense will decrease by approximately $75 when she removes Daughter from her cell phone plan. Pl.'s Mar. 2015 Dep. at 13, Ex. 342. The cost for utilities should also decrease once Plaintiff relocates to

[16] This figure includes expenditures for hair care, post office box rental, professional license fees, vehicle registration fees, and amounts budgeted monthly for Christmas, birthdays, and other gifts.

smaller housing.

On the other hand, Plaintiff testified her transportation expenses are understated because she included only her average cost for gas and oil changes. She testified she thinks the true costs should be $20 or $30 higher to reflect the need for other regular vehicle maintenance such as tire or brake replacement.

Plaintiff owns a 2007 Toyota Camry with approximately 220,000 miles on it. Despite its age, she testified she is making a $330 per month car payment because she refinanced the loan after her second divorce; Plaintiff thinks the car loan will be paid off next year. However, Plaintiff explained she was experiencing an increasing number of problems with the car, and she feared that she would be required to replace it in the next couple of years.

Plaintiff testified that while her expenses for food and housekeeping may seem high, she purchases more expensive food and healthcare products due to various allergies from which she suffers (discussed

below).

Plaintiff's monthly medical expenses represent payments for previous medical procedures, insurance co-payments for doctor's visits, medications, and health supplements. Pl.'s Resp. to DOE's Interrog. No. 15, Ex. 325. This figure was generally supported by her testimony and the financial documents she produced. Pl.'s Resp. to ECMC's Req. for Produc. Nos. 23, 24, 25, Ex. 233. Plaintiff testified this figure would be higher at the time of trial because she had been attending counseling sessions and chiropractor appointments, which have co-payments of approximately $15–20 each.

Plaintiff's scheduled installment loan payments include a monthly payment of $100 for "Yolanda Car Loan". Ex. 311 at 4. Plaintiff testified that a payment labeled in the schedule as "Car" is actually a typo, and should be "Carr", the last name of her mother. Plaintiff testified she regularly borrows money from her mother, most recently to travel to South America for photography training. *See also* Pl.'s Mar. 2015 Dep. at

78–82, Ex. 342. The trip cost approximately $5,900, and while Plaintiff was able to partially finance the trip on her own, she still borrowed roughly $3,800 from her mother. Pl.'s Resp. to ECMC's Interrog. at 00666, Ex. 344; Pl.'s Mar. 2015 Dep. at 85–86, Ex. 342. The parties have no written agreement concerning these loans or payments; Plaintiff's mother keeps track of how much she is owed and instructs Plaintiff concerning how much she needs to pay. In addition to borrowing from her mother, Plaintiff has also received financial support from her father. Plaintiff testified he recently gave her $2,000 to pay her attorney and other medical expenses. *See also* Pl.'s Bank Statements at 00143, Ex. 318. The record is unclear concerning if or how she intends to repay this amount.

5. Plaintiff's Financial Decisions

In light of her challenging financial circumstances, in the Court's opinion, over the years, Plaintiff has made some regrettable decisions, which ECMC highlighted in these proceedings. For example, though grossly indebted for her student loans, in 2007, Plaintiff financed the

purchase of a used motorcycle with her husband for $10,000.[17] Pl's Sept. 2014 Dep. at 81, Ex. 343. Plaintiff testified she elected to keep the motorcycle after the divorce, and to make the loan and insurance payments, even though she did not need it for transportation. She testified she later sold the motorcycle for approximately $775, though she was aware it had a Kelly Blue Book value of a couple thousand dollars. She testified she had attempted to sell it for more, but could not get any other offers because of the motorcycle's mechanical problems. She also testified, that because her ex-husband's name was on the loan, he at times helped her make the payments.

Shortly after filing this adversary proceeding, when she should have known that her financial conditions and health would be put under the microscope, Plaintiff elected to travel to South America to participate in the photography course, borrowing the funds to do so from her mother.

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[17] Plaintiff testified she thought the motorcycle cost was closer to $4,000, but that the $10,000 borrowed included other costs, such as for an engine guard, windshield, and clothing.

She testified the training involved daily hikes and boating trips. Plaintiff attempted to justify her decision by explaining that, at the time she took the trip, she was looking for a new career and did not realize that photography would not be an economically feasible alternative. She testified she would need at least another year or two to repay her mother for the trip. In addition to this trip, Plaintiff also purchased a camera lense for approximately $460, as well as an SD card for almost $125 to replace one she had accidentally thrown away. *See* Capital One Statement at 00835, Ex. 347 (purchase of camera lens); Pl.'s Mar. 2015 Dep. at 75–76, 87 (discussing the camera lens and SD card).

Plaintiff has also incurred a substantial amount of credit card debt since discharging significant amounts of debt in her bankruptcy case.[18] The statements for her two Capital One credit cards reflect that she owes approximately $2,800 and $3,300 as of November 2015. Ex. 357 at 01034,

[18] According to her schedules, Plaintiff sought to discharge over $100,000 of unsecured debt. *See In re McDowell*, No. 10-40845-JDP, Plaintiff's chapter 7 petition at 31, Dkt. No. 1 (May 14, 2010); Order Granting Discharge, Dkt. No. 20 (Sept. 7, 2010).

01076. As of March 2015, her Kohl's and Amazon credit card balances were approximately $765 and $220 respectively. Ex. 317 at 00361. While Plaintiff testified she felt these balances were incurred for necessary expenses, she also testified that she spent approximately $835 dollars on food and gas during a trip to see family in California in November 2013, and at least another $310[19] on a trip to Yellowstone in September 2013. *See* Ex. 347 at 00834 (California Trip); Ex. 347 at 00838 (Yellowstone trip).[20] Plaintiff's schedule J reflects that her current monthly credit card payments are approximately $400.

Plaintiff also routinely incurs various bank and credit fees and

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[19] ECMC argues this trip cost the full $638.94 reflected on that month's credit card statement. ECMC's Posttrial Brief at 11, Dkt. No. 94. However it seems a majority of the charges for that month were made in or around Plaintiff's place of living after the trip to Yellowstone. *See* Ex. 347 at 00838–00839.

[20] While not charged to her credit card, Plaintiff also testified she traveled to Salt Lake in July 2015, to take photographs for a friend to help build Plaintiff's photography portfolio. However, Plaintiff testified she was compensated for various expenses and the only expense of record is $44 for one dinner. Plaintiff testified about another trip to build her portfolio by photographing the wedding of a friend in Nevada, but the time frame and expenses of the trip were not established.

charges. She testified that she frequently over-drafts her checking account knowing that the practice costs her $35 per transaction. *See, e.g.*, Ex. 318 at 00130, 00152. She testified she tries to do this only once per month, for an amount she feels will cover her expenses for the remainder of the month, to avoid incurring this fee multiple times after she has exhausted her funds. Plaintiff also testified that she often is a month behind on internet, credit card, and cell phone payments, which causes her to incur various late fees and charges. *See, e.g.*, Ex. 358 at 01167 (Verizon); Ex. 347 at 00776-00777 (October 2014 Capital One Statement reflecting a $35 late fee with fees for the year of $199); Ex. 322 at 00187 (Cable One). However, she stated that she sometimes makes late credit card payments because she is living paycheck to paycheck. Pl.'s Mar. 2015 Dep. at 71, Ex. 342. Despite the financial difficulties causing her to incur these charges, Plaintiff nonetheless decided to finance a new cell phone for her son that cost almost $600, adding an additional $27 to her monthly cell phone bill. Ex. 358 at 01180.

Plaintiff also admitted she did not make her mortgage payments from August 2014 until she signed the deed in lieu of foreclosure in June or July 2015. Pl.'s Resp. to DOE's Interrog. No. 17, Ex.325; Pl.'s Supp. Resp. to DOE's Interrog. No. 13, Ex. 314. Her September 2014 mortgage statement reflects that she may have been skipping payments prior to that time, but Plaintiff testified that while her mortgage statement reflected past due payments, during that time she was on some sort of repayment plan to help her catch up. Sept. 2014 Mortgage Statement at 1, Ex. 352. She testified she could not recall what she had done with the extra funds from not making her mortgage payments, but that she was just trying to make it through month to month.

Plaintiff also acknowledged that she received significant tax refunds in 2012 and 2013, but she could not recall how she had spent the funds. *See* 2013 Federal Tax Return at 0093, Ex. 213 (showing a refund of $3,105); 2012 Federal Tax Return at 0114, Ex. 211 (showing a refund of $1,489). On a smaller scale, in response to questioning by counsel, Plaintiff could not

recall where numerous cash withdrawals she had taken from her bank account were spent, although she testified the more recent withdrawals may have been made to implement a cash budgeting system she learned at a financial course she recently attended.

6. Plaintiff's Health

Plaintiff's medical records document the various health issues she has experienced since her student loans became due in 2007. *See* Ex. 103. In particular, the medical records from Dr. Eric W. Perttula indicate test results suggesting that Plaintiff was experiencing low thyroid levels as early as August 2010. Ex. 103 at 0001. However, a formal diagnosis with attendant treatment for this condition did not begin until 2013.[21] *See also* Ex. 203 at 0024. Plaintiff's medical records show that, since the 2013 diagnosis, doctors have struggled to regulate her thyroid levels. Ex. 103 at 0027, 0029, 0035. Earlier medical records also indicate that she began

[21] Dr. Cook's report (discussed below) notes that Dave Holland, C.N.P., first started Plaintiff on thyroid medication in July 2013, but that particular record is not before the Court. Ex. 100 at 5.

receiving treatment for migraines as early as 2011. Ex. 103 at 0015.

Plaintiff also testified she was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") in college, which causes her to have difficulties concentrating, focusing, and processing thoughts. She previously was able to successfully treat this condition with medication; however, she testified that her medication has been less effective since her thyroid problems began.

In addition to these early issues, Plaintiff testified the bulk of her current health problems began in 2012. That year she underwent two surgeries, one to correct a birth defect in her sinuses, and another for an injury to her knee. She testified it was then that she began to feel like she could not function normally due to fatigue, headaches, sudden weight gain,[22] and problems thinking clearly.

Plaintiff began seeing her current primary physician, Dr. Laramie Wheeler, in early 2015; she consulted her numerous times prior to trial.

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[22] *See* Ex. 103 at 0024 (indicating Plaintiff had gained 37 pounds in two years, and 50 pounds in three years)

See Exs. 102, 112, 317. Dr. Wheeler has worked with Plaintiff to treat her various symptoms. *See* Ex. 112 at 4 (describing Plaintiff's symptoms). Since that time, Dr. Wheeler has given Plaintiff an array of diagnoses of her problems including fatigue, generalized pain, myalgia, insomnia, gluten intolerance, hypothyroidism, hyperlipidemia, insulin resistence, migraines, parasthesia in her legs, and right shoulder pain, among other things. *See* Exs. 102, 112.

While not described in the medical records, Plaintiff testified, and Dr. Wheeler explained in a letter dated March 2, 2015, that Plaintiff also likely suffers from an auto-immune disease that is contributing to her symptoms. *See* Ex. 102 at 1. Plaintiff described this disease as one where her body is attacking itself, and that the symptoms included daily generalized pain. Shortly before trial Plaintiff was also diagnosed with sleep apnea, the treatment of which has ameliorated some of her fatigue. Ex. 102 at 13.

Plaintiff testified that because she has not responded to traditional

methods of treatment, Dr. Wheeler has, with some success, treated her with a combination of prescription medication, over-the-counter medication, and herbal supplements.[23] *See* Ex. 102 at 1. *See also., e.g.*, Ex. 112 at 6, 11 (indicating the treatments Dr. Wheeler has prescribed).

In the letter dated March 2, 2015, Dr. Wheeler stated it is probable that Plaintiff's various health problems are chronic and likely to persist through her lifetime. Ex. 102 at 1. In a later letter dated May 5, 2015, Dr. Wheeler opined that Plaintiff's job-related stress is a cause of some of her problems, and that if she continues to work as a social worker, Plaintiff will continue to experience symptoms, which will eventually lead to a premature death. Ex. 112 at 3.

Plaintiff also testified she suffers from food allergies, including gluten and dairy intolerance, which necessitated an extreme change in her diet. While her medical records do not indicate any specific diagnosis

[23] Plaintiff testified that these supplements are meant to help her adrenal glands and her auto-immune response. One was a liquid tincture containing various herbal extracts to treat her symptoms such as inflammation, pain, and her ability to focus.

concerning dairy, Dr. Wheeler stated in the March 2 letter that she was treating Plaintiff for gluten intolerance, which Plaintiff testified began after she told Dr. Wheeler she had some of the symptoms. Ex. 102 at 1. In a response to an interrogatory, Plaintiff indicated she had seen a Dr. Gene Petty about her food allergies and underwent allergy testing, but those records and test results were not provided to the Court. Pl.'s Resp to ECMC's Interrog. No. 8, Ex. 224. Plaintiff also testified that she has been seeing a nutritionist who prescribed a special diet, but there is no documentation of her visits with the nutritionist in the record. As indicated previously, Plaintiff testified, that due to her allergies, she must often buy supplemental shakes as meal replacements. She also testified she must use specialized makeup, lotions, soaps, and even bathroom tissue, all of which are more expensive than normal.

In addition to providing the Court with Plaintiff's medical records, both parties retained doctors to conduct an independent medical examination ("IME") of Plaintiff. Their opinions are at odds with each

other, as well as with that of Dr. Wheeler.

a. Dr. David C. Simon

Dr. Simon[24] was retained by Defendants and examined Plaintiff on July 28, 2015. He testified the examination lasted less then twenty minutes and that he spent the majority of that time asking her questions. While he testified that he generally reviewed examinees' medical histories prior to such examinations, he apparently did not do so prior to meeting Plaintiff.

Dr. Simon's report highlights some of Plaintiff's medical history including her thyroid dysfunction, insulin resistance, dyslipidemia, depression, anxiety, joint pain, ADHD, and migraines. *See* Simon's Report at 2-3, Ex. 247. Despite these notes, Dr. Simon testified that he did not discuss, or could not recall discussing, Plaintiff's complaints about headaches, memory loss, or problems concentrating. He did, however,

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[24] Dr. Simon testified he has been a medical doctor since 1995. He specializes in physical medicine and rehabilitation and currently works at the Eastern Idaho Medical Center where he works with brain injuries, trauma, orthopedic, and some cardiac rehabilitation. He also has a private practice where he focuses on musculoskeletal problems and neurological testing in addition to performing independent medical exams.

talk with Plaintiff about her thyroid issues, and recalled that Plaintiff told him that she had consulted an endocrinologist who diagnosed her with Metabolic X Syndrome,[25] but that she discontinued seeing him because she did not trust him.

Dr. Simon testified that what stood out to him during the examination was that Plaintiff's pain was an aching, and that she said only stress made it worse, not physical activity. *See also, Id.* at 4. He testified the evaluation was otherwise unremarkable in terms of any medical issues, and noted she had a good range of motion for her lower back, indicating a low chance of lower back problems.

As for Plaintiff's pain levels, Dr. Simon's report seems inconsistent. At trial, DOE's lawyer focused on Plaintiff's score on the "McGill Pain Questionnaire." In that respect, the report states:

> The McGill Pain questionnaire specifies 15 potential pain descriptors. The examinee rates the intensity of each descriptor

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[25] The parties offered no information or explanation about Metabolic X Syndrome, and the Court is unfamiliar with this condition.

> on a scale of 0 to 3. The total of all descriptors was 1. The total of the 11 somatic descriptors was 1, averaging .1 and the total of the 4 affective descriptors was 0.

Id. at 6. Dr. Simon further testified that, while not in the report, Plaintiff also rated her overall pain as somewhere between the categories of mild and discomfort. However, in addition to the McGill questionnaire, under "Current Status," the report discloses that "the examinee reports the pain now is a 3. During the last month the pain averaged 3–4, with a high of 8, and a low of 2." *Id.* at 4. Based upon the testimony, to the Court, the discrepancy in the scores is likely explained by Plaintiff's frame of reference when filling out the McGill questionnaire. Plaintiff testified she filled out the form according to how she felt that day before work; Dr. Simon confirmed she did in fact fill out the form the day of the appointment. Moreover, Dr. Simon testified that, at the examination, he did not explain to Plaintiff whether her answers to the McGill questionnaire should reflect how she was feeling at that time, or more generally.

Dr. Simon concluded in his report that "the only objective diagnosis I can give her is obesity." *Id.* at 6. The report further provided that, "[o]besity would not keep her from working full-time. There are no objective findings on examination or in her medical records that would necessitate work restrictions." *Id.*; *see also* Ex. 249 at 1 (finishing the sentence Dr. Simon had accidentally omitted a portion of). Dr. Simon also noted Plaintiff had "subjective pain and fatigue", and that this could be a sign of a number of things, but none were confirmed and all would be treatable, even a thyroid problem. Simon's Report at 6. Dr. Simon also noted Plaintiff reported herniated discs and annular tears, but that there was no record of these injuries, and that if she did have them at some point, they would have healed by now. *Id.* However, Dr. Simon did testify that the appropriate way to diagnose such injuries is by an MRI, and that if an MRI so indicated, then he would agree she did in fact have those injuries.

b. Dr. Gary L. Cook

Dr. Cook,[26] Plaintiff's expert witness, examined Plaintiff on August 7, 2015. He reviewed Plaintiff's medical records prior to the examination, examined and spoke with her for roughly an hour, and then again reviewed her records and spoke with her via telephone to resolve any discrepancies and get a more detailed history. He testified he probably spent six to eight hours reviewing Plaintiff's medical records.

Dr. Cook testified that he relies on the latest and most well-regarded online sources, and medical journals and texts in making his diagnoses. He further testified that he places great weight on a treating physician's opinions because they have usually spent much more time with the patient. In this case, he felt Dr. Wheeler had had the most success in ameliorating some of Plaintiff's symptoms. And, in regard Dr. Wheeler's May 15 letter, Dr. Cook stated, "[a]lthough stark statements regarding the probability of a premature death are rare in medical opinions, this

[26] Dr. Cook testified he had primarily practiced anesthesiology and pain management for 28 years before entering private practice in 2008, about the same time he started conducting IMEs.

examiner is in complete agreement with this practitioner's conclusions." Cook's Report at 8, Ex. 100.

When asked about Dr. Simon's report, Dr. Cook expressed concern that Dr. Simon had not completely accounted for, and had too easily dismissed, Plaintiff's various symptoms. *Id.* at 9-11. Ultimately, Dr. Cook strongly disagreed with Dr. Simon's conclusion that there is nothing preventing Plaintiff from working full-time, and noted Dr. Simon's conclusion is also at odds with Dr. Wheeler's opinion. *Id.* at 11. As for Plaintiff's pain levels, Dr. Cook's pain disability questionnaire scored Plaintiff at a "92 Moderate Disability." *Id.* at 15.

Dr. Cook diagnosed Plaintiff with several conditions. His first diagnosis was subclinical hyperthyroidism, possibly of iatrogenic origin. *Id.* at 15-16. His report provides a detailed explanation for his diagnosis, and provides the following excerpt from an article called "Clinical Impressions and Management of Subclinical Hyperthyroidism: A Review:"

> The detrimental effects of [subclinical hyperthyroidism] have been extensively studied and its effect on the cardiovascular system, the skeleton, mood disturbance, quality of life is quite significant leading to considerable morbidity and mortality.
>
> Majority of the patients are asymptomatic and lack overt features . . . the issue is contentious, the situation is challenging and the benefits of treatment are debatable. The consensus for who, when and how to treat is growing but still hasn't been universally accepted.

Ex. 100 at 17.

ECMC points out that this article also provides that the significance of the disease is uncertain for most patients as their thyroid may revert to normal, remain static, or become worse. ECMC's Posttrial Brief at 14, Dkt. No. 94. ECMC also notes other excerpts in the article provide there is no uniform recommendation for treatment, and it is often hard to draw firm conclusion about the effect of the disease on mood, affective disorders or quality of life. *Id.* at 14–15. When confronted at trial with this criticism of his reliance upon this article, Dr. Cook testified he agreed that there is still no consensus as to the outlook of the disease or the treatment. However, in regards to its effect on those who suffer from the disease, he felt the

article was outdated and that since it was published, the U.S. Preventive Task Force and other studies have come to some convergence of opinion. *See also* Cook's Addendum at 4–5, Ex. 101. However, he testified the quality of the evidence is still low. *See also Id.* Despite this admission, he testified that Plaintiff's symptoms were likely to persist and that the continuation of her current work was problematic.[27]

Dr. Cook recognized that his diagnosis disagreed with Plaintiff's treating physician's diagnoses of *hypo*thyroidism.[28] He testified that this is likely because subclinical hyperthyroidism is an obscure diagnosis[29] and that it shares many of the symptoms of hypothyroidism. However, he

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[27] In commenting on thyroid dysfunction in general, Dr. Cook testified that the thyroid regulates overall metabolism of the body at a cellular level, controls heart rate and levels of energy, and is pervasive and influences every function of the body, particularly on a cognitive basis. Some symptoms include fatigue, weakness, memory problems, anxiety, problems concentrating and attending to tasks, some of which he observed during his examination.

[28] Dr. Cook also rejected other diseases that could account for some of Plaintiff's symptoms including: Hashimoto's thyroiditis, chronic fatigue syndrome, and fibromyalgia. Cook's Report at 19-20.

[29] Dr. Cook testified that this diagnosis affects only about 0 to 2 percent of patients with thyroid dysfunction.

testified there are distinct differences that Plaintiff exhibited. Cook's Report at 18-19, Ex. 100. Also, while on the witness stand, Dr. Cook reviewed Plaintiff's lab work he had previously not seen, and testified it supported his opinion.

Dr. Cook's also diagnosed Plaintiff with "Chronic Headaches, Mixed. Possible Cervicogenic Origin." *Id.* at 20. The report provides that "Plaintiff's debilitating headaches affecting her concentration, focus, attention, cognition and job function may have a cervicogenic component." *Id.* at 21. It further provides that this particular type of migraine "demonstrate the greatest loss in domain of physical functioning when compared with the groups with other headache disorders." *Id.* Ultimately, Dr. Cook concluded that because the required diagnostic steps had not been pursued by any of her practitioners to date, Plaintiff should consult with a qualified neurologist to evaluate her.

Dr. Cook also diagnosed Plaintiff with chronic low-back pain, chronic cervical and shoulder pain, and right upper-extremity weakness.

Id. at 22. He testified these were apparent at Plaintiff's physical examination, and while Dr. Simon thought her back should be healed by now, the environment of the spine is not conducive to healing.

Finally, Dr. Cook diagnosed Plaintiff with chronic pain syndrome, one symptom of which is "symptom magnification."[30] *Id.* at 23–24. However, he stated, this should not disqualify or diminish her symptoms or complaints because her symptom magnification was appropriate for the level of pain she experiences. He also testified that chronic pain can reflect a reprogramming of the brain, so that even once an injury is healed, a person can still interpret normal sensations as pain.

Dr. Cook concluded that Plaintiff's current work duties are problematic. Cook's Report at 25, Ex. 100. However, his ultimate prognosis was "uncertain to guarded" due to the uncertainty surrounding her particular illnesses, and he testified the salient issue was obtaining a

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[30] Dr. Cook's report explains that symptom magnification can be created by "fear of having learned that certain actions or positions provoke pain" or "can be a response to feeling discounted or mistrusted, so that one must emphasize symptoms to persuade the physician of their reality." Cook's Report at 24.

definitive diagnoses or explanation of her thyroid dysfunction. *Id.* at 26. He also felt that Plaintiff had a probability greater than 51% of requiring future medical surgical treatment for pain arising from diagnoses of thyroid disease and back pain. *Id.* at 27. He testified that overall, to a reasonable degree of medical certainty, Plaintiff experiences chronic pain, particularly in her neck and shoulder area, and will likely have it for the rest of her life. As for the thyroid problem, his impression was that most thyroid conditions are of a permanent nature and require treatment of a permanent nature (either taking medication for the rest of her life or destroying and removing her thyroid altogether).

Finally, Dr. Cook testified that, to a reasonable degree of medical certainty, Plaintiff's continued work will accelerate her medical condition. He testified she has a history of cardiac rhythm disturbances evidenced by medical records, a rapid heart rate when she has anxiety attacks, and skip beats, all of which predispose her to cardiac events, stroke, and other life threatening conditions. He testified this history combined with her

thyroid dysfunction puts her at risk of a cardiac event.

c. Plaintiff's Mental Health

In addition to her physical ailments, Plaintiff explained that she also struggles with anxiety, which she testified has been aggravated by her lack of ability to focus and think clearly while treating patients. *See also*, Ex. 112 (diagnosing Plaintiff with anxiety); Cook's Report at 23, Ex. 100. Dr. Cook testified that Plaintiff told him that she experiences panic attacks, which are infrequent, but are paralyzing when they do occur.

Plaintiff also has been diagnosed with depression, which she testified stems from her inability to do her job and not feeling well everyday. Ex. 102 at 8; Cook's Report at 23, Ex. 100. She testified she temporarily took an anti-depressant medication, but it led to suicidal thoughts, and was discontinued. She testified she has not attempted another anti-depression medication since that time. This seems to be at the suggestion of Dr. Wheeler. Ex. 102 at 9 (noting "Is struggling with depression. Not badly enough to try prescription medication (Prozac made

her suicidal).") As previously mentioned, Plaintiff recently began attending counseling sessions again.

Dr. Cook testified these diagnoses are also of a permanent nature, especially in the stressful environment of her work. He felt that without Plaintiff's training in mental health care, the severity of her problems would probably be even more debilitating.

d. Subsequent Opinions

After reviewing Dr. Cook's report, and while the trial was pending, Dr. Simon authored another report indicating that nothing had changed the opinions he expressed in his original IME report. *See also* Simon Letter at 1, Ex. 249. While he felt a third endocrinologist evaluation was unnecessary because Plaintiff had dismissed the opinions of two prior endocrinologists, he ultimately admitted that an endocrinologist would be the most qualified to help Plaintiff with her thyroid problems. *See Id.* However, he testified he was certain the treatment was most likely as simple as taking Plaintiff off of her current thyroid medication, and that

even if she had the disease it was treatable. *See also Id.*

As for Plaintiff's prior visits with endocrinologists, Plaintiff testified that she had in fact seen two endocrinologists: Dr. Vance and Dr. Prichione. Plaintiff had previously stated she stopped seeing Dr. Vance because he was "mean and horrible." Ex. 342 at 90 ln. 7. However, she testified it was not that she did not like what he was saying, but that she did not like how she was being treated. She further testified that to her, it was normal for someone who is dissatisfied with a care provider to seek help elsewhere.

In response to Dr. Simon's recommended method of treatment, Dr. Cook stated that Dr. Simon's suggestion was simplistic and overlooked the complexities and controversies regarding treatment of subclinical hyperthyroidism. Cook's Addendum at 3, Ex. 101. Dr. Cook testified there were risks associated with simply removing the medication because the body may have become dependent on it, and that Dr. Simon's suggestion reflected his lack of familiarity with the diagnosis. *See also Id.*

Dr. Cook again noted there was still controversy within the medical community as to the proper treatment of the disease. *Id.* at 3-5.

Plaintiff testified she had yet to see another endocrinologist as of trial. She testified she found Dr. Wheeler to be more helpful than the endocrinologists she had previously seen, and that Dr. Wheeler was still treating her for the auto-immune response that Dr. Wheeler thought was causing her thyroid levels to fluctuate. Plaintiff further testified that despite lab results indicating that she does not have Hashimoto's disease, Dr. Wheeler was still treating her as if she does.

Finally, regarding her back problems, Plaintiff provided an MRI report of her lumbar spine[31] that notes:

> Minimal broad-based disk bulges at L3-L4 through L5-S1 with small foci of increased subannular signal along the posterior aspect of L4-L5 posterior central aspect of L5-S1. Both of these small foci of increased signal are unchanged and are nonspecific but could represent subannular tears.

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[31] An MRI report regarding Plaintiff's cervical spine from May 2011 was also presented to the Court, but as near as the Court can tell, it was unremarkable.

Ex. 114 at 1. However, this MRI is dated March 2010, and a more recent evaluation was not presented to the Court. *Id.* Plaintiff testified she is currently seeing a chiropractor for these issues, but records of these visits are not in evidence. Moreover, her more recent medical records make limited reference to back pain. *See* Ex. 112, 102, 103. Plaintiff testified this is because she is focused on solving her more serious health concerns with Dr. Wheeler.

In addition to the physicians' IME reports, Defendants also submitted a report in evidence from Nancy J. Collins, a certified rehabilitation counselor, a forensic vocational expert, a senior disability analyst, and certified life care planner. Ex. 248. The parties stipulated that Collins had reviewed Dr. Cook's report prior to writing her report.

In her vocational assessment, Collins concluded that Plaintiff could work in several other social work related jobs, or change fields to human resources or higher education. *Id.* at 13-15. Of the positions suggested, only one position would result in any substantial increase to her current

rate of pay, and in fact, a few of the suggested positions would result in a decrease in hourly wage. *See Id.*

Concerning Plaintiff's health and her ability to work, the report provides that, "[Plaintiff] does not have any specific physical restriction from any of the medical providers" and "[Plaintiff's] subjective complaints have been consistent over time, but not consistent with any one diagnosis. As far as I can tell, there is still no confirmed medical diagnosis for her that explains her multiple subjective complaints." *Id.* at 6.

Collins' ultimate conclusion was that, to a reasonable degree of certainty, Plaintiff did not have to leave the field of social work because there are less stressful positions within that field. *Id.* at 15. She also noted that Plaintiff was now seeing a therapist and was receiving accommodations at work for her medical issues. *Id.* at 15. Collins further concluded that if social work was too stressful, Plaintiff could find a less stressful job in another field, with wages comparable to what she is earning currently. *Id.*

Conclusions of Law, Analysis and Disposition

Obtaining relief from student loan debts in bankruptcy is an arduous task. Student loan obligations are presumed to be nondischargeable in bankruptcy. *Rifino v. United States (In re Rifino)*, 245 F.3d 1083, 1087 (9th Cir. 2001). More precisely, § 523(a)(8) provides that a student loan may be discharged only if it is shown that "excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents . . . ."

The Code does not define undue hardship. *Educ. Credit Mgmt. Corp. v. Jorgensen (In re Jorgensen)*, 479 B.R. 79, 86 (9th Cir. BAP 2012) (citing *Educ. Credit Mgmt. Corp v. Nys (In re Nys)*, 446 F.3d 938, 944 (9th Cir. 2006)). However, that a debtor will struggle if a student loan must be repaid is not enough, since "the existence of the adjective 'undue' indicates that Congress viewed garden-variety hardship as insufficient excuse for a

discharge of student loans." *Rifino*, 245 F.3d at 1087.[32]

To determine when a debtor's student loans will impose an undue hardship on the debtor if excepted from discharge, the Ninth Circuit, long ago, adopted the test first announced in *Brunner v. N.Y. State Higher Educ. Serv. Corp. (In re Brunner)*, 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd* 831 F.2d 395, 396 (2d Cir. 1987). *United States Aid Funds, Inc. v. Pena (In re Pena)*, 155

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[32] Moreover, that the evidence demonstrates that it is more likely than not that, as a practical matter, a debtor will not repay a loan is also not dispositive under the undue hardship standard. *See Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, 464 F.3d 878 (9th Cir. 2006) (reversing bankruptcy court's decision to grant partial discharge because despite satisfying the first two prongs of the *Brunner* test, the plaintiff had failed to make good faith efforts to repay his loans). *See also Maulin v. Salliemae (In re Maulin)*, 190 B.R. 153, 157 (Bankr.W.D.N.Y.1995) ("Although it mandates no particular demonstration, good faith effort does require some evidence beyond a showing of financial incapacity."). While, one might wonder why the bankruptcy law would prohibit the discharge of student loans when the proof demonstrates little likelihood they will ever be repaid, that is a policy issue for Congress, not this Court. *In re Fulbright*, 319 B.R. 650, 659 (Bankr. D. Mont. 2005) (citing *Lamie v. United States Trustee*, 540 U.S. 526, 124 S.Ct. 1023, 1034 (2004)). Similarly, the wisdom of "loaning" students more than they can ever realistically be expected to repay, and the consequences for students, parents, and our Nation, resulting from our increasingly large "student-debtor class," is yet another issue for the policymakers. Suffice it to say, in the opinion of this bankruptcy judge, it is doubtful the Code's and courts' current approach to this serious problem is up to the task. *See Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 920-923 (9th Cir. B.A.P. 2013) (Pappas, B.J., concurring).

F.3d 1108, 1112 (9th Cir. 1998). The test consists of three prongs, requiring a debtor to prove: (1) the debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) the debtor has made good faith efforts to repay the loans. *Brunner*, 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd* 831 F.2d 395, 396 (2d Cir. 1987).

The debtor bears the burden of proving all three prongs by a preponderance of the evidence. *Rifino*, 245 F.3d at 1087-1088; *Bryant v. Wells Fargo Bank (In re Bryant)*, 99.3 IBCR 118, 119 (Bankr. D. Idaho 1999). Because the three prongs are independent requirements, "[f]ailure to prove any one precludes discharge." *Roth*, 490 B.R. at 916 (citing *Carnduff v. U.S. Dep't of Educ. (In re Carnduff)*, 367 B.R. 120, 127 (9th Cir. BAP 2007).

Below, the Court examines each of these requirements in light of the evidence in this case.

1. Minimal Standard of Living

This prong has been described as prescribing the "minimum necessary to establish 'undue hardship'" and that it "comports with common sense." *Pena*, 155 F.3d at 1111. To satisfy its requirements, as applied here, Plaintiff must show "more than simply tight finances" and "more than temporary financial adversity," although her condition may be "short of utter hopelessness." *United States Aid Funds v. Nascimento (In re Nascimento)*, 241 B.R. 440, 445 (9th Cir. BAP 1999).

Maximization of income by the debtor is not necessary to satisfy this prong. *Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, 464 F.3d 878, 882 n.3 (9th Cir. 2006). Calculating the debtor's appropriate cost of living is factual in nature and "is a matter properly left to the discretion of the bankruptcy court." *Jorgensen*, 479 B.R. at 87 (citing *Pena*, 155 F.3d at 1112).

Under this analysis, a "dependent" is a minor child or other person to whom the debtor owes a legal obligation to support. Thus, adult children are generally not considered to be dependents for purposes of this

analysis. *Carlson-Callow v. Sallie Mae Servicing (In re Carlson-Callow*), 2008 WL 2357012 *6 (Bankr. D. Idaho 2008). As a result, in this case, only Plaintiff's son is a dependent.

Plaintiff argues she has satisfied the first prong of the *Brunner* test because her medical problems have caused her to simultaneously experience a decrease of income as well as an increase in expenses. Pl.'s Pretrial Br. at 5, Dkt. 73. In contrast, ECMC argues that Plaintiff can maintain a minimal standard of living and repay her loans because she can earn more than she is currently making, and because her claimed living expenses are too high, merely reflecting that she has not adequately managed her money. ECMC's Posttrial Br. at 5-11, Dkt. No. 94.

As income maximization is more appropriately considered in connection with the other prongs of the *Brunner* test, to test Plaintiff's satisfaction of this prong, the Court will consider Plaintiff's current salary, working 32 hours per week, earning approximately $3,400 per month, and her current expenses.

As for expenses, generally speaking, Plaintiff's payroll deductions and monthly out-of-pocket expenses generally show that she maintains a minimal, rather than some higher standard of living. A few of her expense item, though, deserve specific comment.

First, while ECMC criticizes it, the Court does not question Plaintiff's decision to carry life insurance coverage that would, in the event of her death, pay her beneficiary three times Plaintiff's annual income. Nor is the Court concerned with Plaintiff's decision to carry dental insurance. On the other hand, because Daughter is not a dependent for these purposes, the Court finds Plaintiff's payroll deductions are overstated to the extent Daughter is covered under Plaintiff's medical insurance. Even so, the parties never established whether removing Daughter from Plaintiff's coverage would reduce her premiums, and if so, by how much.[33]

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[33] ECMC has not challenged the reasonableness of Plaintiff's retirement contribution, and the Court deems it to be reasonable under Plaintiff's particular circumstances. *See Craig v. Educ. Credit Mgmt. Corp. (In re Craig)*, 579 F.3d 1040, 1046 (9th Cir. 2009) (quoting *Hebbring v. U.S. Trustee*, 463 F.3d 902, 907 (9th Cir.

As for Plaintiff's other expenses, her desire to increase her prior budget to account for higher medical and transportation expenses is reasonable. Moreover, her monthly installment payments should be increased to reflect the payments she has now committed to pay to DOE. As such, her claimed monthly expenses would be closer to $3,750.

However, of that $3,750, Plaintiff's monthly utility costs are overstated to the extent they include the $75 in her cell phone bill attributable to Daughter's phone, any fees she incurs for late payments, and the approximately $27 payments necessary to cover her son's expensive phone. Assuming this results in at most $100-150 overstatement, Plaintiff's monthly expenses to maintain a minimal standard of living for her and her son amount to at least $3,600.

Aside from these minor adjustments, the Court finds Plaintiff's expenses consistent with a minimal standard of living. Despite occupying

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2006) ("bankruptcy courts have discretion to determine whether retirement contributions are a reasonably necessary expense for a particular debtor based on the facts of each individual case.")

an unnecessarily large house, Plaintiff is paying below-market rent. And, while Plaintiff's budget for food and housekeeping supplies are arguably high, this is primarily due to her special needs, dietary restrictions, and allergies. ECMC pointed out, and the Court agrees, that Plaintiff and her son have a propensity to eat outside of the home, primarily at "fast food" restaurants, which inflates food costs. But, the Court is also mindful that Plaintiff is a working, single mother who has an active teenage boy to feed. Given the other demands in her life and Plaintiff's health concerns, a modest expense for eating out is not inappropriate in measuring a minimal standard of living. Moreover, any reduction proposed to address this factor would be inconsequential.

The Court is also satisfied that Plaintiff's medical expenses are justified and reasonable. The combination of paying past medical bills, current co-payments, as well as the costs for prescription drugs and supplements, was adequately supported in the evidentiary record and the amount claimed in Plaintiff's budget is rational.

Finally, while ECMC objects, the Court considers it appropriate for Plaintiff to include credit card payments as an expense item. The reality is that her failure to make these payments would result in the imposition of further fees, late charges, and collection costs. And, while the Court suspects that some of the credit card charges resulted from Plaintiff's poor spending decisions, these arguments are more appropriately considered under *Brunner's* third prong.

In sum, under the first prong, Plaintiff's approximate $2,550 net income is inadequate to satisfy the $3,600 or so in necessary living expenses she incurs each month. Because Plaintiff is currently living at a deficit without paying any amount on her ECMC student loans, the Court concludes that Plaintiff could not maintain a minimal standard of living were she required to repay those loans.

2. Additional Circumstances

The second prong requires Plaintiff to prove that her "present inability to pay will likely persist through a substantial portion of the

loan's repayment period." *Nys*, 446 F.3d at 945. Due to the difficulty of predicting future income, courts have required the debtor to demonstrate that "additional circumstances" exist to prove that their present financial situation will persist well into the future. *Id.* A nonexhaustive list of representative circumstances, as relevant in this case, includes:

> [(1)] Serious mental or physical disability of the Plaintiff or the Plaintiff's dependents which prevents employment or advancement; [(2)] The Plaintiff's obligations to care for dependents . . . [(7)] Maximized income potential in the chosen educational field, and no other more lucrative job skills . . . [(8)] Limited number of years remaining in [the Plaintiff's] work life to allow payment of the loan; [(9)] Age or other factors that prevent retraining or relocation as a means for payment of the loan; [(10)] Lack of assets, whether or not exempt, which could be used to pay the loan; [(11)] Potentially increasing expenses that outweigh any potential appreciation in the value of the Plaintiff's assets and/or likely increases in the Plaintiff's income . . .

Id. at 947. The additional circumstances offered by a debtor to justify discharge of an educational loan are not limited to current events and facts, but may also include those that existed at the time the debtor obtained the educational loans in question. *Mason*, 464 F.3d at 883-84.

The additional circumstances test focuses upon objective factors when trying to predict a debtor's future income. *Nys*, 446 F.3d at 945. The debtor "does not have a separate burden to prove them beyond the inability to pay presently or in the future which would justify complete or partial discharge." *Id.* Thus, "the circumstances need be 'exceptional' only in the sense that they demonstrate insurmountable barriers to the [plaintiff's] financial recovery and ability to pay." *Id.* at 946. This requirement prevents debtors from purposely choosing to "live a lifestyle that prevents her from repaying her student loans." *Id.* In other words, to discharge a student loan, the debtor can not have had a reasonable opportunity to improve her financial situation, and chosen not to do so. *Id.* At the same time, the Court should not fault Plaintiff "for having made reasonable choices that now inhibit her ability to substantially increase her income in the future." *Id.*

Plaintiff argues that her health problems, which she alleges currently contributes to her inability to pay her student loans, will be life-

long issues and will in the future prevent her from ever being able to repay her student loans. Pl.'s Posttrial Reply Br. at 1-2, Doc. No. 98. Put another way, because of her health issues, Plaintiff argues that her marginal financial situation will continue to deteriorate and her income will likely erode. *Id.* at 2.

In response, ECMC argues that Plaintiff's medical concerns are not as serious as she claims. As evidence, it points to Plaintiff's demonstrated ability to participate in a large variety of physical activities outside of work, namely the trip to South America. *Id.* at 17-18. ECMC also attempts to discount Dr. Cook's and Dr. Wheeler's medical opinions for various reasons and claims that Dr. Simon's diagnosis, limited to obesity, is the correct one. *Id.* at 16-17. ECMC further urges that, even should Plaintiff's health concerns continue, her earnings potential remains quite high, such that her income should be enough to cover Plaintiff's anticipated expenses and pay her loans, were Plaintiff to act more fiscally responsible. *Id.* at 5-12.

Obviously, here, the most salient issue bearing on "additional circumstances" is the status of Plaintiff's health and its impact on her ability to earn income and limit necessary expenses in the future. To the Court, a decision about Plaintiff's health is challenging because her physicians are still in the process of determining a proper diagnosis and treatment. This analysis is further complicated by the disagreement evident in the opinions of the medical professionals.

While the proof is conflicting, assigning appropriate weight to the opinions offered by the experts leads the Court to find that Plaintiff's medical issues are indeed serious and likely of a permanent nature. Because of that, Plaintiff's medical and other expenses are likely to remain elevated, and her earnings capacity will likely remain limited. In the *Brunner* vernacular, Plaintiff's present inability to pay her student loans will likely persist through a substantial portion of the student loan repayment period. In sum, the Court concludes that the "additional circumstances" requirement under *Brunner* has been satisfied in this case.

Multiple doctors have noted Plaintiff's various symptoms over a period of years, including those testifying before the Court. However, these professionals could not agree as to the specific cause or nature of Plaintiff's illnesses, nor was there any consensus about how to treat her. Even so, both Plaintiff's primary physician, Dr. Wheeler, and Dr. Cook seem to agree that her current health concerns are potentially debilitating and will cause longstanding problems for her. They did not agree on a precise diagnosis, but they agreed that Plaintiff has thyroid dysfunction. Moreover, they agreed as to other diagnoses, such as anxiety, depression, migraines, and thyroid dysfunction, that seem to be of a permanent nature, and debilitating in and of themselves.

The Court carefully considered the testimony and opinions of Dr. Simon. On balance, though, the Court is reluctant to rely upon his evaluation of Plaintiff. In comparison to the other physicians, he devoted little time to talking with or examining Plaintiff, or to analyzing Plaintiff's condition. His examination was cursory, his report was unpersuasive, and

his conclusions seemed inadequately supported. At bottom, his conclusion that little is wrong with Plaintiff, and that if something is, it's easily treatable, stands in stark contrast to the other medical evidence, and is in direct conflict with the opinions of the two other medical professionals. All things considered, the Court respectfully declines to assign substantial weight to Dr. Simon's opinions.

Moreover, while ECMC notes that other tribunals may have found Dr. Cook to have been an advocate for plaintiffs in the past,[34] the Court finds, if that is so, it is of little moment here. Though his opinions generally support Plaintiff's position, Dr. Cook's report readily disagreed

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[34] Dr. Cook testified that he was aware of one case where a social security report contained comments to this effect. Counsel for ECMC also cited *Thomas "Keith" Austin*, IC 2011-006851, 2015 WL 1266138 (Idaho Ind. Com. Feb. 26, 2015), where the Idaho Industrial Commission stated that:

> "Dr. Cook's opinion is given less weight than the opinions of Drs. Sant and Frizzell because Dr. Cook clearly went out of his way to advocate for Claimant. Recall, Dr. Cook utilized the edition of the Guides that produced the highest level of partial permanent impairment even though he generally used the 6th edition."

Id. at 12.

with and dismissed certain diagnoses that may have benefitted Plaintiff. Instead, his report provided ample support for the conclusions he reached, and recommended consultation with a more qualified professional for those determinations he felt he could not make.

As for Ms. Collins' report, the Court finds its conclusions of little value since they are premised on the assumption that nothing currently restricts Plaintiff's ability to work because her complaints are subjective and yet to be confirmed by a professional's diagnosis. This assumption misses the point: while it is correct there is a disagreement as to Plaintiff's correct diagnosis, some of the experts support Plaintiff's account of her symptoms and have diagnosed the existence of legitimate medical problems which inhibit Plaintiff's ability to function at work.

Furthermore, Collins' suggestion that Plaintiff may work full-time not as a social worker, but in a different capacity, or in another field, would likely not improve Plaintiff's financial problems. Even were Plaintiff working 40 hours per week, but at the reduced pay attendant to

some of those suggested positions, she would still not earn enough to cover her reasonable expenses. In any event, the Court is not persuaded that Plaintiff is physically able to work full-time in some other capacity, as was evidenced when her symptoms did not improve when she took on a less burdensome job and reduced her hours.

As for ECMC's suggestion that the lack of a reliable diagnosis in this case resulted from Plaintiff's efforts to "doctor shop," the Court disagrees. While it is true that Plaintiff has consulted with several medical professionals to deal with her health issues, those who have attended to her have struggled to address Plaintiff's debilitating symptoms. To the Court, her failure to achieve relief is a rational explanation for Plaintiff's multiple attempts to locate suitable treatment.

Besides Plaintiff's medical problems, there are other circumstances existing that suggest her financial problems will persist long term. At 43 years old, Plaintiff is well into her working career. Her son will be financially dependent upon her for at least three more years, and she has

few assets to her name. Plaintiff's expenses are likely to increase. Her housing costs will probably escalate when the house she lives in is sold. While she may pay off her car in a year, given its tired condition, the need for a newer vehicle looms large. Simply put, by any measure, Plaintiff's financial future is not bright.

For all these reasons, the Court finds that, in this case, the "additional circumstances" exist in this case of the type contemplated under *Brunner* exist making it more likely than not that Plaintiff's inability to repay her student loans will persist through a substantial portion of the repayment period.

3. Good Faith

The final prong of the *Brunner* test requires Plaintiff to show that she made good faith efforts to repay the loans, or to show that the forces preventing repayment are truly beyond her control. *Brunner*, 46 B.R. at 756. This prong is intended to forestall debtors from abusing the bankruptcy system by filing a case primarily to avoid payment of student

loan debts. *Pena*, 155 F.3d 1111.

"Good faith is measured by the Plaintiff's efforts to obtain employment, maximize income, and minimize expenses." *Roth*, 490 B.R. at 917 (quoting *Mason*, 464 F.3d at 884 (internal quotations omitted)). The BAP has assembled the following list of factors courts have considered in making a good faith determination:

> 1) whether the Plaintiff has made any payments on the loan prior to filing for discharge, "although a history of making or not making payments is, by itself, not dispositive[,]" 2) whether the Plaintiff has sought deferments or forebearances, 3) the timing of the Plaintiff's attempt to have the loan discharged, and 4) whether the Plaintiff's financial condition resulted from factors beyond her reasonable control, as a Plaintiff may not willfully or negligently cause her own default.

Roth, 490 B.R. at 917 (citations omitted).

While also not dispositive, another important "good faith" factor focuses upon the debtor's efforts to negotiate a repayment plan. *Id.* (citing *Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane*), 287 B.R. 490, 499 (9th Cir. BAP 2002) and *Jorgensen*, 479 B.R. at 89, n. 4. In considering such

efforts, the terms, duration, and consequences, such as future tax liability and negative credit ratings, need to be considered. *Roth*, 490 B.R. at 917 (citing *Carnduff*, 367 B.R. at 136-137).[35]

Plaintiff argues that she has acted in good faith in this case by trying to maximize, or at least to maintain her income, as well as by endeavoring to minimize her expenses. Pl.'s Posttrial Reply Br. at 3, Dkt. No. 98. ECMC strongly disagrees, arguing that many of Plaintiff's financial decisions, and much about her current financial situation, evidence a lack of good faith. ECMC's Posttrial Br. at 20, Dkt. No. 94.

Since graduating in 2006, Plaintiff has maintained employment and sought to maximize her income by working in increasingly responsible positions within the field in which she was educated and trained to work. Initially, she worked full-time and steadily increased her salary for several years. Plaintiff did not experience a decrease in pay until recently, which

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[35] Whether a debtor has exhibited good faith under *Brunner* is a question of fact, and a bankruptcy court's findings are reviewed for clear error. *Hedlund v. Educ. Res. Inst. Inc.*, 718 F.3d 848, 854 (9th Cir. 2013).

the Court finds to primarily be the result of the serious health problems Plaintiff has developed, which required her to, among other things, pursue more amenable working conditions.

Plaintiff's expenses are, for the most part, unremarkable and modest, and she has generally attempted to keep them low, largely out of necessity, given her limited income. Indeed, her current expenses are extremely low given the financial demands associated with raising a child.

This is not to say that Plaintiff has not made mistakes in managing her finances, both discrete and chronic, and ECMC is justified in criticizing some of Plaintiff's decisions. For example, Plaintiff's decision while deeply in debt to purchase a motorcycle with her husband on credit, and after divorce, to retain it and make payments on the loan, is difficult to understand. Her decision to borrow and spend thousands for a trip to South American for "training" for an photography occupation that, had she researched it beforehand, would have shown would pay her an inadequate income, was, frankly, foolish. Plaintiff's continuing practices

of relying on credit cards and overdrafted checks to live and pay her bills is also clearly problematical and unwise. Her willingness to finance her adult daughter's expenses is commendable, but represents a choice Plaintiff should have declined given the amounts she owes to her creditors. And, Plaintiff's purchase of an expensive cell phone for her teenage son on her constricted budget demonstrates a lack of financial discipline.

On the other hand, Plaintiff did not seek to discharge her student loans shortly after they first became due, or when she was first required to seek bankruptcy relief. While it is true that, over the years, Plaintiff has made few payments totaling insignificant amounts towards retirement of the student loans, during most of the repayment period, Plaintiff had requested and was granted forbearance by the lender due to her financial difficulties. Moreover, Plaintiff twice attempted, albeit unsuccessfully, to repay her loans through IBR plans, and she sought repayment assistance through NHSC. Plaintiff did not seek to discharge her loans until her

health problems escalated, causing her to move to a lower paying job while facing increasing expenses. By that time, her loan balance had ballooned to such a balance that it would have been improbable for her to make payments sufficient to ever pay off her loans. At this point in time, Plaintiff is not paying her student loans, not because she can do so but chooses not to, but because she simply lacks the economic ability to do so.

In sum, all things considered, the Court concludes that Plaintiff has demonstrated the requisite good faith to discharge the bulk of her student loans under the *Brunner* test. She has attempted to earn a good income while living modestly. While her financial decisions have not been perfect, even had she not erred in her spending decisions, she would have nonetheless been unable to make any substantial student loans payments while meeting her normal living expenses. In other words, to the extent that Plaintiff made bad judgments about motorcycles, trips, cell phones and kids, her decisions, at bottom, were largely inconsequential in relation to whether she could have paid her student loans. As a result, that she

occasionally made bad financial choices should not disqualify her from securing relief.

Moreover, the Code accommodates situations like this one. The discharge of student loans is not an all or nothing proposition. *See Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168, 1173 (9th Cir. 2003). "Bankruptcy courts may exercise their equitable authority under § 105(a) to partially discharge student loans." *Jorgensen*, 479 B.R. at 86 (citing *Saxman*, 325 F.3d at 1173). In doing so, bankruptcy courts have discretion in determining the amount and terms of payment of a partial discharge. *Bossardet v. Educ. Credit Mgmt. Corp. (In re Bossardet)*, 336 B.R. 451, 457 (Bankr. D. Ariz. 2005). "However, a bankruptcy court's discretion to grant a partial discharge is not unlimited. In each case, the bankruptcy court must find that all three prongs of the *Brunner* test were satisfied as to the portion of debt discharged." *Jorgensen*, 479 B.R. at 86. And, the debtor still bears the burden of establishing undue hardship as to any portion of the debt to be discharged. *Carnduff*, 367 B.R. at 133.

In this case, in the exercise of its discretion, the Court concludes that, under *Brunner,* Plaintiff is entitled to a discharge of the bulk of the balance due on the ECMC student loans because she can not repay them without undue hardship. By entry of a partial discharge, the Court can, in an equitable fashion, both grant Plaintiff the relief she truly needs, while recognizing that, in the past, Plaintiff may have deprived the lender of a modest amount of funds Plaintiff may have "misspent" under the circumstances.

Presumably recognizing the Court's authority to grant a partial discharge, and the propriety of such remedy under these facts, after trial, ECMC offered to agree to the entry of a partial discharge to reduce Plaintiff's remaining student loan balance to $60,000. ECMC's Posttrial Br. at 22-23. However, ECMC claims that if this course is taken, to allow Plaintiff to maintain eligibility for the various income-driven repayment plans, the contract interest rate must remain the same and no particular payment terms can be set. *Id.* at 23. While it is significant that ECMC

apparently realizes that Plaintiff can not repay the full balance due on her student loans, it offered little to support of the specific amount to be excepted from discharge, and under the evidence, the Court finds ECMC's proposal to be excessive.[36]

Instead, the Court is guided in its decision by case law. For example, in *Jorgensen*, the bankruptcy court declined to discharge the debtor's student loans for the amount of payments she had made on a car she purchased before traveling abroad for five and a half months, during which time she had no need for the vehicle. 470 B.R. at 86-87. On appeal, the BAP concluded that the bankruptcy court had appropriately exercised its discretion. *Id.* Concerning the *Brunner* good faith analysis, the panel stated:

> [Debtor's] decision to purchase a car before she went to Paris . . . weigh[s] against a finding of good faith. To be clear, [her] purchase of a new car was not improper . . . however, [it] was imprudent. As a result, she incurred several thousand dollars of

[36] While repayment plans tied to Plaintiff's income are undoubtedly more realistic, if she were required to repay $60,000 over 15 years with seven percent interest, her monthly payment would be almost $540.

> a car payment expense without using the vehicle. The bankruptcy court properly accounted for her error by finding that the extraneous expense could not be discharged.

Id. at 89.

Here, where Plaintiff has made several imprudent decisions that were not necessary to maintain a minimal standard of living, and weigh against a finding of good faith, the Court finds it appropriate to nonetheless grant her a partial discharge of the bulk of her student loan debt. Under the facts, the Court concludes that Plaintiff's lack of financial discipline may have consumed $10,000 that would otherwise have been available to pay on her loans. She will not be allowed to discharge that amount of the ECMC debt, but all balances due on the student loans in excess of that sum will be discharged. Contract interest will continue to accrue on that sum, and any of repayment terms will be left to Plaintiff and ECMC to negociate. To the Court, this resolution adequately recognizes Plaintiff's genuine need for relief from her student loan debt, while protecting ECMC from Plaintiff's occasional imprudence in

managing her finances.

//

Conclusion

Under § 523(a)(8) and the applicable case law, Plaintiff has shown she can not repay the full balance due on the ECMC student loan debt without an undue hardship. Based upon the facts and equities, the Court concludes that a partial discharge of that debt should be entered. Accordingly, for the explained above, and based upon the facts and equities, all amounts owed by Plaintiff on the ECMC loan in excess of $10,000 will be excepted from discharge.

Counsel for parties shall submit an approved form of judgment for entry by the Court.

Dated: May 3, 2016

Honorable Jim D. Pappas
United States Bankruptcy Judge

SulmeyerKupetz

A PROFESSIONAL CORPORATION

Examining the Dischargeability of Student Loan Debt in Bankruptcy Proceedings

Presented By: Steven Werth and Magdalena Bordeaux

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Student Loan Debt

- **Today, 40 million Americans collectively owe $1.2 trillion in student loan debt. This is higher than the amount of all credit card debt of all Americans combined.**

- **Some now wonder whether Congress or bankruptcy courts should re-examine the circumstances in which a debtor with significant student loan debt can discharge that liability in a bankruptcy case.**

Timeline

1976: Student loan debt dischargeable

1976: Education Amendment Act of 1976 passes

1990: Undue hardship extended to 7 years

1998: Undue hardship expiration date eliminated

2005: Undue hardship now applies to private student loans

The Statute

11 U.S.C. §523(a) states:

(a) A discharge under … this title does not discharge an individual debtor from any debt--

(8) unless excepting such debt from discharge under this paragraph would impose an **undue hardship** on the debtor and the debtor's dependents, for –

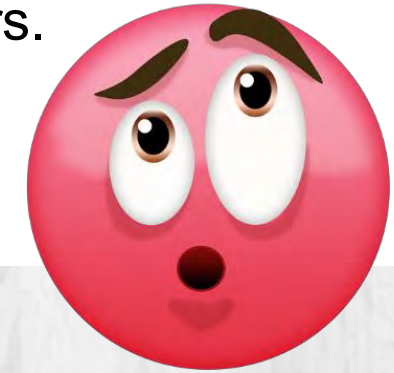
(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the International Revenue Code of 1986, incurred by a debtor who is an individual.

What is Undue Hardship?

- Undue hardship is not defined in Section 523(a)(8).
- Congress added undue hardship to Section 524, stating that a reaffirmation agreement is an undue hardship if the debtor's monthly income minus her monthly expenses are less than the scheduled payments on the reaffirmed debt.
- However, courts have come up with their own tests to determine whether undue hardship exists in student loan matters.



The Brunner Test

The first test for undue hardship had three parts:

Based on current income and expenses, the debtor cannot maintain a minimal standard of living

The debtor's state of affairs is likely to persist

There was a good faith effort to repay the loans

Brunner Widely Adopted

- Most courts have adopted the Brunner test to determine whether or not a debtor has made a showing of undue hardship under Section 523(a)(8).
- The 1st and the 8th Circuit use a totality of the circumstances test.
- As such, case law analyzing whether student loan debt can be discharged is essentially case law analyzing whether the three factors of the Brunner test are met.

But First, A Preliminary Issue

- Section 523(a)(8)(A) applies to government loans, and (B) applies to other student loans.

- The added requirements of Section 523(a)(8)(B) mean that certain private loans do not benefit from this exception to discharge. The *Nunez* court, for example, held that a loan to attend a flight school did not fall within the statute.

How To Determine If A Loan Falls Within The Statute

Lenders have the burden of proof as to whether a certain loan falls within the scope of Section 523(a)(8).

Some loans will qualify only if they are a "qualified education loan," as defined in Internal Revenue Code Section 221(d)(1).

To be a qualified education loan, the loan must be incurred "solely to pay qualified higher education expenses," which means the cost of attendance of an "eligible educational institution" as defined in 26 U.S.C. §25A(f)(2).

26 U.S.C. §25A(f)(2) states that that means an institution (1) described in section 481 of the Higher Education Act of 1965 (20 U.S.C. § 1088), and (2) which is eligible to participate in a program under title IV of that act.

The Federal government provides a list of schools entitled to Title IV funding in a document called the "Federal School Codes" which can be found online.

Is the Brunner Test Appropriate?

- As the Brunner test is very difficult to meet, one should consider arguing that a totality of the circumstances approach is more appropriate—even in a circuit which has adopted the Brunner test.
- One could also argue that the that the court should consider the equities of the case without applying any rigid formula, such as whether there is a “certainty of hopelessness,” as some cases have analyzed.

Satisfying The Brunner Factors

- Debtors have the burden of proof as to whether certain student loan payments constitute an undue hardship.
- This will require a complaint to be filed, a trial, and testimony from the debtor as to her expenses, income, and attempts to pay off her loan in the past.
- The three factors cannot be satisfied simply by referencing a debtor's Schedule I (monthly income) and Schedule J (monthly expenses), which is the test used for undue hardship in Section 524. All three factors must be met for the debt to be dischargeable.

Factor One

That the debtor cannot, based on current income and expenses, maintain a "minimal" standard of living for himself or herself and his or her dependents if forced to repay the loans.

Possible outcomes:

Outcome #1:
The debtor's Schedule I and J indicate she has enough money each month to pay her student loan debt.

Outcome #2:
The debtor's Schedule I and J indicate she has enough money each month to pay her student loan debt, but only if she makes payments that are zero or abnormally low.

Outcome #3:
The debtor's expenses exceed her income.

Factor Two

That this state of affairs is likely to persist for a significant portion of the repayment period of the student loan.

- This closes a loophole that would otherwise exist for debtors who are currently unemployed or young.
- It requires the court to look to the future and speculate as to whether the debtor's financial situation will improve.
- Some courts look to whether there are exceptional circumstances that demonstrate insurmountable barriers to the debtor's ability to pay.
- This test factor may have a different meaning now that student loans can last into a borrower's retirement, whereas when the Brunner test was adopted, loans were smaller and of shorter duration.

Factor Three

That the debtor has made good faith efforts to repay the loans.

- It also looks to whether the debtor has previously sought to obtain an unreasonable number of deferments or forbearances, and looks at the timing of the debtor's attempt to obtain a discharge.
- This looks to a debtor's efforts to obtain employment, maximize income, minimize expenses, and make prior payments.
- If a debtor had the ability to make prior payments, but did not do so, courts may view that as an indicator of bad faith.

Totality of the Circumstances

The totality of the circumstances test used by the 1st Circuit and 8th Circuit looks to such things as:

1. Total present and future incapacity to pay debts for reasons not within the control of the debtor.
2. Whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment.
3. Whether the hardship will be long term.
4. Whether the debtor has made payments on the student loan.
5. Whether there is permanent or long-term disability of the debtor.
6. The ability of the debtor to obtain gainful employment in the area of the study.
7. Whether the debtor has made a good faith effort to maximize income and minimize expenses.
8. Whether the dominant purpose of the bankruptcy petition was to discharge the student loan.
9. The ratio of student loan debt to total indebtedness.

Conclusion

Student loan debt historically has been very difficult to discharge. Case law interpreting the Brunner test, however, may no longer apply to a factual situation where borrowers face six-figure student loan debt that will take decades to repay.

The bankruptcy courts appear to be re-examining the rigid test of undue hardship set forth in *In re Brunner*, and are proposing that a new standard—one that comports more closely with the actual language of the statute—be used to determine undue hardship so that bankruptcy judges, not creditors, are the ones determining which loans should be forgiven under Section 523(a)(8).

Questions?

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO

In Re: **Elizabeth M. McDowell,** **Debtor.**	**Bankruptcy Case No. 10-40845-JDP**
Elizabeth M. McDowell, **Plaintiff,** **vs.** **Education Credit Management Corporation, and U.S. Department of Education,** **Defendants.**	**Adv. Proceeding No. 14-08005-JDP**

AMENDMENT TO MEMORANDUM OF DECISION

On the Court's own motion, the Memorandum Decision entered in this adversary proceeding on May 3, 2016, Dkt. No. 99, is hereby amended.

In particular, the final two paragraphs of the Memorandum's Conclusion are hereby amended to read as follows:

Conclusion

Under § 523(a)(8) and the applicable case law, Plaintiff has shown she can not repay the full balance due on the ECMC student loan debt without an undue hardship. Based upon the facts and equities, the Court concludes that a partial discharge of that debt should be entered. Accordingly, for the reasons explained above, and based upon the facts and equities, all amounts owed by Plaintiff on the ECMC loan in excess of $10,000 will be discharged.

Counsel for the parties shall submit an approved form of judgment for entry by the Court.

Dated: May 12, 2016

Honorable Jim D. Pappas
United States Bankruptcy Judge

Ninth Circuit Judicial Conference
Bankruptcy Education Committee

Splits Within The Circuit: Issues Where There Is No Controlling Ninth Circuit Authority

Hon. Meredith Jury
United States Bankruptcy Court
Central District of California

Hon. Frank Kurtz
United States Bankruptcy Court
Eastern District of Washington

Hon. Laura Taylor
United States Bankruptcy Court
Southern District of California

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Equitable Mootness (Kurtz)

Equitable Mootness in the Ninth Circuit

Hawthorns marked moots, or assemblies to decide issues of local importance...this one may still be a 'moot point'- something arguable, undecided, contested, its original function lost generations ago. Paul Evan, The Guardian, November 12, 2014.

Due to their dynamic nature, bankruptcy reorganization cases are ill suited for the appellate process. While the order on appeal is being heard and decided, the underlying bankruptcy case grinds on, with reorganization plans being confirmed, property or money distributed, and third parties impacted. Frequently the issue arises as to whether deciding the appeal would be unfair to parties who may not have participated in the appeal but who relied upon the final orders in the bankruptcy reorganization case. In other words, should the appellate court elect not to reach the merits of a bankruptcy appeal because it would be inequitable and undermine the bankruptcy reorganization case.

Equitable mootness is a prudential or court developed doctrine that finds its roots in Article III of the United States Constitution. In Article III, there is a prohibition against review of moot cases based on the requirement that federal courts adjudicate only "Cases" and "Controversies." U.S.C Const. Art. 3, ¶ 1 Et. Seq. "For that reason, if an event occurs while the case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatsoever' to a prevailing party, the appeal must be dismissed." Church of Scientology of California v. U.S., 506 U.S. 9, 12, 113 S. Ct. 447 (1992) (quoting Mills v. Green, 159 U.S. 651, 653, 16 S. Ct. 132 (1971)). If an appellate court is unable to fashion a remedy for an appeal, its

opinion is characterized as advisory and the appeal as moot. In such a case, the appellate court is without jurisdiction to adjudicate the appeal. In re Mortgages Ltd., 771 F.3d 1211, 1215 (9th Cir. 2014).

By contrast, equitable mootness is not jurisdictional, constitutional or even based upon a statute. Rather it rests upon equitable considerations of finality and good faith reliance on bankruptcy reorganization litigation. "An appeal is equitably moot if the case presents transactions that are so complex or difficult to unwind that debtors, creditors, and third parties are entitled to rely on the final bankruptcy court order." Mortgages Ltd., at 1215. The relationship between constitutional mootness and equitable mootness is said to be the distinction between the "inability to alter the outcome" and the "unwillingness to alter the outcome." In re Continental Airlines, 91F.3d 553, 558 (3rd Cir. 1996).

Significantly the "bankruptcy mootness rule" is the application of a long standing appellate rule to bankruptcy cases. "The rule that failure to obtain a stay pending appeal renders the issues moot did not originate in the bankruptcy rules. Rather, it is a judicial doctrine which developed from the general rule that the occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot, and the particular need for finality in orders regarding stays in bankruptcy." Algeran, Inc. v. Advanced Ross Corp., 759 F.2d 1421, 1424 (9th Cir. 1985).

Our panel selected equitable mootness for discussion because Ninth Circuit case law regarding the doctrine is unsettled. For example, in In re Onouli-Kona Land Co., 846 F.2d 1170, 1172 (9th Cir. 1988), the court recognized the tension that had developed within its equitable mootness case law between cases based upon the "general rule" that an appeal is not moot if the

court can fashion some relief between the parties and cases based upon the "particular need" for finality in bankruptcy. Id. Fourteen years later, in In re Thorpe Insulation Co., 677 F.3d 869, 880-881 (9th Cir. 2012), the court lamented that it had not articulated its mootness doctrine in a coherent manner. In Thorpe, the court identified the factors that a reviewing court should consider before deciding whether a bankruptcy appeal is moot. Id. Last year, in In re Transwest Resort Properties, Inc., 801 F.3d 1161 (9th Cir. 2015), a split court applied the Thorpe factors to determine whether the appeal before it was moot in a manner that generated a strong dissent and some criticism. See, Randolph J. Haines, Ninth Circuit Eviscerates Equitable Mootness, 2015 No. 8 Norton Bankr. L. Adviser NL 1. The topic is important because the watering down of the bankruptcy mootness rule would significantly impact reorganization cases by undermining final orders in contested bankruptcy cases.

In part, the source of this controversy is the contention that the equitable mootness doctrine is inconsistent with federal bankruptcy jurisdiction. After Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 87, 102 S. Ct. 2858 (1982), federal district courts were given original jurisdiction to hear bankruptcy cases. District courts have delegated those cases to the bankruptcy courts, based upon the premise that decisions by non Article III bankruptcy judges were subject to review by Article III courts. The argument is that the equitable mootness doctrine impermissibly allows federal courts to avoid a statutory duty. In re Continental Airlines, 91F.3d 553, 567-73 (Alito, J., dissenting) (3rd Cir. 1996). In re United Producers, Inc., 526 F.3d 942, 946 (6th Cir. 2008).

In re Roberts Farms, Inc., 652 F.2d 793 (9th Cir. 1981)

Case studies regarding equitable mootness in the Ninth Circuit normally begin with Roberts Farms, a Bankruptcy Act case. In that case, the court disallowed some creditors' claims and they appealed to the district court. While the appeal was pending, the debtor confirmed a plan of arrangement. The district court dismissed the appeal as moot, and the Ninth Circuit affirmed. In its decision, the Roberts Farms court emphasized the rule of appellate law that "the failure to seek stays coupled with a substantial change of circumstances would justify dismissal of the appeal for lack of equity." Id. at 798. The court further stated "appellants have failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable orders of the bankruptcy court and have permitted such a comprehensive change of circumstances to occur as to render it inequitable for this court to consider the merits of the appeal." Id.

In re International Environmental Dynamics, Inc., 718 F. 2d 322 (9th Cir. 1983)

Because Roberts Farms emphasized the failure of the appellants to obtain stays in either the bankruptcy or district court before the debtor's plan of arrangement became effective, its holding gave rise to the argument that confirmation of a plan of reorganization ended any possibility of appellate relief. This argument was rejected in International Environmental Dynamics, In that case, the creditor sought to have legal fees returned to the debtor's estate. The attorney argued that the appeal was moot under the Roberts Farms holding because he had received the fees and the creditor had failed to secure a stay. The court disagreed, reasoning that because the attorney was a party to the appeal, the bankruptcy court could fashion effective relief "by remanding with instructions to the bankruptcy court to order the return of erroneously dispersed funds." Id. at 325-326

Algeran, Inc. v. Advanced Ross Corp., 759 F.2d 1421 (9th Cir. 1985)

In Algeran, the issue before the court was whether the bankruptcy mootness rule applied when an appellant had failed to obtain a stay from an order that annulled the automatic stay and confirmed a prepetition sale of certain of the debtor's assets. In that case, the debtor argued that the mootness rule did not apply because 11 U.S.C. § 363 (m) limits the mootness rule to appeals from sales by a bankruptcy trustee. The Ninth Circuit rejected this argument, stating that the bankruptcy mootness rule developed from appellate rules and their application through bankruptcy cases.

In re Sun Valley Ranches, Inc., 823 F.2d 1373 (9th Cir. 1987)

In Sun Valley Ranches, the debtor filed a chapter 11 petition to reorganize and to forestall a foreclosure sale. The mortgage creditor moved for relief from stay based upon his contention that the debtor's prospects for reorganization were unrealistic. The bankruptcy court granted relief from stay and its order was affirmed on appeal to the district court. During this appeal period, the creditor foreclosed upon the debtor's farm. At the Ninth Circuit, the creditor argued that the debtor's appeal was moot because the foreclosure sale had occurred and the court could not grant effective relief. In Sun Valley Ranches, the Ninth Circuit created an exception to the mootness rule for cases in which real property is sold to a creditor who is a party to the appeal. The court reasoned that in such a case, the appeal is not moot because a court could fashion some sort of relief, particularly where the foreclosure sale is subject to statutory rights of redemption.

In re Onouli-Kona Land Co., 846 F.2d 1170 (9th Cir. 1988)

Similar to Sun Valley Ranches, Onouli-Kona Land Co. concerned the unstayed sale of the debtor's disputed property during the pendency of the appeal. In that case, the bankruptcy court

set aside a state foreclosure sale and ordered a new auction sale under its own supervision. The creditor whose debt was secured by the property was the successful bidder at the new sale. The debtor appealed the bankruptcy order confirming the sale of the property. The creditor moved to dismiss the appeal as moot because the debtor had failed to obtain a stay of the sale pending appeal. The district court affirmed and the issue moved to the Ninth Circuit. On appeal, the Ninth Circuit adhered to its prior precedent that the bankruptcy mootness rule is not limited to appeals from sales by bankruptcy trustees under §363(m). In addition to that argument, the debtor contended that the appeal was not moot because the creditor was a party to the appeal. Applying the bankruptcy mootness rule, the court decided that the debtor's appeal was moot. "The exception we articulated in In re Sun Valley for real property sold to a party-creditor is only appropriate when a foreclosure sale is subject to statutory rights of redemption; Hawaii has no such rights." Onouli-Kona Land Co. at 1175-76.

Suter v. Goedert, 504 F.3d 982 (9th Cir. 2007)

In Suter v. Goedert, the defendant law firm purchased the estate's interest in the debtors' legal malpractice claim against it. After the sale, the law firm entered into a stipulation with the bankruptcy trustee to dismiss the malpractice case. After the debtors appealed the sale order to the district court, the law firm moved to dismiss for mootness because the malpractice case had been dismissed. The district court agreed but its decision was reversed by the Ninth Circuit. The court stated that the law firm had not "affirmatively" demonstrated that the debtors had no recourse under state law in the event that their appeal had been successful. Id. at 986.

In re Sylmar Plaza, LP., 314 F.3d 1070 (9th Cir. 2002)

In Sylmar Plaza, the debtors owned a shopping center that they sold free and clear pursuant to bankruptcy court order. Instead of appealing the sale order, the secured creditor appealed the order confirming the debtors' plan of reorganization, which provided for payment at the nondefault interest rate. In particular, the bank objected to the fact that "the plan leaves the [debtors] solvent while permitting them to avoid paying post petition interest at the default interest rate. Id., 1074. Relying upon Roberts Farms, the debtors argued that creditor's appeal was moot because it failed to seek or obtain a stay pending appeal, and the plan had been substantially consummated. The Ninth Circuit disagreed, reasoning "even if a plan has been substantially consummated, because [the creditor's] claim is only for monetary damages against solvent debtors, this is not a case in which it would be impossible to fashion effective relief. Nor has there been a comprehensive change in circumstances as to render it inequitable for the court to consider the merits of the appeal." Id. at 1074.

In re Thorpe Insulation Co., 677 F.3d 869 (9th Cir. 2012)

Currently the seminal case regarding equitable mootness in the Ninth Circuit is Thorpe. In Thorpe, the asbestos debtor confirmed and consummated what it characterized as an insurance neutral plan. In other words, the plan approved settlements with some insurers and preserved coverage issues with nonsettling insurers for state court litigation. Nonsettling insurers were prevented from litigating plan objections because the plan arguably did not directly affect their rights. They appealed. At the Ninth Circuit, the appellants requested a stay of the confirmation order, which the court denied. During the appellate process, the debtors' chapter 11 plan became effective. As a consequence, the debtors asked the Ninth Circuit to dismiss the appeal as

constitutionally and equitably moot. The court rejected the constitutional mootness argument, reasoning that it could reverse the confirmation order.

Next, the court addressed whether the appeal was equitably moot under its Roberts Farms precedent because the appellants had not obtained a stay and prevented the plan of reorganization from going into effect. In its analysis, the court observed that it had not articulated its mootness doctrine in a coherent manner. From its case law, the Ninth Circuit identified the following factors (1) whether a stay was sought; (2) whether the plan had been substantially consummated; (3) whether third party rights have intervened; and (4) if so, whether any relief can be provided practically and equitably. As part of this analysis, the court stated that obtaining a stay was a factor but not a controlling one in determining whether an appeal was moot. The court further reasoned that the appeal was not moot because the bankruptcy court, on remand, should be able to devise an appropriate equitable remedy that would avoid materially upsetting the plan.

Rev Op Grp. v ML Manager LLC (In re Mortgages Ltd.), 771 F.3d 623 (9th Cir. 2014) and Rev Op Grp. v ML Manager LLC (In re Mortgages Ltd.), 771 F.3d 1211 (9th Cir. 2014)

The factors articulated in Thorpe were recently applied in two companion Mortgages cases, herein referred to as Mortgages I and Mortgages II. In the Mortgages cases, the debtors raised money from investors that the debtors lent to real estate purchasers. The debtors filed a chapter 11 reorganization and restructured their business in a confirmed chapter 11 plan. Some investors were aggrieved by their treatment in the confirmed chapter 11 plan and they appealed orders based upon the confirmed plan. In both cases, the district court dismissed the appeals as equitably moot.

In Mortgages I, the appellant could not obtain a stay from the bankruptcy or district court

due to the high cost of the bond necessary to secure the appeal. Regardless, the Ninth Circuit held that the appeal was not moot, observing that the appellant had diligently pursued a stay pending appeal and stating "we are cautious about not giving a party who is diligent....an opportunity to present its appeal." Mortgages Ltd. at 628. The court further explained that even though the plan had been substantially consummated, relief could be granted without unduly upsetting the plan. In Mortgages II, the court reached the opposite result. In that case, the appellant argued that it was financially unable to post the extremely expensive bond that would be required, referencing the bond sought by the debtor in the Mortgages I case. Citing Roberts Farms and Thorpe, the court held that the appeal must be dismissed as equitably moot because the appellant had failed to seek a stay without giving adequate cause. In its decision, the court noted the lack of consistency in Ninth Circuit equitable mootness case law but expressed its preference for a bright line rule that it discerned from both Roberts Farms and Thorpe that appellants who fail to seek a stay without giving adequate cause will face dismissal.

In re Transwest Resort Properties, Inc., 801 F.3d 1161 (9th Cir. 2015)

The uncertainty in Ninth Circuit equitable mootness case law was not rectified by the split decision in Transwest. The Transwest debtors owned two high end resort hotels. Their reorganization plan was funded by a third party investor with no prepetition interest in either the debtors or their properties. The debt against their properties was acquired by a hedge fund creditor, which ultimately held a total claim of approximately $247 million, secured by collateral worth only $92 million. Consequently the hedge fund creditor elected to have its entire claim treated as a secured claim pursuant to § 1111 (b). In response, the debtors' plan proposed a treatment for the creditor under § 1129 (b) that provided for the payment of the entire debt with

annual interest only payments until a final balloon payment became due in 21 years. The proposed treatment also provided for a due on sale clause, with an exception allowing the reorganized debtor under certain circumstances to sell or refinance the property subject to the restructured debt. The hedge fund creditor voted against the debtors' plan and objected to its confirmation.

After a contested confirmation hearing, the plan was confirmed. The hedge fund creditor appealed the confirmation order and unsuccessfully requested both the bankruptcy court and the district court to stay confirmation of the debtors' plan pending its appeal. After the plan became effective, the investor asked the court to dismiss the appeal as equitably moot, emphasizing its $30 million acquisition cost based on the confirmed chapter 11 plan and the many millions more that it had invested for renovation of the two resort hotels.

The Transwest court recognized and applied the Thorpe factors but in a manner that appeared to limit their application. In Judge Haines' words "the opinion effectively eliminates the equitable mootness doctrine in the Ninth Circuit; splits from every other circuit– as well as Ninth Circuit precedent– with respect to the factors governing the doctrine; and creates new, poorly defined law with uncertainties for all sides in a reorganization dispute– for those contemplating relief from confirmation and those would the "innocence" required to rely on final orders." Haines, 2015 No 8 Norton Bankr. L. Advisor NL 1.

Whether the appellants sought a stay is the first Thorpe factor. In Transwest, this factor weighed in favor of appellate review because the hedge fund creditor had sought a stay in both the bankruptcy and district courts. In this regard, the court relied upon Thorpe and Mortgage I for the proposition that the court should be "cautious" about not giving a party whose is diligent

in pursing a stay an opportunity to present its appeal. Transwest at 1168. According to Judge Haines, the court's analysis of this factor is inconsistence with prior precedent. In prior cases, the court considered whether the failure to obtain a stay in a bankruptcy case was fatal to the appeal or simply a factor in favor of mootness. In Transwest, the court appears to state that an appellant satisfies the first Thorpe factor by diligently pursuing a stay, which in the court's own words "cuts strongly in favor of appellate review[.]" Id.

Whether substantial consummation of the plan had occurred is the second Thorpe factor. In Transwest, it was undisputed that the confirmed plan had been substantially consummated. The investor asked the court to attribute great significance to this factor noting that in several circuits substantial consummation creates a presumption of equitable mootness. See In re Chateaugay Corp., 94 F.3d 772, 776 (2nd Cir. 1996); In re Pub. Serv. Co. of N.H., 963 F.2d 469, 473 n. 13 (1st Cir. 1992); and In re AOV Indus.,Inc., 792 F.2d 1140, 1149 (D.C. Cir. 1982). While conceding that it was a factor in favor of equitable mootness, the Transwest court did not accept the contention that it should create a presumption. In his minority opinion, Judge Mylan Smith faults the majority for failing to attribute greater significance to this factor.

Whether the relief sought by the appellants would bear unduly on innocent parties is the third Thorpe factor identified by the Transwest court. As the Transwest court analyzed this factor, the appealing investor was not the type of innocent party that the equitable mootness doctrine was meant to protect. In this regard, the court emphasized that the investor was involved in the confirmation process, negotiated provisions of the confirmed plan, and argued against the stay requested by the hedge fund creditor. Accordingly, the Transwest court reasoned that this factor weighed in favor of appellate review.

In his dissent, Judge Smith expressed strong disagreement with the majority's analysis of this factor. Judge Smith noted that many reorganization plans rely upon third party investors. Because the decision to invest or not to invest in a reorganized debtor is undoubtably based on the terms of the confirmed plan, investors frequently participate in the drafting of plan terms and the confirmation process. Transwest appears to hold that in order for this factor to be weighed in favor of mootness, an investor must be "innocent," meaning that the investor played no part in the reorganization process. Arguably this is a new and unrealistic requirement because it would be a rare reorganization case where a party investing new money into a reorganized debtor would not play some part in drafting the terms of the proposed plan and participating in the process by which it would be confirmed.

The fourth Thorpe factor is whether it would be possible to fashion effective equitable relief without completely undoing the plan. Under prior Ninth Circuit precedent, the Transwest court observed that even the possibility of incomplete relief might be sufficient to allow the appeal to proceed to its merits. At that point in the opinion, the court speculated about two examples of potential partial relief. Again, Judge Smith disagreed with the majority's analysis of this factor. He cited to Thorpe for the proposition that "to determine whether this appeal is equitably moot, we must assess whether the remedies will "completely knock the props out from under the plan and thereby create an uncontrollable situation for the bankruptcy court." Here, according to Judge Smith, the success of the entire reorganization plan hinged on the investors' continued willingness to invest in and rennovate the reorganized debtors' properties. "There is ample reason to believe that incorporating the proposed remedies into the reorganization plan could cause [the investor] to stop funding improvements and divest. Id. at 1175.

In re Sunnyslope Housing Ltd. Partnership, 2016 WL 1392318 (9th Cir. 2016)

Judge Haines' concern that Transwest may portend the demise of the equitable mootness doctrine in contested Ninth Circuit reorganization cases would not have been alleviated by the decision in Sunnyslope. Sunnyslope owned a 150-unit apartment complex which was intended to provide affordable housing for lower income occupants. The senior lien on the property was held by Capstone and guaranteed by HUD. When the loan went into default, HUD honored the guarantee and ultimately sold its interest to First Southern for about $5 million. Sunnyslope filed a chapter 11 case and it proposed a cram down plan, under which it would retain the property and pay First Southern based upon the value of its collateral. At the valuation hearing, the debtor argued for a value of less than $3 million due to covenants concerning rents paid by low income tenants. The bankruptcy court agreed with the debtor's proposed valuation and confirmed its cram down plan. First Southern appealed to the district court, challenging both the valuation and confirmation orders. It asked for stays in both the bankruptcy and district courts but not the Ninth Circuit.

Sunnyslope moved to dismiss the appeals as equitably moot. In that motion, the debtor argued that reversal of the confirmation order would be unfair to Capstone, which had infused new equity into the reorganized debtor. After applying the Thorpe factors, the Sunnyslope court decided that the appeal was not moot.

As in Transwest, the appellant had unsuccessfully pursued stays in the bankruptcy and district courts but not in the Ninth Circuit. As in Transwest, the court disregarded this failure, emphasizing its requirement to be cautious about denying First Southern the opportunity to present its appeal. In part, the explanation for its reasoning was based upon its recognition that

the Ninth Circuit does not often grant stays in such circumstances.

The court next addressed the issue of whether Capstone was an innocent party. According to the Sunnyslope court, even though Capstone was not a party before the court, it was not an innocent third party because "it is here in the guise of Sunnyslope." Because Capstone had provided new equity and acquired ownership in the reorganized debtor, it was effectively a party before the court. Moreover Capstone was a sophisticated investor that understood the risks associated with the appeal and its subsequent investment in the reorganized debtor. In summary, Capstone was not innocent.

Discharge Despite Late-Filed Tax Returns (Kurtz)

May Taxes Be Discharged Despite Late-Filed Returns

(a)(4) of Section 727 is fully supported by the evidence of record.

Accordingly,

IT IS ORDERED that the final order of the bankruptcy court entered on September 26, 2014, sustaining Appellees' objections to Appellant's discharge, is affirmed. Judgment shall be entered by separate document.

IN RE: Kevin Wayne MARTIN and Susan Martin, Debtors.

United States, Appellant,

v.

Kevin Wayne Martin; Susan Martin, Appellees.

BAP No. EC–14–1180–KuKiTa
Bk. No. 11–62436
Adv. No. 12–01131

United States Bankruptcy Appellate Panel of the Ninth Circuit.

Argued and Submitted on November 19, 2015 at Pasadena, California

Filed–December 17, 2015

Background: Chapter 7 debtors brought adversary proceeding against Internal Revenue Service (IRS), seeking determination that their federal tax debts for certain years were dischargeable. The Bankruptcy Court, W. Richard Lee, J., 508 B.R. 717, ruled that debtors' tax filings for those years qualified as returns for nondischargeability purposes and granted judgment in their favor. IRS appealed.

Holding: The Bankruptcy Appellate Panel, Kurtz, J., held that in order for untimely tax return to qualify as "return" for nondischargeability purposes, court utilizes *Hatton II*'s version of *Beard* test.

Vacated and remanded.

1. Bankruptcy ⚷3782

Bankruptcy Appellate Panel (BAP) reviews questions of statutory construction de novo.

2. Bankruptcy ⚷3343.5

In order for untimely tax return to qualify as "return" for nondischargeability purposes, court utilizes *Hatton II*'s version of *Beard* test, which provides that (1) it must purport to be a return, (2) be executed under penalty of perjury, (3) contain sufficient data to allow calculation of tax, and (4) represent an honest and reasonable attempt by debtor to satisfy requirements of tax law. 11 U.S.C.A. § 523(a)(1)(B)(i).

Appeal from the United States Bankruptcy Court for the Eastern District of California, Honorable W. Richard Lee, Bankruptcy Judge, Presiding

Boris Kukso argued for appellant United States

Appellees Kevin Wayne Martin and Susan Martin argued pro se.

Before: KURTZ, KIRSCHER and TAYLOR, Bankruptcy Judges.

OPINION

KURTZ, Bankruptcy Judge:

INTRODUCTION

When is a tax return not a tax return? According to an increasing number of courts, including some courts of appeal, the answer is: when the tax return, otherwise wholly compliant with applicable tax laws, is filed a second (or more) late. Ac-

cording to these courts, by way of the 2005 Bankruptcy Code amendments, Congress intended to make a substantial and exceptionally harsh change to nondischargeability law by adding a hanging paragraph at the end of 11 U.S.C. § 523(a) [1] defining the term "return" to exclude any taxpayer filing that does not wholly and strictly comply with all applicable return filing requirements, even if the taxing authority itself could and would forgive that noncompliance. Indeed, the United States rejects this statutory interpretation in this appeal.

The courts adopting a literal construction of the "return" definition more or less admit that their unforgiving view of congressional intent cannot be squared within the context of § 523(a), or even within the narrower context of the hanging paragraph itself, without running into some significant conundrums. The second sentence of the hanging paragraph expressly includes within the definition of "return" some types of returns that the taxing authority prepares on behalf of the taxpayer, when the taxpayer never gets around to it. Why Congress would want to treat a taxpayer who files a tax return a month or a week or even a day late—possibly for reasons beyond his or her control—so much more harshly than a taxpayer who never files a tax return on his or her own behalf is a mystery that literal construction adherents never adequately explain. Nor have they adequately explained why, later on in the second sentence of the hanging paragraph, Congress felt a need to explicitly exclude from the "return" definition another type of return filed by taxing authorities on behalf of taxpayers when that exclusion is superfluous if one accepts a literal construction of the first sentence of the hanging paragraph.

When one looks beyond the hanging paragraph, at the context of the nondischargeability statute as a whole and Congress' scheme for nondischargeable debts, one encounters additional, even-more-serious problems with the literal construction of the "return" definition. Section 523(a)(1)(B)(ii), which pre-existed the 2005 amendments, already contains a specific and carefully-balanced treatment of tax debts associated with untimely-filed tax returns. Literal construction of the "return" definition renders § 523(a)(1)(B)(ii) all but meaningless—reducing the potential application of that provision to a minuscule scope. And, according to the literal construction adherents, Congress intended the "return" definition to accomplish this dramatic rebalancing of the dischargeability of tax debt without a single legislative comment to that effect.

In light of these concerns arising from a contextual reading of the hanging paragraph, we reject the literal construction of the "return" definition. We further conclude that there is binding Ninth Circuit authority predating the 2005 amendments instructing us how to determine when a taxpayer filing should be treated as a return for nondischargeability purposes and that authority was not abrogated by the 2005 amendments.

The bankruptcy court erred because it declined to apply the existing Ninth Circuit test as to what constitutes a "return," so we VACATE the bankruptcy court's ruling declaring the Martins' tax debt dischargeable, and we REMAND so that the bankruptcy court can apply the Ninth Circuit test.

1. Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

FACTS

The facts are undisputed. The Martins did not file their tax returns for 2004, 2005 and 2006 at the time they were due. Consequently, the Internal Revenue Service ("IRS") conducted an audit examination beginning in June 2008 to fix the amount of the Martins' tax liability for those three years. Without the benefit of the Martins' self-reported income tax data in the form of tax returns, the IRS duly followed the deficiency and assessment procedures set forth in the Internal Revenue Code. *See* 26 U.S.C. § 6201, et seq. In August 2008, following the completion of the audit examination, the IRS issued a notice of deficiency for each of the three tax years.

The Martins did not respond to the notices of deficiency, but the notices did spur the Martins to hire a new accountant to prepare the missing tax returns. In December 2008, the accountant signed and completed the Martins' tax returns for 2004, 2005 and 2006, but the Martins did not get around to signing and filing the tax returns until six months later in June 2009. There is no evidence explaining the reason for the Martins' several-year delay in preparing their 2004, 2005 and 2006 tax returns, nor is there any evidence explaining the Martins' delay in signing and filing the completed returns.[2]

Meanwhile, having not heard from the Martins, the IRS made assessments against the Martins for the 2004, 2005 and 2006 tax years in March 2009. Thereafter, the IRS twice sent the Martins notices of the unpaid taxes and demands for payment—once in March 2009 and another time in April 2009. The IRS then gave the Martins notice of its intent to collect the assessed taxes by levy.

Only after the IRS threatened to collect the unpaid taxes did the Martins finally file their 2004, 2005 and 2006 tax returns. The IRS accepted the untimely returns and adjusted the Martins' tax liability based on the information set forth in the returns. The IRS adjusted their 2004 tax liability downward by roughly $1,000 (from $18,432 to $17,358), their 2005 tax liability upward by roughly $5,000 (from $9,928 to $14,852), and their 2006 tax liability down-

2. While it does not constitute evidence in the strict sense, at the summary judgment oral argument, the Martins attempted to explain the delays. With respect to their initial failure to timely prepare their 2004, 2005 and 2006 tax returns, Ms. Martin stated:

> [W]e had problems with our previous accountant. Her husband died and she had to let us go and—and so she—basically we were trying to—she had her assistant try to finish us up. And she got sick and held on to our taxes for over a year. And we repeatedly tried to get them back from her, and she kept saying she was going to finish them.
>
> And then by the time we realized—finally we demanded them back, and we had to find a new accountant who had to start fresh. And that was Andrea, and that's when she started reassessing and doing all our taxes to help get us caught up.

Hr'g Tr. (Aug. 29, 2013) at 6:4–15. With respect to the six-month delay in signing and filing the completed returns, the bankruptcy court and Ms. Martin engaged in the following colloquy:

> THE COURT: Why didn't the tax returns get filed [six] months earlier, when the accountant signed them?
>
> SUSAN MARTIN: Because she actually finished them on 12–18–08. And I believe we were waiting for two other years that were behind, '07 and '08, to be completed before we put them all in together.
>
> THE COURT: Why? Why. Why didn't—why didn't—
>
> SUSAN MARTIN: I don't know. I—I just feel like we were trying to get it all in at once. I—I guess that's why we waited. I was wondering the same thing, why we didn't get them in right away. But we had so many back taxes that we were just trying to get them all done. And that's why they sat for a little while.

Hr'g Tr. (Aug. 29, 2013) at 5:7–19.

ward by roughly $5,000 (from $32,133 to $27,010).

The Martins commenced their chapter 7 bankruptcy case in November 2011 and commenced pro se the adversary proceeding from which this appeal arises in July 2012. By way of their complaint, they sought a determination that their 2004, 2005 and 2006 tax debt was dischargeable. The IRS responded to the complaint by alleging that the subject tax debt was nondischargeable pursuant to § 523(a)(1)(B)(i), as a tax debt for which a tax return was required but never filed.[3]

The IRS filed a summary judgment motion based on the undisputed facts. The bankruptcy court denied the IRS's summary judgment motion and instead, on the undisputed facts, granted judgment in favor of the Martins. In a thoughtful, thorough and detailed memorandum of decision, the bankruptcy court rejected the IRS's legal theories attempting to explain why a tax return filed post-assessment is the functional equivalent of no tax return at all for both tax purposes and nondischargeability purposes.

The bankruptcy court also grappled with the meaning of the word "return" for purposes of the nondischargeability statute, both before and after the 2005 Bankruptcy Code amendments. Ultimately, the bankruptcy court held that the correct standard for determining whether a taxpayer filing qualified as a return for purposes of the nondischargeability statute had not changed as a result of the 2005 amendments. According to the bankruptcy court, the test established in the tax court decision of *Beard v. Commissioner,* 82 T.C. 766, 774–79 (1984), *aff'd* 793 F.2d 139 (6th Cir.1986), should be used to determine whether the debtor taxpayer had filed a return. The *Beard* test as articulated in Ninth Circuit authority requires courts to consider the following factors:

> (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

United States v. Hatton (In re Hatton), 220 F.3d 1057, 1060–61 (9th Cir.2000) ("*Hatton II*") (citing *United States v. Hindenlang (In re Hindenlang),* 164 F.3d 1029, 1033 (6th Cir.1999)).

Instead of utilizing the version of the *Beard* test as applied in *Hatton II* and *In re Hindenlang,* the bankruptcy court utilized a slightly different version of the *Beard* test. Whereas the honest-and reasonable inquiry in the *Hatton/Hindenlang* version is broad in scope and at least partially subjective in focus, the honest-and-reasonable inquiry in the version of the *Beard* test utilized by the bankruptcy court was narrow in scope and exclusively objective in focus. The bankruptcy court only considered the face of the Martins' tax filings and looked at the form and content of those filings in order to determine, from an objective standpoint, that the Martins' filings for the 2004, 2005 and 2006 tax years constituted "an honest and reasonable attempt to satisfy the requirements of the tax law."

The bankruptcy court concluded that the Martins' 2004, 2005 and 2006 tax filings qualified as returns for nondischargeability purposes and granted judgment in their favor on that basis. The IRS timely filed its notice of appeal on April 14, 2014.

3. Ultimately, the IRS conceded the dischargeability of the additional amount assessed for 2005 based on the Martins' 2005 tax return. Nor did it contest the dischargeability of the penalties it assessed and the interest accrued on the penalties.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(I), and we have jurisdiction under 28 U.S.C. § 158.

ISSUE

Did the bankruptcy court apply the correct legal standard for determining whether the Martins' tax filings qualified as tax returns for purposes of the nondischargeability statute?

STANDARD OF REVIEW

[1] This appeal presents a question of statutory construction, which is a question of law we review de novo. *Samson v. W. Capital Partners, LLC (In re Blixseth),* 684 F.3d 865, 869 (9th Cir.2012) (per curiam).

DISCUSSION

A. The Parties' Positions

In this appeal, the IRS has advocated two distinct positions: an official, preferred position and an unofficial, fall-back position. Officially, the IRS contends that the dischargeability of income tax debt associated with a late-filed tax return should hinge on whether the taxpayer filed the return before or after the IRS made any assessment. This position is not new for the IRS. *See, e.g., Mallo v. I.R.S. (In re Mallo),* 774 F.3d 1313, 1325–27 (10th Cir. 2014); *Wogoman v. I.R.S. (In re Wogoman),* 475 B.R. 239, 250 (10th Cir. BAP 2012); *see also* IRS Chief Counsel Notice CC–2010–016, *available at* 2010 WL 3617597.

Alternately and unofficially, the IRS contends that the Ninth Circuit's version of the *Beard* test is sufficient to accomplish its litigation goal in this appeal. According to the IRS, if the bankruptcy court here had applied the Ninth Circuit version of the *Beard* test, it should have and would have concluded that the Martins' 2004, 2005 and 2006 tax returns do not qualify as returns for nondischargeability purposes.

The Martins similarly contend that the *Beard* test applies, but they insist that the bankruptcy court correctly determined under the *Beard* test that their 2004, 2005 and 2006 tax returns qualify as returns for nondischargeability purposes.

Notably, neither side here advocates in favor of the literal construction of the "return" definition that Congress added to the nondischargeability statute as part of the 2005 Bankruptcy Code amendments. Indeed, in this case and in other cases, the IRS expressly has rejected the literal construction and has stated that the literal construction leads to "overly harsh" results. *In re Wogoman,* 475 B.R. at 250. Instead, the IRS has advocated for its less draconian approach focusing on whether the taxpayer filing occurred before or after an IRS tax assessment. *Id.*

Even though neither side here supports the literal construction of the "return" definition, in light of the increasing number of courts that have adopted that construction, our analysis necessarily focuses on that approach first. Before undertaking that analysis, however, we first describe the legal state of affairs in the Ninth Circuit before Congress added the "return" definition to the nondischargeability statute.

B. The Ninth Circuit Legal Landscape Before BAPCPA [4]

Section 523(a)(1)(B)(i) excepts from discharge tax debt when the debtor taxpayer

4. The Bankruptcy Abuse Prevention and Consumer Protection Act, Pub.L. No. 109–8, 119 Stat. 23 (2005) ("BAPCPA").

was required to file a tax return but did not do so. *Cal. Franchise Tax Bd. v. Jackson (In re Jackson),* 184 F.3d 1046, 1050 (9th Cir.1999). "The policy behind this subsection is that a debtor should not be permitted to discharge a tax liability based upon **a required tax return that was never filed.**" *Id.* at 1052 (citing 3 NORTON BANKRUPTCY LAW AND PRACTICE 2d § 47:6, 47–15 (1997)). Meanwhile, § 523(a)(1)(B)(ii) excepts from discharge tax debt associated with untimely filed tax returns filed within two years of the debtor's bankruptcy filing, and § 523(a)(1)(C) excepts from discharge tax debt associated with tax returns that are fraudulent or evasive. *See In re Hindenlang,* 164 F.3d at 1032; *see also* 4 COLLIER ON BANKRUPTCY ¶ 523.07[3],[4] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. rev. 2015).

In *United States v. Hatton (In re Hatton)* ("*Hatton I*"), 216 B.R. 278, 282 (9th Cir. BAP 1997), this Panel adopted for purposes of § 523(a)(1)(B)(i) the meaning of "return" set forth in *Beard. Beard* held that a document qualifies as a return if:

> (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

In re Hindenlang, 164 F.3d at 1033. *Hatton I* applied the Beard test in upholding the bankruptcy court's finding that the debtor had filed a return within the meaning of § 523(a)(1)(B)(i). *Hatton I* reasoned that the debtor taxpayer came close enough to filing a return by meeting with the IRS, by acquiescing to the substitute return the IRS filed on the debtor taxpayer's behalf, by acknowledging his liability for 1983 taxes in the amount set forth in the substitute return, and by entering into an installment payment agreement, pursuant to which debtor agreed to pay his delinquent taxes at a rate of $200 per month.

The Ninth Circuit Court of Appeals reversed. *Hatton II,* 220 F.3d at 1060–61. *Hatton II* rejected *Hatton* I's attempted expansion of the *Beard* test to include a debtor taxpayer who had not signed any document under penalty of perjury and who "made every attempt to avoid paying his taxes" until the IRS sent the debtor taxpayer a letter threatening to levy on his wages and bank accounts and to seize his property. *Id.* at 1061. But *Hatton II* did not throw out the baby with the bath water. For purposes of § 523(a)(1)(B)(i), *Hatton II* explicitly adopted *Beard's* definition of return, as articulated in *In re Hindenlang.*[5]

By adopting *In re Hindenlang's* version of the *Beard* test, *Hatton II* sub silentio overruled, at least in part, another Panel decision—*United States v. Nunez (In re Nunez),* 232 B.R. 778, 783 (9th Cir. BAP 1999). *In re Nunez* adopted a slightly

5. There is nothing in *Hatton II* suggesting that it adopted other aspects of *In re Hindenlang,* particularly *In re Hindenlang*'s holding that post-assessment tax returns filed by the taxpayer never qualify as returns for purposes of § 523(a)(1)(B). To the contrary, *Hatton II's* analysis—especially its reliance on the *Beard* test to determine whether the taxpayer filed a return—is inconsistent with *In re Hindenlang*'s pre- or post-assessment test. As stated in one persuasive bankruptcy court decision:

> Had the *Hatton* court adopted the *Hindenlang* [pre- or post-assessment] Rule, it would not have needed to consider whether the Debtor had executed the submissions under penalty of perjury or the Debtor's subjective intent post assessment. The court would have simply determined that the debtor's post assessment submissions, could not as a matter of law, constitute returns under § 523(a)(1)(B).

Rushing v. United States (In re Rushing), 273 B.R. 223, 227 (Bankr.D.Ariz.2001).

different version of the *Beard* test. Following *Savage v. I.R.S. (In re Savage)*, 218 B.R. 126, 132 (10th Cir. BAP 1998), *In re Nunez* narrowed the honesty-and-reasonableness prong of the Beard test to examine only what appeared on the face of the taxpayer's filing in order to ascertain whether that filing constituted "an honest and genuine endeavor to satisfy the law." *In re Nunez*, 232 B.R. at 783 (quoting *In re Savage*, 218 B.R. at 132). *In re Nunez*, therefore, excluded from its honesty-and-reasonableness analysis the length of the delay in the taxpayer's filing, the reason for the delay and the number of tax years for which timely filings were missed. *Id.* It is impossible to reconcile this aspect of *In re Nunez* with *Hatton II*'s honesty-and-reasonableness analysis, which largely hinged on the delay in taxpayer compliance. *See Hatton II*, 220 F.3d at 1061.

In short, in the Ninth Circuit, the *Hatton II/ In re Hindenlang* version of the *Beard* test indisputably governed the definition of the term "return" for purposes of determining the nondischargeability of tax debts, at least until the enactment of BAPCPA. In the next section, we attempt to discern how (if at all) BAPCPA changed the legal landscape.

C. The Impact of BAPCPA on the Nondischargeability of Tax Debts

Recall that, when Congress first enacted the Bankruptcy Code in 1978, it specifically noted that § 523(a)(1)(B) represented a careful balancing of the competing interests of the debtor, the taxing authority, and the debtor's other creditors. *See Maryland v. Ciotti (In re Ciotti)*, 638 F.3d 276, 279 (4th Cir.2011) (citing S.Rep. No. 95–989, at 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5800)). Congress further stated that § 523(a)(1)(B) reflected its intent that "**tax claims which are nondischargeable**, despite a lack of priority, **are those to whose staleness the debtor contributed by some wrong-doing or serious fault.**" S.Rep. No. 95–989, at 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5800 (emphasis added).

In contrast, when Congress enacted BAPCPA, it did not offer any similarly specific statement of its legislative rationale for adding a definition of "return" into the Code's nondischargeability statute. *In re Mallo*, 774 F.3d at 1327.[6] But BAPCPA was accompanied by a general statement of legislative intent indicating that the 2005 amendments as a whole were motivated by four general factors:

> the "recent escalation of consumer bankruptcy filings," the "significant losses . . . associated with bankruptcy filings," the fact that the "bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse," and "the fact that some bankruptcy

6. Congress did explain the second sentence of the hanging paragraph, as follows:

> Income Tax Returns Prepared by Tax Authorities. Section 714 of the Act amends section 523(a) of the Bankruptcy Code to provide that a return prepared pursuant to section 6020(a) of the Internal Revenue Code, or similar State or local law, constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer pursuant to section 6020(b) of the Internal Revenue Code, or similar State or local law, does not constitute filing a return (and the debt cannot be discharged).

H.R. Rep. 109–31(I), at 103 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 167. It seems odd that Congress would bother to explain the relatively minuscule effect of the second sentence of the hanging paragraph but not offer any legislative comment on the first sentence, which literal construction adherents claim dramatically altered the nondischargeability of tax debt associated with untimely filed tax returns.

debtors are able to repay a significant portion of their debts."

In re Ciotti, 638 F.3d at 279 (citing H.R.Rep. No. 109–31, at 3–5 (2005), reprinted in 2005 U.S.C.C.A.N. 88, at 90–92).

In any event, BAPCPA added the "return" definition into the nondischargeability statute in a hanging paragraph tacked onto the end of § 523(a) and often cited as § 523(a)(*). The hanging paragraph consists of two sentences, the first of which defines the term "return" and the second of which further refines that definition by explicitly including a certain type of return prepared by the taxing authority on behalf of the taxpayer and by expressly excluding another. The full text of the hanging paragraph provides as follows:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C. § 523(a)(*).

A number of courts, including several Courts of Appeal, have addressed the issue of what the "return" definition means, and many of them have held that the term "applicable filing requirements" is unambiguous and that the plain and ordinary meaning of the term necessarily includes time deadlines for filing returns as stated in the Internal Revenue Code, 26 U.S.C. § 6072(a), and/or in equivalent state statutes. Therefore, these literal construction courts have concluded that untimely returns are not returns at all for purposes of the nondischargeability statute. *See, e.g., Fahey v. Massachusetts Dep't of Revenue (In re Fahey),* 779 F.3d 1, 4–5 (1st Cir. 2015); *In re Mallo,* 774 F.3d at 1321; *McCoy v. Miss. State Tax Comm'n (In re McCoy),* 666 F.3d 924, 928, 932 (5th Cir. 2012).

The literal construction adherents have not been deterred by the perceived harshness resulting from their reading of the statute. They rely heavily (if not exclusively) on the plain language of the phrase "applicable filing requirements" to conclude that Congress intended by way of the "return" definition in the hanging paragraph to except from discharge the tax debts of all taxpayers whose tax returns do not strictly comply with all filing requirements—including time deadlines. *See, e.g., In re Fahey,* 779 F.3d at 4–5; *In re Mallo,* 774 F.3d at 1321; *In re McCoy,* 666 F.3d at 932. In doing so, they gloss over one of the most important rules of plain meaning statutory construction: that the meaning of a statutory term only is considered plain and unambiguous if the term is clearly understood in the context of the words surrounding it and in the context of the larger statutory scheme.

The Supreme court reiterated the vital importance of contextual reading in *Yates v. United States,* — U.S. —, 135 S.Ct. 1074, 1081–82, 191 L.Ed.2d 64 (2015). *Yates* emphasized that the clarity of statutory language only can be measured in "the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 1081 (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)). While the Court's ruling in *Yates* was a plurality decision, there was no controversy amongst the Justices about the critical importance of contextual reading. In fact, the *Yates* dissent, in which four

Justices joined, was even more compelling on this point:

> I agree with the plurality (really, who does not?) that context matters in interpreting statutes. We do not "construe the meaning of statutory terms in a vacuum." Rather, we interpret particular words "in their context and with a view to their place in the overall statutory scheme." And sometimes that means, as the plurality says, that the dictionary definition of a disputed term cannot control.

Id. at 1092 (Justice Kagan dissenting) (citations omitted).

The more one considers the phrase "applicable filing requirements" in context, the more doubtful the literal construction becomes. First, within the hanging paragraph itself, the second sentence does not square with the so-called ordinary meaning of the term "applicable filing requirements" found in the first sentence. The literal construction of "applicable filing requirements" effectively excepts from discharge all taxes associated with untimely-filed returns, but the second sentence adds right back into the definition returns prepared by taxing authorities under 26 U.S.C. § 6020(a) or under equivalent state statutes. That subsection provides:

> **(a) Preparation of return by Secretary.**—If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.

26 U.S.C. § 6020(a). Thus, under the literal construction of the hanging paragraph, a debtor taxpayer who is one month or one day or even one hour late in filing his or her return will have his associated tax debt excepted from discharge, whereas a debtor taxpayer who never bothers to file his or her own return can discharge his or her associated tax debt if the IRS fortuitously prepares a return on that person's behalf.

Why would Congress want to treat debtor taxpayers who do nothing on their own to comply with their return filing obligations so much better than debtor taxpayers who—perhaps for reasons beyond their control—miss the filing deadline by as little as a day but then conscientiously complete and file their return? The literal construction adherents have an answer to this question, but that answer is hardly persuasive. The literal construction adherents speculate that Congress wanted to make available to the taxing authorities a "carrot" they could offer to formerly uncooperative taxpayers to encourage their cooperation going forward. *In re Fahey,* 779 F.3d at 7; *In re Mallo,* 774 F.3d at 1324; *In re McCoy,* 666 F.3d at 931.

This makes no sense. The literal construction adherents admit (at least some of them do) that it is extremely rare for taxing authorities to engage in the expensive and time-consuming process of preparing tax returns on behalf of taxpayers. *See, e.g., In re Fahey,* 779 F.3d at 6–7. More importantly, the literal construction of the "return" definition in reality creates an incentive for impoverished taxpayers who already are late in filing one or more tax returns to further delay, with the hope that they would be some of the lucky few for whom the taxing authorities decide to prepare returns on the taxpayers' behalf (which then would enable them under the literal construction to obtain a discharge of an otherwise nondischargeable tax debt).

When read with a literal construction, the disconnect between the first and second sentences of the hanging paragraph does not end there. In the last part of the

second sentence, the hanging paragraph excludes from the definition of "return" returns prepared by taxing authorities under 26 U.S.C. § 6020(b) or under equivalent state statutes. That subsection provides in relevant part:

> **(b) Execution of return by Secretary.—**
>
> **(1) Authority of Secretary to execute return.**—If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

26 U.S.C. § 6020(b). Thus, according to the literal construction adherents, even though the first sentence of the hanging paragraph already excludes all late-filed returns from the definition of "return," Congress felt it necessary (supposedly for the sake of clarity) to repeat one tiny aspect of this exclusion one sentence later—the exclusion with respect to § 6020(b) returns, which by definition are untimely. *See, e.g., In re Fahey,* 779 F.3d at 7; *In re Mallo,* 774 F.3d at 1324. Many literal construction adherents acknowledge that a statute should, if possible, be construed in a manner that avoids rendering any part of it redundant. *See, e.g., In re Fahey,* 779 F.3d at 6; *In re Mallo,* 774 F.3d at 1317. Indeed, *In re Fahey* cites to *TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001), which stated: "[i]t is a **cardinal principle** of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Id.* (citations and internal quotation marks omitted and emphasis added).

The literal construction adherents offer little to explain their acceptance of the redundancy created by their interpretation of the hanging paragraph. According to them, Congress likely was redundant for the sake of clarity. But this explanation is wholly at odds with the cardinal principle of statutory construction referenced immediately above. Alternately, the literal construction adherents dismiss the redundancy as insignificant, especially in light of the plain meaning of the term "applicable filing requirements." *See, e.g., In re Fahey,* 779 F.3d at 7. This reasoning not only is circular but also undermines a contextual reading of the statute.

Assuming the literal construction of the term "applicable filing requirements" already has not collapsed under the weight of the contextual difficulties found within the hanging paragraph itself, another more-extreme level of difficulties awaits within § 523(a)(1)(B)(ii). In that subparagraph, as originally enacted in 1978, Congress clearly excepted from discharge any and all tax debts associated with untimely filed returns that were filed within two years of the debtor's bankruptcy petition filing. *In re Ciotti,* 638 F.3d at 279. Before BAPCPA, there was no genuine dispute regarding the broad coverage of this subparagraph. *See id.* After BAPCPA, at least under the literal construction, the once-expansive coverage of this subparagraph has been dramatically reduced to an infinitesimal scope—a scope bordering on and approaching zero. As the literal construction adherents would have it, this subparagraph post-BAPCPA only would apply to § 6020(a) returns, since § 6020(a) returns are the only type of untimely returns that fall within the definition of "return" under the literal construction. *See, e.g., In re Fahey,* 779 F.3d at 6; *In re Mallo,* 774 F.3d at 1323–24.

Structurally, interpreting the definitional hanging paragraph in a way that dramatically alters the coverage of § 523(a)(1)(B)(ii) is an excellent example of "the tail wagging the dog." This structural concern is the least of our concerns. The literal construction also renders § 523(a)(1)(B)(ii) all but meaningless. The literal construction adherents explain away this concern by suggesting that, while "meaningless" is not okay under the cardinal rule disfavoring interpretations that render part of a statute superfluous, "all but meaningless" is fine. *See, e.g., In re Fahey,* 779 F.3d at 6; *In re Mallo,* 774 F.3d at 1323–24.

And yet we have an even more significant concern. The Supreme Court disfavors interpretations of ambiguous Bankruptcy Code provisions (and amendments) that impose major changes in pre-existing practice in the absence of at least some discussion in the legislative history. *See Dewsnup v. Timm,* 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). The literal construction adherents reason that this concern is unjustified because the "return" definition is unambiguous. But our contextual reading of the statutory text convinces us otherwise.

At the outermost circle of contextual reading, we must consider how the literal construction of the term "applicable filing requirements" fits within Congress' statutory scheme for excepting debts from discharge. Recall that Congress' original Bankruptcy Code enactment of § 523(a)(1)(B) embodied a careful balancing of the competing interests of the debtor, taxing authorities and the debtor's other creditors. *See In re Ciotti,* 638 F.3d at 279 (citing S.Rep. No. 95–989, at 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5800)). Nothing in the term "applicable filing requirements" or in the four general factors that served as the impetus for BAPCPA manifests an intent to effect a sea-change in how Congress chose to balance the dischargeability of tax debts associated with untimely filed returns.

The Supreme Court before BAPCPA recognized that "exceptions to discharge should be confined to those plainly expressed," *Kawaauhau v. Geiger,* 523 U.S. 57, 62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) (quoting *Gleason v. Thaw,* 236 U.S. 558, 562, 35 S.Ct. 287, 59 L.Ed. 717 (1915)), and the Supreme Court after BAPCPA continues to adhere to this same principle. *Bullock v. BankChampaign, N.A.,* —— U.S. ——, 133 S.Ct. 1754, 1760, 185 L.Ed.2d 922 (2013). Here, in light of our contextual reading of the term "applicable filing requirements," we are not persuaded that the statutory text, as amended by BAPCPA, manifests a plainly expressed intent to rebalance the nondischargeability of tax debts associated with untimely filed tax returns.

D. Application of the Correct Definition of "Return" to this Appeal

Our rejection of the literal construction of the "return" definition leaves us with the task of articulating what the definition of "return" in the hanging paragraph is supposed to mean. The generic terms "applicable bankruptcy law" and "applicable filing requirements" necessarily reflect that the answer will depend on which nonbankruptcy laws are applicable (federal or state or local) and what the applicable filing requirements say. "[N]early all courts" pre-BAPCPA utilized some version of the *Beard* test. *In re Mallo,* 774 F.3d at 1318. In other words, for purposes of determining the dischargeability of federal income tax debt, the "return" definition added by Congress in 2005 effectively codified the *Beard* test, except that Congress in the second sentence of the hanging paragraph carved out some specific rules

for tax returns prepared by taxing authorities.[7]

[2] In this appeal, in the context of late-filed federal income tax returns prepared and filed by the taxpayers, there is no convincing or persuasive indication that BAPCPA or the hanging paragraph abrogated *Hatton II's* holding that we should use *In re Hindenlang's* version of the *Beard* test—a test derived from nonbankruptcy law—to determine whether the Martins' untimely tax returns qualify as tax returns for nondischargeability purposes. That version of the *Beard* test provides:

> (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

In re Hindenlang, 164 F.3d at 1033.[8]

Similar to what this Panel held in *In re Nunez,* the bankruptcy court here concluded that it should utilize a different version of the *Beard* test. In this alternate version, the prong of the test focusing on the honesty and reasonableness of the debtor's efforts to file the return is narrow in scope and considers only the form and substance of the purported return while ignoring the length of delay, the reason for the delay, and the number of tax years missed. As we stated at the outset of this discussion, this alternate version of the *Beard* test is inconsistent with the holding and reasoning set forth in *Hatton II,* so we cannot uphold the bankruptcy court's usage of this alternate test.

Hatton II offered two distinct reasons why the taxpayer there did not satisfy the *Beard* test. *Hatton II,* 220 F.3d at 1061. First, *Hatton II* explained the taxpayer had not signed any document under penalty of perjury, so the second Beard test factor was not met. *Id.* In addition, Hatton II explained that the taxpayer indisputably took no steps to cure his delinquency in filing his 1983 federal income tax return, and did not begin to cooperate with the IRS's efforts, until the IRS threatened to levy on his wages and his bank account. *Id.* According to *Hatton II,* these undisputed facts established that the taxpayer had not engaged in "an honest and reasonable attempt to comply with the requirements of the tax law" as required by the fourth Beard test factor. *Id.* The bankruptcy court posited that, because *Hatton II* offered two separate and independent reasons why the Beard test was not met, the second reason given—regarding the honesty and reasonableness of the taxpayer's efforts—perhaps was non-binding dicta. We disagree. When alternate grounds are given for a holding, neither ground constitutes non-binding dicta. *Exp. Grp. v. Reef Indus., Inc.,* 54 F.3d 1466, 1471 (9th Cir.1995).

The bankruptcy court attempted to offer some other reasons why it might not be

7. We express no opinion on what "return" means under applicable nonbankruptcy law when state tax returns are in play, as that issue is not properly before us.

8. The IRS follows the *Beard* test in defining the term "return" under many circumstances. As the bankruptcy court noted in its Memorandum Decision:

> The IRS has referenced the *Beard* Test in its revenue rulings and other materials. *See* Rev. Rul.2005–59, 2005–2 C.B. 505 (2005) (clarifying when documents constitute valid returns under *Beard* Test in context of joint filers); I.R.S. Chief Couns. Notice CC–2004–032, 2004 WL 3210764 (Sept. 9, 2004) ("The four part test set forth in *[Beard]* is widely accepted as the analysis for determining what constitutes a return for purposes of the Internal Revenue Code.").

Mem. Dec. (March 31, 2014) at 20:23–26.

bound by *Hatton II,* but none of these other reasons, even if valid, justify a departure from *Hatton II's* version of the *Beard* test, which included a broader honesty-and-reasonableness prong than the bankruptcy court utilized. Because the bankruptcy court did not apply the correct legal standard for assessing the honesty and reasonableness of the Martins' efforts to comply with applicable tax laws, we must VACATE AND REMAND so that the bankruptcy court can apply the proper legal standard to the relevant facts of this case, which are not limited to the form and content of the Martins' filings, but also include the number of missing returns, the length of the delay, the reasons for the delay, and any other circumstances reasonably pertaining to the honesty and reasonableness of the Martins' efforts.

In sum, we need to ensure that the bankruptcy court views all of the relevant facts through the lens of the appropriate legal standard set forth in *Hatton II,* and we furthermore believe that the determination of whether all of the relevant facts and circumstances constitute an honest and reasonable effort to comply with the applicable tax laws is best made, in the first instance, by the bankruptcy court.

E. IRS Argument That Tax Debts Associated With Post–Assessment Tax Returns Are Always Nondischargeable

There is only one other issue that we need to address. We must address the IRS's argument that a tax debt associated with an IRS tax assessment made without the benefit of a taxpayer-prepared tax return always should be treated as nondischargeable.

The IRS's argument is twofold. First, the IRS contends that, when as here the taxpayer does not file his or her tax return until after the IRS has assessed taxes pursuant to Internal Revenue Code deficiency procedures, the debt arising from the assessment is (and always will be) a debt for which no return has been filed, thereby bringing the debt within the scope of § 523(a)(1)(B)(i)—a tax debt for which a tax return was required but never filed. According to the IRS, it makes no difference whether the taxpayer, after assessment, belatedly files his or her tax return because the nature of the debt (as a debt arising from the assessment rather than the return) cannot and does not change under applicable tax law even when a return is later filed. Aplt. Opn. Br. at pp. 7–15.

Our initial reaction to this argument is that it tends to prove too much. If we were to accept the IRS's interpretation of the nature of an assessment-based tax debt, it proves not only that the tax liability arose without a tax return, but also that a tax return was neither necessary nor "required" to impose the assessment-based tax debt. In any event, even if the belated tax return associated with an assessment-based tax debt was still required in some sense, we agree with the reason offered by the bankruptcy court for rejecting this argument. As the bankruptcy court explained, the tax debt within the meaning of the Bankruptcy Code preexists both the filing of the return and the issuance of the IRS assessment. Mem. Dec. (March 31, 2014) at p. 12 (citing *Rhodes v. United States (In re Rhodes),* 498 B.R. 357, 362 (Bankr.N.D.Ga.2013); *see also In re Mallo,* 774 F.3d at 1326 (following *In re Rhodes).* Under the Internal Revenue Code, the tax debt—or right to payment—arises at the end of each tax year and not later on. *In re Rhodes,* 498 B.R. at 362. An assessment is merely a method for fixing the amount of that debt and not the source of the debt itself. *Id.*

Second, the IRS argues that a post-assessment tax return is the functional equivalent of no tax return at all. As the IRS puts it, once it is forced to assess taxes without the benefit of a taxpayer-prepared return, a later-filed tax return fails to serve its primary function as a vehicle for self-reporting tax liability. We already rejected this identical argument in *In re Nunez,* 232 B.R. 778, 781–82 (9th Cir. BAP 1999). While some parts of *In re Nunez* were sub-silentio overruled by *Hatton II*, *Hatton II* did not overrule this part of *In re Nunez.* Nor did Hatton II overrule the following reasoning from *In re Nunez* supporting its rejection of the IRS's post-assessment tax return argument:

> Congress could have conditioned discharge of tax debt on whether a return was filed prior to an assessment. As correctly noted by the [bankruptcy] court, Congress used assessment as a trigger for other time periods in the Code, for example, the priority qualifications found in Section 507(a)(8)(A)(ii). When Congress includes particular language in one section of the Code, but omits it in another, it is presumed to have acted intentionally and purposely. We will not read into Section 523(a)(1)(B) the requirement that a debtor must have filed a return prior to an assessment by the IRS.

In re Nunez, 232 B.R. at 782 (internal citation omitted).

Indeed, *Hatton II* is consistent with *Nunez's* rejection of the IRS's post-assessment tax return argument in the following sense: if *Hatton II* had agreed with the IRS that a post-assessment tax return is no tax return at all, *Hatton II* would not have had any need to apply the *Beard* test (as it did) to resolve the question of whether the debtor there had filed a return within the meaning the nondischargeability statute. Simply put, *Hatton II's* holding and reasoning cannot be reconciled with the IRS's post-assessment tax return argument.

Accordingly, we reject both aspects of the IRS's post-assessment tax return argument.

CONCLUSION

For the reasons set forth above, we VACATE the bankruptcy court's judgment holding that the Martins' tax debt was dischargeable, and we REMAND for further proceedings consistent with this decision.

IN RE: Michael Paul FREE and Hak Suk Free, Debtors.

Michael Paul Free; Hak Suk Free, Appellants,

v.

Michael G. Malaier, Chapter 13 Trustee,* Appellee.

BAP No. WW–14–1395–JuKiF
Bk. No. 3:14–bk–41876–PBS

United States Bankruptcy Appellate Panel of the Ninth Circuit.

Argued and Submitted on September 25, 2015

Filed December 17, 2015

Background: Debtors who had previously obtained Chapter 7 discharge of their lia-

* On May 15, 2015, the BAP Clerk's Office entered an order substituting K. Michael Fitzgerald as the successor chapter 13 trustee in place of the former chapter 13 trustee, David

Sanctions (Jury)

NOTES: (1) Work in process. Use these materials as an aid, not a substitute, for your own research (*e.g.*, Shepardize all cites). (2) Attorney discipline: consider ABA standards.[1] (3) Sanctions generally: consider citing multiple legal grounds for sanctions, providing lots of notice, protecting attorney-client privilege,[2] and whether the apparent wrongdoer should be given protections akin to criminal proceedings.[3]

Authority[4]	*Prerequisites*	*Compensatory $*	*Sanctions $ (a) Pay to party (b) Pay to court*	*Attorney Fees*	*Other/Notes (for serious sanctions, consider referral to disciplinary panel)*[5]
9011(c)(1)(A) Motion	(1) 21 day chance to withdraw/correct[6], (2) objectively unreason-able conduct,[7] (3) motion not combined with other requests	Yes as warranted for effective deterrence[8]	(a) Yes (b) Yes	Yes	"Directives of a non-monetary nature"[9] Which includes (1) vexatious litigant order,[10] (2) suspension/disbarment[11] (3) bench warrant?? (4) evidentiary sanctions??[12]
9011(c)(1)(B) on court's initiative	OSC describing specific conduct issued prior to withdrawal or settlement of issue	No[13]	(a) No[14] (b) Yes	No[15]	(same?)
Inherent power[16]	(1) Notice (& opp. for hrg?)[17] (2) explicit *(or implied?*[18]*)* finding of bad faith or willful misconduct;[19] (3) clear & convincing evid?[20]	Yes	(a) Yes,[21] (b) Yes,[22] but no "serious" sanctions (>$5k, 1998 dollars?)[23]	Yes[24]	Same?? (1) Vexatious litigant?? (2) Suspension/disbarment[25] (3) Bench warrant (body detention)?? Note: "technical" or "inadvertent" violations will not support sanctions under inherent power[26]
Contempt-Civil § 105(a) (compensatory, or coercive *i.e.* sanctions must cease upon compliance)[27]	(1) Specific & definite order (incl. automatic orders *e.g.* stay);[28] (2) notice & opp. for hearing; (3) clear & convincing evid;[29] (4) enforce via contested matter not AP[30]	Yes, limited to "actual damages" (including atty fees seeking compliance with order)[31]	(a) Yes??[32] (b) Yes, but no serious sanctions …[33]	Yes[34]	Same?? (1) Vexatious litigant, (2) suspension/disbarment, (3) bench warrant (body detention), (4) fines or incarceration until compliance.[35] Notes: (a) "failure to take all reasonable steps within the party's power to comply" is sanctionable;[36] (b) intent is irrelevant and good faith is not a defense, unless coupled with reasonable interpretation of order;[37] (c) inability to comply with the order is a defense, but "self-induced inability is not a defense,"[38] (d) "technical" or "inadvertent" violations will not support contempt finding[39]
Contempt-Crim. (punitive)	N/A				

Authority[4]	*Prerequisites*	*Compensatory $*	*Sanctions $ (a) Pay to party (b) Pay to court*	*Attorney Fees*	*Other/Notes (for serious sanctions, consider referral to disciplinary panel)*[5]
28 U.S.C. § 1927	N/A[40]				
Removal 28 U.S.C. §1447(c)	Must be tied to specific removal, by virtue of the language "incurred as a result of the removal."[41]	Yes[42]	(a) No (b) No	Yes[43]	
362(k) [formerly 362(h)]	Individual[44] injured by willful violation	Yes	(a) Yes (b) No??	Yes[45]	Emotional distress damages ok[46]; punitive damages ok.[47]
7037, discovery sanctions					Evidentiary presumptions[48]
All Writs Act[49] 28 U.S.C. §1651	(1) Notice & opp for hrg; (2) adequate record for review; (3) for vexatious litigant order: substantive findings as to the frivolous or harassing nature of the actions; (4) narrowly tailored to fit the specific vice at issue				Vexatious Litigant (filing injunctions)
LBR 1001-1(f)	Non-compliance with LBR, FRCP, FRBP or any court order				LBR authorizes "imposition of sanctions"
LBR 2090-2	Cause to believe counsel engaged in unprofessional conduct				(1) civil or criminal contempt (2) "other appropriate sanctions" (3) referral to disciplinary authority for state or jurisdiction in which counsel is licensed to practice (4) refer matter per Local Civil Rule 83-3 or General Order 96-05
LBR 9020-1 Contempt	Filed motion per 9013-1 with proposed OSC, showing cause via (1) written explanation and (2) appearance at hearing				Civil contempt and sanctions

Enforcement/Referrals/Reporting

Agency/Court	*Method of Referral/Report*	*Possible agency actions*
The State Bar of California	Complete and submit Discipline Referral Form to: The State Bar of California Office of the Chief Trial Counsel Intake Department 845 South Figueroa Street Los Angeles, CA 90017-2515	If State Bar determines probable misconduct is present, action is referred to State Bar Court, which may (1) issue public or private reprovals, (2) recommend the California Supreme Court disbar or suspend attorneys, or (3) temporarily remove attorneys from practice of law where they present a substantial threat of harm to clients/public. Costs may be imposed per Cal. Bus. & Prof. Code 6086.10.[50]
U.S. District Court, Standing Committee on Discipline, for criminal/punitive contempt[51]	Submit complaint in writing to the USDC Standing Committee on Discipline, c/o Clerk of Court	Per Local Civil Rule 83-3.1.3, possible penalties include: (1) disbarment; (2) suspension not to exceed three years; (3) public or private reproval; (4) monetary penalties (may incl. order to pay costs of proceedings); (5) and/or acceptance of resignation.
U.S. Attorney's Office	Submit Criminal Referral Notification Statement to: Administrative Office of the United States Courts, Bankruptcy Judges Division One Columbus Circle, N.E. Washington, DC 20544	
American Bar Association, Center for Professional Responsibility	Submit disciplinary orders to the National Lawyer Regulatory Data Bank: National Lawyer Regulatory Data Bank Center For Professional Responsibility American Bar Association 321 North Clark Street Chicago, IL 60610	N/A – database, "central repository of information to facilitate reciprocal discipline and to help prevent the admission of lawyers who have been disbarred or suspended elsewhere."[52]

[1] Attorney discipline - ABA standards recommended but not mandatory. The BAP has held that the ABA standards are persuasive but it is no longer reversible error not to follow them provided that (1) the disciplinary proceeding is fair, (2) the evidence supports the findings, and (3) the penalty imposed was reasonable. *In re Nguyen*, 447 B.R. 268 (9th Cir. BAP 2011) (en banc reconsideration of *In re Crayton*, 192 B.R. 970 (9th Cir. BAP 1996)). *See In re Brooks-Hamilton*, 400 B.R. 238, 252-53 (9th Cir. BAP 2009) (under ABA standards, "the bankruptcy court should consider: (1) whether the duty violated was to a client, the public, the legal

system or the profession; (2) whether the lawyer acted intentionally, knowingly or negligently; (3) whether the lawyer's misconduct caused a serious or potentially serious injury; and (4) whether aggravating factors or mitigating circumstances exist."). *See also In re Lehtinen*, 564 F.3d 1052, 1062 (9th Cir. 2009) ("In the federal system there is no uniform procedure for disciplinary proceedings. The individual judicial districts are free to define the rules to be followed and the grounds for punishment.") (citation omitted).

[2] Attorney-client privilege: For the "crime-fraud exception" see *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996); *In re Grand Jury Subpoena*, 31 F.3d 826, 830 (9th Cir. 1994) (in camera review where a "reasonable belief that in camera review may lead to evidence that the exception applies").

[3] Criminal due process if sanctions might be punitive? At least one court has required special procedures. *See In re Winslow*, 131 B.R. 171, 173, *later proceedings*, 132 B.R. 1020 (D. Colo. 1991) (even without criminal contempt, if civil contempt could result in incarceration, the subject should be informed of right to counsel and right to have counsel appointed if indigent).

[4] Authority - court should notify the person charged of the *precise* authority for sanctions. *See In re DeVille*, 361 F.3d 539, 548-50 & n.4 (9th Cir. 2004) (bankruptcy court's notice was sufficient, despite not specifically identifying its inherent authority as one ground for sanctions, in the particular circumstances, but "[w]e do not expect … that the result reached here will be often justified in future cases where the sanctioned party was not explicitly informed of the precise ground for the imposition of sanctions").

[5] Referral to disciplinary panel discretionary, but strongly urged by BAP. "Although the Panel's prior decisions do not require that the bankruptcy court refer the matter to the [disciplinary panel], we strongly urge the bankruptcy court to do so, … [so that] the bankruptcy court will avoid the awkward responsibility for serving as 'prosecutor and arbiter in the investigation, prosecution and discipline' of [the attorney]." *In re Brooks-Hamilton*, 400 B.R. 238, 252-53 (9th Cir. BAP 2009); *see also In re Crayton*, 192 B.R. 970, 978 (9th Cir. BAP 1996). The Ninth Circuit has rejected an argument that a lack of referral to a standing committee was reversible error (when the local rules made such referrals discretionary). *In re Lehtinen*, 564 F.3d 1052, 1062 (9th Cir. 2009). For Bankr. C.D. Cal. disciplinary panel procedures, *see* (Fourth Amended) General Order 96-05.

[6] 9011 (motion) – 21-day "safe harbor" and exception for petition. No "safe harbor" (21-day opportunity to withdraw/correct) if the conduct at issue is the filing of a bankruptcy petition in violation of F.R.B.P. 9011(b). F.R.B.P. 9011(c)(1)(A) (2014).

[7] 9011 (motion) – objectively unreasonable conduct. "'The imposition of Rule 9011 sanctions…requires only a showing of objectively unreasonable conduct.'" *In re DeVille*, 361 F.3d 539, 548 (9th Cir. 2004) (*quoting Fellheimer, Eichen & Braverman v. Charter Technologies,* 57 F.3d 1215, 1225 (3d Cir.1995))

[8] 9011 (motion) - no monetary sanctions against parties represented by counsel for 9011(b)(2) violation. Monetary sanctions may be ordered against the represented party's counsel, but not against the party him/her/itself. *See* F.R.B.P. 9011(c)(2)(A) (2014) ("Monetary sanctions may not be awarded against a represented party for violation of [F.R.B.P. 9011](b)(2).")

[9] 9011 (motion or OSC) - nonmonetary directives authorized. *See* F.R.B.P. 9011(c)(2) (2014) ("[T]he sanction [under F.R.B.P. 9011] may consist of, or include, directives of a nonmonetary nature….").

[10] 9011 (motion or OSC) -vexatious litigants. In a discussion of "available sanctions" under F.R.B.P. 9011, "[c]ourts have ordered non-monetary sanctions including enjoining litigants…from bringing similar suits without leave of the court." *In re Upland Partners*, 2006 WL 980583 at *9 (Bankr. D. Hawai'i, Mar. 15, 2006) (imposing filing injunction on litigant). *See also Fariello v. Campbell*, 860 F.Supp. 54, 71 (E.D.N.Y. 1994) (imposing pre-filing review sanction on vexatious pro se litigant pursuant to F.R.C.P. 11).

VEXATIOUS LITIGANTS GENERALLY *See generally In re Stanwyck,* 450 B.R. 181, 200-08 (Bankr. C.D. Cal. 2011) (Carroll, C.J.).

(A) Extreme remedy. *See Molski v. Evergreen Dynasty Corp.*, 400 F.3d 1047, 1057 (9th Cir. 2007) (*citing De Long v. Hennessey, et al.*, 912 F.2d 1144, 1147 (9th Cir. 1990) ("[P]re-filing orders are an extreme remedy that should rarely be used.").

(B) Factors. In *De Long*, the Ninth Circuit set out the four factors in the above table (*see* All Writs Act) for district courts to examine before entering pre-filing orders. *See De Long v. Hennessey, et al.*, 912 F.2d 1144 (9th Cir. 1990). The Ninth Circuit has also held that the factors set forth by the Second Circuit in *Safir v. U.S. Lines, Inc.*, 792 F.2d 19 (2d Cir. 1986) "provide[] a helpful framework for applying the [third and fourth] factors" set forth in *De Long*. *Molski v. Evergreen Dynasty Corp.*, 400 F.3d 1047, 1058 (9th Cir. 2007). The five *Safir* factors are as follows:

(1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties. *Safir*,792 F.2d at 24.

(C) Only *pro se* parties? The U.S. District Court for the Central District of California has held that "a represented party ordinarily is incapable of being declared a vexatious litigant," finding the rationale of CCP § 391(b) (vexatious litigant statute limited to unrepresented parties) instructive in interpreting the All Writs Act (28 U.S.C. § 1651(a)). *Doran v. Vicorp Restaurants, Inc.*, 407 F.Supp.2d 1115, 1118 (C.D. Cal. 2005) ("Attorneys...are bound by rules of ethics and...rely on their reputation in the community to sustain their careers. Attorneys therefore are much less likely to file frivolous claims, even[] absent the threat of their clients being declared vexatious litigants."). *But see, Matter of Hartford Textile Corp.*, 681 F.2d 895, 896 (2d Cir. 1982) (enjoining individual and her attorney from filing certain papers in the U.S. Bankruptcy Court, SDNY; SDNY; and the U.S. Court of Appeals for the Second Circuit where the case had "an almost unparalleled history of frivolous and repetitious claims, motions, petitions, demands, and appeals....").

[11] 9011 (motion or OSC) – suspension or disbarment. The BAP has held that "[b]ankruptcy courts...have express authority under the Code and the Rules to sanction attorneys, including disbarment or suspension from practice." *In re Nguyen,* 447 B.R. 268, 281 (9th Cir. BAP 2011) (*citing* F.R.B.P. 9011, 11 U.S.C. § 105(a), and Bankr. N.D. Cal.'s LBR 1001-2).

[12] 9011 (motion or OSC) evientiary sanctions. See discovery sanctions below.

[13] 9011 (OSC) - compensatory damages not available. *See* F.R.B.P. 9011(c)(1)(B) & (c)(2); *Barber v. Miller*, 146 F.3d 707, 711 (9th Cir. 1998) (*quoting* Fed. R. Civ. P. 11, Adv. Comm. Notes, 1993 Amend. ("[A] monetary sanction imposed after a court-initiated show cause order [is] limited to a penalty payable to the court.")).

[14] 9011 (OSC) – sanctions only payable to court, not party. *Id.*

[15] 9011 (OSC) – attorney fees not available. *Id.*; *see also In re Loyd*, 304 B.R 372, 374 (9th Cir. BAP 2003).

[16] ***INHERENT POWER V. CIVIL CONTEMPT (§ 105(a))***

(A) Differences. "Civil contempt authority allows a court to remedy a violation of a specific order (including 'automatic' orders, such as the automatic stay or discharge injunction). The inherent sanction authority allows a bankruptcy court to deter and provide compensation for a broad range of improper litigation tactics." In addition, "[b]efore imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct" which "consists of something more egregious than mere negligence or recklessness." *In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003) (emphasis added, citations and internal quotation marks omitted).

(B) Congress vested bankruptcy courts with inherent powers. *See In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003) ("bankruptcy courts, like district courts, also possess [the] inherent power" to sanction "bad faith" or "willful misconduct" because "the very creation of the court" establishes such inherent power "unless Congress intentionally restricts those powers," and Congress' intent is confirmed by § 105(a)). *In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003) (citations omitted).

(C) Constitutional limits? In view of *Stern v. Marshall*, it is not entirely settled whether the bankruptcy court has any "inherent" sanctioning powers, nor whether §105(a) includes sanctioning powers, nor whether any such powers apply in parallel with statutory provisions that provide for other remedies. The Supreme Court heard arguments in January 2014 on whether, pursuant either to either § 105(a) or inherent sanctioning power, a bankruptcy court may impose an equitable surcharge on a debtor's homestead exemption in order to compensate the estate for the costs of bad-faith litigation. *Law v. Siegel* (Sup. Ct. No. 12-5196). *See generally Malley v. Agin*, 693 F.3d 28, 30 (1st Cir. 2012), *and Latman v. Burdette*, 366 F.3d 774, 785 & n.8 (9th Cir. 2004) (permitting surcharge), *and compare In Re Scrivner*, 535 F.3d 1258 (10th Cir.2008) (not permitting surcharge).

[17] Inherent power – adequate notice. "[W]hen using the inherent sanction power, due process is accorded as long as the sanctionee is 'provided with sufficient, advance notice of exactly which conduct was alleged to be sanctionable, and [was] furthermore aware that [he] stood accused of having acted in bad faith.'" *In re Lehtinen*, 564 F.3d 1052, 1060 (9th Cir. 2009) (*quoting In re DeVille*, 361 F.3d 539, 547 (9th Cir. 2004)).

[18] Inherent power – *implied* finding of bad faith *might* be sufficient. *In re Lehtinen*, 564 F.3d 1052, 1061 (9th Cir. 2009) (implied finding was sufficient).

[19] Inherent power – bad faith /willful misconduct. *See In re Lehtinen*, 564 F.3d 1052, 1058 (9th Cir. 2009) (*quoting In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003) ("Before imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct."); *In re Deville*, 280 B.R. 483, 495 (9th Cir. BAP 2002) (*quoting Chambers v. NASCO, Inc.*, 501 U.S. 32, 51, 111 S.Ct. 2123 (1991)) ("To impose inherent power sanctions, a court must find that a party acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'"), *aff'd*, 361 F.3d 539 (9th Cir. 2004).

[20] Inherent power – clear and convincing evidence? The Ninth Circuit has declined to decide "whether the bankruptcy court must find bad faith by clear and convincing evidence or under a preponderance of the evidence standard, a question not yet resolved in this circuit." *In re Dyer*, 322 F.3d 1178, 1197 n.20 (9th Cir. 2003) (citing *Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1143 n.11 (9th Cir.2001)).

[21] *Mark Industries, Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 733 (9th Cir. 1995) (upholding, though limiting, order of monetary sanctions payable to court under court's inherent authority)

[22] Inherent power – punitive sanctions. "[T]he inherent sanction authority 'does not authorize *significant* punitive damages.'" *In re Lehtinen*, 564 F.3d 1052, 1059 (9th Cir. 2009) (emphasis added) (*quoting In re Dyer*, 322 F.3d 1178, 1197 (9th Cir. 2003)). Dyer uses the terms "serious" and "significant" punitive sanctions interchangeably, and distinguishes them from "relatively mild" punitive sanctions.

[23] **CIVIL CONTEMPT (compensatory or coercive) v. CRIMINAL CONTEMPT (punitive).**

(A) Distinction: "When the petitioners carry the keys of their prison in their own pockets, the action is essentially a civil remedy." *Shillitani v. United States*, 384 U.S. 364, 368 (1965). The Ninth Circuit has "explained the difference between civil sanctions and criminal sanctions: Civil penalties must either be compensatory or designed to coerce compliance. In contrast, a flat unconditional fine totaling even as little as $50 could be criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance, and the fine is not compensatory. This is so regardless of whether the noncompensatory fine is payable to the court or to the complainant [although] [w]hether the fine is payable to the complainant may … be one relevant factor in determining whether the fine is compensatory or punitive." *In re Dyer*, 322 F.3d 1178, 1192 (9th Cir. 2003) (citations and internal quotation marks omitted). "Where the fine is not compensatory, it is civil only if the contemnor is able to avoid paying the amount imposed by performing the act required by the court's order." *In re Count Liberty, LLC*, 370 B.R. 259, 274 (Bankr. C.D. Cal. 2007).

(B) "Serious" v. "relatively mild" sanctions. Bankruptcy court may not impose "serious" punitive sanctions, although "relatively mild non-compensatory fines may be necessary under some circumstances." *In re Dyer*, 322 F.3d 1178, 1193 & n.16 (9th Cir. 2003) (citations omitted) ("As we did in *Hanshaw,* [244 F.3d 1128, 1140 n. 10 (9th Cir. 2001)] we leave for another day the development of a precise definition of the term 'serious' punitive (criminal) sanctions") (but note that *Dyer* summarizes one case as "implying that any fine above $5,000, 'at least in 1998 dollars,' would be serious, but declining to reach the question," and *Dyer* cites another case as affirming a "non-compensatory fine of $250 on an attorney in order to vindicate local rules.")).

[24] Inherent power – attorney fees. *See In re DeVille*, 361 F.3d 539 (9th Cir. 2004) (upholding bankruptcy court's use of inherent power to support sanction of attorney's fees and costs).

[25] Inherent power – suspension/disbarment. *See In re Lehtinen*, 564 F.3d 1052 (9th Cir. 2009); *In re Crayton*, 192 B.R. 970, 976 (9th Cir. BAP 1996).

[26] Inherent power – "technical" or "inadvertent" violations are "not enough to support a sanction award under the inherent authority." *In re Dyer*, 322 F.3d 1178, 1197-98 (9th Cir. 2003) (citation omitted) (creditor and his counsel "announced in [their] letter, in advance, their intent to record the deed [of trust]" and it is "hard to believe" that they would have done so "had they realized that doing so would violate a court order" so their violation of the automatic stay (which is the equivalent of a court order) was inadvertent, although their subsequent failure and refusal to cure that violation was willful).

[27] Civil contempt § 105(a) – generally. See endnote *Inherent Powers v. Civil Contempt (§105(a))*, *supra*.

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. [11 U.S.C. § 105(a)]

[28] Civil contempt (§ 105(a)) – "specific and definite order" required. *In re Dyer*, 322 F.3d 1178, 1190 (9th Cir. 2003) (citation omitted); *In re Lehtinen*, 564 F.3d 1052, 1058 (9th Cir. 2009).

[29] Civil contempt (§ 105(a)) – clear and convincing evidence required. *FTC v. Affordable Media, LLC,* 179 F.3d 1228, 1239 (9th Cir. 1999).

[30] Civil contempt (§ 105(a)) – enforce via contested matter not AP: Civil contempt must be sought by contested matter rather than an adversary proceeding. See *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1190-91 (9th Cir. 2011). For example, a bankruptcy court may dismiss a complaint seeking contempt sanctions for violation of the discharge injunction. *Id.* at 1188. If an adversary proceeding has already occurred then the error may be harmless (no need to redo as contested matter). *Nash v. Clark Cnty. Dist. Atty's. Office (In re Nash)*, 464 B.R. 874, 879 (9th Cir. BAP 2012).

[31] Civil contempt (§ 105(a)) – limits on compensatory damages. "A compensatory fine must be limited to actual damages incurred as a result of the violation. Actual loss includes attorneys fees and costs incurred in securing compliance with the order." *In re Count Liberty, LLC*, 370 B.R. 259, 274 (Bankr. C.D. Cal. 2007) (internal citations omitted). Consequential damages: can be awarded. *In re Costa,* 172 B.R. 954, 964-65 (Bankr. E.D. Cal. 1994). Causation: According to one 4th Circuit decision, damages are recoverable to extent that the court finds that the contumacious behavior "significantly contributed to the [harm] and that such a result was forseeable." *In re General Motors Corp.,* 110 F.3d 1003, 1018 (4th Cir. 1997).

[32] Civil contempt (§ 105(a)) – sanctions payable to party. "A fine may be payable to the complainant as compensation for damages caused by the contemnor's noncompliance." *In re Count Liberty, LLC*, 370 B.R. 259, 274 (Bankr. C.D. Cal. 2007).

[33] Civil contempt (§ 105(a)) – sanctions payable to court. "[A] fine that would be payable to the court is…remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order." *In re Count Liberty, LLC*, 370 B.R. 259, 274 n37 (Bankr. C.D. Cal. 2007).

[34] Civil contempt (§ 105(a)) – attorney fees. "We emphasize that attorneys' fees are an appropriate component of a civil contempt award." *In re Dyer*, 322 F.3d 1178, 1195 (9th Cir. 2003); *see also In re Count Liberty, LLC,* 370 B.R. 259, 274 (Bankr. C.D. Cal. 2007) ("Actual loss includes attorneys fees and costs incurred in securing compliance with the order.").

[35] Civil contempt (§ 105(a)) – remedies.

(A) disbarment / suspension. *See In re Computer Dynamics, Inc.*, 253 B.R. 693, 699 (E.D. Va. 2000) ("Pursuant to the civil contempt power, bankruptcy courts can suspend an attorney from the practice of law and condition reinstatement on compliance with a court order.").

(B) Vexatious litigant. *In re Stanwyck,* 450 B.R. 181 (Bankr. C.D. Cal. 2011) (Carroll, C.J.).

(C) Bench warrant / incarceration. "Incarceration is an appropriate coercive sanction for civil contempt so long as 'the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order.' 'When the petitioners carry 'the keys of their prison in their own pockets,' the action 'is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.'" *In re Count Liberty, LLC*, 370 B.R. 259, 274 (Bankr. C.D. Cal. 2007) (internal citations omitted). *See also* AOUSC memo (6/01) re Bankruptcy Court's authority to issue bench warrants (body detention requests) to U.S. Marshal.

[36] Civil contempt (§ 105(a)) – "failure to take all reasonable steps within the party's power to comply" is sanctionable. *Reno Air Racing Assn. Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006).

[37] Civil contempt (§ 105(a)) – intent is irrelevant, and good faith is not a defense (unless coupled with reasonable interpretation of order). "Because civil contempt serves a remedial purpose, it matters not with what intent the defendant did the prohibited act." *In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003) (citation and internal quotation marks omitted); *In re Count Liberty, LLC*, 370 B.R. 259, 275 (Bankr. C.D. Cal. 2007) (citing cases). *Cf. In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003) (for violation of the automatic stay, "willfulness" is required but it has a particularized meaning "in this context," namely it "does not require a specific intent to violate the stay [but] [r]ather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the automatic stay were intentional") (citations and internal quotations omitted).

[38] Civil contempt (§ 105(a)) – inability to comply. Inability to comply with the courts order is a defense, but the burden is on the contemnor to show "categorically and in detail" how compliance is "impossible." *FTC v. Affordable Media*, 179 F.3d 1228, 1241 (9th Cir. 1999). A "self-induced inability [to comply with the court's order] is not a defense." *United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980). It is not enough to show "substantial," "diligent," or "good faith" efforts to comply (as opposed to making *all* reasonable efforts to comply). *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529-30 (11th Cir. 1992) (citations

omitted). Caveat: If a coercive sanction "has lost all coercive effect" then it "becomes criminal [contempt]." *SEC v. Elmas Trading Corp.*, 824 F.2d 732, 733 (9th Cir. 1987).

[39] Civil contempt (§ 105(a)) – "technical" or "inadvertent" violations will not support a finding of contempt. *In re Count Liberty, LLC*, 370 B.R. 259, 275 (Bankr. C.D. Cal. 2007) (citing cases).

[40] 28 U.S.C. § 1927 – N/A because bankruptcy court is not a "court of the United States." *In re DeVille*, 361 F.3d 539, 546 (9th Cir. 2004) (quoting with approval the BAP's summary that "28 U.S.C. § 1927 does not suffice because the Ninth Circuit does not regard a bankruptcy court as a 'court of the United States.'") (citations omitted).

[41] Removal – generally. *In re DeVille*, 361 F.3d 539, 546 (9th Cir. 2004).

[42] Removal - costs and expenses of remand. "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c) (2011).

[43] Removal- attorney fees. *In re DeVille*, 361 F.3d 539, 546 (9th Cir. 2004) ("28 U.S.C. § 1447(c) allows a court discretion to grant attorneys' fees and costs for an improper removal.").

[44] Stay violations. A bankruptcy trustee is not an "individual" entitled to an award of sanctions under 11 U.S.C. § 362(k) (formerly § 362(h)). *See In re Pace*, 67 F.3d 187, 192 (9th Cir.1995). But non-individuals can seek contempt sanctions for violation of the automatic stay. *See In re Goodman*, 991 F.2d 613, 620-21 (9th Cir. 1993).

[45] Stay violations – attorney fees. Previously the 9th Circuit had held that the statute does not authorize fees on fees. *See Sternberg v. Johnston*, 595 F.3d 937, 1122 n. 3 (9th Cir.2010) (as amended on denial of petition for rehearing) (fees can be awarded under § 362(k) [formerly § 362(h)] for bringing about an end to stay violation, but not for pursuing a damages award, but leaving open whether such fees could be awarded under the bankruptcy court's "inherent civil contempt authority"). That has now been overruled en banc: fees on fees can be awarded as part of damages under § 362(k). *In re Schwartz-Tallard*, __ F.3d __ (9th Cir. 10/14/2015) (en banc).

Note: The following pre-*Schwartz-Tallard* caselaw may be informative as to the interaction between § 362(k) and other sanctions authority. *See In re H. Granados Comm., Inc.*, 503 B.R. 726, 734-35 (9th Cir. BAP 2013) (fees incurred in pursuing damages can be awarded under § 105(a), distinguishing *Sternberg*); *compare In re Roman*, 283 B.R. 1 (9th Cir. BAP 2002) (relief is not permissible under § 105(a) to the extent that 362(k) provides a remedy). *Compare In re S. Cal. Sunbelt Developers, Inc.*, 608 F.3d 456, 464 (9th Cir. 2010) (fees on fees are permissible under § 303(i)(1), distinguishing *Sternberg*).

[46] Stay violations – emotional distress damages. *See In re Dawson*, 390 F.3d 1139, 1148 (9th Cir. 2004) (to support emotional distress damages debtor must show "clear evidence" of "significant harm" caused by stay violation, as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process; but stay violation need not be "egregious" and corroborating evidence is not necessarily required, and non-experts may testify to manifestations of mental anguish).

[47] Stay violations – punitive damages. Movant must show "reckless or callous disregard of the law or rights of others." *In re Bloom*, 875 F.2d 224, 228 (9th Cir. 1989). But a "monetary penalty" may not be imposed under § 362(k) unless the stay-violator has received "effective notice," which may include for example receipt of such notice by a specified person, pursuant to § 342(g)(2).

[48] Discovery Sanctions – evidentiary presumptions. *See Hoffman v. Construction Protective Services, Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008) (court should explore alternatives to evidentiary sanctions that would preclude the entire cause of action, but in proper circumstances that is permissible); *In re Singh* (9th Cir. BAP 2/26/16, unreported) (reversing terminating sanctions – dismissal for lack of prosecution due to failure to file status report). In *Hoffman* the Ninth Circuit also held, "we reject the notion that the [trial] court was required to make a finding of willfulness or bad faith" to exclude the evidence. *Id.* Subsequent decisions make the parameters of this holding somewhat unclear. *Compare R&R Sails v. Ins. Co. of Pa.*, 673 F.3d 1240, 1247-48 (9th Cir. 2012) ("because the sanction amounted to dismissal of a claim, the district court was required to consider whether the claimed noncompliance involved willfulness, fault, or bad faith, … and also to consider the availability of lesser sanctions") (citations omitted), *with Toyrrific, LLC v. Karapetian*, 606 F. App'x 365, 366 n.1 (9th Cir. 2015) ("We note that there is some tension in our law over the requirement that, before a sanction amounting to dismissal of a claim can be issued, the district court must consider whether the claimed 'noncompliance involved willfulness, fault, or bad faith' and must also consider 'the availability of lesser sanctions.'") (citations omitted).

[49] All Writs Act – applicability to bankruptcy courts. The All Writs Act applies to "[t]he Supreme Court and all courts established by Act of Congress." 28 U.S.C. § 1651(a). "Bankruptcy courts, being courts established by Act of Congress, 'have the power to regulate vexatious litigation pursuant to 11 U.S.C. § 105 and 28 U.S.C. § 1651.'" *Goodman v. Cal. Portland Cement Co. (In re GTI Capital Holdings, LLC)*, 420 B.R. 1, 11 (Bankr. D. Ariz. 2009) (*quoting Lakusta v. Evans (In re Lakusta)*, 2007 WL 2255230, *3 (N.D. Cal. 2007)); *see also In re Yan*, 2013 WL 6801085, *5 (Bankr. N.D. Cal. Dec. 23, 2013).

[50] Reporting of sanctions to State Bar. Although judicial sanctions must be reported to the State Bar (except sanctions for failure to make discovery or monetary sanctions of less than $1,000), it is the attorney's responsibility to report that to the State Bar, not the court's.

[51] Refer to District Court for criminal contempt: "We do not preclude the possibility that a bankruptcy court could initiate criminal contempt proceedings by referring alleged contempt to the district court. Nor do we address whether the district court could refer those proceedings back to the bankruptcy court if the parties so consented. See 28 U.S.C. § 157(3) (authorizing the bankruptcy court to hold a jury trial only 'if specifically designated to exercise such jurisdiction by the district court and with the express consent of all the parties')." *In re Dyer*, 322 F.3d 1178, 1194 n.17 (9th Cir. 2003) (additional citations to articles discussing constitutional issues omitted).

[52] ABA – Nationwide database. *See* http://www.americanbar.org/groups/professional_responsibility/services/databank.html. (Possible overlap in reporting where matter also referred to California State Bar – State Bar rep was unable to confirm whether disciplinary reports go to databank, awaiting call back from ABA.)

Short-Sale Distributions (Jury)

MEMORANDUM ON SHORT SALE DISTRIBUTIONS

1. **Issue:** Short sales with distributions to the estate. It appears that this issue relates to situations involving a "short sale" of a debtor's fully or over-encumbered real property, with the undersecured lender's consent. In such a situation, the undersecured lender agrees to be paid less than the full amount of its secured claim in exchange for a quick and relatively painless alternative to the nonjudicial foreclosure and unlawful detainer processes. During the short sale process, the trustee (or debtor) may successfully negotiate "carve outs," such as an "incentive payment," from the sale proceeds. A small split of authority has emerged where the debtor then tries to claim an exemption on the right to receive the economic benefit from the lender, thus potentially leaving the estate with little to nothing from the short sale proceeds.

2. **Relevant Cases:**

   A. **A "carve-out" from a short sale is subject to a debtor's exemption claim:**

   - *In re Wilson*, 494 B.R. 502, 506 (Bankr. C.D. Cal. 2013).
     - The trustee 7 trustee indicated in a broker employment application that anticipated short sales of the debtor's two real properties would supply "carve-outs" to the estate in the

amount of $36,250. The debtor then amended her schedule C to claim the California wildcard exemption in the properties and the trustee objected; he argued that the debtor could not claim exemptions that did not exist on the date of petition. The bankruptcy court overruled the trustee's objection to the validity of the amended exemption claim, determining that the debtor's exemptions attached to the proceeds from the sale of the properties.

- No other court in the Ninth Circuit has cited to *Wilson* for its holding.

B. A "carve-out" from a short sale is <u>not</u> subject to a debtor's exemption claim:

- *In re Bunn-Rodemann*, 491 B.R. 132 (Bankr. E.D. Cal. 2013).
  - Again, the chapter 7 trustee objected to the debtor's amended schedule C, where the debtor claimed the California wildcard exemption on "[a]ny and all proceeds, revenues, or concessions conceded to or granted by the secured mortgage lender" with respect to the debtor's real property. The bankruptcy court sustained the trustee's objection, determining that the sale proceeds from a short sale were not subject to exemption.
  - Rationale for the bankruptcy court's decision:

        - Debtor's exemption claim did not exist on the date of petition;
        - Carve-out was paid out for the trustee's efforts, consistent with a § 506(c); and
        - Debtor could not claim an exemption against a consensual lien under California law.
    - *Bunn-Rodemann has not been cited for this holding;* three other courts within the Ninth Circuit have cited to it, but for other or indirect reasons.

- *See also In re Baldridge*, 2013 WL 1759365, *1–2, (E.D. Mich. Apr. 24, 2013), *aff'd*, 553 Fed.Appx. 598 (6th Cir. 2014) (affirming the bankruptcy court's decision that the lender's carve out was not property of the estate because the proceeds were generated by the trustee's post-petition efforts to sell the property and the debtors could only claim an exemption if the property had equity – which it did not); and
- *In re Reeves*, 2011 WL 841238 (Bankr. E.D.N.C. Mar. 8, 2011), *aff'd*, 2012 WL 10180780 (E.D.N.C. Aug. 14, 2012), *aff'd*, 546 Fed. Appx. 235 (4th Cir. 2013) (authorizing trustee's sale of debtor's real property subject to a carve out from the IRS for administrative expense payments; debtors' were not entitled to exemption claim before priority and unsecured claims because the agreement was consistent with § 724(b) distribution scheme).

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by In re Mannone, Bankr.E.D.N.Y., May 20, 2014

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United States District Court,
E.D. Michigan,
Southern Division.

In re Joseph BALDRIDGE and
Dianne Baldridge, Debtors.
Joseph Baldridge and Dianne
Baldridge, Appellants,
v.
Douglass Ellmann, Chapter
7 Trustee, Appellee.

No. 12–14612.
|
April 24, 2013.

Attorneys and Law Firms

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OPINION AND ORDER AFFIRMING THE BANKRUPTCY COURT'S DECISION TO DENY APPELLANTS' HOMESTEAD EXEMPTIONS

ROBERT H. CLELAND, District Judge.

***1** Appellants Joseph Baldridge and Dianne Baldridge appeal the bankruptcy court's denial of Appellants' exemptions in the proceeds from the sale of their home after finding that the home had no equity. Appellee Douglass Ellmann, the Chapter 7 Trustee, responded, and a hearing on the matter is unnecessary. *See* E.D. Mich. LR 7.1(f)(2). For the following reasons, the court will affirm the bankruptcy court's decision.

I. BACKGROUND

Joseph Baldridge and Dianne Baldridge ("Debtors") filed a Chapter 7 Bankruptcy on February 10, 2012. The bankruptcy petition included $150,000 of tax debt, $157,238 of unsecured debt, and Debtors' home, located at 2720 Brassow Road, Saline, Michigan, 48176 (the "Property"). At the time of filing, the Property had a first mortgage with a balance of $158,189.56 owed to Citizens Bank ("Citizens") and a second mortgage with a balance of $512,861.20 owed to Fifth Third Bank ("Fifth Third"). Debtors did not claim an exemption on the Property at the time of filing. The bankruptcy court discharged Debtors from their dischargeable debt on October 4, 2012.

Citizens and Fifth Third separately obtained a lift of the automatic stay, and Citizens proceeded to foreclose on the Property. The Trustee identified a purchaser and, on July 16, 2012, moved to sell the Property free and clear of all liens for $503,000. Fifth Third objected to the motion but eventually reached a settlement with the Trustee. Pursuant to the agreement, after the sale proceeds were used to satisfy the first mortgage, Fifth Third would accept the remaining proceeds. From that amount, Fifth Third would pay the Trustee's broker, closing

costs, and $28,000 to the bankruptcy estate as a "carve-out" pursuant to 11 U.S.C. § 506(c).

Debtors also objected to the Trustee's motion, arguing that they were entitled to exempt a portion of the sale proceeds. On August 29, 2012, when the bankruptcy court held a hearing on the motion, each Debtor, for the first time in the case, formally claimed a $10,800 homestead exemption pursuant to 11 U.S.C. § 522(d)(1) in the proceeds of the sale. The bankruptcy court found that Debtors' exemptions were subordinate to Fifth Third's second mortgage lien and that there was no equity in the Property that Debtors could exempt. The bankruptcy court further ruled that Fifth Third's $28,000 payment to the estate as a carve-out to the Trustee under 11 U.S.C. § 506(c) did not constitute equity that was subject to Debtors' exemptions.

II. DISCUSSION

Debtors appeal the bankruptcy court's ruling that they may not claim an exemption in the proceeds from the sale of the Property. A bankruptcy court's legal conclusions are reviewed *de novo*. *In re Eagle–Picher Indus., Inc.*, 285 F.3d 522, 527 (6th Cir.2002). A debtor may exempt certain "property of the estate" that existed when the bankruptcy petition was filed. 11 U.S.C. § 522(b). "Property of the estate" is comprised of all of the debtor's rights and interests in any property at the time of filing. 11 U.S.C. § 541. The types of property that may be exempted are specified under 11 U.S.C. § 522(d). While exempt property is protected against unsecured debts, 11 U.S.C. § 522(c), it is not protected against secured debts, 11 U.S.C. § 522(c)(2). Exemptions are subordinate to a secured creditor's lien on real property. 11 U.S.C. § 522(c)(2); *In re Johnson*, 439 B.R. 416, 442–45 (Bankr.E.D.Mich.2010) (holding that when a debtor grants a consensual lien in property, the debtor waives the exemptions in that property). Consequently, if the amount of the secured debt exceeds the fair market value of the property such that there is no equity, the exemption is lost. *In re Neal*, 424 B.R. 235, 236 (Bankr.E.D.Mich.2010) ("The debtors are only entitled to an exemption to the extent there is equity in the property."). As the Ninth Circuit Bankruptcy Appellate Panel explained:

> ***2** Section 522(d) exempts the debtor's interest in property—not the property itself. The value that can be exempted is the unencumbered portion. Consequently, the amount of exemption available to a debtor is the lesser of either the equity in the property or the maximum amount of the applicable exemption.

In re Urban, 375 B.R. 882, 885 n. 7 (B.A.P. 9th Cir.2007).

Debtors assert that they may claim an exemption in the Property. 11 U.S.C. § 522(d)(1) allows a debtor to claim a homestead exemption that does not exceed $21,625 in the value of real property that a debtor uses as a residence. Each Debtor claimed a homestead exemption of $10,800, for a total of $21,600. Citizens held a first mortgage with a balance of $158,189.56, and Fifth Third held a second

mortgage with a balance of $521,861.20. The agreed-upon sales price for the Property is $503,000. After the sale proceeds are applied to satisfy the first mortgage, the remaining amount, approximately $344,811, is insufficient to satisfy the amount owed on Fifth Third's second mortgage of $521,861.20. As Fifth Third's lien is not satisfied, there is no equity in the Property to which Debtors can claim their homestead exemptions.

Debtors argue that they are entitled to claim an exemption against the $28,000 that Fifth Third paid to the bankruptcy estate pursuant to its settlement agreement with the Trustee. 11 U.S.C. § 506(c) allows for carve-out payments in which "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property." Fifth Third, in resolving its objection to the Trustee's motion, agreed to pay $28,000 to the bankruptcy estate as a carve-out under 11 U.S.C. § 506(c). Debtors argue that because the $28,000 carve-out benefits the estate, they hold an interest in the payment and, consequently, it constitutes "property of the estate" under 11 U.S.C. § 541. Thus, Debtors claim that the $28,000 carve-out is subject to their homestead exemptions.

"Property of the estate" is comprised of "all legal or equitable interests of the debtor in property *as of the commencement of the case.*" 11 U.S.C. § 541(a)(1) (emphasis added). The $28,000 carve-out, therefore, cannot constitute "property of the estate" because it was generated as a result of the Trustee's efforts in selling the Property—after Debtors filed their bankruptcy petition. Furthermore, the court reiterates that, because Debtors' exemptions are subordinate to Citizen's and Fifth Third's consensual secured liens, Debtors can only claim an exemption if there is equity in the Property. As the sale proceeds are insufficient to satisfy both mortgages, there is no equity for Debtors to exempt. The $28,000 carve-out does not transform into home equity simply because it is paid to the estate. Fifth Third was entitled to all of the sale proceeds remaining after the first mortgage was satisfied. The estate received the $28,000 carve-out only upon Fifth Third's voluntary agreement to pay the estate out of the proceeds to which Fifth Third was owed; were it not for Fifth Third agreeing to pay the carve-out, the bankruptcy estate would have received nothing. Debtors may not now reap a benefit they could not have otherwise obtained just because Fifth Third voluntarily agreed to pay the estate from proceeds that Fifth Third was rightfully owed.

III. CONCLUSION

***3** Accordingly, IT IS ORDERED that the bankruptcy court's decision to deny Appellants' exemptions in the proceeds from the sale of the property located at 2720 Brassow Road, Saline, Michigan, 48176 is AFFIRMED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1759365

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Declined to Extend by In re Mannone, Bankr.E.D.N.Y., May 20, 2014

491 B.R. 132
United States Bankruptcy Court,
E.D. California.

In re BonnieJean BUNN–RODEMANN, Debtor.

No. 12–39835–C–7.
|
Docket Control No. JRR–1.
|
April 10, 2013.

Synopsis

Background: Chapter 7 trustee objected to bankruptcy-specific California state law exemption claimed by debtor in her alleged right to negotiate "carve out" from prospective proceeds of sale of debtor's overencumbered homestead in exchange for debtor's assistance in working with lender to conduct short sale of property.

[Holding:] The Bankruptcy Court, Ronald H. Sargis, J., held that control over homestead property, as well as ability to attempt to negotiate such a "carve out" from proceeds otherwise subject to lender's security interest, passed to Chapter 7 trustee, such that debtor was not entitled to exemption therein.

Objection sustained.

Attorneys and Law Firms

***133** Stephen J. Johnson, Auburn, CA, for Debtor.

MEMORANDUM OPINION AND DECISION

RONALD H. SARGIS, Bankruptcy Judge.

John Roberts, the Chapter 7 Trustee ("Trustee") has filed an objection to exemptions claimed by BonnieJean Bunn–Rodemann ("Debtor") in this Chapter 7 bankruptcy case. Jurisdiction for this Contested Matter exists pursuant to 28 U.S.C. §§ 1334 and 157(a), and the referral of bankruptcy cases and all related matters to the bankruptcy judges in this District. E.D. Cal. Gen 182, 223. This Objection to Claim of Exemptions is a core arising under Title 11, including 11 U.S.C. §§ 522. 28 U.S.C. § 157(b)(2)(A), (B), and (O).

INTRODUCTION

The Debtor has claimed an exemption with respect to rights and interests relating to real property commonly known as 1845 Hidden Hills Drive, Roseville, California (the "Property"). The Exemption claimed by the Debtor on Amended Schedule C, Dckt. 9, is stated as follows:

> TYPE OF PROPERTY: Any and all proceeds, revenues, or concessions conceded to or granted by the secured mortgage lender on the property at 1845 Hidden Hills Dr. Roseville, CA 95661 and or the

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debtor's intangible personal value contained in the possessory interest in the property. (Hereinafter "Property")

STATUTE CREATING EXEMPTION: CCCP § 703.140(b)(5)

VALUED CLAIMED EXEMPT: $11,764.00

***134** The Trustee objects to this exemption, asserting that the asset being claimed as exempt did not exist as of the commencement of the case and will only exist if the Trustee markets and sells the Property post-petition. The monies, to be paid by the creditor from the sales proceeds subject to the creditor's lien, were not property of the Debtor or property in which an exemption can be claimed. Such monies paid to the estate are "carve-outs" from the creditor's sale proceeds, which are paid based upon the post-petition activities of the bankruptcy estate's representatives.

The Debtor responds, opposing the objection to her claim of exemption, asserting that the scope of 11 U.S.C. § 541 property of the bankruptcy estate is very broad. She is correct, with 11 U.S.C. § 541 sweeping up every conceivable right and interest of the Debtor as of the commencement, with specifically enumerated exceptions. However, notwithstanding these interests and rights being swept into the bankruptcy estate, 11 U.S.C. § 541 does not create rights. *State of California v. Farmers Markets, Inc. (In re Farmers Markets, Inc.)*, 792 F.2d 1400, 1402 (9th Cir.1986).

It is asserted by the Debtor that she was in possession of the Property as of the commencement of the bankruptcy case, had the right to negotiate and attempt to conduct a sale (or short-sale) of the Property, and the right to receive payment of any concessions or "incentive payments" a creditor would give her from that creditor's short-sale proceeds. The Debtor asserts that the pre-petition right to do this continues after the commencement of the case and that the Debtor's right to attempt to conduct a short-sale and receive the creditor's concessions may be claimed exempt as a necessary part of her post-discharge "fresh start."

DISCUSSION

Exemption of the Asset by the Debtor

[1] A debtor may claim an exemption in an asset which is property of the bankruptcy estate. The vast majority of exemptions under California Law (the applicable bankruptcy exemptions in California, Cal.Code Civ. Pro. § 703.140) are for monetary amounts in assets of the estate. Such assets continue to remain property of the estate until used, sold, or abandoned from the estate. *Schwab v. Reilly*, —— U.S. ——, 130 S.Ct. 2652, 2667, 177 L.Ed.2d 234 (2010); *Gebhart v. Gaughan (In re Gebhart)*, 621 F.3d 1206, 1210 (9th Cir.2010).

The specific exemption claimed by the Debtor is provided in California Code of Civil Procedure 703.140(b)(1) and (5),

> (1) The debtor's aggregate interest, not to exceed twenty-four thousand sixty dollars ($24,060) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the

debtor or a dependent of the debtor uses as a residence.

...

(5) The debtor's aggregate interest, not to exceed in value one thousand two hundred eighty dollars ($1,280) plus any unused amount of the exemption provided under paragraph (1), in any property.

[2] **[3]** **[4]** The Debtor's exemption under California law in property of the estate is determined as of the bankruptcy case filing date. *Owen v. Owen*, 500 U.S. 305, 314, 111 S.Ct. 1833, 1838, n. 6, 114 L.Ed.2d 350; *In re Wolf*, 248 B.R. 365, 367–368 (9th Cir. BAP 2000). A debtor does not have the ability to claim exemptions which did not exist as of the commencement of the case or post-petition increases in the value of the property in excess of the amount claimed as exempt. ***135** *In re Hyman*, 967 F.2d 1316, 1319, n. 2 (9th Cir.1992). To be claimed as exempt the property must exist and become part of the bankruptcy estate. *Owen, supra* at 308, 111 S.Ct. 1833.

The "asset" being asserted by this exemption is the Debtor's physical possession of her residence and her ability to control a short-sale of the Property. Attempting to claim an exemption in this type of asset is a relatively new phenomenon arising from creditors realizing that a short-sale of the property securing the debt (by which the creditor agrees to take less than the full amount owed) is better than the creditor completing a non-judicial foreclosure sale and the creditor becoming the owner of the property. Once the creditor becomes the owner, it has to take on the responsibility of being an owner, including, (1) evicting the borrower/former owner, (2) managing the property as an asset of the creditor, (3) paying insurance, property taxes, and utilities, (4) employing people or third-party vendors to secure, repair, and maintain the property while it is being marketed, and (5) engaging a real estate broker to sell the property.

Savvy borrowers and their counsel often extract not only reasonable moving expenses (in lieu of the creditor having to incur the cost and expense of an unlawful detainer action), but negotiate an "incentive payment" from the sales proceeds for the efforts of the borrower in working with a real estate broker and taking the time to market the property for a short-sale. This is a basic economic calculation in which the creditor determines that the cost of the "incentive payment" is less than the cost of foreclosing, owning the property, and selling the property itself.

Recently, Chapter 7 trustees have begun working with creditors to conduct such short-sales of property of the bankruptcy estate. The trustee enters into an agreement with the creditor for a short-sale the property, rather than abandoning the overencumbered property to the debtor. If abandoned, the property would no longer be property of the estate, with the debtor having regained the right and ability to negotiate a short-sale with the creditor. The trustee who consummates a short-sale receives for the bankruptcy estate the "incentive payment" from the creditor's sale proceeds.

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Rights of the Estate Asserted by the Chapter 7 Trustee

[5] [6] This Debtor has elected to file the present Chapter 7 case, rather than a Chapter 13 or Chapter 11 case. One of the immediate results of electing to file a Chapter 7 case is that all of the property of the estate is placed under the exclusive control of the Chapter 7 Trustee. The Chapter 7 Trustee is the representative of the bankruptcy estate. 11 U.S.C. § 323(a). He is the only person, absent an order of the court, authorized to collect, control, authorize the use of, liquidate, and disburse the property of the estate. 11 U.S.C. §§ 704(a), 721, 726. [1]

1 This is contrasted to the provisions of 11 U.S.C. §§ 1107, 1203, and 1302 which allow the Chapter 11 or 12 debtor in possession and the Chapter 13 debtor to exercise the powers of a trustee over property of the estate.

[7] In filing the Chapter 7 case, the Debtor transferred the overencumbered Property to the estate, giving control to the Chapter 7 Trustee to administer this Property as part of the bankruptcy estate. The Debtor no longer has the right or power to conduct a short-sale, control, or use this property of the bankruptcy estate. The Debtor no longer has the ability to "sell her owner real estate services" to engage a broker to market and sell the Property to generate cash sales proceeds, ***136** which are encumbered by the creditor's lien.

The Chapter 7 Trustee has the right to sell the Property. The creditor may enter into a transaction with the Chapter 7 Trustee for the estate to employ a real estate broker, market the Property, and consummate a short-sale of the Property. The Chapter 7 Trustee may choose to undertake the responsibility for maintaining, insuring and protecting the Property pending any sale. It is the Chapter 7 Trustee's labor and estate's expense in working to sell property of the estate which is the subject of the "incentive payment."

This view of the Chapter 7 short-sale transaction is consistent with 11 U.S.C. § 506(c), which provides that a creditor's collateral shall be surcharged reasonable and necessary "costs and expenses of preserving, or disposing of, [property securing a claim] to the extent of any benefit to the holder of such claim, ..." With the "incentive payment," the creditor and Chapter 7 Trustee monetize the benefit to the creditor for the estate retaining the property and incurring the cost and expense related to maintaining and selling the Property.

The California Exemption is Limited to Involuntary Liens

[8] The Debtor's contention that this "incentive payment" may be claimed exempt also runs afoul the exemption laws of California—the Debtor cannot claim an exemption in the value of the property subject to the creditor's consensual lien. Exemptions may be claimed only against involuntary liens, such as judgments, attachments, and execution liens.

§ 703.010. Application of exemptions

Except as otherwise provided by statute:

(a) The exemptions provided by this chapter or by any other statute apply to all procedures for enforcement of a money judgment.

(b) The exemptions provided by this chapter or by any other statute do not apply

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if the judgment to be enforced is for the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on the property other than a lien created pursuant to this division or pursuant to Title 6.5 (commencing with Section 481.010) (attachment).

Cal.Code Civ. Pro. 703.010. *See* *In re Pavich*, 191 B.R. 838, 847 (Bankr.E.D.Cal.1996),

> The Bankruptcy Code provides uniform 'exemptions' which shield certain types of a debtor's property from the claims of creditors, helping the debtor to obtain a 'fresh start.' *See* 11 U.S.C. § 522(d). Exemption laws protect a debtor's property against the enforcement of certain 'nonconsensual' liens, such as money judgments or attachment liens. 2 CEB, Debt Collection Practice in California § 9.4 (1987); *see also* Cal.Code Civ. Proc. § 703.010.

To the extent that a creditor elects to pay a portion of the sales proceeds subject to its lien as an "incentive payment" for the bankruptcy estate to conduct a short-sale of this Property, such monies of the creditor are not assets in which the Debtor may claim an exemption.

The Debtor does not have, and cannot claim an exemption in, the rights and powers of the Chapter 7 Trustee to sell property of the estate and for the estate to receive "incentive payments" for the efforts of the estate's representatives (Chapter 7 Trustee and estate employed real estate broker) in selling such Property. The creditor is free to pay a portion of the encumbered sales proceeds to whomever it chooses for conducting a short-sale.

Relationship of Chapter 7 Debtor and Trustee Electing to Retain Overencumbered Property.

If a trustee elects not to abandon overencumbered property of the estate, but ***137** retain it in an effort to obtain a short-sale "incentive payment," the debtor has several options. These include, without limitation, the following. A debtor is under no obligation to fund insurance, protect the property, maintain the property, or assist the trustee in selling the overencumbered property. That debtor may elect to move out of the property, turning physical possession, and the day-to-day maintenance and security obligations, over to the trustee.

In reality, these debtor-trustee issues concerning a short sale are steeped in the highest tradition of bankruptcy—what deal can be made that is in everyone's best interest. Most likely, a trustee wants a debtor to remain in physical possession, keeping the property insured and protected as an occupied home. The debtor would like to stay in possession, paying only the current insurance and maintenance costs, allowing the debtor to avoid paying rent for housing and delaying moving expenses during the first months of a Chapter 7 fresh start.

The creditor and trustee likely not only want the debtor to occupy the property, but to do so

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in a manner that will maximize the short-sale proceeds. This maximizes the ultimate sales price, which will likely maximize the estate's "incentive payment" for conducting a short sale. Additionally, the trustee and creditor want a debtor to not only cooperate with the real estate broker for the estate and the marketing efforts, but to voluntarily move out of the property after the short-sale is completed so that the buyer can immediately take possession of the property.

While the no-rent incentive may balance paying the current insurance and maintenance expense, that may not be sufficient incentive for a debtor to cooperate with the trustee and creditor for the short-sale. A debtor may negotiate for a portion of the "incentive payment," including moving expenses. The rules for a debtor negotiating with the trustee for some of the "incentive payment" are the same that apply to the trustee negotiating the "incentive payment" for the estate from the creditor—how hard can a debtor squeeze for a "piece of the action" so that the trustee only squeals, but doesn't scream. If the debtor squeezes too hard and the trustee screams, it is likely that the trustee would exercise the trustee's right to possession of property of the estate and obtain an order from the Bankruptcy Court for the immediate turnover of the property from the debtor. [2]

2 Federal Rule of Bankruptcy Procedure 7001(a) permits a trustee to obtain the turnover of property from a debtor by motion rather than requiring an adversary proceeding or unlawful detainer lawsuit.

CONCLUSION

The Objection to Claim of Exemption filed by the Chapter 7 Trustee is sustained. No interests or rights of the Debtor which are property of the estate exist which may be claimed as exempt. The Debtor retains her right to negotiate for her assistance as the Trustee attempts to sell the Property. If the Trustee abandons the Property to the Debtor, she may then negotiate directly with the Creditor for a short-sale of the abandoned property. The Debtor cannot exempt (or appropriate) the sales proceeds encumbered by the creditor's lien or the monies due for the future work of the Chapter 7 Trustee.

The Debtor expressed concern that to the extent she is entitled to any moving expenses to be paid by the creditor pursuant to any statute or regulation, she was including those rights as part of the exemption. The court does not overrule the exemption to the extent that there is any ***138** statute or regulation which grants the right to the Debtor to receive moving expenses from the creditor's proceeds from the short-sale.

The court shall issue an order consistent with the Ruling. This Memorandum Opinion and Decision constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 and Federal Rule of Bankruptcy Procedure 4003, 7052 and 9014.

All Citations

491 B.R. 132

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2011 WL 841238
Only the Westlaw citation
is currently available.
United States Bankruptcy
Court, E.D. North Carolina,
Wilson Division.

In re Garon Lee REEVES and
Diane Lindsey Reeves, Debtors.

No. 10–02562–8–SWH.
|
March 8, 2011.

ORDER GRANTING AUTHORITY TO CONDUCT SALE AND APPROVING CARVE OUT

STEPHANI W. HUMRICKHOUSE, Bankruptcy Judge.

***1** The matter before the court is the trustee's motion for authority to conduct a sale of real property free and clear of liens and to approve a carve out for administrative costs and unsecured claims. A hearing was held on December 22, 2010. The matter was taken under advisement by the court, and at the conclusion of the hearing, counsel were invited to file supplemental memoranda of law. Memoranda were timely filed on behalf of the trustee, the debtor, and the Internal Revenue Service ("IRS").

The debtors filed a joint chapter 7 petition on March 31, 2010, and Joseph N. Callaway was appointed trustee. The debtors listed certain real property located at 1425 Chelton Oaks Place, Raleigh, North Carolina, on their schedule A, with a stated value as of the petition date of $300,000 (the "Property"). The Property is subject to a consensual first mortgage in favor of Wells Fargo Mortgage in the amount of $195,516; a tax lien in favor of the IRS in the amount of $367,998.60; a tax lien in favor of the North Carolina Department of Revenue in the amount of $50,000; and 2010 Wake County and City of Raleigh ad valorem taxes in an amount less than $10,000. On their original schedule C, the debtors claimed exemptions pursuant to N.C. Gen.Stat. § 1C–1601(a)(1) and (2) in the Property in the amount of $104,484. On May 7, 2010, the debtors amended schedule C to claim exemptions of $60,000 in the Property under those same provisions.[1] On May 19, 2010, the trustee objected to the debtors' exemptions in the Property on the basis that there is no equity in the Property. In that objection, the trustee also foreshadowed his intention to sell the Property to obtain net sale proceeds and to apply the proceeds to the IRS lien.

1 Debtors explain that they "set the value of their claim of exemption at $60,000.00, because of the propensity of chapter 7 trustee to assert that if a debtor lists a value at zero, the debtor has claimed no exemption." Debtor's Response to Objection to Exemptions Docket No. 19.

On June 14, 2010, the debtors filed a response to the trustee's objection to their exemptions, stating that they had a right to exempt the Property notwithstanding their lack of equity in it. On July 23, 2010, the court denied the trustee's objection to the exemption claimed by the debtors but specifically preserved the trustee's right to seek authority to sell the Property in order to generate funds for a

recovery to unsecured creditors "upon a carve out by the IRS or some other method," as well as the debtors' rights to object to such a sale.

On October 21, 2010, the trustee filed a motion for authority to conduct a sale of the Property free and clear of liens and for the court's approval of a carve out for the benefit of administrative costs and unsecured claims in the case. The IRS has agreed to carve out 30% of the net proceeds of the sale of the Property otherwise subject to the IRS lien for the payment of allowed administrative claims, with a balance to be paid on a pro rata basis to unsecured creditors. The debtors filed an objection to the motion on November 15, 2010.

The trustee contends that he is entitled to sell the Property and distribute the proceeds pursuant to § 724(b) of the Bankruptcy Code (the "Code") and that the debtors' claimed exemptions will neither prevent the sale, in light of § 522(c)(2)(B), nor prohibit the IRS from allocating a portion of its distribution to the unsecured creditors as set out in § 724(b). [2] The debtors contend that since the Property has been exempted from the estate, the trustee has no authority to sell it, even if such sale will yield funds for the payment of administrative or unsecured claims. Furthermore, the debtors contend, allowing the trustee to sell the debtors' residence absent approval from the district court would violate 26 U.S.C. § 6334(a)(13).

2 The trustee relies upon *In re Laredo*, 334 B.R. 401 (Bankr.N . D.Ill.2005) for his position. The court finds that case to be instructional, but not dispositive. In that case there was equity in the property above the tax lien, the debtor had not objected to the sale, and merely contested distribution of the proceeds.

DISCUSSION

***2** The debtors argue that the trustee is barred from selling the Property because, based upon the court's allowance of the debtors' exemptions in the Property, it is not property of the estate. The court disagrees with the debtors' conclusion. All property of the debtors became property of the estate at the time of the filing of the petition in this case. After the property came into the estate, the debtors were entitled to exempt it under § 522 of the Code, which invoked the exemptions objections procedure followed by the trustee. *See* *Tignor v. Parkinson*, 729 F.2d 977 (4th Cir.1984); *Shirkey v. Leake*, 715 F.2d 859, 863 (4th Cir.1983). In this case, the debtors' claimed exemptions in the Property were upheld by the court, notwithstanding the fact that there was indisputably no equity in the Property. *See* *In re McQueen*, 196 B.R. 31 (E.D.N.C .1995); *In re Thennes*, Case No. 03–04271–5–ATS (Bankr.E.D.N.C. Oct. 7, 2004). However, the effect of allowance of the debtors' exemptions in the Property was to exempt their *interest* in the Property from the estate, not the Property itself. *Schwab v. Reilly*, 130 S.Ct. 2652 (2010).

Section 704(a)(1) of the Code charges the chapter 7 trustee with the duty to sell property of the estate. When a trustee liquidates property of the estate, he must recognize and address the interests of secured creditors holding liens, co-owners with joint interests and the debtor itself, including the debtor's ability to claim exemptions. Absent specific statutory direction to the contrary, the trustee must distribute the proceeds from the sale of estate property to satisfy the interests of third parties before

any such proceeds inure to the benefit of the estate. Section 724(b), though, does give that direction to the contrary, and specifies how the proceeds of property of the estate subject to an unavoidable tax lien shall be distributed. In essence, the proceeds of the sale of such property are to be distributed first to lienholders senior to the tax lien, then to the holders of certain allowed chapter 7 administrative claims up to the amount of the secured tax lien, then to the tax lien claimant and, ultimately, to the estate.[3] Section 724(b) "provides a rule by which a secured tax claimant's right to distribution of property of the estate is subordinated, up to the amount of the lien, to the rights of holders of claims entitled to priority under § 507(a)(1)-(7)." *In re Laredo,* 334 B.R. 401, 411 (Bankr.N.D.Ill.2005). Since the administrative claimants are only allowed to step into the shoes of the tax creditor to the extent of the tax lien, the only parties affected by the operation of § 724(b) are the priority claimants and the tax lien creditor. *In re Bino's Inc.*, 182 B.R. 784, 787 (Bankr.N.D.Ill.1995). The trustee confirmed at the hearing that all proceeds of the sale of the Property would be applied in reduction of the IRS claim notwithstanding the agreed carve out, so the debtors will receive full credit for the sale.

3 Section 724(b) provides as follows:

> (b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title (other than to the extent that there is a properly perfected unavoidable tax lien arising in connection with an ad valorem tax on real or personal property of the estate) and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed—
> (1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;
> (2) second, to any holder of a claim of a kind specified in section 507(a)(1)(C) or 507(a)(2) (except that such expenses under each such section, other than claims for wages, salaries, or commissions that arise after the date of the filing of the petition, shall be limited to expenses incurred under this chapter and shall not include expenses incurred under chapter 11 of this title), 507(a)(1)(A), 507(a)(1)(B), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;
> (3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;
> ...
> (6) sixth, to the estate.

***3** In this case, because the Property is property of the estate, the trustee is authorized to sell it and distribute the proceeds in accordance with § 724(b). The fact that property is fully secured does not exclude that property from the estate, or prevent a trustee from liquidating it. In practice, trustees in this district frequently liquidate fully secured property for the benefit of the secured creditor where the trustee is authorized to recover his costs of disposal from the property pursuant to § 506(c). Section 724(b) provides the trustee specific authority to sell the Property in light of the existence of the IRS lax lien, and direction as to the distribution of the proceeds.

Next, the debtors argue that even if the trustee has the right to sell the Property, their exemptions should be paid before all claims except the claims of Wells Fargo and the Wake County Tax Collector. That payment scheme is, however, simply contradictory to the plain language of both § 724(b) and § 522(c). The debtors do not dispute that their exemption in the Property does not preempt enforcement of the IRS claim and that § 522(c)(2)(b)[4] operates to give the IRS "rights in the Property superior to the debtors' exemption rights." Debtors'

Response to Objection to Exemption No. 19. Section 724 simply recognizes the exemption enforcement exclusion for tax liens and allows the estate to take advantage of the "niche" created by that lien to pay administrative claims of the estate through the sale of property subject to an unavoidable tax lien. *In re K.C. Mach. & Tool Co.*, 816 F.2d 238 (6th Cir.1987). In the instant case, the IRS has further agreed to forego a portion of the proceeds properly payable to it under the statute, for the benefit of the estate for any amount that administrative expenses are less than $30,000. The concept of gifting a portion of a distribution priority has been upheld in the chapter 7 context. *In re SPM Mfg. Corp.*, 984 F.2d 1305 (1st Cir.1993). [5] The key point is this: the carve out for the benefit of unsecured creditors is a carve out from the lien held by the IRS, not from a creditor who would be subject to the debtor's exemption. *See* *In re World Health Alts., Inc.*, 344 B.R. 291, 297 (Bankr.D.Del.2006). Put another way, whatever interest in the Property the debtors may have is not being "trumped" by a creditor who would otherwise be subject to the debtor's exemptions.

4 Section 522(c)(1) and (2) of the Code provides, in pertinent part, as follows:

> (c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except—
>
> (1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in such paragraph);
>
> (2) a debt secured by a lien that is—
>
> (A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and
>
> (ii) not void under section 506(d) of this title; or
>
> (B) *a tax lien, notice of which is properly filed;*

11 U.S.C. § 522(c) (2000) (emphasis added).

5 In a very recent case, *In re DBSD North America, Inc.*, ——F.3d ——, 2011 WL 350480 (2nd Cir.2011), the Second Circuit abrogated certain gifting practices as violations of the absolute priority rule in the context of a chapter 11 plan confirmation. That decision does not affect the court's analysis of the legal status of the proposed distribution priority in the current case, however, because the absolute priority rule has no application in a chapter 7 case.

Additionally, debtors contend that the trustee's proposed sale of the Property violates 26 U.S.C. § 6334(a)(13). However, that section restricts the IRS from levy and sale, not the trustee. The trustee is given explicit authority to sell property subject to a tax lien in § 724(b) without additional district court approval.

Finally, the debtors rely on a line of cases which have held that the trustee is prohibited from selling property in which valid exemptions exist in order to satisfy domestic support obligations ("DSO"). The debtors argue that domestic support obligations enjoy an exclusion from the effects of exemption similar to the exclusion applicable to a tax lienor under § 522 and thus a similar prohibition against sale should follow. This argument also must fail because there is no provision in the code comparable to § 724(b) that grants the trustee specific authority to sell and designate a distribution priority for the proceeds of property subject to a DSO claim. Those cases are, therefore, distinguishable. [6]

6 In *In re Quezada*, 368 B.R. 44 (Bankr.S.D.Fla.2007), a case cited by the debtors, the court denied a trustee's request for authority to sell property subject to the homestead exemption to satisfy DSO obligations. However, in that case, the Florida homestead exemption covered the entire value of the property, and thus the property was fully excluded from the estate. The court

> noted that the trustee has no authority to sell property which is not property of the estate and based its ruling on that finding.

***4** Accordingly, the trustee's motion for authority to sell the Property free and clear of liens and for approval of a carve out is **ALLOWED.**

SO ORDERED.

All Citations

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494 B.R. 502
United States Bankruptcy Court,
C.D. California,
Riverside Division.

In re Floretta WILSON, Debtor(s).

No. 6:12–bk–33437–SC.
|
June 24, 2013.

Synopsis

Background: Chapter 7 trustee objected to amended state law "wildcard" exemption claimed by debtor in deed of trust property, after trustee negotiated "carveouts" with deed of trust creditors, whereby creditors essentially agreed to "tip" the estate in amount of carveouts if trustee would utilize powers available to him to conduct short sales of both parcels.

Holdings: The Bankruptcy Court, Scott C. Clarkson, J., held that:

[1] debtor was not improperly seeking to claim exemption in assets that did not exist on petition date;

[2] trustee waived issue of whether debtor's amended exemptions should be denied based on debtor's "bad faith" in seeking amendment or based on prejudice to creditors; but

[3] exemption had to be limited to statutory maximum of $23,350.

Objection sustained in part and overruled in part.

Attorneys and Law Firms

***503** Daniel N. Greenbaum, Law Office of James D. Pacitti, Sherman Oaks, CA, Edmond Richard McGuire, Law Office of John Ribarich, Los Angeles, CA, for Debtor.

Lynda T. Bui, Shulman Hodges & Bastian LLP, Riverside, CA, Trustee.

MEMORANDUM DECISION AND ORDER DENYING IN PART AND GRANTING IN PART THE CHAPTER 7 TRUSTEE'S OBJECTION TO DEBTOR'S AMENDED CLAIMS OF EXEMPTION

SCOTT C. CLARKSON, Bankruptcy Judge.

A hearing on Chapter 7 Trustee's Objection to the Debtor's Amended Claims of Exemption filed on May 6, 2013 [Docket No. 29], took place on June 19, 2013, at 11:00 a.m. in Video Hearing Room 126, located at 3420 Twelfth Street, Santa Ana, CA 92501 and Courtroom 5C, located at 411 W Fourth Street, Santa Ana, CA 92701. Lynda T. Bui, Chapter 7 Trustee (the "Trustee") appeared in support of the Motion. All other appearances are as noted on the record.

Statement of Facts

On October 16, 2012 (the "Petition Date"), Floretta Wilson (the "Debtor") ***504** filed her petition under Chapter 7 of Title 11, United States Code. The Debtor's schedules

reflect, among other things, ownership of two real properties, the first being 13272 San Jose Street, Hesperia, CA 92344 (the "Hesperia Property") and the second being 4246 8th Avenue, Los Angeles, CA 90008 (the "Los Angeles Property"). (These properties are hereinafter referred to as the "Properties.") With respect to the Hesperia Property, Bank of America holds the first and second deeds of trust, and Wachovia Mortgage holds a first deed of trust on the Los Angeles Property. The Debtor asserted in her schedules that both Properties were "underwater". At the time of filing, Debtor did not claim any exemptions with respect to the Hesperia Property or the Los Angeles Property. [Trustee's Objection, Dk. 29, p. 3, lines 9–10].

According to the Trustee, on November 21, 2012, the Debtor testified at the Section 341(a) initial meeting of creditors that she was approximately $60,000.00 in arrears and indicated that she would attempt to obtain a loan modification. The Trustee does not elaborate with respect to which property the Debtor was referring. [Trustee's Objection, Dk. 29, p. 3, lines 16–17]. The Trustee continued the meeting of creditors to January 15, 2013, to allow the Debtor to proceed with the loan modification. Again, the Trustee does not elaborate as to which property the Debtor was referring. [Trustee's Objection, Dk. 29, p. 3, lines 18–19]. The Debtor received her discharge on January 29, 2013 [Dk. 16].

On March 25, 2013, the Trustee filed an Application for an Order Authorizing Employment of Kristian Peter of Bankruptcy Short Sale Solutions as Real Estate Broker [Dk. 20] to assist the Trustee in the listing, marketing and negotiating of a short sale of the Estate's interest in the Properties. [Trustee's Objection, Dk. 29, p. 4, lines 1–5]. The Application stated that the broker has obtained offers for the Properties that would provide for "bankruptcy fee 'carve-outs' of $15,000.00 for the Hesperia Property and $21,250.00 for the Los Angeles Property." [1] [Trustee's Reply, Dk. 34, p. 2, lines 14–16].

1 This, of course, is most likely incorrect. What the Trustee really implies is that the lenders, Bank of America and Wachovia, may be willing to carve out a "gratuity" to the estate so that they do not have to proceed with a foreclosure (and undertake all of the new requirements imposed by the State of California with its new foreclosure statutes and consumer protection efforts.) The Court declines to undertake a separate analysis of the bad faith use of the federal bankruptcy system by such actions, except to question whether the Bankruptcy Code was enacted to provide cover for lending entities desirous of avoiding state-imposed consumer protection laws (including the recently enacted mortgage modification assistance requirements by the State of California.)

On April 5, 2013, the Debtor filed an Amended Schedule C [Dk. 22], asserting exemptions in the Properties and other personal properties under Cal. Code of Civ. Pro. ("CCP") Section 703.140(b)(5) in the total amount of $26,328.00. [2] On May 6, 2013, the Trustee filed an Objection to Debtor's Amended Claims of Exemption (the "Motion" or "Objection"). The Trustee asserts that the Debtor may not claim exemptions which did not exist as of the Petition Date and that the claimed exemptions exceeds the maximum amount the Debtor is entitled to under CCP Sections 703.140(b)(1) and (5). [Trustee's Objection, Dk. 29, p. 2, lines 8–11].

2 This is commonly called the "wild-card" exemption, which includes all unused amounts of exception under

CCP Section 703.140(b)(1) plus an additional amount contained in CCP Section 703.140(b)(5).

For all of the reasons set forth below, the Trustee's Objection is overruled as to ***505** the validity of the exemptions and attachment to the Properties and sustained as to the amount of the exemptions.

The Arguments Presented

Underlying this Objection, the Trustee desires to make an arrangement with Bank of America and Wachovia to undertake short sales for the Properties under Section 363 of the Bankruptcy Code and receive a piece of the action. Put another way, apparently the lenders are willing to "tip" the estate so that they will not have to foreclose on these Properties. The Debtor agrees that the Trustee is able to conduct these sales; however, the Debtor argues that she must be paid her exemption amounts after the sale. Of course, payment to the Debtor of her exemption amounts impedes the Trustee from engaging in a Section 363 sale because there would be no benefit to the estate if the Debtor received all of the funds carved out by the banks. Thus, the Trustee wants guidance from this Court, in the form of the requested order on the Objection, so that the Trustee will not fruitlessly expend time and effort in doing the bidding of the secured lenders.

Initially, this Court believed that the Trustee was seeking an advisory opinion on the subject of the validity of the exemptions, because no sale was pending and the exemptions are not relevant until the time of the sale closings. However, in light of the time limitations controlling objections to exemptions, the Court deems the Objection appropriate for resolution now.

The stated arguments by the Trustee in her Objection are important for what they allege, and what they do not allege. The Trustee states that the exemptions are invalid because the exemptions were not available when the debtor filed for bankruptcy and exceeds the maximum amount that the Debtor is entitled to under CCP sections 703.140(1) and (5). The Trustee does not object to the exemptions because they were filed late, or that they were made in bad faith, or that they cause prejudice to the Trustee or the creditors of the estate. No evidence of such issues or allegations was presented to the Court by the Trustee, and that burden is squarely on the Trustee when raising such objections. "The bankruptcy court has no discretion to disallow amended exemptions, unless the amendment has been made in bad faith...." *In re Arnold*, 252 B.R. 778, 784 (9th Cir. BAP 2000) (internal citations omitted).

[1] Both of the Trustee's stated arguments may be disposed of summarily. First, within her first argument, the Trustee is confusing exemptions, on the one hand, with the estate property upon which the exemptions attach, on the other hand. As an example, on p. 6 lines 7–8 the Trustee states, "[in] other words, the potential carve-out did not exist on the Petition Date and the Debtor had no inherent right to the carve-out or any other concession from the secured lender...." [Trustee's Objection, Dk. 29, p. 6, lines 7–8]. The "carve-out" is not the asset upon which the Debtor holds exemptions; it is the Properties upon which the exemptions are held. The "carve-outs" from the Properties are the means by which the estate is acquiring funds that are subject to the exemptions.

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The various cases cited by the Trustee do not stand for the Trustee's proposition regarding the non-existence of the exemptions at the time of the filing of the petition. These cases discuss valuation issues and the amounts allowable under the estate exemptions. For instance, the Trustee asserts that *In re Hyman*, 967 F.2d 1316 (9th Cir.1992) stands for the proposition that, "[a] debtor does not have the ability to claim exemptions which did not exist as of the commencement of the case or post-petition increases in the value of ***506** the property in excess of the amount claimed as exempt." *See*, Trustee's Objection [Dk. 29 p. 5, lines. 16–18], citing *In re Hyman* at 1319. This subject has no relevance to the matter before this Court. The value of the Properties is not the issue here; the issue is the availability of funds from the sale of estate property to which exemptions may attach. Further, there exists no challenge to the secured creditors' liens, and thus the gratuity is not derived from a settlement or other recovery that may not be subject to exemptions. The Trustee's further reliance on the Supreme Court's *Owen v. Owen*, 500 U.S. 305, 306, 111 S.Ct. 1833, 1834, 114 L.Ed.2d 350 (1991), is also irrelevant to the facts in this case.

Both of the homes were in existence and owned by the Debtor on the Petition Date. The Debtor did not believe that the exemption interests available to the Debtor were worthy of a declared exemption on the Petition Date. However, now that the Debtor believes that there may be exemption value because the lenders may pay a tip to the estate for the privilege of avoiding foreclosure proceedings and the consumer protection requirements imposed by the State of California, the Debtor is entitled to file her amended Schedule C to include exemptions relevant to the Properties.

[2] **[3]** **[4]** Objections on the timing of amended exemptions are considered by reviewing the totality of the circumstances of the incident, with bad faith and prejudice to the estate and creditors at the forefront of the analysis, evidence of which are the initial burden of the objecting party. *In re Nicholson*, 435 B.R. 622, 630 (9th Cir. BAP 2010); *In re Arnold*, 252 B.R. 778, 784 (9th Cir. BAP 2000). These issues were not raised, no evidence of any bad acts by the Debtor was provided in the Objection, and thus they were waived by the Trustee. In order to prevail on the bad faith issue, "a party objecting to a debtor's claim of exemption must prove bad faith by a 'preponderance of the evidence'...." *In re Nicholson*, 435 B.R. 622, 634 (9th Cir. BAP 2010).

[5] Second, the Trustee is intending to sell the Properties pursuant to Section 363 of the Bankruptcy Code. Those proposed sales are subject to all attached interests on those Properties, whether valid voluntary secured liens, tax liens, other statutory liens, judicial liens, or valid exemptions. [3] Those interests, as validly claimed by the interest holders, must be paid over to the interest holders upon sale under Section 363. Upon such sale, Bank of America will receive its payoff, Wachovia will receive its payoff, and the Debtor will receive her exemptions, up to the amount validly held.

3 Section 363(f) permits the Trustee to sell estate property "free and clear of any interest in such property...." 11 U.S.C. § 363(f). Both Section 522 of the Bankruptcy Code and CCP Section 703.140(b)(1) and (5) clearly

> delineate exemptions as the debtor's interest in value in property.

It does not matter how funds are generated by the estate through a Section 363 sale, including if derived from a "tip" from Bank of America or Wachovia so that they will not have to undertake a foreclosure proceeding under California law. Funds derived from these sales are property of the estate and are subject to valid exemptions. The wild card exemption is designed precisely for this purpose—to attach to any estate property that the Debtor designates in her Schedule C form. In this instance, the Debtor has designated funds derived from the sale of the Properties for exemption, and she is entitled to the exemption.

***507** **[6]** Finally, the Trustee argues that the Debtor has overstated the amount of the exemption she is entitled to receive. The Trustee argues that the maximum wildcard exemption is $23,350.00, and not the $26,328.00 claimed. The Trustee is correct, and if these sales occur, the Debtor will only be entitled to a total of $23,350.00. The Debtor shall file an amended Schedule C within thirty (30) days of entry of this Order, designating the appropriate reduction on whichever property she decides to reduce the exemption amount. If no further amendment is timely made pursuant to this Order, the Trustee will pay over to the Debtor the currently stated amount of exemption in full on whichever property is sold and closed first, and thereafter make the appropriate reduction in connection with payment of the exemption on the second property.

Conclusion

The Trustee's Objection is overruled with respect to the challenge to the exemptions' validity and attachment to the Properties. The Trustee's Objection is sustained as to the amounts of the exemptions. The Debtor is only entitled to a total wildcard exemption amount of $23,350.00. The adjustments to the exemptions are to be made in accordance with this Order, as stated above.

IT IS SO ORDERED.

All Citations

494 B.R. 502

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Stub Rent (Taylor)

Stub Rent – Under § 365(d)(3).[1]

I. **Issue:** Whether to allow stub rent under the "billing date approach" or the "proration approach."

- Circuit Split Outside Ninth Circuit: Whether leasehold obligations "arise" under § 365(d)(3) when they are due; or when they accrue (thus making them partially entitled to administrative status).
  - Relevant Statutory Language: Section 365(d)(3): "trustee shall timely perform all the obligations of the debtor, except those specified in § 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected . . . ."
- Overview of Prevailing Circuit Approaches:
  - Proration Approach.
    - In *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125, 1127 (7th Cir. 1998), the Seventh Circuit adopted the proration approach (slight majority).
  - Billing Date Approach.
    - In *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 211 (3rd Cir. 2001), the Third Circuit adopted the billing date approach.

[1] Prepared by Janine Lee, Spring 2016 extern to Judge Laura Taylor.

II. Circuit Decisions

A. Proration Approach: *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125, 1127 (7th Cir. 1998).

- Congress passed § 365(d)(3) to give relief to landlords and to allow them, during the period after the petition but before rejection, to collect the rent fixed in the lease. The statute refers only to a class of post-petition debts. (affirming the lower courts' decisions that debt had to be prorated between pre-petition and post-petition periods of occupancy for commercially-leased property).
- This interpretation allows post-petition creditors to obtain a high priority in estate distribution in order to enable the debtor to keep going for as long as the current revenues cover current costs, so that the enterprise does not prematurely collapse due to pre-petition debt. This prioritization of post-petition debt allows the debtor or trustee to "ignore sunk costs—treat bygones as bygones—and continue operating as long as the debtor's business is yielding a net economic benefit."

B. Billing Date Approach: *In re Montgomery Ward Holding Corp*, 268 F.3d 205, 211 (3rd Cir. 2001).

- The language is not ambiguous (nonetheless, the court reviewed legislative history, concluding that it was consistent with the court's outcome). The court interpreted the language "arising from" to modify "lease" (as opposed to the most proximate noun, "order"). Thus, the requirement relates to obligations, "arising from[,] and after the order of

relief under[,] any unexpired lease." Unmatured rights to payment under a lease exist from the date the lease is executed, and no right to payment would ever arise under an unexpired lease after the order for relief.

- The alternate view would require a trustee to perform all obligations "arising from . . . the order for relief," which would make little sense and is inconsistent with legislative history.
- The clear and express intent of the relevant Code provision is to require the trustee to perform the lease in accordance with its terms. Thus, because one must look to the terms of the lease to determine the nature of the obligation and when it arises, it is difficult to find a textual basis for the proration approach.
    - An obligation, in the context of a lease contract, arises when one becomes legally obligated to perform.
    - The court disclaims the assertion that the statutory language is ambiguous and the arguments of courts holding the opposite view—that "obligation" may be interpreted in light of "claim."

III. <u>Cases Within The Ninth Circuit Adopting the Proration Approach</u>

1. *In re Leather Factory, Inc.*, 475 B.R. 710 (Bankr. Cal. C.D. 2012).
    - The court found the operative statutory language to be ambiguous; and therefore, looked at legislative intent.
        - Congress intended to shift the burden of debtor's use of their property away from landlords. To allow stub rent to be a pre-

petition claim (under the billing date approach) would reward the debtor and his administrative creditors at the expense of the landlord, who cannot evict due to automatic stay.

- The court declined to determine whether the stub rent would also be an administrative claim under § 503(b).

2. *In re Picturesque, L.L.C.*, No. 2-06-02461-EWH, 2006 WL 3820891, at *1 (Bankr. D. Ariz. Dec. 22, 2006).
   - The case cited by debtor was not on point; therefore, the court followed the majority and adopted the proration approach.
   - Landlords are entitled to administrative (but not priority) claim for rent that becomes due post-petition.
3. *In re Nat'l Refractories & Minerals Corp.,* 297 B.R. 614, 619-20 (Bankr. N.D. Cal. 2003).
   - The court adopted the proration approach, citing *In re Handy Andy*, finding that this interpretation tracks the purpose of giving post-petition creditors a high priority in distribution.

IV. <u>Cases Within The Ninth Circuit Adopting the Billing Date Approach</u>

- *In re Designer Doors, Inc.*, 389 B.R. 832, 841 (Bankr. D. Ariz. 2008), did not deal specifically with stub rent but addressed when an obligation arises under a lease under § 365(d)(3).
  - The court discussed the divergent approaches and noted that the Ninth Circuit has yet to adopt an approach.
    - The court determined that the “billing date approach” is the

correct one; as the language clearly contemplates “that an obligation either arises within the specified time period, or it does not, as determined by the lease.”

Scope of Stay Termination under § 362(c)(3)(A) (Taylor)

Scope of Stay Termination Under § 362(c)(3)(A).[1]

I. **Issue:** Scope of the termination of the automatic stay under § 362(c)(3)(A).

1. Minority interpretation: Under the statute, the automatic stay terminates as to the debtor, the debtor's property, and property of the estate.
2. Majority interpretation: Under the statute, the automatic stay terminates only as to the debtor and the debtor's property.

II. **Cases Adopting the Minority View Within the Ninth Circuit:**

1. *In re Reswick*, 446 B.R. 362 (9th Cir. BAP 2011).
   - The BAP found the phrase "with respect to the debtor" in the statute to be ambiguous; it, therefore, read the phrase in the context of § 362(c)(3) as a whole. Because § 362(c)(3) begins by referencing either a "single or joint case," the phrase in § 362(c)(3)(A) simply distinguishes between the debtor and the debtor's spouse.
   - This interpretation construes the phrase "with respect to the debtor" as referring *to whom* termination of the stay applies; not to *which property* termination of the stay applies.
   - This interpretation is consistent with the legislative history, indicating congressional intent to address the perceived abuse of repeat filings; it is also consistent with the canon of statutory construction that words must be considered within the broader

[1] Prepared by Janine Lee, Spring 2016 extern to Judge Laura Taylor.

context of the statute as a whole.

- Alternately, the majority interpretation interprets "with respect to the debtor" as a distinction regarding *property*, thus rendering § 362(c)(3)(A) internally inconsistent, as it begins with the phrase "the stay under subsection (a) with respect to *any action taken with respect to a debt or property securing debt or with respect to any lease* . . . ."
    - The majority interpretation also renders § 362(c)(3)(A) devoid of any practical effect; few creditors would pursue only the debtor personally or only the debtor's property.
    - Lastly, the majority interpretation impedes the policy goal of discouraging bad-faith filings and would create a loophole to allow repeat filers to receive the principal benefit of the automatic stay—protection of property of the estate.

2. *In re Jackola*, 2011 WL 2518930, at *3 (Bankr. D. Haw. June 22, 2011).
    - The bankruptcy court chose to follow *Reswick*, and adopted the minority view.

III. <u>Cases Adopting the Majority View Within the Ninth Circuit:</u>

1. *In re Rinard*, 451 B.R. 12 (Bankr. C.D. Cal. 2011).
    - The court found the plain text to be "crystal clear," as there is no mention of the estate in the text, no hanging paragraphs, and no

"fuzzy words."

- Moreover, this view supports the overarching goals of the Bankruptcy Code of: 1) a debtor's fresh start; and 2) equal treatment among creditors.

- Alternately, the minority view results in a creditor race to the courthouse and; in a (chapter 13) case like *Reswick*, results in a money recovery for the moving creditor, and a failed chapter 13 plan for the rest of the creditors.

IV. <u>Other BAP's Adopting the Majority View:</u>

1. *In re Holcomb*, 380 B.R. 813 (10th Cir. BAP 2008).
2. *In re Jumpp*, 356 B.R. 789 (1st Cir. BAP 2006).

UCLA LAW REVIEW

Implicit Bias in the Courtroom

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ABSTRACT

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* The author team comprises legal academics, scientists, researchers, and even a sitting federal judge who seek to answer this question in accordance with behavioral realism. The Article first provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications that distinguish between explicit, implicit, and structural forms of bias. Next, the Article applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. This application involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed. Finally, the Article examines various concrete intervention strategies to counter implicit biases for key players in the justice system, such as the judge and jury.

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INTRODUCTION

The problems of overt discrimination have received enormous attention from lawyers, judges, academics, and policymakers. While explicit sexism, racism, and other forms of bias persist, they have become less prominent and public over the past century. But explicit bias and overt discrimination are only part of the problem. Also important, and likely more pervasive, are questions surrounding implicit bias—attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.

How prevalent and significant are these implicit, unintentional biases? To answer these questions, people have historically relied on their gut instincts and personal experiences, which did not produce much consensus. Over the past two decades, however, social cognitive psychologists have discovered novel ways to measure the existence and impact of implicit biases—without relying on mere common sense. Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects. These fascinating discoveries, which have migrated from the science journals into the law reviews and even popular discourse, are now reshaping the law's fundamental understandings of discrimination and fairness.

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls? In what circumstances are these risks most acute? Are there practical ways to reduce the effects of implicit biases? To what extent can awareness of these biases mitigate their impact? What other debiasing strategies might work? In other words, in what way—if at all—should the courts respond to a better model of human decisionmaking that the mind sciences are providing?

We are a team of legal academics, scientists, researchers, and a sitting federal judge[1] who seek to answer these difficult questions in accordance with behavioral realism.[2] Our general goal is to educate those in the legal profession who are

1. Judge Mark W. Bennett, a coauthor of this article, is a United States District Court Judge in the Northern District of Iowa.
2. Behavioral realism is a school of thought that asks the law to account for more accurate models of human cognition and behavior. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit*

unfamiliar with implicit bias and its consequences. To do so, we provide a current summary of the underlying science, contextualized to criminal and civil litigation processes that lead up to and crescendo in the courtroom. This involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed, followed by suggestions designed to address the harms. We seek to be useful to legal practitioners of good faith, including judges, who conclude that implicit bias is a problem (one among many) but do not know quite what to do about it. While we aim to provide useful and realistic strategies for those judges already persuaded that implicit bias is a legitimate concern, we also hope to provoke those who know less about it, or are more skeptical of its relevance, to consider these issues thoughtfully.

We are obviously not a random sample of researchers and practitioners; thus, we cannot claim any representative status. That said, the author team represents a broad array of experience, expertise, methodology, and viewpoints. In authoring this paper, the team engaged in careful deliberations across topics of both consensus and dissensus.[3] We did not entirely agree on how to frame questions in this field or how to answer them. That said, we stand collectively behind what we have written. We also believe the final work product reveals the benefits of such cross-disciplinary and cross-professional collaboration.

Part I provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications. Often the science can seem too abstract, especially to nonprofessional scientists. As a corrective, Part II applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. Part III

Bias and the Law, 58 UCLA L. REV. 465, 490 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 997–1008 (2006). Jon Hanson and his coauthors have advanced similar approaches under the names of "critical realism," "situationism," and the "law and mind sciences." *See* Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1339 n.28 (2010) (listing papers).

3. This paper arose out of the second symposium of PULSE: Program on Understanding Law, Science, and Evidence at UCLA School of Law, on March 3–4, 2011. We brought together leading scientists (including Anthony Greenwald, the inventor of the Implicit Association Test), federal and state judges, applied researchers, and legal academics to explore the state of the science regarding implicit bias research and to examine the various institutional responses to date. The Symposium also raised possibilities and complications, ranging from the theoretical to practical, from the legal to the scientific. After a day of public presentations, the author team met in a full-day closed session to craft the outlines of this paper. Judge Michael Linfield of the Los Angeles Superior Court and Jeff Rachlinski, Professor of Law at Cornell Law School, participated in the symposium but could not join the author team. Their absence should not be viewed as either agreement or disagreement with the contents of the Article.

examines different intervention strategies to counter the implicit biases of key players in the justice system, such as the judge and jury.

I. IMPLICIT BIASES

A. Empirical Introduction

Over the past thirty years, cognitive and social psychologists have demonstrated that human beings think and act in ways that are often not rational. We suffer from a long litany of biases, most of them having nothing to do with gender, ethnicity, or race. For example, we have an oddly stubborn tendency to anchor to numbers, judgments, or assessments to which we have been exposed and to use them as a starting point for future judgments—even if those anchors are objectively wrong.[4] We exhibit an endowment effect, with irrational attachments to arbitrary initial distributions of property, rights, and grants of other entitlements.[5] We suffer from hindsight bias and believe that what turns out to be the case today should have been easily foreseen yesterday.[6] The list of empirically revealed biases goes on and on. Indeed, many legal academics have become so familiar with such heuristics and biases that they refer to them in their analyses as casually as they refer to economic concepts such as transaction costs.[7]

One type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races. An *attitude* is an association between some concept (in this case a social group) and an evaluative valence, either positive or negative.[8] A *stereotype* is an association between a concept (again, in this case a social group) and a trait.[9] Although interconnected, attitudes and stereotypes

4. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 667 (1999) (describing anchoring).
5. *See generally* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).
6. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).
7. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CALIF. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).
8. In both common and expert usage, sometimes the word "prejudice" is used to describe a negative attitude, especially when it is strong in magnitude.
9. If the association is nearly perfect, in that almost every member of the social group has that trait, then we think of the trait less as a stereotype and more as a defining attribute. Typically, when we use the word "stereotype," the correlation between social group and trait is far from perfect. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949 (2006).

should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa. For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.

The conventional wisdom has been that these social cognitions—attitudes and stereotypes about social groups—are explicit, in the sense that they are both consciously accessible through introspection *and* endorsed as appropriate by the person who possesses them. Indeed, this understanding has shaped much of current antidiscrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations.

However, recent findings in the mind sciences, especially implicit social cognition (ISC),[10] have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.

How have mind scientists discovered such findings on matters so latent or implicit? They have done so by innovating new techniques that measure implicit attitudes and stereotypes that by definition cannot be reliably self-reported. Some of these measures involve subliminal priming and other treatments that are not consciously detected within an experimental setting. Other instruments use reaction time differences between two types of tasks—one that seems consistent with some bias, the other inconsistent—as in the Implicit Association Test (IAT).[11]

10. Implicit social cognition (ISC) is a field of psychology that examines the mental processes that affect social judgments but operate without conscious awareness or conscious control. *See generally* Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007). The term was first used and defined by Anthony Greenwald and Mahzarin Banaji. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

11. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998) (introducing the Implicit Association Test (IAT)). For more information on the IAT, see Brian A. Nosek, Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265 (John A. Bargh ed., 2007).

The well-known IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures. For example, suppose we want to test whether there is an implicit stereotype associating African Americans with weapons. In a schema-consistent run, the participant is instructed to hit one response key when she sees a White face or a harmless object, and another response key when she sees an African American face or a weapon. Notice that the same key is used for *both* White and harmless item; a different key is used for *both* African American and weapon. Most people perform this task quickly.

In a schema-inconsistent run, we reverse the pairings. In this iteration, the same key is used for both White and weapon; a different key is used for both African American and harmless item. Most people perform this task more slowly.[12] Of course, the order in which these tasks are presented is always systematically varied to ensure that the speed of people's responses is not affected by practice. The time differential between these runs is defined as the implicit association effect and is statistically processed into standard units called an IAT D score.[13]

Through the IAT, social psychologists from hundreds of laboratories have collected enormous amounts of data[14] on reaction-time measures of "implicit biases," a term we use to denote implicit attitudes and implicit stereotypes. According to these measures, implicit bias is pervasive (widely held),[15] large in magnitude (as compared to standardized measures of explicit bias),[16] dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are

12. *See* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 17 (2007).
13. This D score, which ranges from –2.0 to 2.0, is a standardized score, which is computed by dividing the IAT effect as measured in milliseconds by the standard deviations of the participants' latencies pooled across schema-consistent and -inconsistent conditions. *See, e.g.*, Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003). If an individual's IAT D score is divided by its standard deviation of the population that has taken the test, the result is interpretable as the commonly used effect size measure, Cohen's *d*.
14. The most prominent dataset is collected at PROJECT IMPLICIT, http://projectimplicit.org (last visited Mar. 22, 2012) (providing free online tests of automatic associations). For a broad analysis of this dataset, see Nosek et al., *supra* note 12.
15. Lane, Kang & Banaji, *supra* note 10, at 437.
16. Cohen's d is a standardized unit of the size of a statistical effect. By convention, social scientists mark 0.20, 0.50, and 0.80 as small, medium, and large effect sizes. The IAT effect, as measured in Cohen's d, on various stereotypes and attitudes range from medium to large. *See* Kang & Lane, *supra* note 2, at 474 n.35 (discussing data from Project Implicit). Moreover, the effect sizes of implicit bias against social groups are frequently larger than the effect sizes produced by explicit bias measures. *See id.* at 474–75 tbl.1.

separate mental constructs),[17] and predicts certain kinds of real-world behavior.[18] What policymakers are now keen to understand are the size and scope of these behavioral effects and how to counter them—by altering the implicit biases themselves and by implementing strategies to attenuate their effects.

Useful and current summaries of the scientific evidence can be found in both the legal and psychological literatures. For example, in the last volume of this law review, Jerry Kang and Kristin Lane provided a summary of the evidence demonstrating that we are not perceptually, cognitively, or behaviorally colorblind.[19] Justin Levinson and Danielle Young have summarized studies focusing on jury decisionmaking.[20] In the psychology journals, John Jost and colleagues responded to sharp criticism[21] that the IAT studies lacked real-world consequences by providing a qualitative review of the literature, including ten studies that no manager should ignore.[22] Further, they explained how the findings are entirely consistent with the major tenets of twentieth century social cognitive psychology.[23] In a quantitative review, Anthony Greenwald conducted a meta-analysis of IAT studies—which synthesizes all the relevant scientific findings—and found that implicit attitudes as measured by the IAT predicted certain types of behavior, such as anti-Black discrimination or intergroup discrimination, substantially better than explicit bias measures.[24]

Instead of duplicating these summaries, we offer research findings that are specific to implicit bias leading up to and in the courtroom. To do so, we chart

17. *See* Anthony G. Greenwald & Brian A. Nosek, *Attitudinal Dissociation: What Does It Mean?*, *in* ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 65 (Richard E. Petty, Russell E. Fazio & Pablo Briñol eds., 2008).
18. *See* Kang & Lane, *supra* note 2, at 481–90 (discussing evidence of biased behavior in perceiving smiles, responding to threats, screening resumes, and body language).
19. *See* Kang & Lane, *supra* note 2, at 473–90; *see also* David L. Faigman, Nilanjana Dasgupta & Cecilia L. Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008).
20. *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 319–26 (2010).
21. *See, e.g.*, Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1108–10 (2006).
22. *See, e.g.*, John T. Jost et al., *The Existence of Implicit Prejudice Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 41 (2009).
23. *See id.*
24. *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19–20 (2009). Implicit attitude scores predicted behavior in this domain at an average correlation of r=0.24, whereas explicit attitude scores had correlations at an average of r=0.12. *See id.* at 24 tbl.3.

out two case trajectories—one criminal, the other civil. That synthesis appears in Part II.

B. Theoretical Clarification

But before we leave our introduction to implicit bias, we seek to make some theoretical clarifications on the relationships between explicit biases, implicit biases, and structural processes that are all involved in producing unfairness in the courtroom. We do so because the legal literature has flagged this as an important issue.[25] In addition, a competent diagnosis of unfairness in the courtroom requires disentangling these various processes. For instance, if the end is to counter discrimination caused by, say, *explicit* bias, it may be ineffective to adopt means that are better tailored to respond to *implicit* bias, and vice versa.

We start by clarifying terms. To repeat, explicit biases are attitudes and stereotypes that are consciously accessible through introspection *and* endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate.

Above, we used the labels "explicit" and "implicit" as adjectives to describe mental constructs—attitudes and stereotypes. Readers should recognize that these adjectives can also apply to research procedures or instruments. An explicit instrument asks the respondent for a direct self-report with no attempt by researchers to disguise the mental construct that they are measuring. An example is a straightforward survey question. No instrument perfectly measures a mental construct. In fact, one can often easily conceal one's explicit bias as measured through an explicit instrument. In this way, an explicit instrument can poorly measure an explicit bias, as the test subject may choose not to be candid about the beliefs or attitudes at issue.

By contrast, an implicit instrument does not depend on the respondent's conscious knowledge of the mental constructs that the researcher is inferring from the measure. An example is a reaction-time measure, such as the IAT. This does not necessarily mean that the respondent is unaware that the IAT is measuring bias.

25. *See generally* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1 (2011).

It also does not mean that the respondent is actually unaware that he or she has implicit biases, for example because she has taken an IAT before or is generally aware of the research literature. To repeat, no instrument perfectly measures any mental construct, and this remains true for implicit instruments. One might, for instance, try to conceal implicit bias measured through an implicit instrument, but such faking is often much harder than faking explicit bias measured by an explicit instrument.[26]

Finally, besides explicit and implicit biases, another set of processes that produce unfairness in the courtroom can be called "structural." Other names include "institutional" or "societal." These processes can lock in past inequalities, reproduce them, and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong.[27] In other words, structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category.

Because thinking through biases with respect to human beings evokes so much potential emotional resistance, sometimes it is easier to apply them to something less fraught than gender, race, religion, and the like. So, consider a vegetarian's biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are *explicit* biases.

Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of *concealed* bias (explicit bias that is hidden to manage impressions).

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26. *See, e.g.*, Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83, 95–96 (2003).

27. *See, e.g.*, Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1117–22 (2002) (applying lock-in theory to explain the inequalities between Blacks and Whites in education, housing, and employment); john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795–800 (2008) (adopting a systems approach to describe structured racialization); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 743–48 (2000) (describing lock-in theory, drawing on antitrust law and concepts).

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward meat. This is an *implicit* bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for $10 or a cheeseburger for $3. Unfortunately, she has only $5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of *structural* bias in favor of meat.

We disentangle these various mechanisms—explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces—because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms—explicit bias, implicit bias, and structural forces—are not mutually exclusive.[28] To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest

28. *See, e.g.*, GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 23–30 (2002) (discussing self-reinforcing stereotypes); john powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, POVERTY & RACE, Sept./Oct. 2011, at 3, 6 (explaining why "implicit bias insights are crucial to addressing the substantive inequalities that result from structural racialization").

that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.[29]

II. TWO TRAJECTORIES

A. The Criminal Path

Consider, for example, some of the crucial milestones in a criminal case flowing to trial. First, on the basis of a crime report, the police investigate particular neighborhoods and persons of interest and ultimately arrest a suspect. Second, the prosecutor decides to charge the suspect with a particular crime. Third, the judge makes decisions about bail and pretrial detention. Fourth, the defendant decides whether to accept a plea bargain after consulting his defense attorney, often a public defender or court-appointed private counsel. Fifth, if the case goes to trial, the judge manages the proceedings while the jury decides whether the defendant is guilty. Finally, if convicted, the defendant must be sentenced. At each of these stages,[30] implicit biases can have an important impact. To maintain a manageable scope of analysis, we focus on the police encounter, charge and plea bargain, trial, and sentencing.

1. Police Encounter

Blackness and criminality. If we implicitly associate certain groups, such as African Americans, with certain attributes, such as criminality, then it should not be surprising that police may behave in a manner consistent with those implicit stereotypes. In other words, biases could shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk the individual, and concludes the encounter with an arrest versus a warning.[31] These biases could contribute to the substantial racial disparities that have been widely documented in policing.[32]

29. *See* Jerry Kang, *Implicit Bias and the Pushback From the Left*, 54 ST. LOUIS U. L.J. 1139, 1146–48 (2010) (specifically rejecting complaint that implicit bias analysis must engage in reductionism).
30. The number of stages is somewhat arbitrary. We could have listed more stages in a finer-grained timeline or vice versa.
31. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976–77 (2002).
32. *See, e.g.*, Dianna Hunt, *Ticket to Trouble/Wheels of Injustice/Certain Areas Are Ticket Traps for Minorities*, HOUS. CHRON., May 14, 1995, at A1 (analyzing sixteen million Texas driving records and finding that minority drivers straying into White neighborhoods in Texas's major urban areas were twice as likely as Whites to get traffic violations); Sam Vincent Meddis & Mike Snider, *Drug War 'Focused' on Blacks*, USA TODAY, Dec. 20, 1990, at 1A (reporting findings from a 1989 *USA*

Since the mid–twentieth century, social scientists have uncovered empirical evidence of negative attitudes toward African Americans as well as stereotypes about their being violent and criminal.[33] Those biases persist today, as measured by not only explicit but also implicit instruments.[34]

For example, Jennifer Eberhardt, Philip Goff, Valerie Purdie, and Paul Davies have demonstrated a bidirectional activation between Blackness and criminality.[35] When participants are subliminally primed[36] with a Black male face (as opposed to a White male face, or no prime at all), they are quicker to distinguish the faint outline of a weapon that slowly emerges out of visual static.[37] In other words, by implicitly thinking *Black*, they more quickly saw a weapon.

Interestingly, the phenomenon also happens in reverse. When subliminally primed with drawings of weapons, participants visually attended to Black male faces more than comparable White male faces.[38] Researchers found this result not only in a student population, which is often criticized for being unrepresentative of the real world, but also among police officers.[39] The research suggests both that

Today study that 41 percent of those arrested on drug charges were African American whereas 15 percent of the drug-using population is African American); Billy Porterfield, *Data Raise Question: Is the Drug War Racist?*, AUSTIN AM. STATESMAN, Dec. 4, 1994, at A1 (citing study showing that African Americans were over seven times more likely than Whites to be arrested on drug charges in Travis County in 1993).

33. *See generally* Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995).

34. In a seminal paper, Patricia Devine demonstrated that being subliminally primed with stereotypically "Black" words prompted participants to evaluate ambiguous behavior as more hostile. *See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). The priming words included "Negroes, lazy, Blacks, blues, rhythm, Africa, stereotype, ghetto, welfare, basketball, unemployed, and plantation." *Id.* at 10. Those who received a heavy dose of priming (80 percent stereotypical words) interpreted a person's actions as more hostile than those who received a milder dose (20 percent). *Id.* at 11–12; *see also* John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996).

35. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

36. The photograph flashed for only thirty milliseconds. *Id.* at 879.

37. *See id.* at 879–80. There was a 21 percent drop in perceptual threshold between White face primes and Black face primes. This was measured by counting the number of frames (out of a total of 41) that were required before the participant recognized the outlines of the weapon in both conditions. There was a 8.8 frame difference between the two conditions. *Id.* at 881.

38. Visual attendance was measured via a dot-probe paradigm, which requires participants to indicate on which side of the screen a dot flashes. The idea is that if a respondent is already looking at one face (for example, the Black photograph), he or she will see a dot flash near the Black photograph faster. *See id.* at 881 (describing dot-paradigm as the gold standard in visual attention measures).

39. *See id.* at 885–87 (describing methods, procedures, and results of Study 4, which involved sixty-one police officers who were 76 percent White, 86 percent male, and who had an average age of forty-two).

the idea of Blackness triggers weapons and makes them easier to see, and, simultaneously, that the idea of weapons triggers visual attention to Blackness. How these findings translate into actual police work is, of course, still speculative. At a minimum, however, they suggest the possibility that officers have an implicit association between Blackness and weapons that could affect both their hunches and their visual attention.

Even if this is the case, one might respond that extra visual attention by the police is not too burdensome. But who among us enjoys driving with a police cruiser on his or her tail?[40] Moreover, the increased visual attention did not promote accuracy; instead, it warped the officers' perceptual memories. The subliminal prime of weapons led police officers not only to look more at Black faces but also to remember them in a biased way, as having more stereotypically African American features. Thus, they "were more likely to falsely identify a face that was more stereotypically Black than the target when they were primed with crime than when they were not primed."[41]

We underscore a point that is so obvious that it is easy to miss. The primes in these studies were all flashed *subliminally*. Thus, the behavioral differences in visually attending to Black faces and in remembering them more stereotypically were all triggered implicitly, without the participants' conscious awareness.

Shooter bias. The implicit association between Blackness and weapons has also been found through other instruments, including other priming tasks[42] and the IAT. One of the tests available on Project Implicit specifically examines the implicit stereotype between African Americans (as compared to European Americans) and weapons (as compared to harmless items). That association has been found to be strong, widespread, and dissociated from explicit self-reports.[43]

Skeptics can reasonably ask why we should care about minor differentials between schema-consistent and -inconsistent pairings that are often no more than a half second. But it is worth remembering that a half second may be all

In this study, the crime primes were not pictures but words: "violent, crime, stop, investigate, arrest, report, shoot, capture, chase, and apprehend." *Id.* at 886.

40. *See* Carbado, *supra* note 31, at 966–67 (describing existential burdens of heightened police surveillance).

41. Eberhardt et al., *supra* note 35, at 887.

42. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). The study deployed a priming paradigm, in which a photograph of a Black or White face was flashed to participants for two hundred milliseconds. Immediately thereafter, participants were shown pictures of guns or tools. *Id.* at 184. When primed by the Black face, participants identified guns faster. *Id.* at 185.

43. For N=85,742 participants, the average IAT D score was 0.37; Cohen's d=1.00. By contrast, the self-reported association (that is, the explicit stereotype measure) was Cohen's d=0.31. *See* Nosek et al., *supra* note 12, at 11 tbl.2.

the time a police officer has to decide whether to shoot. In the policing context, that half second might mean the difference between life and death.

Joshua Correll developed a shooter paradigm video game in which participants are confronted with photographs of individuals (targets) holding an object, superimposed on various city landscapes.[44] If the object is a weapon, the participant is instructed to press a key to shoot. If the object is harmless (for example, a wallet), the participant must press a different key to holster the weapon. Correll found that participants were quicker to shoot when the target was Black as compared to White.[45] Also, under time pressure, participants made more mistakes (false alarms) and shot more unarmed Black targets than unarmed White targets, and failed to shoot more armed White targets (misses) than armed Black targets.[46] Interestingly, the shooter bias effect was not correlated with measures of explicit personal stereotypes.[47] Correll also found comparable amounts of shooter bias in African American participants.[48] This suggests that negative attitudes toward African Americans are not what drive the phenomenon.[49]

The shooter bias experiments have also been run on actual police officers, with mixed results. In one study, police officers showed the same bias in favor of shooting unarmed Blacks more often than unarmed Whites that student and civilian populations demonstrated.[50] In another study, however, although police officers showed a similar speed bias, they did not show any racial bias in the

44. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–17 (2002) (describing the procedure).
45. *Id.* at 1317.
46. *Id.* at 1319. For qualifications about how the researchers discarded outliers, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 n.16 (2005). Subsequent studies have confirmed Correll's general findings. *See, e.g.*, Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (finding similar results).
47. Correll et al., *supra* note 44, at 1323. The scales used were the Modern Racism Scale, the Discrimination and Diversity Scale, the Motivation to Control Prejudiced Responding Scale, and some questions from the Right-Wing Authoritarianism Scale and the Personal Need for Structure Scale for good measure. *Id.* at 1321. These are survey instruments that are commonly used in social psychological research. Shooter bias was, however, correlated with measures of societal stereotypes—the stereotypes that other people supposedly held. *Id.* at 1323.
48. *See id.* at 1324.
49. On explicit attitude instruments, African Americans show on average substantial in-group preference (over Whites). On implicit attitude instruments, such as the IAT, African Americans bell curve around zero, which means that they show no preference on average. *See* Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY RES. & PRACTICE 101, 105–06 (2002).
50. *See* E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 PSYCHOL. SCI. 180, 181 (2005).

most important criterion of accuracy. In other words, there was no higher error rate of shooting unarmed Blacks as compared to Whites.[51]

Finally, in a study that directly linked implicit stereotypes (with weapons) as measured by the IAT and shooter bias, Jack Glaser and Eric Knowles found that "[i]ndividuals possessing a relatively strong stereotype linking Blacks and weapons [one standard deviation above the mean IAT] clearly show the Shooter Bias."[52] By contrast, recall that Correll found no such correlation with explicit stereotypes. These findings are consistent with the implicit stereotype story. Of course, it may also be true that participants were simply downplaying or concealing their explicit bias, which could help explain why no correlation was found.

In sum, we have evidence that suggests that implicit biases could well influence various aspects of policing. A fairly broad set of research findings shows that implicit biases (as measured by implicit instruments) alter and affect numerous behaviors that police regularly engage in—visual surveillance, recall, and even armed response.[53] It should go without saying that explicit biases, which often undergird unspoken policies of racial profiling, also play an enormous role in the differential policing of people of color. It also should go without saying that various structural forces that produce racially segregated, predominantly minority neighborhoods that have higher poverty and crime rates also have a huge impact on racialized policing. Nevertheless, we repeat these points so that readers internalize the idea that implicit, explicit, and structural processes should not be deemed mutually exclusive.

2. Charge and Plea Bargain

Journalistic investigations have uncovered some statistical evidence that racial minorities are treated worse than Whites in prosecutors' charging decisions.[54]

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51. *See* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1010–13, 1016–17 (2007) (describing the results from two studies).
52. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 169 (2008).
53. For discussions in the law reviews, with some treatment of implicit biases, see Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 667–73 (2007) (providing a cognitive model based on automatic categorization in accordance with behavioral realism).
54. For example, in San Jose, a newspaper investigation concluded that out of the almost seven hundred thousand criminal cases reported, "at virtually every stage of pre-trial negotiation, whites are more successful than non-whites." Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, WASH. POST, May 12, 1992, at A4. San Francisco Public Defender Jeff Brown commented on racial stereotyping: "It's a feeling, 'You've got a nice

Of course, there might be some legitimate reason for those disparities if, for example, minorities and Whites are not similarly situated on average. One way to examine whether the merits drive the disparate results is to control for everything except some irrelevant attribute, such as race. In several studies, researchers used regression analyses to conclude that race was indeed independently correlated with the severity of the prosecutor's charge.

For example, in a 1985 study of charging decisions by prosecutors in Los Angeles, researchers found prosecutors more likely to press charges against Black than White defendants, and determined that these charging disparities could not be accounted for by race-neutral factors, such as prior record, seriousness of charge, or use of a weapon.[55] Two studies also in the late 1980s, one in Florida and the other in Indiana, found charging discrepancies based on the race of the victim.[56] At the federal level, a U.S. Sentencing Commission report found that prosecutors were more apt to offer White defendants generous plea bargains with sentences below the prescribed guidelines than to offer them to Black or Latino defendants.[57]

While these studies are suggestive, other studies find no disparate treatment.[58] Moreover, this kind of statistical evidence does not definitively tell us that biases

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person screwing up,' as opposed to feeling that 'this minority is on a track and eventually they're going to end up in state prison.'" Christopher H. Schmitt, *Why Plea Bargains Reflect Bias*, SAN JOSE MERCURY NEWS, Dec. 9, 1991, at 1A; *see also* Christopher Johns, *The Color of Justice: More and More, Research Shows Minorities Aren't Treated the Same as Anglos by the Criminal Justice System*, ARIZ. REPUBLIC, July 4, 1993, at C1 (citing several reports showing disparate treatment of Blacks in the criminal justice system).

55. *See* Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 615–19 (1985).

56. *See* Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1493 (2000) (citing Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 441–47 (1979)); Radelet & Pierce, *supra* note 55, at 615–19.

57. LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 12 n.41 (2000), *available at* http://www.protectcivilrights.org/pdf/reports/justice.pdf (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995)); *see also* Kevin McNally, *Race and Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004) (compiling studies on the death penalty).

58. *See, e.g.*, Jeremy D. Ball, *Is It a Prosecutor's World? Determinants of Count Bargaining Decisions*, 22 J. CONTEMP. CRIM. JUST. 241 (2006) (finding no correlation between race and the willingness of prosecutors to reduce charges in order to obtain guilty pleas but acknowledging that the study did not include evaluation of the original arrest report); Cyndy Caravelis et al., *Race, Ethnicity, Threat, and the Designation of Career Offenders*, 2011 JUST. Q. 1 (showing that in some counties, Blacks and Latinos are more likely than Whites with similar profiles to be prosecuted as career offenders, but in other counties with different demographics, Blacks and Latinos have a lesser likelihood of such prosecution).

generally or implicit biases specifically produce discriminatory charging decisions or plea offers by prosecutors, or a discriminatory willingness to accept worse plea bargains on the part of defense attorneys. The best way to get evidence on such hypotheses would be to measure the implicit biases of prosecutors and defense attorneys and investigate the extent to which those biases predict different treatment of cases otherwise identical on the merits.

Unfortunately, we have very little data on this front. Indeed, we have no studies, as of yet, that look at prosecutors' and defense attorneys' implicit biases and attempt to correlate them with those individuals' charging practices or plea bargains. Nor do we know as much as we would like about their implicit biases more generally. But on that score, we do know something. Start with defense attorneys. One might think that defense attorneys, repeatedly put into the role of interacting with what is often a disproportionately minority clientele, and often ideologically committed to racial equality,[59] might have materially different implicit biases from the general population. But Ted Eisenberg and Sheri Lynn Johnson found evidence to the contrary: Even capital punishment defense attorneys show negative implicit attitudes toward African Americans.[60] Their implicit attitudes toward Blacks roughly mirrored those of the population at large.

What about prosecutors? To our knowledge, no one has measured specifically the implicit biases held by prosecutors.[61] That said, there is no reason to

59. *See* Gordon B. Moskowitz, Amanda R. Salomon & Constance M. Taylor, *Preconsciously Controlling Stereotyping: Implicitly Activated Egalitarian Goals Prevent the Activation of Stereotypes*, 18 SOC. COGNITION 151, 155–56 (2000) (showing that "chronic egalitarians" who are personally committed to removing bias in themselves do not exhibit implicit attitudinal preference for Whites over Blacks).

60. *See* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–55 (2004). The researchers used a paper-pencil IAT that measured attitudes about Blacks and Whites. *Id.* at 1543–45. The defense attorneys displayed biases that were comparable to the rest of the population. *Id.* at 1553. The findings by Moskowitz and colleagues, *supra* note 59, sit in some tension with findings by Eisenberg and Johnson. It is possible that defense attorneys are not chronic egalitarians and/or that the specific practice of criminal defense work exacerbates implicit biases even among chronic egalitarians.

61. In some contexts, prosecutors have resisted revealing information potentially related to their biases. For example, in *United States v. Armstrong*, 517 U.S. 456 (1996), defendants filed a motion to dismiss the indictment for selective prosecution, arguing that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court but left all White crack defendants to be prosecuted in state court, resulting in much longer sentences for identical offenses. *Id.* at 460–61. The claim foundered when the U.S. Attorney's Office resisted the defendants' discovery motion concerning criteria for prosecutorial decisions and the U.S. Supreme Court upheld the U.S. Attorney's Office's refusal to provide discovery. *Id.* at 459–62. The Court held that, prior to being entitled even to discovery, defendants claiming selective prosecution cases based on race must produce credible evidence that "similarly situated individuals of a different race were not prosecuted." *Id.* at 465.

presume attorney exceptionalism in terms of implicit biases.[62] And if defense attorneys, who might be expected to be less biased than the population, show typical amounts of implicit bias, it would seem odd to presume that prosecutors would somehow be immune. If this is right, there is plenty of reason to be concerned about how these biases might play out in practice.

As we explain in greater detail below, the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments.[63] They exercise tremendous discretion to decide whether, against whom, and at what level of severity to charge a particular crime; they also influence the terms and likelihood of a plea bargain and the length of the prison sentence—all with little judicial oversight. Other psychological theories—such as confirmation bias, social judgeability theory, and shifting standards, which we discuss below[64]—reinforce our hypothesis that prosecutorial decisionmaking indeed risks being influenced by implicit bias.

3. Trial

a. Jury

If the case goes to the jury, what do we know about how implicit biases might influence the factfinder's decisionmaking? There is a long line of research on racial discrimination by jurors, mostly in the criminal context. Notwithstanding some mixed findings, the general research consensus is that jurors of one race tend to show bias against defendants who belong to another race ("racial outgroups"). For example, White jurors will treat Black defendants worse than they treat comparable White defendants. The best and most recent meta-analysis of laboratory juror studies was performed by Tara Mitchell and colleagues, who found that the fact that a juror was of a different race than the defendant influenced

62. Several of the authors have conducted training sessions with attorneys in which we run the IAT in the days leading up to the training. The results of these IATs have shown that attorneys harbor biases that are similar to those harbored by the rest of the population. One recent study of a related population, law students, confirmed that they too harbor implicit gender biases. *See* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 28–31 (2010).

63. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE L. REV. 795 (2012) (undertaking a step-by-step consideration of how prosecutorial discretion may be fraught with implicit bias).

64. *See infra* Part II.B.

both verdicts and sentencing.[65] The magnitude of the effect sizes were measured conservatively[66] and found to be small (Cohen's d=0.092 for verdicts, d=0.185 for sentencing).[67]

But effects deemed "small" by social scientists may nonetheless have huge consequences for the individual, the social category he belongs to, and the entire society. For example, if White juries rendered guilty verdicts in exactly 80 percent of their decisions,[68] then an effect size of Cohen's d=0.095 would mean that the rate of conviction for Black defendants will be 83.8 percent, compared to 76.2 percent for White defendants. Put another way, in one hundred otherwise identical trials, eight more Black than White defendants would be found guilty.[69]

One might assume that juror bias against racial outgroups would be greater when the case is somehow racially charged or inflamed, as opposed to those instances when race does not explicitly figure in the crime. Interestingly, many experiments have demonstrated just the opposite.[70] Sam Sommers and Phoebe Ellsworth explain the counterintuitive phenomenon in this way: When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes. By contrast, when the case is not racially charged, even though there is a Black defendant and a White victim, jurors are not especially vigilant about the possibility of racial bias influencing their

65. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627–28 (2005). The meta-analysis processed thirty-four juror verdict studies (with 7397 participants) and sixteen juror sentencing studies (with 3141 participants). *Id.* at 625. All studies involved experimental manipulation of the defendant's race. Multirace participant samples were separated out in order to maintain the study's definition of racial bias as a juror's differential treatment of a defendant who belonged to a racial outgroup. *See id.*

66. Studies that reported nonsignificant results (p>0.05) for which effect sizes could not be calculated were given effect sizes of 0.00. *Id.*

67. *Id.* at 629.

68. *See* TRACY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 221152, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 1, 3 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf ("Seventy-nine percent of trials resulted in a guilty verdict or judgment, including 82% of bench trials and 76% of jury trials."); *see also* THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 1 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf (reporting the "typical" outcome as three out of four trials resulting in convictions).

69. This translation between effect size *d* values and outcomes was described by Robert Rosenthal & Donald B. Rubin, *A Simple, General Purpose Display of Magnitude of Experimental Effect*, 74 J. EDUC. PSYCHOL. 166 (1982).

70. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).

decisionmaking. These findings are more consistent with an implicit bias than a concealed explicit bias explanation.[71]

So far, we know that race effects have been demonstrated in juror studies (sometimes in counterintuitive ways), but admittedly little is known about "the precise psychological processes through which the influence of race occurs in the legal context."[72] Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors. Leading scholars from the juror bias field have expressly raised the possibility that the psychological mechanisms might be "unintentional and even non-conscious processes."[73]

Some recent juror studies by Justin Levinson and Danielle Young have tried to disentangle the psychological mechanisms of juror bias by using the IAT and other methods. In one mock juror study, Levinson and Young had participants view five photographs of a crime scene, including a surveillance camera photo that featured a masked gunman whose hand and forearm were visible. For half the participants, that arm was dark skinned; for the other half, that arm was lighter skinned.[74] The participants were then provided twenty different pieces of trial evidence. The evidence was designed to produce an ambiguous case regarding whether the defendant was indeed the culprit. Participants were asked to rate how much the presented evidence tended to indicate the defendant's guilt or innocence and to decide whether the defendant was guilty or not, using both a scale of guilty or not guilty and a likelihood scale of zero to one hundred.[75]

The study found that the subtle manipulation of the skin color altered how jurors evaluated the evidence presented and also how they answered the crucial question "How guilty is the defendant?" The guilt mean score was M=66.97 for

71. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 255 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000). That said, one could still hold to an explicit bias story in the following way: The juror has a negative attitude or stereotype that he is consciously aware of and endorses. But he knows it is not socially acceptable so he conceals it. When a case is racially charged, racial bias is more salient, so other jurors will be on the lookout for bias. Accordingly, the juror conceals it even more, all the way up to making sure that his behavior is completely race neutral. This explicit bias story is not mutually exclusive with the implicit bias story we are telling.

72. Samuel R. Sommers, *Race and the Decision-Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 172 (2007).

73. *Id.* at 175.

74. Levinson & Young, *supra* note 20, at 332–33 (describing experimental procedures).

75. *Id.* at 334.

dark skin and M=56.37 for light skin, with 100 being "definitely guilty."[76] Measures of explicit bias, including the Modern Racism Scale and feeling thermometers, showed no statistically significant correlation with the participants' weighing of the evidence or assessment of guilt.[77] More revealing, participants were asked to recall the race of the masked robber (which was a proxy for the light or dark skin), but many could not recall it.[78] Moreover, their recollections did not correlate with their judgments of guilt.[79] Taken together, these findings suggest that implicit bias—not explicit, concealed bias, or even any degree of conscious focus on race—was influencing how jurors assessed the evidence in the case.

In fact, there is even clearer evidence that implicit bias was at work. Levinson, Huajian Cai, and Young also constructed a new IAT, the Guilty–Not Guilty IAT, to test implicit stereotypes of African Americans as guilty (not innocent).[80] They gave the participants this new IAT and the general race attitude IAT. They found that participants showed an implicit negative attitude toward Blacks as well as a small implicit stereotype between Black and guilty.[81] More important than the bias itself is whether it predicts judgment. On the one hand, regression analysis demonstrated that a measure of *evidence evaluation* was a function of both the implicit attitude and the implicit stereotype.[82] On the other hand, the IAT scores did not predict what is arguably more important: guilty verdicts or judgments of guilt on a more granular scale (from zero to one hundred).[83] In sum, a subtle change

76. *See id.* at 337 (confirming that the difference was statistically significant, F=4.40, p=0.034, *d=0.52*).
77. *Id.* at 338.
78. This finding built upon Levinson's previous experimental study of implicit memory bias in legal decisionmaking. *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–406 (2007) (finding that study participants misremembered trial-relevant facts in racially biased ways).
79. Levinson & Young, *supra* note 20, at 338.
80. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Bias: The Guilty–Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010).
81. *Id.* at 204. For the attitude IAT, D=0.21 (p<0.01). *Id.* at 204 n.87. For the Guilty–Not Guilty IAT, D=0.18 (p<0.01). *Id.* at 204 n.83.
82. Participants rated each of the twenty pieces of information (evidence) in terms of its probity regarding guilt or innocence on a 1–7 scale. This produced a total "evidence evaluation" score that could range between 20 (least amount of evidence of guilt) to 140 (greatest). *Id.* at 202 n.70 (citation omitted). The greater the Black = guilty stereotype or the greater the negative attitude toward Blacks, the higher the guilty evidence evaluation. The ultimate regression equation was: Evidence = 88.58 + 5.74 x BW + 6.61 x GI + 9.11 x AI + e (where BW stands for Black or White suspect; GI stands for guilty stereotype IAT score; AI stands for race attitude IAT score; *e* stands for error). *Id.* at 206. In normalized units, the implicit stereotype β=0.25 (p<0.05); the implicit attitude β=0.34 (p<0.01); adjusted R^2=0.24. *See id.* at 206 nn.93–95.
83. *Id.* at 206 n.95.

in skin color changed judgments of evidence and guilt; implicit biases measured by the IAT predicted how respondents evaluated identical pieces of information.

We have a long line of juror research, as synthesized through a meta-analysis, revealing that jurors of one race treat defendants of another race worse with respect to verdict and sentencing. According to some experiments, that difference might take place *more* often in experimental settings when the case is *not* racially charged, which suggests that participants who seek to be fair will endeavor to correct for potential bias when the threat of potential race bias is obvious. Finally, some recent work reveals that certain IATs can predict racial discrimination in the evaluation of evidence by mock jurors. Unfortunately, because of the incredible difficulties in research design, we do not have studies that evaluate implicit bias in real criminal trials. Accordingly, the existing body of research, while strongly suggestive, provides inferential rather than direct support that implicit bias accounts for some of the race effects on conviction and sentencing.

b. Judge

Obviously, the judge plays a crucial role in various aspects of the trial, exercising important discretion in setting bail,[84] deciding motions, conducting and deciding what can be asked during jury selection, ruling on the admissibility of evidence, presiding over the trial, and rendering verdicts in some cases. Again, as with the lawyers, there is no inherent reason to think that judges are immune from implicit biases. The extant empirical evidence supports this assumption.[85] Jeff Rachlinski and his coauthors are the only researchers who have measured the implicit biases of actual trial court judges. They have given the race attitude IAT to judges from three different judicial districts. Consistent with the general population, the White judges showed strong implicit attitudes favoring Whites over Blacks.[86]

84. *See* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables besides race).

85. Judge Bennett, a former civil rights lawyer, shares his unnerving discovery of his own disappointing IAT results in Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010).

86. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009). White judges (N=85) showed an IAT effect M=216 ms (with a standard deviation of 201 ms). 87.1 percent of them were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. Black judges (N=43) showed a small bias M=26 ms (with a standard deviation of 208 ms). Only 44.2 percent of Black judges were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. *See id.*

Rachlinski and colleagues investigated whether these biases predicted behavioral differences by giving judges three different vignettes and asking for their views on various questions, ranging from the likelihood of defendant recidivism to the recommended verdict and confidence level. Two of these vignettes revealed nothing about race, although some of the judges were subliminally primed with words designed to trigger the social category African American. The third vignette explicitly identified the defendant (and victim) as White or Black and did not use subliminal primes. After collecting the responses, Rachlinski et al. analyzed whether judges treated White or Black defendants differently and whether the IAT could predict any such difference.

They found mixed results. In the two subliminal priming vignettes, judges did not respond differently on average as a function of the primes. In other words, the primes did not prompt them to be harsher on defendants across the board as prior priming studies with nonjudge populations had found.[87] That said, the researchers found a *marginally* statistically significant interaction with IAT scores: Judges who had a greater degree of implicit bias against Blacks (and relative preference for Whites) were harsher on defendants (who were never racially identified) when they had been primed (with the Black words). By contrast, those judges who had implicit attitudes in favor of Blacks were less harsh on defendants when they received the prime.[88]

In the third vignette, a battery case that explicitly identified the defendant as one race and the victim as the other,[89] the White judges showed equal likelihood of convicting the defendant, whether identified as White or Black. By contrast, Black judges were much more likely to convict the defendant if he was identified as White as compared to Black. When the researchers probed more deeply to see what, if anything, the IAT could predict, they did not find the sort of interaction that they found in the other two vignettes—in other words, judges with strong implicit biases in favor of Whites did not treat the Black defendant more harshly.[90]

Noticing the difference between White and Black judge responses in the third vignette study, the researchers probed still deeper and found a three-way interaction between a judge's race, a judge's IAT score, and a defendant's race. No effect was found for White judges; the core finding concerned, instead, Black

87. *See* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004).

88. *See* Rachlinski et al., *supra* note 86, at 1215. An ordered logit regression was performed between the judge's disposition against the priming condition, IAT score, and their interaction. The interaction term was marginally significant at p=0.07. *See id.* at 1214–15 n.94.

89. This third vignette did not use any subliminal primes.

90. *See id.* at 1202 n.41.

judges. Those Black judges with a stronger Black preference on the IAT were less likely to convict the Black defendant (as compared to the White defendant); correlatively, those Black judges with a White preference on the IAT were more likely to convict the Black defendant.[91]

It is hard to make simple sense of such complex findings, which may have been caused in part by the fact that the judges quickly sniffed out the purpose of the study—to detect racial discrimination.[92] Given the high motivation not to perform race discrimination under research scrutiny, one could imagine that White judges might make sure to correct for any potential unfairness. By contrast, Black judges may have felt less need to signal racial fairness, which might explain why Black judges showed different behaviors as a function of implicit bias whereas White judges did not.

Put another way, data show that when the race of the defendant is explicitly identified to judges in the context of a psychology study (that is, the third vignette), judges are strongly motivated to be fair, which prompts a different response from White judges (who may think to themselves "whatever else, make sure not to treat the Black defendants worse") than Black judges (who may think "give the benefit of the doubt to Black defendants"). However, when race is not explicitly identified but implicitly primed (vignettes one and two), perhaps the judges' motivation to be accurate and fair is not on full alert. Notwithstanding all the complexity, this study provides some suggestive evidence that implicit attitudes may be influencing judges' behavior.

4. Sentencing

There is evidence that African Americans are treated worse than similarly situated Whites in sentencing. For example, federal Black defendants were sentenced to 12 percent longer sentences under the Sentencing Reform Act of 1984,[93] and Black defendants are subject disproportionately to the death penalty.[94]

91. *Id.* at 1220 n.114.
92. *See id.* at 1223.
93. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001) (examining federal judge sentencing under the Sentencing Reform Act of 1984).
94. *See* U.S. GEN. ACCOUNTING OFFICE, GAO GGD-90-57, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (finding killers of White victims receive the death penalty more often than killers of Black victims); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview,*

Of course, it is possible that there is some good reason for that difference, based on the merits. One way to check is to run experimental studies holding everything constant except for race.

Probation officers. In one study, Sandra Graham and Brian Lowery subliminally primed police officers and juvenile probation officers with words related to African Americans, such as "Harlem" or "dreadlocks." This subliminal priming led the officers to recommend harsher sentencing decisions.[95] As we noted above, Rachlinski et al. found no such effect on the judges they tested using a similar but not identical method.[96] But, at least in this study, an effect was found with police and probation officers. Given that this was a subliminal prime, the merits could not have justified the different evaluations.

Afrocentric features. Irene Blair, Charles Judd, and Kristine Chapleau took photographs from a database of criminals convicted in Florida[97] and asked participants to judge how Afrocentric both White and Black inmates looked on a scale of one to nine.[98] The goal was to see if race, facial features, or both correlated with actual sentencing. Using multiple regression analysis, the researchers found that after controlling for the seriousness of the primary and additional offenses, the race of the defendant showed no statistical significance.[99] In other words, White and Black defendants were sentenced without discrimination based on race. According to the

With Recent Findings From Philadelphia, 83 CORNELL L. REV. 1638, 1710–24 (1998) (finding mixed evidence that Black defendants are more likely to receive the death sentence).

95. *See* Graham & Lowery, *supra* note 87.

96. Priming studies are quite sensitive to details. For example, the more subliminal a prime is (in time duration and in frequency), the less the prime tends to stick (the smaller the effects and the faster it dissipates). Rachlinski et al. identified some differences between their experimental procedure and that of Graham and Lowery's. *See* Rachlinski et al., *supra* note 86, at 1213 n.88. Interestingly, in the Rachlinski study, for judges from the eastern conference (seventy judges), a programming error made their subliminal primes last only sixty-four milliseconds. By contrast, for the western conference (forty-five judges), the prime lasted 153 milliseconds, which was close to the duration used by Graham and Lowery (150 milliseconds). *See id.* at 1206 (providing numerical count of judges' prime); *id.* at 1213 n.84 (identifying the programming error). Graham and Lowery wrote that they selected the priming durations through extensive pilot testing "to arrive at a presentation time that would allow the primes to be detectable but not identifiable." Graham & Lowery, *supra* note 87, at 489. It is possible that the truncated priming duration for the eastern conference judges contributed to the different findings between Rachlinski et al. and Graham and Lowery.

97. *See* Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 675 (2004) (selecting a sample of 100 Black inmates and 116 White inmates).

98. *Id.* at 676. Afrocentric meant full lips, broad nose, relatively darker skin color, and curly hair. It is what participants socially understood to look African without any explicit instruction or definition. *See id.* at 674 n.1.

99. *Id.* at 676.

researchers, this is a success story based on various sentencing reforms specifically adopted by Florida mostly to decrease sentencing discretion.[100]

However, when the researchers added Afrocentricity of facial features into their regressions, they found a curious correlation. Within each race, either Black or White, the more Afrocentric the defendant looked, the harsher his punishment.[101] How much so? If you picked a defendant who was one standard deviation above the mean in Afrocentric features and compared him to another defendant of the same race who was one standard deviation below the mean, there would be a sentence difference of seven to eight months between them, holding constant any difference in their actual crime.[102]

Again, if the research provides complex findings, we must grapple with a complex story. On the one hand, we have good news: Black and White defendants were, overall, sentenced comparably. On the other hand, we have bad news: Within each race, the more stereotypically Black the defendant looked, the harsher the punishment. What might make sense of such results? According to the researchers, perhaps implicit bias was responsible.[103] If judges are motivated to avoid racial discrimination, they may be on guard regarding the dangers of treating similarly situated Blacks worse than Whites. On alert to this potential bias, the judges prevent it from causing any discriminatory behavior. By contrast, judges have no conscious awareness that Afrocentric features might be triggering stereotypes of criminality and violence that could influence their judgment. Without such awareness, they could not explicitly control or correct for the potential bias.[104] If this explanation is correct, we have further evidence that discrimination is being driven in part by implicit biases and not solely by explicit-but-concealed biases.

* * *

Where does this whirlwind tour of psychological research findings leave us? In each of the stages of the criminal trial process discussed, the empirical research

100. *Id.* at 677.
101. *Id.* at 676–77. Jennifer Eberhardt and her colleagues reached consistent findings when she used the same Florida photograph dataset to examine how Black defendants were sentenced to death. After performing a median split on how stereotypical the defendant looked, the top half were sentenced to death 57.5 percent of the time compared to the bottom half, which were sentenced to death only 24.4 percent of the time. *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006). Interestingly, this effect was not observed when the victim was Black. *See id.* at 385.
102. *See* Blair et al., *supra* note 97, at 677–78.
103. *See id.* at 678 (hypothesizing that "perhaps an equally pernicious and less controllable process [is] at work").
104. *See id.* at 677.

gives us reason to think that implicit biases—attitudes and beliefs that we are not directly aware of and may not endorse—could influence how defendants are treated and judged. Wherever possible, in our description of the studies, we have tried to provide the magnitude of these effects. But knowing precisely how much work they really do is difficult. If we seek an estimate, reflective of an entire body of research and not any single study, one answer comes from the Greenwald meta-analysis, which found that the IAT (the most widely used, but not the only measure of implicit bias) could predict 5.6 percent of the variation of the behavior in Black–White behavioral domains.[105]

Should that be deemed a lot or a little? In answering this question, we should be mindful of the collective impact of such biases, integrated over time (per person) and over persons (across all defendants).[106] For a single defendant, these biases may surface for various decisionmakers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect.

To get a more concrete sense, Anthony Greenwald has produced a simulation that models cumulating racial disparities through five sequential stages of criminal justice—arrest, arraignment, plea bargain, trial, and sentence. It supposes that the probability of arrest having committed the offense is 0.50, that the probability of conviction at trial is 0.75, and that the effect size of implicit bias is r=0.1 at each stage. Under this simulation, for a crime with a mean sentence of 5 years, and with a standard deviation of 2 years, Black criminals can expect a sentence of 2.44 years whereas White criminals can expect just 1.40 years.[107] To appreciate the full social impact, we must next aggregate this sort of disparity a second time over all defendants subject to racial bias, out of an approximate annual

105. *See* Greenwald et al., *supra* note 24, at 24 tbl.3 (showing that correlation between race attitude IAT (Black/White) and behavior in the meta-analysis is 0.236, which when squared equals 0.056, the percentage of variance explained).

106. *See* Rachlinski et al., *supra* note 86, at 1202; Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of 'Affirmative Action,'* 94 CALIF. L. REV. 1063, 1073 (2006).

107. The simulation is available at *Simulation: Cumulating Racial Disparities Through 5 Sequential Stages of Criminal Justice*, http://faculty.washington.edu/agg/UCLA_PULSE.simulation.xlsx (last visited May 15, 2012). If in the simulation the effect size of race discrimination at each step is increased from r=0.1 to r=0.2, which is less than the average effect size of race discrimination effects found in the 2009 meta-analysis, *see supra* note 105, the ratio of expected years of sentence would increase to 3.11 years (Black) to 1.01 years (White).

total of 20.7 million state criminal cases[108] and 70 thousand federal criminal cases.[109] And, as Robert Abelson has demonstrated, even small percentages of variance explained might amount to huge impacts.[110]

B. The Civil Path

Now, we switch from the criminal to the civil path and focus on the trajectory of an individual[111] bringing suit in a federal employment discrimination case—and on how implicit bias might affect this process. First, the plaintiff, who is a member of a protected class, believes that her employer has discriminated against her in some legally cognizable way.[112] Second, after exhausting necessary administrative remedies,[113] the plaintiff sues in federal court. Third, the defendant tries to terminate the case before trial via a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure (FRCP) 12(b)(6). Fourth, should that fail, the defendant moves for summary judgment under FRCP 56. Finally, should that motion also fail, the jury renders a verdict after trial. Again, at each of these

108. *See* ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 3 (2011), *available at* http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf.

109. *See* Rachlinski et al., *supra* note 86, at 1202.

110. *See* Robert P. Abelson, *A Variance Explanation Paradox: When a Little Is a Lot*, 97 PSYCHOL. BULL. 129, 132 (1985) (explaining that the batting average of a 0.320 hitter or a 0.220 hitter predicts only 1.4 percent of the variance explained for a single at-bat producing either a hit or no-hit). Some discussion of this appears in Kang & Lane, *supra* note 2, at 489.

111. We acknowledge that *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), made it much more difficult to certify large classes in employment discrimination cases. *See id.* at 2553–54 (holding that statistical evidence of gender disparities combined with a sociologist's analysis that Wal-Mart's corporate culture made it vulnerable to gender bias was inadequate to show that members of the putative class had a common claim for purposes of class certification under FED. R. CIV. P. 23(b)).

112. For example, in a Title VII cause of action for disparate *treatment*, the plaintiff must demonstrate an adverse employment action "because of" the plaintiff's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006). By contrast, in a Title VII cause of action for disparate *impact*, the plaintiff challenges facially neutral policies that produce a disparate impact on protected populations. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). We recognize that employment discrimination law is far more complex than presented here, with different elements for different state and federal causes of action.

113. The U.S. Equal Employment Opportunity Commission (EEOC) process is critical in practical terms because the failure to file a claim with the EEOC within the quite short statute of limitations (either 180 or 300 days depending on whether the jurisdiction has a state or local fair employment agency) or to timely file suit after resorting to the EEOC results in an automatic dismissal of the claim. However, neither EEOC inaction nor an adverse determination preclude private suit. *See* 2 CHARLES SULLIVAN & LAUREN WALTER, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 12.03[B], at 672 (4th ed. 2012).

stages,[114] implicit biases could potentially influence the outcome. To maintain a manageable scope of analysis, we focus on employer discrimination, pretrial adjudication, and jury verdict.

1. Employer Discrimination

For many, the most interesting question is whether implicit bias helped cause the employer to discriminate against the plaintiff. There are good reasons to think that some negative employment actions are indeed caused by implicit biases in what tort scholars call a "but-for" sense. This but-for causation may be legally sufficient since Title VII and most state antidiscrimination statutes require only a showing that the plaintiff was treated less favorably "because of" a protected characteristic, such as race or sex.[115] But our objective here is not to engage the doctrinal[116] and philosophical questions[117] of whether existing antidiscrimination laws do or should recognize implicit bias-actuated discrimination. We also do not address what sorts of evidence should be deemed admissible when plaintiffs attempt to make such a case at trial.[118] Although those questions are critically important, our

114. As explained when we introduced the Criminal Path, the number of stages identified is somewhat arbitrary. We could have listed more or fewer stages.

115. Section 703(a) of Title VII of the 1964 Civil Rights Act states that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

116. For discussion of legal implications, see Faigman, Dasgupta & Ridgeway, *supra* note 19; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Krieger & Fiske, *supra* note 2.

117. For a philosophical analysis, see Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010).

118. For example, there is considerable disagreement on whether an expert should be allowed to testify that a particular case is an instance of implicit bias. This issue is part of a much larger debate regarding scientists' ability to make reasonable inferences about an individual case from group data. John Monahan and Laurens Walker first pointed out that scientific evidence often comes to court at two different levels of generality, one general and one specific. *See* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). For instance, in a case involving the accuracy of an eyewitness identification, the general question might concern whether eyewitness identifications that are cross-racial are less reliable than same-race identifications; the specific question in the case would involve whether the cross-racial identification in this case was accurate. Interested in social science evidence, Monahan and Walker referred to this as "social framework" evidence, though their fundamental insight regarding frameworks applies to all scientific evidence. In the context of implicit biases, then, general research amply demonstrates the phenomenon in the population. However, in the courtroom, the issue typically concerns whether a particular decision or action was a product of implicit bias.

As a scientific matter, knowing that a phenomenon exists in a population does not necessarily mean that a scientist can reliably say that it was manifest in a particular case. This has led to a debate as to

task is more limited—to give an empirical account of how implicit bias may potentially influence a civil litigation trajectory.

Our belief that implicit bias causes some employment discrimination is based on the following evidence. First, tester studies in the field—which involve sending identical applicants or applications except for some trait, such as race or gender—have generally uncovered discrimination. According to a summary by Mark Bendick and Ana Nunes, there have been "several dozen testing studies" in the past two decades, in multiple countries, focusing on discrimination against various demographic groups (including women, the elderly, and racial minorities).[119] These studies consistently reveal typical "net rates of discrimination" that range from 20–40 percent.[120] In other words, in 20–40 percent of cases, employers treat subordinated groups (for example, racial minorities) worse than privileged groups (for example, Whites) even though the testers were carefully controlled to be identically qualified.

Second, although tester studies do not distinguish between explicit versus implicit bias, various laboratory experiments have found implicit bias correlations with discriminatory evaluations. For example, Laurie Rudman and Peter Glick demonstrated that in certain job conditions, participants treated a self-promoting and competent woman, whom the researchers termed "agentic," worse than an

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whether experts should be limited to testifying only to the general phenomenon or should be allowed to opine on whether a particular case is an instance of the general phenomenon. This is a complicated issue and scholars have weighed in on both sides. For opposition to the use of expert testimony that a specific case is an instance of implicit bias, see Faigman, Dasgupta & Ridgeway, *supra* note 19, at 1394 ("The research . . . does not demonstrate that an expert can validly determine whether implicit bias caused a specific employment decision."); and John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks*," 94 VA. L. REV. 1715, 1719 (2008) ("[Testimony] in which the expert witness explicitly linked general research findings on gender discrimination to specific factual conclusions . . . exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by both the original and revised proposal of what constitutes 'social framework' evidence."). For advancement of allowing expert testimony that a particular case is an instance of some general phenomenon, see Susan T. Fiske & Eugene Borgida, *Standards for Using Social Psychological Evidence in Employment Discrimination Proceedings*, 83 TEMPLE L. REV. 867, 876 (2011) ("Qualified social scientists who provide general, relevant knowledge and apply ordinary scientific reasoning may offer informal opinion about the individual case, but probabilistically.").

In the end, lawyers may be able to work around this dispute by using an expert to provide social framework evidence that identifies particular attributes that exacerbate biased decisionmaking, then immediately calling up another witness who is personally familiar with the defendant's work environment and asking that witness whether each of those particular attributes exists.

119. *See* Marc Bendick, Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. SOC. ISSUES (forthcoming 2012), *available at* http://www.bendickegan.com/pdf/Sent_to_JSI_Feb_27_2010.pdf.

120. *Id.* (manuscript at 15).

equally agentic man.[121] When the job description explicitly required the employee to be cooperative and to work well with others, participants rated the agentic female less hirable than the equally agentic male.[122] Probing deeper, the researchers identified that the participants penalized the female candidate for lack of social skills, not incompetence.[123] Explicit bias measures did not correlate with the rankings; however, an implicit gender stereotype (associating women as more communal than agentic)[124] did correlate negatively with the ratings for social skills. In other words, the higher the implicit gender stereotype, the lower the social skills evaluation.[125]

Third, field experiments have provided further confirmation under real-world conditions. The studies by Marianne Bertrand and Sendhil Mullainathan demonstrating discrimination in callbacks because of the names on comparable resumes have received substantial attention in the popular press as well as in law reviews.[126] These studies found that for equally qualified—indeed, otherwise identical candidates, firms called back "Emily" more often than "Lakisha."[127] Less attention has been paid to Dan-Olof Rooth's extensions of this work, which found similar callback discrimination but also found correlations between implicit stereotypes and the discriminatory behavior.[128] Rooth has found these correlations

121. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 757 (2001). Agentic qualities were signaled by a life philosophy essay and canned answers to a videotaped interview that emphasized self-promotion and competence. *See id.* at 748. Agentic candidates were contrasted with candidates whom the researchers labeled "androgynous"—they also demonstrated the characteristics of interdependence and cooperation. *Id.*

122. The difference was M=2.84 versus M=3.52 on a 5 point scale ($p<0.05$). *See id.* at 753. No gender bias was shown when the job description was ostensibly masculine and did not call for cooperative behavior. Also, job candidates that were engineered to be androgynous—in other words, to show both agentic and cooperative traits—were treated the same regardless of gender. *See id.*

123. *See id.* at 753–54.

124. The agentic stereotype was captured by word stimuli such as "independent," "autonomous," and "competitive." The communal stereotype was captured by words such as "communal," "cooperative," and "kinship." *See id.* at 750.

125. *See id.* at 756 (r=–0.49, $p<0.001$). For further description of the study in the law reviews, see Kang, *supra* note 46, at 1517–18.

126. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004). A search of the TP-ALL database in Westlaw on December 10, 2011 revealed ninety-six hits.

127. *Id.* at 992.

128. Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECON. 523 (2010) (finding that implicit stereotypes, as measured by the IAT, predicted differential callbacks of Swedish-named versus Arab-Muslim-named resumes). An increase of one standard deviation in implicit stereotype produced almost a 12 percent decrease in the probability that an Arab/Muslim candidate received an interview. *See id.*

with not only implicit stereotypes about ethnic groups (Swedes versus Arab-Muslims) but also implicit stereotypes about the obese.[129]

Because implicit bias in the *courtroom* is our focus, we will not attempt to offer a comprehensive summary of the scientific research as applied to the implicit bias in the *workplace*.[130] We do, however, wish briefly to highlight lines of research—variously called "constructed criteria," "shifting standards," or "casuistry"—that emphasize the *malleability of merit*. We focus on this work because it has received relatively little coverage in the legal literature and may help explain how complex decisionmaking with multiple motivations occurs in the real world.[131] Moreover, this phenomenon may influence not only the defendant (accused of discrimination) but also the jurors who are tasked to judge the merits of the plaintiff's case.

Broadly speaking, this research demonstrates that people frequently engage in motivated reasoning[132] in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. In other words, as between two plausible candidates that have different strengths and weaknesses, we first choose the candidate we like—a decision that may well be influenced by implicit factors—and then justify that choice by molding our merit standards accordingly.

We can make this point more concrete. In one experiment, Eric Luis Uhlmann and Geoffrey Cohen asked participants to evaluate two finalists for police chief—one male, the other female.[133] One candidate's profile signaled *book smart*, the other's profile signaled *streetwise*, and the experimental design varied which profile attached to the woman and which to the man. Regardless of which attributes the male candidate featured, participants favored the male candidate and articulated their hiring criteria accordingly. For example, education (book

129. Jens Agerström & Dan-Olof Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. APPLIED PSYCHOL. 790 (2011) (finding that hiring managers (N=153) holding more negative IAT-measured automatic stereotypes about the obese were less likely to invite an obese applicant for an interview).

130. Thankfully, many of these studies have already been imported into the legal literature. For a review of the science, see Kang & Lane, *supra* note 2, at 484–85 (discussing evidence of racial bias in how actual managers sort resumes and of correlations between implicit biases, as measured by the IAT, and differential callback rates).

131. One recent exception is Rich, *supra* note 25.

132. For discussion of motivated reasoning in organizational contexts, see Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1029–34 (2005). Motivated reasoning is "the process through which we assimilate information in a self-serving manner." *Id.* at 1029.

133. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005).

smarts) was considered more important when the man had it.[134] Surprisingly, even the attribute of being family oriented and having children was deemed more important when the man had it.[135]

Michael Norton, Joseph Vandello, and John Darley have made similar findings, again in the domain of gender.[136] Participants were put in the role of manager of a construction company who had to hire a high-level employee. One candidate's profile signaled more education; the other's profile signaled more experience. Participants ranked these candidates (and three other filler candidates), and then explained their decisionmaking by writing down "what was most important in determining [their] decision."[137]

In the control condition, the profiles were given with just initials (not full names) and thus the test subjects could not assess their gender. In this condition, participants preferred the higher educated candidate 76 percent of the time.[138] In the two experimental conditions, the profiles were given names that signaled gender, with the man having higher education in one condition and the woman having higher education in the other. When the man had higher education, the participants preferred him 75 percent of the time. In sharp contrast, when the woman had higher education, only 43 percent of the participants preferred her.[139]

The discrimination itself is not as interesting as *how* the discrimination was justified. In the control condition and the man-has-more-education condition, the participants ranked education as more important than experience about half the time (48 percent and 50 percent).[140] By contrast, in the woman-has-more-education condition, only 22 percent ranked education as more important than experience.[141] In other words, what counted as merit was redefined, in real time, to justify hiring the man.

Was this weighting done consciously, as part of a strategy to manipulate merit in order to provide a cover story for decisionmaking caused and motivated by explicit bias? Or, was merit refactored in a more automatic, unconscious, dissonance-reducing rationalization, which would be more consistent with an implicit bias story? Norton and colleagues probed this causation question in another series of

134. *See id.* (M=8.27 with education versus M=7.07 without education, on a 11 point scale; p=0.006; d=1.02).
135. *See id.* (M=6.21 with family traits versus 5.08 without family traits; p=0.05; d=0.86).
136. Michael I. Norton et al., *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004).
137. *Id.* at 820.
138. *Id.* at 821.
139. *Id.*
140. *Id.*
141. *Id.*

experiments, in the context of race and college admissions.[142] In a prior study, they had found that Princeton undergraduate students shifted merit criteria—the relative importance of GPA versus the number of AP classes taken—to select the Black applicant over the White applicant who shared the same cumulative SAT score.[143] To see whether this casuistry was explicit and strategic or implicit and automatic, they ran another experiment in which participants merely rated admissions criteria in the abstract without selecting a candidate for admission.

Participants were simply told that they were participating in a study examining the criteria most important to college admissions decisions. They were given two sample resumes to familiarize themselves with potential criteria. Both resumes had equivalent cumulative SAT scores, but differed on GPA (4.0 versus 3.6) versus number of AP classes taken (9 versus 6). Both resumes also disclosed the applicant's race. In one condition, the White candidate had the higher GPA (and fewer AP classes); in the other condition, the African American candidate had the higher GPA (and fewer AP classes).[144] After reviewing the samples, the participants had to rank order eight criteria in importance, including GPA, number of AP classes, SAT scores, athletic participation, and so forth.

In the condition with the Black candidate having the higher GPA, 77 percent of the participants ranked GPA higher in importance than number of AP classes taken. By contrast, when the White candidate had the higher GPA, only 63 percent of the participants ranked GPA higher than AP classes. This change in the weighting happened even though the participants did not expect that they were going to make an admissions choice or to justify that choice. Thus, these differences could not be readily explained in purely strategic terms, as methods for justifying a subsequent decision. According to the authors,

> [t]hese results suggest not only that it is possible for people to reweight criteria deliberately to justify choices but also that decisions made under such social constraints can impact information processing even prior to making a choice. This suggests that the bias we observed is not simply post hoc and strategic but occurs as an organic part of making decisions when social category information is present.[145]

142. Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 42 (2006).
143. *Id.* at 44.
144. *See id.*
145. *Id.* at 46–47. This does not, however, fully establish that these differences were the result of implicit views rather than explicit ones. Even if test subjects did not expect to have to make admissions determinations, they might consciously select criteria that they believed favored one group over another.

The ways that human decisionmakers may subtly adjust criteria in real time to modify their judgments of merit has significance for thinking about the ways that implicit bias may potentially influence employment decisions. In effect, bias can influence decisions in ways contrary to the standard and seemingly commonsensical model. The conventional legal model describes behavior as a product of discrete and identifiable motives. This research suggests, however, that implicit motivations might influence behavior and that we then rationalize those decisions after the fact. Hence, some employment decisions might be motivated by implicit bias but rationalized post hoc based on nonbiased criteria. This process of reasoning from behavior to motives, as opposed to the folk-psychology assumption that the arrow of direction is from motives to behavior, is, in fact, consistent with a large body of contemporary psychological research.[146]

2. Pretrial Adjudication: 12(b)(6)

As soon as a plaintiff files the complaint, the defendant will try to dismiss as many of the claims in the complaint as possible. Before recent changes in pleading, a motion to dismiss a complaint under FRCP 8 and FRCP 12(b)(6) was decided under the relatively lax standard of *Conley v. Gibson*.[147] Under *Conley*, all factual allegations made in the complaint were assumed to be true. As such, the court's task was simply to ask whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim."[148]

Starting with *Bell Atlantic Corp. v. Twombly*,[149] which addressed complex antitrust claims of parallel conduct, and further developed in *Ashcroft v. Iqbal*,[150] which addressed civil rights actions based on racial and religious discrimination post-9/11, the U.S. Supreme Court abandoned the *Conley* standard. First, district courts must now throw out factual allegations made in the complaint if they are merely conclusory.[151] Second, courts must decide on the plausibility of the claim based on the information before them.[152] In *Iqbal*, the Supreme Court held that

146. *See generally* TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002).
147. 355 U.S. 41 (1957).
148. *Id.* at 45–46.
149. 550 U.S. 544 (2007).
150. 129 S. Ct. 1937 (2009).
151. *Id.* at 1951.
152. *Id.* at 1950–52.

because of an "obvious alternative explanation"[153] of earnest national security response, purposeful racial or religious "discrimination is not a plausible conclusion."[154]

How are courts supposed to decide what is "Twom-bal"[155] plausible when the motion to dismiss happens before discovery, especially in civil rights cases in which the defendant holds the key information? According to the Court, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[156]

And when judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.[157]

Moreover, consider what the directive to rely on common sense means in light of social judgeability theory.[158] According to this theory, there are social rules that tell us when it is appropriate to judge someone. For example, suppose your fourth grade child told you that a new kid, Hannah, has enrolled in school and that she receives free lunches. Your child then asks you whether you think she is smart. You will probably decline to answer since you do not feel entitled to make that judgment. Without more probative information, you feel that you would only be crudely stereotyping her abilities based on her socioeconomic status. But what if the next day you volunteered in the classroom and spent twelve minutes observing

153. *Id.* (quoting *Twombly*, 550 U.S. 544) (internal quotation marks omitted).
154. *Id.* at 1952.
155. *See In re* Iowa Ready-Mix Concrete Antitrust Litig., No. C 10-4038-MWB, 2011 WL 5547159, at *1 (N.D. Iowa Nov. 9, 2011) (referring to a *Twombly-Iqbal* motion as "Twom-bal").
156. *Iqbal*, 129 S. Ct. at 1940.
157. These schemas also reflect cultural cognitions. *See generally* Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).
158. *See* Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCHOL. 48 (1994).

Hannah interacting with a teacher trying to solve problems? Would you then feel that you had enough individuating information to come to some judgment?

This is precisely what John Darley and Paget Gross tested in a seminal experiment in 1983.[159] When participants only received economic status information, they declined to evaluate Hannah's intelligence as a function of her economic class. However, when they saw a twelve-minute videotape of the child answering a battery of questions, participants felt credentialed to judge the girl, and they did so in a way that was consistent with stereotypes. What they did not realize was that the individuating information in the videotape was purposefully designed to be ambiguous. So participants who were told that Hannah was rich interpreted the video as confirmation that she was smart. By contrast, participants who were told that Hannah was poor interpreted the same video as confirmation that she was not so bright.[160]

Vincent Yzerbyt and colleagues, who call this phenomenon "social judgeability," have produced further evidence of this effect.[161] If researchers told you that a person is either an archivist or a comedian and then asked you twenty questions about this person regarding their degree of extroversion with the options of "True," "False," or "I don't know," how might you answer? What if, in addition, they manufactured an illusion that you were given individuating information—information about the specific individual and not just the category he or she belongs to—even though you actually did not receive any such information?[162] This is precisely what Yzerbyt and colleagues did in the lab.

They found that those operating under the illusion of individuating information were more confident in their answers in that they marked fewer questions with "I don't know."[163] They also found that those operating under the illusion gave more stereotype-consistent answers.[164] In other words, the illusion of being informed made the target judgeable. Because the participants, in fact, had received no such individuating information, they tended to judge the person in accordance with their schemas about archivists and comedians. Interestingly, "in the debriefings,

159. *See* John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 22–23 (1983).
160. *See id.* at 24–25, 27–29.
161. *See* Yzerbyt et al., *supra* note 158.
162. This illusion was created by having participants go through a listening exercise, in which they were told to focus only on one speaker (coming through one ear of a headset) and ignore the other (coming through the other). They were later told that the speaker that they were told to ignore had in fact provided relevant individuating information. The truth was, however, that no such information had been given. *See id.* at 50.
163. *See id.* at 51 (M=5.07 versus 10.13; p<0.003).
164. *See id.* (M=9.97 versus 6.30, out of 1 to 20 point range; p<0.006).

subjects reported that they did not judge the target on the basis of a stereotype; they were persuaded that they had described a real person qua person."[165] Again, it is possible that they were concealing their explicitly embraced bias about archivists and comedians from probing researchers, but we think that it is more probable that implicit bias explains these results.

Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff's claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge's schemas. Just as Yzerbyt's illusion of individuating information entitled participants to judge in the laboratory, the express command of the Supreme Court may entitle judges to judge in the courtroom when they lack any well-developed basis to do so.

There are no field studies to test whether biases, explicit or implicit, influence how actual judges decide motions to dismiss actual cases. It is not clear that researchers could ever collect such information. All that we have are some preliminary data about dismissal rates before and after *Iqbal* that are consistent with our analysis. Again, since *Iqbal* made dismissals easier, we should see an increase in dismissal rates across the board.[166] More relevant to our hypothesis is whether certain types of cases experienced differential changes in dismissal rates. For instance, we would expect *Iqbal* to generate greater increases in dismissal rates for race discrimination claims than, say, contract claims. There are a number of potential reasons for this: One reason is that judges are likely to have stronger biases that plaintiffs in the former type of case have less valid claims than those in the latter. Another reason is that we might expect some kinds of cases

165. *Id.*

166. In the first empirical study of *Iqbal*, Hatamyar sampled 444 cases under *Conley* (from May 2005 to May 2007) and 173 cases under *Iqbal* (from May 2009 to August 2009). *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 597 (2010). She found that the general rate of complaint dismissal rose from 46 percent to 56 percent. *See id.* at 602 tbl.2. However, this finding was not statistically significant under a Pearson chi-squared distribution test examining the different dismissal rates for *Conley*, *Twombly*, and *Iqbal* for three results: grant, mixed, and deny.

to raise more significant concerns about asymmetric information than do others. In contracts disputes, both parties may have good information about most of the relevant facts even prior to discovery. In employment discrimination cases, plaintiffs may have good hunches about how they have been discriminated against, but prior to discovery they may not have access to the broad array of information in the employer's possession that may be necessary to turn the hunch into something a judge finds plausible. Moreover, these two reasons potentially interact: the more gap filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge's assessment in the absence of a well-developed evidentiary record.

Notwithstanding the lack of field studies on these issues, there is some evidentiary support for these differential changes in dismissal rates. For example, Patricia Hatamayr sorted a sample of cases before and after *Iqbal* into six major categories: contracts, torts, civil rights, labor, intellectual property, and all other statutory cases.[167] She found that in contract cases, the rate of dismissal did not change much from *Conley* (32 percent) to *Iqbal* (32 percent).[168] By contrast, for Title VII cases, the rate of dismissal increased from 42 percent to 53 percent.[169] Victor Quintanilla has collected more granular data by counting not Title VII cases generally but federal employment discrimination cases filed specifically by Black plaintiffs both before and after *Iqbal*.[170] He found an even larger jump. Under the *Conley* regime, courts granted only 20.5 percent of the motions to dismiss such cases. By contrast, under the *Iqbal* regime, courts granted 54.6 percent of them.[171] These data lend themselves to multiple interpretations and suffer from various confounds. So at this point, we can make only modest claims. We merely suggest that the dismissal rate data are consistent with our hypothesis that *Iqbal*'s plausibility standard poses a risk of increasing the impact of implicit biases at the 12(b)(6) stage.

If, notwithstanding the plausibility-based pleading requirements, the case gets past the motion to dismiss, then discovery will take place, after which defendants will seek summary judgment under FRCP 56. On the one hand, this procedural posture is less subject to implicit biases than the motion to dismiss because more individuating information will have surfaced through discovery. On the

167. *See id.* at 591–93.
168. *See id.* at 630 tbl.D.
169. *See id.*
170. *See* Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal*'s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011). Quintanilla counted both Title VII and 42 U.S.C. § 1981 cases.
171. *See id.* at 36 tbl.1 (p<0.000).

other hand, the judge still has to make a judgment call on whether any "genuine dispute as to any material fact"[172] remains. Similar decisionmaking dynamics are likely to be in play as we saw in the pleading stage, for a significant quantum of discretion remains. Certainly the empirical evidence that demonstrates how poorly employment discrimination claims fare on summary judgment is not inconsistent with this view, though, to be sure, myriad other explanations of these differences are possible (including, for example, doctrinal obstacles to reaching a jury).[173]

3. Jury Verdict

If the case gets to trial, the parties will introduce evidence on the merits of the claim. Sometimes the evidence will be physical objects, such as documents, emails, photographs, voice recordings, evaluation forms, and the like. The rest of it will be witness or expert testimony, teased out and challenged by lawyers on both sides. Is there any reason to think that jurors might interpret the evidence in line with their biases? In the criminal trajectory, we already learned of juror bias via meta-analyses as well as correlations with implicit biases. Unfortunately, we lack comparable studies in the civil context. What we offer are two sets of related arguments and evidence that speak to the issue: motivation to shift standards and performer preference.

a. Motivation to Shift Standards

Above, we discussed the potential malleability of merit determinations when judgments permit discretion and reviewed how employer defendants might shift standards and reweight criteria when evaluating applicants and employees. Here, we want to recognize that a parallel phenomenon may affect juror decisionmaking. Suppose that a particular juror is White and that he identifies strongly with his Whiteness. Suppose further that the defendant is White and is being sued by a racial minority. The accusation of illegal and immoral behavior threatens the

172. FED R. CIV. P. 56(a).

173. *See, e.g.*, Charlotte L. Lanvers, *Different Federal Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & POL'Y 381, 395 (2007); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law Sch. Research Paper No. 08-022, 2008), *available at* http://ssrn.com/abstract=1138373 (finding that civil rights cases, and particularly employment discrimination cases, have a consistently higher summary judgment rate than non–civil rights cases).

status of the juror's racial ingroup. Anca Miron, Nyla Branscombe, and Monica Biernat have demonstrated that this threat to the ingroup can motivate people to shift standards in a direction that shields the ingroup from ethical responsibility.[174]

Miron and colleagues asked White undergraduates at the University of Kansas to state how strongly they identified with America.[175] Then they were asked various questions about America's relationship to slavery and its aftermath. These questions clumped into three categories (or constructs): judgments of harm done to Blacks,[176] standards of injustice,[177] and collective guilt.[178] Having measured these various constructs, the researchers looked for relationships among them. Their hypothesis was that the greater the self-identification with America, the higher the standards would be before being willing to call America racist or otherwise morally blameworthy (that is, the participants would set higher confirmatory standards). They found that White students who strongly identified as American set higher standards for injustice (that is, they wanted more evidence before calling America unjust);[179] they thought less harm was done by slavery;[180] and, as a result, they felt less collective guilt compared to other White students who identified less with America.[181] In other words, their attitudes toward America were correlated with the quantum of evidence they required to reach a judgment that America had been unjust.

In a subsequent study, Miron et al. tried to find evidence of causation, not merely correlation. They did so by experimentally manipulating national identification by asking participants to recount situations in which they felt similar to other Americans (evoking greater identification with fellow Americans) or different from other Americans (evoking less identification with fellow Americans).[182]

174. Anca M. Miron, Nyla R. Branscombe & Monica Biernat, *Motivated Shifting of Justice Standards*, 36 PERSONALITY SOC. PSYCHOL. BULL. 768, 769 (2010).
175. The participants were all American citizens. The question asked was, "I feel strong ties with other Americans." *Id.* at 771.
176. A representative question was, "How much damage did Americans cause to Africans?" on a "very little" (1) to "very much" (7) Likert scale. *Id.* at 770.
177. "Please indicate what percentage of Americans would have had to be involved in causing harm to Africans for you to consider the past United States a racist nation" on a scale of 0–10 percent, 10–25 percent, up to 90–100 percent. *Id.* at 771.
178. "I feel guilty for my nation's harmful past actions toward African Americans" on a "strongly disagree" (1) to "strongly agree" (9) Likert scale. *Id.*
179. *See id.* at 772 tbl.I (r=0.26, p<0.05).
180. *See id.* (r=–0.23, p<0.05).
181. *See id.* (r=–0.21, p<0.05). Using structural equation modeling, the researchers found that standards of injustice fully mediated the relationship between group identification and judgments of harm; also, judgments of harm fully mediated the effect of standards on collective guilt. *See id.* at 772–73.
182. The manipulation was successful. *See id.* at 773 (p<0.05, d=0.54.).

Those who were experimentally made to feel *less* identification with America subsequently reported very different standards of justice and collective guilt compared to others made to feel *more* identification with America. Specifically, participants in the low identification condition set lower standards for calling something unjust, they evaluated slavery's harms as higher, and they felt more collective guilt. By contrast, participants in the high identification condition set higher standards for calling something unjust (that is, they required more evidence), they evaluated slavery's harms as less severe, and they felt less guilt.[183] In other words, by experimentally manipulating how much people identified with their ingroup (in this case, American), researchers could shift the justice standard that participants deployed to judge their own ingroup for harming the outgroup.

Evidentiary standards for jurors are specifically articulated (for example, "preponderance of the evidence") but substantively vague. The question is how a juror operationalizes that standard—just how much evidence does she require for believing that this standard has been met? These studies show how our assessments of evidence—of how much is enough—are themselves potentially malleable. One potential source of malleability is, according to this research, a desire (most likely implicit) to protect one's ingroup status. If a juror strongly identifies with the defendant employer as part of the same ingroup—racially or otherwise—the juror may shift standards of proof upwards in response to attack by an outgroup plaintiff. In other words, jurors who implicitly perceive an ingroup threat may require more evidence to be convinced of the defendant's harmful behavior than they would in an otherwise identical case that did not relate to their own ingroup. Ingroup threat is simply an example of this phenomenon; the point is that implicit biases may influence jurors by affecting how they implement ambiguous decision criteria regarding both the quantum of proof and how they make inferences from ambiguous pieces of information.

b. Performer Preference

Jurors will often receive evidence and interpretive cues from performers at trial, by which we mean the cast of characters in the courtroom who jurors see, such as the judge, lawyers, parties, and witnesses. These various performers are playing roles of one sort or another. And, it turns out that people tend to have stereotypes about the ideal employee or worker that vary depending on the segment of the labor

183. In standards for injustice, M=2.60 versus 3.39; on judgments of harm, M=5.82 versus 5.42; on collective guilt, M=6.33 versus 4.60. All differences were statistically significant at p=0.05 or less. *See id.*

market. For example, in high-level professional jobs and leadership roles, the supposedly ideal employee is often a White man.[184] When the actual performer does not fit the ideal type, people may evaluate the performance more negatively.

One study by Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran, and Gary Blasi found just such performer preference with respect to lawyers, as a function of race.[185] Kang and colleagues measured the explicit and implicit beliefs about the ideal lawyer held by jury-eligible participants from Los Angeles. The researchers were especially curious whether participants had implicit stereotypes linking the ideal litigator with particular racial groups (White versus Asian American). In addition to measuring their biases, the researchers had participants evaluate two depositions, which they heard via headphones and simultaneously read on screen. At the beginning of each deposition, participants were shown for five seconds a picture of the litigator conducting the deposition on a computer screen accompanied by his name. The race of the litigator was varied by name and photograph. Also, the deposition transcript identified who was speaking, which meant that participants repeatedly saw the attorneys' last names.[186]

The study discovered the existence of a moderately strong implicit stereotype associating litigators with Whiteness (IAT D=0.45);[187] this stereotype correlated with more favorable evaluations of the White lawyer (ingroup favoritism since 91% of the participants were White) in terms of his competence ($r=0.32$, $p<0.01$), likeability ($r=0.31$, $p<0.01$), and hireability ($r=0.26$, $p<0.05$).[188] These results were confirmed through hierarchical regressions. To appreciate the magnitude of the effect sizes, imagine a juror who has no explicit stereotype but a large implicit stereotype (IAT D=1) that the ideal litigator is White. On a 7-point scale, this juror would favor a White lawyer over an identical Asian American

184. *See, e.g.*, Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573 (2002); Alice H. Eagly, Steven J. Karau & Mona G. Makhijani, *Gender and the Effectiveness of Leaders: A Meta-Analysis*, 117 PSYCHOL. BULL. 125 (1995); *see also* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 213–17 (2000) (discussing how conceptions of merit are designed around masculine norms); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297 (2007).

185. *See* Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

186. *See id.* at 892–99 (describing method and procedure, and identifying attorney names as "William Cole" or "Sung Chang").

187. *See id.* at 900. They also found strong negative implicit attitudes against Asian Americans (IAT D=0.62). *See id.*

188. *Id.* at 901 tbl.3.

lawyer 6.01 to 5.65 in terms of competence, 5.57 to 5.27 in terms of likability, and 5.65 to 4.92 in terms of hireability.[189]

This study provides some evidence that potential jurors' implicit stereotypes cause racial discrimination in judging attorney performance of basic depositions. What does this have to do with how juries might decide employment discrimination cases? Of course, minority defendants do not necessarily hire minority attorneys. That said, it is possible that minorities do hire minority attorneys at somewhat higher rates than nonminorities. But even more important, we hypothesize that similar processes might take place with how jurors evaluate not only attorneys but also both parties and witnesses, as they perform their various roles at trial. To be sure, this study does not speak directly to credibility assessments, likely to be of special import at trial, but it does at least suggest that implicit stereotypes may affect judgment of performances in the courtroom.

We concede that our claims about implicit bias influencing jury decisionmaking in civil cases are somewhat speculative and not well quantified. Moreover, in the real world, certain institutional processes may make both explicit and implicit biases less likely to translate into behavior. For example, jurors must deliberate with other jurors, and sometimes the jury features significant demographic diversity, which seems to deepen certain types of deliberation.[190] Jurors also feel accountable[191] to the judge, who reminds them to adhere to the law and the merits. That said, for reasons already discussed, it seems implausible to think that current practices within the courtroom somehow magically burn away all jury biases, especially implicit biases of which jurors and judges are unaware. That is why we seek improvements based on the best understanding of how people actually behave.

Thus far, we have canvassed much of the available evidence describing how implicit bias may influence decisionmaking processes in both criminal and civil cases. On the one hand, the research findings are substantial and robust. On the other hand, they provide only imperfect knowledge, especially about what is actually happening in the real world. Notwithstanding this provisional and limited knowledge, we strongly believe that these studies, in aggregate, suggest that implicit bias in the trial process is a problem worth worrying about. What, then, can be done? Based on what we know, how might we intervene to improve the trial process and potentially vaccinate decisionmakers against, or at least reduce, the influence of implicit bias?

189. These figures were calculated using the regression equations in *id.* at 902 n.25, 904 n.27.
190. *See infra* text accompanying notes 241–245.
191. *See, e.g.*, Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 267–70 (1999).

III. INTERVENTIONS

Before we turn explicitly to interventions, we reiterate that there are many causes of unfairness in the courtroom, and our focus on implicit bias is not meant to deny other causes. In Part II, we laid out the empirical case for why we believe that implicit biases influence both criminal and civil case trajectories. We now identify interventions that build on an overlapping scientific and political consensus. If there are cost-effective interventions that are likely to decrease the impact of implicit bias in the courtroom, we believe they should be adopted at least as forms of experimentation.

We are mindful of potential costs, including implementation and even overcorrection costs. But we are hopeful that these costs can be safely minimized. Moreover, the potential benefits of these improvements are both substantive and expressive. Substantively, the improvements may increase actual fairness by decreasing the impact of implicit biases; expressively, they may increase the appearance of fairness by signaling the judiciary's thoughtful attempts to go beyond cosmetic compliance.[192] Effort is not always sufficient, but it ought to count for something.

A. Decrease the Implicit Bias

If implicit bias causes unfairness, one intervention strategy is to decrease the implicit bias itself. It would be delightful if explicit refutation would suffice. But abstract, global self-commands to "Be fair!" do not much change implicit social cognitions. How then might we alter implicit attitudes or stereotypes about various social groups?[193] One potentially effective strategy is to expose ourselves to countertypical associations. In rough terms, if we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes.

192. In a 1999 survey by the National Center for State Courts, 47 percent of the American people doubted that African Americans and Latinos receive equal treatment in state courts; 55 percent doubted that non–English speaking people receive equal treatment. The appearance of fairness is a serious problem. *See* NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 37 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf. The term "cosmetic compliance" comes from Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

193. For analysis of the nature versus nurture debate regarding implicit biases, see Jerry Kang, *Bits of Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 132 (Justin D. Levinson & Robert J. Smith eds., 2012).

These exposures can come through direct contact with countertypical people. For example, Nilanjana Dasgupta and Shaki Asgari tracked the implicit gender stereotypes held by female subjects both before and after a year of attending college.[194] One group of women attended a year of coed college; the other group attended a single-sex college. At the start of their college careers, the two groups had comparable amounts of implicit stereotypes against women. However, one year later, those who attended the women's college on average expressed no gender bias, whereas the average bias of those who attended the coed school increased.[195] By carefully examining differences in the two universities' environments, the researchers learned that it was exposure to countertypical women in the role of professors and university administrators that altered the implicit gender stereotypes of female college students.[196]

Nilanjana Dasgupta and Luis Rivera also found correlations between participants' self-reported numbers of gay friends and their negative implicit attitudes toward gays.[197] Such evidence gives further reason to encourage intergroup social contact by diversifying the bench, the courtroom (staff and law clerks), our residential neighborhoods, and friendship circles. That said, any serious diversification of the bench, the bar, and staff would take enormous resources, both economic and political. Moreover, these interventions might produce only modest results. For instance, Rachlinski et al. found that judges from an eastern district that featured approximately half White judges and half Black judges had "only slightly smaller" implicit biases than the judges of a western jurisdiction, which contained only two Black judges (out of forty-five total district court judges, thirty-six of them being White).[198] In addition, debiasing exposures would have to compete against the other daily real-life exposures in the courtroom that rebias. For instance, Joshua Correll found that police officers who worked in areas with high minority demographics and violent crime showed more shooter bias.[199]

If increasing direct contact with a diverse but countertypical population is not readily feasible, what about vicarious contact, which is mediated by images,

194. *See* Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 649–54 (2004).

195. *See id.* at 651.

196. *See id.* at 651–53.

197. *See* Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 270 (2006).

198. *See* Rachlinski et al., *supra* note 86, at 1227.

199. *See* Correll et al., *supra* note 51, at 1014 ("We tentatively suggest that these environments may reinforce cultural stereotypes, linking Black people to the concept of violence.").

videos, simulations, or even imagination and which does not require direct face-to-face contact?[200] Actually, the earliest studies on the malleability of implicit bias pursued just these strategies. For instance, Nilanjana Dasgupta and Anthony Greenwald showed that participants who were exposed vicariously to countertypical exemplars in a history questionnaire (for example, Black figures to whom we tend to have positive attitudes, such as Martin Luther King Jr., and White figures to whom we tend to have negative attitudes, such as Charles Manson) showed a substantial decrease in negative implicit attitudes toward African Americans.[201] These findings are consistent with work done by Irene Blair, who has demonstrated that brief mental visualization exercises can also change scores on the IAT.[202]

In addition to exposing people to famous countertypical exemplars, implicit biases may be decreased by juxtaposing ordinary people with countertypical settings. For instance, Bernard Wittenbrink, Charles Judd, and Bernadette Park examined the effects of watching videos of African Americans situated either at a convivial outdoor barbecue or at a gang-related incident.[203] Situating African Americans in a positive setting produced lower implicit bias scores.[204]

There are, to be sure, questions about whether this evidence directly translates into possible improvements for the courtroom.[205] But even granting numerous caveats, might it not be valuable to engage in some experimentation? In chambers and the courtroom buildings, photographs, posters, screen savers, pamphlets, and decorations ought to be used that bring to mind countertypical exemplars or associations for participants in the trial process. Since judges and jurors are differently situated, we can expect both different effects and implementation strategies. For example, judges would be exposed to such vicarious displays regularly as a feature of their workplace environment. By contrast, jurors would be exposed only

200. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1166–67 (2000) (comparing vicarious with direct experiences).

201. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001). The IAT effect changed nearly 50 percent as compared to the control (IAT effect M=78ms versus 174ms, p=0.01) and remained for over twenty-four hours.

202. Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828 (2001). *See generally* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (literature review).

203. *See* Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815, 818–19 (2001).

204. *Id.* at 819.

205. How long does the intervention last? How immediate does it have to be? How much were the studies able to ensure focus on the positive countertypical stimulus as opposed to in a courtroom where these positives would be amidst the myriad distractions of trial?

during their typically brief visit to the court.[206] Especially for jurors, then, the goal is not anything as ambitious as fundamentally changing the underlying structure of their mental associations. Instead, the hope would be that by reminding them of countertypical associations, we might momentarily activate different mental patterns while in the courthouse and reduce the impact of implicit biases on their decisionmaking.[207]

To repeat, we recognize the limitations of our recommendation. Recent research has found much smaller debiasing effects from vicarious exposure than originally estimated.[208] Moreover, such exposures must compete against the flood of typical, schema-consistent exposures we are bombarded with from mass media. That said, we see little costs to these strategies even if they appear cosmetic. There is no evidence, for example, that these exposures will be so powerful that they will overcorrect and produce net bias against Whites.

B. Break the Link Between Bias and Behavior

Even if we cannot remove the bias, perhaps we can alter decisionmaking processes so that these biases are less likely to translate into behavior. In order to keep this Article's scope manageable, we focus on the two key players in the courtroom: judges and jurors.[209]

1. Judges

a. Doubt One's Objectivity

Most judges view themselves as objective and especially talented at fair decisionmaking. For instance, Rachlinski et al. found in one survey that 97 percent of judges (thirty-five out of thirty-six) believed that they were in the top quartile in "avoid[ing] racial prejudice in decisionmaking"[210] relative to other judges attending the same conference. That is, obviously, mathematically impossible.

206. *See* Kang, *supra* note 46, at 1537 (raising the possibility of "debiasing booths" in lobbies for waiting jurors).
207. Rajees Sritharan & Bertram Gawronski, *Changing Implicit and Explicit Prejudice: Insights From the Associative-Propositional Evaluation Model*, 41 SOC. PSYCHOL. 113, 118 (2010).
208. *See* Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 141 (2010) (finding an effect size that was approximately 70 percent smaller than the original Dasgupta and Greenwald findings, *see supra* note 201).
209. Other important players obviously include staff, lawyers, and police. For a discussion of the training literature on the police and shooter bias, see Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 46–48 (2010).
210. *See* Rachlinski et al., *supra* note 86, at 1225.

(One is reminded of Lake Wobegon, where all of the children are above average.) In another survey, 97.2 percent of those administrative agency judges surveyed put themselves in the top half in terms of avoiding bias, again impossible.[211] Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-conception.

Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes himself to be objective, such belief licenses him to act on his biases. In one study, they had participants choose either the candidate profile labeled "Gary" or the candidate profile labeled "Lisa" for the job of factory manager. Both candidate profiles, comparable on all traits, unambiguously showed strong organization skills but weak interpersonal skills.[212] Half the participants were primed to view themselves as objective.[213] The other half were left alone as control.

Those in the control condition gave the male and female candidates statistically indistinguishable hiring evaluations.[214] But those who were manipulated to think of themselves as objective evaluated the male candidate higher (M=5.06 versus 3.75, p=0.039, d=0.76).[215] Interestingly, this was not due to a malleability of merit effect, in which the participants reweighted the importance of either organizational skills or interpersonal skills in order to favor the man. Instead, the discrimination was caused by straight-out disparate evaluation, in which the Gary profile was rated as more interpersonally skilled than the Lisa profile by those primed to think themselves objective (M=3.12 versus 1.94, p=0.023, d=0.86).[216] In short, thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe.

But is such a suggestion based on wishful thinking? Is there any evidence that education and reminders can actually help? There is some suggestive evidence from Emily Pronin, who has carefully studied the bias blindspot—the belief

211. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

212. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210–11 (2007).

213. This was done simply by asking participants to rate their own objectivity. Over 88 percent of the participants rated themselves as above average on objectivity. *See id.* at 209. The participants were drawn from a lay sample (not just college students).

214. *See id.* at 210–11 (M=3.24 for male candidate versus 4.05 for female candidate, p=0.21).

215. *See id.* at 211.

216. *See id.* Interestingly, the gender of the participants mattered. Female participants did not show the objectivity priming effect. *See id.*

that others are biased but we ourselves are not.[217] In one study, Emily Pronin and Matthew Kugler had a control group of Princeton students read an article from *Nature* about environmental pollution. By contrast, the treatment group read an article allegedly published in *Science* that described various nonconscious influences on attitudes and behaviors.[218] After reading an article, the participants were asked about their own objectivity as compared to their university peers. Those in the control group revealed the predictable bias blindspot and thought that they suffered from less bias than their peers.[219] By contrast, those in the treatment group did not believe that they were more objective than their peers; moreover, their more modest self-assessments differed from those of the more confident control group.[220] These results suggest that learning about nonconscious thought processes can lead people to be more skeptical about their own objectivity.

b. Increase Motivation

Tightly connected to doubting one's objectivity is the strategy of increasing one's motivation to be fair.[221] Social psychologists generally agree that motivation is an important determinant of checking biased behavior.[222] Specific to implicit bias, Nilanjana Dasgupta and Luis Rivera found that participants who were consciously motivated to be egalitarian did not allow their antigay implicit attitudes to translate into biased behavior toward a gay person. By contrast, for those lacking such motivation, strong antigay implicit attitudes predicted more biased behavior.[223]

A powerful way to increase judicial motivation is for judges to gain actual scientific knowledge about implicit social cognitions. In other words, judges should be internally persuaded that a genuine problem exists. This education and

217. *See generally* Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2007).
218. *See* Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 574 (2007). The intervention article was 1643 words long, excluding references. *See id.* at 575.
219. *See id.* at 575 (M=5.29 where 6 represented the same amount of bias as peers).
220. *See id.* For the treatment group, their self-evaluation of objectivity was M=5.88, not statistically significantly different from the score of 6, which, as noted previously, meant having the same amount of bias as peers. Also, the self-reported objectivity of the treatment group (M=5.88) differed from the control group (M=5.29) in a statistically significant way, p=0.01. *See id.*
221. For a review, see Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 211 (2009).
222. *See* Russell H. Fazio & Tamara Towles-Schwen, *The MODE Model of Attitude–Behavior Processes*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 97 (Shelly Chaiken & Yaacov Trope eds., 1999).
223. *See* Dasgupta & Rivera, *supra* note 197, at 275.

awareness can be done through self-study as well as more official judicial education. Such education is already taking place, although mostly in an ad hoc fashion.[224] The most organized intervention has come through the National Center for State Courts (NCSC). The NCSC organized a three-state pilot project in California, Minnesota, and North Dakota to teach judges and court staff about implicit bias.[225] It used a combination of written materials, videos, resource websites, Implicit Association Tests, and online lectures from subject-matter experts to provide the knowledge. Questionnaires completed before and after each educational intervention provided an indication of program effectiveness.

Although increased knowledge of the underlying science is a basic objective of an implicit bias program, the goal is not to send judges back to college for a crash course in Implicit Psychology 101. Rather, it is to persuade judges, on the merits, to recognize implicit bias as a potential problem, which in turn should increase motivation to adopt sensible countermeasures. Did the NCSC projects increase recognition of the problem and encourage the right sorts of behavioral changes? The only evidence we have is limited: voluntary self-reports subject to obvious selection biases.

For example, in California, judicial training emphasized a documentary on the neuroscience of bias.[226] Before and after watching the documentary, participants were asked to what extent they thought "a judge's decisions and court staff's interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups."[227] Before viewing the documentary, approximately 16 percent chose "rarely-never," 55 percent chose "occasionally," and 30 percent chose "most-all." After viewing the documentary, 1 percent chose "rarely-never," 20 percent chose "occasionally," and 79 percent chose "most-all."[228]

Relatedly, participants were asked whether they thought implicit bias could have an impact on behavior even if a person lacked explicit bias. Before viewing the documentary, approximately 9 percent chose "rarely-never," 45 percent chose "occasionally," and 45 percent chose "most-all." After viewing the documentary, 1 percent chose "rarely-never," 14 percent chose "occasionally," and 84 percent

224. Several of the authors of this Article have spoken to judges on the topic of implicit bias.

225. *See* PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), *available at* http://www.ncsc.org/IBReport.

226. The program was broadcast on the Judicial Branch's cable TV station and made available streaming on the Internet. *See The Neuroscience and Psychology of Decisionmaking*, ADMIN. OFF. COURTS EDUC. DIV. (Mar. 29, 2011), http://www2.courtinfo.ca.gov/cjer/aoctv/dialogue/neuro/index.htm.

227. *See* CASEY ET AL., *supra* note 225, at 12 fig.2.

228. *See id.*

chose "most-all."[229] These statistics provide some evidence that the California documentary increased awareness of the problem of implicit bias. The qualitative data, in the form of write-in comments[230] support this interpretation.

What about the adoption of behavioral countermeasures? Because no specific reforms were recommended at the time of training, there was no attempt to measure behavioral changes. All that we have are self-reports that speak to the issue. For instance, participants were asked to agree or disagree with the statement, "I will apply the course content to my work." In California, 90 percent (N=60) reported that they agreed or strongly agreed.[231] In North Dakota (N=32), 97 percent reported that they agreed or strongly agreed.[232] Three months later, there was a follow-up survey given to the North Dakota participants, but only fourteen participants replied. In that survey, 77 percent of those who responded stated that they had made efforts to reduce the potential impact of implicit bias.[233] In sum, the findings across all three pilot programs suggest that education programs can increase motivation and encourage judges to engage in some behavioral modifications. Given the limitations of the data (for example, pilot projects with small numbers of participants, self-reports, self-selection, and limited follow-up results), additional research is needed to confirm these promising but preliminary results.

From our collective experience, we also recommend the following tactics. First, training should commence early, starting with new-judge orientation when individuals are likely to be most receptive. Second, training should not immediately put judges on the defensive, for instance, by accusing them of concealing explicit bias. Instead, trainers can start the conversation with other types of decisionmaking errors and cognitive biases, such as anchoring, or less-threatening biases, such as the widespread preference for the youth over the elderly that IATs reveal. Third, judges should be encouraged to take the IAT or other measures of implicit

229. *Id.* at 12 fig.3.

230. Comments included: "raising my awareness of prevalence of implicit bias," "enlightened me on the penetration of implicit bias in everyday life, even though I consciously strive to be unbiased and assume most people try to do the same," and "greater awareness—I really appreciated the impressive panel of participants; I really learned a lot, am very interested." *See* CASEY ET AL., *supra* note 225, at 11.

231. *See id.* at 10.

232. *See id.* at 18. Minnesota answered a slightly different question: 81 percent gave the program's applicability a medium high to high rating.

233. *See id.* at 20. The strategies that were identified included: "concerted effort to be aware of bias," "I more carefully review my reasons for decisions, likes, dislikes, and ask myself if there may be bias underlying my determination," "Simply trying to think things through more thoroughly," "Reading and learning more about other cultures," and "I have made mental notes to myself on the bench to be more aware of the implicit bias and I've re-examined my feelings to see if it is because of the party and his/her actions vs. any implicit bias on my part."

bias. Numerous personal accounts have reported how the discomfiting act of taking the IAT alone motivates action. And researchers are currently studying the specific behavioral and social cognitive changes that take place through such self-discovery. That said, we do not recommend that such tests be mandatory because the feeling of resentment and coercion is likely to counter the benefits of increased self-knowledge. Moreover, judges should never be expected to disclose their personal results.

c. Improve Conditions of Decisionmaking

Implicit biases function automatically. One way to counter them is to engage in effortful, deliberative processing.[234] But when decisionmakers are short on time or under cognitive load, they lack the resources necessary to engage in such deliberation. Accordingly, we encourage judges to take special care when they must respond quickly and to try to avoid making snap judgments whenever possible. We recognize that judges are under enormous pressures to clear ever-growing dockets. That said, it is precisely under such work conditions that judges need to be especially on guard against their biases.

There is also evidence that certain elevated emotional states, either positive or negative, can prompt more biased decisionmaking. For example, a state of happiness seems to increase stereotypic thinking,[235] which can be countered when individuals are held accountable for their judgments. Of greater concern might be feelings of anger, disgust, or resentment toward certain social categories. If the emotion is consistent with the stereotypes or anticipated threats associated with that social category, then those negative emotions are likely to exacerbate implicit biases.[236]

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234. There are also ways to deploy more automatic countermeasures. In other words, one can teach one's mind to respond not reflectively but reflexively, by automatically triggering goal-directed behavior through internalization of certain if-then responses. These countermeasures function implicitly and even under conditions of cognitive load. *See generally* Saaid A. Mendoza et al., *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 514–15, 520 (2010); Monteith et al., *supra* note 221, at 218–21 (discussing bottom-up correction versus top-down).

235. *See* Galen V. Bodenhausen et al., *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 621 (1994).

236. *See* Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 EMOTION 585 (2009). The researchers found that implicit bias against gays and lesbians could be increased more by making participants feel disgust than by making participants feel anger. *See id.* at 588. Conversely, they found that implicit bias against Arabs could be increased more by making participants feel angry rather than disgusted. *See id.* at 589; *see also* David DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCHOL. SCI. 319 (2004).

In sum, judges should try to achieve the conditions of decisionmaking that allow them to be mindful and deliberative and thus avoid huge emotional swings.

d. Count

Finally, we encourage judges and judicial institutions to count. Increasing accountability has been shown to decrease the influence of bias and thus has frequently been offered as a mechanism for reducing bias. But, how can the behavior of trial court judges be held accountable if biased decisionmaking is itself difficult to detect? If judges do not seek out the information that could help them see their own potential biases, those biases become more difficult to correct. Just as trying to lose or gain weight without a scale is challenging, judges should engage in more quantified self-analysis and seek out and assess patterns of behavior that cannot be recognized in single decisions. Judges need to count.

The comparison we want to draw is with professional umpires and referees. Statistical analyses by behavioral economists have discovered various biases, including ingroup racial biases, in the decisionmaking of professional sports judges. Joseph Price and Justin Wolfers found racial ingroup biases in National Basketball Association (NBA) referees' foul calling;[237] Christopher Parsons and colleagues found ingroup racial bias in Major League Baseball (MLB) umpires' strike calling.[238] These discoveries were only possible because professional sports leagues count performance, including referee performance, in a remarkably granular and comprehensive manner.

Although NBA referees and MLB umpires make more instantaneous calls than judges, judges do regularly make quick judgments on motions, objections, and the like. In these contexts, judges often cannot slow down. So, it makes sense

237. Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q. J. ECON. 1859, 1885 (2010) ("We find that players have up to 4% fewer fouls called against them and score up to 2½% more points on nights in which their race matches that of the refereeing crew. Player statistics that one might think are unaffected by referee behavior [for example, free throw shooting] are uncorrelated with referee race. The bias in foul-calling is large enough so that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew assigned to the game.").

238. Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1433 (2011) ("Pitches are slightly more likely to be called strikes when the umpire shares the race/ethnicity of the starting pitcher, an effect that is observable only when umpires' behavior is not well monitored. The evidence also suggests that this bias has substantial effects on pitchers' measured performance and games' outcomes. The link between the small and large effects arises, at least in part, because pitchers alter their behavior in potentially discriminatory situations in ways that ordinarily would disadvantage themselves (such as throwing pitches directly over the plate).").

to count their performances in domains such as bail, probable cause, and preliminary hearings.

We recognize that such counting may be difficult for individual judges who lack both the quantitative training and the resources to track their own performance statistics. That said, even amateur, basic counting, with data collection methods never intended to make it into a peer-reviewed journal, might reveal surprising outcomes. Of course, the most useful information will require an institutional commitment to counting across multiple judges and will make use of appropriately sophisticated methodologies. The basic objective is to create a negative feedback loop in which individual judges and the judiciary writ large are given the corrective information necessary to know how they are doing and to be motivated to make changes if they find evidence of biased performances. It may be difficult to correct biases even when we do know about them, but it is virtually impossible to correct them if they remain invisible.

2. Jurors

a. Jury Selection and Composition

Individual screen. One obvious way to break the link between bias and unfair decisions is to keep biased persons off the jury. Since everyone has implicit biases of one sort or another, the more precise goal would be to screen out those with excessively high biases that are relevant to the case at hand. This is, of course, precisely one of the purposes of voir dire, although the interrogation process was designed to ferret out concealed explicit bias, not implicit bias.

One might reasonably ask whether potential jurors should be individually screened for implicit bias via some instrument such as the IAT. But the leading scientists in implicit social cognition recommend against using the test as an individually diagnostic measure. One reason is that although the IAT has enough test-retest reliability to provide useful research information about human beings generally, its reliability is sometimes below what we would like for individual assessments.[239] Moreover, real-word diagnosticity for individuals raises many more issues than just test-retest reliability. Finally, those with implicit biases need not

239. The test-retest reliability between a person's IAT scores at two different times has been found to be 0.50. For further discussion, see Kang & Lane, *supra* note 2, at 477–78. Readers should understand that "the IAT's properties approximately resemble those of sphygmomanometer blood pressure (BP) measures that are used to assess hypertension." *See* Anthony G. Greenwald & N. Sriram, *No Measure Is Perfect, but Some Measures Can Be Quite Useful: Response to Two Comments on the Brief Implicit Association Test*, 57 EXPERIMENTAL PSYCHOL. 238, 240 (2010).

be regarded as incapable of breaking the causal chain from implicit bias to judgment. Accordingly, we maintain this scientifically conservative approach and recommend against using the IAT for individual juror selection.[240]

Jury diversity. Consider what a White juror wrote to Judge Janet Bond Arterton about jury deliberations during a civil rights complaint filed by Black plaintiffs:

> During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about "those people" rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). *Had just one African-American been sitting in that room, the content of discussion would have been quite different.* And had the case been more balanced—one that hinged on fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome.
>
> I pass these thoughts onto you in the hope that the jury system can some day be improved.[241]

This anecdote suggests that a second-best strategy to striking potential jurors with high implicit bias is to increase the demographic diversity of juries[242] to get a broader distribution of biases, some of which might cancel each other out. This is akin to a diversification strategy for an investment portfolio. Moreover, in a more diverse jury, people's willingness to express explicit biases might be muted, and the very existence of diversity might even affect the operation of implicit biases as well.

In support of this approach, Sam Sommers has confirmed that racial diversity in the jury alters deliberations. In a mock jury experiment, he compared the deliberation content of all-White juries with that of racially diverse juries.[243] Racially diverse juries processed information in a way that most judges and lawyers would consider desirable: They had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer

240. For legal commentary in agreement, see, for example, Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 856–57 (2012). Roberts suggests using the IAT during orientation as an educational tool for jurors instead. *Id.* at 863–66.

241. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (quoting letter from anonymous juror) (emphasis added).

242. For a structural analysis of why juries lack racial diversity, see Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 68–71 (2008).

243. The juries labeled "diverse" featured four White and two Black jurors.

uncorrected statements, and greater discussion of race-related topics.[244] In addition to these information-based benefits, Sommers found interesting predeliberation effects: Simply by knowing that they would be serving on diverse juries (as compared to all-White ones), White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty.[245]

Given these benefits,[246] we are skeptical about peremptory challenges, which private parties deploy to decrease racial diversity in precisely those cases in which diversity is likely to matter most.[247] Accordingly, we agree with the recommendation by various commentators, including Judge Mark Bennett, to curtail substantially the use of peremptory challenges.[248] In addition, we encourage consideration of restoring a 12-member jury size as "the most effective approach" to maintain juror representativeness.[249]

b. Jury Education About Implicit Bias

In our discussion of judge bias, we recommended that judges become skeptical of their own objectivity and learn about implicit social cognition to become motivated to check against implicit bias. The same principle applies to jurors, who must be educated and instructed to do the same in the course of their jury service. This education should take place early and often. For example, Judge

244. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

245. *See* Sommers, *supra* note 242, at 87.

246. Other benefits include promoting public confidence in the judicial system. *See id.* at 82–88 (summarizing theoretical and empirical literature).

247. *See* Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. BEHAV. DECISION MAKING 467 (2007); Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527 (2008) (reviewing literature); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007) (finding that race influences the exercise of peremptory challenges in participant populations that include college students, law students, and practicing attorneys and that participants effectively justified their use of challenges in race-neutral terms).

248. *See, e.g.*, Bennett, *supra* note 85, at 168–69 (recommending the tandem solution of increased lawyer participation in voir dire and the banning of peremptory challenges); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

249. Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 427 (2009).

Bennett spends approximately twenty-five minutes discussing implicit bias during jury selection.[250]

At the conclusion of jury selection, Judge Bennett asks each potential juror to take a pledge, which covers various matters including a pledge against bias:

> I pledge *** :
>
> I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.[251]

He also gives a specific jury instruction on implicit biases before opening statements:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common

250. Judge Bennett starts with a clip from *What Would You Do?*, an ABC show that uses hidden cameras to capture bystanders' reactions to a variety of staged situations. This episode—a brilliant demonstration of bias—opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear. *What Would You Do?* (ABC television broadcast May 7, 2010), *available at* http://www.youtube.com/watch?v=ge7i60GuNRg.

251. Mark W. Bennett, Jury Pledge Against Implicit Bias (2012) (unpublished manuscript) (on file with authors). In addition, Judge Bennett has a framed poster prominently displayed in the jury room that repeats the language in the pledge.

> sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.[252]

Juror research suggests that jurors respond differently to instructions depending on the persuasiveness of each instruction's rationale. For example, jurors seem to comply more with an instruction to ignore inadmissible evidence when the *reason* for inadmissibility is potential unreliability, not procedural irregularity.[253] Accordingly, the implicit bias instructions to jurors should be couched in accurate, evidence-based, and scientific terms. As with the judges, the juror's education and instruction should not put them on the defensive, which might make them less receptive. Notice how Judge Bennett's instruction emphasizes the near universality of implicit biases, including in the judge himself, which decreases the likelihood of insult, resentment, or backlash from the jurors.

To date, no empirical investigation has tested a system like Judge Bennett's—although we believe there are good reasons to hypothesize about its benefits. For instance, Regina Schuller, Veronica Kazoleas, and Kerry Kawakami demonstrated that a particular type of reflective voir dire, which required individuals to answer an open-ended question about the possibility of racial bias,

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252. *Id.* In all criminal cases, Judge Bennett also instructs on explicit biases using an instruction that is borrowed from a statutory requirement in federal death penalty cases:

> You must follow certain rules while conducting your deliberations and returning your verdict:
>
> * * *
>
> Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex. To emphasize the importance of this requirement, the verdict form contains a certification statement. Each of you should carefully read that statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

The certification statement, contained in a final section labeled "Certification" on the Verdict Form, states the following:

> By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on the charged offense regardless of the race, color, religious beliefs, national origin, or sex of the defendant.

This certification is also shown to all potential jurors in jury selection, and each is asked if they will be able to sign it.

253. *See, e.g.*, Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046 (1997) (finding evidence that mock jurors responded differently to wiretap evidence that was ruled inadmissible either because it was illegally obtained or unreliable).

appeared successful at removing juror racial bias in assessments of guilt.[254] That said, no experiment has yet been done on whether jury instructions specifically targeted at implicit bias are effective in real-world settings. Research on this specific question is in development.

We also recognize the possibility that such instructions could lead to juror complacency or moral credentialing, in which jurors believe themselves to be properly immunized or educated about bias and thus think themselves to be more objective than they really are. And, as we have learned, believing oneself to be objective is a prime threat to objectivity. Despite these limitations, we believe that implicit bias education and instruction of the jury is likely to do more good than harm, though we look forward to further research that can help us assess this hypothesis.

c. Encourage Category-Conscious Strategies

Foreground social categories. Many jurors reasonably believe that in order to be fair, they should be as colorblind (or gender-blind, and so forth.) as possible. In other words, they should try to avoid seeing race, thinking about race, or talking about race whenever possible. But the juror research by Sam Sommers demonstrated that White jurors showed race bias in adjudicating the merits of a battery case (between White and Black people) unless they perceived the case to be somehow racially charged. In other words, until and unless White jurors felt there was a specific threat to racial fairness, they showed racial bias.[255]

What this seems to suggest is that whenever a social category bias might be at issue, judges should recommend that jurors feel free to expressly raise and foreground any such biases in their discussions. Instead of thinking it appropriate to repress race, gender, or sexual orientation as irrelevant to understanding the case, judges should make jurors comfortable with the legitimacy of raising such issues. This may produce greater confrontation among the jurors within deliberation, and evidence suggests that it is precisely this greater degree of discussion, and even confrontation, that can potentially decrease the amount of biased decisionmaking.[256]

This recommendation—to be conscious of race, gender, and other social categories—may seem to contradict some of the jury instructions that we noted

254. Regina A. Schuller, Veronica Kazoleas & Kerry Kawakami, *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009).

255. *See supra* notes 70–71.

256. *See* Alexander M. Czopp, Margo J. Monteith & Aimee Y. Mark, *Standing Up for a Change: Reducing Bias Through Interpersonal Confrontation*, 90 J. PERSONALITY & SOC. PSYCHOL. 784, 791 (2006).

above approvingly.[257] But a command that the race (and other social categories) of the defendant should not influence the juror's verdict is entirely consistent with instructions to recognize explicitly that race can have just this impact—unless countermeasures are taken. In other words, in order to make jurors behave in a colorblind manner, we can explicitly foreground the possibility of racial bias.[258]

Engage in perspective shifting. Another strategy is to recommend that jurors try shifting perspectives into the position of the outgroup party, either plaintiff or defendant.[259] Andrew Todd, Galen Bohenhausen, Jennifer Richardson, and Adam Galinsky have recently demonstrated that actively contemplating others' psychological experiences weakens the automatic expression of racial biases.[260] In a series of experiments, the researchers used various interventions to make participants engage in more perspective shifting. For instance, in one experiment, before seeing a five-minute video of a Black man being treated worse than an identically situated White man, participants were asked to imagine "what they might be thinking, feeling, and experiencing if they were Glen [the Black man], looking at the world through his eyes and walking in his shoes as he goes through the various activities depicted in the documentary."[261] By contrast, the control group was told to remain objective and emotionally detached. In other variations, perspective taking was triggered by requiring participants to write an essay imagining a day in the life of a young Black male.

These perspective-taking interventions substantially decreased implicit bias in the form of negative attitudes, as measured by both a variant of the standard IAT (the personalized IAT) and the standard race attitude IAT.[262] More important, these changes in implicit bias, as measured by reaction time instruments,

257. *See* Bennett, *supra* note 252 ("[Y]ou must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.").

258. Although said in a different context, Justice Blackmun's insight seems appropriate here: "In order to get beyond racism we must first take account of race." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

259. For a thoughtful discussion of jury instructions on "gender-, race-, and/or sexual orientation-switching," see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 252–55 (2003); *see also id.* at 257–58 (quoting actual race-switching instruction given in a criminal trial based on Prof. Lee's work).

260. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011).

261. *See id.* at 1030.

262. Experiment one involved the five-minute video. Those in the perspective-shifting condition showed a bias of M=0.43, whereas those in the control showed a bias of M=0.80. Experiment two involved the essay, in which participants in the perspective-taking condition showed M=0.01 versus M=0.49. *See id.* at 1031. Experiment three used the standard IAT. *See id.* at 1033.

also correlated with behavioral changes. For example, the researchers found that those in the perspective-taking condition chose to sit closer to a Black interviewer,[263] and physical closeness has long been understood as positive body language, which is reciprocated. Moreover, Black experimenters rated their interaction with White participants who were put in the perspective-taking condition more positively.[264]

CONCLUSION

Most of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we—all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity—have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

Confronted with a robust research basis suggesting the widespread effects of bias on decisionmaking, we are therefore forced to choose. Should we seek to be behaviorally realistic, recognize our all-too-human frailties, and design procedures and systems to decrease the impact of bias in the courtroom? Or should we ignore inconvenient facts, stick our heads in the sand, and hope they somehow go away? Even with imperfect information and tentative understandings, we choose the first option. We recognize that our suggestions are starting points, that they may not all work, and that, even as a whole, they may not be sufficient. But we do think they are worth a try. We hope that judges and other stakeholders in the justice system agree.

263. *See id.* at 1035.
264. *See id.* at 1037.

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JUDICIAL MINDFULNESS

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Like all human beings, judges are influenced by personal routines and behaviors that have become second nature to them or have somehow dropped below the radar of their conscious control. Professor Ellen Langer and others have labeled this general state "mindlessness." They have distinguished "mindful" thinking as a process that all people can employ to gain awareness of subconscious influences, and thus increase the validity of their decisions. In this Article, I establish a theory of "judicial mindfulness" that would guard against two types of "cold" bias when interpreting legal materials. The first harmful bias involves traumatic past events that might unknowingly influence judges when they decide cases that are reminiscent of the trauma. The second harmful bias involves the elimination of valid legal theories or the interpretation of ambiguous phrases to mean only one thing, thus motivating premature decision-making. Judicial mindfulness is attainable when judges implement two psychological techniques that fit within psychologists Wilson and Brekke's general framework for correcting instances of mental contamination: (1) negative practice and (2) transitional or dialectical thought. These systems alert judges to their biases by allowing them to understand how they arrive at decisions, and then offer a framework that analyzes the processes they employ to achieve legitimate legal conclusions.

I. INTRODUCTION

> "There are Three things extreamly hard, Steel, a Diamond and to know one's self."[1]
>
> —*Benjamin Franklin*

Only once have I witnessed a law student behave in a manner disrespectful of a judge. The student recounted the tale of a federal

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1. POOR RICHARD: THE ALMANACKS FOR THE YEARS 1733-1758, at 175 (Richard Saunders ed., 1964) [hereinafter ALMANAC] (citing BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (1750)). As a caveat, this Article rests on the assumption that judges should exercise self-awareness—they should know whether biases have impaired the legal justifications they provide—whenever they have measurable discretion. Just as America's judicial circuits have concerned themselves with the threat of gender and racial biases influencing the courts, a majority of Americans are concerned with these types of influences as well. *See generally* Article, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force: The Quality of Justice*, 67 S. CAL. L. REV. 745 (1994) (discussing concerns); John M. Scheb & William Lyons, *Public Holds U.S. Supreme Court in High Regard*, 77 JUDICATURE 273, 274 (1994) (noting that sixty-nine percent of the national public believed Justices should recognize and eliminate political biases from decisions). When a decision is biased, even if judges provide legal bases for their decisions, they are inherently less accurate. *See infra* Part III (describing harmful judicial biases). In the pages that follow, I provide a practical approach for judges to achieve greater self-awareness.

judge who read a self-help book in her chambers as she decided a case.[2] Because the student acted as if the judge were neglecting her official duties, his tale inspired an important question: should it be the case that judges refrain from self-help? Seemingly, the vast majority of the American judiciary are no different than book dealers: they see self-help as "the Rodney Dangerfield of publishing"—it just doesn't get any respect.[3] Like the movers-and-shakers of the business world, judges are supposed to be self-reliant in the face of personal conflict.[4] Yet, notwithstanding doubts regarding self-help, many of which are

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2. A student at a conference on judicial clerkships described a particularly odd experience while interviewing with a federal judge. When he met the judge, she was completing the review of a dispute that required a prompt judgment. The judge held two items in her hands. While, in one hand, she grasped the case file, in the other, the judge clenched a worn copy of a generic self-help book on improving decision-making. The book had been opened to a dog-eared and thoroughly highlighted page featuring a shaded box containing instructions on stress-reducing breathing techniques. Supposedly, while in the student's presence, the judge followed these exercises by the number, and then commented that such exercises enabled her to withstand the toils of her role. Professors, and students alike, were startled upon hearing the story. In fact, the student referenced the meeting to convey the downside of interviewing with judges. He echoed the popular criticism that it is not a judge's place to search for help from anything but case law or treatises in resolving a given dilemma.

3. Daniel McGinn, *Self-Help U.S.A.*, NEWSWEEK, Jan. 10, 2000, at 44.

4. Judges must achieve a final decision, just as the working world requires unquestioned obedience while performing work routines. The duty to apply the law to cases may consequently raise conflicts for judges. *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (observing that "it is more important that the applicable rule of law be settled than that it be settled right"). *Compare* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 255 (1998) (noting "traditional rules of finality of judgments" in all legal proceedings), *with* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 1958) (stressing the importance of working within an occupational calling without concern for life's pressures).

A factor that complicates matters for judges is a relatively widely held belief among judges that they should avoid referring to any personal influences in their decision-making. This situation existed in the 1920s when judges would have been "stoned in the street" for acknowledging such influences. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 275, 278 (1929). A decade later, the stigma continued, requiring judges to deal with behavioral matters in "a sneaking, hole-in-corner manner." JEROME FRANK, LAW AND THE MODERN MIND 152 (1930). And, even today, little has changed. While judges recognize the need to reduce racial and gender bias in the courts, the only way they have been willing to address such issues has been in an anonymous forum where they can deny claiming responsibility for their beliefs. *See* Article, *supra* note 1, at 969 (describing a program that "used a series of real-life vignettes gathered from the news media [and] elicited audience participation by providing each participant with computer capacity to give their opinion, anonymously and immediately, about whether a given scenario constituted gender-biased conduct"). The following risk thus presents itself: pressure to limit disclosure of personal conflicts, which do not rise to a level requiring recusal from a case, may very well condition judges to ignore such factors.

Under these models, reliance on self-help resources becomes a sign of personal weakness. *See* Julia M. Klein, Book Review, *A Noodler's Chicken Soup*, THE NATION, Mar. 12, 2001, at 31 (noting Tom Tiede's popular sentiment that readers who buy self-help books "may be congenitally programmed to fail"); Ira J. Hadnot, Editorial, *Therapy By the Book; Increasing Popularity of "Self-Help" Works Sparks Debate About Their Pluses, Minuses*, DALLAS MORNING NEWS, Apr. 23, 2000, at 1J (doubting individuals' choices when they rely on advice from unsupported research).

reasonably based,[5] executives in all fields increasingly purchase self-help titles and government agencies increasingly send top-level officials to self-mastery workshops at taxpayers' expense.[6]

While the general public might be wise to continue seeking personal guidance in its faithful trips to the bookshelves, it is less evident that judges' unique problems are best addressed in the same generic self-help racks.[7] Although judges are well respected, judging is one of the most stressful professions known (*i.e.*, judges are often torn between the mandate of the law as opposed to their own conscience).[8] From a

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5. *See* Hadnot, *supra* note 4, at 1J (observing estimates that over ninety-five percent of these books are "published without any [supporting] research").

6. Consider that the number of Americans buying self-help titles rose 15% in only three years, from 33% in 1988 to 48% in 1991. *Compare* Leonard Wood, *Self-Help Buying Trends*, PUB. WKLY., Oct. 14, 1988, at 33 (reviewing Gallup Poll from 1988); Leah Garchik, S. F. CHRON., July 27, 1991 (providing statistics for 1991), *with* Robert D. Putnam, *Are We Joiners or Loners?*, ATLANTA J. & CONST., Dec. 27, 1995, at 7A (noting that 40% of Americans belonged to some type of support group in 1994). These purchasers, in fact, occupied many of the higher stations of American professional life. *See* Wood, *supra*, at 33 (noting that the majority of self-help book buyers are college educated, aged 35-49, and earn an annual income over $30,000); Margaret Jones, *'Convergence' at the Bookstore*, PUB. WKLY., Nov. 3, 1989, at 32 (noting a "typical clientele [that is] 30-55 years old [and] college-educated or better").

In the realm of public service, self-help has touched the lives of our nation's most powerful leaders. On December 30, 1994, President Clinton invited a number of self-help specialists to a retreat at Camp David for counsel. His guests included Anthony Robbins and Stephen R. Covey, both of whom are known for self-help publications and seminars. *See* Ann Devroy, *Clinton Turns to Two Wizards of Self-Help*, MEMPHIS COM. APPEAL, Jan. 4, 1995, at 4A (describing how former Minority Speaker Newt Gingrich had also summoned Covey for advice). Yet, in light of this novel visit, a "prominent" official within the Clinton Administration reported: "I was appalled . . . . My information is that the chief of staff (Leon Panetta) didn't even know about [the meeting]." Robert Nova, Editorial, *Ickes' Unseen Hand Running Democratic Party*, BUFFALO NEWS, Jan. 14, 1995, at 3. Seemingly, this episode received more public outcry than rumors of President Reagan's multiple meetings with psychics, which incidentally evidenced similar reliance on metaphysical solutions to public officials' problems. *Compare* Wayne R. Anderson, *Why Would People Not Believe Weird Things?*, 22 SKEPTICAL INQUIRER, 42, 43 (1998) ("We smiled when we learned that Nancy Reagan arranged her schedule (and that of the president?) on the advice of an astrologer . . ."), *with* McGinn, *supra* note 3, at 45 (noting that agencies are spending taxpayers' money to send an increasing number of military officials and public administrators to self-help workshops like the Covey symposium regarding habits of effective people).

7. Seemingly, self-help book readers strive for keys to unlock the doors to their subconscious minds. They want to know what restrains them from attaining personal goals. When we consider that Americans have relied on such documents since the inception of this nation, such desires hardly seem immature or childish. *See, e.g.*, *Introduction to* ALMANACK, *supra* note 1, at vii (observing how most Americans found the *Poor Richard's* series "virtually indispensable"). However, it is not so clear that judges will prosper from applying methods that are not specifically intended for the complex legal decision-making that they face on a daily basis. *See* William J. Brennan, Jr., *Foreword*, *in* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING, at xxi (3d ed. 1997) (noting that even college graduates are not prepared to handle the legal analyses performed by first-year law students, let alone judges).

8. *See* C. Robert Showalter & Tracy D. Eells, *Psychological Stress in the Judiciary*, 33 CT. REV. 6, 6 (1996) (noting the National Judges Health-Stress Project's findings that "judges are over-represented in . . . 'high stress' categor[ies] compared to other professionals"); James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making*, 43 J. POL. 104, 114 (1981) ("Although American judges . . . are subject to the expectation that they 'follow' precedents in making decisions, they are just as obviously expected, by others *and* by themselves, to 'do justice.'"); Karl Georg Wurzel, *Methods*

psychological perspective, the major difficulty that results from such stress is increased difficulty recognizing the presence of unwanted thoughts. Studies indicate that "when individuals participate in complex tasks, they are much less aware of themselves," which is only compounded by the stress, which makes them "less self-conscious [and] undermine[s] self-regulatory processes."[9] Not only does this stress impair the judge's ability to understand limitations on his conscious control, it results in a diminished ability to "carefully weigh and elaborate upon the various sources of information impinging on them."[10] In light of such impositions, judges may very well be obligated to better understand their own limitations to successfully discharge their duties.

While generic self-help may not be the appropriate way to build necessary linkages between judges' own personalities and the judicial role,[11] this prohibition should not outweigh every imaginable self-help method. The challenge is creating a resource for resolving a judge's inner conflicts that is acceptable to peers who hold him to extremely high standards.[12] This Article creates such an alternative resource. It probes judicial mindsets with the hopes of revealing the human factors that will enable judges to achieve greater reliability in their interpretations of the most difficult cases and controversies. While we could call this method judicial self-help, we should call it judicial mindfulness because of how it is applied.

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of Judicial Thinking, *in* SCIENCE OF LEGAL METHOD 286, 298 (1921) (noting that "the judge is exposed more than any other thinker to emotional influences," which can lead to errors in judgment).

9. James W. Pennebaker, *Stream of Consciousness and Stress: Levels of Thinking*, *in* UNINTENDED THOUGHT 327, 330 (James S. Uleman & John A. Bargh eds., 1989) (hereinafter UNINTENDED THOUGHT).

10. *Id.* at 341. *See also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 783 (2001) ("[J]udges make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment.").

11. For more on this connection, see Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 2028-29 (1996): "[P]erceived [judicial] constraint comes from a text, or more precisely, [judges'] agreed-upon perception of a text.... [T]he judges' own personal ideologies are not law, as judges themselves well know. They become part of law through a process of integration and coordination whose contours are established by existing legal categories.".

12. *See* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1327 (1995) (noting how judges often write opinions to impress one another). To highlight the demands of peer pressure on the Supreme Court, see Jilda M. Aliotta, *Social Backgrounds, Social Motives and Participation on the U.S. Supreme Court*, 10 POL. BEHAV. 267, 279 (1988) (pointing out that "justices who graduated from less prestigious law schools [may] feel that they are at a disadvantage in attempting to persuade their colleagues").

II. PSYCHOLOGY AS TABOO IN LEGAL ADJUDICATION

The fact that scholars propound numerous conflicting theories of constitutional interpretation,[13] for example, suggests the possibility that these theories do not provide judges with enough guidance about how to achieve the best outcomes—how to weigh and balance the competing claims in a case. It follows that greater self-awareness of "blind spots" or internal biases will aid this balancing process. Yet, self-help hardly seems a leading contender for the appropriate solution to the problem of constitutional interpretation.[14]

The major difficulty with theories of constitutional interpretation is this: even if judges accepted them, none offer the kinds of practical guidance that judges need to improve their decisions.[15] For example, while Originalist methods of constitutional interpretation have been celebrated for eliminating instances of bias with a rigid analytical framework,[16] the theory has its drawbacks. It fails to identify how judges should prioritize conflicting historical sources or explain which approach for resolving such dilemmas is optimal in a particular instance.[17] Because the legal profession demands clarity and thorough evaluation in logical analyses, it seems hard to imagine that theories of constitutional interpretation are just too difficult for scholars to grasp or explain.[18] There has to be some other explanation that eludes us for determining whether a judge has achieved a sufficiently unbiased and

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13. Without listing the multiple variations of constitutional theories, scholars have noted the fundamental difficulty with most of these views. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 33-34 (1998) (observing the "irreconcilable tension" between variations of Originalism and living constitutionalism that "only increase as we move forward in time").

14. Presumably, some might argue that, at the most basic level, all theories of constitutional interpretation are essentially methods of judicial self-help. On this view, the only difference between the constitutional theories adopted by judges and self-help in general is the absence of psychological analysis. Yet, given the fact that constitutional scholars directly refute psychological models, this notion hardly seems compelling. *See* Robert A. Carter, *Self-Help: It All Started With Ben Franklin . . . And the Genre Continues Its Impressive Growth in Many Fields, Including Accounting Law and Medicine*, PUB. WKLY., Oct. 14, 1988, at 28 (referring to West's *Law in a Nutshell* series as a form of legal self-help); *infra* Part II.A (describing legal scholar's direct attacks on psychologists).

15. *See* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1014 (1978) ("[E]ach [theory] is theoretically defective, and . . . insofar as any of them are cast in ways that make them plausible, they would not, even if accepted, be of much assistance for actual Justices.").

16. *See* David M. Zoltnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1379 (1999) (expressing Justice Scalia's view that an Originalist perspective defies the "mainstream constitutional theory, which he believes allows judges to inject their own personal values into constitutional law").

17. *See infra* notes Part IV.B.III and accompanying text (describing potential inaccuracies in Justices' attempts to consult historical and other authoritative sources).

18. *See* Greenawalt, *supra* note 15, at 1014. (claiming that these theories may be too complex "to yield to capsulization"—that they are beyond the comprehension of mere mortals).

thus more accurate decision. In this Article, I propose one respect in which constitutional theories are deficient in practice. They fail to address an essential element of reality: judges are human beings,[19] and as a result, are motivated by influences originating beyond the scope of their immediate comprehension.[20] This is not to say that all judges experience subconscious conflicts and psychoses to a level where they are mentally disabled without aid of a special process.[21] Instead, the proposition states that theories of constitutional interpretation and popular methods of legal analysis will work optimally if judges are aware of how their own personalities and experiences might influence their legal reasoning.[22]

While many might label this the psychology of judicial decision-making,[23] we must be careful not to adopt an overly broad reading of the term *psychology* here. Psychology, in general, involves a number of analytical frameworks,[24] whereas the science to which I am referring involves the much narrower field of self-awareness. The centerpiece of this Article is the concept of mindfulness, a relatively new theory that focuses on transcending self-imposed limitations on one's decision-making and determining the alternatives that exist absent such impositions.[25] Whereas the self-awareness theory offers practical tools to modify behavior, traditional psychological methods can do more harm than good to interpreters of the Constitution for two reasons.

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19. *See* BERNARD L. SHIENTAG, THE PERSONALITY OF THE JUDGE 3 (1944) ("It has been intermittently discovered that judges are human beings, subject to the same fundamental laws of biology and of psychology as are human beings generally."); LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 12 (1999) ("Each justice is only human, and being human means sometimes making decisions that are self-serving or in other ways biased.").

20. *See* Harold D. Lasswell, *Self-Analysis and Judicial Thinking*, 40 INT'L J. ETHICS 354, 356 (1930) (recognizing that judges are influenced by "unseen compulsions" when analyzing and deciding cases); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11-12 (1921) (noting that judges are influenced by forces "so far beneath the surface that they cannot reasonably be classified as other than subconscious").

21. *See* ELLEN J. LANGER, MINDFULNESS 26-27 (1989) (observing that "[o]ne need not work through deep-seated personal conflict to make conscious those thoughts that are mindlessly processed"). In fact, scholars have doubted psychological models for this very same reason. *See* James R. Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735, 758-59 (1978) ("The essential unresolved question is whether insight for effective self-scrutiny is possible without the encouragement and guidance of an experienced psychoanalyst or psychotherapist.").

22. *See infra* Part IV.

23. *See generally* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998) (reviewing various theories in this category).

24. *See generally* James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7 (1983) (describing the applicability of multiple psychological components in the judging process, including role assumption, attitude, fact patterns, organizational behavior, environmental concepts, and self-esteem).

25. *See infra* Part III (explaining Langer's theory).

First, most psychological models are merely descriptive in nature and do not offer solutions to the problems they explore.[26] Second, and even worse, the great majority of these models are so obtuse and complex that many psychological theories exist, for all practical purposes, only within the confines of the ivory towers of the academics who originated them.[27]

Although the analytical methods that I propose would not force intensive therapy on judges before hearing cases, even my less demanding objective seems to be taboo in the field of American jurisprudence. Legal scholars dismiss the notion that judicial decisions should be evaluated on the basis of how a judge reached a particular decision. Most do not care if a judge was influenced by psychological factors, as long as the decision is justified by legally accepted methods.[28]

The remainder of this Article responds to the notion that psychology is useless in aiding judges in their decision-making by distinguishing several key points. Part II.B explains that the origin of a legal decision particularly matters to judges when facts give rise to legal indeterminacy, the condition in which "the correct theory of legal reasoning fails to yield a right answer or permits multiple answers to legal questions."[29] Next, Part III depicts the stages of the process by which judges exhibit any number of particular biases falling under five overarching categories. It then presents a model of judicial debiasing that envisions mindful judging as its objective. This Part attempts to preserve "good" biases and those instances where it is more optimal to keep a mental process operating within the judge's subconscious.[30] Part IV explains

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26. *See generally* Simon, *supra* note 23 (explaining the solely descriptive nature of current psychological models).

27. For example, consider the following "operationalized model" of judicial decision-making in the Supreme Court:

> Voting behavior on civil rights and liberties or economics = justice's party identification + appointing president's intentions index – southern regional origins – agricultural origins – family social status (for economics only) + non-Protestant religion – first born – father as government officer (for civil rights and liberties only) + judicial experience – prosecutorial/judicial experience index.

C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior: 1916-88*, 35 AM. J. POL. SCI. 460, 471-72 (1991). The researchers who developed this model confirmed that it accounts for up to fifty-one percent of the variance in decisions by forty-six Supreme Court Justices during the course of nearly six decades. *Id.* at 477. While this predictive model may be impressive to statisticians, it does little to improve the quality of judicial opinions. Just as a Justice cannot change the fact that she was born to a family of government officials, she probably would be unable to determine whether the characteristics of her fellow Justices fit neatly enough within the categories described to know how they would vote on a given issue.

28. *See infra* Part II.A (describing attacks on psychological theorists).

29. Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 320 (1989). *See also infra* Part III.A (discussing indeterminacy).

30. *See infra* Part III.C (distinguishing "good" from "bad" biases).

how and why the theory of judicial mindfulness successfully resolves some crucial problems of legal analysis. Part V addresses practical considerations regarding implementation of the theory. Part VI concludes that the proposed psychological model increases judges' decisional accuracy. We should note however, that the criticisms pointed out by philosophers and other legal practitioners, which are discussed immediately below, are often valid in cases where the law is determinate. Consequently, judicial mindfulness is not always required of the bench. We might say that this tactic should be reserved for the "tougher cases."[31]

A. The Demise of Social Science Approaches to Jurisprudence

Sociological jurisprudence—the implementation of psychological methodologies in legal analysis—emerged in the 1930s.[32] Judge Jerome Frank and Dean Roscoe Pound fostered this movement by echoing the sentiments of Justice Oliver Wendell Holmes[33] and challenging the legal profession to implement psychological methods in its analytical processes.[34] The movement grew so strong that lawyers and judges alike believed the Pound/Frank camp would soon transform the face of legal education.[35] But this raging inferno soon dwindled to no more than a candle's light.[36] And, while psychologists continue to float an occasional theory in the direction of our nation's law reviews, none have compelled

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31. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."); *infra* note 39 and accompanying text (explaining indeterminate and hard cases). Note, however, that cases can be "tough" for reasons other than legal indeterminacy.

32. *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609-10 (1908) (calling for a legal system "adjusted to human conditions").

33. *See generally* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) (noting that "[t]he life of the law has not been logic: it has been experience"); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) ("Law is merely a prediction of what judges will do.").

34. *See* FRANK, *supra* note 4, at 29 (demanding a psychological method because:

> Most of us are unwilling—and for the most part unable—to concede to what extent we are controlled by . . . biases. We cherish the notion that we are grown-up and rational, that we know why we think and act as we do, that our thoughts and deeds have an objective reference, that our beliefs are not biases but are of the other kind—the result of direct observation of objective data.).

35. James A. Elkins, *A Humanistic Perspective in Legal Education*, 62 NEB. L. REV. 494, 505, 505 n.45 (1983) (discussing the psychological movement in legal education).

36. *See* Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 348 (1984) (noting that "the checks [legal realists] drew on [social science] went unpaid for insufficient funds"); *see also* Elkins, *supra* note 35, at 508 ("After the appearance of the psychoanalytic critiques in the 1960's and the early 1970's, the concern for psychology began to wane as legal educators followed new intellectual currents.").

law schools or legal practitioners to adopt uniform systems of psychological training.

Although a myriad of theories have been advanced casting doubt on the need for psychological methods of self-awareness in the law, they essentially reduce to three primary explanations: (1) the notion of the justification process, as advocated by Richard A. Wasserstrom;[37] (2) the theory of legitimate legal reasoning, as advanced in Steven Burton's good faith thesis;[38] and (3) the notion of moderate, or what I call *healthy* indeterminacy, as illustrated by Ken Kress.[39] Together, the

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37. Wasserstrom observed that the outcome of a judicial decision does not necessarily depend on a judge's motivations when determining the law regarding that outcome. He distinguished the process of discovery from the process of justification, where justification involves applying "logic[al] analysis" and discovery involves the imagination and creative impulses a person experiences before directing her attention to the task at hand. RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 26-27 (1961) (noting that the process of justification describes thought, rather than one's reaction to a text or situation). *See also* Scot W. Anderson, Note, *Surveying the Realm: Description and Adjudication in Law's Empire*, 73 IOWA L. REV. 131, 144 n.91 (1987) ("For example, Kekule discovered the structure of the benzene ring while dozing before his fireplace. This discovery came to him from the inspiration of his dream. That dream, however, does not justify that discovery. Justification rests, in this case, on the rigors of scientific investigation."); STEVEN J. BURTON, JUDGING IN GOOD FAITH 45 n.17 (1992) ("Some causal reasons bear no relationship to justification. We may be caused to act in some way by misfiring neurons, by operant conditioning, by emotional impulses, or by external threats of harm."). Accordingly, these reasons are not legal reasons because they fail to "establish that an act was right or wrong." *Id.*

38. The good faith thesis holds that judges can reach legally justified decisions even in the face of incompatible or indeterminate rationales because they follow legally acceptable guidelines. *See* BURTON, *supra* note 37, at 12 ("[T]he rules of interpretation might be indeterminate, but all relevant policies and principles supported by all relevant political moralities may converge on one resolution. Convergence is possible at any level of analysis and might produce determinate results in a case."). Burton observed the importance of serving the judicial role, from which judges would not intentionally depart. *See id.* at 35 (noting how "judges do not fulfill their legal duty if they act only on parts of the law with which they agree").

Burton's notion of judicial honesty represents the view that judges do not intentionally deceive. *Compare* Simon, *supra* note 23, at 93-94 (suggesting that judges are genuine because most cannot become aware of their own influences without the right tools), *with* Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y, 155, 156 (1994) (noting that because judges "must always deny their authority to make law, even when they are making law. . . . [c]ourts and judges always lie"). There are yet other explanations that mediate between these extremes. *See* Simon, *supra*, at 17 (noting that if judges are "deceptive," the deception exists when they believe "even though the law seems coherent and I am not constrained by a singularly correct decision, I will nonetheless report closure because that is what I am expected to do and that serves the judicial function best"). Others might simply cite cases like *United States v. Hatter*, 519 U.S. 801 (1996) (holding that it would be unconstitutional to make judges pay Social Security and Medicare taxes, as these taxes would diminish the judges' salaries while they are in office), for the proposition that judges are self-interested and have incentives to "regularly forego candor" when arriving at decisions. *See* Idleman, *supra* note 12, at 1310.

39. Professor Kress defined indeterminacy as a situation where "legal questions lack single right answers." Kress, *supra* note 29, at 283. *See also id.* at 320 ("[L]egal indeterminacy may properly be defined in terms of legal reasoning, as follows: Law is indeterminate where the correct theory of legal reasoning fails to yield a right answer or permits multiple answers to legal questions."). A number of scholars provide similar analyses. *See* H.L.A. HART, THE CONCEPT OF LAW 273 (2d ed. 1994) (defining indeterminate law as "incompletely regulated"); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB.

Wasserstrom-Burton-Kress model of legal decision-making (hereinafter *WBK*) rests on three principles. First, judges must use legitimate legal reasons to support their decisions. Second, judges are compelled by official duty and legal training to reject purely emotional views as the byproducts of the discovery process. Third, some level of indeterminacy is healthful for the judicial process, because it provides new avenues of exploration, as long as judges employ the prior two principles in their analyses of less determinate legal bases.

B. Indeterminacy and the Rebirth of Psychological Analysis

Seemingly, the three *WBK* principles reject the notion that psychology matters in the judicial process. However, a detailed analysis of the principles reveals that each respective theorist, at the least, recognizes the potential for unreliable legal analyses when judges use traditional methods of interpretation. In Wasserstrom's model, "[t]he value of the justification process is lost . . . if the judge does not pay attention in good faith to the value of the justification he comes up with."[40] Burton acknowledges not only that "indeterminacy can be stubborn" but that decisions made in ambiguous situations deserve extra attention because they become the very "reasons . . . that justify [a] particular law in the first place."[41] Furthermore, Professor Kress acknowledges the ever-present threat of conclusions that are so rigid and formalistic that they can actually limit the level of justice delivered to the public. Perhaps these limitations might even include a judge's own decision to refrain from realizing her own participation in a system characterized by radical indeterminacy.[42]

POL'Y 411, 411 (1996) (defining indeterminacy as "the extent to which any particular legal theory cannot provide knowable answers to concrete problems"). Some even compare indeterminacy with the notion of the hard case. *See* HART, *supra*, at 272-73 (noting that in hard cases, when there is no law to be found, a judge may "follow standards or reasons for decision which are not dictated by the law").

Professor Kress affirmed that some level of indeterminacy or indecisiveness is actually beneficial and necessary for the proper functioning of the judiciary. *See* Kress, *supra*, at 293 ("[I]t is arguable that justice not only permits, but indeed *requires* moderate indeterminacy. Although justice demands that most things be settled in advance, there must be room for flexibility in marginal and exceptional cases in order that equity be done.") (emphasis added).

40. WILLIAM L. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 60 (1980).

41. BURTON, *supra* note 37, at 48 (describing the "privileged status" that judicial decision-making should occupy in ambiguous situations because of its inherent risk). *Cf. also* Guthrie et al., *supra* note 10, at 781 ("As Jerome Frank put it, if judicial decisions are 'based on judge's hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge's hunches *makes the law*.'" (citing FRANK, *supra* note 4, at 104)).

42. *See* Kress, *supra* note 29, at 336 (surveying those who recommend the "instrumental use of the indeterminacy thesis to unfreeze the legal mind and encourage creative legal solutions[,]" which simultaneously cautions against the danger of inflexible analyses). *But cf.* Lawson, *supra* note 39, at 421 ("All

To a large extent, the reliability of each *WBK* theory rests on the proposition that a judge knows he is being influenced during the process by which he discovers some principle of law when deciding a case. After all, were a judge to say that it does not matter how he initially came upon an idea because he substantiated it later at some point with legitimate methods, for this assertion to be true, he would have to know: (1) the source and extent of the motivation for her idea; (2) the weight of the motivation in determining how he used legitimate methods of analysis; and (3) that he would have selected the same methods of interpretation if the motivation had differed.

The problem with theories like *WBK* is that, in their rejection of psychology, they leave the judicial decision-making process virtually unchecked. Professor Charles Lawrence has observed the exclusion and ostracism of "students of the unconscious" in legal forums whenever they address matters extending beyond expert testimony.[43] Lawrence further explains that this result is "hardly surprising" and that the reluctance may even be "appropriate":

> The law is our effort to rationalize our relationships with one another. It is a system through which we attempt to define obligations and responsibilities. Denial of the irrational is part of that system, as is our notion that one should not be held responsible for any thoughts or motives of which one is unaware.[44]

So, the legal community accepts the *WBK*, perhaps in an effort to let sleeping dogs lie.

In the scientific community, similar arguments prevail, limiting interest in locating and eliminating bias because of the unsettling implications of detecting such contamination: "As a colleague once remarked, 'If someone asks for constructive criticism, tell them something good, because they don't really want to hear anything bad.' In a way, [all] 'news' about human cognitive capacity *is bad*."[45] Just as the *WBK* theories represent the "good news" in the legal system, the "good news" that the scientific community conjures up in defense of its disinterest in debiasing is a set of similar and "[t]ypical arguments—'The group overcomes the limitations of individual scientists,' or

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else being equal, the more certain we can be about our conclusions, the less indeterminacy we will find."). Also note Kress's rationale that "[t]he pervasiveness of easy cases undercuts . . . claim[s] of radical indeterminacy" does not preclude the possibility of unhealthy indeterminacy occurring. Kress, *supra*, at 296.

43. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329 (1987).

44. *Id.*

45. DAVID FAUST, *Preface to* THE LIMITS OF SCIENTIFIC REASONING, at xxvi (1984).

'Scientific method *ensures* protection from cognitive limitations'—[which] are put forth as self-evident, with little critical attempt to consider the substantive issues raised by the judgment literature."[46]

In judicial decision-making, the "good news" ignores these facts: "[M]aking true and making false are not things that facts do to judges. The facts don't reach out and grab the decision-maker, preventing her from deciding capriciously, or dictating themselves to her in any unavoidable way."[47] Because "[d]ifferent judges will reach different results even when they all take themselves to be pursuing the right answer," it logically follows that some level of self regulation is necessary.[48] Seeing that most of the small amount of what judges know about self-regulation has come from psychological research, the propositions for which the *WBK* theories stand exist more as a psychological defense mechanism than a true response to the issue of debiasing judges.

We are faced with the dilemma of whether judges can ever know whether or not the motivation for a decision masquerades as its justification—a justification that may happen to be false. If, indeed, judges deny recognizing their own behavioral influences, they run the risk of inaccurate[49] decisions.[50]

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46. *Id.* at xxv.

47. Jeremy Waldron, *The Irrelevance of Moral Objectivity*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 158, 183 (Robert P. George ed., 1992).

48. *Id.*

49. When I refer to inaccuracy, this does not mean judges are wrong. Instead it means they are less accurate. *See* Wurzel, *supra* note 8, at 300 (noting that "[*e*]*rrors* produced by emotion are felt most often and easiest in the field of legal thinking." (emphasis added)). Consider Robert Cover's model of the judging process. In it, he observes that judges use a process of elimination to achieve a desired result. *See* Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1624 (1999) (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) (defining term)):

> When a judge faces a question in which legal meaning is contested . . . the problem is not . . . that there is a "gap" in the law or that the law is "unclear." Rather, there is simply *too much* law—a host of meanings competing for recognition. . . . The role of the judge therefore is purely negative. It is "jurispathic" or law-killing . . . .

When judges unknowingly eliminate theories for the wrong reasons, while they are "not dishonest;" the writing of a judge's opinion will "not reflect the completeness and clarity essential to [the] thoroughgoing integrity" required of his office. Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 723 (1979). As a result, decisions lack accuracy because judges, in not stating the "real reasons" for their decisions "can be misled by th[e] pretense [of the opinion and a] hidden fact may not emerge, or may emerge incompletely." *Id.*

50. *See* Lawson, *supra* note 39, at 421-22 ("[B]ecause of the lack of consciousness about the need for standards of proof for legal claims, the standard employed in any context may shift without warning. It is difficult to apply a standard consistently if one is not aware of the standard or is not even aware that a standard is being applied.").

The concerns regarding whether a judge knows the real reasons for his decisions come into focus when we consider the risks posed by judges who do not show the "correctness of their action" when they adopt a particular theory or analyze a case in a particular way.[51] In such cases, justification may only "show that one or another way of going on should be advantaged over others without support for the reasons why."[52] Suppose that an analytical method justified under these circumstances leads to a correct decision only half of the time. Given that the decision could have gone another way, if psychological methods, such as the one proposed in this Article, help judges achieve a more well thought conclusion, it stands that the psychological method should count as a legitimate part of the justification process. In this instance, psychological methods would be relevant to the process of judging by helping judges determine and justify why they are using some approaches at the exclusion of others.[53] The next part of this Article will explore areas of legal analysis in which the lack of a psychological approach to limit bias threatens the accuracy of judicial determinations.

III. JUDICIAL BIAS AND ITS HARMFUL EFFECTS

A. Defining Judicial Bias

Critics of psychological methods of self-help in the law have treated the term "bias" in only the most general sense. The generic view of bias is so broad that it includes many aspects of the judge's own experience, which can be seen as a benefit rather than a drawback.[54] Often, the

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51. BURTON, *supra* note 37, at 19.

52. *Id.* (exploring the claims of "new jurisprudences").

53. Implementing psychological processes that reduce bias among judges makes sense for two reasons. First, scholars following the lead of Herbert Wechsler have argued that neutrality is an essential part of the judicial decision-making process. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (arguing for judges to provide "reasons that in their generality and their neutrality transcend any immediate result"). *See also* William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1263 (1986) (addressing concerns related to applying neutral principles in a modern context). Second, the Supreme Court publicly affirms these principles. *See infra* note 220 and accompanying text (explaining the position of the Supreme Court regarding the quest for neutrality).

54. Professor John Leubsdorf explains that lawmakers, by failing to define the criteria of bias or an unbiased "decision according to law," "cannot tell us what motives will subvert decision according to law and what motives will promote it." John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 241 (1987). In the most basic sense, "proof that a judge's mind is a complete *tabula rasa* demonstrates lack of qualification, not lack of bias," suggesting the value of certain personal experiences in judicial decision-making. LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 24 (2d ed. 1992). *Cf.* E. Tory Higgins & John A. Bargh, *Unconscious Sources of Subjectivity and Suffering: Is Consciousness the Solution?*, *in* THE CONSTRUCTION OF SOCIAL JUDGMENTS

definition of bias changes,[55] as legal scholars have understood that they "may omit important types of bias not yet envisioned."[56] Recognizing that certain biases are, in fact, healthy for the legal system,[57] the crucial determination becomes developing a method of debiasing that will simultaneously preserve the healthy aspects of judicial experience and eliminate the unhealthy aspects of partiality.[58] Regulations guiding judges in the area of judicial disqualification have attempted to strike this delicate balance.[59] The result has been law that is less than optimal and rife with "cloudy distinctions that disqualify an occasional judge while allowing many others to sit."[60] Even here, the Supreme Court expects sitting judges to detect and eliminate their own biases.[61]

67, 81 (Leonard L. Martin & Abraham Tesser eds., 1992) [hereinafter CONSTRUCTION] ("[I]f relatively slow, serial, limited conscious thought had to take over everything typically handled by unconscious processes, we would not be able even to get out of bed in the morning.").

55. The manner in which the definition of "bias" has transformed over the years in *Black's Law Dictionary* offers an intriguing perspective. As in the early years of *Bouvier's Law Dictionary*, *Black's* explanation of the term was similarly complex, attempting to offer a perspective on how the bias operated. *Compare* BOUVIER'S LAW DICTIONARY 238 (15th ed. 1883) (even recognizing exceptions that would permit courts to be biased against groups rather than individuals), *with* BLACK'S LAW DICTIONARY 130 (2d ed. 1910) [hereinafter BLACK'S SECOND] (containing a similarly lengthy definition). But, in more recent years, Black's has rescinded much of the former commentary. The most drastic omission occurred with the release of the Seventh Edition in 1999. No longer did the definition of bias require a judge's mind to be "perfectly open to conviction." *Compare* BLACK'S SECOND, *supra*, at 130 (alluding to a judge's "predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction"), *and* BLACK'S LAW DICTIONARY 205 (4th ed. 1968) (same), *and* BLACK'S LAW DICTIONARY 147 (5th ed. 1979) (same), *and* BLACK'S LAW DICTIONARY 162 (6th ed. 1990) (same), *with* BLACK'S LAW DICTIONARY 153 (7th ed. 1999) (limiting the definition to a pithy reference to "[i]nclination" or "prejudice," and noting that the state originates "during a trial"). Either the editors have recognized the impossibility of the mandate, or they have lost their grasp on the method by which a judge can attain such levels of impartiality. *See infra* note 72 (revealing that this is true even among the most learned judges).

56. ABRAMSON, *supra* note 54, at 24.

57. In *Liteky v. United States*, 510 U.S. 540 (1994), the Supreme Court recognized two such instances. First, it may be necessary for a judge to develop a certain animus towards a defendant to carry out his role:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) *necessary to completion of the judge's task.*

Id. at 550-51 (1994) (emphasis added). Second, the Court permits those types of judicial biases that arise from judges' exposure to legal scholarship and their resulting interpretations of the law. *Id.* at 554 ("[T]he judge's view of the law acquired in scholarly reading . . . will *not* suffice" as grounds for "'bias or prejudice' recusal").

58. *See infra* Part III.C.1 and accompanying text (explaining beneficial biases and unconscious processes of which judges lack awareness).

59. *See* 28 U.S.C. § 144 (1994) (regulating the disqualification of biased judges); 28 U.S.C. § 455(b)(1) (1994) (same); AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT § 3C (1990) (same).

60. Leubsdorf, *supra* note 54, at 238.

61. Justice Kennedy's concurrence in *Liteky* sheds light on the responsibilities of judges to detect and eliminate biases. In that case, he explains that the Court is not concerned with psychological types of biases that may be influencing the judge: "One of the very objects of law is the impartiality of its judges in fact

Vagueness is ultimately the greatest obstacle to debiasing judicial

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and in appearance. So in one sense it could be said that any disqualifying state of mind must originate from a source outside law itself. That meta-physical inquiry, however, is beside the point." *Liteky*, 510 U.S. at 558 (Kennedy, J., concurring). The reason why this rejection may at first seem undeniable is the role of the judge. The Court sees it as a duty of judges to become aware of their own biases and exercise control over them. Justice Kennedy conveyed that the Court has "accept[ed] the notion that the 'conscientious judge will, as far as possible, make himself aware of his biases . . . and, by that very self-knowledge, nullify their effect.'" *Id.* at 562 (citing *In re* J.P. Linahan, Inc., 138 F.2d 650, 652 (2d Cir. 1943) (Kennedy, J., concurring)). He further noted as a "requisite[ ] of judicial office," the "skill and capacity to disregard extraneous matters," so that judges can remain "faithful" to their oaths and "approach *every* aspect of *each* case with a neutral and objective disposition." *Id.* at 561-62 (Kennedy, J., concurring) (emphasis added). Kennedy alluded to the fact that this skill had been "acquired" by the judge but failed to explain where. *Id.* at 562 (Kennedy, J., concurring).

If Justice Kennedy is mandating that judges should somehow know how to debias themselves with knowledge gained prior to their assumption of office, he appears to be overly optimistic. Simply consider the difficulty of the Justices and the counselors in oral arguments to definitively explain bias that would rise to a "really bad" level. First was the exchange between Chief Justice Rehnquist and Petitioner's Counsel Peter J. Thompson:

> MR. THOMPSON: I think—you know, Congress, by passing this statute, a broad statute like this, basically indicated that it may be very difficult to make these determinations. I don't —
>
> QUESTION: Whether it's difficult in a particular case for a judge to make it, I certainly agree with you, but don't we have to have some uniform definition of bias before we can get at the reasonableness and so forth, which may be very difficult?
>
> MR. THOMPSON: . . . [A] definition of bias as I think it would fit into the standards that were applicable in 455(a), and what I came up with was this: circumstances that would lead a reasonable person to question whether the judge's inclination or state of mind toward a party belies favor or aversion to a degree or kind that might affect the judge's impartiality in the case.
>
> I think a more exacting definition of bias or of the standard, or to anticipate all the different ways in which it could come up . . . would be almost impossible, and it needs to, of course, be handled on a case-by-case basis.
>
> QUESTION: The problem—your response to the Chief Justice disclosed this. The problem—what you're proposing is, it doesn't just open up every prior trial that a particular defendant has had before this judge. It opens up any prior trial that involved the same kind of issues. . . .
>
> . . . Isn't there any way to avoid subjecting the judiciary to that enormous burden?

United States Supreme Court Official Transcript, *Liteky* (No. 92-6921), *available at* 1993 U.S. TRANS LEXIS 129, at *10-12.

Another attempt similarly failed, this time initiated by Justice Scalia with Respondent's Counsel Thomas G. Hungar.

> QUESTION: Can you give me a definition of pervasive bias, because I really—I agree with Justice Kennedy, I don't see what's gained by adopting this rule with this exception.
>
> MR. HUNGAR: I'm not sure. It has to be—It has been fleshed out by the courts of appeals on a case-by-case basis, and obviously it would—
>
> QUESTION: Does it mean anything different than really bad bias? Is that what it means? (Laughter)
>
> MR. HUNGAR: That might be as good a way of putting it as any, Justice Scalia.

Id. at *29-30.

In both instances, counsel quickly entered into territory so murky that their best response was allusion to the difficulty of the hypotheticals offered and the suggestion that the definition of bias is so elusive, it is best interpreted on a case-by-case basis. *Liteky* never addressed the precise steps judges should take to improve their analyses if impeded by unconscious biases of some sort. Yet, in dicta, Justice Kennedy seemed adamant that judges have a duty to do so.

decisions. Without pointing to particular instances of unhealthy bias, it becomes relatively easy to oversimplify matters by explaining that no methods would be sufficient to solve the problem: "If . . . 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will."[62] This Article acknowledges the difficulties of determining when judges should disqualify themselves for being biased.[63] In part, it borrows from the literature in this field to identify the goal of impartiality and explain the basic premises behind bias that undercuts such impartiality. Yet, it focuses on the types of bias that may be eliminated upon their recognition, preventing the need for judicial disqualification.[64] To this end, the disqualification literature disfavors those instances in which the judge relies on "an extrajudical source, resulting in an opinion on the merits based on something other than what the judge learned from participating in the case,"[65] and favors circumstances when the judge is impartial (*viz*, "lacks motives and

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62. *In re* J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943). *Cf.* Leubsdorf, *supra* note 54, at 250 (challenging vague definitions of biases as mere "unconscious motives:" "If unconscious motives sway everyone, how can one find a judge who is free of them? If only Hercules can find the correct result—or if there is no correct result—how can we say that one judge is better suited to decide a case than another?").

A more popular method of oversimplifying matters is attributing anomalies in judicial decisions to the judges' politics. If "law is politics all the way down," short of changing political parties during a case, the judge has few options to remedy the problem. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L. J. 1515, 1526 (1991) (reviewing this popular view); *see also* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 47 (1996) (noting not only that judicial decisions are strongly based upon judges' political orientations, but also that their decisions show allegiance to the political party of the president who elected them). The problem with this theory is that it relieves judges of the responsibility to understand other nonpolitical influences on their decision-making. Critics of the political explanation demand that judges be provided the tools that are necessary to explore their decisions in greater depth. *See* WRIGHTSMAN, *supra* note 19, at 55 ("Though [political] labels fit, we need to move beyond them in order to understand the determinants of opinion formation [to the] . . . theory [that] emphasizes the differences in processing information.").

63. *See, e.g.*, JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 4 (1995) ("Within th[e] framework of rules that too often fail to give adequate guidance, disqualification issues are becoming increasingly complex."); Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 117 (1994) (observing "the generally accepted rule that virtually nothing the trial judge sees or hears during the proceeding in a case can spark a bias sufficiently serious to warrant her removal").

64. *Cf. infra* text accompanying note 115 (dispelling the notion that a stigma must accompany the treatment of all unconscious or preconscious processes occurring in one's decision-making).

65. ABRAMSON, *supra* note 54, at 24. *See also* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 4.6.5, at 138-39 (1996) (explaining same notion). Extrajudicial sources create impairments in legal decision-making and reasoning when they make "finding the correct answer—or the class of answers that are not wrong . . . difficult for judges." Leubsdorf, *supra* note 54, at 261.

assumptions that would tend to warp her perception of the correct results"[66]).

Some legal scholars have attempted to categorize judicial bias broadly. For example, one commentator suggests that "[j]udges are biased when they adopt and give power to myths or stereotypes about a group."[67] Such attempts, however, do not provide methods for overcoming such biases. As a representative example, consider the reflections of Justice Lewis F. Powell on his deciding vote in *Bowers v. Hardwick*[68] in 1990: "I think I probably made a mistake in that one."[69] Powell's admitted "mistake" was basing his decision on his own experience, or lack thereof, with an entire segment of American society —gays and lesbians.[70] Some may read the quotation and determine that Justice Powell's lack of experience rose to the level of bias observed at the outset of this paragraph, or at least, perhaps, some degree of homophobia.[71] If this is so, we must ask the harder question: does the definition provided explain how the bias operates—when a "myth or stereotype" rises to a level that can contaminate a decision? Seemingly not.[72] Further, acknowledging those biases that are the most obvious does little to help categorize others that operate more discreetly.[73] The problem is simply that "[h]uman judgments—even very bad ones—do

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66. Leubsdorf, *supra* note 54 at 261; *cf. also* SHAMAN & GOLDSCHMIDT, *supra* note 63, at 70 (stressing that "the areas of personal relationships and potential bias are in serious need of clarification").

67. Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 371 (2000).

68. 478 U.S. 186 (1986).

69. Arnold Agneshwar, *Ex-Justice Says He May Have Been Wrong: Powell on Sodomy*, NAT'L L.J., Nov. 5, 1990, at 3.

70. *See, e.g.*, Mark Tanney, Note, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99, 142 (1997) (suggesting that Powell was homophobic in his *Bowers* opinion based on his comments of 1990 and the fact that Powell "had never known a gay person").

71. *See* Brown, *supra* note 67 at 369-70 ("[I]n a legal system fraught with de jure discrimination against gay men and lesbians, what does it mean to say that a *judge* manifests bias on the basis of sexual orientation? To put the issue more provocatively, what does Canon 3 mean in a world where *Bowers v. Hardwick* is good law?"); Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213, 1218 (2002) (suggesting that the *Bowers* decision and Powell's quote represent "underlying, unconscious bias against gay men").

72. *See* Diane Kobrynowicz & Monica Biernat, *Considering Correctness, Contrast, and Categorization in Stereotyping Phenomena*, *in* STEREOTYPE ACTIVATION AND INHIBITION 109, 111 (Robert S. Wyer, Jr., ed., 11th ed. 1998) (discussing the inherent difficulty of "determining the accuracy of a stereotype," let alone when one is, in fact, "bad"); Guthrie et al., *supra* note 10, at 782 (noting that "even the most learned judges have acknowledged that they do not understand *how* judges make decisions" because of the lack of probing research on the topic and the failure to connect the task with an advanced body of psychological research) (emphasis added). *But see* Brown, *supra* note 67, at 370 (explaining three instances that she believes would qualify as actionable biases under Canon 3).

73. *See* ABRAMSON, *supra* note 54 (explaining that there are many biases that have yet been discovered).

not smell."[74] The law, therefore, fails to distinguish where the line exists distinguishing good biases from bad.

Psychology can be useful in assisting judges in their analyses because a number of psychologists investigating bias and debiasing processes have begun to explain biases in terms of how they operate, rather than by their results in individual instances. Norbert Kerr and his colleagues have identified three such categories of bias, in which individuals act under "self-enhancing or self-protective motives," use "cognitive short-cuts or heuristics," or exhibit "inappropriate sensitivity or insensitivity to certain types of information."[75] Such biases lead to inevitable and detectable results. Most notably, and relevant to the process of judging, biased individuals commit "sins of omission," in which they "miss . . . good cue[s]"[76] or "sins of commission," in which they "use a bad cue" in decision-making.[77] The legal community has only recently begun to grasp these concepts,[78] and has of late focused more on sins of commission, which are easier to detect among samples of judges.[79]

In an exhaustive study of 167 federal magistrates, Professor Chris Guthrie and his colleagues investigated the effects on judges of several heuristics noted in the psychology literature during the decision-making process.[80] The study concluded that "even highly qualified judges inevitably rely on cognitive decision-making processes that can produce systematic errors in judgment."[81] While observations on how to debias judges were minimal in comparison to the authors' efforts to identify the presence of the heuristics, the researchers doubted that the simple

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74. Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 121 (1994).

75. Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 687 (1996).

76. *Id.* at 689. Particularly, these sins are committed when "the judge fails to use information held to be diagnostic by the idealized model of judgment." *Id.*

77. *Id.* An example of this sin occurs when judges use a litigant's race to reach a decision that is different from what it would have without such consideration. *Id.*

78. Guthrie et al., *supra* note 10, at 782 ("Few [studies] have dealt with the sources of judicial error.").

79. The focus of Guthrie and his colleagues' research was admittedly directed towards sins of commission. "Just as certain patterns of visual stimuli can fool people's eyesight, leading them to see things that are not really there, certain fact patterns can fool people's judgment, leading them to believe things that are not really true." *Id.* at 780. Consequently, it is mainly errors in prediction of phenomena that occupied the attention of the researchers. *See also* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 38, 53-54 (Hal R. Arkes & Kenneth R. Hammond eds., 1986) (explaining that their focus on many of the same heuristics considered by Guthrie and Rachlinski was mainly concerned with errors in applying "fundamental statistical rules" or considering "the effect of sample size on sampling variability").

80. *See* Guthrie et al., *supra* note 10, at 784 (providing descriptions of the "five common cognitive illusions" tested on the judge-respondents); *id.* at 787-816 (applying the theories to their research results).

81. *Id.* at 779.

methods accepted by most legal commentators supporting prevailing *WBK* theories—they doubted that "increased attention and greater deliberation [would] enable judges to abandon the heuristics that they are otherwise inclined to rely upon [and] avoid the illusions of judgment that these heuristics produce."[82] Instead, the study recommended that "judges . . . learn to educate themselves about cognitive illusions so that they can try to avoid the errors that these illusions tend to produce."[83] Exactly how judges should do this was an uncertain question in the literature.

The Guthrie et al. study rejected the *WBK* approach to judicial decision-making, concluding that

> [e]ven with greater [legal] resources, judges will still resort to cognitive shortcuts. If judges are unaware of the cognitive illusions that reliance on heuristics produces, then extra time and resources will be of no help. Judges will believe that their decisions are sound and choose not to spend the extra time and effort needed to make a judgment that is not influenced by cognitive illusions.[84]

These findings are equally applicable to sins of omission because the biasing processes work nearly identically. In both cases, the judge's actions raise to the level of *sins* because he "cannot easily distinguish between what 'the law says' and what [he] believes . . . ."[85] He therefore "may not know how much he is (or should be) investigating what legal sources say, and how much he is applying his own ideals."[86] Consequently, biased judicial decision-making becomes detrimental to the justice system when the "investigation is so difficult that judges must use intuitions and short-cuts, or when there is an unclear boundary between questions having correct answers and those left to the values of judges."[87]

This Article is more interested in "sins of omission" because they are more difficult to detect and have been equally, if not more, neglected than the dialogue on heuristics. While there is likewise "no single, simple answer to" the question of "[w]hat . . . the legal system [can] do to avoid or minimize" such biases,[88] there have been significant advances in the exploration of sins of omission that are worthy of mention and experimentation in judicial self-awareness. At its heart,

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82. *Id.* at 819. In fact, increased scrutiny of difficult legal sources that initially brought on biases can "feed [directly] into some cognitive illusions." *Id.* at 820.

83. *Id.* at 821.

84. *Id.* at 820.

85. Leubsdorf, *supra* note 54, at 262.

86. *Id.*

87. *Id.* at 266.

88. Guthrie et al., *supra* note 10, at 821.

this Article aims to develop a more comprehensive view of what bias is and how it operates. To this end, the section below depicts a more complete picture of how a judge progresses through the levels of developing a biased judicial opinion.

B. The Elements of the Judicial Biasing Process

Figure 1, on the next page, charts five aspects of the biasing process that can lead to judicial inaccuracy under Professor Leubsdorf's theory of cognitive judging.[89]

1. Influences Present During Issue Framing

At the most basic level, the judge can potentially trigger certain networks of thought that lead to biases when determining the essential issues to be decided in a case. According to psychologist Donal E. Carlston, all decision-makers work their way to the conclusion of a determination by accessing nodes of senses and experiences that are connected to neural networks.[90] Essentially, distinctions are blurred between sight, sound, memory, and the other senses as these nodes are activated.[91] An individual can be led anywhere along the continuum of the past events he has experienced without intending that destination.[92] In the judging process, the determination of issues can relate to matters as varied as the existing precedent,[93] rules of interpretation,[94] the judge's experience with the issue in both legal and nonlegal terms,[95] and the audience for which the judge is writing.[96] Each of these sources for issue identification can raise unwanted though associated thoughts that increase a judge's propensity toward multiple varieties of bias.

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89. *See supra* notes Part II.A (explaining criteria).

90. Donal E. Carlston, *Impression Formation and the Modular Mind: The Associated Systems Theory*, *in* THE CONSTRUCTION OF SOCIAL JUDGMENTS 301, 318-22 & fig.11.4 (Leonard L. Martin & Abraham Tesser eds., 1992) [hereinafter CONSTRUCTION].

91. *Id.*

92. This also means that "retrieval of [specific] information . . . will vary depending on the nature of other currently accessible material." *Id.* at 320. *Cf.* Timothy D. Wilson & Sara D. Hodges, *Attitudes as Temporary Constructions*, *in* CONSTRUCTION, *supra* note 90, at 37, 38 (suggesting that "people often have a large, conflicting 'data base' relevant to their attitudes on any given topic, and the attitude they have at any given time depends on the subset of these data to which they attend").

93. *See supra* Part II.A and accompanying text (discussing the presumed reliability of accepted conventions of legal reasoning).

94. *Id.*

95. *See supra* notes 54 and 57 (explaining the necessity of judges to rely on such experiences, which they do often).

96. *See supra* note 12 and accompanying text (describing audiences judges may contemplate when authoring opinions).

FIGURE 1:

PROCESS THROUGH WHICH JUDGES' BIASES INFLUENCE THEIR LEGAL DETERMINATIONS

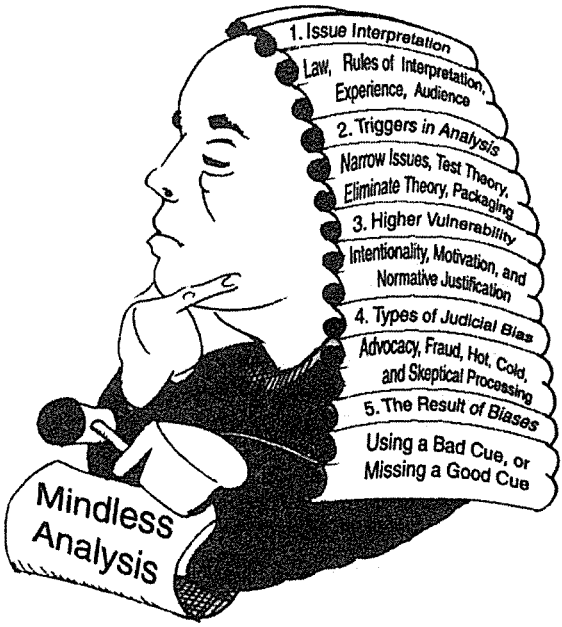

Illustration by Jamie Boling

2. Triggers in the Process of Legal Analysis

Following the specification of issues to be decided by the judge, certain conventions of legal reasoning can trigger biases related to the issues.[97] These trigger points emerge when the judge further limits an issue for the purpose of clarity,[98] selects and eliminates theories of

97. *See infra* notes 148 and 228 (addressing practically infinite tools to aid the judge in legal reasoning).

98. The power of initially framing issues in resolving any dispute is best illuminated in the mediation literature. Professor James Stark observes the following: "For their part, lawyers—who, like physicians, are taught to think in diagnostic categories—often prematurely 'classify the flow of reality' into the wrong categories, because of insufficient training or insufficient sensitivity to the unique aspects of each client's situation." James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLIN. L. REV. 457, 480-81 (1996). Often, practitioners of the law will have to retrace their steps to alert themselves to issues missed on the first go around. *Id.* at 481.

interpretation,[99] attempts to test a theory's utility by applying particular unique facts to the theory,[100] or relies on certain aesthetic measures to package the final determination for a particular audience or the general audience who will be reading the opinion.[101]

3. Factors Increasing Susceptibility to Bias

In a third element of the biasing process, the judge's own personal characteristics will determine his susceptibility to a particular variation of bias. These characteristics include the judge's level of "intentionality," in which a "judge is aware of a bias yet chooses to express it when [he] could do otherwise";[102] his "motivation," which relates to conditions where "the bias has its origins in the judge's preferences, goals, or values,"[103] or the "normative justification" in which he engages.[104] In this final instance, judges use "some normative system" to "distinguish[] appropriate or defensible biases from inappropriate or indefensible biases."[105] Based on the invocation of these three factors that increase susceptibility to biases, the judge may display any of countless biases falling under five overarching categories.

4. The Types of Bias Influencing Judges

The first type of bias is "advocacy," which roughly equates to the "selective use and emphasis of evidence to promote a hypothesis,

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99. *See supra* note 49 and accompanying text (discussing jurispathic decision-making and law killing).

100. *See* Simon, *supra* note 23, at 27 (explaining a prevailing model of judicial decision-making that includes, as key elements "test[ing] conceptions" and using the results of such tests to "decide[] which conception is the most satisfactory"). Some have asserted the possibility and recommendation that judges attempt to test the validity of their hunches. On this view, judges similarly "follow the consequences of their decisions [and evaluate] whether their subjective feeling of rightness has consequences that verify it." Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55, 81 (2001) (responding to William James's pragmatic epistemology). Because each judge is an individual who views life and the law in different and unique ways, there are few specifications on exactly how analyses based on precedent or hunches are to be tested in any definitive way. For the judge presiding in *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 595 (5th Cir. 1995), as explored in context *infra* note 191, the Archie Bunker/Homer Simpson test for determining whether a defendant's behavior rose to a sufficient level of egregiousness may have been totally warranted.

101. *See infra* Part IV.A (describing use of ornamental quotations and science fiction in legal opinions); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051-52 (2002) (describing four distinctive systems of legal analysis that he labels "aesthetics").

102. Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANN. REV. PSYCHOL. 259, 267-68 (1998).

103. *Id.* Note the way MacCoun differentiates between motivation and intentionality: "intentional bias is motivated, but not all motivated biases are intentional." *Id.* at 268.

104. *Id.*

105. *Id.*

without outright concealment or fabrication."[106] The second is "fraud," or "intentional, conscious efforts to fabricate, conceal, or distort evidence, for whatever reason—material gain, enhancing one's professional reputation, protecting one's theories, or influencing a political debate."[107] The third is "cold bias," which operates at a largely "unconscious" level "even when the judge is earnestly striving for accuracy."[108] The fourth is "hot bias," which is likewise unintended but "directionally motivated," where "the judge wants a certain outcome to prevail."[109] The final variation is "skeptical processing," where a "judge interprets the evidence in an unbiased manner, but [his] conclusions may differ from those of other judges because of [his] prior probability estimate, his asymmetric standard of proof, or both."[110] While these biases may operate in different ways and their definitions may overlap to a degree, it is possible to understand practically all instances that commentators usually call biases as falling into one of these five groups.

5. Consequences of the Presence of Bias

Biases are bad when they either lead the decision-maker to use a bad cue or miss a good one. In anticipation of the following section, which identifies ways to become aware of biases, it is assumed that the more the judge increases the missing of good cues or the use of bad ones, the more mindless his decision is in the legal sense.

In the context of Figure 1, this Article is concerned with those judges whose biases are triggered by the elimination of theories or packaging of results, which evokes instances of cold biases that cause the judge to miss good cues. To address the debiasing process in this respect, this Article draws from a number of sources. The section below identifies the framework for the process of debiasing in the most general sense, which should be equally applicable to sins of omission and commission. At each stage of the process, it highlights those actions that judges should take to gain awareness of and correct instances of mental contamination.

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106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 269. This is the category in which most heuristics probably fall. *See supra* notes 79-83 and accompanying text (describing the operation of most heuristics).

C. The Stages of the Judicial Debiasing Process

1. The Necessity of Adopting a Pragmatic Approach

Before explaining the framework for debiasing mentally contaminated judgments, further comment is necessary on distinguishing good from bad biases. The disallowance of extrajudicial reasons for an opinion, which underlies legal definitions of bias, is too vague for use as a uniformly applicable standard to determine inappropriate biases.[111] "[S]ome forms of bias are more forgivable than others" and others "seem normatively defensible"[112] because certain mental processes are better left to the unconscious.[113] A body of literature addressing the values of unconsciously dictated thoughts and actions sheds much needed light on the issue.

Two pioneers in this field are psychologists E. Tory Higgins and John A. Bargh.[114] They have advocated that preconscious and unconscious thought processes are too often inappropriately stigmatized because unwanted and uncontrollable "psychoanalytic variables such as repression and perceptual defenses" have similar origins.[115] They suggest that people naively ignore the flipside of the equation indicating that "consciousness is good when unconsciousness is bad."[116] Namely, consciousness "may be less helpful when unconsciousness itself is good."[117] While, on their face, "neither [level of mental processing] is inherently good or bad,"[118] consciousness is good in instances when "unconsciously generated influences on decisions and responses are undesirable or inappropriate to current goals, or lacking altogether (as

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111. The Supreme Court so stated when it rejected extrajudiciality as the singular meaningful factor when determining whether judges should disqualify themselves:

> As we have described [the "extrajudicial source" doctrine] . . . there is not much doctrine to the doctrine. The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for "bias or prejudice" recusal, since *some* opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will *not* suffice.

Liteky v. United States, 510 U.S. 540, 554 (1994).

112. MacCoun, *supra* note 102, at 263.

113. *Infra* Part III.C.1.

114. *See generally* E. Tory Higgins & John A. Bargh, *Unconscious Sources of Subjectivity and Suffering: Is Consciousness the Solution?*, *in* CONSTRUCTION, *supra* note 90, at 67 (making several key distinctions).

115. *Id.* at 67 n.1

116. *Id.* at 81.

117. *Id.*

118. *Id.* at 97.

in completely novel circumstances)."[119] Consciousness is bad, however, when it "inhibits the use of relevant stored knowledge."[120] As the researchers have stated:

> When considering the advantages and disadvantages of consciousness, it might be useful to distinguish *consciousness of the problem* and *conscious problem solving*. When people are functioning maladaptively, it may be necessary for them to become conscious that there is a problem before the problem can be addressed. In this sense, consciousness may be critical to problem solving. This does not imply, however, that conscious processing is the best way to solve the identified problem. . . . Once one has identified the problem, perhaps the best next step is to "sleep on it." To attempt control at this stage may restrain rather than facilitate discovering a solution.[121]

The authors likewise suggest "distinguish[ing between] the generation of solutions and the assessment of solutions."[122] While "[u]nconscious processing may be most effective and efficient when attempting to generate the broadest range of possible solutions. . . . [c]onscious processing . . . may be best when assessing the comparative utility of alternative solutions."[123]

Essentially, judges can learn two lessons from the research situating unconscious biases. "[C]onsciousness implies awareness but not understanding. If understanding is lacking, conscious processing per se is not going to solve the problem."[124] Furthermore, "the relative advantages and disadvantages of conscious versus unconscious may vary for different stages and aspects of problem-solving."[125] Observing the various dimensions of the biasing process illustrated above in Figure 1, it is clear that judges may not need to scrutinize their decision-making until they are alerted to the fact that they have increased their own

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119. *Id.* at 80.

120. *Id.* at 97. Such inhibition occurs when reference to the "here and now" only has a "less informative" orientation than reflection on the past. *Id.* at 96. Furthermore, the researchers note how it is often optimal to "[l]et sleeping dogs lie" and not waste time on an issue when "there is no solution to the problem." *Id.* at 88. They present the following hypothetical to illustrate this point. "Telling a male friend, 'Women don't find you attractive because you're so short,' may increase his consciousness of the problem, but it is unlikely to improve matters." *Id.* Yet another related difficulty is the natural tendency of decision-makers to attempt to prove their theories correct even when new information indicates that they have erred: "[W]hen one becomes aware of information disconfirming one's belief, one does not change the belief. Instead, one mentally reworks the disconfirming evidence (*e.g.*, by discrediting its validity, or through a situational attribution) in order to preserve the prior belief." *Id.* at 95.

121. *Id.* at 96.

122. *Id.* (emphasis omitted).

123. *Id.*

124. *Id.*

125. *Id.*

susceptibility to bias or they have definitively identified one. Judges also need to know when their debiasing efforts are likely to succeed.

2. Goals for Judicial Debiasing

Just as biasing needs an overarching definition, so does debiasing. In this context, debiasing cannot merely mean thought suppression or exercising some modicum of conscious control. While it is possible to gain control over unwanted thoughts, many recognize the exhausting nature of the practice if it is exercised on a regular basis.[126] Others highlight the pitfalls of a premium on vague notions of suppressing unwanted thoughts.[127] To be of use to judges, debiasing should be defined according to a feasible objective. The definition must account for the difficulty of eliminating negative thought processes that have yet to be recognized by decision-makers,[128] let alone psychologists.[129] The proposed model for judicial debiasing envisions judges who can better understand how their particular personal experiences might trigger certain biases; who can appreciate the limitations that such biases impose; who can detect these biases once triggered; and finally, who can determine the strength of such biases. Such an objective provides the judge flexibility in responding to biases. If the judge is capable of suppressing the thought sufficiently, he can allocate his energy accordingly. If the judge experiences difficulty, he might seek other help or disqualify himself, if necessary.

The value of this pragmatic approach of limiting the scope of judicial debiasing's objectives is evident upon comparison to decision-making enhancers in other professional fields. Most notable is the Recognition-Primed Decision (RPD) Model,[130] which has been applied to decision-making settings as diverse as "firefighting, command and control,

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126. *See id.* at 79-80 ("Through constant, repeated suppression of the habitual impulse, and the substitution of a different, more acceptable or appropriate response, an undesirable unconscious response may be supplanted with a new, desired one—but only through deliberate, conscious effort.").

127. Daniel M. Wegner & David J. Schneider, *Mental Control: The War of the Ghost in the Machine*, *in* UNINTENDED THOUGHT, *supra* note 9, at 287, 303 (explaining that people who want to eliminate thoughts often can, yet "thought suppression [can] ha[ve] ironic and troubling effects . . . in that the suppressed thought can return, sometimes to be more absorbing than it was at the start").

128. *See supra* note 84 and *infra* note 210 and accompanying text (describing the difficulty of dealing with problems of which someone is unaware).

129. *See* Abramson, *supra* note 54 (explaining that definitions of bias are growing in the advent of new research).

130. *See* Gary Klein, *How Can We Train Pilots to Make Better Decisions*, *in* AIRCREW TRAINING AND ASSESSMENT 165, 171 fig.9.1 (Harold F. O'Neil, Jr. & Dee H. Andrews eds., 2000) (depicting and describing how the RPD model is used to assist professionals in making more accurate decisions under uncertain conditions).

process control, [and] medicine."[131] Experts who have implemented this measure have recognized that attempting to remove all harmful biases with any type of decision-making aid is an impossible undertaking.[132] Instead, these implementers recognize that certain heuristics can create error and adopt the more realistic objective of "build[ing] the experience base for [recognizing and] using heuristics more skillfully."[133] The method of judicial debiasing proposed in this Article will similarly assist the judge in becoming more knowledgeable of himself. The specific methods highlighted provide the judge vital tools sufficient to gain such awareness.

3. Debiasing in General

In a practical context, judicial debiasing involves three categories of action by the judge to eliminate instances of mindlessness, which will be developed more fully in Part IV. The framework for the process was developed by psychologists Timothy D. Wilson and Nancy Brekke.[134] After exploring aspects of several cold biases that extended far beyond the realm of heuristics to several sins of omission,[135] the authors pointed out the four criteria necessary to correct contaminated thought processes:[136] First, people "must be aware of the unwanted mental process," which they can detect "directly" or "suspect" with awareness of an appropriate "theory."[137] Second, "[p]eople must be motivated to correct the error."[138] Although, "[e]ven if motivated to correct the error, people must be aware of the magnitude of the bias."[139] Finally, the individual must exhibit "[c]ontrol over [personal] responses to be able to correct the unwanted mental processing."[140] One example of the exercise of such control is turning off the counterargument autopilot that

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131. *Id.* at 165.

132. *Id.* at 190.

133. *Id.*

134. *See generally* Wilson & Brekke, *supra* note 74, at 119 fig.1.

135. *See id.* at 142 app. B (describing "Unwanted Consequences of Automatic Processing" and mental contamination relating to "Source Confusion" as distinct from "Failure[s] of [Applying a] Rule of Knowledge and Application" and associating each type of bias with existing theories and specific studies).

136. "Mental contamination" is defined as "the process whereby a person has an unwanted judgment, emotion, or behavior because of mental processing that is unconscious or uncontrollable," with the term "unwanted" signifying that "the person making the judgment would prefer not to be influenced in the way he or she was." Wilson & Brekke, *supra* note 74, at 117.

137. *Id.* at 119. *See also id.* at 130.

138. *Id.* Elsewhere, the researchers explain that "people's motivation to correct for bias and, more generally, their motivation to form an accurate judgment are important determinants of the extent to which they will avoid mental contamination." *Id.* at 131.

139. *Id.* at 120.

140. *Id.*

Higgins and Bargh explained was likely to persist after realization of an error in judgment.[141] The Wilson and Brekke model for debiasing is no simple one.[142] Those legal scholars who have attempted to apply it in the absence of specific practices that build on the framework have found it to be of some value, but also that it poses a number of confusing and unanswered questions.[143]

4. Judicial Debiasing

In developing a judicial debiasing approach, it must be accepted that the task is extremely complex, if for no reason other than the fact that "people [often] do not have the proper control conditions, with random assignment, that would enable them to determine how biased their judgments are, even in the aggregate."[144] Stated differently,

> [D]ecision biases will not go away by manipulating simple variables, such as asking people to work harder, or informing them about the bias, or restructuring the task, but rather will require sophisticated theories and techniques dealing with basic cognitive processes.[145]

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141. *See id.* at 133; Higgins & Bargh, *supra* note 114.

142. Elsewhere, the authors have explained the difficulty of understanding mental processes. *See* Wilson & Brekke, *supra* note 74, at 121:

> When [people] form an evaluation of someone, what they experience subjectively is usually the final product (e.g., "This guy is pretty attractive"), not the mental processes that produced this product, such as the operation of a halo effect (e.g., people do not consciously think, "Well, I like this guy, so I guess I'll boost my perception of how attractive he is").

Id.

143. *See, e.g.*, Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1287-99 (1998) (applying Wilson and Brekke's theory to the hypothetical issue of evaluating an African American student's poor level of preparation in a class the author was teaching); *id.* (describing serious unresolved issues about the course of action she should pursue under the model to correct likely errors in her unconscious thought process).

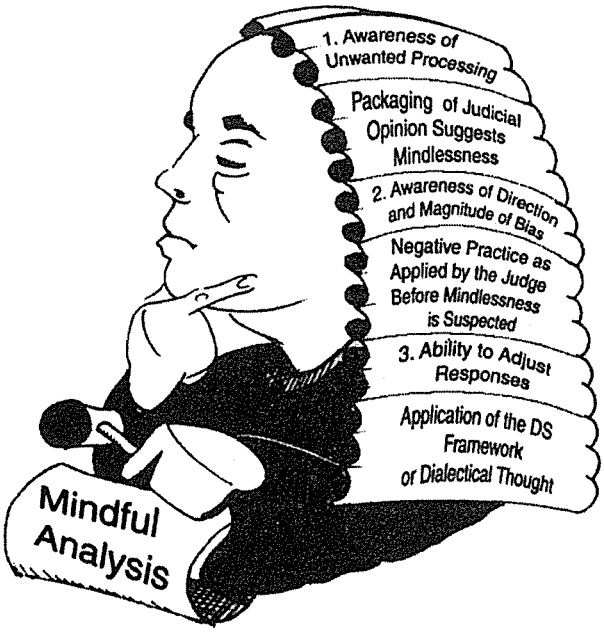
144. Wilson & Brekke, *supra* note 74, at 122. These concerns, however, have not stopped some commentators from praising simpler methods for uncovering unconscious biases. In one instance, a Web-based computer program has been theorized to settle the matter with regard to gender, race, and age bias. *See* Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 959-64 (1999) (describing several aspects of "Implicit Association Testing"); *see also Fight Hate and Promote Tolerance, Test for Hidden Bias*, *at* http://www.tolerance.org/hidden_bias/02.html (providing self-administered computer tests to detect unconscious "Sexual Orientation Bias," "Racial Bias (Arab/Muslims)," "Racial Bias (Weapons)," "Racial Bias (Black/White Children)," "Racial Bias (Black/White Adults)," "Racial Bias (Asian Americans)," "Age Bias," "Gender Bias," and "Body Image Bias"). The drawback of this approach is the level of specificity of the biases that the tests indicate. They fail to detect biases in particular instances, leaving one to determine the presence of unconscious bias in only the most general sense. Respecting particular cases, indications of the absence of a type of bias on the computer program may even be misleading to a judge who experiences such bias in the courtroom.

145. Phillip M. Massad et al., *Utilizing Social Science Information in the Policy Process: Can Psychologists Help?*, *in* ADVANCES IN APPLIED SOCIAL PSYCHOLOGY 213, 225 (Robert F. Kidd & Michael J. Saks eds., 1983).

A more intensive effort to build on these basic principles is not futile, however. "We may not be able to avoid a stereotypical or prejudiced thought, but we can stop ourselves from acting on it."[146] As depicted in Figure 2, below, the proposed method adopts three of Wilson & Brekke's four steps as guideposts. It dismisses the third step, which requires motivation to correct the bias, given that judges are required to correct biases they know may influence their judgment and that any method of self-help is of little use to those who do not desire such help.

FIGURE 2:

THE THREE STAGES OF THE JUDICIAL DEBIASING PROCESS



While Parts IV and V, below, explain the operation of the debiasing process in great detail, it is wise to highlight the fact that debiasing is a shared responsibility between judges and their educators. After judges

146. *Id.*

learn the types of strategies to identify and eliminate biases, they must endeavor to use the process in self-regulation. The judge's job at this stage is not all that daunting. As one scholar has noted:

> Judges can choose to forgo useless or misleading information. They can adjust their responses—if not internal representations—in light of information about nonrepresentativeness. They also have a third option: They can make different use of the nonrepresentative information. More specifically, they can use such information not as a basis for judgments, but as a standard of comparison. Judgments thereby acquire a comparative, relative quality, yielding a contrast effect.[147]

After a judge becomes alerted to an anomaly in his analysis, correcting the process may be as simple as relying on a different system of reasoning.[148] In Professor Pierre Schlag's view, judges inevitably resort to four of these legal "aesthetics," any of which may be shortsighted due to lack of conscious awareness.[149] Testing a theory using the DS Framework, explored in Part IV.B.1, *infra*, may demonstrate a more optimal form of reasoning that favors one aesthetic over the other. Consequently, the optimal decision may rely on a reinterpretation of fact or law in an analytical framework that enables more transitional thought.[150]

With these basic assumptions stated, the focus of this Article is not bias in the generic sense, if "generic" means an inclination to decide a case in a certain way based upon the judge's personal experience. This is because, as the *WBK* postulates, we would expect the judge to adopt legal justifications that make his ultimate decision valid regardless of his

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147. Fitz Strack, *The Different Routes to Social Judgments: Experiential Versus Informational Strategies*, *in* CONSTRUCTION, *supra* note 90, at 249, 270.

148. *See* Schlag, *supra* note 101, at 1051-52 (describing four types of legal aesthetics used by judges to achieve judicial decisions, including the "grid aesthetic," the "energy aesthetic," the "perspectivist aesthetic," and the "disassociative aesthetic"). Because all aesthetics under the model are necessary to the legal reasoning process, it is presumed that some further indication of cognitive limitation, besides the act of privileging one aesthetic over another, is necessary before a judge must implement a corrective measure. Greater awareness that an aesthetic may be limiting a judge after review of an opinion is more probable because "[a] legal aesthetic is something that a legal professional both undergoes and enacts, most often in an automatic, unconscious manner." *Id.* at 1102. After recognition that there is a problem, it may be more evident that "[a] position that may seem inexorable, or compelling [will] turn out to be an effect of operating or thinking within a particular aesthetic . . . that is itself neither necessary nor particularly appealing." *Id.* at 1112.

149. *Id.* at 1114.

150. To this end, different factors may result in biases depending on whether the analysis involves interpreting the law, facts, or mixed questions of law and fact. *See* Leubsdorf, *supra* note 54, at 262-63 (explaining that fact determinations most often create problems when they involve reliance on unproven assumptions, while legal determinations create problems when "judges do not know to what extent their own values do or should influence the result").

personal feelings.[151] Instead, the dangerous "bias" comes in two distinct forms. In the first case, the culprit is the traumatic past experience a judge may have had—one that a present legal dispute invokes and one that can ultimately determine the extent to which the judge considers and applies the governing law. The second culprit is the mistaken assumption resulting from the information a judge perceives in one way, but which could have, and should have, been understood in a completely different context. In both cases the problem is one of process (*i.e.*, these negative influences exist when judges initially review data and organize responses to them).[152] In other words, if judges have certain inclinations towards seeing things—or not seeing things—in certain ways, if the causes of these inclinations relate to the judges' past or another extralegal influence, the *WBK* approach to decision-making may not validate the judge's resolution of the legal issue.

Judges' past experiences, especially the more unsettling ones, have long been a cause for concern in the judicial disqualification literature.[153] When researchers have tested judges to determine the type of situations involving bias that would cause judges to disqualify themselves from deciding cases, they have found that the majority of judges are either ambivalent to or disposed against disqualification,[154] even when circumstances may create the appearance of impropriety.[155] Researchers explain that the "variety of factual situations with which judges are confronted daily" influence judges based on their past experiences to a much greater extent than the scenarios researchers have developed in laboratory settings.[156] Recognized examples of such situations may include instances where judges dislike defendants they

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151. It is not the aim of this Article to suggest that all of the biases indicated in Figure 1 can be eliminated or controlled sufficiently with any uniform process, or that *all* instances of such bias are possible to control or eliminate.

152. *See* LANGER, *supra* note 21, at 75-77 (describing the value of adopting a critical orientation toward process over outcome in improving one's ability to function optimally).

153. Consider Justice Frankfurter's noted comments as he disqualified himself from deciding *Public Utilities Commission v. Pollak* in 1952: "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it." Jeffrey M. Shaman, *Foreward to* LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT, at ix, x (1986) (citing Justice Frankfurter).

154. *See* SHAMAN & GOLDSCHMIDT, *supra* note 63, at 31 (1995) (finding that fifty-four percent of judges in their sample were ambivalent and thirty-two percent of the judges were disposed against disqualification "in cases involving bias").

155. *See id.* at 37 (addressing the similarity of the current case to the judge's own recent divorce); *id.* at 40 (addressing a judge who is a member of a group that restricts membership based on race and gender deciding a similar case).

156. *Id.* at 51 (commenting that a judge's experiences to open-ended questions expanded the researchers' understanding of pertinent conflicts based on the researchers' limited estimates).

knew before hearing cases,[157] where judges are assaulted by defendants in the past and later decide cases involving the same defendants,[158] or where judges make public statements on topics regarding how certain cases should be decided in general and then are assigned several of those particular types of cases.[159]

A survey of 571 trial and intermediate court judges from Arkansas, Nebraska, New Hampshire, and Ohio[160] provides crucial insight into the types of issues that judges consider are worthy of recusal on the grounds of bias. More important than those cases in which judges would promptly disqualify themselves are those cases in which judges would sit throughout the case. On balance, the judge-respondents were more likely *not* to disqualify themselves when, for example, "a divorce case [was] similar to the judge's own divorce"—even when the divorce occurred "less tha[n] three years ago,"[161] and when the "judge's son [was] threatened by a party."[162] Judges were ambivalent to disqualification in situations similar to those where "the judge [was] a member of a restrictive club and the case involve[d] a claim of discrimination similar to the [racial and gender] restriction placed by the club."[163] These examples provide only a sampling of the majority of bias-related scenarios to which judges were either ambivalent or disposed against.[164]

One explanation for these prevalent behaviors may be that the judges lacked the ability to determine the degree to which their unsettling past experiences would influence their decision-making processes. For example, "[t]he judges that mentioned situations involving relationships noted that it was difficult to pinpoint just when a personal or professional relationship becomes too close to allow them to remain impartial in a proceeding."[165] Because the disqualification decision mainly rests with judges themselves, the judges may have been warranted in deciding to wait and see if any bias would emerge in such cases. Yet, in the context of those pre- and subconscious factors that threaten to limit the judges' analyses of theories or interpretations of phrases or facts during decision-making, there can be no similar hope

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157. *Id.* app. A, Item 32, at 32.

158. *Id.* app. A, Item 21, at 77.

159. *Id.* app. A, Item 23, at 77.

160. *See id.* at 1, 8, 5, 31 (explaining conditions under which judges were tested).

161. *Id.* at 37.

162. *Id.* at 54 tbl.3.

163. *Id.* at 40.

164. For further investigation of particular scenarios that were tested, see *id.* app. A, in which the researchers labeled questions 20-25, 27-29, 31-33, and 39-40, as involving bias. *Id.* at 31 n.12 (labeling).

165. *Id.* at 61.

for self-awareness. Although these unconscious impediments on judgment may not rise to a level requiring recusal, they certainly caution us to the quality of the judges' product.

The neural networks that make judges more susceptible to bias involving past experiences can be activated by scenarios less charged than hearing a case dealing with a defendant who had formerly struck the same judge. More related to the potential bias involving the judge who had recently experienced a similar divorce, suppose that a judge had been assigned a case involving a rape or robbery resembling one that he had experienced—or, for that matter, a rape or robbery experienced by a relative or close friend. The judge's gut instinct will naturally tell him to vindicate the interests of the victim of the familiar crime. And, while the judge may attempt to control thoughts that incline him to decide the case in a manner favoring such vindication, the judge cannot deactivate preconscious networks of thought that may foreclose the evaluation of theories of law that would otherwise be available in the more traditional process of legal reasoning.[166] It becomes essential then for the judge to implement a process that evaluates the consistency and reliability of the analysis that created the outcome of his decision.[167]

The second, more prevalent, example of cold bias considered by this Article is best related in the following hypothetical scenario. Suppose that a state supreme court justice attends a distinguished panel at the local university's law school. While there, the Dean invites the justice to visit his home: "Justice, it would be an honor if you came to meet my son; he's so *spontaneous*, you'll just love him." The justice cheerfully agrees and proceeds to his waiting suburban utility vehicle. In the alternative, suppose the Dean instead had said: "Justice, it would be an honor if you came to meet my son; he's so *impulsive*, you'll just love

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166. *See* Wegner & Schneider, *supra* note 127, at 303 ("[M]otivated thinking may not have the clean-cut success we sometimes find with motivated physical activities. When we want to brush our teeth or hop on one foot, we can usually do so; when we want to control our minds, we may find that nothing works as it should.").

167. Perhaps this example brings Sigmund Freud's work to mind. Freud often emphasized the concept of "working through" serious emotional issues to gain awareness of their influence in people's lives even years after the initial incident. Anne C. Dailey, *Striving for Rationality: Open Minded: Working out the Logic of the Soul*, 86 VA. L. REV. 349, 366 (2000) (book review) (describing concept). The resulting issue for the purpose of this Article becomes whether it is realistic for us to expect that the judge has the tolerance and capacity to scrutinize the horrific details of his own misfortunes and then direct his effort toward reducing their negative effects. One view might hold that judges, as most humans, will find the process too uncomfortable and would rather leave these types of decisions unexplored as not to bring skeletons out of the closet. The contrary view would recognize that these types of situations rarely arise. Because the resulting disruption will be infrequent, judges must still recognize their official duties and address factors that might potentially influence their impartiality, regardless of the discomfort associated with the task. As we shall see, this Article identifies tools that judges may use to locate, identify, and deal with such conflicts.

him." With that, the judge instead provides a well thought excuse and proceeds to mingle with the other guests. In these last two examples, the difference in the judge's response depended on the connotations he had preconceived about the meaning of the word "impulsive," as opposed to the word "spontaneous," even though they both meant the same thing.[168] Professor Langer provides similar examples of this judgmental phenomenon:

> [T]here are as many different views as there are different observers. . . . If there is only one perspective, you can't both be right. But with an awareness of many perspectives, you could accept that you are both right and concentrate on whether your remarks had the effect that you actually wanted to produce. . . . It is easy to see that any single gesture, remark, or act . . . can have *at least* two interpretations: spontaneous versus impulsive; consistent versus rigid; softhearted versus weak; intense versus overemotional; and so on.[169]

In fact, in an experiment she appropriately titled "Patient by Any Other Name,"[170] Langer documented the same type of error in judgment among mental health professionals. Langer was prompted to investigate the prevalence of premature labeling by the troubling realization that she considered people who described certain emotional problems in clinical settings as being "patients"[171] with troubles, while she viewed friends describing the same exact emotional difficulties outside of the clinical setting as being perfectly normal.[172] Consequently, to test how widespread these types of biases were in the decision-making process, Langer and her colleague recorded an interview with "a rather

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168. *See* WEBSTER'S II NEW COLLEGE DICTIONARY 1067 (1999) [hereinafter WEBSTER'S II] (defining "spontaneous" as "[i]mpulsive; unpremeditated"). On the view that it is questionable to rely on dictionary definitions and the ambiguity of these words appears dubious, *see infra* note 218 (describing the unreliability of dictionary definitions), consider the example of a judge determining the fate of a juvenile offender. In one instance, the defendant is described by the prosecutor as being a "troubled youth." In the alternative, the same defendant is described as "a good kid who made a mistake." Although the same defendant with the same record is being described, simply based on the difference between these two contrasting designations, the judge could foreseeably reach a different conclusion.

169. LANGER, *supra* note 21, at 68-69.

170. *See generally* Ellen Langer and Robert Ableson, *A Patient By Any Other Name . . .: Clinician Group Differences in Labeling Bias*, 42 J. COUNSELING & CLINICAL PSYCHOL. 4 (1974).

171. LANGER, *supra* note 21, at 155 ("When we discussed certain behaviors or feelings that they saw as a problem, I also tended to see whatever they reported as abnormal. I saw their behavior as consistent with the label of patient.").

172. *Id.* As Langer explains,

> Later, outside of the therapy context, when I encountered exactly the same behavior [as exhibited by the patients] (for example, difficulty in making a decision or in making a commitment) or feelings (like guilt or the fear of failure) in people whom I know, it appeared to be perfectly common or to make sense given the circumstances.

Id.

ordinary-looking man" discussing aspects of his employment.[173] They previewed the film to a group of psychotherapists and told one half that he was a "patient," as opposed to the other half, to whom they told he was a "job applicant." The researchers had further placed professionals trained in two different types of clinical theory—one that supported labeling patients and one that rejected the notion of labeling—in both the control and experimental groups.[174] They subsequently observed the following:

> [W]hen we called the man on the tape a job applicant, he was perceived by both groups of therapists to be well adjusted. When he was labeled a patient, therapists trained to avoid the use of labels still saw him as well adjusted. Many of the other therapists, on the other hand, saw him as having serious psychological problems.[175]

In Langer's study, it was the viewers who had not been immunized—those who had not eschewed the use of labels—who proceeded in a mindless way by letting their preconceptions dictate their interpretation of the evidence. Without a method for determining when judges have closed their minds to meaningful alternatives, judges often fall into the same trap when interpreting statutes or cases in which word meanings or theoretical concepts can potentially lead to contrary conclusions.[176] In other words, judges might prematurely assume that the facts of a case should lead them to a certain mode of constitutional interpretation, for example, or a specific method within that mode.[177] On balance, these

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173. *Id.*

174. Half of the subjects were familiar with the "classical doctrine of mental illness," which is heavily dependent on labels indicating patients' illnesses, while the other half were behavior therapists whose training "explicitly encourages" discounting such labels. Langer & Ableson, *supra* note 170, at 8, 9.

175. LANGER, *supra* note 21, at 156. *See also* Langer & Ableson, *supra* note 170, at 7 ("Do the traditional clinicians generate a significantly bigger adjustment difference between job applicant and patient than do behavioral clinicians? The answer is yes ($F = 4.75, p < .05$).").

176. *See also supra* note 168 (discussing a judge's possible different reactions to a youth offender described as a "troubled youth" versus "a good kid who made a mistake.")

177. Edward R. Hirt & Keith D. Markman, *Multiple Explanation: A Consider-an-Alternative Strategy for Debiasing Judgments*, 69 J. PERSONALITY & SOC. PSYCHOL. 1069, 1070 (1995). Psychology offers a number of possible explanations for this result. The following commentary synopsizes a number of studies. Consider the "change-of-standard" effect, in which "people make an initial judgment . . . in relation to one standard and then later, when using the judgment in their current responding, reinterpret the meaning of that judgment in relation to a different standard without taking the change of standard into account sufficiently." E. Tory Higgins & Akiva Liberman, *Memory Errors From a Change of Standard: Lack of Awareness or Understanding?*, 27 COGNITIVE PSYCHOL. 227, 228 (1994). On this view, a judge might see a similarity between the way he had interpreted a statute earlier and mindlessly jump into the same type of analysis without considering the unique new questions posed by the litigants or the facts. Alternatively, consider the notion of "self-enhancement bias," where people exhibit "the tendency to see [themselves] as better than [they] really are." Jonathan A. White & S. Plous, *Self-Enhancement and Social Responsibility: On Caring More, But Doing Less, Than Others*, 25 J. APPLIED SOC. PSYCHOL. 1297, 1297 (1995). The danger here is that such biases "lead to a complacency in which people ignore legitimate risks and fail to take necessary actions

types of bias show how judges may be stopping short their analyses and thus their achievement of the better or best resolution to the legal problem in question at any given time.

The thrust of this Article is that premature information processing during the judicial decision-making process poses a societal problem even if the legal analysis that results from the premature commitment is perfectly rational and legitimate from a legal standpoint. What we see both in the case of the judges whose past experiences triggered a subconscious reaction and the judge at the cocktail party is a harmful type of bias. The negative connotation does not arise because the judges failed to provide a reliable justification. After all, the cases on which the first grouping of judges would rely to support their decisions, and the dictionary meaning of the word "impulsive" on which the second justice proceeded, would be perfectly legitimate.[178] Instead, these biases are dangerous if the judges allow their first impressions of a situation to dominate the structure of their future analyses without recognizing other equally viable alternatives. Put differently, danger arises if these judges stop analyzing facts too soon.[179]

On a grand scale, when such biases go unchecked during the process of legal interpretation, there exists a risk that the optimum answer will not be given. It is a danger that judges may not consider all of the relevant arguments and will thus achieve a result that—albeit certainly legally legitimate—still falls short of the best answer in the given situation, or, at the very least, a better answer. One can base this result on the fact that continuing review and reflection might have resulted in a more informed decision. And, quite possibly, the more informed

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or precautions. For example . . . people who believe they will not become sick are less likely than others to immunize themselves against the flu." *Id.* at 1298 (citations omitted). In this case, judges might feel overconfident regarding their abilities to apply constitutional theories to issues based on the fact that they have implemented such analyses for years, all the while knowing the ironic truth that they may be determining new areas of law that have not yet been addressed and require the most demanding models of interpretation. The notion that certain legal issues have never been addressed should caution judges to be especially aware of unique circumstances, while routine application of an interpretive theory would call for the opposite (*i.e.*, finding similarities with predetermined outcomes to guide the present analysis).

178. WEBSTER'S II, *supra* note 168, at 1067.

179. Normally, it poses no problem when a judge decides to stop reviewing materials in a case. Professor Simon's theory of "satisficing" sees decisions to stop researching as a natural practice among all decision-makers. *See* J. MARCH & H. SIMON, ORGANIZATIONS 140 (1959) (describing how individuals settle for the solutions that are "good enough" to meet the criteria for a decision without continuing the search until they find the best answer); *see also* Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition*, 69 U. COLO. L. REV. 71, 141 (1998) (noting how the concept of satisficing embraces, rather than rejects rationality in its approximation of human nature). The problem I address does not attack judges for satisficing. Instead, it deals with judges' conclusions that fall short of a "good enough" decision because the materials on which they rely fail to account for equally compelling or legitimate theories or facts—facts that may be at their fingertips, though they choose to ignore them due to the influence of biases.

decision could have altered the outcome of the case and thus could have transformed the law into a more responsive body of authority capable of meeting the challenges of an ever-changing society.[180]

The two instances of bias described above threaten judges because they petrify the law and limit it to the past, while the social dynamics and norms of our lives are constantly changing.[181] Accordingly, limiting the influence of these biases should be among judges' major priorities. But this task poses a significant challenge: determining *when* judges should seek help and not only *where* they need to look when they find a dilemma. I offer the following framework to illustrate how judges can determine whether they should attempt debiasing in the two situations described above.

Assume that there are two types of judges: those who are willing to address biases of which they are made aware, and those who are unwilling to address biases they know exist in a given case (short of recusal) or in the course of decision-making in general. This Article concerns itself with the first group of judges because they are the ones who will benefit by learning about new methods of self-analysis. However, both categories of biased judges will fall into three groups based on their behaviors. In the first cluster, the biased judge represents himself to peers, the public, the press, or the parties in a case as if he has not been influenced in any way. In the second cluster, these audiences will suspect something unusual about the way the biased judge reached a decision based on the textual sources he quotes or the analogies he raises. Finally, the third cluster of biased judges will make statements or issue opinions that blatantly reveal the presence of the bias.

In responding to biases in these three groups, we can easily address two of the scenarios: the first and the third. The first group of biased judges poses the greatest risk because the biased judge's audience may assume that he achieved a legal decision by exhausting all legitimate avenues of analysis, when, in fact, the bias caused him to decide the case prematurely. These judges must become aware of their own inclinations and should constantly check themselves with the methods described in Parts IV and V of this Article when making decisions. Similarly, in the third group, we need not worry excessively about the effects of bias,

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180. *See* Guthrie et al., *supra* note 10 at 778 ("The quality of the judicial system depends upon the quality of decisions that judges make.").

181. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 309 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989) (1960) (noting that a "text . . . if it is to be understood properly—*i.e.*, according to the claim it makes—must be understood at every moment, in every concrete situation, in a new and different way.").

because the biased judge's audience will know of the bias and will most likely dismiss the validity of the contaminated analysis.[182]

The second group of judges, those who act peculiarly, create the most trouble for the public because they challenge their audiences, and even themselves, to gauge whether the deviant behavior reveals the presence of bias or exists for some other purpose. To eliminate these biases, a number of legal scholars have proposed tentative solutions. Some suggest further empowerment of juries.[183] Others would invest greater resources in litigants, such as the implementation of a peremptory challenge system to remove biased appellate court judges.[184] Yet others would develop multi-judge panels instead of having judges sit alone.[185] And still more explain that certain "rules of thumb" can succeed in limiting unconscious bias.[186]

The difficulty of implementing many of these reforms would stem from the complete overhaul of the justice system that they would require. As the dialogue expands on developing ways to implement such reforms, this Article offers temporary measures that might help

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182. For example, Professor Wrightsman points to the judge who decided that a father who had been convicted of murdering his former wife, had been accused of child molestation, and had been behind in paying his child support, should have custody of his eleven year-old daughter in a legal battle against her lesbian mother because of the judge's position on homosexuality: "I'm opposed to it, and that's my beliefs." WRIGHTSMAN, *supra* note 19, at 49 (citing L. Pitts, Jr., *Judicial Homophobia Led to Bizarre Custody Decision Favoring Killer Dad*, KANSAS CITY STAR, Feb. 8, 1996, at C13). In such a case, if the judge had not turned to any legal basis for proclaiming that the girl's mother was unfit, then his statements should naturally alert others to be weary of the assessment. *Cf. Panel to Examine Remarks of Judge on Homosexuals*, N.Y. TIMES, Dec. 21, 1988, at A16 (citing Judge Jack Hampton's reason for giving a murderer a lenient sentence, "I don't care much for queers cruising the streets, picking up teen-age boys. I've got a teen-age boy . . . . [I] put prostitutes and gays at about the same level . . . . I'd be hard put to give somebody life for killing a prostitute.").

Similar sentiments about obvious biases were expressed during oral arguments in *Liteky*:

> QUESTION: Supposing that a judge—take in this 1983 trial, Judge Elliot had made rulings that were beyond challenge at all, and—but commented when the defendant finally was led off to where—["Y]ou know, I think you're a worthless, mealy-mouthed little tool, and I hope I never see you in this court again.["] Now, is that pervasive bias?
>
> MR. HUNGAR: Obviously, Mr. Chief Justice, it's difficult to draw precise lines in this area. That might well rise to the level of pervasive bias.
>
> QUESTION: If that doesn't, what would?
>
> (Laughter).

United States Supreme Court Official Transcript, Liteky v. United States, 510 U.S. 540 (1994) (No. 92-6921), *available at* 1993 U.S. TRANS LEXIS 129, at *20-21.

183. *See* Patricia Cohen, *Judicial Reasoning Is All Too Human*, N.Y. TIMES, June 30, 2001, at B9 (recounting Professor Shari Seidman Diamond's recommendation to "[r]ely on juries because they can be shielded from unlawful evidence").

184. *See generally* Bassett, *supra* note 71.

185. *See* Cohen, *supra* note 183, at B9 (relating the recommendation of Professor Steven Landsman to "[c]onsider having a panel instead of a single judge rule on [lower court] cases, as is regularly done on the appellate level").

186. *Id.* at B9 (noting the comments of Professor Jeffrey J. Rachlinski).

biased judges and their audiences recognize the need for debiasing. Often the judicial opinion itself can provide the framework for the detection of bias through the manner in which judges package their arguments. In Professor Amsterdam and Bruner's work *Minding the Law*,[187] the researchers analyzed judicial opinions to determine whether judges internalized certain societal myths.[188] Professor Guthrie and his colleagues also recognized a point helpful to their research: "[m]ost importantly, published judicial opinions include examples of the influence of cognitive illusions."[189]

To illustrate this phenomena, I will address judges' reliance on fictitious texts as authoritative materials in the decision-making process.[190] In particular, I address authoritative uses of works by George Orwell and William Shakespeare.[191] Citations to these works may

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187. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000).

188. *Id.* at ch. III. For an overview of several limiting archetypes in legal opinion writing, see also Collin O'Connor Udell, *Parading the Saurian Tail: Projection, Jung, and the Law*, 42 ARIZ. L. REV. 731, 751-74 (2000) (describing the operation of shadow jurisprudence in the courts).

189. Guthrie et al., *supra* note 10, at 821.

190. A growing body of literature suggests that judicial opinions do not reflect the judge's process of arriving at a ruling contained within it, and are thus useless as indicia of the decision-making process. *See* Simon, *supra* note 23, at 34-35 (explaining that judges themselves "emphasize[ ] the discrepancy between the opinion and the decision making process"). For the most part, this sentiment is true, since, for example, Supreme Court Justices involve themselves in multiple discrete levels of analysis before writing opinions. *See generally* JUDGES ON JUDGING: VIEWS FROM THE BENCH Part II, Chs. 7-11 (David M. O'Brien ed., 1997) (discussing these stages). However, in some respects, judges *do* show us aspects of their own behavioral influences, which are so powerful in cases that they survive through each decision-making stage and appear in the opinion. *See* Theodore Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CAL. L. REV. 89, 90, 94 (1918) (noting that "every [judicial] opinion is unavoidably a fragment of autobiography . . . [that] amounts to a confession" not to mention that the "genetic understanding" of an opinion constitutes a psychological revelation); William Domnarski, *Shakespeare in the Law*, 67 CONN. B.J. 317, 323 (1993) ("With the use of figurative language the judge declares his interest in going beyond the issue and facts before him and connecting them to the larger world of ideas . . ."). This section explores these particularly telling examples, which pertain to the entire judging process.

191. Consider that these extralegal sources represent only a small portion of a much more varied spectrum, ranging from reliance on television series and children's nursery rhymes to paintings, and even sculptures. For television series, see, for example, *De Angelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 595 (5th Cir. 1995) (comparing the conduct of an alleged harasser to that of fictional television characters: "The R.U. Withmi column did not represent a boss's demeaning harangue, or a sexually charged invitation, or a campaign of vulgarity . . . . R.U. Withmi intended to be a curmudgeon, the police department's *Archie Bunker* or *Homer Simpson*, who eyed with suspicion all authority figures, academy-trained officers . . . whatever had changed from the old days.") (emphasis added). For nursery rhymes, see, for example, *Ex parte Kailer*, 255 P. 41, 42 (Kan. 1927) (assessing the best interests of children: "Casuists could make a good argument that in the legendary case of the old woman who lived in a shoe, who had so many children she did not know what to do, the welfare and best interests of those children would be to rescue them . . . ."); *In re* Guardianship of Denlow, 384 N.Y.S. 2d 621, 630 (1976) (addressing child abandonment: "The predicament of this mother—even as [the party to proceedings] seemed to view it—was somewhat akin to the 'old woman who lived in a shoe'"); *see also* Lee v. Venice Work Vessels, Inc., 512 F.2d 85, 87-88 (5th Cir. 1975) (noting problems with "extending survival of the cause of action beyond the Administrator to the heirs" in inheritance matters: "[This] reminds us, somehow, of the fabled end of

provide a way to determine whether biases are at work. Yet, before beginning, it is noteworthy that some caution is necessary any time individuals attempt to point out biases in people other than themselves. As Professor Robert MacCoun observed:

> [T]alk is cheap—it is easier to accuse someone of bias then to actually establish that a judgment is in fact biased. Moreover, it is always possible that the bias lies in the accuser rather than (or in addition to) the accused. There are ample psychological grounds for taking such attributions with a grain of salt.[192]

While it is presumed that the review of written judicial opinions can work optimally as one method to indicate the need for judicial debiasing, judicial mindfulness moves beyond those judges who write only opinions.[193]

When judges refer to extralegal sources in their opinions, we can reach a number of conclusions. Usually, these citations are merely fleeting references, crafted by the judge to demonstrate his learnedness. One author appropriately defines these references as "ornamental" quotations, because they are merely decorative in nature.[194] However,

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'Humpty-Dumpty':

> Humpty-Dumpty sat on a wall
> Humpty-Dumpty had a great fall
> All the King's horses
> And all the King's men
> Couldn't put Humpty-Dumpty together again.

Id. at 88 & n.4). For paintings, see, for example, *In re Subpoenaed Grand Jury Witness Subpoenaed Witness v. United States*, 171 F.3d 511, 513 (7th Cir. 1999) (citing the difficulty of interpreting the Mona Lisa's smile as the basis for applying precedent and the case's outcome: "While a bright line rule would be easy to understand and enforce, *Cherney* requires that we read the nuance in Mona Lisa's smile."). For sculptures, see, for example, *Johnson v. State of Florida*, 351 So.2d 10, 13 (Fla. 1977) (Adkins, J., dissenting) (alluding to two sculptures to justify that a graphic magazine was not obscene:

> The magazine "Climax" was examined. Just as the sculpture "Bound Slave" by Michelangelo, and "David with the Head of Goliath" by Donatello, the magazine contained pictures of men with their genitals completely exposed. Just as Rembrandt's "Danae," the magazine contained pictures of a nude female stretched out in a sensuous position. . . . Granted, the magazine lacked serious literary, artistic, or scientific value, but this alone does not bring it within the rule prohibiting certain publications.).

192. MacCoun, *supra* note 102, at 263.

193. While analyzing judicial opinions to detect bias may be a useful form of oversight, the process disregards the many decisions of trial judges that are not supported by written opinions. Judicial mindfulness reaches trial judges as well.

194. Domnarski, *supra* note 190, at 318 (defining ornamental quotations as "quotations invoked because of their subject, theme or key word relationship with the judicial opinion"). *See also* Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1237 (1998) (noting that judges use extralegal allusions "not . . . to derive constitutional norms but simply to sell them"). In the present context, various citations to Orwell show no more than an ornamental use. *See* USW v. Weber, 443 U.S. 193, 219-20 (1979) (citing a passage relating to the fictional government of Oceania's declaration of war in a way that "[w]ithout words said, [sent] a wave of understanding

while ornamental quotes predominate the federal reporters, certain references are instrumental in nature—ones that seemingly convey legal principles where the law is apparently silent. I am of the view that we can gain much from distinguishing between ornamental and instrumental uses of fiction because instrumental uses are more likely to indicate that some type of force—very likely bias rooted in a past experience or hasty interpretation of an ambiguous term—has altered the way a judge has been trained to resolve a legal dispute. Consider the following example.

The case of *Florida v. Riley*[195] is one of the most illustrative examples of a judge's instrumental use of a fictional work. *Riley* involved police deployment of a helicopter to monitor an individual who cultivated marijuana bushes in his back yard. Here, the Court addressed whether police surveillance was unreasonable based on the low altitude of the helicopter (*i.e.*, it determined when surveillance exceeded the bounds of plain view and became particularized and intrusive to the individual). On balance, *Riley* emphasizes that the issue of privacy invasion is among the hardest constitutional issues to adjudicate, especially since the Framers of the Constitution could not contemplate many of the technological advances that currently define our society.[196] Seemingly then, it should raise no eyebrows that this privacy case generated conflicting beliefs and legal justifications.[197] When a plurality of the *Riley* court held that helicopters traveling above 400 feet did not violate

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rippl[ing] through [a] crowd [of spectators]" for the proposition that the majority's decision regarding Title VII "represent[ed] an equally dramatic and . . . unremarked switch in this Court's interpretation" (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR 181-82 (1949)); United States v. 15324 County Highway E., 219 F.3d 602, 603 (7th Cir. 2000) ("The year 1984 came and went without the government's transformation into the ubiquitous and all-seeing Big Brother of George Orwell's book. (This, at least, is how everyone but dyed-in-the-wool conspiracy devotees would characterize things.)").

195. 488 U.S. 445 (1988).

196. *See* David Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753, 796 (1987) (noting "issues that the framers and ratifiers did not consider, or could not have considered").

197. *See* Erwin Chemerinsky, *The Supreme Court 1988 Term: Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 51 (1989) (noting difficulties with "open textured" constitutional terms like "speech," "search," "cruel and unusual," and "excessive fines"); Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 63 (1994) ("The textual provisions at issue in constitutional adjudication are usually susceptible to more than one reasonable construction, at which point an interpreter must refer to something else to settle the ambiguity of the relevant text."). Accordingly, judges commonly refer to the Orwellian conception of an imposing government as a "Big Brother" who sees all. *See, e.g.*, United States v. 15324 County Highway E., 219 F.3d 602, 603 (7th Cir. 2000) (referencing the notion of "Big Brother" in a short line without citing the novel). They similarly cite Orwell for the notion of "double-thinking." *See, e.g.*, Rushman v. City of Milwaukee, 959 F. Supp. 1040, 1044 n.3 (E.D. Wis. 1997) ("Double-thinking is the deliberate reversal of facts and words. So, in Oceania, the Ministry of Peace waged wars; the Ministry of Truth spread lies"); Passarell v. Glickman, 1997 U.S. Dist. LEXIS 2719, at *8 (D.D.C. 1997) (noting Orwell's notion of double-speak and adding that "Orwell did not anticipate that the current Department of Agriculture of the United States would add to that list . . . .").

individual privacy interests, Justice Brennan responded by citing eight lines of George Orwell's *1984*—a passage involving Big Brother's use of helicopters:

> The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.[198]

This was a far cry from the run-of-the-mill Orwell reference for two reasons. The first striking thing about this quote is its length in comparison to the majority of such citations. But second, and even more intriguing, is Brennan's statement immediately following the quote: "Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent."[199] Characteristic of a great many cases, *Riley* represents a bold leap by a court official. In it, Justice Brennan directly defied the notion that judges are not supposed to be literary.[200] In doing so, he also exposed his inner-self to the public and his fellow Justices.[201] We gain much from this form of irregular behavior, especially when contrasted with other judges' uses of the same passage.

Compare *Gibson v. Florida Legislative Investigation Committee*,[202] in which Justice Douglas cited the very same passage from *1984*, but for a contrary purpose. *Gibson* involved the determination of whether compelled production of documents relating to membership in an organization violated the Free Exercise clause and individuals' rights to associate. In the following excerpt, note the passages redacted by Justice Brennan in *Riley*, which I have marked in italics:

> *Outside, even through the shut window pane, the world looked cold. Down in the street little eddies of wind were whirling dust and torn paper into spirals, and though the sun was shining and the sky a harsh blue, there seemed to be no color in anything except the posters that were plastered everywhere.* The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said, *while the dark eyes looked deep into*

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198. *Riley*, 488 U.S. at 466 (Brennan, J., dissenting) (citing ORWELL, *supra* note 194, at 4).

199. *Id.* at 467 (Brennan, J., dissenting).

200. *See* Domnarski, *supra* note 190, at 344 (recounting the recommendations of Chief Justice Charles Evans Hughes).

201. *See* Schroeder, *supra* note 190, at 90 (referencing judicial opinions as windows to the judge's mind).

202. 372 U.S. 539 (1963).

> *Winston's own. Down at street level another poster, torn at one corner, flapped fitfully in the wind, alternately covering and uncovering the single word INGSOC.* In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a blue-bottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows. *The patrols did not matter, however. Only the Thought Police mattered.*[203]

Something obviously missing from Brennan's reference was the fact that "[t]he patrols did not matter," which, in *Riley*, would have undercut Brennan's claim that society deems helicopter surveillance an unreasonable invasion of privacy.[204]

While readers might interpret a fictional text in an infinite number of ways,[205] Brennan's disingenuous use of *1984* may demonstrate a strong personal attachment to the work, which most likely interfered with his interpretation of the passage.[206] The danger inherent in Brennan's actions is that he may have imported other past experiences and emotional inclinations along with the initial interpretation, thus increasing the likelihood of inaccurate, or what I will soon define as mindless, decision-making. Given the good faith thesis and other affirmations of judicial honesty,[207] Brennan most probably interpreted the passage in the same way it struck him during an initial read, long

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203. *Id.* at 575-76 n.11 (Douglas, J., concurring) (noting additionally "[w]here government is the Big Brother, privacy gives way to surveillance" (footnote omitted)). While it is not my role to be a literary critic here, I still find it interesting that Justice Douglas's use of the passage shifts its focus away from the individual to society, while Brennan's draws our attention to the individual's plight.

204. It may be true that only Orwell can tell us what this phrase means. However, on its face, the notion that citizens found helicopter surveillance permissible ran contrary to Brennan's argument. The cannons of legal interpretation would direct Brennan to explain how the sentence supported his view. Justice Brennan did not explain the meaning of the quote. Instead, he let it stand as if the sentence never followed.

I should acknowledge the alternative view that Brennan's use of the Orwell passage merely underscored the invasiveness of Orwell's fictional government, which might require no mention of the omitted sentence to support its validity. Even on this reading, the sheer length and contents of the passage in both *Riley* and *Gibson* alert us to stirred emotions not normally present in judicial opinions.

205. *See* John F. Coverdale, *Text as Limit; A Plea for Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501, 1511 (1997) (explaining the deconstructionist view that "words are so subjective that texts are open to numerous or even infinite interpretations, none of which can be shown to be correct in preference to any other").

206. While there is always the possibility that one of Justice Brennan's clerks wrote the portion of the opinion referencing Orwell, it is still a safe assumption that Brennan reviewed that passage and let it stand. In any event, the question becomes why he would not address a portion of the cited work that contradicts his major point. Without a better explanation, it is likely that Brennan felt so strongly about the passage that he did not care to dilute it. Seemingly these types of abnormal behaviors alert us that judges are influenced by some other source besides the law when making their determinations. In these types of situations, it behooves the judge to consider self-analysis.

207. *See supra* note 38 and accompanying text (confirming that judges do not intentionally deceive).

before he became a judge.[208] In this respect, one could say he may have been influenced by his emotions, which were evoked by the memory of this portion of the text [209]

In analyzing *Riley*, we must look to the mechanics of Justice Brennan's reasoning process, and not necessarily its product. In other words, we must resist falling prey to an argument that may seem perfectly reasonable to the uninformed reader—an argument suggesting that *Riley* actually supports philosophers' rejection of psychology's relevance in the decision-making process. After all, none of Brennan's fellow Justices adopted or even referred to his citation of Orwell. Not to mention, Brennan's cite appeared in the dissenting section of the opinion, suggesting that the *Riley* plurality gave it no weight because of its irrelevance to the law. But the key assumption underlying this deceiving rationale is the notion that either the judge is capable of spotting the extralegal influence or his audience is. This notion ignores the fact that when judges do not disclose personal influences, it is extremely difficult for their peers to establish the possibility of bias. Furthermore, when the

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208. Researchers confirm the notion that judges return to their initial interpretations of fictional works by observing how judges cite different volumes and editions of works published in the years when they attended college, thereby increasing the probability that they used a personal edition for reference. *See* Domnarski, *supra* note 190, at 349 ("The Shakespeare judges have used is not just the Shakespeare found in *Bartlett's Book of Quotations* . . . . [J]udges have cited to more than a score of different editions of Shakespeare. . . ." With respect to quotations of *1984*, older judges cite the Hartcourt & Brace version from 1949, while those who have been appointed in more recent years cite the newer versions. *See* Florida v. Riley,, 488 U.S. 455, 466 (1988) (citing 1949 edition); USW v. Weber, 443 U.S. 193, 220 (1979) (Rehnquist, J., dissenting) (same); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 576 (1963) (Douglas, J., concurring) (same). *Contra* Cramer v. Consolidated Freightways, Inc., 209 F.3d 1122, 1136 (2000) (Fisher, J., dissenting) (citing 1992 Signet Classic version); Rushman v. Milwaukee, 959 F. Supp. 1040, 1044 (E.D. Wis. 1997) (citing from an edition reprinted in 1977).

209. At this point, I should distinguish that this Article does not take sides in the popular debate regarding whether emotions should have a place in moral decision-making. In this debate, some scholars argue that judgments made on the basis of the judge's morality are characterized by emotivism, "the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, . . . attitude, or feeling." ALASDAIR MACINTYRE, AFTER VIRTUE 11-12 (2d ed. 1984). On this view, "reason is employed only in the selection of means to ends or values already given, but not in the critical examination or clarification of the ends or values themselves." Frank I. Michelman, *The Supreme Court 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 25 n.118 (1986). Others refute "emotivism" with the process of "reflective equilibrium," in which interpreters follow the "subtle process" of "adjusting the settled law by deleting mistakes." Ken Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 378 (1984) (summarizing Dworkin's version of reflective equilibrium from RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 159-68 (1977), which built on Rawls's theory in JOHN RAWLS, A THEORY OF JUSTICE 20-21, 48-50 (1971) and John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177, 184-90 (1951)); *see also* Larry Alexander & Ken Kress, *Against Legal Principles*, *in* LAW AND INTERPRETATION 279, 306 (Andrei Marmor ed., 1995) ("In the moral realm, reflective equilibrium is championed as the correct epistemological method for discovering (constructing?) correct moral principles."). This Article does not reach the debate noted above because it addresses practical psychological tools to deal with judicial biases—a far step from the broader philosophical debate regarding the role of morals in the law.

judge doesn't know about his own influences, he can't alert others to them, and lack of self-searching makes it more likely that he will not discover them.[210] This result is more than likely guaranteed by the lack of self-inquiry that characterizes the bench, introducing the greater danger—a hidden danger—that the judge may be unaware of his combining of factual analyses with emotional ones in the creation of hierarchies of legal reasoning.[211] We can see these threats more clearly when we consider legal decision-making as a process of elimination.

According to Professor Robert Cover, law is a process of elimination where a judge eliminates theories until he arrives at the appropriate solution.[212] On this model, as Professor Burton's comments suggest, when law is indeterminate, elimination *is* justification.[213] Consequently, if judges eliminate theories on the basis of emotional attachments, they decrease the legitimacy of their legal analyses. Accordingly, if other judges have no way to know that the biased judge's reasoning is illegitimate, and adopt the same reasoning, the eventual judicial decision will be less accurate. *Riley* therefore shows us an exceptional circumstance: unless the biased judge is bold enough to provide the real reasons for his decision, or is bold enough to address these reasons with the appropriate psychological tools before sharing his view, all of the judges may fail to achieve the most accurate legal determination possible, which would be a different outcome under the same circumstances if no bias were present. The key becomes recognizing one's own biases and restraining them or alerting other judges that such influences are present.

Riley hardly stands alone. In fact, it provides a fresh perspective on countless judicial opinions, and, in each situation, compels us to shed a new light on the citing judges' conceptions of legal reasoning. When in *Levy v. Louisiana*,[214] for example, a majority of the Supreme Court addressed the issue of discrimination against children born out of wedlock and inaccurately cited lines from a despicable character in Shakespeare's *King Lear*, the quote suggests that Justices were in search

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210. *See* Simon, *supra* note 23, at 36-37 (explaining how judges are "[n]aturally" helpless to act on forces "of which they are not consciously aware").

211. Scholars have long recognized the danger of the judicial hunch—that a judge will jump to conclusions and find legal reasons to support them. *See* Hutcheson, *supra* note 4, at 277 (noting the practically uncontrollable intensity of judicial hunches as the "restless, eager ranging of the mind to overcome the confusion and the perplexities of the evidence, or of constricting and outworn concepts"); Lasswell, *supra* note 20, at 359-61 (noting unexplained feelings judges have toward attorneys based on their past experiences).

212. *See* Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) (describing the elimination process).

213. *See* BURTON, *supra* note 37, at 48 (discussing the danger of ambiguous law).

214. 391 U.S. 68 (1968).

of a message with social or moral value, even though it was codified in an extralegal source.[215]

While fiction may be the most telling of behavioral influences, a number of scholars evidence the biased use of history in Originalist interpretations. In one study, a comparison of Justice Brennan and Rehnquist's opinions revealed that "both Justices . . . use[d] the intent of the framers to support an outcome consistent with their [ideological rather than legal] predispositions."[216] With Originalism, as in their use of fiction, judges often act contrary to their professed rationales.[217] The same can be said of judges' authoritative use of dictionaries.[218] Quite

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215. *Id.* at 72 n.6 (Douglas, J.) (citing WILLIAM SHAKESPEARE, KING LEAR ACT 1, SC. 2, 1.6) (supporting rights for children born out of wedlock with the following citation:

> Why bastard, wherefore base?
> When my dimensions are as well compact,
> My mind as generous, and my shape as true,
> As honest madam's issue? Why brand they us
> With base? with baseness? bastardy? base, base?)

Contra Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 77 n.3 (1968) (Harlan, J., dissenting) (noting how Edmund, the character cited by the *Levy* majority, was an awful and untrustworthy individual, thereby conveying a different contextual message in the cited text). Note the commonality of inaccurate statements regarding such sources. *See* Domnarski, *supra* note 190, at 333 ("To a surprising and embarrassing degree judges have misused these quotations on law by not knowing the quotation's original context."). While it would not be difficult for a judge to read an entire work, and in the case of Brennan's dissent in *Riley* only one line further, emotional and behavioral inclinations evidence the operative factors dictating such mischaracterizations.

216. John B. Gates & Glenn A. Phelps, *Intentionalism in Constitutional Opinions*, 49 POL. RES. Q. 245, 256 (1995) (noting how, in some cases, both Justices used vague language with no historical examples to support the Framers, while, in other cases, they provided detailed historical analyses). *Compare* Valley Forge Christian Coll. v. American's United, 454 U.S. 464, 494 (1982) (Brennan, J., dissenting) (commenting how the Framers "surely intended" a result, without explaining how); Cent. Hudson Gas & Elec. Corp. v. PSC of N. Y., 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting) (describing commercial speech as "the kind of speech that those who drafted the First Amendment had in mind" but refraining from further historical analysis), *with* National League of Cities v. Usery, 426 U.S. 833, 876-77 (1976) (Brennan, J., dissenting) (citing extensively THE FEDERALIST NOS. 45 and 46 to support the adequacy of state protections against government encroachment); Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 466 (1982) (Rehnquist, J.) (interpreting extensively THE FEDERALIST NO. 42 to determine the constitutionality of a uniform bankruptcy law).

217. *See* Gates & Phelps, *supra* note 216, at 257 (1996) (noting inconsistency in rationales); *see also* Raymond, *supra* note 63, at 1242 (noting the way references to totalitarian governments like those depicted by Orwell are used inconsistently and unpredictably by judges in the same circumstances (observing Justice Frankfurter's "understate[ment]" of circumstances where individuals would expect him to draw such an analogy in *Rochin v. California*, 342 U.S. 165 (1952))).

218. While dictionary quoting has become a "fanatical movement," judges use them haphazardly and unpredictably. Nicholas Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Noncontractability and the Proper Incentives*, 44 DUKE L.J. 1133, 1143 (1995); *see also* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1446-47 (1994) ("[T]here has been no apparent pattern to (or discussion of) the Justices' choices of volume or vintage" of dictionary. "Individual judges must make *subjective* decisions about which dictionary . . . to use." (emphasis added)).

Critics point to cases like *Chisom v. Roemer*, 501 U.S. 380 (1991), in which Justice Scalia turned to a dictionary published in 1950 to define the word "representatives" for the purpose of interpreting a

possibly, each of these dilemmas are related to unrecognized biases, the type of which I described above.

For those who argue that emotional factors are not at work in the way judges justify their decisions, the initial burden of proof is on them to prove otherwise.[219] On this note, we should consider the comments of Professor Erwin Chemerinsky, which I will define as the Chemerinsky challenge. After recognizing that the only thing that accurately characterizes the Rehnquist Court is the quest for impartiality in decision-making,[220] Chemerinsky observed the following: Either the Court should reject the quest for neutrality all together as "a rhetorical gloss to explain . . . rulings . . . that the Court favors," or we should accept that "the Court truly seeks neutrality, but lacks a consistent theory and is thus left with an inconsistent method of decision-making."[221] In the next part of this Article, I propose that psychology can meet the demands of the Chemerinsky challenge by demonstrating the possibility of an adequate and consistent method for achieving neutrality.

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statute passed in 1982, ignoring more recent definitions of the word. *See id.* at 410 (Scalia, J., dissenting) ("There is little doubt that the ordinary meaning of 'representatives' does not include judges, see Webster's Second New International Dictionary 2114 (1950)."). These types of misuse suggest that Justices would rather use dictionaries as "'a second robust coordinating device' that permits [them] to decide and dispose easily of technical cases that they . . . find uninteresting as well as to 'reach some methodological consensus, in the face of substantive disagreements.'" Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 278-79 (1998) (citing Frederick Shaver, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV., at 232, 253). While dictionary definitions accordingly provide an "optical illusion" of "certainty—or 'plainness,'" when all that exists may be the "appearance" of these notions, the Court refrains from addressing the threat of inaccuracy. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL. 71, 72 (1994) (citation omitted). *See also* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) (refusing to create a method for determining which of two conflicting definitions of the same word in the same dictionary prevailed as the correct meaning).

219. *See* Chemerinsky, *supra* note 197, at 51 (noting the worthlessness of Justices' dedication to neutral principles when they fail to define "what constitutes such principles or how they are to be determined"). For generations, scholars have commented against "sententious admonitions to 'know thyself'" and mere assertions that judges have the ability to reach unbiased decisions. *See* Lasswell, *supra* note 20, at 362; FRANK, *supra* note 4, at 260 (noting "Peter Pan legends of juristic happy hunting ground in a land of legal absolutes"); *see also* Jerome Frank, *Are Judges Human? Part One, The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 42 (1931) (explaining the "fiction" in jurisprudence that "so-called rules were the controlling influences affecting decisions, although *we know perfectly well that what we are saying is not true*"). With assertions of this nature, it seems likely that judges, like all decision-makers, cannot combat the negative effects of behavioral influences until they can observe these influences in action.

220. *See* Chemerinsky, *supra* note 197, at 91 (noting that the Court "sweepingly reject[s] all judicial value imposition," finds "certain types of value judgements are impermissible," and yet "never explain[s] the line between the allowable and the unacceptable"); *see also id.* at 48 (noting that commentators are "hard pressed to find a coherent approach to constitutional decisionmaking" on the Rehnquist court, even in light of their goal of neutrality).

221. *See id.* at 59.

IV. JUDICIAL MINDFULNESS

This section aims to develop the general framework for judicial debiasing by exploring aspects of Professor Ellen Langer's theory of mindfulness. The theory is extremely helpful in clarifying the goals of debiasing and in identifying what debiasing seeks to avoid with respect to two types of cold biases outlined above in Part III.C. Professor Langer's theory developed out of her investigations of the way people limit themselves during the decision-making process.[222] Her research explored the conditions required for overcoming such limitations, distinguishing mindful thinking from mindless thinking by highlighting the importance of "cognitive flexibility,"[223] a condition in which people view "[a] situation or environment from several perspectives," instead of "rushing headlong from questions to answers."[224] Put simply, mindful thinking involves "drawing novel distinctions, examining information from new perspectives, and being sensitive to context,"[225] whereas mindless thinking is characterized by "treat[ing] information as though it were *context-free*—true regardless of circumstances."[226] This theory echoed the concerns of sociological jurisprudes and others, who warned against judges with slot machine minds.[227]

At first glance, it may seem reasonable to assume that judges are engaging in a mindful approach when they analyze facts and apply

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222. *See generally* LANGER, *supra* note 21 (exploring the human process of decision-making).

223. Justin Brown & Ellen Langer, *Mindfulness and Intelligence: A Comparison*, 25 EDUC. PSYCHOLOGIST 305, 314 (1990).

224. Ellen J. Langer, *A Mindful Education*, 28 EDUC. PSYCHOLOGIST 43, 44 (1993).

225. *Id.*

226. LANGER, *supra* note 21, at 3. Mindlessness occurs in three distinct ways. The first form, "entrapment by category," applies when we limit ourselves to interpreting the facts in life in the way we originally encountered them, which is harmful because we do not update our original assumptions. *Id.* at 10. The second form, "automatic behavior," occurs when "we take in and use limited signals from the world around us . . . without letting other signals . . . penetrate as well." *Id.* at 12. Finally, in the third form, "acting from a single perspective," we simply see rules as "inflexible." *Id.* at 6. In each of these cases, the danger is "moving directly from problem to solution" without exploring other viable alternatives. Brown & Langer, *supra* note 223, at 314.

To Langer, the more we force ourselves to follow regimented rules, the greater the chances are that we will miss our marks. In essence, the less certain we are about an issue, the more we will have an opportunity to recognize viable alternatives. So, it is ultimately the illusion of control and order that can hurt, rather than help, our interpretations. Langer explored mindlessness in a number of studies, during which she found that mindless thought can reduce an individual's performance by more than half of his potential. *See generally* Benzion Chanowitz & Ellen J. Langer, *Premature Cognitive Commitment*, 41 J. PERSONALITY & SOC. PSYCHOL. 1051 (1981) (measuring the performance trends in research subjects who believed they had a debilitating disease, as opposed to others who were provided with information leading them to doubt the accuracy of the estimate).

227. Hutcheson, *supra* note 4, at 275.

calculated tests to weigh them. After all, judges apparently have a variety of resources with which to distinguish and interpret facts, each of which seemingly counts as one of Langer's requisite diverse perspectives.[228] But we must take Langer's theory a step further. That is, we must look not only at the way judges distinguish and interpret facts, but also at the way judges select analytical systems that necessarily limit the use of particular analyses (*e.g.*, how judges decide which constitutional theories to apply in specific cases). This last distinction raises an entirely different issue.

While it is no news that lacking theoretical options poses the greatest danger to anyone applying a theory, as the *WBK* rationale emphasizes,[229] Langer offers a practical solution to the problem based on her research of people's discriminatory beliefs. Langer's work suggests that people's levels of prejudice drop when they "increase rather than decrease the number of distinctions" they establish about "the relative importance of any particular difference."[230] This finding highlights the benefits of creating new categories of understanding. It also expands on the notion of healthy indeterminacy, under which "[f]lexibility is needed to permit experimentation with and investigation of alternative normative structures, to assure fairness, and to promote other substantive values in situations not anticipated or fully appreciated in advance."[231]

Langer's findings stress that informed decision-making is not automatic. Since one must challenge a theory or mental process that formerly defined the limits of a given realization, there is some illusion of risk.[232] Nevertheless, the reward for taking the first bold step is

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228. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 73-75 (1990) (describing a virtual "grab bag" of resources judges use to attribute meaning, including: "introspection, "common sense," and "memory"); *but cf.* Lawson, *supra* note 39, at 412 (questioning whether theories like Originalism can solve these problems since they still do not codify "*what materials count* towards establishing a provision's original meaning," "*how much* the various materials ought to count[,]" or clarify matters of "*application*" (*i.e.*, how much the actual materials reflect history).

229. *See supra* notes 39 and 42 and accompanying text (describing the danger of inflexibility in judicial interpretation).

230. Ellen Langer et al., *Decreasing Prejudice by Increasing Discrimination*, 49 J. PERSONALITY & SOC. PSYCHOL. 113, 113 (1985) (reporting the results of various tests involving studies of disabled individuals and questions intended to provoke various levels of mindful thought). Here, whereas research subjects first categorized handicapped persons as generally disabled, after learning to make calculated distinctions, the same subjects were more likely to label the same person as a "person who cannot do *X*." *Id.* at 114.

231. Kress, *supra* note 29, at 294.

232. *See* MICHAEL BASSECHES, DIALECTICAL THINKING AND ADULT DEVELOPMENT 29 (1984) (discussing the dangers of self-questioning but noting the benefits of a more accurate thought process). Basseches particularly notes that "[i]n questioning these boundaries, we may be questioning precisely those points of reference which provide us with a sense of intellectual stability and coherence about our world." *Id. But cf. id.* at 30 ("The dialectical analysis is more likely to allow one to experience [such] pain as loss and

greater consistency and reliability in the final product of the analysis. In other words, the more a person admits areas of uncertainty, the more he will "create[] the freedom to discover meaning where experts choose to see only random noise."[233]

Langer used the common experience of starting a car each morning to illustrate these benefits. While there is "very little choice involved" with turning the key in an ignition each morning, "the degree of choice increases" whenever your car will not start.[234] In essence, by finding yourself in a situation that calls into doubt your initial assumption, you as the driver, must become more aware of factors that you would not have originally considered.[235] You might even decide to look under the hood, only to find that other dangerous conditions exist besides the fact that your battery is low. Seemingly, the same is true of the judicial decision-making process.

With Langer's theory in mind, if judges were truly confident that they could select the right method of constitutional interpretation, it follows that they would explain the merit of selecting a particular constitutional theory in the same painstaking detail with which they describe factual evaluations under those very theoretical systems. Yet judges rarely, if ever, write opinions in this way. Instead of defining each of the factors needed for an appropriate analysis (including defining the appropriateness of the theory and its limitations in the case-specific context),[236] most judges apply an interpretive theory as if the theory speaks for itself.[237] Subsequently, if judges are simply searching for ways

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to mourn the loss. At the same time, the pain of loss may be counterbalanced by an emotionally positive intellectual awareness of (a) order in the developmental process, (b) new discovery, and (c) the opening of new possibilities.").

233. Brown & Langer, *supra* note 223, at 324.

234. *Id.*

235. Langer supports this proposition by citing the discovery of alternative uses for the drug Monoxidil, which began as a product to lower blood pressure, and an agricultural machine that initially destroyed crops with its icy foam byproduct. In both cases, the alternative uses (*i.e.*, using the crop machine as a snowmaker and Monoxidil as a hair growth stimulant) "occurred because the discoverers recognized that their unsuccessful attempts to resolve problems could be viewed from other perspectives." Brown & Langer, *supra* note 223, at 314.

236. *See* Lawson, *supra* note 39, at 412 (describing necessary factors for justifying use of a constitutional theory like Originalism).

237. Justice Walter Schaefer stressed that judges should articulate the bases for their decisions to increase the legitimacy. *See generally* Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966) (suggesting that judges explicitly state reasoning for decisions individually rather than in a unified manner). And, while it seems that Justices like Antonin Scalia provide detailed analyses of their methodological processes, his actual judicial opinions reveal blatant contradictions. *See* Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) (noting specific types of documents he believes to "display how the text of the Constitution was originally understood"); *but cf. supra* note 218 and accompanying text (discussing Justice Scalia's inaccurate reliance

to achieve predetermined outcomes and conceal their motives for arriving at a particular solution, their decision-making processes are more likely to be susceptible to bias.[238] Langer implies that judges should articulate to themselves the reasons for selecting a particular theory and then employ an objective procedure to address mindless impulses. The following section provides a method for achieving mindfulness and address the conditions that are necessary to achieve mindful adjudication.

The Elements of Judicial Mindfulness

Because the goal of mindfulness does not explain how to achieve its objectives, we must distinguish the conditions required by Langer's theory. Langer's theory presupposes that judges not only have a method to determine how their own beliefs influence analyses of facts in a particular case, but also whether these beliefs influence selection of a particular theory of interpretation.[239] The concept of judicial mindfulness, as opposed to mindfulness in general, involves applying two steps.[240] First, judges need to determine the magnitude and direction of their own bias: this essentially requires identification of the ways that they are influenced by factors related to the cases they hear. In the case of interpreting the Constitution, judges must thus know what the Constitution means to them, as viewed through the lens of their past experiences.[241] They can accomplish this goal by applying the

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on a weak dictionary as a source of meaning). Seemingly, in permitting interpreters to consult Justices' external materials regarding the decision-making process, supporters of this approach would need an additional method of interpretation for interpreting each Justice's interpretative theory of each method of constitutional interpretation.

238. Determining which theories to use in their analyses, judges are more vigilant rather than mindful. To Langer, vigilance represents a condition in which "one has to have a particular stimulus in mind, an expectation of what the stimulus is rather than what it could be." Langer, *supra* note 224, at 44. Consequently, the risk judges run is "pay[ing] attention to something[,] [while] at the same time, something else may go unnoticed." *Id.*

239. Langer's theory is thus the psychological translation of Professor Chemerinsky's objective in challenging the Court. Let us recall his challenge, which demands a consistent theory demonstrating self-awareness. The general notion of mindfulness achieves this objective by increasing the distinctions that individuals make about their experiences. Therefore, by showing how to achieve mindfulness in the judicial realm, we simultaneously show that it is possible to achieve awareness of biases in reaching judicial opinions, thus increasing our likelihood of selecting a correct model of constitutional interpretation.

240. That is, assuming that judges have alerted themselves to the manifestations of mindlessness (entrapment by category or automatic behavior), as evident in analyses of their opinions (perhaps after locating ornamental quotations rising above the level of decoration).

241. While the trend among judges may be to ignore instances in which personal issues arise in the decision-making process, at least some have been willing to explore the effects of their personality types on their interpersonal relations and general attitudes. A growing number of judges have experimented with the Meyers-Briggs Type Indicator (MBTI), a forced-choice test designed to evaluate a subject's preferences

psychological theory called negative practice, a method for discovering subconscious influences by consciously engaging in an activity that is the opposite of one's initial inclinations (*e.g.*, reading the Constitution in a totally subjective manner). Second, with knowledge of their personality preferences and subconscious constitutional influences, judges should engage in what psychologists call transitional thinking to adjust for unwanted responses in decision-making; that is, they must begin to ask themselves directed questions that move beyond the limitations of their own belief systems. Each of these steps is described below in detail.

A. Gauging Subconscious Constitutional Influences Using Negative Practice

A necessary condition for self-modification is awareness about unconscious behavioral influences, an object many constitutional scholars fear judges will never attain.[242] In America's psychology wards, however, clinicians turn to a number of methods to achieve this goal. The theory of negative practice emerged from the overarching theory of satiation, which dictates, *inter alia*, that patients can extinguish unwanted habits by overindulging in them.[243] While monitoring the process, psychoanalysts observed how "troublesome symptoms—including obsessive-compulsive ones—often disappear when the client intentionally engages in them rather than fights ineffectually against

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toward certain behaviors. For a general overview of the MBTI, see generally MOST EXCELLENT DIFFERENCES: ESSAYS ON USING TYPE THEORY IN THE COMPOSITION CLASSROOM (Thomas C. Thompson ed., 1996) (explaining the origin and operation of the MBTI).

For an overview of the MBTI's effectiveness in helping judges, see John W. Kennedy, Jr., *Personality Type and Judicial Decision Making*, 37 JUDGES' J. 4, 9 (1998) ("If judges are tuned into their own personality type . . . they can minimize the extent to which their own biases affect their evaluation of . . . [a] case."). Judge Homer Thompson also experienced similar success in his training of fellow judges. *See* Larry Richard, *Law Practice; How Your Personality Affects Your Practice*, 79 A.B.A.J. 74, July 1993, at 76 (noting Judge Homer Thompson's comment: "I observed that they [several hundred judges to whom he administered the MBTI] found it tremendously valuable in better understanding themselves, their associates and the public they serve"). Judge Kennedy even warns that judges are "unable to guard against the type of biases that influence their decisions" if they are "unaware of typological differences." Kennedy, *supra*, at 9. While these words of praise suggest that the MBTI might solve all of a judge's problems, the test has a number of limitations, the foremost of which is the fact that it cannot predict how a judge would approach a given case. For general criticisms of the MBTI, see generally M.H. Sam Jacobson, *Themes in Academic Support for Law Schools: Using the Meyers-Briggs Type Indicator to Assess Learning Style: Type or Stereotype*, 33 WILLAMETTE L. REV. 261 (1997) (doubting the MBTI and supporting this sentiment with various studies).

242. *See* Idleman, *supra* note 12, at 1321 (quoting Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 989-90 (1993) (arguing the impossibility of developing an adequate psychological model because "neither full self-awareness nor full disclosure is possible").

243. *See generally* ARNOLD A. LAZARUS, BEHAVIOR THERAPY AND BEYOND (1971) (introducing the concept of paradoxical intention to counter patients' obsessive fears by intentionally inflating them).

them."[244] Negative practice, as a subset of satiation, helps patients explore the sources of their compulsions by "deliberately . . . performing [any unwanted] behavior while consciously attending to it."[245] For the purposes of this Article, negative practice is more promising than general satiation theory because it places the subject in control of realizing solutions to her own problem, which is exactly what judges need to do. A pioneer in the field explained why negative practice can benefit judges:

> The value of . . . negative practice is that of increased insight. The student is assigned deliberately to create situations in which the former insecurities and inadequate behavior would tend to be present. The old inadequate reactions, however, are not to be used, but, instead, the appropriate behavior is to be carried out. . . . [D]eliberate entrance into insecure situations not only teaches new reactions, but also gets rid of a great deal of the fear associated with them.[246]

While the theory might be applied by judges in a number of ways, the proposed modification specifically addresses implementation of the theory in the area of constitutional interpretation.

In the proposed modification of negative practice, a judge should begin the awareness process with two essentials: a copy of the Constitution and some scratch paper. He should then analyze the textual provisions of the Amendments that have created the most difficulty for judges, writing exactly how each phrase applies to his own collective life experiences, in the absence of case-specific factual

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244. JOHN L. SHELTON & MARK ACKERMAN, HOMEWORK IN COUNSELING AND PSYCHOTHERAPY: EXAMPLES OF SYSTEMATIC ASSIGNMENTS FOR THERAPEUTIC USE BY MENTAL HEALTH PROFESSIONALS 149 (1974). In practice, therapists "often assign intentional obsession or compulsion times" for compulsive worriers to "obsess thoroughly. . . . [and] [w]rite a one page description of each worry-time" for discussion during treatment. *Id.* at 149-50. The researchers note that "[c]lients often do the homework once or twice, then begin to forget to do so—at the same time recording fewer (and sometimes no) obsessions or compulsions per day on their data sheet." *Id.* at 150.

245. DAVID L. WATSON & RONALD G. THARP, SELF-DIRECTED BEHAVIOR: SELF-MODIFICATION FOR PERSONAL ADJUSTMENT 89 (6th ed. 1993). In one clinical case: "Garrett, who habitually cracked his knuckles, spent five minutes each morning and five minutes each evening [engaging in the behavior] while paying close attention to every aspect of the behavior. This helped him learn to pay attention to the target behavior." *Id.* at 90. Negative practice is useful to judges in the same way it was useful for Garrett: It can make them aware of their behavior when interpreting the Constitution in a biased way. *See also* FREDRIC M. LEVINE & EVELYN SANDEEN, CONCEPTUALIZATION IN PSYCHOTHERAPY: THE MODELS APPROACH 80-81 (1985) (describing successful applications of the theory in up to ninety percent of the cases where it was implemented and exploring the diverse settings where the theory was used, including inhibiting nervous tics and stuttering); *cf.* G.K. YACORZYNSKI, MEDICAL PSYCHOLOGY 113 (1951) (explaining the value of the process in a strictly physiological sense).

246. C. VAN RIPER, SPEECH CORRECTION: PRINCIPLES AND METHODS 85 (1939).

circumstances.[247] With little more, this process should help begin to reveal to judges what their own inclinations are regarding the Constitution. While this process may seem almost trivial, we must ask ourselves whether judges actually do engage in this kind of inquiry or whether any judge would otherwise have reason to engage in it.[248] Ultimately then, regardless of its simplicity, the proposed method allows judges to develop a baseline for analyzing the intensity of their constitutional inclinations. The process might resemble a method proposed by one judge in an effort to address levels of confidence in one's decision, "Use a mental meter that establishes a blue zone between 30% to 50% confidence, a green zone from 50% to 90%, and a red zone from 90% to 100%."[249] Judges could rate the intensity of their dispositions toward or against certain provisions of the Constitution in a similar way. This model, however still does not explain what judges can do to discount these influences while making decisions. Part IV.B, below, explores this notion.

B. Transcending Self-Imposed Belief Systems Through Transitional Thinking

1. The Dialectical Schemata

Assuming that the process of interpreting the Constitution in a personal way (negative practice) helps some judges become aware of (a) their reliance upon past experiences to evaluate new facts and/or (b) their inclinations to view a certain constitutional phrase in a narrow-minded manner, these judges must still determine whether they bypassed viable alternatives for resolving issues in the case. In essence, this next logical step in the evaluation process requires a judge to move beyond the limits of the *legal* decision-making process[250] to transitional thought (*i.e.*, "distinguishing between the actual ideas or answers [you]

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247. In fact, she should go through great lengths to support her conclusions as clearly as possible, perhaps to the point where she uses specific emotional experiences to justify her conclusion, as if applying a legal precedent.

248. If anything, the multiple incentives compelling judges to deny behavioral influences have probably prevented the application of negative practice—that is, until now.

249. STEPHEN D. HILL, DECISIONS: THE SYSTEMATIC APPROACH TO MAKING COMPLEX DECISIONS FOR BUSY TRIAL JUDGES 24 (1999).

250. *See* Emily Souvaine et al., *Life After Formal Operations: Implications for a Psychology of the Self*, *in* HIGHER STATES OF HUMAN DEVELOPMENT 229, 229 (Charles N. Alexander & Ellen J. Langer eds., 1990) (noting that "[t]he very nature of being subject to a system prevents the individual from reflecting upon the limits of that system"). Also note Langer's observation that "the freedom to define [a] process—outside of which the outcome has no inherent meaning or value—may be more significant than achieving that outcome." Brown & Langer, *supra* note 223, at 327.

produce[] and the reasoning or process by which [you] arrive[] at these ideas or products").[251] This thinking involves, *inter alia*, the ability (1) "to reflect on one's basic premises and pursue evidence of their limitations," (2) "to be somehow qualitatively less defensive in relation to others," and (3) "to recognize and [temporarily] tolerate paradox and contradiction."[252]

This kind of transitional thought calls for a dialectical evaluation process similar to the one envisioned by Professor Michael Basseches. For the purpose of this Article, dialectics characterizes thought that occurs in a fluid and moving way.[253] Because the object of dialectical thinking is "actively oriented toward shifting categories of analysis and creating more inclusive categories,"[254] transitional thinking encompasses it, and judges can use the criteria that characterize a dialectical system to determine if they have achieved a transitional state. The concept of the dialectic relates back to mindfulness because Langer actually envisions two simultaneous systems in her theory. First, a person can "simply resolv[e] [a] crisis in a mindful manner."[255] Second, and of greater significance, he can use the process of being mindful as "an opportunity for [further] innovation."[256] Langer terms this innovation "second-order mindfulness,"[257] which ultimately involves fixing the cognitive system that created the problem, rather than only the problem itself, the objective of both transitional and dialectical thinking.

In 1984, Professor Michael Basseches introduced the Dialectical Schemata (DS) Framework, an analytical tool that identifies nine discrete attributes of cognitive functioning that help a person achieve systems-transcending thought.[258] Each of these nine schemata addresses

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251. Souvaine et al., *supra* note 250, at 245.

252. *Id.* at 237.

253. *See* BASSECHES, *supra* note 232, at 55 ("Dialectical thinking is thinking which looks for and recognizes instances of dialectic—developmental transformation occurring via constitutive and interactive relationships."); *id.* at 24 ("Orienting toward dialectic leads the thinker to describe changes as dialectical movement (*i.e.*, as movement that is developmental movement through forms occurring via constitutive and interactive relationships) and to describe relationships as dialectical relationships (*i.e.*, as relationships that are constitutive, interactive, and that lead to or involve developmental transformation)"). Importantly, however, the dialectical process does not "preclude a formal analyses," thus condemning judges to replace traditional methods of decision-making. *Id.* at 27.

254. *Id.* at 29 (noting additionally that "formal analyses which establish categories of analysis from the thinker's own perspectives tend to remain relatively impermeable" in contrast).

255. LANGER, *supra* note 21, at 198.

256. *Id.*

257. *Id.* at 199.

258. While, in total, Professor Basseches identified twenty-four methods of thinking Dialectically, he highlighted nine particular Meta-formal approaches within the larger group. This section focuses on Meta-formal principles for the following reason: Not only do they "most clearly reflect[] the meta-systematic level of . . . dialectical thinking," they "enable the thinker to describe (a) limits of stability of forms; (b)

the multiple ways we can limit ourselves by failing to recognize transitions, and especially inconsistencies and incompatibilities, between different types of thought structures. For example, one of Basseches's research subjects observed the way people often point out contradictions in theories to show why the theories inevitably fail. The subject noted how this type of criticism is less optimal than using a different method to critique the theory because relying on a flawed theory leaves the potential for further contradiction. Accordingly, to achieve more consistent results in one's criticisms of a contradictory theory, the critic, after recognizing the flaw, should instead synthesize the two opposing views and find a more "inclusive" way to represent the contradiction.[259] Basseches denotes this activity as "Understanding the Resolution of Disequilibrium or Contradiction in Terms of a Notion of Transformation in Developmental Direction"[260] (hereinafter Disequilibrium Schema).

The rest of this subsection examines portions of Professor Basseches's interviews with research subjects. To test what he calls the Disequilbrium Schema, Basseches asked a research subject to share his views about philosophical paradoxes, like the one that the Greek mathematician Zeno had identified, *circa* 400 B.C. Zeno's paradoxical theory against movement can best be described by the Race Course:

> Starting at point *S* a runner cannot reach the goal, *G*, except by traversing successive "halves" of the distance, that is, subintervals of *SG*, each of them *SG/2n* (where $n = 1, 2, 3, \ldots$). Thus, if *M* is the midpoint of *SG*, he must first traverse *SM*; if *N* is the midpoint of *MG*, he must next traverse *MN*; and so forth. Let us speak of *SM*, *MN*, *NO*, . . . as *the Z-intervals* and of traversing any of them as *making a Z-run*. The argument then comes to this:
> [*F*1] To reach *G* the runner must traverse all *Z*- intervals (make all the *Z*-runs).
> [*F*2] It is impossible to traverse infinitely many intervals (make infinitely many *Z*-runs).
> [*F*3] Therefore, the runner cannot reach *G*.
> But why would Zeno assert [*F*2]? Probably because he made the following further assumption:
> [*F*4] The completion of an infinite sequence of acts in a finite time interval is logically impossible.

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relationships among forms; (c) movements from one form to another (transformation); and (d) relationships of forms to the process of form-construction or organization." BASSECHES, *supra* note 232, at 76. While this Article highlights three of these schemata, each of the nine offers a significant tool with which judges can enhance their decision-making. *See id.* at 74 tbl.1. (labeling schemata).

259. *Id.* at 126.

260. *Id.*

This assumption has enormous plausibility.[261]

After discussing philosophical theories, the research subject in this particular inquiry made the following comments about Zeno's Paradox, which satisfied the criteria of the Disequilibrium Schema described above:

> [SUBJECT]: [T]ake a classic paradox like [Z]eno's paradox, you know, where you have the paradoxical conclusion that there is no motion . . . . [T]he classic skeptic's response is to walk across the room. Now, in one sense, yeah, that person is right, that does refute the paradox, I mean, shows you that the conclusion is false. On the other hand, the paradox seemed to arise by rather straightforward reasoning, involving our usual conceptions of space and time and motion; and so, to me, the *deep response to this paradox, you know, is then to articulate the concepts of space, time and motion* and *to define the logic in such a way that the paradoxes can no longer be drawn—that is, the contradiction can no longer be drawn—from them*[262]. . . . So, in other words, there was a tension between the facts of the real world namely, that there is motion—and the way the Greek philosophers were describing that motion. The two won't go together because when you put them together you did get a contradiction, right? So then the theoretical problem, you know, which forced Aristotle ultimately to formulate a highly sophisticated physical theory, was to find a way of getting around this.
> [BASSECHES]: SO WOULD YOU SAY THAT THE GUY WHO WALKED AROUND THE ROOM—THAT THAT SOLUTION WAS INADEQUATE?
> [SUBJECT]: Yeah, that's sort of failing to, or refusing to accept . . . to face a certain reality because that same skeptic . . . I mean, he is right, there is motion, but *he is going to go on using language which generates the paradox, rather than trying to do better and get deeper into the world and our way of expressing the world, in order to avoid that contradiction.*[263]

Basseches emphasized certain sentences with italics because they represent the Disequilibrium Schema in two ways. First, they recognize a contradiction between the "skeptic's response" and the "deep response."[264] Second, they "describ[e] the deep response as a movement to a more inclusive (more developed) form which integrates a language for describing the physical world, a logic, *and the observed facts of motion*: [as evident in the subject's prescription] to articulate the concepts of space, time, and motion and to define the logic in such a way that the

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261. Gregory Vlastos, *Zeno of Elea*, *in* 7 THE ENCYCLOPEDIA OF PHILOSOPHY 369, 372 (Paul Edwards ed., 1967).

262. Basseches uses italics in a passage to indicate instances of dialectical thinking.

263. BASSECHES, *supra* note 232, at 127.

264. *Id.*

paradoxes can no longer be drawn."[265] As demonstrated below, these observations also apply to the legal analyses employed by judges. [266]

To Professor Basseches, two additional schemata, besides the Disequilibrium Schema, relate particularly to the task of judicial decision-making.[267] Judges' foremost concern should be to display the analytical characteristics of the schema titled "Criticism of Formalism Based on the Interdependence of Form and Content" (hereinafter Criticism of Formalism Schema),[268] which also relates to the schema known as "Multiplication of Perspectives as a Concreteness-Preserving Approach to Inclusiveness" (hereinafter Multiplication Schema).[269] The examples cited below illuminate these two Meta-Formal tools.

In the first case, the Criticism of Formalism Schema deals with the "effort to describe relationships and movements of particulars as governed by rules or laws which can be stated at a general or universal level, with no reference to the content of the particulars."[270] In the legal realm, we encounter this phenomenon whenever a judge identifies formal rights, such as statutory rights, requiring the application of standardized analytical procedures.[271] An example of this might include applying a subsection of the Uniform Commercial Code and working through each provision, only to arrive at some preordained point. This type of formality, however, is susceptible to criticism when the legal questions deal not with a clearly defined statute, but rather with a

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265. *Id.* at 128.

266. *See infra* Part IV.B.3.A (describing Justice Scalia's analysis of the passage of time in *Printz*).

267. *See* Interview with Michael Basseches (Apr. 3, 2001).

268. BASSECHES, *supra* note 232, at 142.

269. *Id.* at 146.

270. *Id.* at 142. Basseches further notes how: "In the sphere of logic, one finds statements such as 'If *p* is true, then *not-p* is false.' This statement is meant to apply to any proposition which may be substituted for *p*, regardless of its content." *Id. But cf.* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949) (recognizing that legal reasoning is the kind "in which the classification changes as the classification is made [and] [t]he rules change as the rules are applied."). Professor Levi's description of the "moving classification system" suggests that the legal reasoning process can develop valid classifications even where specifics appear to be absent. *Id.* at 4. What seems indisputable is the increased level of attention that the interpreter must devote to situations where classifications move easily—a requirement upon which Basseches seems to focus his attention with the Criticism of Formalism Schema.

271. According to Basseches, these are "statements of formal rights which cannot be violated and formal procedures which must be followed no matter what one's particular purpose might be." *Id.* at 142. *See also id.* at 142-43 (noting how these outcomes are supported by the following inferences:

> [G]eneral laws and rules (form) govern relationships and movements of particulars (content) which exist separately from the general statements themselves. These pre-existing particulars are considered to confirm (in the case of theories and facts) or conform to (in the case of rules and behaviors) the laws by acting in accordance with them, or to disconfirm or violate them by acting in discordance with them. Formalism appeals to impartiality as justification, claiming either that impartial rules should be obeyed because they are fair, or that theoretical generalizations are justified by the conformity to them of impartially collected facts.).

"theoretical law."[272] For example, in the case of a constitutional principle, such as the prohibition against Congress compelling states to enact a federal scheme,[273] while

> a formalist may claim that [the law's] validity is demonstrated by facts which conform to it [,]. . . if sets of stimulus conditions, response classes, or positive reinforcements are not particulars which exist prior to the law, but are rather defined by the experimenter . . ., there is every reason to believe that another law could be formalized which would apply *equally well* to the same events but which would conceptualize those events using different categories.[274]

To guard against this threat, the transitional thinker must instead adopt an outlook that reflects the Criticism of Formalism—a perspective that envisions form and content as being "interdependent." The legal theorist must recognize her own role in developing the very categories that ultimately comprise the "universal statement" to which she is appealing. In the following excerpt, the subject mindfully comments on an instance in which a music aficionado interpreted a meaning in a composer's work of which the composer was not yet aware:

> [SUBJECT]: I'm saying that if you start off with the notion that there is *a* conceptual framework involved and that a perception of that framework is either closer to or further from being accurate, depending on whether it agrees with the conceptual model, you've got problems. There has to be the interaction between what?—the conceptual, and what?—the perceptual source.[275]

Here, the subject identified a problem that relates to "a single abstract 'conceptual' *form* to which different listeners' perceptions of the composition (substantive content) conform more or less accurately."[276] The subject stressed the need for interdependence by "saying that the way the composer or an analyst conceptualizes the piece should *depend* on what listeners hear and that unanticipated perceptions should be viewed as sources of conceptual enrichment, rather than as inaccuracies. (What listeners hear clearly *depends* on how the piece was

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272. BASSECHES, *supra* note 232, at 143.

273. The Court developed this rule in the recent case of *New York v. United States*, 505 U.S. 144 (1992), where it deemed unconstitutional any attempt by Congress to "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 288 (1981)).

274. BASSECHES, *supra* note 232, at 143. With this observation, Basseches validates the notion that such mindless thinking can potentially keep a person from achieving the better or best answer by confining them to a state of theoretical indeterminacy.

275. *Id.* at 144-45.

276. *Id.* at 145.

conceptualized.)."[277] In a legal sense, judges should make similar distinctions in their analyses by synthesizing alternative theories and expanding them, rather than limiting themselves by endorsing only one of multiple approaches.

In the final instance, the Multiplication Schema complements the Criticism of Formalism in that it "treat[s] a large problem as a *whole* by viewing the whole from several vantage points (either from within or without the whole) at one time."[278] Basseches provides the example of evaluating hospitals in America, an objective that can include each of the following considerations: (1) the quality of "healthcare delivery," (2) the "organizational structure" of the hospital, (3) the historical economic developments of the hospital in relation to America's changing corporate structure, and (4) the experiences of staff members in the hospital.[279] Evidently, by comparing and contrasting these several perspectives, an evaluator will enjoy a more informed decision-making process. Albeit this schema is hardly complex, the challenge becomes acknowledging the one-sidedness of any perspective[280] and balancing it with others to generate more accessible outcomes. The subject who epitomized this schema responded to a question requiring him to distinguish "the nature of education in general,"[281] as opposed to the nature of education at his small private college:

> [BASSECHES]: WELL, I GUESS THE FIRST QUESTION HAS TO DO IN A BROADER SENSE WITH WHAT EDUCATION IS ABOUT, AND THEN THE SECOND . . .
> [SUBJECT]: For the broader sense, I throw up my hands in despair. The only way I could deal with that question would be to disaggregate it. . . . *I would start to try to pick out centers. It seems to me you have to cut that cake up so many different ways and you start talking about the different sections, primary, secondary; the considerations such as ethnicity, social class, parental background; whether it is education geared specifically towards occupational preparation or whether it is more general.* This is all off the top of my head. I think before you can view the question of education in America you have to start making these kinds of discriminations . . . .
> [BASSECHES]: SO YOU DON'T THINK YOU COULD SAY SOMETHING ABOUT WHAT EDUCATION IS ABOUT . . . ?

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277. *Id.*

278. BASSECHES, *supra* note 232, at 147.

279. *Id.*

280. *Id.* at 149. This result implicates a three step process: acknowledging (1) "the limits of abstraction," (2) the necessary one-sidedness of perspectives, and (3) " the essential importance of the concrete." *Id.*

281. *Id.* at 149.

> [SUBJECT]: *Not meaningfully. I could certainly say something.* I'm pretty glib. But I don't think I could say anything that either you or I would be very impressed with.[282]

In the excerpt above, the subject's reference to picking out centers indicated analysis of multiple perspectives, while his unwillingness to speculate regarding the unknown indicated a preference for concreteness (evident in the assumption that "the subject is suggesting that what he would say at a general level would not be meaningful because it would be so abstract").[283] The subsections below will apply these three most prevalent schemata, as described above, to the reasoning adopted by the Supreme Court in *Printz v. United States*.[284]

2. *Printz*'s Appeal to the Dialectical Schemata

Because the systems of analysis discussed above work best when judges apply them willingly,[285] it would be deceptive to pretend that any particular judicial opinion demonstrates influenced decision-making or that any particular method of psychological analysis would have caused a different result.[286] However, judicial opinions criticized by scholars for being inconsistent may be valuable as analytical tools to hypothesize how a particular method of self-analysis might have assisted the judges who wrote those opinions.

Printz is useful for demonstrating the hypothetical benefits of the analytical approaches presented because scholars with divergent viewpoints have criticized the numerous inconsistencies present in the opinion.[287] Foremost among these inconsistencies is the seemingly biased interpretation of historical materials considered by the Justices in rendering their decision.[288] Some of these commentaries essentially

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282. BASSECHES, *supra* note 232, at 149-50.

283. *Id.* at 150.

284. 521 U.S. 898 (1997).

285. *See infra* Part V (explaining that judges need to apply theories on their own initiative).

286. *See supra* text accompanying note 191 (expressing doubt into the ability to show what Justices are thinking based solely on analysis of their written opinions).

287. *See* Neil Colman McCabe, *"Our Federalism," Not Theirs: Judicial Comparative Federalism in the U.S.*, 40 S. TEX. L. REV. 541, 553 (1999) (referring to *Printz's* reasoning as "an aberration"); Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. L. REV. 199, 202, 210 (1997) (noting the "ad hoc" nature of the decision for which Justice Scalia is accused of having "sidestepped th[e] obvious issue"); Martin S. Flaherty, *Part II: Are We to be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1284, 1289 (1999) (calling *Printz* "[t]he Court's most far reaching exercise in sovereignty federalism" and "disjointed"); Gene R. Nichol, *Justice Scalia and the* Printz *Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, at 962, 967 (1999) (describing the *Printz* opinion as a "mischaracterization of history and intention" and "thin").

288. Much of this commentary focused on Justice Scalia's use of THE FEDERALIST, which I will

suggest that the Justices exhibited mindlessness.[289] Professor Evan Caminker's observation that Justice Scalia succumbed to a process-based bias apparently reflects the second type of dangerous bias where interpreters automatically default to a rigid analytical system without comparison.

> [*Printz*] is particularly striking because of the analytical route the Court took to its doctrinal destination; all but the most unreflective formalists should find its reasoning process troubling . . . . My concern here is not with arbitrating this dispute at a high level of abstraction . . . . My concern is rather with maintaining the integrity of each [interpretive] approach, which requires that each is . . . skillfully applied and invoked only when appropriate. Where foundational sources of text, structure, and history provide scant guidance, interpretive formalism can easily become an exercise in undirected choice from among competing conceptions and formulations—choice that seems arbitrary because it appears neither dictated by the underlying sources, nor counseled by articulated purposes, values, or consequences.[290]

The question involved is one of "process." As another author recognizes: "*Printz* could not have been more straightforward about the constitutional sources it relied on for the result it reached."[291] Instead of the sources used, the trouble apparently rests in the mechanics of the Justices' analyses.

Certain of the Justices' commentaries in *Printz* seem ripe for analysis under the Disequilibrium, Criticism of Formalism, and Multiplication Schemata identified by the DS Framework,[292] even though numerous

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explore in depth below. *See infra* Part IV.B.3 (describing the Court's use of THE FEDERALIST). However, the criticisms of *Printz* to which I am referring not only addressed the dangers scholars normally note are inherent in relying on THE FEDERALIST, they went beyond these common complaints. *See generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 201 (1996) ("Within the language of the Constitution, as it turned out, there was indeterminacy enough to confirm that both Federalists and Antifederalists were right in predicting how tempered or potent a government the Convention had proposed."). Instead, the critics attacked the Justices' specific analytical decisions—attacks which defied the notion that the Federalist Papers are historically indeterminate and noting that the case should have been clear cut. *See* Nichol, *supra* note 287, at 963 ("At bottom, Justice Scalia's federalism analysis constitutes little more than a bow to his constituents, a wave to the crowd. We know we are supposed to support states' rights. Yet we are not told what that means."); McCabe, *supra* note 287, at 554 ("The *Printz* majority's invocation of federalism without a coherent and convincing explanation of the theory raises the question of whether federalism is nothing but a convenient 'device for permitting activist (conservative) judges to impose their policy preferences from the bench.'").

289. *See* discussion *supra* Part III.B (discussing Langer's theory of mindfulness).

290. Caminker, *supra* note 287, at 200-02.

291. Flaherty, *supra* note 287, at 1285.

292. The applicability of the DS Framework is suggested by three factors in the case. First, members of the Court found two extremely different meanings in the same historical materials. *See infra* notes 331

analytical shortcomings in this Supreme Court decision have been raised.[293] While these connections between the analyses adopted by the Justices and the DS Framework may be somewhat tangential, the existence of any linkage to the psychological theory offers essential insight into the value and practical utility of such methods in aiding judges. Rather than criticizing the opinion with sweeping absolutes, such as "right" or "wrong" or "good" or "bad," the use of the examples below questions what the Framework might have suggested to the Justices if they had had the opportunity to consult it.

The *Printz* case involved a determination of whether Congress could require a local law enforcement official to enact an interim federal plan for conducting background checks on purchasers of handguns.[294] Citing the recent case of *New York v. United States*,[295] which outlawed "direct[ ] comp[ulsion of states] to enact or enforce a federal regulatory program,"[296] law enforcement officers from two states attacked the provision on constitutional grounds because of the federal law's

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and 334-341 and accompanying text (describing the Court's battle over Alexander Hamilton's writings in No. 27 of THE FEDERALIST). While this is surely not the first time the Court has viewed the same facts in mysteriously different ways, we shall see that *Printz* displays mindlessness and eligibility for the resolution of bias with the DS framework. *See* WRIGHTSMAN, *supra* note 19, at 52-55 (describing the startling differences between Justice Marshall and Justice Rehnquist's analysis of the very same facts in *Ake v. Oklahoma*, 470 U.S. 68 (1985), and using these diverging interpretations to suggest that judges' "values serve as filters for the way that 'facts' are perceived"). Second, members of the Court applied different analytical frameworks. *See infra* text accompanying notes 331 and 334-341 (comparing analyses); *see* Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1061, 1645 (2000) ("[T]he dueling opinions in *Printz* dramatize the extent to which political theory has replaced text and original understanding by parsing the abstract discussions in *The Federalist* as carefully as a tax opinion might parse the Internal Revenue Code."). Third, Justice Scalia wrote for the majority in a way some might argue defied the very principles for which he is supposed to stand when applying his unique brand of Originalist interpretation. *Compare* Antonin Scalia, *Originalism, The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) (finding repugnant judicial opinions "rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean"), *and* Zoltnick, *supra* note 16, at 1378 (noting how Justice Scalia sees the Constitution as "dead" to eliminate the potential that judges will use it to advance their own values), *with* Nichol, *supra* note 287, at 968 (1999) (noting that Scalia made "no effort . . . to tie the judge-made principle to" either "text" or "particular tradition" and that "[t]he fur would have flown" had Scalia been "asked to write a dissent to his own opinion"); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1521-22 (1998) (using Scalia's own reference to Harold Leventhal, who said "the trick [in using legislative history] is to look over the heads of the crowd and pick out your friends," to cast doubt on his "creat[ion] [of] a constitutional limit on the national government where none appears on the face of the Constitution") (alteration in original).

293. *See supra* notes 287, 288, and 292 (identifying criticisms).

294. *See* Printz v. United States, 521 U.S. 898, 902 (1997) (describing aspects of the Brady Handgun Violence Protection Act that "required the Attorney General to establish a national instant background-check system" by 1998 in an effort to keep guns away from convicted criminals).

295. 505 U.S. 144 (1992).

296. *Id.* at 176.

expansion of their existing local duties.[297] A number of states and political organizations filed supplemental amicus briefs.[298]

The officers argued that the powers Congress had exercised were reserved to the states and that various constitutional provisions prohibited the federal legislature's interference with those powers.[299] The government responded that the burdens imposed by Congress were minimal and represented a tradition of "cooperative federalism" that the founders of the nation sought to promote.[300] These views raised a serious historical question that involved the practices adopted by the first Congress to enact a huge body of federal laws.[301]

Given this apparent respect for cooperation between states and the federal government, two possible historical models potentially resolved this dilemma. On the one hand, the alternative championed by Justice Scalia and the majority held that it was implicit in every historical instance that states still had a choice regarding whether or not to comply with congressional "requests."[302] On the other hand, Justice Stevens

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297. The officers also addressed a number of negative repercussions stemming from the requirement to conduct these investigations. Sheriff Jay Printz, for example, complained that the Act required him to "pull[] deputies off patrol and investigation duties" for time intervals ranging from an hour to several days. Brief for the Petitioner at *3, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1478), *available at* LEXIS 1995 U.S. Briefs 1478. Further administrative burdens included the fact that the officers "ha[d] no mechanism for carrying out the duties assigned by § 922(s) and no budget provision authorizing the expenditures." *Id.* Sheriff Mack identified a closely related dilemma: "To the extent [that Mack] attempted to perform the Federal duties, he incurred civil liability. Under Arizona law, a county official who expends funds in excess of statutory authority is personally liable for their refund." Brief for the Petitioner at *4, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1503), *available at* LEXIS 1995 U.S. Briefs 1503.

298. *See Printz*, 521 U.S. at 901-2 (noting the participation of several states and organizations).

299. Specifically, they argued that (1) Congress had no power to compel state compliance under Article I § 8 of the Constitution, Petitioner's Brief at *9, *Printz* (No. 95-1478), *available at* LEXIS 1995 U.S. Briefs 1478; (2) that the commands violated the Tenth Amendment, Petitioner's Brief at *7, *Printz* (No. 95-1503), *available at* LEXIS 1995 U.S. Briefs 1503; (3) that Article II of the Constitution requires the President to appoint federal officers to faithfully execute federal laws, Petitioner's Brief at *15, *Printz* (No. 95-1478), *available at* LEXIS 1995 U.S. Briefs 1478; and (4) that Congress's requirements were not permissible as an extension of its enumerated powers, such as regulation of commerce. *Id.* at *4.

300. Respondent's Initial Brief at *2, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1478 and 95-1503), *available at* LEXIS, 1995 U.S. Briefs 1478. The government added that the obligations of local officers did not constitute the compulsion outlawed by *New York v. United States*, *id.* at *7, and that the requirements imposed by Congress were less burdensome than more demanding requirements that the Court had upheld in the past. *Id.* at *3 (citing FERC v. Mississippi, 465 U.S. 742 (1982), as upholding a more burdensome demand on states than the interim Brady Act provisions).

301. Notably, the newly formed Congress called on state officials to execute necessary adjudicative tasks, including the transportation of fugitives to their respective overseers, *see* Act of Feb. 12, 1793, Ch. 7 § 1, 1 Stat. 302, the determination of the condition of seafaring vessels, *see* Act of July 20, 1790, ch. 29 § 3, 1 Stat. 132, and the enforcement of federal laws dealing with immigration. *See* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (addressing the maintenance of citizenship applications by states).

302. *See, e.g.*, *Printz*, 521 U.S. at 917 (noting how "President Wilson did not commandeer the services of state officers, but instead requested" their assistance).

supported the government's assertion that the historical materials represented instances of a long tradition of "cooperative federalism,"[303] in which states would clearly benefit from the opportunity to execute the federal laws in a manner sensitive to local concerns,[304] which negated the burdens of complying with the government's orders.

Justice Scalia gained the support of Justices Rehnquist, Kennedy, and Thomas, who resolved the historical question by refuting Justice Stevens's position."[305] Justice O'Connor, who concurred with the *Printz* majority, strayed further from it by advocating that the Tenth Amendment spoke directly to the issue at hand.[306] In the final analysis, the decision expanded *New York*'s holding by outlawing not only compulsion of states to enact a federal regulatory program, but also "conscription" to enforce one temporarily.[307]

3. *Printz*'s Mindless Analyses

That the *Printz* majority and dissent offered contrasting approaches to interpreting historical documents does not, in itself, indicate the existence of mindlessness, even though some scholars have insinuated as much.[308] Nor does this mean that *Printz* was wrongly decided, no matter how mindless the Justices may have appeared in their analyses. Instead, this section highlights how judges in similar positions might use the DS Framework to alert themselves to moments in the decision-making process where they have not fully explored an issue.

The four instances of mindlessness suggested by *Printz* occur in (1) the way Justice Scalia conceived differences in conceptions of legal obligations based on modern meanings, (2) Justice Scalia's and Justice Stevens's reliance on modern secondary sources to explain the meaning

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303. *Id.* at 960 (Stevens, J., dissenting); Respondent's Initial Brief at *2, *Printz* (No. 95-1478), *available at* LEXIS, 1995 U.S. Briefs 1478 ("The challenged provisions of the Brady Act continue the extremely valuable and constitutionally sound tradition of 'cooperative federalism' in the law enforcement arena . . . .").

304. *See generally* Respondent's Initial Brief, *Printz* (No. 95-1478), *available at* LEXIS, 1995 U.S. Briefs 1478 (describing the benefits of "cooperative federalism").

305. *Printz*, 521 U.S. at 917.

306. *See Printz*, 521 U.S. at 936 (O'Connor, J., concurring) ("The Brady Act violates the Tenth Amendment to the extent that it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers.").

307. *See* Caminker, *supra* note 287, at 205 (noting "compulsion"/"conscription" distinction).

308. To one commentator, *Printz* resembled the noted film NIGHT OF THE LIVING DEAD (Columbia TriStar Entertainment 1990), in which constitutional meanings arose from their textual coffins and compelled Justice Scalia to adopt a different analysis. *See* Eskridge, *supra* note 292, at 1516 (observing how "[t]he dead Constitution that Scalia describes in the Tanner Lectures came alive in *Printz* because Scalia cobbled together a constitutional limit from several sources . . . .").

of original historical materials, (3) Justice Scalia's and Justice Souter's deference to the notoriety and popularity of certain Framers as determinants of the Framers' meanings in specific writings, and (4) Justice Scalia's and Justice Stevens's treatment of constitutional questions on which the writings of the Framers' remained silent. It appears that examples one and two defy the Disequilibrium Schema, example three negates the Criticism of Formalism Schema, and example four implicates the Multiplication Schema.

a. Time Distinctions and the Lack Thereof

At one point in *Printz*, Justice Scalia adamantly distinguished the present legal system from the one the Framers knew. The issue arose because Justice Stevens's opinion referenced a 1790 statute that required state courts to "appoint an investigative committee of three persons 'most skillful in maritime affairs'" to determine whether a ship was worthy of travel.[309] Justice Stevens analogized this process to "an expert inquisitorial proceeding, supervised by a judge but otherwise more characteristic of executive activity."[310] Justice Scalia consequently responded to Stevens in a lengthy footnote, pointing out the fact that Stevens impermissibly tried to use modern concepts associated with "contemporary regulatory agencies"[311] to make his point—concepts that clearly did not apply to the time period in question:

> The dissent's assertion that the Act of July 20, 1790 . . . caused state courts to act "like contemporary regulatory agencies" . . . is cleverly true—because contemporary regulatory agencies have been allowed to perform adjudicative ("quasi-judicial") functions. . . . It is foolish, however, to mistake the copy for the original, and to believe that 18th-century courts were imitating agencies, rather than 20th-century agencies imitating courts. The Act's requirement that the court appoint "three persons in the neighbourhood . . . most skillful in maritime affairs" to examine the ship and report on its condition certainly does not change the proceeding into one "supervised by a judge but otherwise more characteristic of executive activity" . . .; *that requirement is not significantly different from the contemporary judicial practice of appointing expert witnesses, see, e.g., Fed. Rule. Evid. 706.*[312]

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309. *Printz*, 521 U.S. at 951 (Stevens, J., dissenting) (citing Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132-33).

310. *Id.* (Stevens, J., dissenting) (rejecting Scalia's observation that these requirements were merely "adjudicative in nature").

311. *Id.* at 950-51 (Stevens, J., dissenting).

312. *Id.* at 908 n.2 (emphasis added).

In response to the passage above, the Disequilibrium criteria would caution against observations similar to Justice Scalia's. After recognizing a contradiction, namely that Justice Stevens misapplied a theory (*i.e.*, that executive duties required of judges in the 1700s were the same as those required in the 1990s), Scalia then attempted to apply his correct interpretation of judges' roles in the 1700s by referencing Rule 706 of the Federal Rules of Evidence. The trouble with his application of the Federal Rules is the fact that they did not come into existence until 1974.[313] Furthermore, until that time, each state had developed its own rules regarding selection of expert witnesses or blue ribbon panels of jurors, which would negate the notion that pre-1974 expert witness provisions have any bearing on the maritime proceedings of 1790.[314] Scalia, much like the traditional skeptic who walked across the room to disprove Zeno's paradox, used the very misgiving he had identified in Stevens's approach (improper time comparisons) to point out the correct mode of interpretation.[315]

The Disequilibrium Schema would counsel one in Justice Scalia's position not to terminate his analysis early on, even if his initial understanding of the premises supporting the Federal Rules analogy were legitimate from an argumentative standpoint. With the aid of this Schema, a decision-maker in Justice Scalia's position should probably complete the analysis only after finding examples that applied at the time period in question so as not to negate his own point.

b. Reliance on Secondary Sources

The historical questions posed in *Printz* required the Justices to consult a great many sources of law developed by the first Congress. But, in a number of instances, Justices quoted modern secondary sources simultaneous with the originals, as if they had the same persuasive weight. In one example, Justice Scalia authoritatively cited a book written in 1948 in a paragraph featuring nothing but statutes from the

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313. *See generally* H.R. REP. NO. 650 (1974) (exploring the historical development of the Federal Rules of Evidence).

314. *See* Mark Lewis & Mark Kitrick, Kumho Tire Co. v. Carmichael: *Blowout From the Overinflation of* Daubert v. Merrell Dow Pharmaceuticals, 31 U. TOL. L. REV. 79, 80 (1999) (observing that "[c]ourts [in the mid-1800s] did not employ a generally agreed upon test for admissibility, causing inconsistency and unpredictability in the admission of expert witness testimony").

315. *See supra* text accompanying notes 263-265 (describing flaws in the skeptic's approach to disproving Zeno's paradox). Even if this statement seems logical for the purpose of demonstrating how Stevens's example is similar to the modern practice of appointing expert witnesses, the form of the argument apparently resembles the same problem observed in Basseches's interview with the subject who referred to Zeno.

1700s.[316] In yet another instance, Justice Stevens introduced a historical theory proposed in a 1993 law review article to explain the meaning of references in the Federalist Papers regarding states' administrative capabilities.[317] These quotations raise a number of concerns about the legitimacy of *Printz*'s outcome. At one point, Justice Stevens attacked Justice Scalia for thinly supporting certain propositions with no more than the "speculation" of a footnote in a law review article.[318]

The trouble with authoritative citations to secondary sources derives partly from considerations about the role of the historian and his potential biases.[319] It is sometimes unavoidable that certain judges will

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316. *See Printz*, 521 U.S. at 909-10 (citing Justice White for the proposition that "Georgia refused to comply with [a] request").

317. *See id.* at 945-46, 946 n.4 (Stevens, J., dissenting) (quoting Beer).

318. In the majority opinion, Justice Scalia doubted the dissenters' theory that requiring certain "discrete ministerial tasks specified by Congress" was permissible and did not amount to compulsion because the requirement would not "diminish the accountability" of state officials. *Id.* at 929-30. Scalia heightened his criticism by claiming that, were this practice to grow, Congress would be able to take credit for all of the states' toil. In this respect "even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects." *Id.* at 930. To support this claim, Scalia cited a footnote in the *Vanderbilt Law Review*. Although he did not quote or paraphrase the citation, the footnote, after citing the District Court's opinion in *Printz* for the proposition that the Brady Act "both absorbs government resources that the states might direct elsewhere and confuses the lines of political accountability," read in its entirety:

> The Brady Act raises at least three accountability issues: (1) the lack of federal funds to support the Act's mandates may force local law enforcement agencies to cut other essential services, leading voters to blame local officials for those cuts; (2) voters opposed to gun control may identify the Act with the local officials charged with administering it, and blame those officials for the statute's enactment; and (3) citizens may blame law enforcement officers for erroneous applications of the Act. Although the Act specifically exempts local officers from civil liability for erroneous determinations, 18 U.S.C. § 922(s)(7), it does not shield them from popular criticism or electoral retaliation for those decisions.

Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 n.65 (1994) (citing Printz v. United States, 854 F. Supp. 1503, 1514-15 (1994)). Justice Stevens attacked the quote as unfounded: "The Court cites no empirical authority to support the proposition, relying entirely on the speculations of a law review article. This concern is vastly overstated." *Printz*, 521 U.S. at 957 n.18 (Stevens, J., dissenting). Seemingly, Scalia would have been better off citing the actual district court opinion, which he might very well have done had he been sensitive to the concerns about secondary sources mentioned in this section.

In another instance, Justice Scalia neglected to provide a pinpoint citation for one of the works he referenced, as if hoping to appease critics wishing to call his bluff with a catchall citation. *See Printz*, 521 U.S. at 923 (referencing generally a 1994 article). Yet, the Justices were not the only ones to fall prey to this practice. *See, e.g.*, Petitioner's Reply Brief at *10, *Printz* (No. 95-1478), *available at* 1996 WL 650918 (citing a 1983 article from the *Washington University Law Quarterly* to drive home the point that "The Framers intended that voluntary cooperation between the States and the federal government would be integral to federalism").

319. Often, scholars note the predominance of confusing language used even after the writing of the Constitution, the clarity of which represented only a temporary respite. *See* PETER M. TIERSMA, LEGAL LANGUAGE 45-46 (1999) (noting how "American legal language came to resemble the statutes of King George III" even though individuals like Thomas Jefferson "seriously considered abolishing the entire

encounter difficulties when interpreting the writings of historians who have interpreted the Framer's meanings from their original writings. This dilemma arises because the historian adds his own interpretation to the finished product.[320] In *Printz*, two specific references highlight the danger of over-reliance on these more modern sources, even more than the examples illustrated above.

First, as Justice Stevens debated with Justice Scalia the issue of whether an early act addressing Selective Service registration equated to a request or compulsion of state officers, he attempted to impeach the portion of the secondary work Scalia cited. Stevens did this by citing seemingly contrary information written by that same author in the same piece.[321] Of key importance, the note to which Stevens referred only spanned a few short pages. Because it is difficult to imagine that Justice Scalia overlooked or intentionally avoided information contrary to his main proposition, some other explanation is necessary to explain why his opinion failed to take this information into account.[322]

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existing system of laws" for the purpose of clarity). The law became so confusing that states like "Massachusetts forbad lawyers from serving in [their] legislature and required that parties in court represent themselves rather than engage an attorney." *Id.* at 43. Given the confusion that existed then, the likelihood that judges now will face a great deal of indeterminacy is no understatement.

Other scholars turn not only to the laws and statutes of earlier years but to the changing role of judges to confirm such doubts. *See* Susanna Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151, 159 (1998) (noting how judges' roles transformed from "romantic" figures "whose judgements were, at once, emanations of [their] own mind[s] [as well as] expressions of the 'rule of law'" and the way the objective of self-analysis gave way to notions of legal realism); *See* DENNIS E. MITHAUG, SELF-REGULATION THEORY: HOW OPTIMAL ADJUSTMENT MAXIMIZES GAIN 32 (1993) (explaining how the 1900s transformed the process of justification: "The relationship between factfinding and theory building reversed positions. Top-down Aristotelian deduction of the past gave way to bottom-up inductive inquiry of the present."). Although the newer inductive system demanded "the development of systematic searches, selections, uses, and reuses of solutions to achieve prescribed goals" it suggests that the prior body of decision-making still rests on the more abstract principles. *Id.* at 40 (emphasis omitted).

Without recommending any specific process, Professor Louis E. Wolcher stated the need for methodological self-consciousness to resolve historical dilemmas. Under his model, the goal would be "neither a privileging of structure over subject, nor subject over structure, but rather a privileging of *the historian's own part in the process of reconstructing the past.*" Louis E. Wolcher, *The Many Meanings of "Wherefore" in Legal History*, 68 WASH. L. REV. 559, 572 (1993) (emphasis added). For Wolcher, this would be the only way to overcome the challenge of determining whether writers' accounts related to the "extralegal life changes," autonomous of legal ones or not. *Id.*

320. Depending upon how many historians the most current author references, this process of removal from the initial interpretation of meaning could continue infinitely. *See* William N. Eskridge, Jr., *Textualism and Original Understanding: Should the Supreme Court Read The Federalist but Not Statutory Legislative History?* 66 GEO. WASH. L. REV. 1301, 1310 (1998) (observing how "sources still being published" about the Framers increase the indeterminacy of their understandings).

321. *See Printz*, 521 U.S. at 953 n.13 (1997) (Stevens, J., dissenting) ("Indeed, the very commentator upon whom the majority relies noted that the 'President *might*, under the act, have issued orders directly to every state officer, and this would have been, for war purposes, a justifiable Congressional grant of all state powers into the President's hands.'" (citation omitted).

322. Here, such conduct raises issues similar to Justice Brennan's use of George Orwell's work in *Riley*.

In a similar vein, Justice Souter attacked Justice Scalia's use of Clinton Rossiter's commentaries about particular Framers. Here, when Scalia commented that Madison's view prevailed over Hamilton's, giving him reason to discount Hamilton's statements, Souter replied citing Rossiter for the proposition that there was no prevailing view among the Framers since the writers of the Federalist Papers had a unified voice:

> This, indeed, should not surprise us, for one of the Court's own authorities rejects the "split personality" notion of Hamilton and Madison as being at odds in The Federalist, in favor of a view of all three Federalist writers as constituting a single personality notable for its integration:
> "*In recent years* it has been popular to describe Publius [the nominal author of The Federalist] as a 'split personality' who spoke through Madison . . . ."[323]

The most striking thing about the paragraph above is not merely the contrast between the Justices' interpretations of the Framers' meanings. More importantly, the highlighted portion of the excerpt above indicates that Justice Souter shifted his analysis to discussions of modern conceptions of the meanings of original documents. In effect, in both examples, the Court began to battle over the historians' views of the original matter, rather than the original matter, which substantially detracted from the Court's interpretive capacity.

It is the Criticism of Formalism Schema that can potentially assist judges facing these kinds of dilemmas. This Schema enables judges to distinguish the ways in which authors' interpretations evidence historical meanings and the author's own meanings simultaneously. Criticism of Formalism provides this capability because it focuses on "assertion[s] of interdependence."[324] By employing this schema, judges could avoid having to rely solely on a scholar's account merely because the author utilized reliable sources in developing the scholarship. Instead, the judge would question how those sources helped to create the depiction that she found compelling when evaluating the facts of the case. This Schema would prompt the judge to consult those very materials to gain a better understanding by implementing the author's rationale, but not the author's verbatim result.

See supra note 204 (suggesting that Brennan omitted the portion of the text he quoted that would have eviscerated the persuasiveness of his claim).

323. *Printz*, 521 U.S. at 973 n.2 (Souter, J., dissenting) (citing CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 58 (1964) (emphasis added)).

324. *See supra* note 263 (describing flaws in the critic's approach).

c. Deference to the Personal Reputations of the Federalists

At two separate points of the *Printz* decision, Justices resorted to a method of interpretation that I call "popularity weighting." This method consists of weighting a Framer's popularity in the same way that one might weight a particular historian's conception of meaning. My concern is that this process detracts from the Justices' mindful analyses. In the first instance, Justice Scalia refuted Justice Souter's assertion that No. 27 of *The Federalist* should be read to uphold the requirement that states comply with the orders of Congress, stating that

> [e]ven if we agreed with JUSTICE SOUTER'S reading of The Federalist No. 27, it would still seem to us most peculiar to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does. That would be crediting the most expansive view of federal authority ever expressed.... Hamilton was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution."[325]

The preceding analysis invokes a number of questions, the most pressing of which is, what does Hamilton's reputation for being a nationalist have to do with the issue at bar?[326] The answer seems to be nothing, as is evident from Souter's response to this criticism. But the net effect of the squabble resulted in diverting the attention of the Justices from the legal questions involved in the dispute.[327]

Before departing from this example, we should note that two phenomena are occurring here. At the most basic level, Justice Scalia relied upon the assumption that Hamilton was a nationalist, although he elected not to define that term in the context of his opinion.[328] On another level, Scalia's comment that a valid Framer's opinion must reflect a collective view rather than an individual one seriously undermines his own view. This mandate sets the interpretive bar so

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325. *Printz*, 521 U.S. at 915-16 n.9 (citing two more recent historical pieces by Rossiter and Farrand to confirm Hamilton's reputation).

326. As one of *Printz*'s critics put it:

> Justice Scalia's reliance on Clinton Rossiter [1964] and Farrand's *Records of the Federal Convention* [1911] at best supports the commonly known proposition that Hamilton was comparatively far more nationalistic than most of the other Founders, *not* that his views on the commandeering of state executive officials failed to "prevail."

Flaherty, *supra* note 287, at 1292 n.91 (1999) (citation omitted).

327. For commentary regarding Justice Souter's off-topic response, see *infra* note 331 and accompanying text.

328. *See* Nichol, *supra* note 287, at 967 (finding preposterous the assumption that simply because Hamilton was "Nationalistic" one is naturally to "suppose[ ] his views should be dismissed out of hand").

high that it, taken to its natural limit, would deny reliance on any of the materials written by the Federalists and would potentially undercut the Originalism that Justice Scalia holds so near and dear to his heart.[329] In other words, by requiring that multiple voices confirm the content of any opinion in *The Federalist Papers*, Scalia would be condemning that interpretive practice to reliance on multiple voices, each of which represent different political and value-based influences—a pitfall of Originalism that the theory's critics castigate the most emphatically.[330] We must ask ourselves then, if such a precarious interpretation on Scalia's part can reasonably be understood to indicate anything other than a mindless state. Perhaps it does not.

An even more compelling example of the dangers of mindless constitutional interpretation is present in Justice Souter's response to Scalia, which heightened the existing state of mindlessness to an unprecedented level. In a passage clearly intended to rebut Scalia's attacks, Souter focused attention on the words Hamilton used in *The Federalist* No. 27. Souter specifically remarked:

> The Court reads Hamilton's description of state officers' role in carrying out federal law as nothing more than a way of describing the duty of state officials "not to obstruct the operation of federal law," with the consequence that any obstruction is invalid. But I doubt that Hamilton's English was quite as bad as all that. Someone whose virtue consists of not obstructing administration of the law is not described as "incorporated into the operations" of a government or as an "auxiliary" to its law enforcement. One simply cannot escape from Hamilton by reducing his prose to inapposite figures of speech.[331]

Justice Souter's use of the vague term "bad" in combatting the majority's interpretation of Hamilton's grammar, without further explanation of what was actually "bad" about Scalia's interpretation, had little judicial value. Even more troubling was his failure to ground his reasoning in the meanings of the words as Hamilton would have understood them.

The Criticism of Formalism Schema would have addressed both instances of mindlessness. With respect to Scalia's reference to

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329. *See* McCabe, *supra* note 287, at 544 (noting how, in *Printz*, "Scalia's use of The Federalist Papers as proof supports a conclusion opposite to his").

330. *See* Flaherty, *supra* note 287, at 1309 (discussing problems associated with understanding collective intent based on the writings of one Framer).

331. *Printz*, 521 U.S. 898, 972-73 n.1 (1997) (Souter, J., dissenting) (citation omitted) (citing Hamilton's writings and trying to prove invalid Justice Scalia's comparison between "auxiliaries" and "nonobstructors"). *Id.* at 973 n.2.

Alexander Hamilton, the Schema would compel several questions: (1) who measured Hamilton's level of popularity; (2) how did that person conduct such an evaluation; and (3) what types of secondary sources were used to arrive at that conclusion? Justice Scalia's analysis makes no mention of these underlying questions; nevertheless, as a result of his remark, there is real danger that future legal practitioners will cite these references for their authoritative weight whenever Hamilton's nationalistic reputation furthers their cause. Because of the precedential force of Scalia's opinion, future judges will have little incentive to engage in the analysis that Scalia neglected. Likewise, with respect to Souter's pithy remark regarding Hamilton's use of grammar, the Criticism of Formalism Schema would urge him to explore the possible meanings of words and standards of grammar that characterized Hamilton's era before interpreting Hamilton's intentions.

d. Ultra-Narrow Interpretations of Silence

This final subsection will focus on Justice Scalia and Souter's dispute over the meaning of a passage written by Alexander Hamilton in No. 27 of *The Federalist Papers*. Scalia's response, in particular, shows us how he considered only one potential interpretation among a number of competing possibilities.[332] Unlike the Criticism of Formalism Schema,

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332. This is not to say that the case only featured one such instance. In fact, Justice Scalia blithely asserted his interpretation on multiple occasions. *See, e.g.*, Nichol, *supra* note 287, at 967-68 ("Even if the dissenters are wrong that the Framers clearly indicated a belief in the acceptability of the federal use of state actors, that, of course, does not mean, without more, that they clearly rejected the practice."); *id.* at 966-67 (pointing out the following drawbacks regarding Scalia's historical analyses:

> Justice Scalia's response to [a] litany of counter-examples is somewhat out of character for such a forceful advocate. The listed examples, he writes, "do not necessarily" conflict with his proffered constitutional rule; they do not "necessarily imply" or provide "clear support" or "clearly confirm" or "conclusively" determine the "precise issue" before the Court. It is possible, he seems to say, to find at least some ambiguity in the cascade of historical practices offered to contradict his new constitutional rule. (Admittedly, the "possible ambiguity" claim grows tiresome after seven or eight uses.) The reader of the opinion is almost left with the impression that Justice Scalia is playing a game of cat and mouse, ending by saying "you can't force me to admit that history is on your side—sure, it's true, but I'll never admit it.).

See also McCabe, *supra* note 287, at 551 ("In the end, Scalia more or less admitted his approach in *Printz* was somewhat 'formalistic,' although he effectively said 'same to you,' when the dissenters accused him of 'empty formalistic reasoning of the highest order.'") (citation omitted).

Additionally, in one example, Justice Scalia noted that although the power to commandeer was "highly attractive" to Congress, Congress did not use the power as much as it could have. *Printz*, 521 U.S. at 905. Scalia thus concluded: "[I]f . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist." *Id.* One commentator appropriately notes the following: "By the end of this discussion, what began as a potential 'reason to believe' transmogrified into a dispositive rationale. . . ." Flaherty, *supra* note 287, at 1290. In contrast to these simpler examples,

which would have encouraged Scalia to explore the many sources that compromised his initial interpretations of a formalistic theory, the Multiplication Schema is appropriate to critique this instance of interpretation because it would require any judge in the same position to dig deeper than the single perspective embraced by Justice Scalia. The following passage by Hamilton led Scalia and Souter to two completely opposed conclusions:

> It merits particular attention . . . that the laws of the Confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.[333]

To the *Printz* Court, the meaning of the word "magistracy" was the key issue.[334] If the word pertained to all civil servants, including the functionaries of a state's executive branch, then the provision seemingly permitted the action sought by the gun control legislation. If, however, the word applied only to judges, the provision would not necessarily permit the desired compulsion. For Justice Souter, the first view constituted the only viable alternative, as he confirmed: "[I]t is The Federalist that finally determines my position."[335] Grasping tightly onto the sentence referencing "[l]egislatures, [c]ourts, and [m]agistrates," Souter proclaimed it evident that magistrates included more than judges in Hamilton's interpretation.[336]

Justice Scalia adhered to the contrary view that magistrates meant judges only.[337] Furthermore, he attacked Souter's analysis, noting how Hamilton and Justice Souter simply presumed that it "flowe[d] automatically" from the reference to complying with the laws of the Confederacy that state officers are "incorporated" into federal service

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the excerpt featured above provides the clearest indication of the type of pervasive mindlessness that can be avoided with the DS Framework.

333. THE FEDERALIST NO. 27, at 162 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

334. *See* David M. Sprick, *Ex Abundanti Cautela (Out of An Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Constitutional Dilemma Over "Federal" Power*, 27 CAP. U. L. REV. 529, 568-69 (1999) (observing the determinative value of this question to the outcome of the case).

335. *Printz*, 521 U.S. at 971 (Souter, J., dissenting).

336. *Id.* Some say that Souter's distinction here had the effect of "rendering Justice Scalia's opinion indefensible." Sprick, *supra* note 334, at 569.

337. *Printz*, 521 U.S. at 907 (proclaiming that historical sources "establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions").

and made "auxiliary" to the government.[338] In a detailed footnote, Scalia presented an alternative theory showing why the argument based on "automatic" flow was mistaken:

> Both the dissent and JUSTICE SOUTER dispute that the consequences are said to flow automatically. They are wrong. The passage says that (1) federal laws will be supreme, and (2) all state officers will be oathbound to observe those laws, and thus (3) state officers will be "incorporated" and "rendered auxiliary." The reason the progression is automatic is that there is not included between (2) and (3): "(2a) those laws will include laws compelling action by state officers." It is the mere existence of all federal laws that is said to make state officers "incorporated" and "auxiliary."[339]

Justice Souter loudly voiced his discontent with Scalia's characterization of his analysis, attacking, *inter alia*, Scalia's view that state duties "not to obstruct the federal law" were their only obligations in carrying out the laws.[340] He further assaulted the inferences underlying Scalia's model, accusing Scalia of creating the straw man notion of "automatic" flow and then assigning this fabricated conception to Souter and Alexander Hamilton without providing a scintilla of support.[341]

Critics have labeled Scalia's behavior in a number of contrasting ways. To some, Scalia's analysis embodies many positive attributes associated with judicial restraint.[342] To others, Scalia's interpretation evidenced unfounded "conclusive reliance on negative inference."[343] Still more argue that Scalia relied on Hamilton "affirmatively"[344] to establish and support the majority's position, while others suggest that Scalia merely grafted *Printz*'s considerations onto arguments that he had

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338. *Id.* at 912 n.4.

339. *Id* (emphasis omitted).

340. *Id.* at 972-73 n.2. It is said that Souter was not the only Justice to criticize Scalia in this way. *See* Jeffrey Rosen, *Dual Sovereigns*, NEW REPUBLIC, July 28, 1997, at 17 (observing Justice Stevens who "remarked spontaneously that Justice Scalia's opinion reminded him of Justice Douglas's opinion in the Griswold Contraceptives case of 1965, which extrapolated a right to privacy from the Constitution's 'penumbras' and 'emanations'").

341. *See Printz*, 521 U.S. at 972 n.1 ("[N]either Hamilton nor I use the word 'automatically'; consequently, there is no reason on Hamilton's view to infer a state officer's affirmative obligation without a textual indication to that effect.").

342. *See* John F. Manning, *Textualism and Original Understanding: Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1363 (1998) (noting that Scalia's actions were calculated and suggesting that his opinion "consciously seeks to assign *The Federalist* only such weight as its analysis merits"). On this view, Scalia is merely responding to the government and Justice Souter "defensive[ly]." *Id.*

343. Flaherty, *supra* note 287, at 1290.

344. *See* Eskridge, *supra* note 292, at 1520 (noting how "Scalia's opinion . . . affirmatively relied on *The Federalist* to establish" the majority's position).

formerly asserted less successfully in other cases.[345] These varied conclusions suggest an almost infinite number of possibilities for using the lessons from *Printz* to improve judicial decision-making.

Amid the din of confusion, the Multiplication Schema rises to the occasion as a reasoned and instructive evaluative criterion. While Scalia's analysis may have been based on a legitimate study of history and the texts composed by the Framers, critics rightly challenge his one-sidedness in interpreting the requirement that all magistrates be judges and then failing to consider other alternatives. Scalia's decision to embrace a singular theoretical resolution highlights the need for the Multiplication of Perspectives as a Concreteness-Preserving Approach to Inclusiveness.

The greatest benefit of this cognitive approach in the context of the *Printz* decision would have been that reliance on this schema might have rebutted the notion that silence in *The Federalist* No. 27 could only mean one thing: that the idea of state compulsion had to be directly indicated with the word "compulsion." The problems inherent in this analysis will surely resurface whenever the Court adjudicates an issue related to compulsion. The meaning of the original text has demonstrably changed; no longer will *The Federalist* No. 27 stand for the more inclusive concepts that it had prior to *Printz*. Whereas, before the case, Hamilton's commentary might have provided guidance to states about resolving dilemmas in complying with federal mandates, *The Federalist* No. 27 is reduced to a justification why Congress cannot compel state governments to act—a meaning that will be forever intertwined with *Printz*'s precedential value.

Even in light of apparent instances of mindlessness, however, it is hardly fair to claim that *Printz* was wrongly decided.[346] The better observation is that *Printz* left several questions unanswered while it wasted time on mindless banter. While one author concludes that "we are left in the dark as to the broader meaning of *Printz*,"[347] others point to more specific examples of remaining uncertainty about *Printz*'s holding.[348]

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345. *See* Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 737 (1999) (noting that Scalia "sugarcoat[ed]" the separation-of-powers argument "directly from his dissent in *Morrison v. Olson*" in *Printz*).

346. Given a virtual cornucopia of explanations for the majority opinion, how would one prove conclusively the correctness of the ruling?

347. Caminker, *supra* note 287 at 202.

348. *See* Nichol, *supra* note 287, at 961-62 (describing a virtual laundry list of cases in which the federal government may still compel states to serve certain federal functions even in light of *Printz*); McCabe, *supra* note 287, at 550 (noting Scalia's "assumption" that law enforcement agents were "state executive branch officials" and recognizing contrary statutes in Texas, for example, that consider sheriffs

V. JUDICIAL MINDFULNESS IN PRACTICE

Part IV, above, introduced the workings of a judicial self-help process. The tough question now is *how much* help does the model actually provide? The proposed model of judicial mindfulness does not enable a judge to emerge with an understanding of every single behavioral influence that affects him. Nor does the model enable him to travel back in time and know the true meanings of the Framers. Yet, we should still recognize the benefits of the model. If the two methods I propose above—using negative practice and transitional thinking—comply with Langer's general theory, then judges can potentially decrease the bias underlying their decisions by fifty percent, if they are currently operating mindlessly.[349] Even if the model only improved decisional accuracy five percent, the model would still be extremely beneficial for judges since indeterminate law more than likely weights potential theoretical solutions equally.[350]

We can critique the proposed model further by analyzing it with a criterion that characterizes effective self-help methods in general: the ease with which judges can implement the process. If judicial mindfulness withstands this test, the theory will stand as a practical approach to increasing the accuracy of judicial decision-making.

For any self-help model to work, the people who use it must understand it. More importantly, they must also be committed to the process.[351] At one level, it makes sense for judges to know that certain debiasing processes exist. Awareness is naturally the first step.[352] But

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to be members of the judiciary); Caminker, *supra* note 287, at 202 ("[T]he Court left open the possibility that particular constitutional provisions outside of Article I, Section 8 might still authorize congressional commandeering, but the Court provided little guidance for determining when this would be so.").

349. *See* Chanowitz & Langer, *supra* note 226, at 1051 (describing results of *Mindfulness* training).

350. *See supra* notes 39-41 and accompanying text (defining and explaining legal indeterminacy). Also note that judges will be more informed regarding which influences they need to subtract from an analysis, fulfilling Professor Schroeder's call, more than eight decades ago, for a process where judges are "knowing [of] the present action, and the immediate stimulus from without, [so that] as if by a process of subtraction, [they] may uncover the contributing motive from within, which is the product of past experience." Schroeder, *supra* note 190, at 90.

351. *See* CARL E. THORESEN & MICHAEL J. MAHONEY, BEHAVIORAL SELF-CONTROL 9 (1974) ("To exercise self-control the individual must understand what factors influence his actions and how he can alter those factors. . . . [t]his understanding requires that the individual in effect become a sort of personal scientist."); Schroeder, *supra* note 190, at 96 (requiring that judges "habitually check[]" themselves for biases).

352. HILL, *supra* note 249, at 21 ("One method to improve decisions, is simply to make decision makers aware of the nature of limitations of biases of which they may not be aware. By simply becoming informed of innate biases and perception distortions, the decision maker can take the steps to correct them . . . *But awareness alone does not create a system.*") (emphasis added); Cohen, *supra* note 183, at B9 ("The first

without actually attempting the practices regularly, the "knowing-doing" gap will remain an impediment to the attainment of judicial mindfulness.[353] Because judges are overloaded, if not overwhelmed, with a growing docket of cases, they need a simple program that allows for quick implementation, a requirement I call the judicial economy of self-help.[354] Judicial mindfulness passes this test because it comports with the general requirements of effective self-help models.[355] Judges only have to use negative practice once to create a baseline for evaluating their behavioral inclinations regarding the Constitution, for example. Given the simplicity of this first step, the only real challenge becomes achieving transitional thought in relation to problem cases as they arise. To meet this challenge, judges might simply create a self-monitoring chart implementing Professor Basseches's examples from the Dialectical Schemata with the results gained from the exercise interpreting the Constitution in a personal way. Because these requirements are minimal in comparison to clinical self-help programs, which require frequent consultation with mental health professionals, judges should be able to use these tools in their chambers as they review cases.

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hurdle is to get judges to admit they are subject to the same psychological hiccups as everyone else."); *cf.* Jonathan Baron & Rex Brown, *Toward Improved Instruction in Decision Making to Adolescents: A Conceptual Framework and Pilot Program*, *in* TEACHING DECISION MAKING TO ADOLESCENTS 95, 107 (Jonathan Baron & Rex Brown eds., 1991) (recognizing that "simply warning . . . of the existence of a bias does not usually help" those affected by it).

353. In explaining this dilemma, Professors Lowenstein and Thompson point out studies indicating that a large proportion of people have faulty conceptions of the way that thermostats operate. They compare the causes of the problem to classes they have taught in which students of negotiation were still unable to implement the theories they learned immediately following instruction. Jeffrey Lowenstein & Leigh Thompson, *The Challenge of Learning*, NEGOTIATION J., Oct. 2000, at 400, 401, 404. While the advanced students in such negotiation classes surely benefited from the luxury of having directed instruction and feedback from the instructors, the success of the self-awareness methods described in this Article is totally contingent upon the judge himself. *See id.* at 403-405 (describing a number of benefits when the learning process is facilitated in classroom settings and explaining the unpredictable value of these methods even as applied in supervised conditions).

354. *See* MITHAUG, *supra* note 319, at 32 (observing that "problem solvers use the least expensive method to gain the minimal amount of information necessary to decide").

355. *See* MICHAEL J. TANSEY & WALTER F. BURKE, UNDERSTANDING COUNTERTRANSFERENCE FROM PROJECTIVE IDENTIFICATION TO EMPATHY 87 (1989) (noting that productive self-checking processes create frameworks for answering the following questions: "What am I experiencing?", "Why am I feeling this way?", "How did this come about?" or "What purposes might this serve for the [litigants or their counsel] to arouse this experience within me?"); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 58 (1994) (noting that, "[a]t a minimum, judges should mentally list potential biases that may permeate their decision-making process [and] review and add to the list daily.").

VI. CONCLUSION

This Article has shown that two types of cold bias—one involving the judge's past traumatic experiences and the other relating to his interpretation of ambiguous terms or words—can negatively influence judges by causing them to interpret the law in a hasty manner without fully exploring alternative channels of interpretation. Either type of bias can limit the utility of the judge's legal determination to the needs of an ever-changing society. While the bias does not corrupt the legitimacy of the materials upon which the judge relies to achieve his final judgment, the bias impedes the process that the judge implements to interpret such materials. In response to these harmful biases, this Article identified certain methods of self-awareness that psychologists have used to solve similar dilemmas in decision-making in a non-legal context. Although these methods have apparently been neglected by the legal community based on doubts about the utility of psychological approaches in aiding legal analyses, they offer a number of important analytical tools to the American judiciary.

While this Article may be the first to adopt Ellen Langer's concept of mindfulness as a judicial objective, judges should have little difficulty embracing the idea. It promotes many of the standards to which judges are held accountable within their own profession. The greater difficulty comes, however, with adopting psychological methods like Michael Basseches's Dialectical Schemata as a legal approach. The problem arises because, regardless of effectiveness of the DS Framework in pointing out specific analytical problems, the Framework was never intended to critique legal decision-making, specifically—a way of thinking that is distinguishable from all others.

This Article urges the legal academy to experiment more with the notion of transitional thinking as a method for judges to check and address their own biases. With enough experimentation in this field, judges should ultimately use psychologically tested models as checks against their natural thought processes when reaching decisions. The general debiasing framework proposed by Wilson and Brekke provide a foundation upon which new advances in transitional thinking can be built.

While this proposal has certain costs in that it requires legal ethicists to promote the system and adapt it to administrative constraints on the courts, these demands are realistic when compared to expensive anonymous training sessions and the risks related to confused legal outcomes.

The recommendation to experiment further with transitional thinking comes not only because the system helps us identify better approaches

to dealing with hard cases like *Printz v. United States*[356]—approaches that scholars, not to mention the *Printz* Justices themselves, were unable to resolve with traditional analytical methods—but also because judges can implement analyses under the framework without devoting incredible amounts of time and energy to learning and implementing the system. While judicial mindfulness may not be the panacea to improve *all* legal analyses, it offers practical tools that will potentially improve legal decision-making in a number of sensitive analytical areas that limit the judicial role or permit unchecked legal outcomes, such as where the law is indeterminate.

In sum, judicial mindfulness recognizes those judges who have realized the need for greater self-awareness in their decision-making. As one such jurist put it: "'Why do I make the decisions I do?' I make them because I have to. But I can do better."[357]

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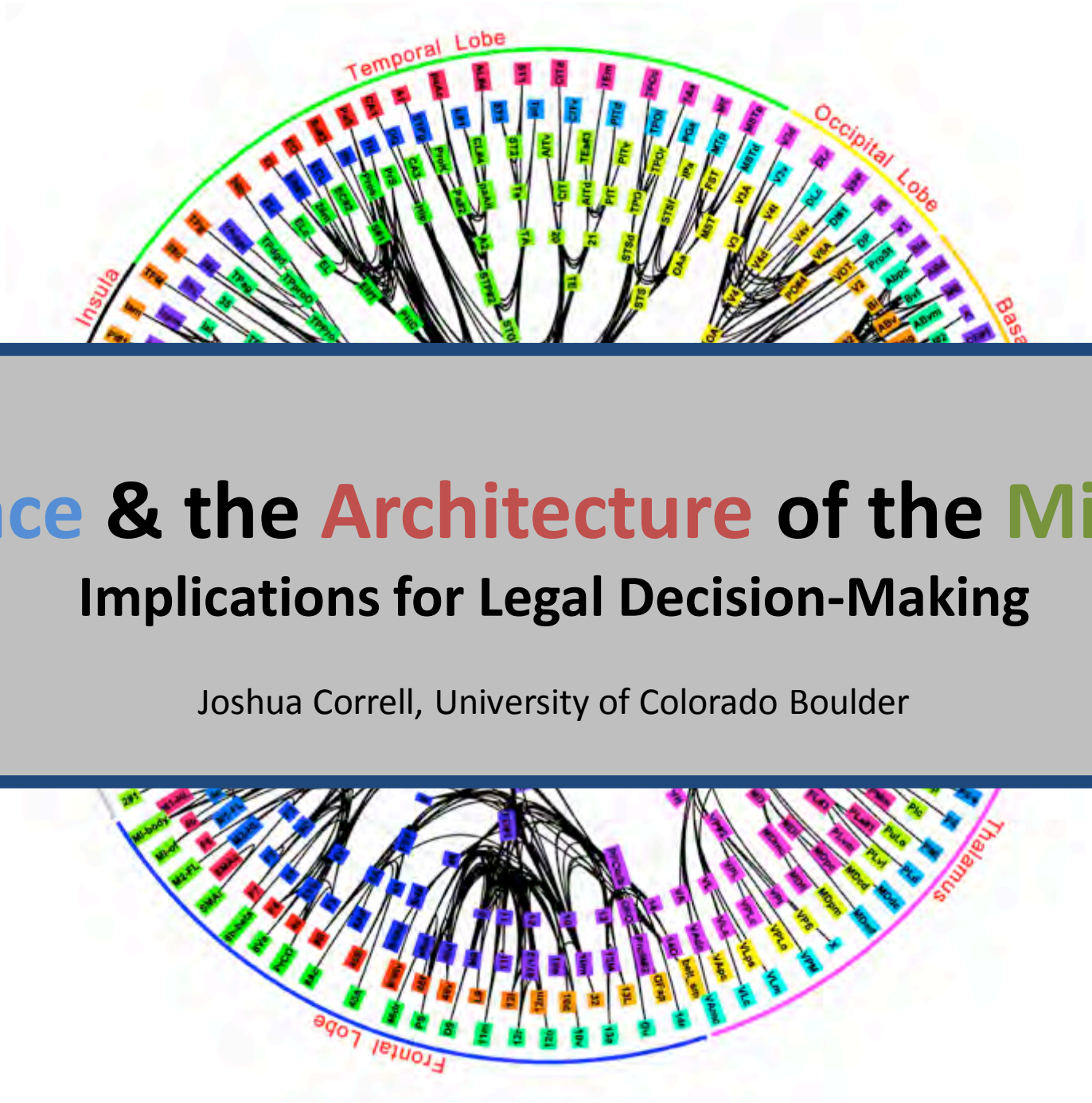
356. *See* Eskridge, *supra* note 320, at 1309 n.53 (calling *Printz* a "hard constitutional case[ ]"); Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS 158 (2001) (same).

357. HILL, *supra* note 249, at 28.



Race & the Architecture of the Mind

Implications for Legal Decision-Making

Joshua Correll, University of Colorado Boulder

General overview

1. Implicit bias… what’s all the fuss?
2. What are we really measuring?
3. Real consequences
4. So what can we do?

Part 1

Implicit bias… what’s all the fuss?

Part 1

- What are attitudes?
- Measuring attitudes
  - Traditional questionnaires
  - Implicit measures

What are attitudes?

- Feelings
- Thoughts (beliefs, associations)
- Behavioral tendencies

personal… part of who we are

Which option best reflects your own views?

Strongly Disagree	Moderately Disagree	Neither Agree nor Disagree	Moderately Agree	Strongly Agree
1	**2**	**3**	**4**	**5**

1. I like the taste of apples

2. Apples are a healthy snack

Which option best reflects your own views?

Strongly Disagree	Moderately Disagree	Neither Agree nor Disagree	Moderately Agree	Strongly Agree
1	**2**	**3**	**4**	**5**

1. It is likely that Black people will bring violence to neighborhoods if they move in

2. It would not bother me if my new roommate were Black

Established 1845 SCIENTIFIC AMERICAN June 1978 Volume 238 Number 6

Attitudes toward Racial Integration

The fourth in a series of reports on racial attitudes shows that U.S. whites have increased their support of integration at a steady pace, with a striking period of more rapid change between 1970 and 1972

by D. Garth Taylor, Paul B. Sheatsley and Andrew M. Greeley

The 1970's are generally characterized as being years of disgruntled reaction to the rapid social, economic and political changes of the 1960's. In some areas of American life that may well be a correct assessment, but it does not seem to have been the case in race relations. The continuing monitoring of racial attitudes conducted by the National Opinion Research Center (NORC) makes it clear that since 1970 white Americans have moved steadily toward approval of racial integration. The most striking fact to emerge from our analysis of the surveys is that the years between 1970 and 1972 were an extraordinary interlude in U.S. history: just when the "white backlash" was thought to be taking effect there was instead a leap forward in racial tolerance—or, to be more specific, in the verbalized attitudes of white Americans with regard to the integration of blacks into U.S. society. The early 1970's were marked also by an increased rate of change in several other measures of support for civil or personal liberties, equality between the sexes and tolerance (some call it permissiveness) in general. The years since 1972 have seen not a reversal of the liberal trend in racial and other matters but rather a return to the slower, but nevertheless steady, rate

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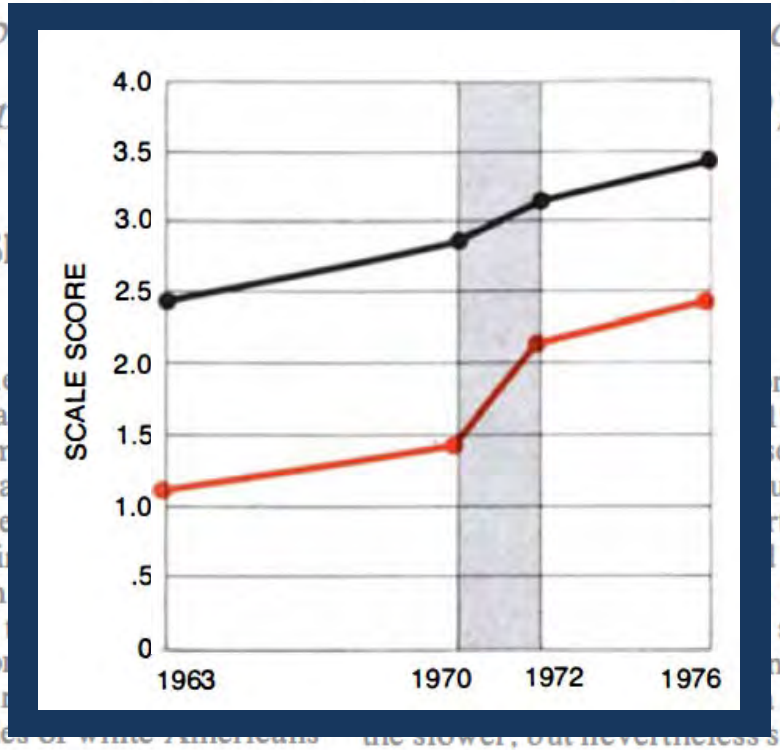

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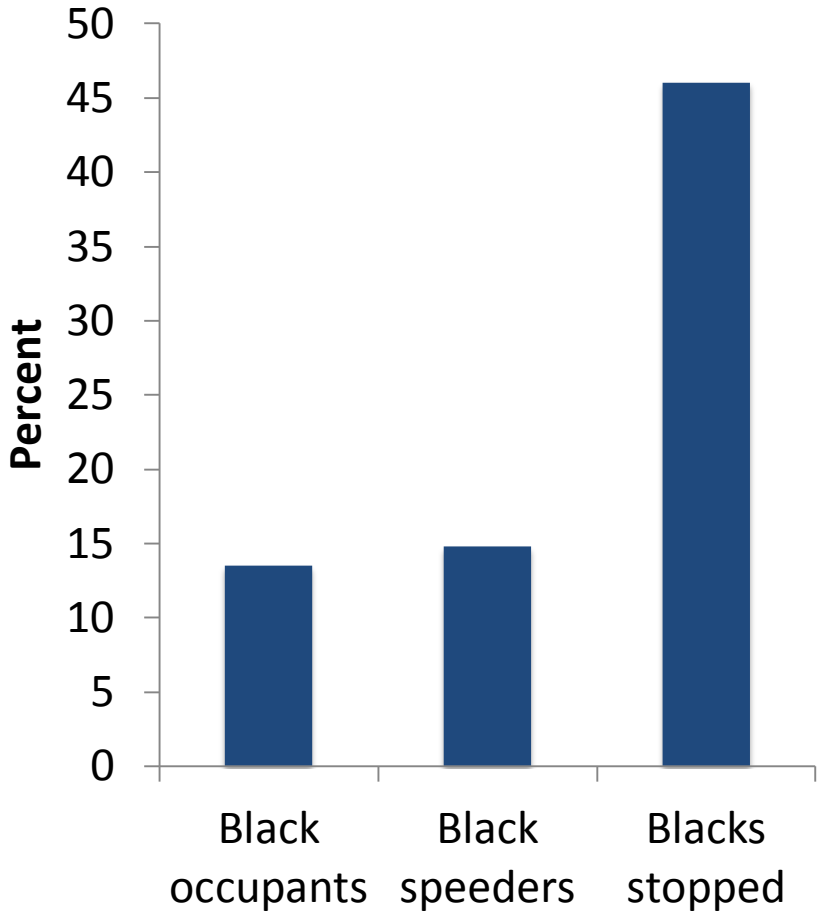
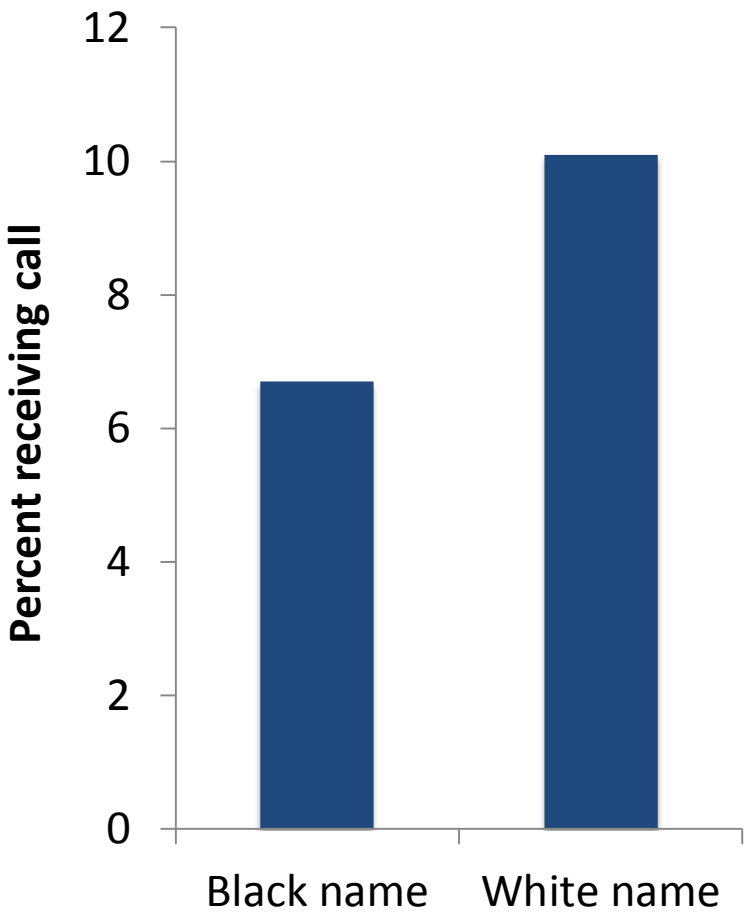
And yet…

- State v Soto
- NJ Turnpike
- Observers count cars



And yet…

- 5000 resumes sent in response to employment ads
- Varied perceived race of names



50% difference on the SAME RESUMES!

Which option best reflects your own views?

Strongly Disagree	Moderately Disagree	Neither Agree nor Disagree	Moderately Agree	Strongly Agree
1	2	3	4	5

1. It is likely that Black people will bring violence to neighborhoods if they move in

Problems with this approach?

- **Strategic misrepresentation**
- **Lack of knowledge**
- **A different kind of measure?**

A different kind of attitude measure

Bad

Good

A different kind of attitude measure

Bad

Good

A different kind of attitude measure

Bad

Good

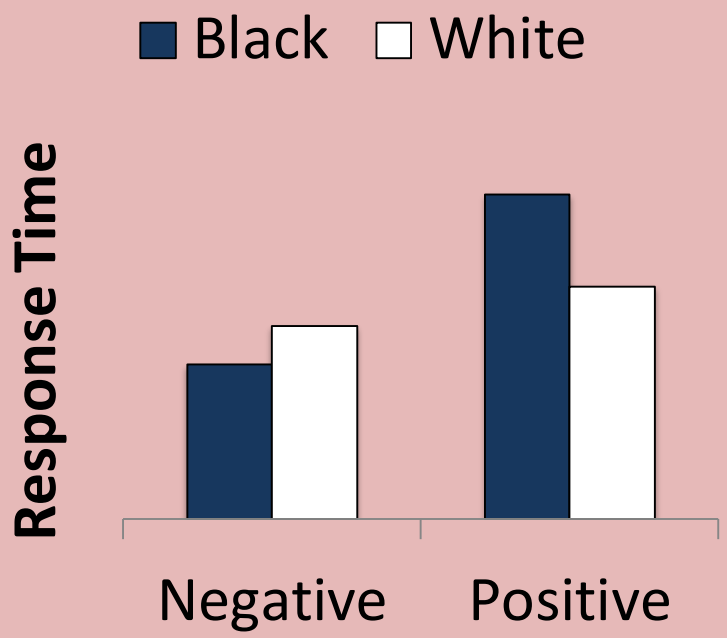
A different kind of attitude measure

Bad

Good

Implicit measures

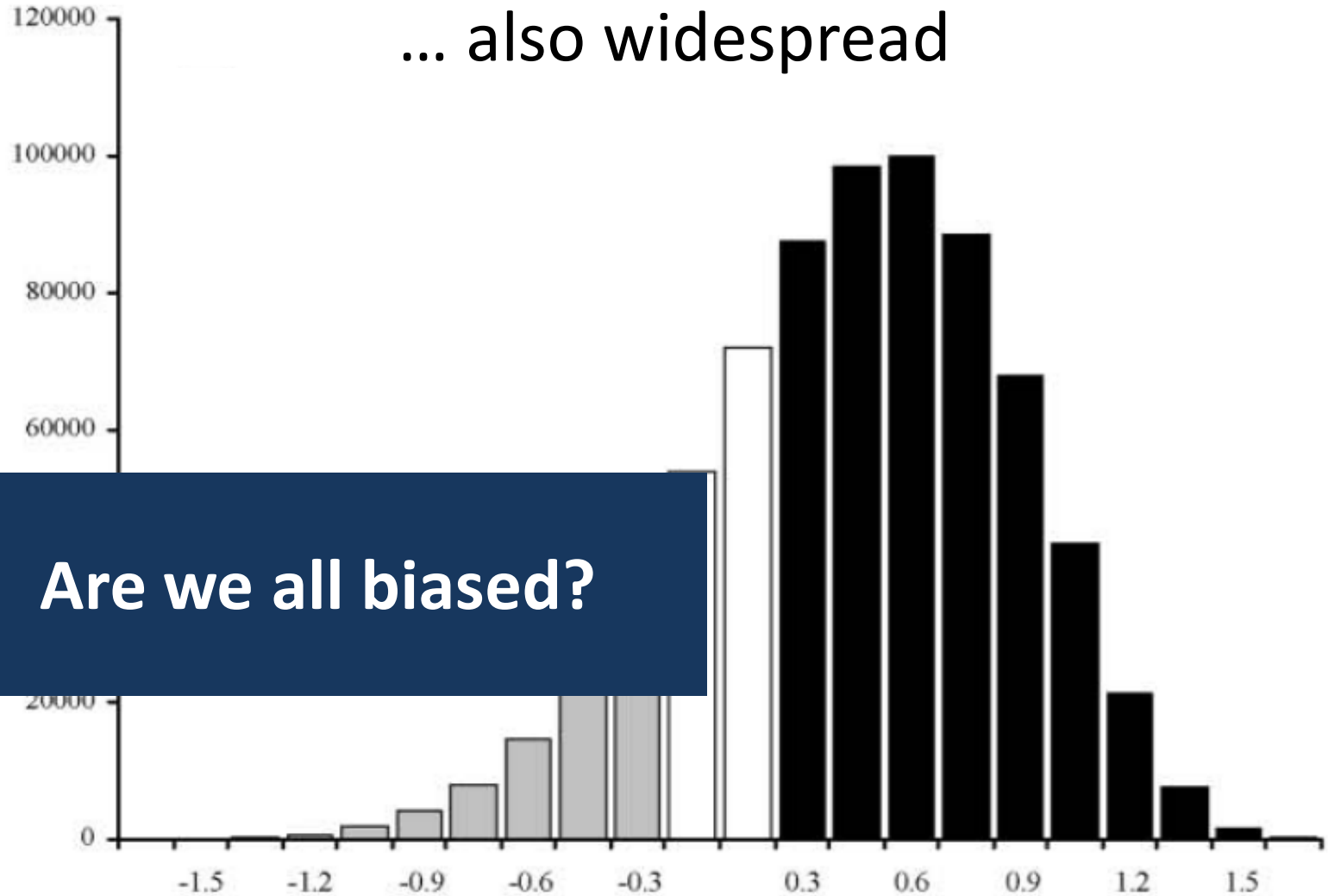
- Assess attitudes indirectly
- Subtle or fast → prevent deliberate responses



- Robust effects
- Weakly related to explicit
- Predict behavior
- “True” attitudes?

Implicit measures

… also widespread



Are we all biased?

Part 1 recap

- Attitudes = thoughts, feelings & behavior
- Questionnaires reveal only what people know & choose to reveal
- Implicit measures are less edit-able
  - Truth?

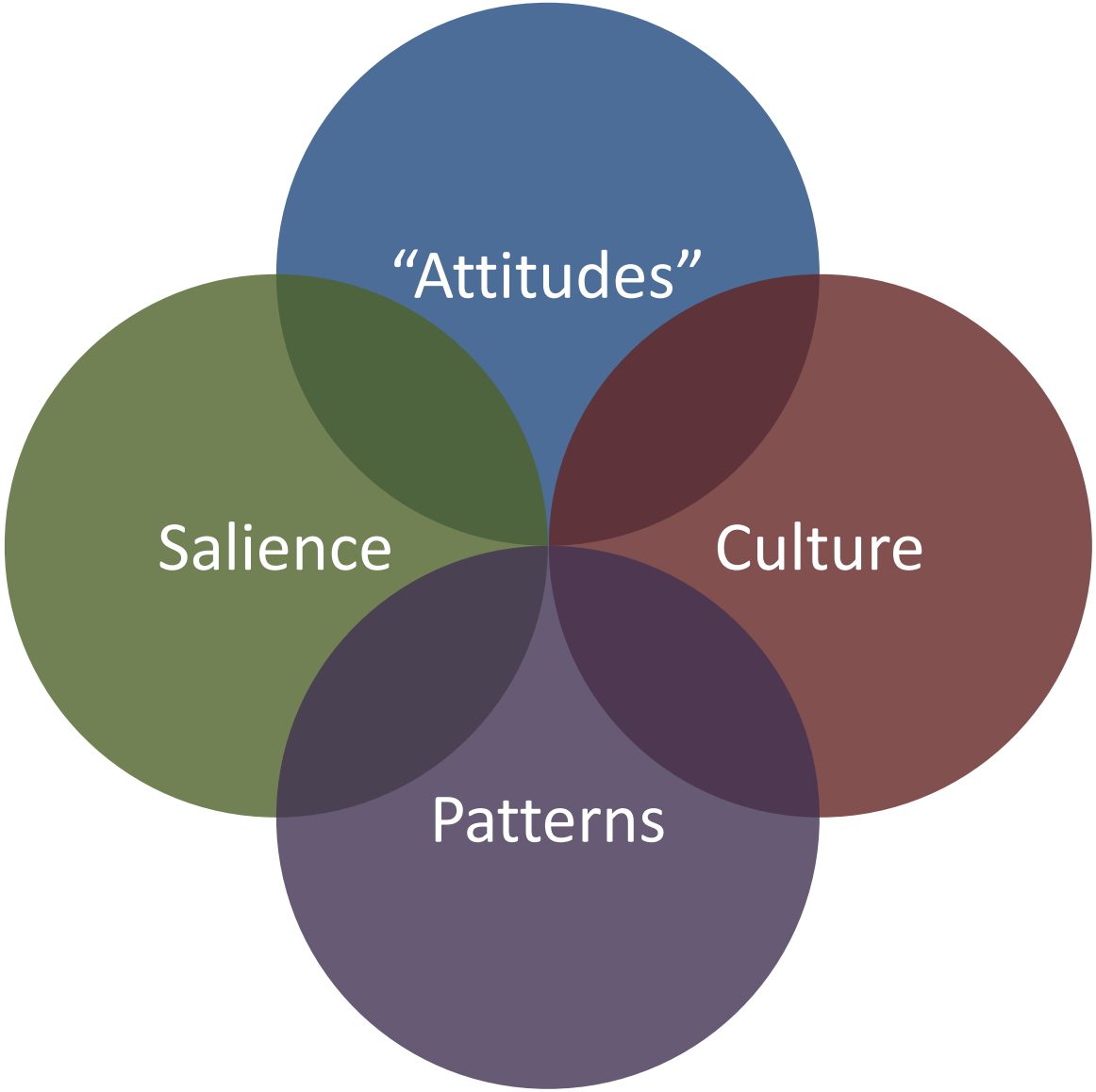
Part 2

What are we really measuring?

Part 2

- What implicit measures <u>really</u> measure
- The mind as a prediction machine

What do they really measure?



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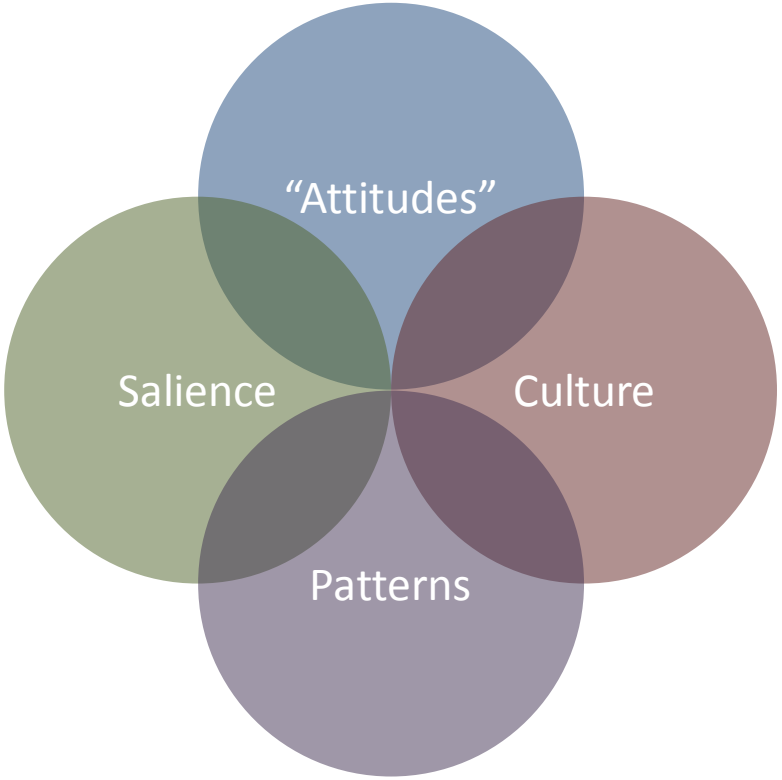

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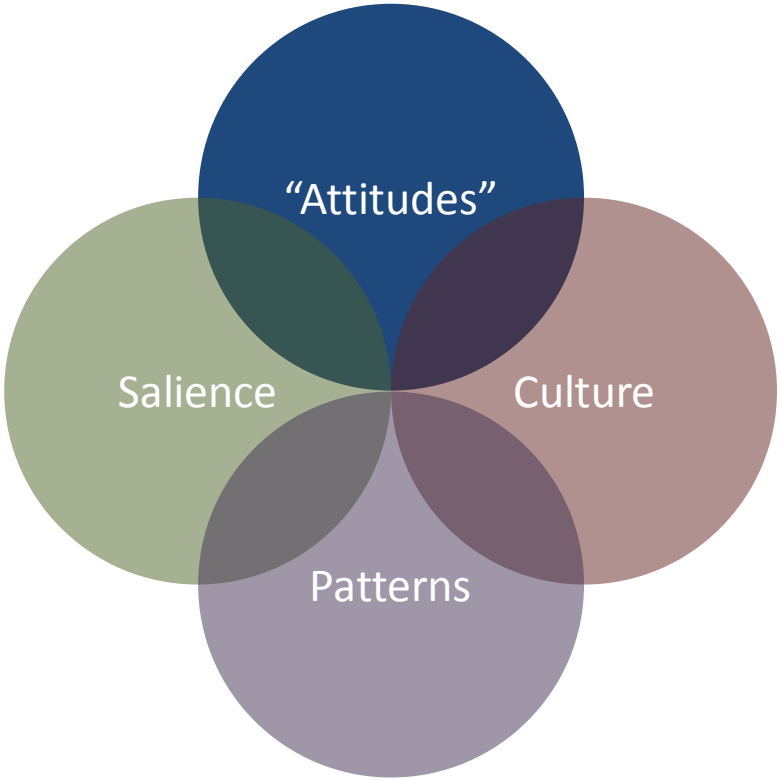

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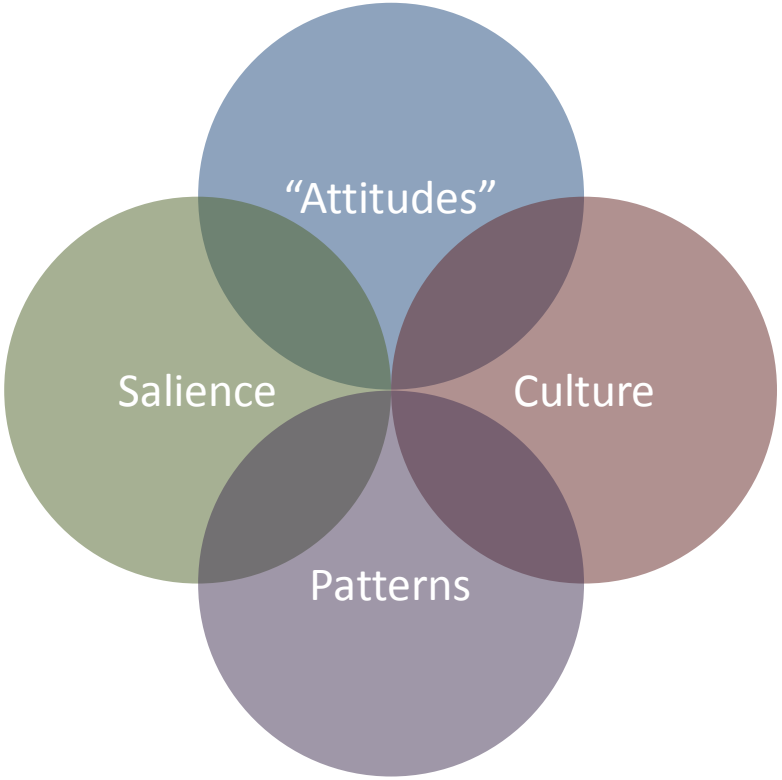

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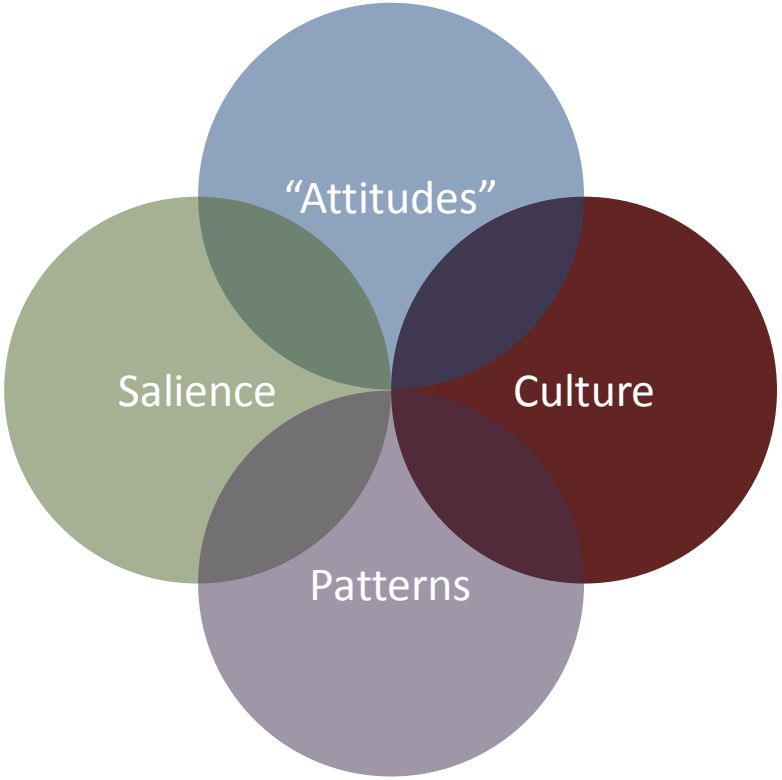

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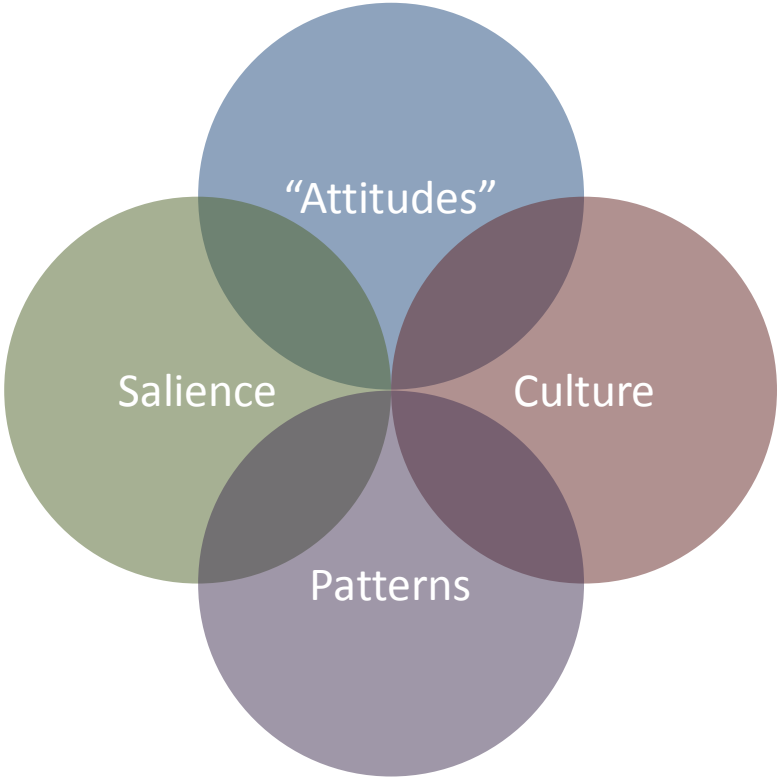

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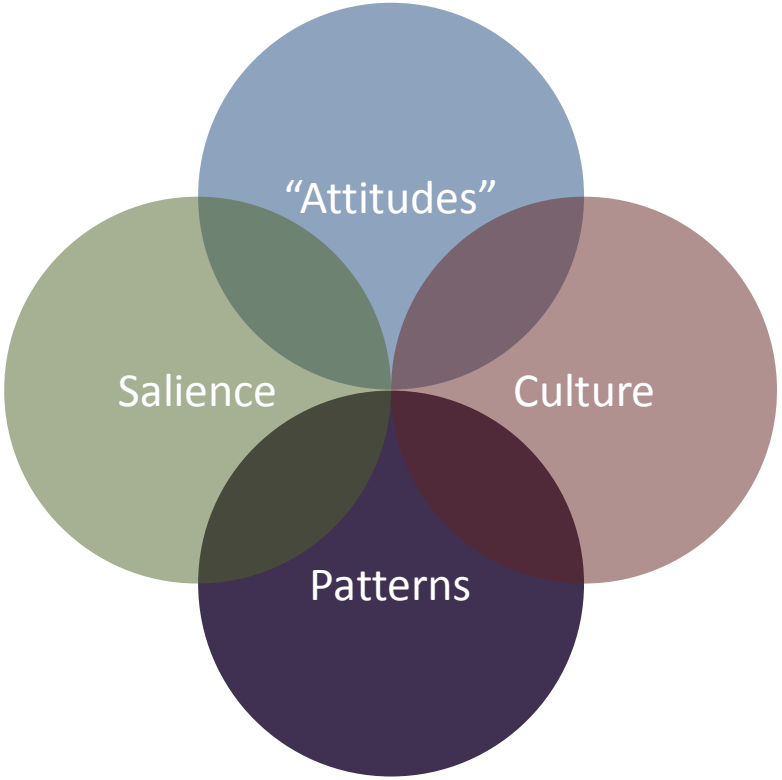

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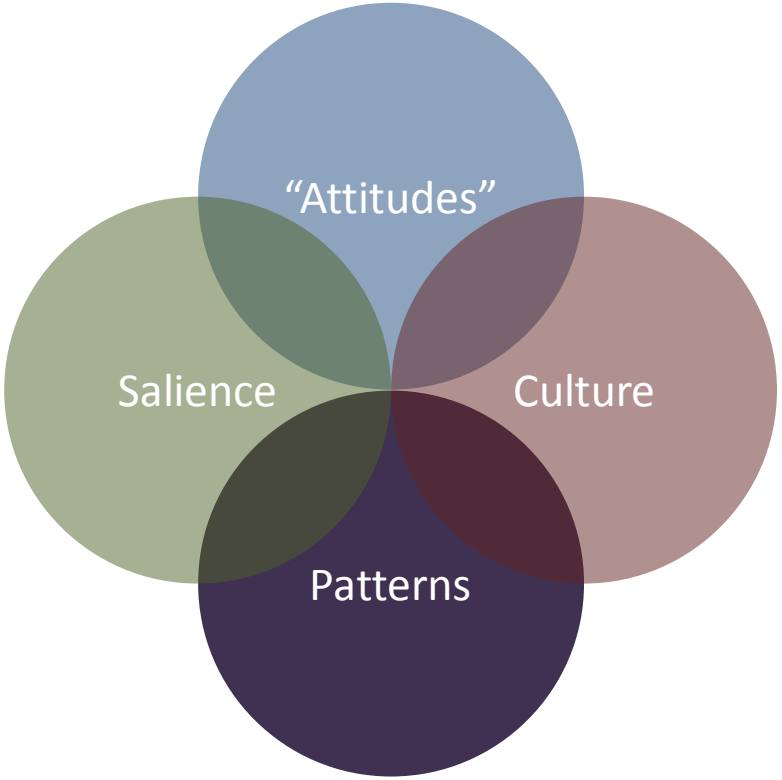

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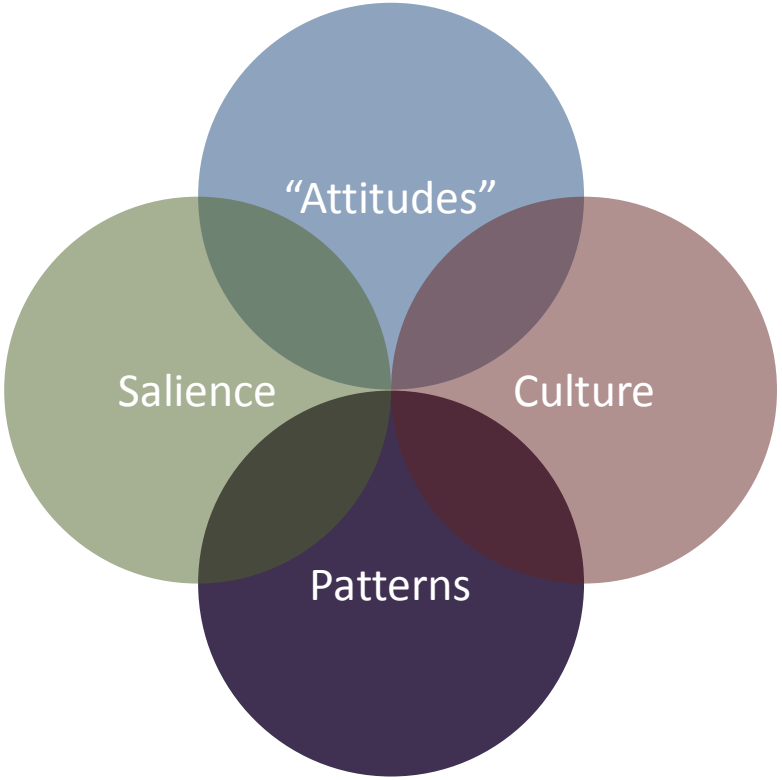
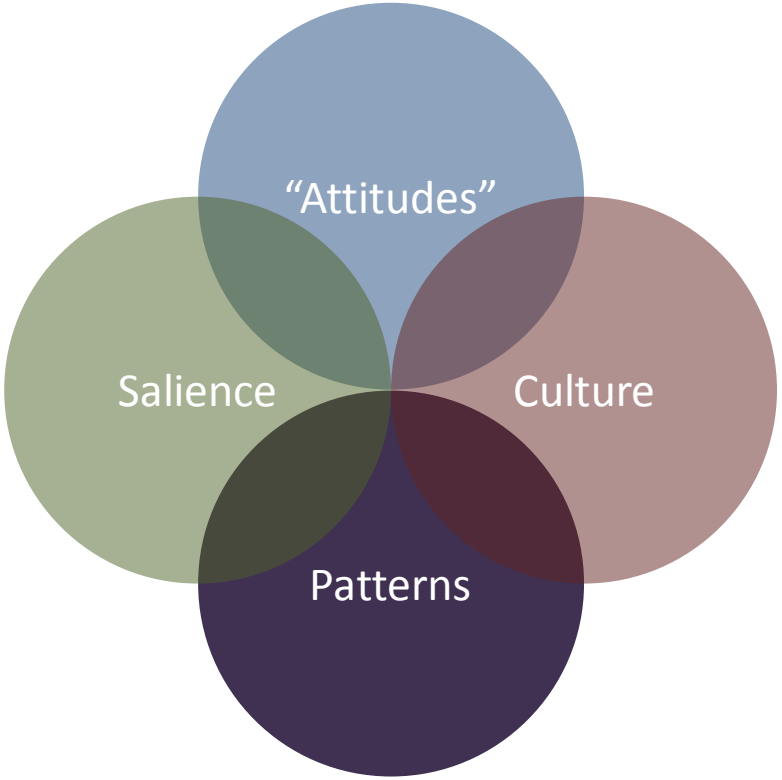


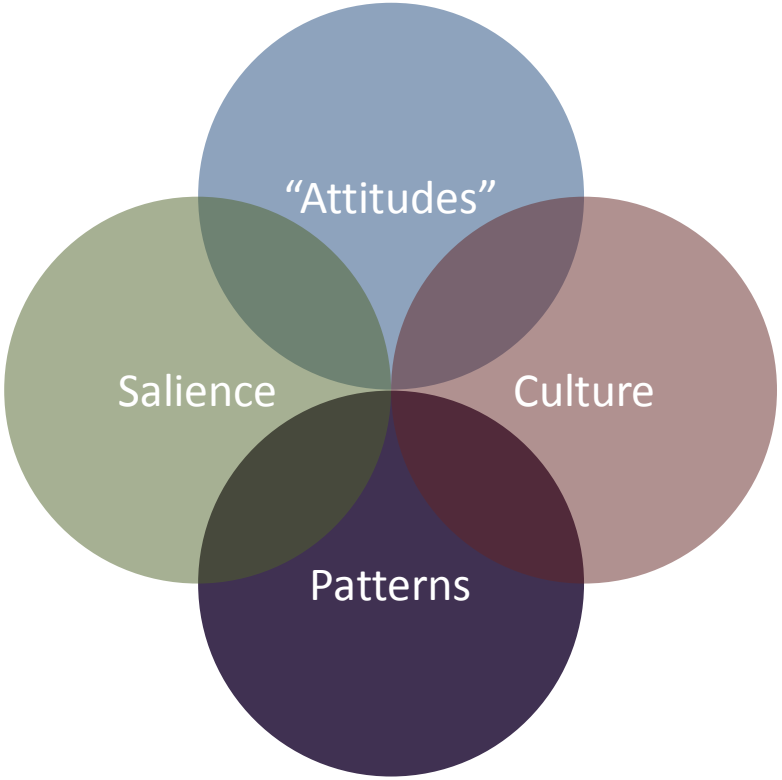
pain

What do they really measure?



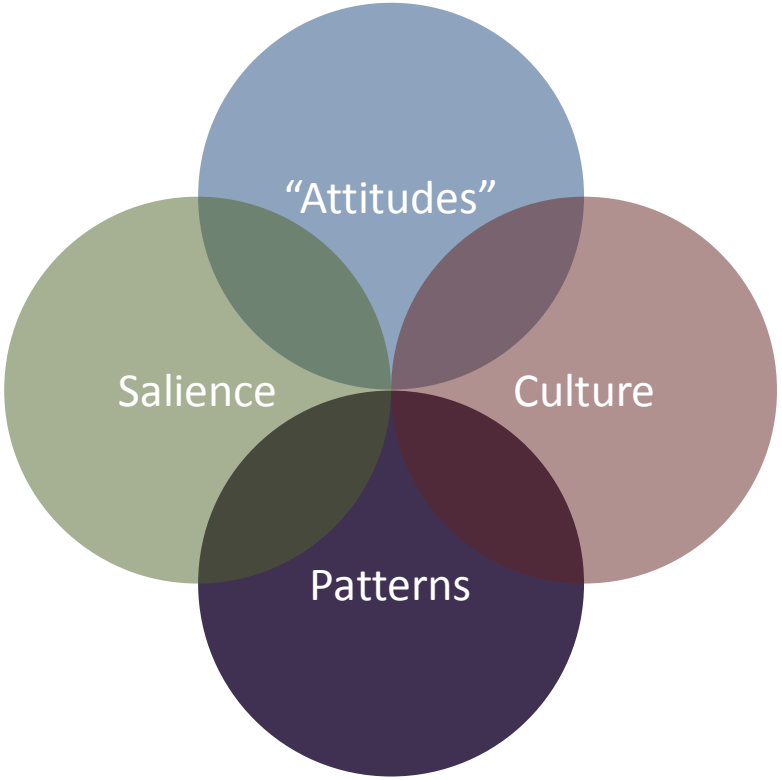
evil

What do they really measure?



smile

What do they really measure?



hurt

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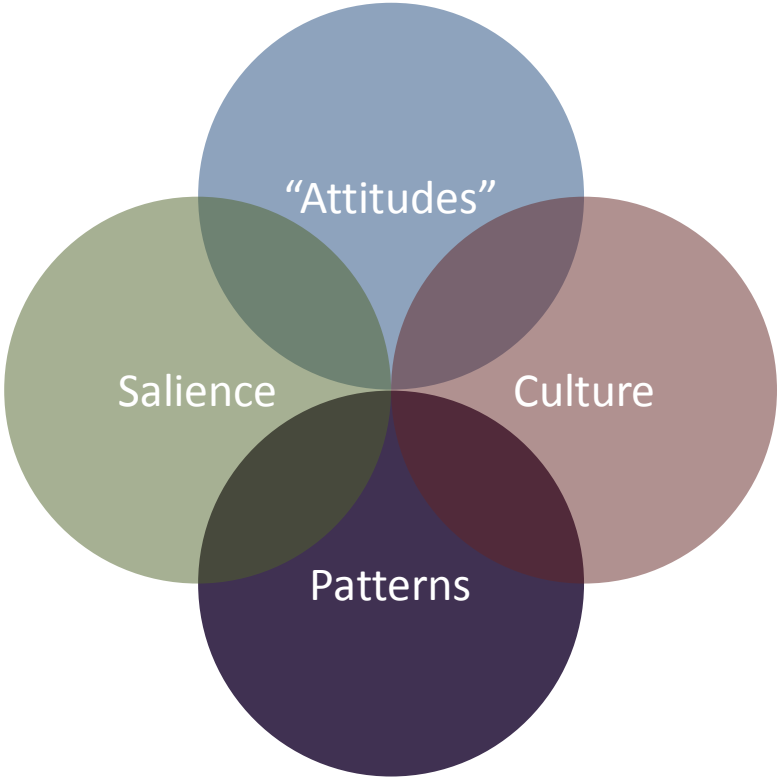

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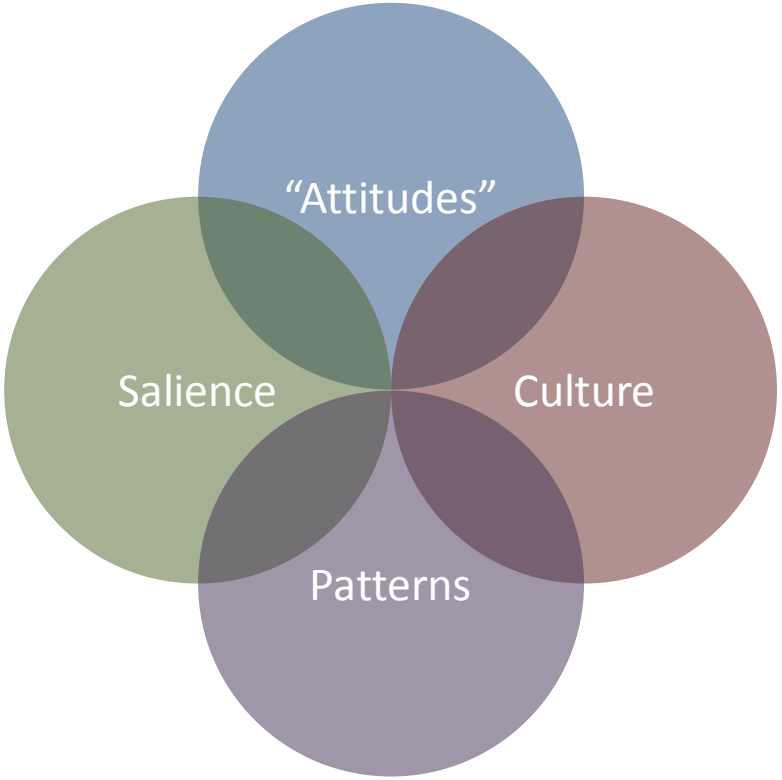

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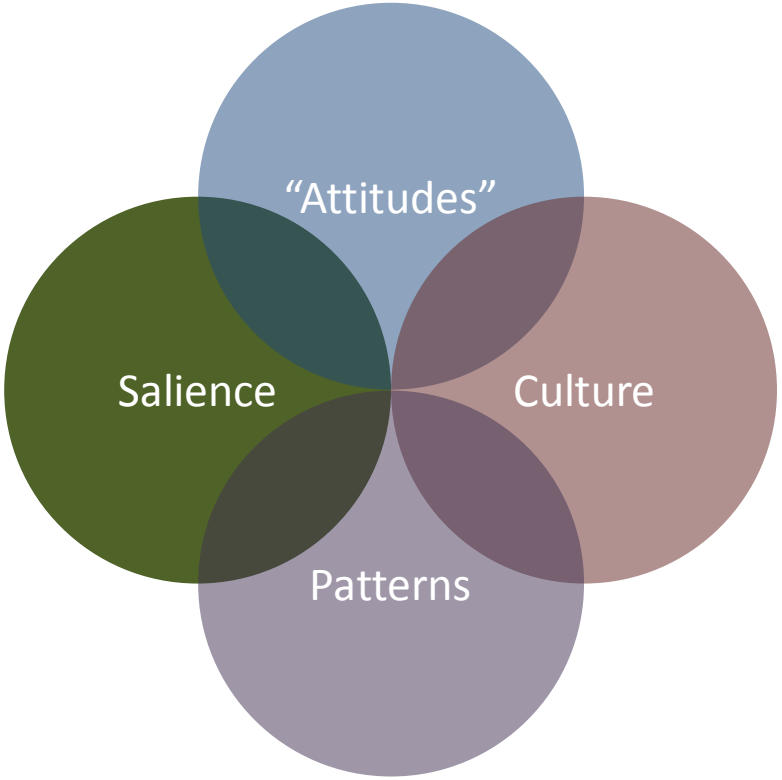

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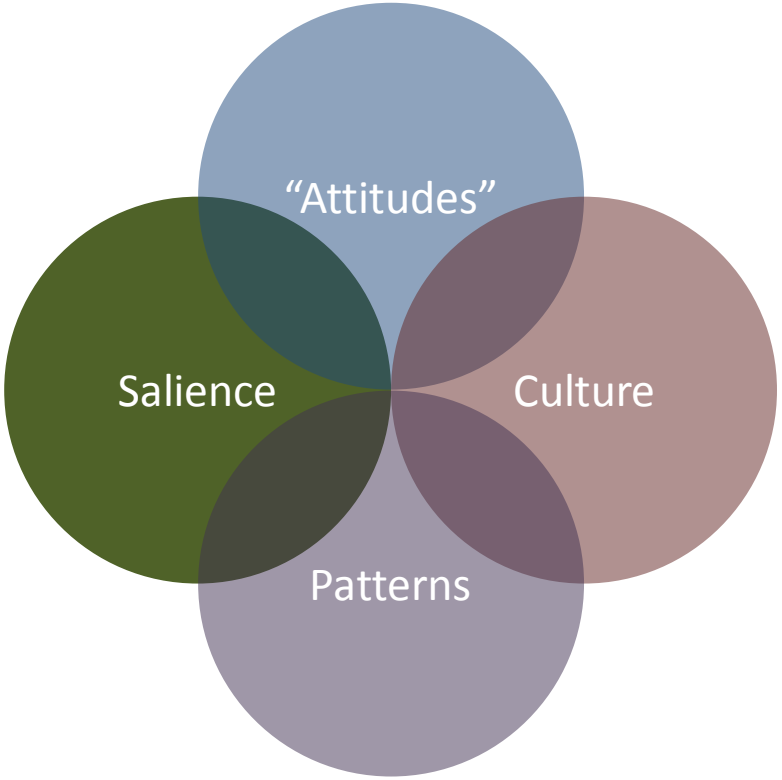

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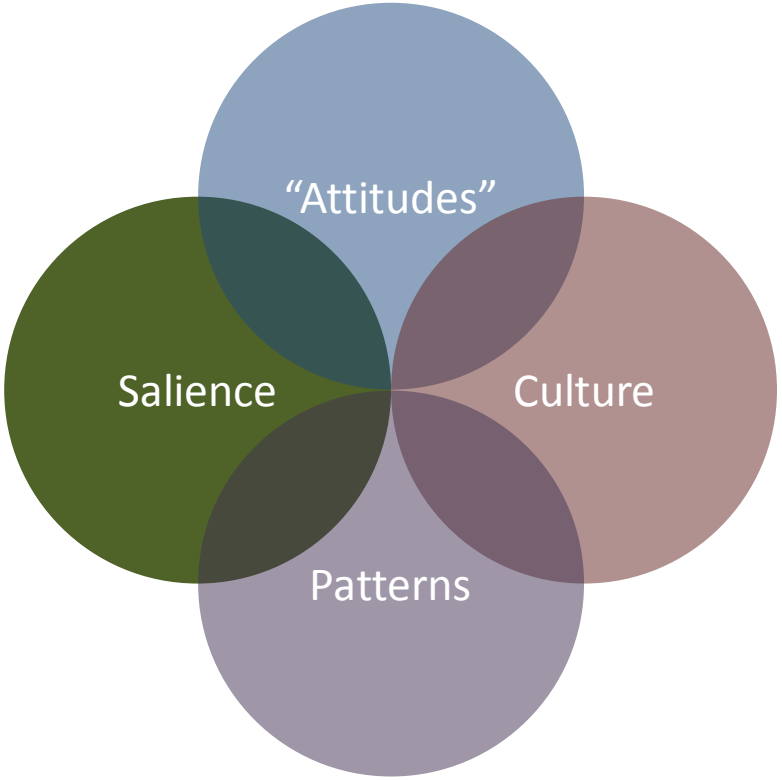

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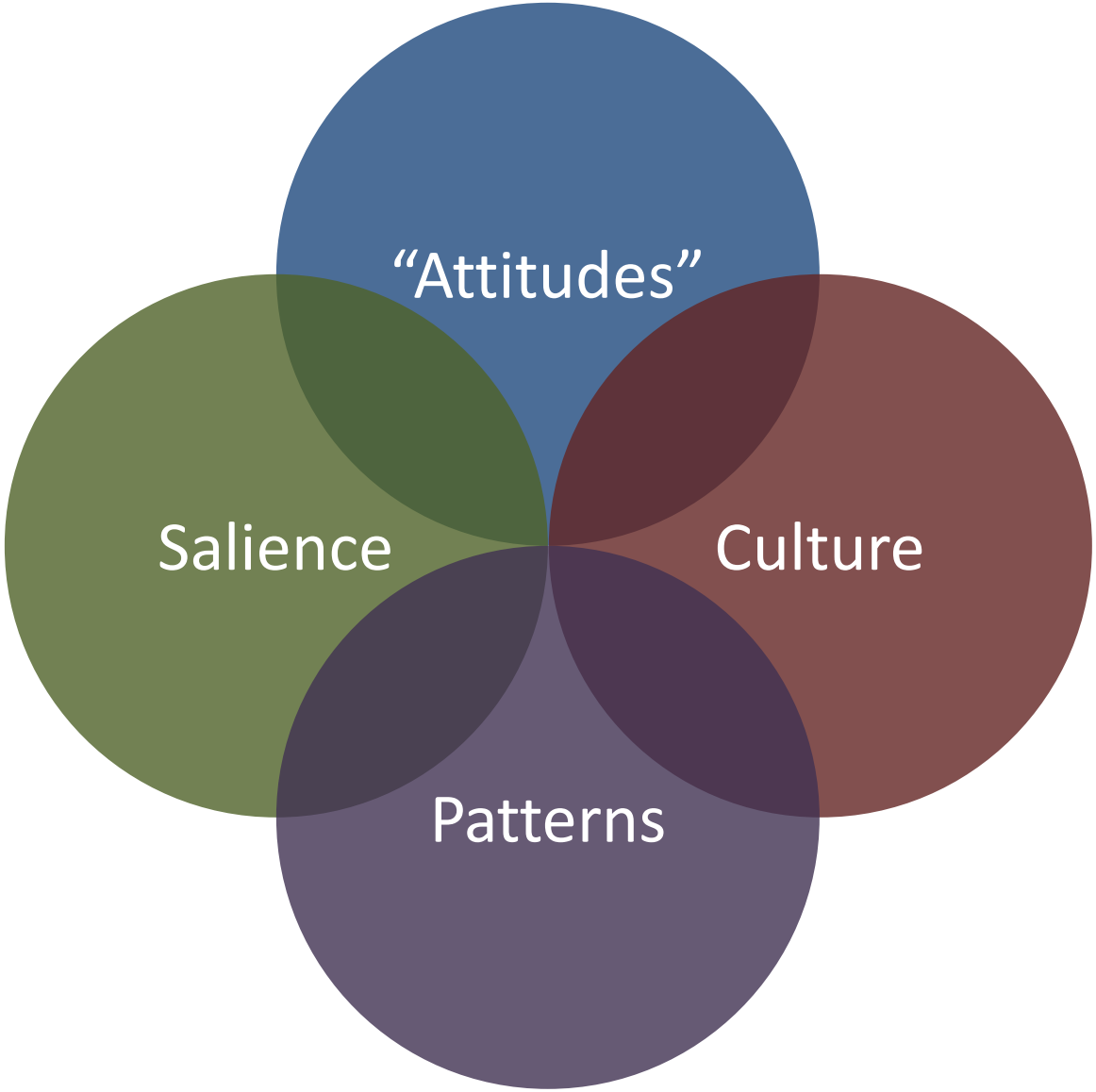

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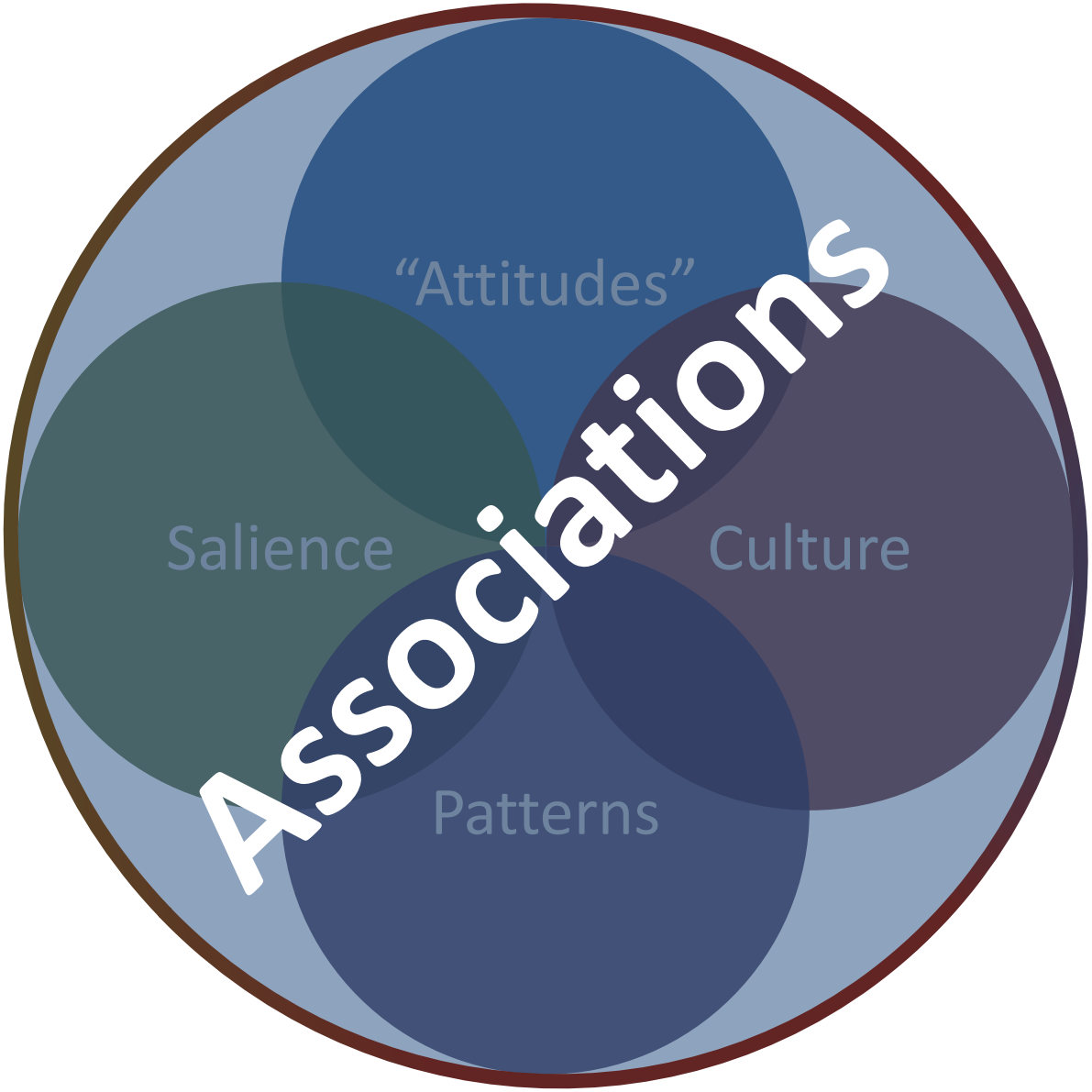
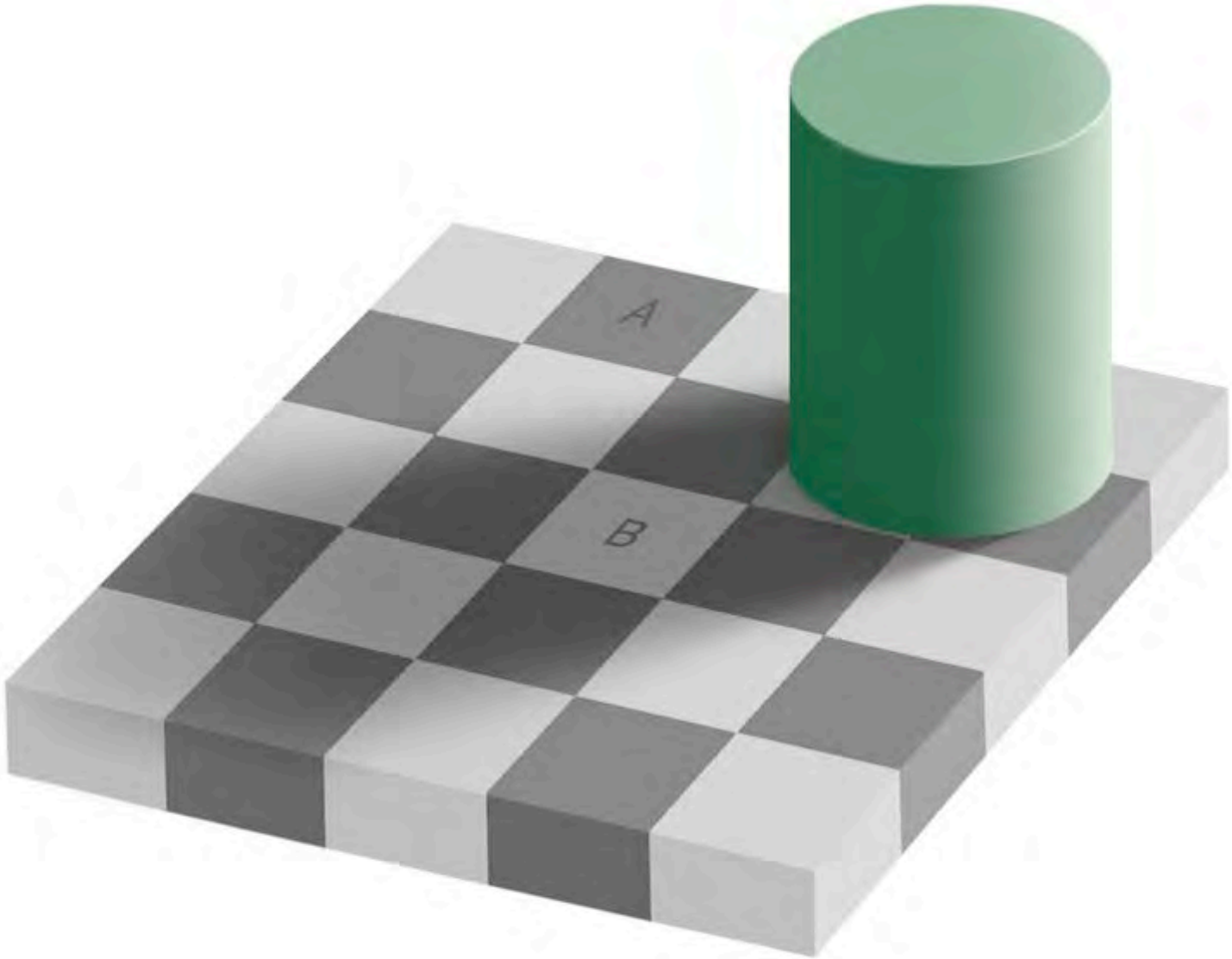


A normally functioning mind



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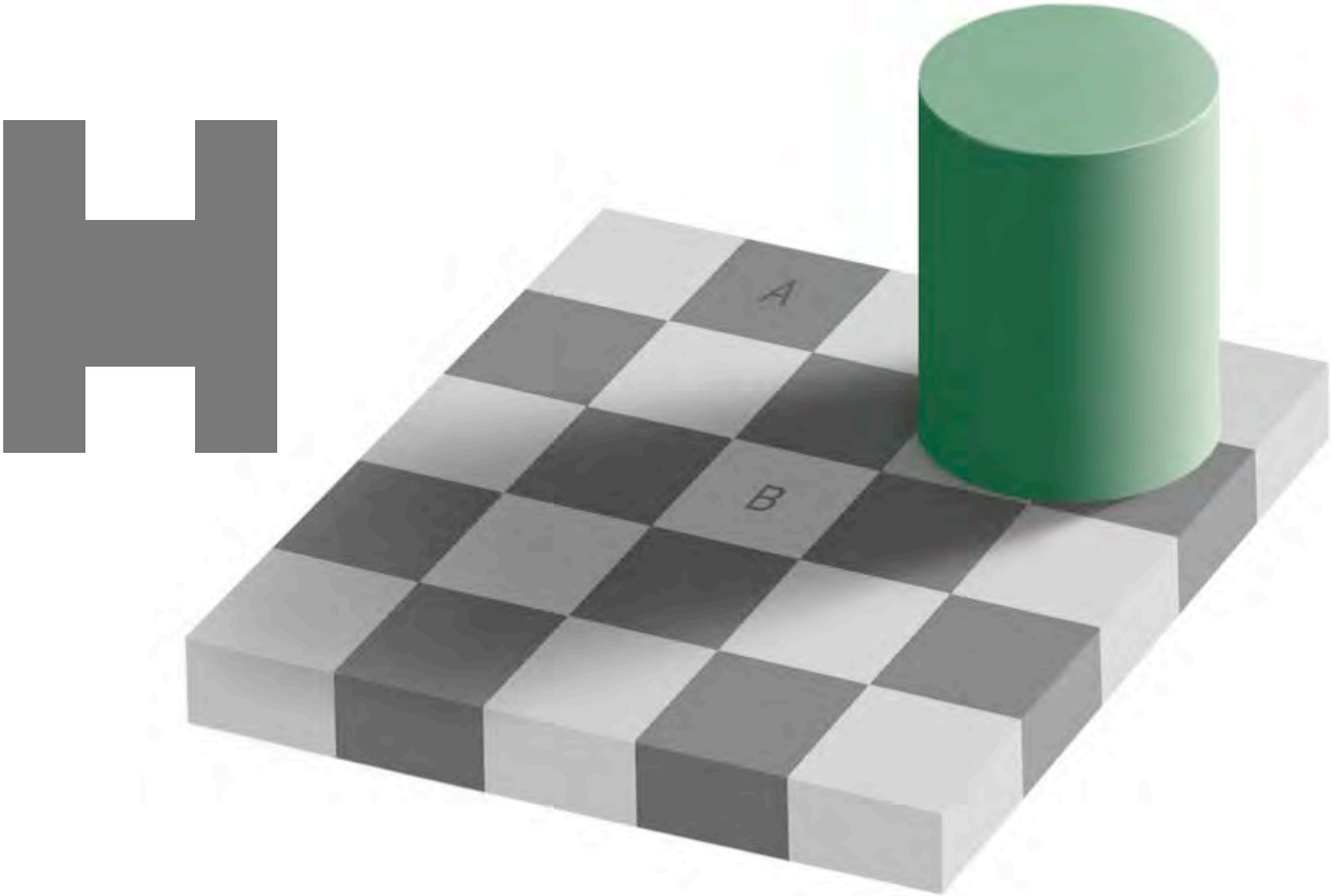

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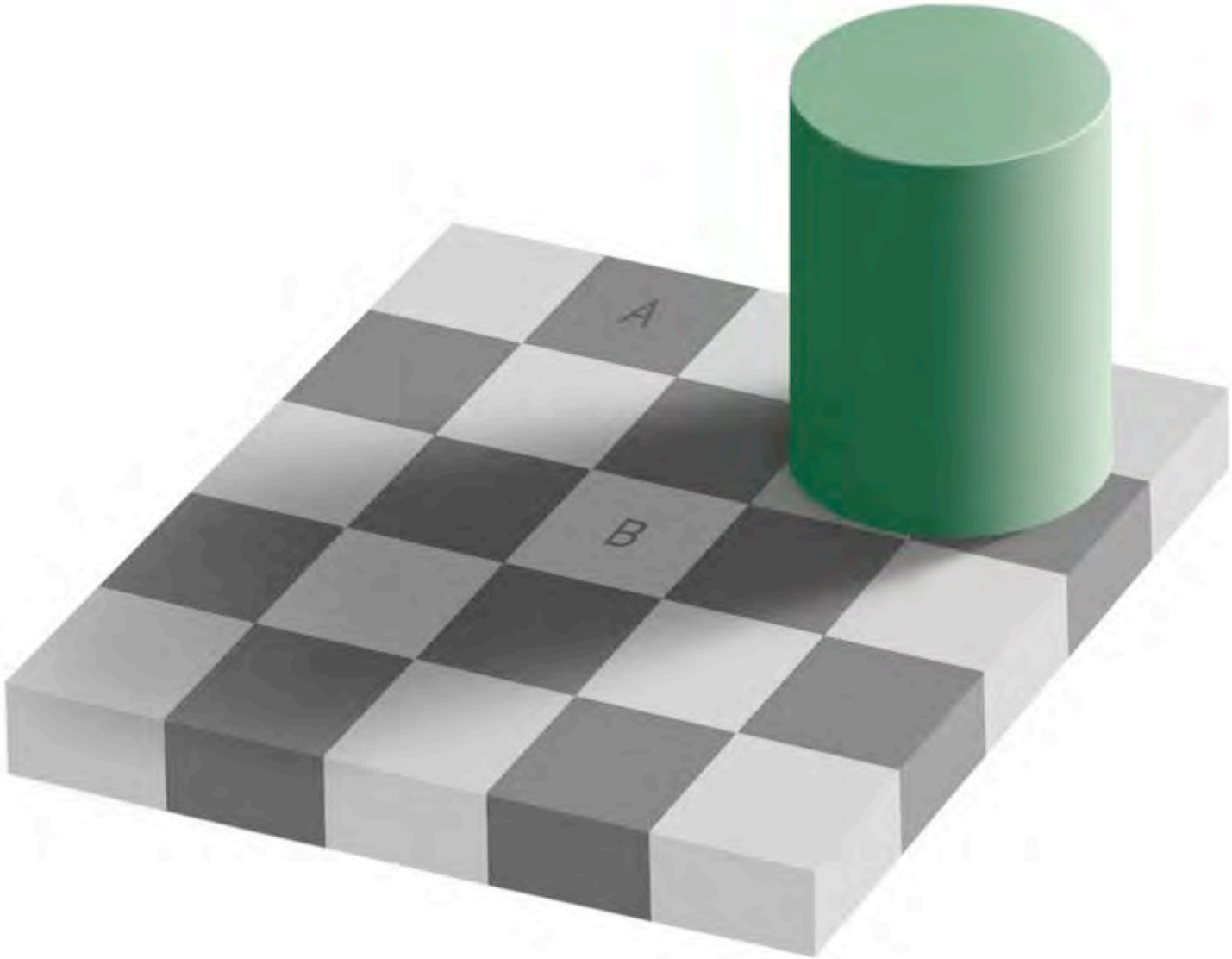

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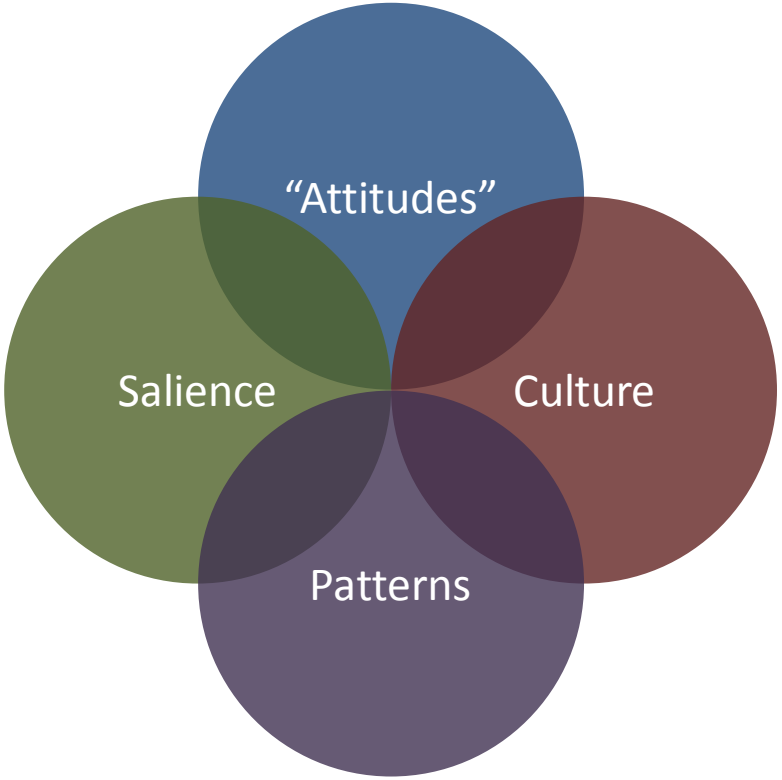
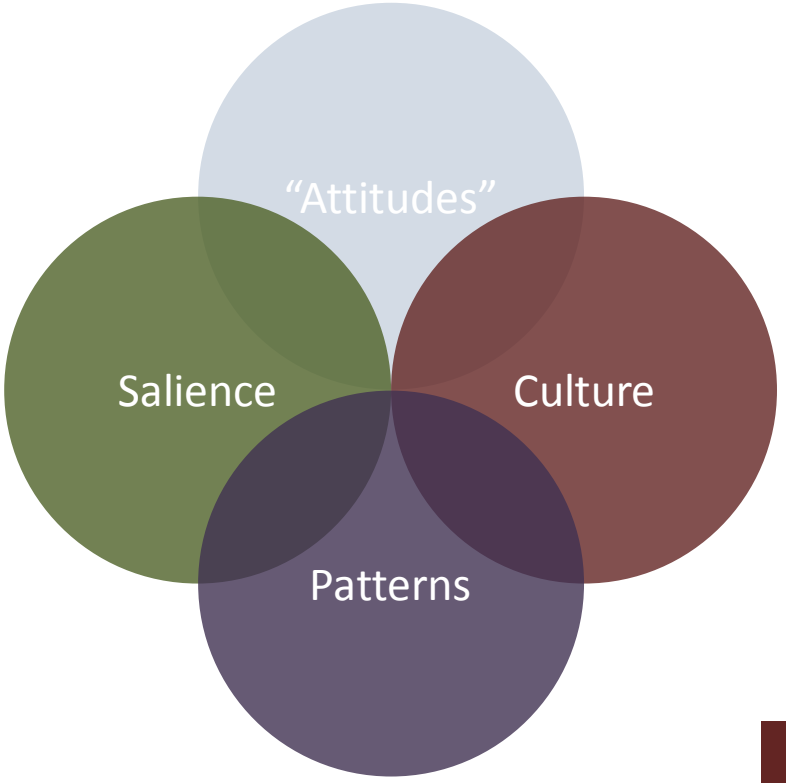


Predictions

A normally functioning mind



Stereotypes in TV

Selective reporting

Race & poverty
(poverty & crime)

Real, influential associations

Part 2 recap

- Implicit measures involve all kinds of associations (not just personal views)

- A normally functioning mind will use any & all information available to make predictions

Part 3

Real Consequences

Part 3

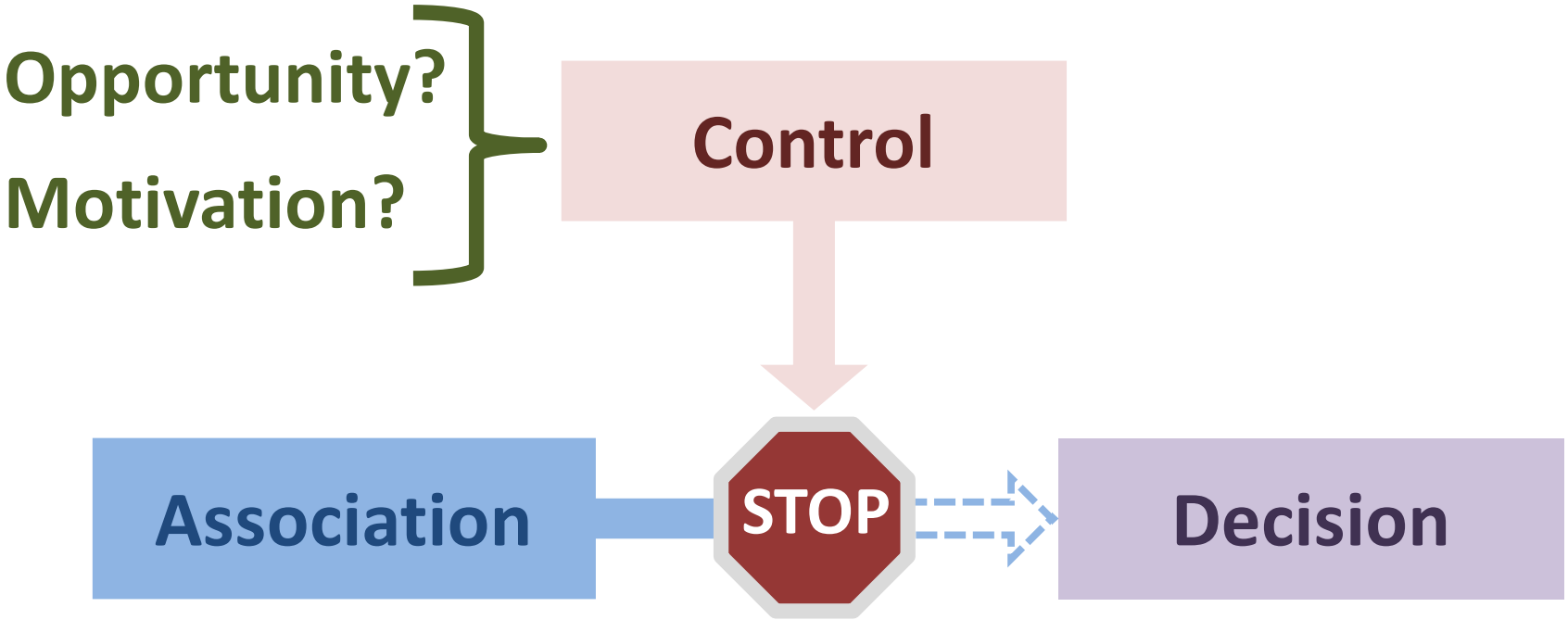
- A model of decision making
- Three vulnerabilities
  - No opportunity to exert control
  - No motivation to exert control
  - No awareness of making a decision

From associations to decisions

Association

Decision

From associations to decisions



An example of control

- Two people charged with same crime
  - Similar circumstances, etc.
  - Similar records, etc.

- One is Black, one is White
- Prosecute <u>just</u> the Black kid?

We hope not!

Three vulnerabilities

No opportunity to control

No motivation to control

Hidden decisions

+

Too Slow!

-10 points

Your score: -10

+

24
27

Red Rock Diner

Good Shot!

+10 points

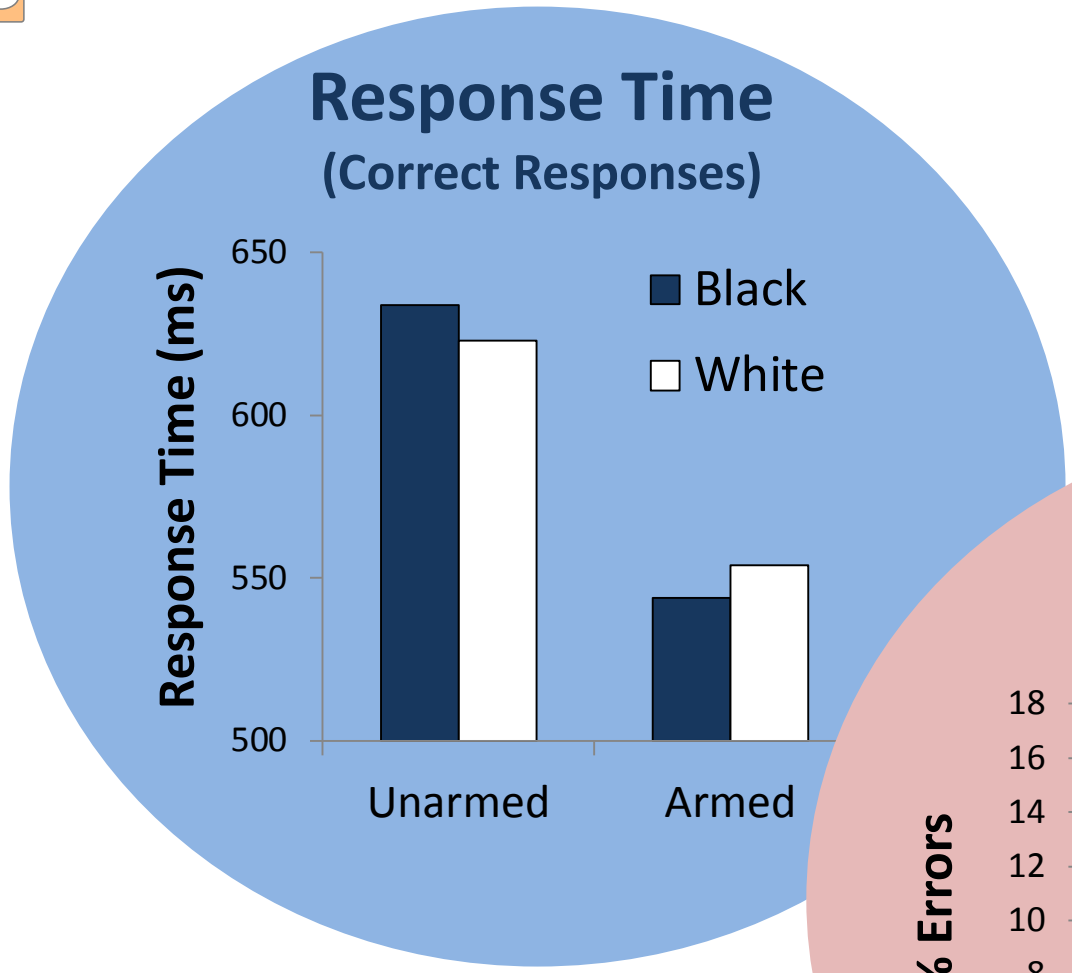
Your score: 0

+

You shot a good guy!

-20 points

Your score: -20


Response Time
(Correct Responses)
Response Time (ms)
650
600
550
500
Black
White
Unarmed
Armed

Error Rates
% Errors
18
16
14
12
10
8
6
4
2
0
Black
White
Unarmed
Armed

But judges don’t shoot

- Many ways to reduce opportunity
  - Keep track of lots of info
  - Stress / emotional situations

- Loss of opportunity for control → vulnerability

Three vulnerabilities

No opportunity to control

No motivation to control

Hidden decisions

Hiring

- Evaluate candidate for peer counseling job
- You learn that he is:
  - Member of (White) fraternity
- And…
  - Good leader
  - Thoughtful
  - Compassionate

Hiring

- Evaluate candidate for peer counseling job
- You learn that he is:
  - Member of (White) fraternity
- And…
  - ~~Good leader~~
  - Thoughtful
  - Compassionate

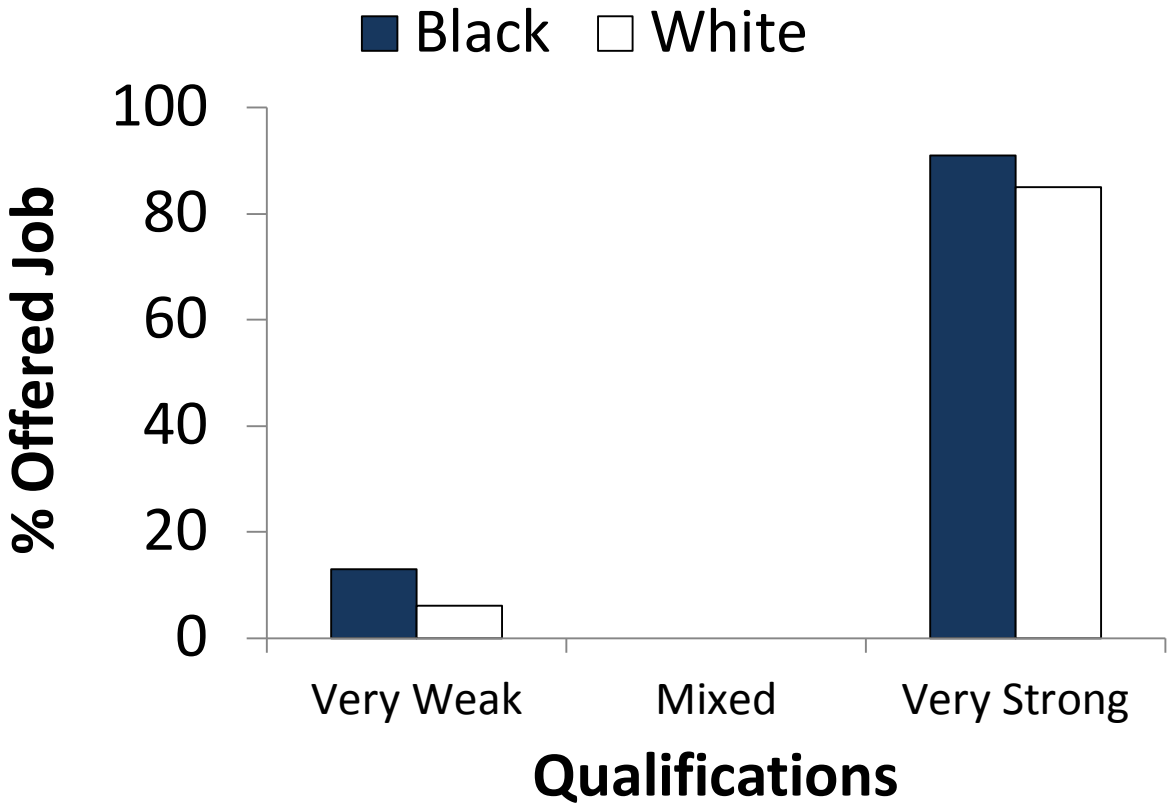
Hiring

- Evaluate candidate for peer counseling job
- You learn that he is:
  - Member of (White) fraternity
- And…
  - ~~Good leader~~
  - Thoughtful
  - ~~Compassionate~~

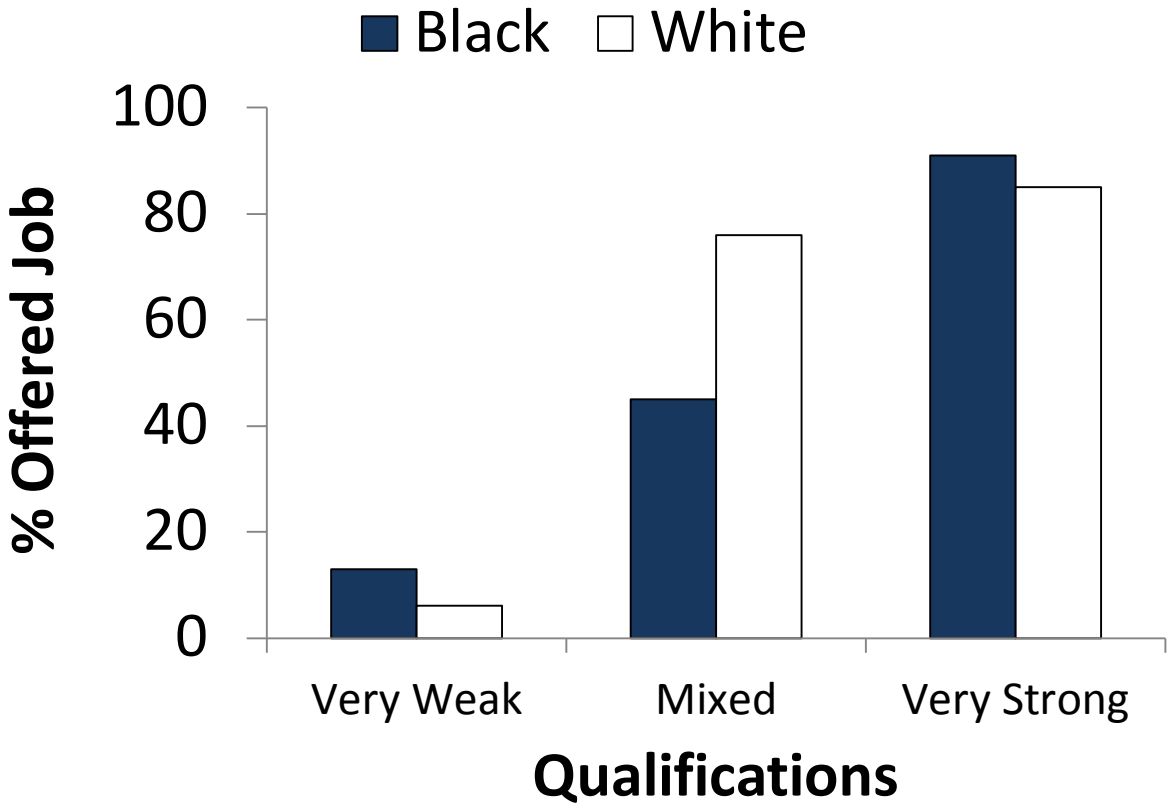
Hiring

- Evaluate candidate for peer counseling job
- You learn that he is:
  - Member of **Black student group**
- And…
  - ~~Good leader~~
  - Thoughtful
  - ~~Compassionate~~

Hiring


Black
White
100
80
60
40
20
0
% Offered Job
Very Weak
Mixed
Very Strong
Qualifications

Hiring


Black
White
100
80
60
40
20
0
% Offered Job
Very Weak
Mixed
Very Strong
Qualifications

Guilt or innocence

- Evaluate suspect
- You learn:
  - A bunch of weak evidence

Guilt or innocence

- Evaluate suspect

- You learn:
  - A bunch of weak evidence
  - Add'l evidence from wiretap (ruled inadmissable)

Guilt or innocence

- Evaluate suspect

- You learn:
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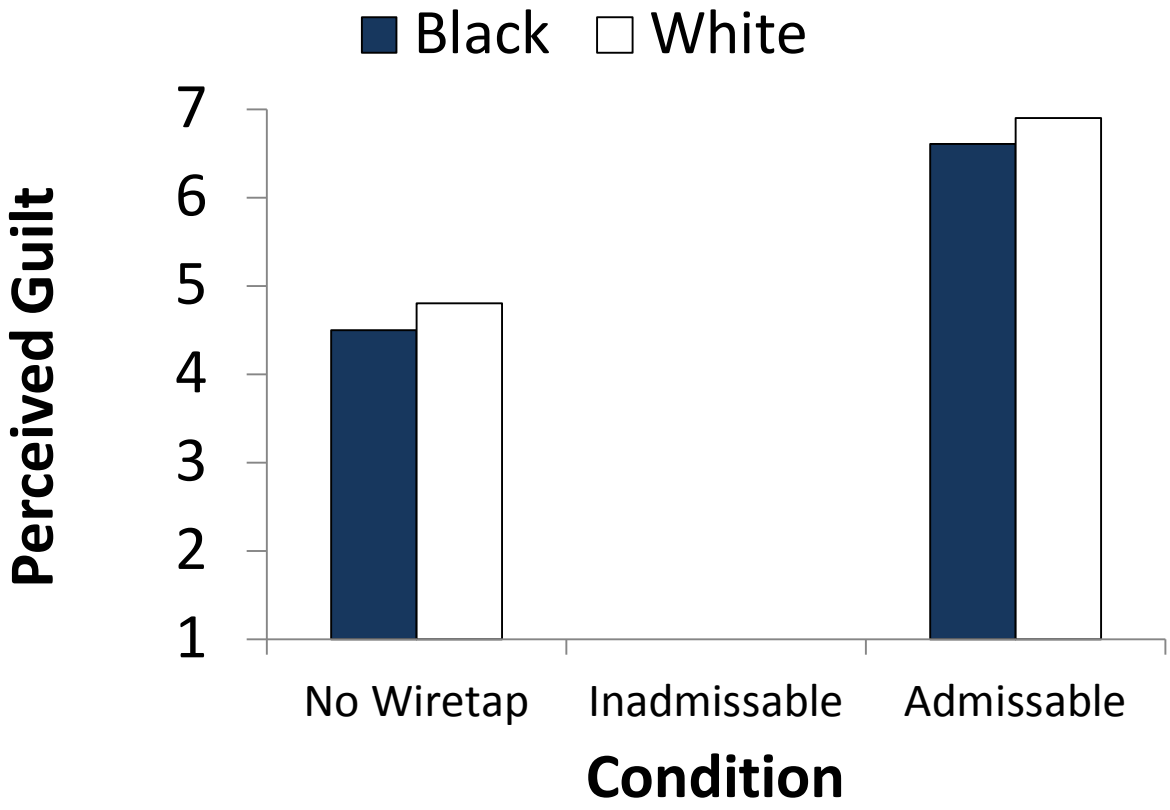
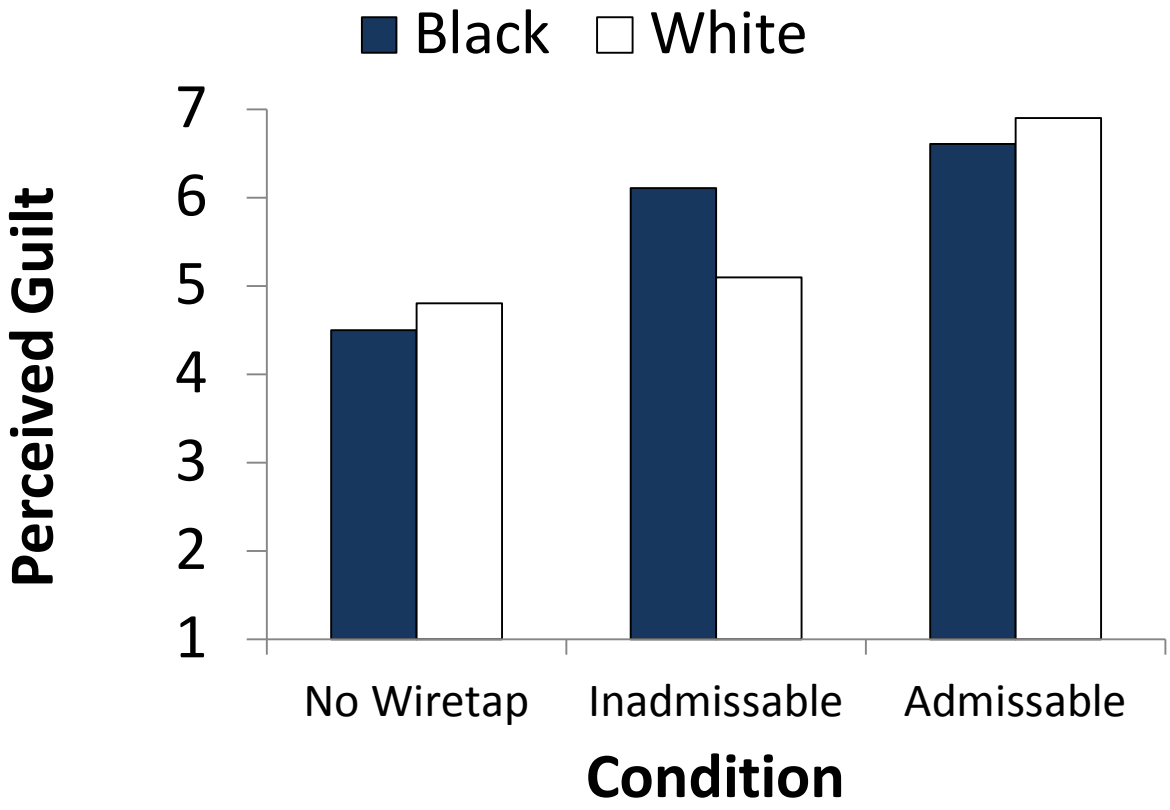
Guilt & innocence



Guilt & innocence



Three vulnerabilities

No opportunity to control

No motivation to control

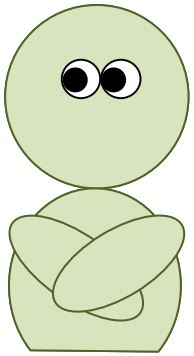
Hidden decisions

Non-verbal signals

- Distance (sit farther, lean back)
- Closed posture (cross arms)
- Indirect gaze (blink, look away)
- Asynchronous movement

- **Discomfort**
- **Underperformance**
- **Concern about prejudice**

Actor is unaware



Partner sees

Part 3 recap

- Associations can influence decisions, but sometimes we can exert deliberative control

- This process is vulnerable in 3 cases
  - No opportunity to exert control
  - No motivation to exert control
  - No awareness that we are making a decision

Part 4

So what can we do?

Part 4

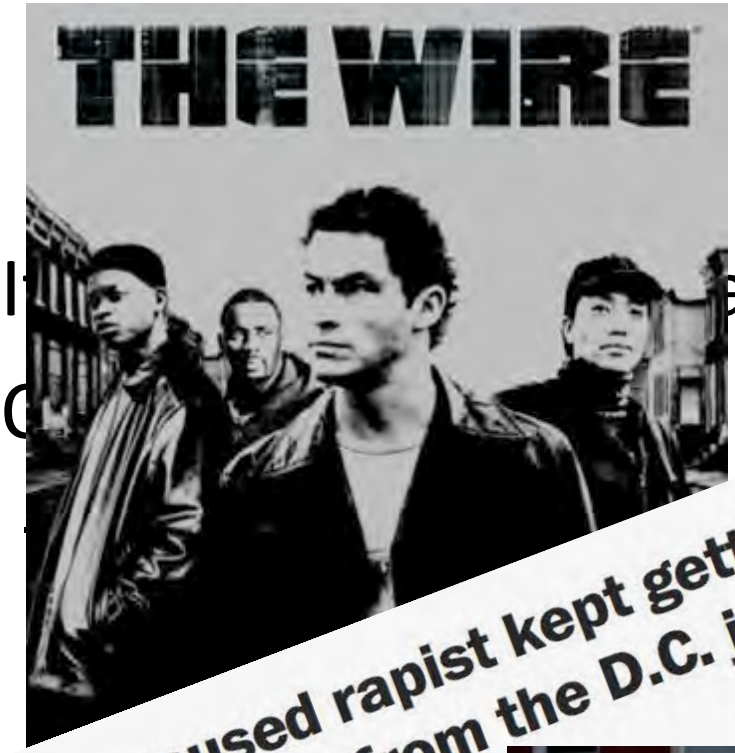
- “Anti-bias” training?
- Awareness
- Training your own mind
- Wise systems

“Anti-bias” training

- If our minds digest patterns, change the diet?
- Or tell us to resist?
  - Just say “no” to stereotypes?

+ pleasant

- Actually works...
- Then the world intrudes



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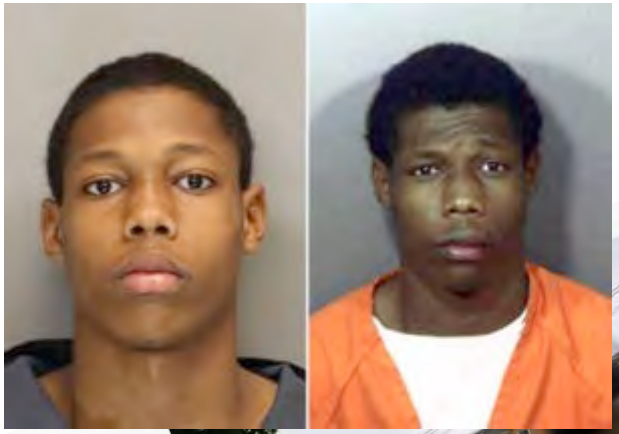
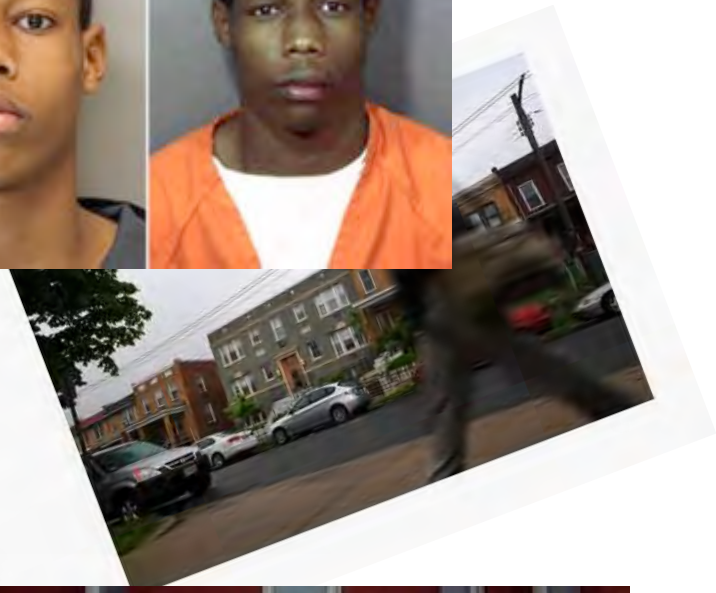




How an accused rapist kept getting second chances from the D.C. justice system

Antwon Pitt was released aft
years and now faces trial fo

Awareness

- (A part of anti-bias training)
- Can increase ability & motivation to control
- A door to long-term changes
  - Personal
  - Professional

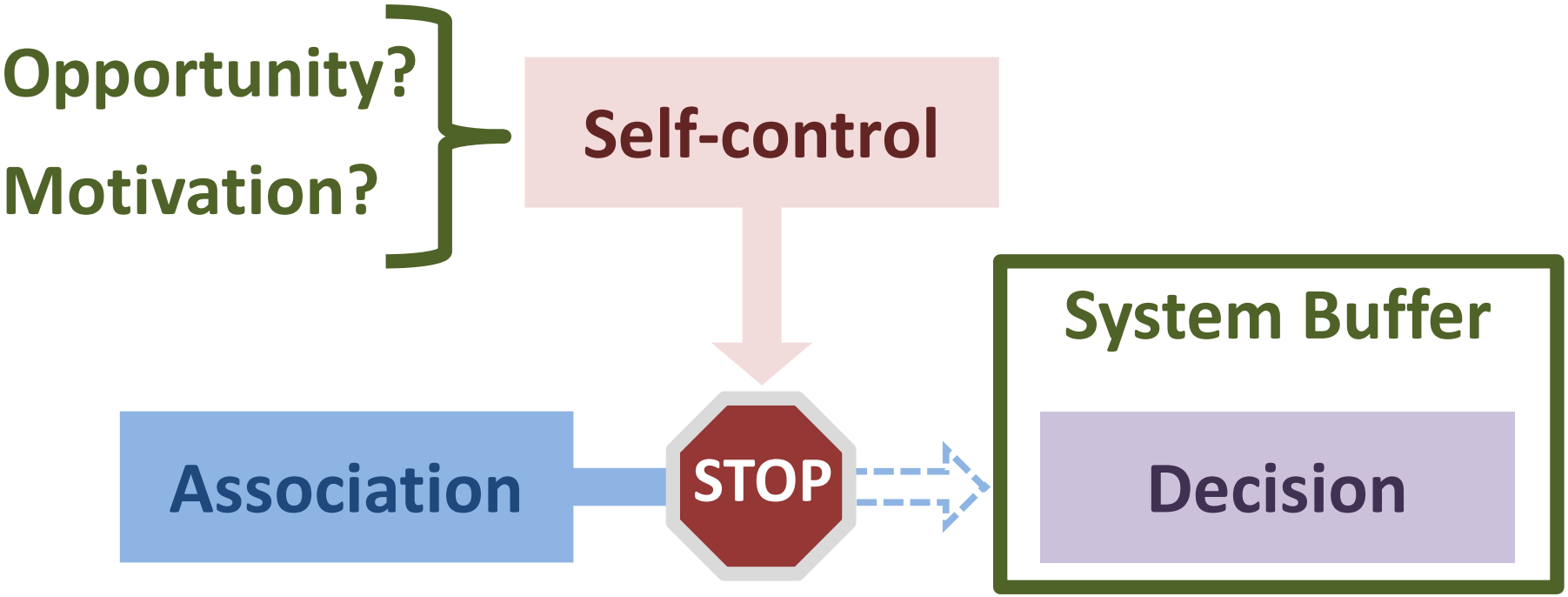
Training your own mind

- Awareness of own bias
- Repeated self-correction over months
  - “Negative self-directed affect”
- Long-term change
- The person has to truly <u>want</u> it

Wise systems

- Awareness of bias (personal or structural)
- Find point of leverage
- Change the structure / system
  - System imposes control by default
  - Individual doesn’t have to

Wise systems



Wise systems

Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians

By Claudia Goldin and Cecilia Rouse*

A change in the audition procedures of symphony orchestras—adoption of "blind" auditions with a "screen" to conceal the candidate's identity from the jury—provides a test for sex-biased hiring. Using data from actual auditions, in an individual fixed-effects framework, we find that the screen increases the probability a woman will be advanced and hired. Although some of our estimates have large standard errors and there is one persistent effect in the opposite direction, the weight of the evidence suggests that the blind audition procedure fostered impartiality in hiring and increased the proportion women in symphony orchestras. (*JEL* J7, J16)

Wise systems

Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians

Using the audition data, we find that the screen increases—by 50 percent—the probability that a woman will be advanced from certain preliminary rounds and increases by severalfold the likelihood that a woman will be selected in the final round.

partiality in hiring and increased the proportion women in symphony orchestras. (*JEL* J7, J16)

Questions for you

- Where & when in your work is racial (or other) bias likely to emerge?
  - Situations that undermine ability to control
  - Situations that undermine motivation to control
  - Hidden decisions

- Is there an aspect of the system that…
  - Might serve as a buffer?
  - Can practically be changed?

Part 4 recap

- No easy fix
- Awareness can allow you (yourself) to change your “programming” if you really try
- At a system-level, awareness can also help you identify
  - Problems
  - Leverage points and solutions

General recap

1. “Implicit bias” is a problematic term
   - Makes people defensive &is inaccurate
   - Measures reflect environmental associations, too
2. But associations have real consequences
3. Through awareness & work:
   - Alter own mental architecture
   - Alter system architecture

Temporal Lobe
Occipital Lobe
Insula
Thalamus
Frontal Lobe

Thank You

FINAL REPORT OF

THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING

MAY 2015

FINAL REPORT OF
THE PRESIDENT'S TASK FORCE ON

21ST CENTURY POLICING

MAY 2015

EXECUTIVE SUMMARY

Trust between law enforcement agencies and the people they protect and serve is essential in a democracy. It is key to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.

In light of recent events that have exposed rifts in the relationships between local police and the communities they protect and serve, on December 18, 2014, President Barack Obama signed an executive order establishing the Task Force on 21st Century Policing. The President charged the task force with identifying best practices and offering recommendations on how policing practices can promote effective crime reduction while building public trust.

This executive summary provides an overview of the recommendations of the task force, which met seven times in January and February of 2015. These listening sessions, held in Washington, D.C.; Phoenix, Arizona; and Cincinnati, Ohio, brought the 11 members of the task force together with more than 100 individuals from diverse stakeholder groups—law enforcement officers and executives, community members, civic leaders, advocates, researchers, academics, and others—in addition to many others who submitted written testimony to study the problems from all perspectives.

The task force recommendations, each with action items, are organized around six main topic areas or "pillars:" Building Trust and Legitimacy, Policy and Oversight, Technology and Social Media, Community Policing and Crime Reduction, Officer Training and Education, and Officer Safety and Wellness.

The task force also offered two overarching recommendations: the President should support the creation of a National Crime and Justice Task Force to examine all areas of criminal justice and propose reforms; as a corollary to this effort, the task force also recommends that the President support programs that take a comprehensive and inclusive look at community-based initiatives addressing core issues such as poverty, education, and health and safety.

Pillar One: Building Trust and Legitimacy

Building trust and nurturing legitimacy on both sides of the police/citizen divide is the foundational principle underlying the nature of relations between law enforcement agencies and the communities they serve. Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority. The public confers legitimacy only on those whom they believe are acting in procedurally just ways. In addition, law enforcement cannot build community trust if it is seen as an occupying force coming in from outside to impose control on the community. Pillar one seeks to provide focused recommendations on building this relationship.

Law enforcement culture should embrace a guardian—rather than a warrior—mindset to build trust and legitimacy both within agencies and with the public. Toward that end, law enforcement agencies should adopt procedural justice as the guiding principle for internal and external policies and practices to guide their interactions with rank and file officers and with the citizens they serve. Law enforcement agencies should also establish a culture of transparency and accountability to build public trust and legitimacy. This is critical to ensuring decision making is understood and in accord with stated policy.

Law enforcement agencies should also proactively promote public trust by initiating positive nonenforcement activities to engage communities that typically have high rates of investigative and enforcement involvement with government agencies. Law enforcement agencies should also track and analyze the level of trust communities have in police just as they measure changes in crime. This can be accomplished through consistent annual community surveys. Finally, law enforcement agencies should strive to create a workforce that encompasses a broad range of diversity including race, gender, language, life experience, and cultural background to improve understanding and effectiveness in dealing with all communities.

Pillar Two: Policy and Oversight

Pillar two emphasizes that if police are to carry out their responsibilities according to established policies, those policies must reflect community values. Law enforcement agencies should collaborate with community members, especially in communities and neighborhoods disproportionately affected by crime, to develop policies and strategies for deploying resources that aim to reduce crime by improving relationships, increasing community engagement, and fostering cooperation.

To achieve this end, law enforcement agencies should have clear and comprehensive policies on the use of force (including training on the importance of de-escalation), mass demonstrations (including the appropriate use of equipment, particularly rifles and armored personnel carriers), consent before searches, gender identification, racial profiling, and performance measures—among others such as external and independent investigations and prosecutions of officer-involved shootings and other use of force situations and in-custody deaths. These policies should also include provisions for the collection of demographic data on all parties involved. All policies and aggregate data should be made publicly available to ensure transparency.

To ensure policies are maintained and current, law enforcement agencies are encouraged to periodically review policies and procedures, conduct nonpunitive peer reviews of critical incidents separate from criminal and administrative investigations, and establish civilian oversight mechanisms with their communities.

Finally, to assist law enforcement and the community achieve the elements of pillar two, the U.S. Department of Justice, through the Office of Community Oriented Policing Services (COPS Office) and Office of Justice Programs (OJP), should provide technical assistance and incentive funding to jurisdictions with small police agencies that take steps toward interagency collaboration, shared services, and regional training. They should also partner with the International Association of Directors of Law Enforcement Standards and Training (IADLEST) to expand its National Decertification Index to serve as the National Register of Decertified Officers with the goal of covering all agencies within the United States and its territories.

Pillar Three: Technology & Social Media

The use of technology can improve policing practices and build community trust and legitimacy, but its implementation must be built on a defined policy framework with its purposes and goals clearly delineated. Implementing new technologies can give police departments an opportunity to fully engage and educate communities in a dialogue about their expectations for transparency, accountability, and privacy. But technology changes quickly in terms of new hardware, software, and other options. Law enforcement agencies and leaders need to be able to identify, assess, and evaluate new technology for adoption and do so in ways that improve their effectiveness, efficiency, and evolution without infringing on individual rights.

Pillar three guides the implementation, use, and evaluation of technology and social media by law enforcement agencies. To build a solid foundation for law enforcement agencies in this field, the U.S. Department of Justice, in consultation with the law enforcement field, should establish national

standards for the research and development of new technology including auditory, visual, and biometric data, “less than lethal” technology, and the development of segregated radio spectrum such as FirstNet. These standards should also address compatibility, interoperability, and implementation needs both within local law enforcement agencies and across agencies and jurisdictions and should maintain civil and human rights protections. Law enforcement implementation of technology should be designed considering local needs and aligned with these national standards. Finally, law enforcement agencies should adopt model policies and best practices for technology-based community engagement that increases community trust and access.

Pillar Four: Community Policing & Crime Reduction

Pillar four focuses on the importance of community policing as a guiding philosophy for all stakeholders. Community policing emphasizes working with neighborhood residents to coproduce public safety. Law enforcement agencies should, therefore, work with community residents to identify problems and collaborate on implementing solutions that produce meaningful results for the community. Specifically, law enforcement agencies should develop and adopt policies and strategies that reinforce the importance of community engagement in managing public safety. Law enforcement agencies should also engage in multidisciplinary, community team approaches for planning, implementing, and responding to crisis situations with complex causal factors.
Communities should support a culture and practice of policing that reflects the values of protection and promotion of the dignity of all—especially the most vulnerable, such as children and youth most at risk for crime or violence. Law enforcement agencies should avoid using law enforcement tactics that unnecessarily stigmatize youth and marginalize their participation in schools (where law enforcement officers should have limited involvement in discipline) and communities. In addition, communities need to affirm and recognize the voices of youth in community decision making, facilitate youth participation in research and problem solving, and develop and fund youth leadership training and life skills through positive youth/police collaboration and interactions.

Pillar Five: Training & Education

As our nation becomes more pluralistic and the scope of law enforcement’s responsibilities expands, the need for expanded and more effective training has become critical. Today’s line officers and leaders must be trained and capable to address a wide variety of challenges including international terrorism, evolving technologies, rising immigration, changing laws, new cultural mores, and a growing mental health crisis.
Pillar five focuses on the training and education needs of law enforcement. To ensure the high quality and effectiveness of training and education, law enforcement agencies should engage community members, particularly those with special expertise, in the training process and provide leadership training to all personnel throughout their careers.
To further assist the training and educational needs of law enforcement, the Federal Government should support the development of partnerships with training facilities across the country to promote consistent standards for high quality training and establish training innovation hubs involving universities and police academies. A national postgraduate institute of policing for senior executives should be created with a standardized curriculum preparing participants to lead agencies in the 21st century.
One specific method of increasing the quality of training would be to ensure that Peace Officer and Standards Training (POST) boards include mandatory Crisis Intervention Training (CIT), which equips officers to deal with individuals in crisis or living with mental disabilities, as part of both basic recruit and in-service officer training—as well as instruction in disease of addiction, implicit bias and cultural responsiveness, policing in a democratic society, procedural justice, and effective social interaction and tactical skills.

Pillar Six: Officer Wellness & Safety

The wellness and safety of law enforcement officers is critical not only for the officers, their colleagues, and their agencies but also to public safety. Pillar six emphasizes the support and proper implementation of officer wellness and safety as a multi-partner effort.
The U.S. Department of Justice should enhance and further promote its multi-faceted officer safety and wellness initiative. Two specific strategies recommended for the U.S. Department of Justice include (1) encouraging and assisting departments in the implementation of scientifically supported shift lengths by law enforcement and (2) expanding efforts to collect and analyze data not only on officer deaths but also on injuries and "near misses." Law enforcement agencies should also promote wellness and safety at every level of the organization. For instance, every law enforcement officer should be provided with individual tactical first aid kits and training as well as anti-ballistic vests. In addition, law enforcement agencies should adopt policies that require officers to wear seat belts and bullet-proof vests and provide training to raise awareness of the consequences of failure to do so. Internal procedural justice principles should be adopted for all internal policies and interactions. The Federal Government should develop programs to provide financial support for law enforcement officers to continue to pursue educational opportunities. Finally, Congress should develop and enact peer review error management legislation.

Implementation Recommendations

The administration, through policies and practices already in place, can start right now to move forward on the recommendations contained in this report. The President should direct all federal law enforcement agencies to implement the task force recommendations to the extent practicable, and the U.S. Department of Justice should explore public-private partnership opportunities with foundations to advance implementation of the recommendations. Finally, the COPS Office and OJP should take a series of targeted actions to assist the law enforcement field in addressing current and future challenges.

Conclusion

The members of the Task Force on 21st Century Policing are convinced that the concrete recommendations contained in this publication will bring long-term improvements to the ways in which law enforcement agencies interact with and bring positive change to their communities.

R U L E S

GOVERNING

THE COURT OF INDIAN OFFENSES

DEPARTMENT OF THE INTERIOR,

OFFICE OF INDIAN AFFAIRS,

Washington, March 30, 1883.

SIR: Your special attention is directed to the following copy of Department letter, viz:

DEPARTMENT OF THE INTERIOR,

Washington, December 2, 1882

SIR: I desire to call your attention to what I regard as a great hindrance to the civilization of the Indians, viz, the continuance of the old heathenish dances, such as the sun-dance, scalp-dance, & c. These dances, or feasts, as they are sometimes called, ought, in my judgment, to be discontinued, and if the Indians now supported by the Government are not willing to discontinue them, the agents should be instructed to compel such discontinuance. These feasts or dances are not social gatherings for the amusement of these people, but, on the contrary, are intended and calculated to stimulate the warlike passions of the young warriors of the tribe. At such feasts the warrior recounts his deeds of daring, boasts of his inhumanity in the destruction of his enemies, and his treatment of the female captives, in language that ought to shock even a savage ear. The audience assents approvingly to his boasts of falsehood, deceit, theft, murder, and rape, and the young listener is informed that this and this only is the road to fame and renown. The result is the demoralization of the young, who are incited to emulate the wicked conduct of their elders, without a thought that in so doing they violate any law, but, on the contrary, with the conviction that in so doing they are securing for themselves an enduring and deserved fame among their people. Active measures should be taken to discourage all feasts and dances of the character I have mentioned.

The marriage relation is also one requiring the immediate attention of the agents. While the Indians remain in a state of at least semi-independence, there did not seem to be any great necessity for interference, even if such interference was practicable (which it doubtless was not). While dependent on the chase the Indian did not take many wives, and the great mass found themselves too poor to support more than one; but since the Government supports them, this objection no longer exists, and the more numerous the family the greater the number of rations allowed. I would not advise any interference with plural marriages now existing; but I would by all possible methods discourage future marriages of that character. The marriage relation, if it may be said to exist at all among the Indians, is exceedingly lax in its character, and it will be found impossible, for some time yet, to impress them with our idea of this important relation.

The marriage state, existing only by the consent of both parties, is easily and readily dissolved, the man not recognizing any obligation on his part to care for his offspring. As far as practicable, the Indian, having taken to himself a wife, should be compelled to continue that relation with her, unless dissolved by some recognized tribunal on the reservation or by the courts. Some system of marriage should be adopted, and the Indian compelled to conform to it. The Indian should also be instructed that he is under obligations to care for and support, not only his wife, but his children, and on his failure, without

proper cause, to continue as the head of such family, he ought in some manner to be punished, which should be either by confinement in the guardhouse or agency prison, or by a reduction of his rations.

Another great hindrance to the civilization of the Indians is the influence of the medicine men, who are always found with the anti-progressive party. The medicine men resort to various artifices and devices to keep the people under their influence, and are especially active in preventing the attendance of the children at the public schools, using their conjurers' arts to prevent the people from abandoning their heathenish rites and customs. While they profess to cure diseases by the administering of a few simple remedies, still they rely mainly on their art of conjuring. Their services are not required even for the administration of the few simple remedies they are competent to recommend, for the Government supplies the several agencies with skillful physicians, who practice among the Indians without charge to them. Steps should be taken to compel these imposters to abandon this deception and discontinue their practice, which are not only without benefit to the Indians but positively injurious to them.

The value of property as an agent of civilization ought not to be overlooked. When an Indian acquires property, with a disposition to retain the same, free from tribal or individual interference, he has made a step forward in the road to civilization. One great obstacle to the acquirement of property by the Indian is the very general custom of destroying or distributing his property on the death of a member of his family. Frequently on the death of an important member of the family all the property accumulated by its head is destroyed or carried off by the "mourners," and his family left in desolation and want. While in their independent state but little inconvenience was felt in such a case, on account of the general community of interest and property, in their present condition not only real inconvenience is felt, but disastrous consequences follow. I am informed by reliable authority that frequently the head of a family, finding himself thus stripped of his property, becomes discouraged, and makes no further attempt to become a property owner. Fear of being considered mean and attachment to the dead frequently prevents the owner from interfering to save his property while it is being destroyed in his presence and contrary to his wishes.

It will be extremely difficult to accomplish much towards the civilization of the Indians while these adverse influences are allowed to exist.

The Government having attempted to support the Indians until such time as they shall become self-supporting, the interest of the Government as well as that of the Indians demands that every possible effort should be made to induce them to become self-supporting at as early a day as possible. I therefore suggest whether it is not practicable to formulate certain rules for the government of the Indians on the reservations that shall restrict and ultimately abolish the practices I have mentioned. I am not ignorant of the difficulties that will be encountered in this effort; yet I believe in all the tribes there will be found many Indians who will aid the Government in its efforts to abolish rites and customs so injurious to the Indians and so contrary to the civilization that they earnestly desire.

Very respectfully,

1. M. TELLER

Secretary.

Hon. HIRAM PRICE,

Commissioner of Indian Affairs.

In compliance with the suggestions contained in the foregoing letter, the following rules are promulgated for the guidance and direction of the several United States Indian agents, and each agent will see to it that the requirements thereof are strictly enforced, with the view of having the evil practices mentioned by the honorable Secretary ultimately abolished.

RULES

1st. There shall be established at each Indian agency, except the agency for the five civilized tribes in the Indian Territory, a tribunal, consisting of three Indians, to be known as "the Court of Indian Offenses," and the three members of said court shall each be styled "Judge of the Court of Indian Offenses."

The first three officers in rank of the police force at each agency shall serve as judges of said court, when practicable, and when in the opinion of the agent said police officers are fit and competent persons to satisfactorily perform the duties thereof. The police officer highest in rank shall be the presiding judge. If, however, any of the said police officers are considered by the agent to be improper persons to be so appointed, or in the event of there being no police officers, then the agent may select from among the members of the tribe persons of intelligence and good moral character and integrity, and recommend the same to this office for appointment as judges in lieu of the officers of the police force aforesaid.

Each judge shall be appointed by this office for a term of one year, subject to removal at any time, at the discretion of the Commissioner of Indian Affairs; provided, however, that no person shall be eligible to appointment as a member of said court who is a polygamist; and provided further, that the judges herein provided for shall receive no money consideration on account of their services in connection with said court.

2d. The Court of Indian Offenses shall hold at least two regular sessions in each and every month, the time and place for holding said sessions to be agreed upon by the judges, or a majority of them, and approved by the agent; and special sessions of the court may be held when requested by three reputable members of the tribe, and approved by the agent.

3d. The court as above organized shall hear and pass judgment upon all such questions as may be presented to it for consideration by the agent, or by his approval, and shall have original jurisdiction over all "Indian offenses" designated as such in Rules 4, 5, 6, 7, and 8 of these rules. The judgment of the court may be by two judges; and that the several orders of the court may be carried into full effect, the United States Indian agent is hereby authorized and empowered to compel the attendance of witnesses at any session of the court, and enforce, with the aid of the police, if necessary, all orders that may be passed by the court or a majority thereof; but all orders, decrees, or judgments of the court shall be subject to approval or disapproval of the agent, and an appeal to and final revision by this office; provided that when an appeal is taken to this office, the appellant shall furnish security satisfactory to the court, and approved by the agent, for good and peaceful behavior pending the final decision of this office.

4th. The "sun-dance," the "scalp-dance," the "war-dance," and all other so-called feasts assimilating thereto, shall be considered "Indian offenses," and any Indian found guilty of being a participant in any one or more of these "offenses" shall, for the first offense committed, be punished by withholding from the person or persons so found guilty by the court his or their rations for a period not exceeding ten days; and if found guilty of any subsequent offense under this rule, shall by punished by withholding his or their rations for a period not less than fifteen days, nor more than thirty days, or by incarceration in the agency prison for a period not exceeding thirty days.

5th. Any plural marriage hereafter contracted or entered into by any member of an Indian tribe under the supervision of a United States Indian agent shall be considered an "Indian offense," cognizable by the Court of Indian Offenses; and upon trial and conviction thereof by said court the offender shall pay a fine of not less than twenty dollars, or work at hard labor for a period of twenty days, or both, at the discretion of the court, the proceeds thereof to be devoted to the benefit of the tribe to which the offender may at the time belong; and so long as the Indian shall continue in this unlawful relation he

shall forfeit all right to receive ration s from the Government. And whenever it shall be proven to the satisfaction of the court that any member of the tribe fails, without proper cause, to support his wife and children, no rations shall be issued to him until such time as satisfactory assurance is given to the court, approved by the agent, that the offender will provide for his family to the best of his ability.

6th. The usual practices of so-called "medicine-men" shall be considered "Indian offenses" cognizable by the Court of Indian Offenses, and whenever it shall be proven to the satisfaction of the court that the influence or practice of a so-called "medicine-man" operates as a hinderance to the civilization of a tribe, or that said "medicine-man" resorts to any artifice or device to keep the Indians under his influence, or shall adopt any means to prevent the attendance of children at the agency schools, or shall use any of the arts of a conjurer to prevent the Indians from abandoning their heathenish rites and customs, he shall be adjudged guilty of an Indian offense, and upon conviction of any one or more of these specified practices, or, any other, in the opinion of the court, of an equally anti-progressive nature, shall be confined in the agency prison for a term not less than ten days, or until such time as he shall produce evidence satisfactory to the court, and approved by the agent, that he will forever abandon all practices styled Indian offenses under this rule.

7th. Any Indian under the charge of a United States Indian agent who shall willfully destroy, or with intent to steal or destroy, shall take and carry away any property of any value or description, being the property free from tribal interference, of any other Indian or Indians, shall, without reference to the value thereof, be deemed guilty of an "Indian offense," and, upon trial and conviction thereof by the Court of Indian Offenses, shall be compelled to return the stolen property to the proper owner, or, in case the property shall have been lost or destroyed, the estimated full value thereof, and in any event the party or parties so found guilty shall be confined in the agency prison for a term not exceeding thirty days; and it shall not be considered a sufficient or satisfactory answer to any of the offenses set forth in this rule that the party charged was at the time a "mourner," and thereby justified in taking or destroying the property in accordance with the customs or rites of the tribe.

8th. Any Indian or mixed-blood who shall pay or offer to pay any money or other valuable consideration to the friends or relatives of any Indian girl or woman, for the purpose of living or cohabiting with said girl or woman, shall be deemed guilty of an Indian offense, and upon conviction thereof shall forfeit all right to Government rations for a period at the discretion of the agent, or be imprisoned in the agency prison for a period not exceeding sixty days; and any Indian or mixed-blood who shall receive or offer to receive any consideration for the purpose herein before specified shall be punished in a similar manner as provided for the party paying or offering to pay the said consideration; and if any white man shall be found guilty of any of the offenses herein mentioned he shall be immediately removed from the reservation and not allowed to return thereto.

9th. In addition to the offenses herein before enumerated, the Court of Indian Offenses shall also have jurisdiction (subject to the provisions of Rule 3) of misdemeanors committed by Indians belonging to the reservation, and of civil suits where Indians are parties thereto; and any Indian who shall be found intoxicated, or who shall sell, exchange, give, barter, or dispose of any spirituous, vinous, or fermented liquors to any other Indian, or who shall introduce or attempt to introduce, under any pretense whatever, any spirituous, vinous, or fermented liquors on the reservation, shall be punishable by imprisonment for not less than thirty day nor more than ninety days, or by the withholding of Government rations therefrom, at the discretion of the court and approval of the agent.

The civil jurisdiction of such court shall be the same as that of a justice of the peace in the State or Territory where such court is located, and the practice in such civil cases shall conform as nearly as practicable to the rules governing the practice of justices of the peace in such State or Territory; and it shall also be the duty of the court to instruct, advise, and inform either or both parties to any suit in regard to the requirements of these rules.

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WYOMING LAW REVIEW

VOLUME 11 2011 NUMBER 2

AMERICAN INDIAN CUSTOMARY LAW IN THE MODERN COURTS OF AMERICAN INDIAN NATIONS

*Justice Raymond D. Austin**

I. INTRODUCTION

American Indian nations need encouragement and support with funds, favorable laws, research, and scholarship to improve life and conditions on their reservations. Core traditional values need to be identified, revitalized, and used to address and solve modern community problems. Leaders of Indian nations and professionals who advise them should understand that the future of Indian nations partly lies in renewed cultures, languages, and religious practices, and in utilizing them in the nation-building process. One way that Indian nations can begin working with traditional precepts is by using them as customary law in the dispute resolution process.[1] Traditional dispute resolution methods should also be revitalized and activated because, as the Navajo Nation has experienced, traditional methods such as peacemaking, when compared to court litigation, are inexpensive, require less time, do not require much personnel, and allow disputants to reach consensual solutions to their problems.

As this article shows, a few Indian nations have proven that traditional values work very well when used as law in Indian nation courts. This article recommends that more Indian nation courts, and the practitioners in those courts, engage in this kind of lawmaking as part of the nation-building process and exercise

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[1] Customary law refers to the longstanding values, customs, and traditions of American Indian nations. These values, customs, and traditions are found in American Indian cultures, languages, and religions.

sovereignty the Indian way. Furthermore, this article recommends that leaders of American Indian nations seek out their own nation's long-standing cultural values, apply them to reservation problems, and gauge their effectiveness.

II. THE UNITED STATES SUPREME COURT ON AMERICAN INDIAN CUSTOMARY LAWS

As early as 1823, the United States Supreme Court acknowledged that Indian nations had their own laws that regulated crimes, relationships, and transactions within their societies.[2] In *Johnson v. M'Intosh*, Indian chiefs sold two plots of land to non-Indian individuals.[3] Later the Indian nations sold lands containing the two plots to the United States.[4] The federal government then deeded the lands, including the two plots, to other individual non-Indians.[5] A dispute arose between the non-Indians as to who had superior title: the parties who received their titles directly from the Indian landowners or the parties who received their deeds from the federal government.[6] The Supreme Court held that although a person who obtains land from an Indian nation has a right to it under the laws of that nation, that right cannot be recognized in the courts of the United States.[7] The Supreme Court said, "The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws."[8] Although deeds to land granted by an Indian nation to individual non-Indians may not be enforceable in United States courts (at least in 1823), the Supreme Court, nonetheless, recognized the customary laws of an Indian nation can protect these kinds of property transactions in tribal forums.[9]

One hundred and thirty-six years after *Johnson v. M'Intosh*,[10] the Supreme Court affirmed in *Williams v. Lee* that Indian nations have the inherent right to make their own laws and be ruled by them.[11] Today, Indian nations' laws include statutory laws that make up tribal codes, tribal customary laws, administrative rules and regulations, court rules, and tribal government policies. Although

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[2] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 568 (1823).

[3] *Id.* at 571–72.

[4] *Id.* at 593–94.

[5] *Id.* at 560.

[6] *Id.* at 594.

[7] *Id.* at 604–05.

[8] *Id.* at 593.

[9] *Id.*

[10] *Id.* at 543.

[11] 358 U.S. 217, 221–23 (1959). The United States Supreme Court also confirmed the right of Indian nation courts to use Indian customary law in *United States v. Wheeler*, 435 U.S. 313, 331–32 (1978).

Indian nations do not need authorization from the Supreme Court, Congress, or the executive branch to use customary laws, these decisions of the nation's highest Court show that the federal government acknowledges that Indian customary laws exist and tribes have the inherent right to utilize them to solve legal and community problems within their jurisdictions.

The Navajo Nation took *Williams v. Lee*'s words of sovereignty to heart and began to aggressively identify long-standing Navajo customs and traditions and apply them in solving legal issues and community problems.[12] Today, the Navajo Nation is a leader among Indian nations—and very likely among the world's indigenous peoples—on using indigenous customs and traditions to solve modern problems. Navajo customary law, called Navajo common law, is the law of preference in the Navajo Nation courts.[13] Navajo common law refers to the customs, traditions, and values that are applied as law and come from Navajo culture, language, and spirituality.[14] In the absence of statutory law, the Navajo Nation courts use Navajo common law as primary and substantive law to resolve legal issues. Navajo common law is also used to interpret Navajo statutes and non-Navajo laws, such as the individual rights provisions in the federal Indian Civil Rights Act of 1968.[15] Furthermore, Navajo common law guides the Navajo Nation government as it engages in policymaking and daily governmental operations.

The federal government recognizes 565 American Indian tribes as possessing the right to self-government.[16] Two hundred and forty-eight American Indian tribes have formal tribal court systems or court systems based on the American form of courts.[17] Only a handful of these tribal courts use customary law.[18]

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[12] 358 U.S. at 223. The decisions of the Navajo Nation Supreme Court and Navajo Nation trial courts are published in the Navajo Reporter. The eight volumes of the Navajo Reporter contain decisions from 1969 to 2005. Navajo court decisions issued after 2005 are in slip opinion form. A substantial amount of the Navajo Nation court decisions apply Navajo customary law to modern legal issues. Navajo Nation court opinions are cited according to the Navajo Nation Supreme Court's Order Establishing a Uniform Citation System for Opinions, as set forth in *In re a Universal Citation System for the Decisions of the Courts of the Navajo Nation*, No. SC-SP-01-00, slip op. at 1–2 (Nav. Sup. Ct. January 23, 2004).

[13] Navajo Nation v. Platero, 6 Nav. R. 422, 424 (Nav. Sup. Ct. 1991).

[14] *Id.*

[15] 25 U.S.C. § 1302 (2006). Some of the rights enumerated in the Indian Civil Rights Act are the free exercise of religion, freedom of speech, freedom of the press, due process, equal protection, and criminal procedure rights like probable cause required for search warrants, sentencing limitations, prohibition against cruel and unusual punishment, and the right to a jury trial. *Id.* § 1302(1)–(10).

[16] *Frequently Asked Questions*, U.S. DEPARTMENT INTERIOR, INDIAN AFF., http://www.bia.gov/FAQs/index.htm (last visited Apr. 22, 2011).

[17] *Id.*

[18] Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 81–82 (2007) (citing Steve Aycock, Thoughts on Creating a Truly Tribal

Leaders of Indian nations must understand that long-standing tribal values, customs, and traditions are sources for problem-solving, not only in the legal arena but also in areas like health and social welfare, education, and government. This process of looking inward for solutions can be described as Indian peoples doing self-government and self-determination the Indian way, by drawing on Indian thinking and long-used Indian methods and normative precepts to solve community problems.

The Navajo Nation courts are skilled at this way of problem-solving. This article explains the methods the Navajo Nation courts and practitioners use to draw customary laws from Navajo culture, language, and spirituality and apply them to legal issues. Navajo common law is one means that the Navajo Nation utilizes to practice self-determination, solve modern problems, and ensure a future for the Navajo people. Navajo common law represents the laws that the Navajo people know and understand. Indian nations across North and South America and indigenous peoples around the globe can learn from the Navajo Nation and use their own long-standing customs and traditions to address their modern problems.

III. THE HISTORY OF INDIAN NATION COURTS

Customary laws and traditional methods of dispute resolution were widely practiced by the American Indian peoples long before the federal government imposed the American form of courts on Indian country in 1883.[19] Traditional American Indian methods for dispute resolution, although unique to each tribe, are usually non-adversarial in practice and function in some ways like American mediation rather than the litigious style of American courts. American Indian peacemaking is now the general term used to identify the various forms of traditional American Indian dispute resolution methods. The Navajo people's traditional forum is called *hózhooji naat'áanii*. *Hózhooji naat'áanii* is a dispute resolution ceremony that has, as its chief goals, the healing of relationships and restoration to harmony of individuals with their communities. American Indian peacemaking usually uses prayer, free-flowing discussion of the underlying causes of the dispute, cultural values, elders and other respected individuals to advise the disputants and participants, and consensus to arrive at a solution. Like Navajo peacemaking, traditional native methods of dispute resolution work to repair relationships among individuals and restore harmony in the community.

Jurisprudence, *in* Conference Materials, Indigenous Justice Systems of North America, 2nd Annual Indigenous Law Conference, Michigan State University College of Law (Mar. 17–18, 2006) (on file with author)). Also, it has been the author's experience that few courts of American Indian nations use customary law.

[19] In 1883, the Bureau of Indian Affairs approved administrative regulations that authorized establishment of the Court of Indian Offenses on different American Indian reservations.

The reformers and federal bureaucrats of the 1880s were not deterred by the fact that Indian nations already possessed well-established customary laws and traditional forums for resolving disputes as they designed and imposed an American form of legal institution on Indian nations.[20] Established in 1883 by the Bureau of Indian Affairs, the Court of Indian Offenses (also called the CFR court) served as one of the tools to implement the federal government's Indian assimilation policy.[21] Inherent in the assimilation policy was the idea that the Indians had to first be "civilized" before assimilation into American mainstream society could occur. Several federal programs—all intended to destroy Indian cultures, languages, religions, and property—were established to carry out the policy. Most notable among these programs to "civilize" the Indians were the reservation system, the federal Indian boarding school system, the spread of Christianity on reservations, the General Allotment Act of 1887, and the establishment of American forms of criminal and civil laws and courts on Indian reservations.[22]

A. *The Court of Indian Offenses*

The assimilationists believed that the best way to assimilate the Indian peoples into American society was to strip them of their cultures, languages, and religious practices and then indoctrinate them with Christianity and American laws, values, and ways of life. To that end, on December 2, 1882, Secretary of the Interior Henry M. Teller recommended the drafting of civil and criminal rules for use on Indian reservations to end the Indians' "savage and barbarous practices," which were "a great hindrance to [their] civilization."[23] Carrying out Secretary Teller's directive, Hiram Price, Commissioner of Indian Affairs, established a set of criminal and civil rules which included rules for the Court of Indian Offenses.[24] The Bureau of Indian Affairs approved them as "Rules Governing the Court of Indian Offenses" (law and order regulations) on April 10, 1883.[25]

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[20] WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 3–4 (1966). The reformers were primarily Easterners who believed that the solution to the Indian problem was the speedy acculturation of the American Indian peoples into American mainstream society. *Id.*

[21] SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 175 (1994). The Court of Indian Offenses was established using the Code of Federal Regulations; hence the term CFR court. Destruction of American Indian tribalism—cultures, languages, religions, and communal land holdings—was at the heart of the Indian assimilation policy.

[22] Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887); HARRING, *supra* note 21, at 13.

[23] H.R. EXEC. DOC. NO. 48-1, pt. 5, vol. I, at xi–xii (1883), *in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880–1900, at 296 (Francis Paul Prucha ed., 1973) [hereinafter AMERICANIZING THE AMERICAN INDIANS].

[24] *See* HAGAN, *supra* note 20, at 108–09.

[25] *Id.* at 109.

In short, the 1883 Bureau of Indian Affairs law and order regulations criminalized traditional Indian dances, traditional marriage and divorce, community and social gatherings, traditional probate, traditional burials and mourning practices, and religious practices of medicine men.[26] In essence, the federal government used the law and order regulations to directly attack American Indian cultures and deny American Indians the right to practice their religions.[27] Indian religious practices, including spiritual and healing ceremonies, performed by tribal spiritual leaders were especially problematic for Secretary Teller:

> Another great hindrance to the civilization of the Indians is the influence of the medicine men, who are always found with the anti-progressive party. The medicine men resort to various artifices and devices to keep the people under their influence . . . [and they use] their conjurers' arts to prevent the people from abandoning their heathenish rites and customs. . . . Steps should be taken to compel these impostors to abandon this deception and discontinue their practices . . . .[28]

The Indians who preferred and continued to practice the traditional ways were, of course, the "anti-progressive party."[29] The reservation Indian agent selected "progressive" Indian men to serve as judges on the Court of Indian Offenses.[30] To be "progressive" meant that the individual had to "wear citizens' dress, and engage in civilized pursuits," and most importantly, be non-polygamist.[31] According to the law and order regulations, the judges of the Court of Indian Offenses, assisted by the reservation Indian agent and Indian police, had the task of stamping out all traditional practices that allegedly kept the Indians in an uncivilized state.[32]

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[26] H.R. EXEC. DOC. NO. 48-1, pt. 5, vol. I, at xi–xii, *in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 23, at 296–98. These traditional practices, among others, were deemed offenses and comprised the 1883 (and 1892) Bureau of Indian Affairs law and order regulations. *Id.*

[27] The federal government used the law and order regulations to violate the right of American Indians to freely practice their religions, but no one came to the defense of the Indian peoples.

[28] *Id.* at 297–98.

[29] *Id.* at 296.

[30] VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 115 (1983).

[31] H.R. EXEC. DOC. NO. 52-1, pt. 5, vol. II, at 28–31 (1892), *in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 23, at 301; *see also* HAGAN, *supra* note 20, at 109.

[32] H.R. EXEC. DOC. NO. 52-1, pt. 5, vol. II, at 28–31, *in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 23, at 301–04. Each Indian defendant was charged and tried in the Court of Indian Offenses operating on his or her respective reservation. The Indian police were formed to keep peace and order on Indian reservations and replace the United States Army, which carried out similar functions. The Indian agent selected and supervised the Indian men who served on the reservation's Indian police force. *Id.* at 301–05.

Whether the CFR judges carried out this duty faithfully, especially when it came to the Navajo CFR judges, is debatable.[33]

Right from the beginning, the Court of Indian Offenses appeared to be on shaky legal ground. In 1888, Indian defendants from the Umatilla Indian Reservation in Oregon challenged the constitutionality of the court.[34] In *United States v. Clapox*, the United States District Court for the District of Oregon dealt with the constitutional question this way:

> These "courts of Indian offenses" are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.[35]

The lack of constitutional support was obvious but did not matter, because the Court of Indian Offenses, despite its name, was not a court at all but a program established by the federal government to "civilize" the Indians.

By the early 1900s, many Indian reservations had a Bureau of Indian Affairs Court of Indian Offenses in operation, although many were still lacking a formal (i.e., western-style), functioning tribal government. The Bureau of Indian Affairs established a Navajo Court of Indian Offenses on the Navajo Reservation in 1892.[36] The Navajo Nation did not begin a formal, American type of Navajo tribal government until January 7, 1923, when the Secretary of the Interior approved ad hoc regulations drafted by the Bureau of Indian Affairs that inaugurated a twelve-member Navajo Tribal Council.[37] Similar to other Indian nations, the Navajo Nation Court System, which has as its foundation the Navajo Court of Indian Offenses, predates the formal western-style Navajo Nation government.

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[33] *See* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 18–23 (2009) (discussing the use of Navajo customary law in the Navajo Court of Indian Offenses).

[34] United States v. Clapox, 35 F. 575, 576 (D. Or. 1888).

[35] *Id.* at 577.

[36] AUSTIN, *supra* note 33, at 19.

[37] *Id.* at 13. The regulations creating the original Navajo Tribal Council were drafted by Herbert J. Hagerman, who had been appointed by the Secretary of the Interior as Special Commissioner to the Navajo Tribe. *Id.*

Although the job of the Court of Indian Offenses was to apply the Bureau of Indian Affairs law and order regulations, many of its judges found innovative ways to incorporate Indian customary ways into the court's proceedings and decisions. Examples of customary methods frequently used included the "talking to," where the judge or a respected elder would counsel the offender on maintaining proper behavior within the community, and traditional restitution, an American Indian method of payment to a victim to atone for an injury and repair relationships. On the Navajo Nation, the knowledge that most Navajos could not read or write gave a Navajo Court of Indian Offenses judge in the 1930s a perfect opportunity to emphasize his disappointment with the defendant's behavior. While giving the young man a "Navajo lecture" on what is considered right and wrong in Navajo society, the judge pointed to "the laws in this law book" that the young man allegedly violated.[38] The "law book" was a copy of Reader's Digest. A "Navajo lecture," still in use in the Navajo Nation courts today, uses stern words to reproach offenders and counsel them on proper behavior in Navajo society.

The Bureau of Indian Affairs issued new law and order regulations for the Court of Indian Offenses on November 27, 1935 (later amended in 1937).[39] Owing to the recent enactment of the Indian Reorganization Act of 1934,[40] the 1935 law and order regulations permitted use of a few Indian customs in the Court of Indian Offenses.[41] The courts were allowed to employ the Indian custom of restitution as a remedy in criminal cases: "In addition to any other sentence, the Court [of Indian Offenses] may require an offender who has inflicted injury upon the person or property of any individual to make restitution [to the injured party]."[42] Another regulation allowed the judges to use "customs of the tribe, not prohibited by . . . Federal laws" in civil cases, and even recommended that persons familiar with "customs and usages" of the tribe advise the court.[43]

Many Indian nations adopted several provisions of the 1935 Bureau of Indian Affairs law and order regulations, including the two provisions just mentioned, as part of their initial statutory laws pursuant to the 1934 Indian Reorganization

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[38] The late Homer Bluehouse, retired Associate Justice of the Navajo Nation Supreme Court and eye-witness to several proceedings of the Navajo Court of Indian Offenses, told this story to the author in the late 1980s. Justice Bluehouse served with the author on the Navajo Nation Supreme Court from 1985 until his retirement in early 1993. The Navajo CFR judge was admonishing in the Navajo language when he pointed to "the laws" in the "law book."

[39] 25 C.F.R. § 161.23 (1938).

[40] Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461–479 (2006)) (recommending tribes exercise self-government).

[41] Law and Order Regulations, 3 Fed. Reg. 1134, 1137 (May 18, 1938).

[42] *Id.*

[43] 25 C.F.R. § 161.23.

Act.[44] Most Indian nations that organized under the Indian Reorganization Act established constitutional governments and their own tribal courts. The Navajo Nation rejected the Indian Reorganization Act and continued to use the Navajo Court of Indian Offenses until the Navajo Nation Council replaced it with the Navajo Nation Court System in 1958.[45] However, the Navajo Nation Council adopted the Bureau of Indian Affairs law and order regulations and the structure of the Court of Indian Offenses for its court system and even hired the judges of the Navajo Court of Indian Offenses as the first judges of the Navajo Nation courts.[46]

B. Modern Courts of Indian Nations

Today, approximately two hundred and twenty-five tribal courts and twenty-three Courts of Indian Offenses operate on Indian reservations throughout the country.[47] The judicial systems of most American Indian nations have a trial court and an appellate court. Depending on caseloads and funding, several Indian nations within a geographic region may organize and use one intertribal court system.[48] Each participating Indian nation usually appoints a judge of its choice to the intertribal court system.

Some Indian nations allow only their members to serve as judges on their courts while others have a mixture of member and non-member judges, including law professors and retired state and federal court judges. Judges of Indian nation courts can be a mixture of state-licensed attorneys and lay practitioners who are called tribal-court advocates. Tribal-court advocates generally are not law school graduates but have obtained experience in tribal court practice and law through an apprenticeship or study at a tribal college and/or a certified paralegal program.[49]

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[44] Section 16 of the Indian Reorganization Act authorized tribes to adopt constitutional governments, including court systems, as a means of tribal self-government. The Navajo Nation government is not organized under the Indian Reorganization Act. Although at least four attempts have been made to adopt a constitution, the Navajo Nation does not have a written constitution today.

[45] *See* Navajo Tribal Council Res. No. CO-69-58 (Oct. 16, 1958). This resolution established the Navajo Nation Court System.

[46] *Id.*; *see also infra* note 63 and accompanying text.

[47] *Frequently Asked Questions*, *supra* note 16.

[48] See, for example, the Southwest Intertribal Court of Appeals, Albuquerque, New Mexico, and the Northwest Intertribal Court System, Lynnwood, Washington.

[49] Tafoya v. Navajo Nation Bar Ass'n, 6 Nav. R. 141, 143 (Nav. Sup. Ct. 1989) (noting that advocates are indispensable to tribal court practice because they "are familiar with the customs and traditions of their people").

Navajo law requires Navajo court judges to be enrolled members of the Navajo Nation, speak the Navajo language, know Navajo culture and traditions, and have several years of practical legal experience in the Navajo Nation courts.[50]

Annual caseloads of tribal courts vary from less than 100 cases for the small courts to an average of 70,000 cases for the larger Navajo Nation courts.[51] Indian nation courts handle many kinds of cases including domestic relations, probate, torts, crimes, contracts, enrollment matters, gaming disputes, employment, land and natural resources issues, and suits against the nation's government. Although suits against non-Indians in Indian nation courts receive the most attention from scholars (and the United States Supreme Court) and generate prolonged and costly litigation through the federal court system, they only account for a small percentage of total yearly caseloads.[52] The majority of cases handled by tribal courts involve parties who are members of the Indian nation or are all Indians (i.e., member and non-member Indians) and concern matters internal to the tribe, tribal and individual property, and tribal lands and natural resources. Funds for court operations are a mixture of federal funds (allocated to tribes through the Bureau of Indian Affairs), Indian nation general funds, and federal, state, and private grants.

IV. AUTHORITY FOR THE USE OF CUSTOMARY LAW

Using the Navajo Nation as an example, two kinds of authorization to use customary law exist. The first is cultural or traditional authorization (which is unwritten), and the second is written authorization contained in a constitution, code, or court rule. The authorizing provision usually sets the boundaries for the use of customary law in the nation's court and/or the traditional dispute resolution forum. Traditional dispute resolution forums are non-adversarial and are generally called peacemaking. On the other hand, a provision in an Indian nation code may preclude use of customary law in the tribal court altogether. For some Indian nations, authorization to use customary law may not be in

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[50] NAVAJO NATION CODE ANN. tit. 7, § 354(A)–(D) (2005) (the Navajo Nation Code is hereinafter cited as "__ N.N.C. § __," in accordance with citation instructions set forth in the Code at page XI, Volume 1). There are several additional qualifications for the position of Navajo Nation judge, including education, age, and lack of criminal convictions. 7 N.N.C. § 354(A)–(D).

[51] 2009 JUD. BRANCH NAVAJO NATION ANN. REP. 34, *available at* http://www.navajocourts.org/Reports/FY2009%20Annual%20Report.pdf (noting that the Navajo Nation courts had 73,193 open cases (yearly caseload) for Fiscal Year 2009 (Oct. 1, 2008–Sept. 30, 2009)). See http://www.navajocourts.org for the Quarterly and Annual Reports of the Navajo Nation courts.

[52] The Navajo Nation Judicial Branch does not keep statistics on the number of civil cases litigated in the Navajo Nation courts by non-Indians, but the best estimate is they number less than 1000 cases per year. The United States Supreme Court took away tribal court criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

the constitution, code, or court rules, which brings up an important question: Does the lack of written authorization preclude a tribal court from using customary law?

A. Traditional Authorization

We live in a world of the written word, which has conditioned some people to believe that the written word is more valuable and credible than the oral tradition. When tribal court judges cannot locate a written provision, such as in the tribe's constitution, code, or court rule, authorizing them to use customary law, they might conclude that they do not have authority to do so. This reasoning is not consistent with either the ruling in *Williams v. Lee*,[53] that Indian nations possess a right to make their own laws and be ruled by them, or the modern federal policy of self-determination that American Indian peoples believe is the proper course. It would also mean tribal court judges are denying the use of Indian customary law by allowing western concepts on the application of law to control what is essentially tribal court decision making. Modern Indians and tribal government officials can, at times, think like the ancestors to construct frameworks to apply to internal problems. Relying on traditional thinking to construct methods and solve problems is "doing sovereignty" the American Indian way.

Before the introduction of the American form of courts and laws among the American Indians, the traditional peacemaker did not ponder whether authority was available allowing him to use customary law—the authority was inherent in the culture which brought about the position of peacemaker. Furthermore, the authority to use normative precepts was inherent in the tribe's culture and long-standing dispute resolution practices. In other words, disputes had to be settled so harmony, peace, and positive relationships prevailed within the community.

American Indian cultural knowledge, primarily contained in oral narratives, contains doctrines, principles, and postulates that permit the use of customs and traditions in dispute resolution and community problem-solving. Traditional knowledge provides ample authority for the use of customs and traditions as law in modern Indian nation courts. Indian judges of the Court of Indian Offenses, including the Navajo CFR judges, relied on culture and long-standing dispute resolution practices to incorporate native normative precepts into their court proceedings even before the Bureau of Indian Affairs allowed the use of Indian custom in the 1930s. The past provides assurance that a modern court of an Indian nation can tap its own culture and traditional dispute resolution practices for authorization to use customary law.

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[53] 358 U.S. 217, 222–23 (1959).

B. *Written Authorization*

Most Indian nation codes have a choice of law statute similar to the one found in the Navajo Nation Code:

> A. In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The Courts shall utilize Diné bi beenahhaz'áanii (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations. The courts shall also utilize Diné bi beenahaz'áanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts.
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> B. To determine the appropriate utilization and interpretation of Diné bi beenahaz'áanii, the court shall request, as it deems necessary, advice from Navajo individuals widely recognized as being knowledgeable about Diné bi beenahaz'áanii.[54]

Statutes similar to the Navajo choice of law statute grant Indian nation courts express written authority to apply customs and traditions to resolve disputes and to request the advice of elders (the people I call "the tribal encyclopedia") to help clarify issues concerning a custom or tradition. Written authorization may also be given in a constitution or in a court rule.[55] For example, a Navajo probate rule states, "If there is shown to be a Navajo custom concerning the distribution of property, the property will descend according to that custom, even if the custom is in conflict with any other provision of this rule."[56]

In addition to explicit authorization, the choice of law statute determines the order by which the court applies the laws. The Navajo statute requires that the Navajo Nation courts first apply Navajo statutory laws and regulations and then Navajo common law, if a statutory law does not address the issue.[57] Navajo common law can be used to interpret Navajo statutory laws and non-Navajo laws.[58] Next, the Navajo Nation courts can resort to "applicable federal laws

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[54] 7 N.N.C. § 204(A)–(B).

[55] PASCUA YAQUI TRIBE CONST. art. VIII, § 2. For example, the Pascua Yaqui Tribe Constitution provides, "The jurisdiction of the courts shall extend to all cases in law and equity arising under, this constitution and the laws, traditions, customs or enactments of the Pascua Yaqui Tribe consistent with the provisions of this constitution." *Id.*

[56] NAVAJO R. PROBATE P. 6(10). The court rules for the courts of the Winnebago Tribe of Nebraska also authorize use of Winnebago customary laws. WINNEBAGO TRIBAL CODE tit. 2, §§ 2-104, 2-111(1)(A) (1994).

[57] 7 N.N.C. § 204(A).

[58] Non-Navajo laws include state and federal statutes and court decisions that are argued as authority in the Navajo Nation courts.

or regulations" in the absence of applicable Navajo law.[59] Last in the order of preference is state law.[60]

The Navajo choice of law statute given above has its source in the Bureau of Indian Affairs law and order regulations that were approved by the Secretary of the Interior on November 27, 1935, and reissued in 1937.[61] The relevant provision in the Bureau of Indian Affairs law and order regulations provided:

> 161.23 Law applicable in civil actions. In all civil cases the Court of Indian Offenses shall apply . . . any ordinances or customs of the tribe, not prohibited by . . . Federal laws.
>
> Where any doubt arises as to the customs and usages of the tribe the Court may request the advice of counsellors [*sic*] familiar with these customs and usages.[62]

Many Indian nations, including the Navajo Nation, adopted several provisions of the 1937 Bureau of Indian Affairs law and order regulations (often word-for-word) as their initial laws on domestic relations, criminal offenses, and court procedures.[63]

V. HOW THE NAVAJO COURTS FIND AND USE CUSTOMARY LAW

Before discussing the use of Navajo common law in the Navajo Nation courts, it is important to understand some basic facts about access to customary law. Colonization and destructive federal Indian policies, including forced removals, assimilation, and termination, caused varying amounts of damage to American Indian languages, cultures, and religious practices so that in some modern tribal courts remnants of old values may be useless as customary law. Some Indian nations do not have anyone knowledgeable about the tribe's past culture, religious practices, and language, all of which contain customary law. Tribes left with little of their traditional culture or language are not known to use customary law in

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[59] 7 N.N.C. § 204(C).

[60] *Id.* § 204(D). Three states partially overlap the Navajo Nation: northeastern Arizona, northwestern New Mexico, and southeastern Utah. The Navajo Nation is located in the four corners area of the southwestern United States.

[61] 25 C.F.R. § 161.1 (1938). The 1937 law and order regulations added livestock and grazing regulations that applied specifically to the Navajo and Hopi reservations. *Id.*

[62] *Id.* § 161.23.

[63] For example, in 1959 the Navajo Tribal Council adopted the Bureau of Indian Affairs law and order regulations as Navajo law: "Pending the adoption by the Navajo Tribe and approval thereof by the Secretary of the Interior of a permanent law and order code, the law and order regulations of the Department of the Interior, 25 CFR 11, . . . are hereby adopted as tribal law . . . ." Navajo Tribal Council Res. No. CJA-1-59 (Jan. 6, 1959).

their courts or government. Some Indian nations may have members who know bits of culture and language but whose knowledge is not sufficient enough to overcome credibility and relevancy objections during litigation.

Locating an Indian nation's applicable customary law in a particular case can require time and effort if the tribe's customs and traditions are unwritten.[64] Although time-consuming, such research is certainly not impossible because, just like other kinds of legal research, a tribe's customary law can be found in literature (e.g., books, research studies, articles, or court cases) or by locating individuals, usually elders, who carry that knowledge. Attorneys, including non-Indian attorneys, who are members of the Navajo Nation Bar Association and practice in the Navajo Nation courts (and federal and state courts) have shown repeatedly that locating and using customary law in litigation is not something that is "unusually difficult for an outsider to sort out" or do.[65] There are certainly challenges in finding and using customary law, but litigators should not shy away from revitalizing traditional values and applying them as law in the courts and other dispute resolution forums of American Indian nations.[66]

A. *Notice and Defining Customary Law*

A party wishing to rely on customary law should state the law in a pleading, preferably as early in litigation as possible, so the court and all parties to the case are properly afforded notice.[67] Notice allows the opposing party an opportunity to locate its own witnesses and identify relevant customs that it may want to

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[64] The Hopi Appellate Court stated very well the challenges associated with finding unwritten customary law:

> Hopi customs, traditions and culture are often unwritten, and this fact can make them more difficult to define or apply. While they can and should be used in a court of law, it is much easier to use codified foreign laws [meaning non-Hopi law]. That ease of use may convince a trial court to forego the difficulty and time needed to properly apply our unwritten customs, traditions and culture.

Hopi Indian Credit Ass'n v. Thomas, No. AP-001-84, 1996 NAHT 0000007, ¶ 28 (Hopi App. Ct. Mar. 29, 1996) (VersusLaw).

[65] Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring).

[66] There really is no such thing as "American Indian customary law." The diversity of American Indian tribes allows for only a particular nation's common law, such as Navajo common law or Hopi common law. To go beyond a specific nation's common law into what might be called Indian common law leads to generalities and pan-Indianism.

[67] *See In re* Estate of Belone, 5 Nav. R. 161, 164 (Nav. Sup. Ct. 1987). "Where a claim relies on Navajo custom, the custom must be alleged, and the pleading must state generally how that custom supports the claim." *Id.* The Hopi Appellate Court recommends that custom be alleged at the trial court first: "A party who intends to raise an issue of unwritten custom, tradition or culture must give notice to the trial court and to the other party." Polingyouma v. Laban, No. AP-006-95, 1997 NAHT 0000018, ¶ 27 (Hopi App. Ct. Mar. 28, 1997) (VersusLaw).

introduce. Notice also gives the court time to evaluate the offered customs and determine whether they are acceptable as customary law and whether other customs are available that might be applied using the doctrine of judicial notice.[68]

Conflict among offered customs can be resolved in one of two ways. First, the court can use its discretion to decide which custom is relevant and useful as customary law in the case. The court should clearly state in its order why it selected custom X over customs Y and Z to preserve the ruling in case of appellate review. Second, the court can form an advisory panel of elders (or knowledgeable people). The court selects one elder and the plaintiff and defendant each select one elder to complete the panel. The court still exercises its discretion in deciding which custom is law and should be used in the case.

A question may arise as to whether an identified custom has the force of law, but that issue is properly left to the discretion of the judge because the answer is embedded in the tribe's culture, language, spirituality, or ways of doing things.[69] A custom that is not law for one tribe may be law for another tribe. For example, a handshake as part of a greeting is a well-known custom, but it is not law. A handshake at the end of oral contracting might be enforceable as customary law for a tribe that practices it as a final act of oral contracting. On the other hand, a similarly performed handshake may only be a custom and not customary law for a tribe that does not consider it integral to oral contracting.

The job of determining what is customary law is easier in the Navajo Nation courts, because Navajo judges are required by law to speak the Navajo language and understand Navajo culture and spirituality, including the complex kinship system.[70] The traditional values that the Navajo Nation courts apply as customary law are usually well known as "law" by the Navajo people. In other words, some well-known Navajo customs function as "law" through "people-practice" in Navajo communities.[71] This is not to say that the courts of Indian nations do not need written guidelines to help litigants and practitioners determine which customs have the force of law in their jurisdictions. Guidelines in this area should be available in a court opinion.

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[68] *See infra* note 80 and accompanying text (defining the judicial notice doctrine).

[69] The following excellent articles should help Indian nation courts decide which customs have the force of customary law: Fletcher, *supra* note 18; Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2008).

[70] 7 N.N.C. § 354(A)(5).

[71] One Navajo common customary law is *nályéeh* (restitution). If there is an injury, the families of the tortfeasor and the injured get together, talk over the problem, and agree on the amount of restitution to be paid to the injured person.

B. The "Tribal Encyclopedia"

Most tribal court judges know that elders, ceremonial practitioners (people non-Indians call "medicine-men" or "-women"), traditional dispute resolvers ("peacemakers"), retired tribal court judges who have knowledge of customary law, and people who generally live a traditional lifestyle are the best sources of customary law.[72] I refer to these knowledgeable people as the "tribal encyclopedia" because they carry the tribe's language, culture, spirituality, and history in their heads. An individual who carries traditional knowledge can be qualified as an expert on such and then testify to traditional values that can be applied as customary law.

The party relying on custom should make sure that the witness, especially if the witness is an elder or a ceremonial practitioner, understands why and how the narrative or traditional value will be used in the dispute resolution process. This explanation on use of custom in court should be done at the beginning of the interview process or at first contact with the potential witness to make sure the witness thoroughly understands the process and what is at stake. If the elder agrees to testify on custom, then any issue related to in-court interpretation or translation should be addressed as early as possible.

Everyone involved in a court case should understand that a traditional person may refuse to disclose sacred knowledge (also called guarded knowledge) or knowledge that applies only in ceremony. A traditional person may also refuse to disclose knowledge that is out of season. For example, some Navajo narratives can be told only in the winter; thus, an elder may caution that customs contained in winter stories should not be disclosed during the summer, although they may be used in the summer if disclosed in the winter. The testimonial boundaries should be mapped and understood to prevent disclosure issues from arising for the first time while the witness is under oath.

For the benefit of practitioners who practice in the tribe's courts, a court of an Indian nation should establish written guidelines on the qualifying of experts based on the tribe's traditional values. These guidelines should establish a roadmap to the kinds of evidence necessary to qualify a person as an expert witness on the tribe's customs and traditions that can serve as customary law. Appellate or trial court opinions, rules of evidence, or an ad hoc set of rules can contain written guidelines.[73] Factors that can be considered for the guidelines include the witness's skill, knowledge, or experience with the tribe's culture, language, or

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[72] The leading Navajo case that explains the process for introducing customary law into litigation before the Navajo Nation courts is *In re Estate of Belone*, 5 Nav. R. 161.

[73] *Id.* The Navajo Nation Supreme Court set forth such guidelines for its trial courts and practitioners. *Id.*

spiritual practices. Knowledge of tribe's values can be obtained through traditional education (e.g., knowledge of creation narratives, traditional stories, or trickster stories), practice (e.g., ceremonial practitioner), skill (e.g., medicine-man's helper, herbalist, or storyteller), and a western form of education (e.g., researcher or author on tribe's culture, linguist, or professor). Finally, care must be taken to ensure that the trial court's discretion regarding the qualifying of experts is preserved, because there are no substitutes for a court's direct observation of the examination of a witness in court.

Customs that can be used as customary law are found in creation narratives, clan narratives, tribal history, maxims, trickster stories, ceremonies, songs, prayers, language, and places, including stories about geographical features and special places. Language is always a rich source of customary law. The Navajo language is descriptive, as are many American Indian languages. Navajo words can describe customary law in action; words create a mental image of law doing its job. Take for example, the Navajo traditional principle called *bił chi'iniyá*, which literally means "something has slipped past, because of a person's inattentiveness or carelessness," or in the legal sense, "a party has failed to take advantage of an opportunity." Implied in the principle of *bił chi'iniyá* is the notion that the person has control over the matter, a control he can lose. This Navajo customary law has the same legal effect as res judicata and finality in American law. A party who misses the deadline for filing a notice of appeal would be subject to the principle of *bił chi'iniyá*.[74]

C. *Written Materials*

Customary law can be found in the trial or appellate court opinions of an Indian nation. Customary law, used to resolve an issue in an appellate court opinion, has precedential value and should be treated and argued as such in other cases. Tribal court judges who apply customary law in their decisions should do more than just cite a broad, vague tribal value and call it customary law. Parties to the case, tribal court advocates, fellow tribal court judges, and the public deserve a good explanation of the customary law, which should include background information about the custom, how the custom translates into English, how the custom applies in the nation's culture, and what persuaded the court to rule that the custom is customary law. A tribal court's written analysis of its application of customary law allows for further development of the customary law, establishes the customary law's use as precedent in other cases and sets the groundwork for

[74] An example of how this principle is used to determine appellate jurisdiction is found in *Begay v. Alonzo*, No. SC-CV-40-08, slip op. at 4–5 (Nav. Sup. Ct. November 7, 2008) (a party who has missed the deadline for filing a notice of appeal is subject to the principle of *bił chi'iniyá*). *See also* AUSTIN, *supra* note 33, at 71, 116.

establishing frameworks that can be used to identify, screen, and apply other customs as law. Also, tribal courts "should take care to avoid" using pan-tribal values as their nation's customary law.[75]

The opinions of Indian nation courts can be found in the respective nation's court reporter (e.g., Navajo Reporter); a general court reporter that publishes the decisions of several tribal courts (e.g., Indian Law Reporter); a loose-leaf collection of the respective tribal court's decisions (e.g., those filed in a binder); and online, including in VersusLaw, Westlaw, and Tribal Court Clearinghouse.[76] Traditional values that can be used as law can also be found in academic writings such as those by anthropologists, ethnologists, and legal scholars. Especially useful are books and articles on a specific tribe's culture, stories (e.g., creation narratives), and religious practices. Books are also available on a particular Indian nation's customary law.[77]

Care must be taken, however, when relying on the writings of non-members of a tribe. Academics normally do an excellent job interpreting and describing aspects of American Indian cultures, but even then there is always the inherent translation or interpretation problem if the researcher does not speak the tribe's language and has to rely on translators. For example, the Navajo language is difficult to translate or interpret into English because some Navajo concepts do not have English word equivalents, and some Navajo words express broad meanings that are not easily translatable into English. From my experience, much of the original meaning of a Navajo concept is lost during translation of Navajo words into English, and a poor translator usually intensifies the problem. Furthermore, the problem is enhanced in a courtroom setting because English legal terms do not have equivalents in the Navajo language and American rules on the admissibility of evidence often filter traditional Navajo concepts of much of their original meanings. Moreover, traditional Indian elders get frustrated when their testimony is frequently interrupted by counsel's objections.[78]

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[75] Fletcher, *supra* note 18, at 84.

[76] The Internet address for Tribal Court Clearinghouse is http://www.tribal-institute.org/.

[77] *See generally* AUSTIN, *supra* note 33; KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941); MARIANNE O. NIELSON & JAMES W. ZION, NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE (2005); JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT (2008); RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975).

[78] In many American Indian cultures, including Navajo culture, it is deeply disrespectful to frequently interrupt an elder when he is telling a story, especially if the interruption is not a question seeking to clarify an event just covered.

Some tribal court judges have expressed that writings on a tribe's culture by its own members may be more accurate than those by non-members.[79] That may be true, but it would be a mistake to ignore the writings of non-Indian scholars. The bulk of the research and literature on American Indian cultures available today, including those on old tribal customs and traditions, is by non-Indians. Tribal court judges can utilize customs found in non-Indian authored literature with the caveat that they ensure the identified custom is accurate, relevant, and useful as customary law when applied to the facts in the case.

D. The Judicial Notice Doctrine

One of the best devices available to Indian nation courts to develop their tribal common law jurisprudence is the judicial notice doctrine.[80] An Indian nation's court can utilize the doctrine to initiate its customary law practice and put practitioners on notice that henceforth customary law will be an essential and important part of the nation's legal system. Indian nation courts should define the judicial notice doctrine within the context of the tribe's culture and establish rules for its use in court decision making.

The Navajo Nation Supreme Court has established that a Navajo judge may use the judicial notice doctrine after satisfying the following test: "[I]f a custom is generally known within the community, or if it is capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned, it is proven. . . . [In other words,] 'judicial notice may only be taken of those facts every damn fool knows.'"[81] For example, it is a well-known kinship custom among the Navajo people that a Navajo has the same clan as his or her mother. The Hopi Appellate Court requires the Hopi courts to take judicial notice of "Hopi

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[79] *In re* Estate of Apachee, 4 Nav. R. 178, 180 (W.R. Dist. Ct. 1983). A Navajo Nation trial judge made this observation clear:

> Only some learned treatises on Navajo Ways will be deemed to reflect Navajo common law because this Court's experience with the works of anthropologists, ethnologists and other commentators on the Navajos is that often these works are incomplete, inaccurate or do not reflect the current state of the Navajo common law, which is a living spirit of the Navajo People. The court notes that the more reliable works for use in finding Navajo common law are those authored by wise and experienced Navajo authors. The Diné are the most accurate commentators on themselves.

Id.

[80] BLACK'S LAW DICTIONARY 923 (9th ed. 2009). Judicial notice means a court can accept a well-known and indisputable fact without requiring a party's proof. *Id.*

[81] *In re* Estate of Belone, 5 Nav. R. 161, 165 (Nav. Sup. Ct. 1987) (citing E. CLEARY, MCCORMICK ON EVIDENCE § 329 (3d ed. 1984)).

custom, tradition or culture when it is applicable."[82] Otherwise, the test for judicial notice in Hopi courts is similar to the one for the Navajo Nation courts.[83]

Whenever an Indian nation court takes judicial notice of a commonly known traditional value, it should set forth a clear explanation of its reasoning in its written decision for the benefit of the parties, to preserve the ruling for possible appellate review, and to establish a decision that may have precedential value. The court should explain the source of the custom (e.g., book, article written by anthropologist, advice from an elder, or judge's own expert knowledge); how it is that the custom is "generally known" in the community or tribe; how the custom is relevant to the facts of the case; and any information that would further the court's development of its tribal common law jurisprudence. A proper analysis of the custom as it is found in that tribe's culture, its description, and method of application should prevent the court from generalizing and relying on pan-Indianism. This is not to say that philosophical doctrines common to many Indian nations do not exist. Indigenous peoples throughout the Americas have several common doctrines through which they see the world and which serve as the foundation of their societies.

Tribal appellate and trial court judges, at least those who speak the tribe's language and know the culture, may rely on their own knowledge to take judicial notice of traditional values even though those traditional values may not have been pleaded or otherwise introduced through a witness or literary source. Taking judicial notice of custom without allowing parties an opportunity to comment may be good for judicial economy, but the better approach is to allow litigants to state their positions about the custom through supplemental briefing. This suggested approach applies to an Indian nation's trial and appellate courts. A judge definitely would not want to take judicial notice of an outdated custom or one that is not relevant to the issue before the court. A statement by a Navajo trial judge underscores this point: "Navajo customs cannot be applied in a vacuum, and they must be applied with logic in accordance with present circumstances."[84] There is also the possibility that a local custom, such as a clan custom, may have more relevance to an issue than a more general custom of the tribe. Thus, to prevent errors (and possible embarrassment), a tribal court should allow litigants an opportunity to review and comment on a custom that it has identified as credible for judicial notice before it applies the doctrine.

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[82] Hopi Indian Credit Ass'n v. Thomas, No. AP-001-84, 1996 NAHT 0000007, ¶ 33 (Hopi App. Ct. Mar. 29, 1996) (VersusLaw).

[83] *Id.* ¶ 32 ("A court may dispense with proof of the existence of a Hopi custom, tradition or culture if it finds the custom, tradition or culture to be generally known and accepted within the Hopi Tribe.").

[84] Apache v. Republic Nat'l Life Ins. Co., 3 Nav. R. 250, 252 (W.R. Dist. Ct. 1982).

E. Using Customary Law to Interpret Foreign Law

The term "foreign law" as used in this section means any law that is not the law of the Indian nation. Laws of an Indian nation include statutes in the tribal code, rulings in court decisions, court rules, administrative rules and regulations, and common law (customary law). An Indian nation's laws can be adopted from state and federal laws, including state and federal court decisions, but once adopted, they become laws of the Indian nation. The Navajo Nation Supreme Court made this point clear when addressing a Navajo statute that had been adopted from state law: "[A statute] adopted from an outside source does not, by itself, make it illegitimate, as the Navajo Nation Council has made it the law of the Navajo Nation."[85] Foreign law includes international laws, statutory and caselaw of American states and the federal government, laws of foreign nations, and laws of other American Indian nations. There is not an American Indian nation today that has exclusively traditional customary laws as its law, just as modern courts of Indian nations are not traditional native institutions.

Indian nation courts, at least those that rely on customs and traditions, can use their customary laws to interpret foreign laws. It is therefore important for each Indian nation to develop a test to screen a foreign law's compatibility with the tribe's culture and ways of doing things. For example, as the Navajo Nation Supreme Court has done, a tribal court can use customary law to interpret the due process provision of the Indian Civil Rights Act, but that interpretation should be compatible with due process as understood and applied in the tribe's culture.[86] The Navajo Nation Supreme Court explained,

> Due process under the [Indian Civil Rights Act] . . . must be interpreted in a way that will enhance Navajo culture and tradition. . . . To enhance the Navajo culture, the Navajo courts must synthesize the principles of Navajo government and custom law. From this synthesis Navajo due process is formed.
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> When Navajo sovereignty and cultural autonomy are at stake, the Navajo courts must have broad-based discretion in interpreting the due process [clause] of the [Indian Civil Rights Act] . . . and the [Navajo] courts may apply Navajo due process in a way that protects civil liberties while preserving Navajo culture and self-government.[87]

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[85] Fort Defiance Hous. Corp. v. Lowe, 8 Nav. R. 463, 474–75 (Nav. Sup. Ct. 2004).

[86] 25 U.S.C. § 1302(8) (2006) (outlining the due process provision of the Indian Civil Rights Act).

[87] Billie v. Abbott, 6 Nav. R. 66, 74 (Nav. Sup. Ct. 1988).

Many of the protections found in the Indian Civil Rights Act, such as free exercise of religion, freedom of speech, freedom of assembly, right to private property, assistance of counsel, equal protection, and due process, have all been known and practiced as part of traditional Navajo and other American Indian cultures since time immemorial. American Indian peoples did not first become aware of individual rights through the 1968 Indian Civil Rights Act or even the United States Bill of Rights. Individual and community rights are inherent in traditional American Indian cultures and have been protected by each tribe's customary law for centuries, including prior to European contact.

The experiences of American Indian nations with protecting individual and community rights have long cultural histories. Thus, there should be no question that modern tribal courts have leeway in interpreting the provisions of the Indian Civil Rights Act and "need not follow the United States Supreme Court precedents 'jot-for-jot.'"[88] In fact, by not following United States Supreme Court precedents "jot-for-jot," the Navajo Nation courts have in some cases accorded individuals more protection than the American courts.[89] Therefore, it is important for federal courts to acknowledge and protect the right of Indian nation courts to use traditional values to interpret not only the provisions of the Indian Civil Rights Act but also tribal and non-tribal statutes and court rulings.

VI. CONCLUSION

Federal Indian policies that promoted assimilation, acculturation, and termination did much damage to American Indian cultures, languages, religions, and property holdings. Consequently, at the close of the first decade of the twenty-first century, American Indian peoples still lag behind other Americans in terms of health, educational achievement, economic prosperity, and social well-being. The time is ripe for American Indians, and particularly their leaders, to realize that the solutions to some of these modern problems may lie in their own traditional cultures. Embedded in American Indian cultures, languages, religious

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[88] Nevada v. Hicks, 533 U.S. 353, 384 (2001) (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 n.238 (1998)).

[89] Navajo Nation v. Rodriguez, 8 Nav. R. 604 (Nav. Sup. Ct. 2004) (asserting that when it comes to *Miranda* warnings, Navajo traditional values grant criminal suspects in Navajo police custody broader and more criminal procedure rights than required by federal and state courts); Atcitty v. Dist. Court for the Judicial Dist. of Window Rock, 7 Nav. R. 227 (Nav. Sup. Ct. 1996) (signifying that due process as interpreted by Navajo traditional values grants applicants a right to governmental benefits that they would not otherwise have received if federal court interpretations of due process were applied).

practices, lore, and sense-of-place are useable values, norms, and mores that can help American Indian peoples overcome reservation problems and improve their living standards.

American Indian peoples must use Indian thinking and long-standing tribal ways and methods to empower themselves, address problems on their lands, and develop strategies that can bring them prosperity. It is a process of Indian peoples "doing sovereignty" the Indian way, by relying on their own traditional values to map out and control their futures. Modern tribal dispute resolution forums, including tribal courts and tribal governmental operations, provide opportunities to develop, test, and refine methods and skills that promote use of long-standing customs and traditions to solve contemporary issues. The opportunities for each American Indian nation to set a course for its future are there. We would not want future American Indian generations to say this about their current American Indian leaders—*bił chi'iniyá*.

INDIAN COURTS AND FUNDAMENTAL FAIRNESS: *INDIAN COURTS AND THE FUTURE* REVISITED

MATTHEW L.M. FLETCHER*

For Ann Getches

This article comes out of the University of Colorado Law Review's symposium issue honoring the late Dean David H. Getches. It begins with Dean Getches's framework for analyzing Indian courts. I revisit Indian Courts and the Future*, the 1978 report drafted by Dean Getches, and the historic context of the report. I compare the 1978 findings to the current state of Indian courts in America. This article focuses on the reality that the ability of Indian courts to successfully guarantee fundamental fairness in the form of due process and equal protection of the law for individuals under tribal government authority is uniquely tied to the legal infrastructure available to the courts. Congress tried to provide the basic framework in the Indian Civil Rights Act ("ICRA"), and many of the most successful tribal justice systems have borrowed from ICRA or developed their own indigenous structure to guarantee due process and equal protection. I argue that ICRA is declining in importance as Indian tribes domesticate federal constitutional guarantees by adopting their own structures to guarantee fundamental fairness.*

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INTRODUCTION

There are about three hundred American Indian courts, or tribal courts,[1] in the United States. These courts constitute a powerful exercise of tribal government authority in the modern era, statutorily cabined only by the Indian Civil Rights Act ("ICRA").[2] They are usually considered the foundation for

1. I will use "Indian courts" and "tribal courts" synonymously. Dean Getches used "Indian courts," which is a term that many might think archaic in the twenty-first century. The more recent accepted phrase is "tribal courts."

2. Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301–41 (2006)). *See generally* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557 (1972); Arthur Lazarus, Jr., *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337 (1969). ICRA purported to extend many, but not all, federal constitutional rights to persons under tribal jurisdiction. *Cf.* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1676–77 (2012) (noting that the Second Amendment does not apply to Indian tribes).

individual rights protections in tribal justice systems[3] despite being criticized as not good fits for tribal government.[4] As tribal justice systems develop, they rely less on ICRA and more on indigenous jurisprudence. This article traces that movement.

This article was prepared in honor of the late Dean of the University of Colorado Law School David Getches and traces the modern history of Dean Getches's contribution to the ongoing public discussion about the legitimacy of Indian courts. His work began in the late 1970s with the publication of *Indian Courts and the Future*, a report of an extensive survey of tribal courts commissioned by the National American Indian Court Judges Association.[5] Getches's work, in many ways the first of its kind, provided the groundwork for establishing a theoretical basis for making tribal law more independent of federal influence and control.

Tribal justice systems, embodied by Indian courts, made enormous strides in the last several decades. Congress is supportive of Indian courts,[6] and more recently, the

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3. *See* U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT, at II-3 (June 1991) (describing the origins of ICRA and asserting that "[i]t was through the . . . ICRA . . . that Congress statutorily imposed on the tribal governments restrictions similar to those found in the Bill of Rights").

4. *See* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1123 (1994) (arguing that individual rights protections are sometimes incompatible with collective tribal rights).

5. NAT'L AM. INDIAN CT. JUDGES ASS'N., INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT (David H. Getches & Orville N. Olney eds., 1978) [hereinafter "REPORT"]. Thanks to the outstanding law librarians at the University of Colorado Law School library, the REPORT and its two appendices are available online. *See* William A. Wise Law Library, *David H. Getches Collection*, http://www.colorado.edu/law/lawlib/research_resources/digital_collections/getches_collection/ (last visited Oct. 28, 2012).

6. *E.g.*, 25 U.S.C. §§ 3601(4)–(9) ("(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems; (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments; (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights; (7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this Act; (8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and (9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this Act."); 25 U.S.C. §§ 3651(5)–(11) ("(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments; (6) Congress and the Federal

Department of Justice has begun to support tribal justice systems by proposing the Stand Against Violence and Empower ("SAVE") Native Women Act, which would reestablish tribal criminal jurisdiction over non-Indians for some crimes.[7] The Senate eventually incorporated this provision into the 2012 Senate version of the Violence Against Women Act ("VAWA") reauthorization.[8]

But the news is not all good. Opponents of tribal sovereignty continually attack tribal justice systems as a means to undercut tribal government authority. In the recent debates over the limited expansion of tribal criminal justice authority in the VAWA reauthorization bill, opponents claimed tribal courts were illegitimate and illiberal, citing to examples opponents claim are representative of tribal justice systems everywhere.[9] Many tribal governments have illiberal tendencies, and some Indian courts are incapable of combating the worst abuses of tribal governments.[10] Yet, in most instances, modern tribal justice systems are successful at resolving these issues.

This article begins with Dean Getches's framework for

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courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands; (7) enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency; (8) there is both inadequate funding and an inadequate coordinating mechanism to meet the technical and legal assistance needs of tribal justice systems and this lack of adequate technical and legal assistance funding impairs their operation; (9) tribal court membership organizations have served a critical role in providing training and technical assistance for development and enhancement of tribal justice systems; (10) Indian legal services programs, as funded partially through the Legal Services Corporation, have an established record of providing cost effective legal assistance to Indian people in tribal court forums, and also contribute significantly to the development of tribal courts and tribal jurisprudence; and (11) the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems.").

7. S. 1763, 112th Cong. (2011).

8. *See Senate Passes VAWA, Including Protections for Native Women,* NAT'L CONGRESS OF AM. INDIANS (Apr. 26, 2012), http://www.ncai.org/news/articles/2012/04/26/senate-passes-vawa-including-protections-for-native-women.

9. S. REP. NO. 112-153, at 40–41, 51–55 (2012) (reporting minority views of Senators arguing against expansion of tribal court jurisdiction); H.R. REP. NO. 112-480, at 58–59 (2012) (reporting House majority views that tribal courts will not provide adequate due process to nonmembers).

10. *See generally* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007) (theorizing illiberalism in tribal governance); Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 50 SAN DIEGO L. REV. (forthcoming 2013) (theorizing lack of tribal accountability for human rights violations).

analyzing Indian courts. Part I first revisits *Indian Courts and the Future*,[11] the 1978 report drafted by Dean Getches, and discusses the historic context of the report. It then analyzes the substance of that report and the framing given to the description of Indian courts by Dean Getches. Part I concludes by comparing the 1978 findings to the current state of Indian courts in America.

Next, this article focuses on the ability of Indian courts to successfully guarantee fundamental fairness in the form of due process and the equal protection of the law for individuals under tribal government authority. Part II first details several tribal court opinions that exemplify the uses of ICRA in the last few decades. These modern court opinions demonstrate the ability of Indian courts to guarantee fundamental fairness to tribal court litigants beyond the minimum standards of the Indian Civil Rights Act by incorporating tribal statutory and common law principles. Finally, this article addresses the question of the future relevance of ICRA. Congress tried to provide the basic framework of individual rights protection in ICRA,[12] and many of the most successful tribal justice systems have borrowed from ICRA or developed their own indigenous structure to guarantee due process and equal protection.[13] ICRA is declining in importance as Indian tribes domesticate federal constitutional guarantees by adopting their own structures to guarantee fundamental fairness.

In short, this article argues that some tribal courts are developing a jurisprudence following principles of "fundamental fairness" that account for tribal customary and traditional law in comporting with American notions of "due process" and "equal protection." This jurisprudence of fundamental fairness may effectively replace, over time, tribal court borrowing of American law in rights cases.

I. THE GETCHES REPORT AND THE PRESENT

This Part covers several decades of recent history involving American Indian justice systems. I begin by describing and

11. *See* REPORT, *supra* note 5.

12. *See* Indian Civil Rights Act, 25 U.S.C. §§ 1301–03 (2006).

13. GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS CONST. art. X, § 1 (1988) (codifying Section 2 of the Indian Civil Rights Act as it existed in 1988 into the tribal constitution).

summarizing what I call the "Getches Report" and follow that with a subsection on the state of Indian courts as of 1978. I conclude this Part with a subsection doing the same for Indian courts in 2012.

A. The Historical Context of the Getches Report

In 1979, the National American Indian Court Judges Association ("NAICJA") published a report entitled *Indian Courts and the Future: Report of the NAICJA Long Range Planning Project*.[14] The project involved surveys of twenty-three tribal courts from around the country about their structure, jurisdiction, day-to-day operations, procedures, and relations with state and federal courts.[15] The results of the surveys are published as Appendix 1 to the report.[16] Appendix 2 collects articles by more than a dozen American Indian law scholars and practitioners who drafted some of the first serious scholarship on tribal courts.[17] In the report, Dean Getches summarized the results of the project and offered dozens of recommendations for developing tribal courts. The report helped tribal advocates begin responding to the series of Congressional hearings that purported to detail (mostly anecdotally) the abuses and incompetence of tribal governance and adjudication in the 1960s.[18] These hearings served as the factual predicate for the enactment of ICRA.[19]

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14. *See* REPORT, *supra* note 5.

15. *See id.* at 5.

16. *See* NAT'L AM. INDIAN CT. JUDGES ASS'N, INDIAN COURTS AND THE FUTURE: APPENDIX 1, COMPLICATION OF FINDINGS FROM RESERVATION SURVEYS (David H. Getches & Orville N. Olney eds., 1978) [hereinafter "APPENDIX 1"].

17. *See* NAT'L AM. INDIAN CT. JUDGES ASS'N, INDIAN COURTS AND THE FUTURE: APPENDIX 2, DISCUSSION MATERIALS PREPARED FOR PROJECT ADVISORY COMMITTEE (David H. Getches & Orville N. Olney eds., 1978) [hereinafter "APPENDIX 2"].

18. For an overview of the 1960s hearings, see Elizabeth Ann Kronk, *Tightening the Perceived "Loophole": Reexamining ICRA's Limitation on Tribal Court Punishment Authority*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 211, 219–25 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley, eds. 2012).

19. Meanwhile, the American Indian Policy Review Commission recommended the expansion of federal support of tribal justice systems. *See* AM. INDIAN POL'Y REVIEW COMM'N, 95th Cong., 1st Sess., Final Report 167 (1977). The Commission found that the limitations of tribal justice systems could be tied most directly to resources. *See id.* One commentator in the study argued that Indian tribes that did not have the capacity to "administer criminal and civil jurisdiction in the early 1950s" should not be restricted years later, further noting that "it should have been foreseen that such capabilities would someday be

The study arrived at a critical juncture in the history of American Indian law. The report came immediately after the Supreme Court's holding in *Oliphant v. Suquamish Indian Tribe*[20] that tribal courts have no criminal jurisdiction over non-Indians; and in the same year as the American Bar Foundation's report, *American Indian Tribal Courts: The Costs of Separate Justice*[21] that recommended the abandonment of efforts to develop tribal justice systems.[22] It would have been interesting to see whether the Court would have addressed the factual findings of the study in the *Oliphant* decision. Perhaps the Court would have pointed to the report and focused on the areas where tribal justices systems needed to improve as justification for limiting tribal jurisdiction. Or, perhaps the Court would have been more likely to be persuaded that tribal jurisdiction over non-Indians was not terribly disturbing as a civil rights matter. Who knows?

Indian Courts and the Future was the first serious study of tribal justice systems. NAICJA staffers and consultants prepared a detailed survey of tribal courts.[23] The survey results offer data that twenty-first century tribal judges and tribal court practitioners would find familiar in some ways and foreign in other ways.[24] The meat of the report is Dean Getches's history of tribal courts and tribal justice systems[25]

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developed . . . ." *Id.* (quoting letter from Douglas Nash, Counsel to the Umatilla Reservation to Donald R. Wharton, Task Force No. 4).

20. 435 U.S. 191 (1978), *superseded by statute*, Pub. L. No. 101-511, 104 Stat. 1892 (1990).

21. SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE (1978); *see also* Samuel J. Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not,"* 62 A.B.A. J. 1002 (1976); Richard B. Collins, Ralph W. Johnson & Kathy Imig Perkins, *American Indian Courts and Tribal Self-Government*, 63 A.B.A. J. 808 (1977) (criticizing and responding to Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not," supra*).

22. *See* BRAKEL, *supra* note 21, at 103 ("[I]t would be more realistic to abandon the [tribal court] system altogether and to deal with Indian civil and criminal problems in the regular county and state court systems.").

23. APPENDIX 1, *supra* note 16, at 1–20.

24. *E.g.*, Juli Anna Grant, *Abby Abinanti, Chief Judge, Yurok Tribal Court, Klamath, California, and California Superior Court Commissioner*, 2 J. CT. INNOVATION 347, 348 (2009) (noting expanded jurisdiction of the tribal court coupled with funding shortages). In contrast to the REPORT, the contemporaneous American Bar Foundation study apparently involved little more than visits by the author to five reservations, conducting informal interviews with various tribal court personnel and parties to tribal court cases, some form of "person on the street" interviews of people in reservation communities, and attendance at a tribal court personnel training. *See* BRAKEL, *supra* note 21, at 3.

25. *See* REPORT, *supra* note 5, at 7–13.

and the recommendations of NAICJA after reviewing the survey and the scholarship.[26] The study concluded that Indian courts suffer from a terrific lack of resources that undercut the ability of the courts to guarantee fundamental fairness.[27] Perhaps most importantly, the study concluded that Indian courts had few law-trained judges and Indian country[28] had limited numbers of law-trained counsel available to litigants.[29]

Indian Courts and the Future, published in 1978, set the stage for discussions about tribal justice systems for the next several decades and more and this report continues to have relevance to the advancement of tribal courts.

B. The State of Indian Courts Circa 1978

At this time, Indian courts suffered from a lack of legal infrastructure—constitutional texts, statutory texts, tribal customary law, and traditional law—upon which to draw and interpret.[30] Tribal judges usually applied state and federal precedents in their 1970s and early 1980s opinions.[31] They did so despite the fact that those opinions were derived from federal and state statutes that did not apply in the tribal context and involved common law from the Anglo-American tradition that also did not apply to tribal communities.[32]

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26. *See id.* at 103–95.

27. *See id.* at 53–55 (reporting findings that the large majority of tribal court judges were not lawyers and the large majority of tribal court advocates were lay people).

28. "Indian country" is a term of art in federal Indian law, denoting the relevant legal boundaries where federal, state, and tribal boundaries meet. *See* 18 U.S.C. § 1151 (2006) (defining "Indian country" for federal criminal jurisdiction purposes). I also use "Indian country" less specifically, as here, to generally describe the place where Indians and tribes reside.

29. *See* REPORT, *supra* note 5, at 53–55, 65 (discussing reliance on non-Indian judges, low salaries for judges and court staff, lack of on-reservation attorneys and law-trained court clerks, and reliance on lay advocates).

30. *See id.* at 37–40, 43–44 (discussing the unavailability of tribal law, the scarcity of model codes, the lack of separation of powers and judicial independence, and the problems with borrowing state law).

31. *See id.* at 43–44 (discussing reliance upon state laws).

32. The prototypical example of a federal common law rule that, at one time, would have been a poor fit for tribal communities is the *Miranda* rule, where criminal suspects have a right to silence and other rights derived, at least in part, from an American tradition of using physical violence to elicit confessions in criminal cases. *See* Miranda v. Arizona, 384 U.S. 436, 446–48 (1966); Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 163–64 (2007). In *Navajo Nation v. Rodriguez*, 8 Navajo Rptr. 604, 615–16 (Navajo 2004), the court noted the disconnect between Anglo-American traditional police

Statutorily, with the exception of a few tribal constitutions,[33] courts had little to draw upon except ICRA.[34] Until 1978, when the Supreme Court decided *Santa Clara Pueblo v. Martinez*,[35] holding that ICRA did not provide a federal cause of action to adjudicate those claims, litigants could access federal courts to litigate ICRA complaints.[36]

The Report noted the widely differing responses from the twenty-three tribal courts on their understanding and implementation of ICRA.[37] Consultants to the study wrote their responses after visiting the tribal courts.[38] The consultants reported that many of the tribal courts had changed into more formal and less traditional entities ten years after ICRA's enactment.[39] The consultants noted that many, but not all, of the courts stated that ICRA was helpful as a guide to compel the court to provide proper procedure to litigants and in helping guide substantive civil rights cases.[40]

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practices and those of the Navajos.

33. For an extensive survey of tribal constitutions available in the 1960s and 1970s, see generally CHARTERS, CONSTITUTIONS AND BY-LAWS OF THE INDIAN TRIBES OF NORTH AMERICA, PTS 1–12 (George E. Fay, ed. 1967–1971).

34. *See* Indian Civil Rights Act, 25 U.S.C. § 1302 (2006).

35. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

36. *Cf.* REPORT, *supra* note 5, at 76 (predicting more and more federal court ICRA cases). At the time, there was robust scholarly literature debating whether federal courts should have ICRA jurisdiction. *Compare* Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1 (1975) (arguing against), *with* Joseph de Raimses, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. REV. 59 (1975) (arguing in favor).

37. *See* APPENDIX 1, *supra* note 16, at 261–67.

38. *See id.* at 2.

39. *See id.* at 263–64 ("The court is much more formal and Anglicized. . . . Procedure is becoming more Anglo oriented. . . . The court has become much less traditional and much more formal. . . . Court procedure has become more formal and sophisticated since passage of the ICRA.").

40. *See id.* at 263 ("Indirectly, a great effect—NAICJA [Native American Indian Court Judges Association] training in response to passage of the ICRA has changed judges' techniques; prosecutor to be hired will be a result of ICRA."); *id.* ("Judges feel the ICRA is a good thing, as it gives them a guideline for defining individual rights."); *id.* ("New code, currently being done, includes ICRA protections in law and procedure for the first time."). *But see id.* at 264 ("[C]ourt procedures are inadequate and need to be updated."); *id.* ("Superintendent of the agency BIA ignores the ICRA. He rejects any of the protections and concepts underlying the act."); *id.* ("The court does not follow ICRA procedures, and there are repeated violations. The steps are finally being taken to remedy some of this, but the BIA is still afraid of any challenge being mounted to the court's procedures. The judge either doesn't understand the ICRA, or he takes it too casually."). An additional positive development arising out of the enactment of ICRA was increased availability of training. *See id.* at 263; *cf.* Letter from Ralph W. Johnson to David H. Getches (June 10, 1977), *reprinted in* APPENDIX 2, *supra*

As a general matter, it appears the tribal courts welcomed ICRA, especially when it came to procedural improvements. However, one court—according to the consultants—failed to comply with ICRA, saying that "[t]he tribe would lose at any time if someone challenged the tribal court on their ICRA procedures."[41]

It appears that the twenty-three tribal courts surveyed took ICRA more seriously as a procedural guide to provide fundamental fairness to litigants, rather than as an invitation to adopt federal civil rights protections wholeheartedly.[42] The relative willingness of tribal courts to comply with ICRA was tempered by some courts' view that ICRA had been imposed on tribes.[43]

Dean Getches highlighted the similarities between rural justice systems and tribal justice systems, noting several common factors such as "close acquaintance between the judge and parties," lower caseload, and limited resources.[44] Because judges often know the parties, the tribal courts surveyed in the study reported that "[p]ersonalized attention to the needs of defendants was . . . common . . . ."[45] That attention resulted in more guilty pleas.[46] However, the increase in guilty pleas did not necessarily lead to more jail time; in fact, jail sentences were rare.[47]

It appears that ICRA had relatively little impact on reservation justice. Dean Getches reported that "[t]he major change in some courts is that proceedings have become more formal and sophisticated or, in the words of some respondents, Anglicized."[48] A corollary to this conclusion is that "tradition has played a smaller role in court proceedings since the Act."[49] Dean Getches did not offer a working definition of what

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note 17, at 127–35 (recommending greater availability of tribal law-specific training for tribal judges and court staff).

41. APPENDIX 2, *supra* note 17, at 267 (court number 17).

42. *See* APPENDIX 1, *supra* note 16, at 263.

43. *E.g.*, *id.* at 267 (noting response to question about general concerns about ICRA: "The fact that they have to apply the ICRA at all."); *see also* Kirke Kickingbird, *"In Our Image..., After Our Likeness:" The Drive for the Assimilation of Indian Court Systems*, 13 AM. CRIM. L. REV. 675, 694–95 (1976) (expressing concern about ICRA's imposition of non-Indian values on tribal justice systems).

44. REPORT, *supra* note 5, at 61.

45. *Id.*

46. *See id.*

47. *See id.*

48. *Id.* at 79.

49. *Id.* at 42–43, 74, 79 (discussing how tradition has been shunted aside and how traditional punishments are rare).

"tradition" or "traditional" meant at the time of the survey. However, it is likely that for most reservations surveyed at this time, a "traditional" criminal prosecution involved semiformal court proceedings without a written record, lawyer participation, or a jury.[50] In addition, most tribal judges believed their courts already complied with the federal requirements in ICRA before its passage.[51] Finally, none of the twenty-three tribes surveyed had waived immunity from suit in tribal court to effectuate ICRA.[52] Of course, these results pre-dated *Martinez*,[53] which held that federal courts have no jurisdiction to entertain civil rights claims against tribes.[54] It therefore makes sense that the tribes would have no pressing reason to consider a waiver.

Dean Getches's framing of the report contrasted with most observers' views of tribal justice systems in one important way—the report was an inside-out view of tribal justice systems rather than an outside-in view.[55] Typically, commentators assume that a federal solution, perhaps an act of Congress, is necessary to reform tribal justice systems.[56] While Dean Getches recommended that Congress provide much (if not all) of the funding to improve tribal justice systems, he also proposed tribal legislation to develop the necessary

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50. *See* JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 132–33 (1994); *Rights of Members of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 90th Cong. 127 (1968) (statement of John S. Boyden, general counsel, Hopi Indian Tribe) (describing objections to American criminal procedure practice from New Mexico Pueblo communities). These kinds of proceedings were even less "traditional" than tribal justice systems in centuries past. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 112–13 (1983).

51. REPORT, *supra* note 5, at 79 ("Some tribal codes and rules of court procedure have been modified to reflect the requirements of the Act, but most judges said they were already complying when it was passed.").

52. *See id.* at 44.

53. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

54. *See* Lawrence R. Baca, *Reflections on the Role of the United States Department of Justice in Enforcing the Indian Civil Rights Act*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 1, 5.

55. By "outside-in," I mean a study of tribal courts by outsiders usually (if not exclusively) judging tribal justice systems by resort to nontribal factors, such as American constitutional law. An example of an "outside-in" study is the American Bar Foundation study by Brakel referenced in note 21. The 1991 United States Commission on Civil Rights report, THE INDIAN CIVIL RIGHTS ACT, is another.

56. *See* Robert L. Bennett, *The Tribal Judiciary*, *in* APPENDIX 2, *supra* note 17, at 13, 25–26 (reporting recommendations by others that Congress should develop a national tribal appellate court and enact tribal laws governing descent and distribution of estates).

infrastructure in Indian country in order to make tribal justice systems viable. Specifically, Dean Getches recommended that tribal legislatures develop their code structures to include the ordinances necessary to govern and to codify a process to apply tribal customary law as a means of preserving the "Indianness" of tribal justice systems.[57] Dean Getches also offered suggestions on how to separate governmental powers in order to prevent abuses, by and against tribal courts, by adopting necessary tribal statutes to ensure proper separation of powers.[58] Importantly, Dean Getches argued that weak tribal judiciaries would inadvertently open the door to state and federal interference with internal tribal affairs.[59]

Dean Getches's recommendations on tribal judicial compliance with ICRA were limited to procedural protections.[60] Like the Supreme Court implied in *Martinez*,[61] Dean Getches argued that the meaning of "due process" and "equal protection" should be left to tribal courts to interpret: "[t]he goal of protection of individual rights in the court should be achieved by maintaining unique Indian traditions and heritage in harmony with the establishment of such individual rights."[62] While American courts recognize claims based on the phrases "due process" and "equal protection," Dean Getches implicitly acknowledged that tribal courts should be free to diverge from American law in order to preserve the "Indianness" of tribal justice systems and tribal law. Of course, there was no way for anyone at the time to predict how that would come about or whether it would happen.

C. The State of Indian Courts Circa 2012

Each year, tribal justice systems grow in numbers, quality,

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57. *See* REPORT, *supra* note 5, at 110–13.

58. *See id.* at 113–15, 124–32 (recommending changes to tribal judicial selection, tenure, and removal rules, and proposing direct separation of the powers statutes).

59. *See id.* at 2.

60. *See id.* at 116–17.

61. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978) ("By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.").

62. REPORT, *supra* note 5, at 117.

and sophistication,[63] and they grow in a manner many would never have contemplated or expected in 1978. While no one knows with certainty how many tribal courts there are in the United States, my estimate places that number at approximately three hundred.[64] Despite having their civil and criminal jurisdiction over nonmembers handcuffed by United States Supreme Court decisions before most even began accepting cases,[65] tribal courts have developed in some of the most creative and progressive ways. Examples include developing cooperative arrangements with state courts,[66] civil remedies against non-Indian criminal offenders,[67] peacemakers courts (traditional dispute resolution practices),[68] and drug courts.[69]

But, just as in 1978, many tribal courts remain undeveloped and often inefficient because of a lack of resources

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63. *See generally* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2011) (surveying tribal court opinions); DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 73–78 (3d ed. 2011) (describing the development of tribal justice systems); HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 44–50 (2008) [hereinafter HARVARD PROJECT] (same).

64. A 2005 report on Indian courts noted that the Bureau of Justice Assistance had awarded grants to 294 Indian tribes for planning and enhancing their court systems. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, PATHWAYS TO JUSTICE: BUILDING AND SUSTAINING TRIBAL JUSTICE SYSTEMS IN CONTEMPORARY AMERICA 6 (2005) [hereinafter PATHWAYS TO JUSTICE], *available at* http://law.und.edu/_files/docs/tji/docs/pathways-report.pdf.

65. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981) (limiting tribal civil jurisdiction over nonmembers); Oliphant v. Suquamish Indian Tribes, 435 U.S. 191, 211 (1978) (eliminating tribal criminal jurisdiction over non-Indians); *see also* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 815–30 (2006) (describing how Congress undermined tribal criminal jurisdiction in 1885 by enacting the Major Crimes Act, now codified at 18 U.S.C. § 1153).

66. *See* Korey Wahwassuck, John P. Smith, & John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, 36 WM. MITCHELL L. REV. 859, 861–67 (2010).

67. *See* Hallie Bongar White, Kelly Gaines Stoner, & James G. White, *Creative Civil Remedies against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427 (2008).

68. Raymond D. Austin, *Freedom, Responsibility, & Duty: ADR and the Navajo Peacemaker Court*, 32 JUDGES' J. 8 (1993) (describing the development of Navajo peacemaker courts); Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875 (1999) (profiling Grand Traverse Band peacemaker court).

69. *See* Ronald Eagleye Johnny, *The Duckwater Shoshone Drug Court, 1997–2000: Melding Traditional Dispute Resolution with Due Process*, 26 AM. INDIAN L. REV. 261 (2001–2002) (describing the Duckwater Shoshone drug court).

and a lack of functional judicial independence.[70] Concerning resources, tribal judges face the reality of limited governmental social services for families and children in need[71] and limited tribal court operations resources.[72] Furthermore, many tribal judges and their staff members have little or no access to electronic legal research and law clerks,[73] although some law schools with Indian law programs are now serving as sources for tribal courts seeking low-cost court clerks.[74] On the structural side, many tribal judges face overt and covert attacks on their independence (although the extent of interference with the judicial function by tribal policymakers is debated).[75] For example, many tribal constitutions provide express or implied tribal council control over appointments and retention of tribal judges.[76] Additionally, some tribal judges

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70. *See* Joseph Thomas Flies-Away, Carrie Garrow, & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Building*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 115, 123 (Miriam Jorgensen, ed. 2007).

71. *E.g.*, Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247, 260 (2007) ("For generations, however, tribes have not been able to meet the most basic needs of their tribal families, and Indian people continue to suffer serious consequences of such persistent privation.").

72. For example, currently, tribal courts cannot implement the Tribal Law and Order Act's public defender requirements due to lack of funding. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-658R, TRIBAL LAW AND ORDER ACT: NONE OF THE SURVEYED TRIBES REPORTED EXERCISING THE NEW SENTENCING AUTHORITY, AND THE DEPARTMENT OF JUSTICE COULD CLARIFY TRIBAL ELIGIBILITY FOR CERTAIN GRANT FUNDS (2012), *available at* http://www.gao.gov/products/GAO-12-658R.

73. *See* Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 455–56 (1999).

74. *See* MASSEY MAYO CASE & JILL E. TOMPKINS, U. OF COLO. L. SCH., A GUIDE FOR TRIBAL COURT LAW CLERKS AND JUDGES (2007), http://www.colorado.edu/iece/docs/Thompson/Final_version_Guide.pdf.

75. *Compare* AM. INDIAN L. CENTER, SURVEY OF TRIBAL JUSTICE SYSTEMS AND COURTS OF INDIAN OFFENSES (2000) (*cited in* Benjamin J. Cordiano, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades after* Duro v. Reina, 41 CONN. L. REV. 265, 283–295 (2008)) (finding little interference), *and* B.J. JONES, THE INDEPENDENCE OF TRIBAL JUSTICE SYSTEMS AND THE SEPARATION OF POWERS 12 (2006), *available at* http://law.und.edu/tji/_files/docs/bjones-jud-indep-memo.pdf (examining the tribal court case law and finding a trend toward increased judicial independence), *with* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 180 n.226 (2004) (questioning the validity of the American Indian Law Center survey).

76. *E.g.*, COLORADO RIVER INDIAN TRIBES CONST. AND BY-LAWS art. VI, § 1(k), *available at* http://www.crit-nsn.gov/crit_contents/ordinances/constitution.pdf (empowering tribal council to establish tribal court).

face threats from tribal legislatures on budgets.[77] Many tribal courts have virtually no authority to review tribal government actions—even where tribal independence is assured by constitution or statute—because of tribal sovereign immunity.[78]

Despite these concerns and limitations on tribal judicial growth, improvements remain notable. The number of tribal courts has doubled since 1978.[79] Many tribal courts do enjoy significant independence and adequate budgetary and governmental support resources. More Indian tribes have the resources to offer adequate social services and to develop alternatives to adversarial proceedings, such as Peacemaker courts or circle sentencing.[80] The respect for tribal courts by tribal governments, tribal members, nonmembers, and foreign governments, while difficult to quantify, improves every year.[81] An increasing number of state courts have adopted rules codifying some form of comity, often reciprocated by tribal courts, in regards to tribal court judgments and orders.[82]

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77. *Cf., e.g.*, Grand Traverse Band of Ottawa & Chippewa Indians v. Grand Traverse Band of Ottawa & Chippewa Indians Tribal Ct Adm'r, Stipulation of Dismissal, No. 02-04-967-CV (Grand Traverse Band Tribal Ct., May 22, 2003) (citing 3 Grand Traverse Band Code § 201, the budgetary process for the tribal court).

78. *Cf.* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 73 (1995) (noting that tribal leaders must balance respect for individual rights with the possibility of civil rights suits "grind[ing] tribal activity to a halt").

79. The Bureau of Indian Affairs counted 134 tribal courts in 1977. *See* REPORT, *supra* note 5, at 148 n.5. No one knows exactly how many tribal courts are in operation now, but my guess is between 250 and 300, based on the Bureau of Justice Assistance report. *See* PATHWAYS TO JUSTICE, *supra* note 64, at 6 (noting 294 tribes had requested federal assistance to develop or enhance tribal justice systems by 2005); *see also* Maylinn Smith, *Tribal Courts: Making the Unfamiliar Familiar*, MINORITY TRIAL LAW., Spring 2008, at 2, *available at* http://www.jrsla.org/pdfs/publications/2008_spring_minoritytrial.pdf (suggesting there are 275 tribal courts).

80. *See generally* Flies-Away, Garrow & Jorgensen, *supra* note 70, at 123–26 (surveying tribal restorative and reparative justice systems, such as Peacemaker courts and circle sentencing); Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517, 521–38 (2007).

81. *Cf.* HARVARD PROJECT, *supra* note 63, at 122–23 (discussing institutional requirements needed to improve respect for tribal justice systems).

82. *E.g.*, MICH. CT. RULE 2.615 (reciprocal comity rule on tribal court judgments); *cf.* Craig Smith, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, 98 CALIF. L. REV. 1393, 1395 (2010) (arguing that the United States Constitution's Full Faith and Credit Clause and Congressional enactments implementing the Clause mandate that state courts give full faith and credit to tribal court judgments); Stacy L. Leeds,

Slowly, state courts began recognizing routine tribal court judgments and orders as a matter of state common law.[83] Tribal court cooperation with local probation offices, social workers and child protection units, and law enforcement have, in some cases, paved the way for improved tribal-state relations and multitudes of intergovernmental agreements.[84] In recent years, more and more tribal courts have made their codes, ordinances, and court rules—as well as written opinions—available online.[85] Joining the hard-copy *Indian Law Reporter*, which publishes selected tribal court opinions, are Westlaw, Lexis, and Versus Law.[86] With tribes making their constitutions and statutes available online and elsewhere, tribal law has never been easier to find.

Meanwhile, tribal courts are developing their own common law. The Navajo Nation's judiciary is the clear leader in this regard.[87] Other tribal courts have done the same, with mixed results, as we will see in the next section. However, many tribal courts, following the lead of the tribal legislatures, still resort to the borrowing of state and federal law in deciding substantive matters of law.[88]

The next section further develops the sketch of modern tribal courts by providing a small survey of some tribal court opinions that address the question of providing fundamental fairness to litigants in the context of ICRA and tribal

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Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective, 76 N.D. L. Rev. 311, 346–60 (2000) (empirical study of tribal judges' experience with state court recognition of their judgments).

83. *E.g.*, John v. Baker, 982 P.2d 738, 761–64 (Alaska 1999) (recognizing tribal court judgment as a matter of comity); Fredericks v. Eide-Kirshmann Ford, Mercury, Lincoln, Inc., 462 N.W.2d 164, 167–71 (N.D. 1990) (recognizing tribal court judgment as a matter of comity); Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 612 N.W.2d 709, 718–19 (Wis. 2000) (recognizing principles of comity to require state and tribal courts to allocate jurisdiction amongst themselves).

84. *E.g.*, Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529 (2012) (describing Michigan's experience in developing cooperation between tribal and state agencies in the context of Indian child welfare).

85. *See generally David Selden*, *Basic Indian Law Research Tips: Tribal Law* (Jan. 2012), *available at* http://narf.org/nill/resources/tribal_law_research_ article.pdf.

86. *See id.*

87. *See generally* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW 39 (2009) (study of Navajo common law and jurisprudence).

88. *See* Hon. Steven Aycock, *Thoughts on Creating a Truly Tribal Jurisprudence* (2006), *excerpted in* FLETCHER, AMERICAN INDIAN TRIBAL LAW, *supra* note 63, at 117–18.

customary and traditional law.

II. FUNDAMENTAL FAIRNESS AND INDIAN COURTS

What guarantees fundamental fairness in Indian courts? Is it ICRA? Is it unwritten tribal customary and traditional law? Is it tribal statutory and constitutional protections? For each tribe, the answer may be different. As we saw in the last section, Dean Getches focused the discussion about these questions by placing the onus on tribal justice systems and away from how state or federal courts and legislatures could guarantee fairness in Indian country. Rather than recommending another federal solution, Dean Getches, on behalf of the National American Indian Court Judges Association, recommended positive tribal law, a return to tribal traditions, and guarantees of procedural due process. In other words, Dean Getches argued that eventually tribal jurisprudence on due process and equal protection should not be based on American jurisprudence but instead on tribal law.

And yet, tribal judges and litigants rely almost exclusively on American jurisprudence concerning due process and equal protection as introduced into tribal law by ICRA.[89] In our 2008 study of tribal court decisions applying ICRA to civil rights claims, we found that ninety-five percent of tribal courts applied American law.

Of the 120 cases involving an ICRA issue, tribal court judges cited federal and state case law as persuasive (and often controlling law) in 114 cases (95 percent). And, of the six cases in which the tribal court explicitly refused to apply federal or state case law, either the parties included tribal members in a domestic dispute or the tribal court held that its interpretations of the substantive provisions of ICRA were stronger or more protective of individual rights than would otherwise be available in analogous federal or state cases.[90]

Of course, the selection of these cases likely dictated the

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89. *See generally* MATTHEW L.M. FLETCHER, TRIBAL COURTS, THE INDIAN CIVIL RIGHTS ACT, AND CUSTOMARY LAW: PRELIMINARY DATA (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103474; *see also* Catharine A. MacKinnon, Martinez *Revisited*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 27, 31 ("[T]ribal courts are dispensing justice on sex equality in a very similar way to the US federal courts, with all its disappointing and unnecessary limitations.").

90. *See* FLETCHER, TRIBAL COURTS, THE INDIAN CIVIL RIGHTS ACT, AND CUSTOMARY LAW: PRELIMINARY DATA, *supra* note 89, at 6.

result in that every case involved an allegation relating to, or reasoning based upon, application of ICRA.

In my view, and this is terribly preliminary, tribal courts will soon rely less on ICRA and the related American jurisprudence on due process and equal protection and more on their own customs and traditions for insight.[91] American law was (and still is) a necessary crutch to establishing a tribal common law that effectively guarantees fundamental fairness to litigants in Indian courts as tribes continue to reestablish and adapt their customs and traditions to meet modern needs. Tribal courts have long recognized a need for a legal foundation that would help them guarantee fundamental fairness for all litigants, and American law, as imposed by Congress in ICRA, provides that foundation. Tribal justice systems can proceed in a manner that builds upon that foundation, as many have.[92] Or tribal courts can dispense with ICRA and federal and state law altogether and choose to rely exclusively on their own common law. As Vine Deloria and Clifford Lytle once wrote, "The greatest challenge faced by the modern tribal court system is in harmonizing of past Indian customs and traditions with the dictates of contemporary jurisprudence."[93]

The subsections that follow provide examples of: (1) tribal courts that have embraced American law in order to provide the necessary foundation required to guarantee fundamental fairness; (2) tribal courts that are relying less on American law and, occasionally, rejecting American law altogether; and (3) the potential pitfalls of moving away from American law.

A. *American Law as a Crutch*

Since the Supreme Court's decision in *Martinez*,[94] tribal

91. Modern scholarship on tribal custom is rapidly developing, and so tribal courts will be able to draw upon that scholarship. *E.g.*, AUSTIN, *supra* note 87 (survey of Navajo common law); Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL'Y 761 (1999–2000) (study of Hopi common law); s*ee generally* Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2007–2008) (study of tribal common law generally).

92. *See, e.g.*, Mark D. Rosen, *Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 275 (surveying tribal courts' application of largely federal and state law to ICRA claims); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1997–1998) (same).

93. *See* DELORIA & LYTLE, *supra* note 50, at 120.

94. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

courts applied American law, as in ICRA, to guarantee due process and equal protection. As Dean Getches noted in 1978, tribal law was generally unavailable to judges, litigants, and the public,[95] all but forcing tribal judges and litigants to argue American law. What is more interesting, as this subsection shows, is that many tribal courts seemed to apply American law, mostly federal law, as precedential law, rather than as persuasive law. Regardless, in possibly hundreds of cases, tribal courts announced, often as a matter of first impression, the tribal interpretation of "due process" by reference to American cases. Here are but a few examples.

Each of the following excerpts involves a question of fundamental fairness, such as a right to notice and a hearing (*Turtle Mountain* and *St. Regis Mohawk*), or property rights (*Puyallup* and *Chitimacha*) that relies on American constitutional law for formulation and legal support. These statements of hornbook American law appear in many tribal court opinions and look no different than the statements one would see in state and federal court opinions.

Please note that I have disregarded the convention of writing that discourages the use of block quotes in favor of quoting extensively from several tribal court opinions. As a reader, you may be tempted to simply skip the block quotes. Please do not. I am trying to preserve the authorial style and the context of the discussions in these opinions.

1. Turtle Mountain Band of Chippewa Indians Court of Appeals:

> A fundamental requirement of [d]ue process is that the parties be given adequate or reasonable notice. "An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . . The notice must be of such nature as reasonably to convey the required information . . . ." Reasonable notice must be given at each new step in the proceedings.[96]

95. *See* REPORT, *supra* note 5, at 37–39 (noting the borrowing of state and federal law).

96. Monette v. Schlenvogt, et al., No. TMAC 04-2021, 2005.NATM.0000003, ¶ 25 (Turtle Mtn. Tribal Ct. App., Mar. 31, 2005) (VersusLaw) (citing Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 314 (1952)).

2. Puyallup Tribal Court:

> The United States Constitution states in pertinent part that no person shall be deprived of property without due process of law. U.S. Constitution, Fifth Amendment. Similarly, the Indian Civil Rights Act prohibits an Indian Tribe exercising powers of self-government from depriving any person of property without due process of law . . . . The essence of due process requires notice and an opportunity to be heard . . . . The notice should be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . ."[97]

3. St. Regis Mohawk Tribal Court:

> The Indian Civil Rights Act safeguards those rights restated in entirety in the Constitution of the Saint Regis Mohawk Tribe. Under the Indian Civil Rights Act tribes are prohibited from depriving persons of rights without due process. While Federal, state, and tribal law is not binding authority upon the Saint Regis Mohawk Tribal Court such can act as persuasive authority. The fundamental requirements of due process is the "opportunity to be heard" . . . . The hearing must be at a "meaningful time and in a meaningful manner" . . . . Due process also requires notice, the right to be heard in a full and fair hearing, to call witnesses and to be heard before an impartial decision maker. The Constitution of the Saint Regis Mohawk Tribe safeguards the same rights as those stated in the Indian Civil Rights Act, that is the political, social, and civil rights of duly enrolled members of the Tribe.[98]

4. Chitimacha Indian Tribal Court of Appeals:

> While the Fifth Amendment due process clause does not apply so as to limit the power of tribal self-government, we

97. Delgado v. Puyallup Tribal Council, No. 95-3604, 1996.NAPU.0000007, ¶¶ 48–50 (Puyallup Tribal Ct. April 3, 1996) (VersusLaw) (citing Mullane, 399 U.S. at 314–315).

98. *In re* Constitutional Question re: Voting, 1998.NASR.0000001, ¶ 40 (St. Regis Mohawk Tribal Ct. Sept. 10, 1998) (VersusLaw) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914); Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

> believe that the due process analysis developed over the years in federal jurisprudence is instructive and a logical place to begin an analysis of the due process protections found in the Indian Civil Rights Act.
>
> The procedural due process provision of the Fifth Amendment to the United States Constitution that is made applicable to the States through the 14th Amendment can be traced back to ideas that first originated in the Magna Charta of England. The Fifth Amendment to the Constitution of the United States states that no person shall "be deprived of life, liberty or property, without due process of law. . . ." In applying this simple language to real life situations the United States Supreme Court has cautioned against the setting out specific rules [sic] which apply in each and every situation. In case after case the United States Supreme Court has adapted the general concept of procedural due process to deal with the competing interests presented by the case at hand. The Court has specifically held: . . . the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.
>
> Moreover, courts have held that procedural due process is . . . "flexible and calls for such procedural protections as the particular situation demands." Simply put: What is procedural due process under the Fifth Amendment in one case is not in another. Each case is different.
>
> In the recent case of [*Mathews v. Eldridge*], the Court set out a "balancing of interests" test to determine the . . . "specific dictates of due process . . ." which included the following three factors: (1) The private interests at stake; (2) The government's interests involved; and (3) The risk that the procedure will result in error.[99]

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99. Chitimacha Housing Authority v. Martin, No. 93-0006, 1994.NACH.0000002, ¶¶ 108–111 (Chitimacha Indian Tribal Ct. App. Sept. 1, 1994) (VersusLaw) (citing and quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Little v. Streate, 452 U.S. 1, 5–6 (1981); Wolf v. McDonnell, 418 U.S. 539, 560 (1974); Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)) (other footnotes omitted).

Discussing these tribal courts here is not intended as criticism of these courts. In each of these cases, it is clear that the tribal judiciary is attempting to apply a law that is fair and reasonable to the litigants and in accordance with ICRA. These cases exemplify a rational response to the need to find and apply law that meets the courts' requirement to guarantee fundamental fairness to litigants.

A second category of tribal courts are more hesitant to adopt and apply American law but have little choice given the dearth of available tribal customary law. Consider this statement from the Mashantucket Pequot Tribal Court, which chose to presumptively apply American precedents in the absence of customary law that would trump the American precedents:

> "The due process clause of the ICRA applies to all tribal proceedings: criminal, civil and administrative" . . . . The ICRA is to be interpreted in a manner "consistent with Tribal practice or custom" . . . . Here, there is no distinctively Mashantucket Pequot tribal custom or tradition or cultural norm which is offered in support of the amendment to the Board of Review policy. In the absence of a clearly demonstrated tribal custom or tradition, and because many provisions of the ICRA, including the due process clause, are in language nearly identical to the Bill of Rights and state and federal constitutions, the court will apply general federal and state principles of due process . . . .[100]

Likely, there simply is no relevant Pequot tribal customary law to apply to civil rights claims. Moreover, it is unlikely that the litigants would be able to research, adapt, and apply tribal customary law in the briefing or during oral argument. These cases demonstrate the standard practice of tribal courts in applying and interpreting ICRA, which is the borrowing of American law as a gap-filler, or crutch. In the last decade or more, several tribal courts are moving away from applying American law and making an effort to adapt and adopt tribal

100. Miller v. Mashantucket Pequot Gaming Enter., 2 Mash. Rep. 418, 421 (1998) (quoting Johnson v. Mashantucket Pequot Gaming Enter., 2 Mash. Rep. 249, 255 (1998); Dugan v. Mashantucket Pequot Gaming Enter, 1 Mash. Rep. 142, 145 (1995)) (other citations omitted).

customs and traditions.[101] This is an important development that Dean Getches both presaged and recommended in the report.[102]

B. The Rise of American Indian Tribal Law

ICRA, along with the accompanying American law that tribal courts so often used to interpret and apply it, is slowly falling by the wayside as tribal courts, litigants, and tribal legislatures rediscover, adapt, and apply tribal customary and traditional law in tribal court cases.[103] It is a very slow process and, frankly, should not be done without careful consideration and understanding of a tribe's customs and traditions. As addressed below, several tribal courts are moving in this direction, often without even expressing it. Tribal courts that are moving away from applying ICRA can be grouped into three categories. First, there are courts that apply ICRA's provisions (such as "due process") but partially reject American jurisprudence in favor of tribal custom and tradition unless a gap exists. A second group applied ICRA but eventually rejected it and now relies exclusively on tribal customary and traditional law. A final group (which is largely hypothetical at this time) rejects ICRA altogether, finding the basis for fundamental fairness guarantees exclusively in tribal law (either custom or statute).

One might ask why it is important that Indian courts begin to develop their own jurisprudence and discard American law where possible. American constitutional law derives from a text to which Indian tribes are not, and cannot, be a party.[104] Moreover, tribal constitutions are not copies of the federal or state constitutions, and some tribes have no written constitution.[105] Those are merely structural differences. There

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101. *See generally* FLETCHER, TRIBAL COURTS, THE INDIAN CIVIL RIGHTS ACT, AND CUSTOMARY LAW: PRELIMINARY DATA, *supra* note 89.

102. *See* REPORT, *supra* note 5, at 86 (reporting that tribal judges hoped for the development of an "Indian common law"); *see also id.* at 110–12 (recommending development of tribal law).

103. *E.g.*, Sekaquaptewa, *Evolving the Hopi Common Law*, *supra* note 91 (reviewing the development of Hopi common law).

104. *See* Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998) (Indian tribes were "not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'") (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991)).

105. *See* Robert J. Miller, Tribal Constitutions and Native Sovereignty 14 (April 4, 2011) (unpublished manuscript), (available at http://ssrn.com/

are cultural differences, too. Even where tribes have incorporated the phrase "due process" into their organic text, the meaning of due process is dependent on the culture of governance in that tribal community.[106] "Equal protection" may mean more (or, unfortunately, less) civil rights protections for women, people with disabilities, and GLBT persons, than under federal or state constitutional law.[107] Finally, differences of scale matter. The United States Constitution governs more than three hundred million people, and state constitutions govern any number from hundreds of thousands to dozens of millions. Most tribal constitutions, and their accompanying governments, govern far fewer people.

1. Partial Rejection of American Jurisprudence in Applying ICRA

More and more, tribal courts are beginning to move away from reliance upon American law as the primary source for interpreting the provisions of ICRA, including due process and equal protection. It is natural to borrow federal and state case law as a gap-filler in interpreting these legal doctrines, especially where the corpus of tribal common law is sparse. However, these tribal courts are aware of the limitations and side effects of American law in tribal justice systems and apply the law sparingly.

a. Cheyenne River Sioux Tribal Court of Appeals

Consider the Cheyenne River Sioux Tribal Court of Appeals. In *High Elk v. Veit*,[108] the court explained how Lakota notions of due process interacted with ICRA in a case involving a garnishment order. The tribal court opinion draws immediately from the due process requirements of ICRA but quickly moves toward discussion of tribal precedents. The tribal judges were wise to resist blind reliance upon state and federal cases involving garnishments. Those cases take into

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abstract=1802890).

106. *See* Newton, *supra* note 92, at 344 n.238 (noting that tribal courts "need not follow the U.S. Supreme Court precedents 'jot-for-jot'").

107. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 432–40 (6th ed. 2011).

108. 6 Am. Tribal Law 73 (Cheyenne River Sioux Tribal Ct. App. 2006).

consideration that trial courts and their administrators deal with hundreds of thousands of garnishment orders a year and that the practical considerations of that administration affect the due process rights of garnishees in a manner that may or may not be similar in tribal court:

> Appellants raise a series of objections to the attachment/garnishment order [under] the federal Indian Civil Rights Act of 1968, 25 U.S.C § 1302(8). While some are phrased as procedural irregularities, most of these . . . implicate the due process requirements of notice and hearing. In *Cheyenne River Sioux Tribe Housing Authority v. Howard*, No. 04-008A (Ch. Riv. Sioux Ct. App., Sept. 23, 2005) this Court recently reaffirmed the traditional Lakota values embodied in the term due process of law. Just as Lakota tradition requires the respectful listening to the position of all interested persons on any important issue, the legal requirement of due process of law requires that all persons interested in a matter receive adequate written notice of any proceeding that would implicate their personal interests, including their property or, as here, rent payments contractually owed to them, that they be made parties to any case or judgment that would affect those interests, and that they have a full and fair opportunity to participate as a party in any hearing on such issues. In the *Howard* case, this Court recently summarized the requirements of due process in a civil context as follows:
>
>> This Court has long recognized that basic Lakota concepts of fairness and respect as well as the federal Indian Civil Rights Act, 25 U.S.C § 1302(8), clearly guarantee all parties who appear before the courts of the Cheyenne River Sioux Tribe due process of law . . . . Basic to any concept of due process of law in a civil proceeding, such as this eviction case, is receipt of timely notice and the opportunity to be heard and present evidence at a hearing in support of one's case . . . . The basic requirements of notice and hearing, which lie at the core of civil due process of law, do not constitute mere formal requirements or hoops that must be surmounted before judgment. Rather, due process involves functional procedural prerequisites designed to assure that every party has a *realistic*

> opportunity to be heard in any case affecting their legal rights. Here, Mr. Howard was fighting to remain in the only home he lawfully occupied, a precious and important right, indeed, particularly for a person in Mr. Howard's fragile medical condition, even if he did own the home in question.

> Every court of the Cheyenne River Sioux Tribe is bound both by customary Lakota concepts of respect and by the requirements of due process of law protected by the federal Indian Civil Rights Act, 25 U.S.C. § 1302(8), to assure that the parties before them are all afforded due process of law.[109]

Here, Lakota traditions do not necessarily supplant ICRA. Instead, they serve as the replacement for what other tribal courts might have used to define and interpret "due process," that is, American law.

The next logical step, although the court and the attorneys practicing before the court may not realize or even desire it, is for tribal courts to recognize that ICRA is unnecessary altogether and that Lakota law should stand alone to protect fundamental fairness.

b. Colville Confederated Tribes Court of Appeals

Similarly, the Colville Confederated Tribes judiciary has recognized the importance of ICRA while limiting its application by taking care to protect and preserve tribal customs and traditions. Colville will not apply American law in interpreting ICRA unless the American precedents are consistent with tribal custom and tradition:

> To place ICRA in perspective for this analysis, we note that the Act was enacted to provide those appearing before tribal courts with certain protections from the Bill of Rights while fostering tribal self-government, and not to impose the full Bill of Rights on tribes. Therefore, when applying common law principles based upon the Bill of Rights to civil rights issues arising from ICRA and tribal law, we do so with

109. *Id.* at 77–80 (citing Dupree v. Cheyenne River Housing Auth., 16 Indian L. Rep. 6106 (Cheyenne River Sioux Ct. App. 1988) and Mullane v. Central Hanover Bank, 339 U.S. 306 (1950)) (other citations omitted).

> considerable care. Federal common law doctrine which interprets duties and protections flowing from the United States Constitution and the Bill of Rights did not include in its development, and is not rooted in tribal law, custom and tradition. Therefore, we will examine how the federal courts have handled similar constitutionally-based issues, but because the origins of tribal law differ, any parallels between federal common law and tribal law must be drawn with caution. Accordingly, we will narrowly adopt such common law interpretations when we are fully satisfied they are consistent with tribal law.[110]

This matter involved tribal criminal sentencing, an area of law uniquely tied to the legal and political culture of the polity. Tribal custom and tradition would seem to be of paramount importance in such cases. Conversely, reliance upon American law would be particularly suspect.

2. Developing Rejection of ICRA

The Navajo Nation and the Hopi Tribe are two tribes that appear to have adopted and applied ICRA for many years, only to later affirmatively reject most aspects of the Act in its common law tradition. Both Navajo and Hopi have a long tradition of developing a tribal common law independent of much reliance upon American law, especially ICRA.[111] Both of these courts have applied ICRA and occasionally borrowed American precedents in applying ICRA but have lately moved onto an exclusively tribal common law. Navajo's tribal common law is older[112] and, thus, will be discussed first.

a. Navajo Nation Supreme Court

The Navajo Nation Judiciary has already successfully

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110. Sam v. Colville Confederated Tribes, No. 93-15379, 1994.NACC.0000002, at ¶¶ 24–25 (Colville Confederated Tribes Ct. App. 1994) (VersusLaw).

111. *See generally* AUSTIN, *supra* note 87 (study of Navajo common law and jurisprudence); Sekaquaptewa, *Evolving the Hopi Common Law*, *supra* note 91 (study of Hopi common law and jurisprudence).

112. *See* Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969–1992*, 18 AM. INDIAN L. REV. 379, 381–87 (1993); *see also* JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 39–41 (2008) (noting that the Hopi tribal court ordinance dates to 1972).

adopted and applied tribal customary and traditional law in a large and growing body of tribal common law.[113] The Judiciary separated the rights provided by ICRA from tribal rights at an early stage in modern American tribal court jurisprudence.[114] In a recent opinion, the Navajo Nation Supreme Court identified the sources of law that it applies when reviewing civil rights cases involving tribal government action, and barely mentioned ICRA:

> The Navajo Nation, while lacking a Constitution, has written organic laws which "set the boundaries for permissible governmental action by the legislative, executive, and judicial branches of the Navajo Nation." Doctrines of checks and balances, separation of powers, accountability to the People, and service of the anti-corruption principle formed the premise for "The Title II Amendments of 1989" (Title II Amendments) enacted by Navajo Nation Council Resolution CD-68-89 on December 15, 1989, which established our three-branch government. Principles of due process, equal protection, the right to counsel in criminal cases, rights of assembly and petition, the right to bear arms, freedom of religion and other rights closely tracking the United States Bill of Rights are guaranteed by the Navajo Nation Bill of Rights (1986). Judicial fairness and independence and access to the courts are guaranteed by the Judicial Reform Act of 1985. The above laws, in addition to substantive rights found in the Navajo Treaty and broad principles of fundamental fairness in our tribal Fundamental Laws, "set the boundaries for permissible governmental action by the legislative, executive, and judicial branches of the Navajo Nation," and are collectively our "fundamental, organic laws."[115]

The Navajo legislature adopted its own Bill of Rights in 1967[116] and has developed a rich common law of its own decisions interpreting and applying tribal customary and traditional law. In many ways, ICRA is all but irrelevant. But

113. *See generally* AUSTIN, *supra* note 87 (study of Navajo common law and jurisprudence).

114. *See, e.g.*, Nez v. Bradley, 3 Navajo Rptr. 126, 129–30 (Navajo 1982).

115. EXC v. Jensen, No. SC-CV-07-10, 2010 WL 3701050, at *12 (Navajo 2010).

116. *See* Navajo Nation Code Ann. tit. 1, § 1 (2005) (citing Navajo Nation Council Res. CO-63-67, October 9, 1967); AUSTIN, *supra* note 87, at 72.

the Navajo Nation has not adopted a written constitution,[117] so ICRA remains a significant foundation of the legal guarantees of fundamental fairness to litigants, if for no other reason than to demonstrate that Navajo rights protections are more generous than those provided in ICRA.[118] Navajo jurisprudence goes beyond ICRA in providing fairness to litigants, but ICRA served as an important steppingstone in the process of developing Navajo common law necessary to guarantee fundamental fairness.[119]

b. Hopi Tribe Appellate Court

Like the Navajo judiciary, the Hopi Appellate Court struggled with how and whether to apply ICRA at all. In cases like *Harvey v. Hopi Tribe*[120] and *Maho v. Hopi Tribe*,[121] the court appears to have presumed the Act applied. The court now appears to have affirmatively rejected ICRA. In the language of *In re Batala*, the court wrote in a footnote:

> In spite of the language of the Indian Civil Rights Act, 25 U.S.C. § 1302(10), the Court said, "[w]e do not decide today, whether contempt of court is the type of criminal offense contemplated by the ICRA to afford the defendant the right to a trial by jury. However, arguments could be made that a right to a jury trial is guaranteed to defendants in criminal contempt cases." Appellant cites three cases from Hopi case law to argue why the failure of the trial court to apprise him of his right to a jury trial constituted reversible error. . . . The third case, *In the Matter of Sekayumptewa*, et al., No Appellate Number (Hopi Ct.App.1997), outlined rights guaranteed under the Indian Civil Rights Act as potentially applicable to Hopi contempt cases. These rights included the right to a jury trial, subsection 10 of the Act . . . . The court in that case did outline due process rights for

117. *See* Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 231 (1989).

118. *See* AUSTIN, *supra* note 87, at 73.

119. *See, e.g.*, Nelson v. Initiative Comm. to Reduce Navajo Nation Council, No. SC-CV-03-10, 2010 WL 4174625, at *4 (Navajo 2010) (citing Halona v. MacDonald, 1 Navajo Rptr. 189 (Navajo 1978)) ("Judicial review by tribal courts of Council resolutions is mandated by the Indian Civil Rights Act, 25 U.S.C. § 1302.").

120. 1 Am. Tribal Law 270, 272 (Hopi App. Ct. 1997).

121. 1 Am. Tribal Law 278, 280 n. 3 (Hopi App. Ct. 1997).

> defendants under the Indian Civil Rights Act, 25 U.S.C. § 1302, in contempt cases, but the Hopi Appellate Court has not bound itself to the black letter meaning of that statute. That Act is more instructive than binding for Hopi purposes and used only at the discretion of the Hopi Appellate Court. Language in *Sekayumptewa* supports this interpretation of Hopi authority, saying only that "the section of the Indian Civil Rights Act that *may* apply to contempt proceeding[s] include . . . ." Furthermore, there was no question of fact to be decided by a jury in this case even if Appellant was convicted of criminal contempt.[122]

The court added: "the Hopi Tribe is not bound by the provisions of the Indian Civil Rights Act."[123] However, the Hopi courts still treat ICRA as persuasive authority, as the same opinion notes.[124]

Again like the Navajo, the Hopi judiciary has seemingly rejected ICRA but has apparently done so in dicta. Regardless, it is my opinion that many more tribal courts will be engaging in the same kind of legal analysis about the general applicability of ICRA to tribal governments. Navajo and Hopi courts are leaders in developing tribal common law. It is natural that their experience and success in announcing tribal common law will inspire other courts to do the same. Eventually, it would not be surprising to see more tribal court opinions rejecting the authority of Congress to enact ICRA, especially considering that the Supreme Court rejected federal enforcement of the statute in *Martinez*.[125]

3. Complete Rejection of ICRA

The tribal court grouping in this section remains largely hypothetical. It remains an open question whether the Nottawseppi Huron Band of Potawatomi Indians Supreme Court and other courts will affirmatively reject ICRA, but I suspect more and more courts may address this possibility in the near future. Following the lead of tribal courts like Navajo

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122. *In re* Batala, 4 Am. Tribal Law 462, 468 n.13 (Hopi App. Ct. 2003) (citations omitted).

123. *Id.* at 468.

124. *Id.* ("As the *Sekayumptewa* opinion noted, the provisions of the Indian Civil Rights Act *may* apply to contempt cases in the Hopi Appellate Court.") (emphasis in original).

125. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

and Hopi, newly constituted tribal courts may skip ICRA altogether and find tribal sources of authority to guarantee fundamental fairness to litigants.

a. Nottawseppi Huron Band of Potawatomi Indians Supreme Court

Here, I discuss one tribal court opinion, the first appellate opinion from a new tribal court in Michigan. It never discussed ICRA as a source of relevant authority, even though (at the time) no parallel tribal rights provisions existed.[126] In this opinion, I and my two colleagues on the bench (Chief Justice John Waubunsee and Associate Justice Holly Thompson) on the Nottawseppi Huron Band of Potawatomi Indians Supreme Court adopted Anishinaabe customs and traditions as a means of forming the basis for guaranteeing fundamental fairness in reviewing government action. We began our analysis with the most basic formulation of tribal custom and tradition, what some might term natural law. Where other tribal courts might have started with ICRA or American constitutional law as the foundation of tribal law, we looked to the Anishinaabe language and the philosophy of the Anishinaabe people:

> Eva Petoskey, a member of the Grand Traverse Band of Ottawa and Chippewa Indians, and a former Vice-Chair of the Grand Traverse Band Tribal Council, recently stated:
>
> > There is a concept that expresses the egalitarian views of our culture. In our language we have a concept, *mino-bimaadziwin*, which essentially means to live a good life and to live in balance. But what you're really saying is much different, much larger than that; it's an articulation of a worldview. Simply said, if you were to be standing in your own center, then out from that, of course, are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings

126. The Nottawseppi Constitution now provides for limitations on the exercise of governmental powers. *See* NOTTAWSEPPI HURON BAND OF POTAWATOMI INDIANS CONST. art. VII (2012), *available at* http://www.nhbpi.com/pdfs/legal/NHBP_Constitution.pdf.

> within the world, other races of people, all of us here in the room. And out from that, the other living beings . . . the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the *manitous*, the various spiritual forces within the world. So when you say that, *mino-bimaadziwin*, you're saying that a person lives a life that has really dependently arisen within the web of life. If you're saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community. . . .
>
> The historical record of the Nottawaseppi Huron Band offers examples: [E]very time somebody was sick [in the 1930's], the women would all gather together and they'd send the word around and they'd go there [to the home of the ill member] and they'd clean that place out. They'd wash blankets, wash dishes, cook and just do everything. Take care of the baby and everything. . . .
>
> [*Mino-bimaadziwin*] informs individual Anishinaabe life choices, but also informs the direction of tribal governance. Fred Kelly, an Anishinaabe and member of the Onigaming First Nation in Canada, draws the connection between [*Mino-bimaadziwin*] and Anishinaabe legal principles: The four concentric circles in the sky—*Pagonekiishig*—show the four directions, the four stages of life, the four seasons, the four sacred lodges (sweat, shaking tent, roundhouse, and the Midewe'in lodge), the four sacred drums (the rattle, hand, water, and big ceremonial drum), and the four orders of Sacred Law. Indeed, the four concentric circles of stars is the origin of the sacred four in *Pimaatiziwin* that is the heart of the supreme law of the Anishinaabe. And simply put, that is the meaning of a constitution. . . .
>
> [*Mino-bimaadziwin*] is not a legal doctrine, but forms the implicit basis for much of tribal custom and tradition, and serves as a form of fundamental

> law. We are careful, however, not to equate customary and traditional law as a common law basis for the decision in all cases before this Court. We again emphasize our holding that the Constitution and tribal code offers little or no guidance on how Article IX elections should be governed, nor is there an enumerated statement of fundamental constitutional rights principles. Today, [*Mino-bimaadziwin*] guides our common law analysis of clarifying the outer boundaries of acceptable governmental conduct in administering Article IX elections.[127]

In the *Spurr* opinion, the Nottawaseppi Huron Band Supreme Court could have reached out and applied ICRA, but instead chose to recognize Anishinaabe custom as a basis for the guarantee of fundamental fairness in holding tribal elections.[128]

These cases show increasing and occasionally dramatic departures from ICRA. However, it should be remembered that in each case it appears that the tribal court sought to provide stronger guarantees of fundamental fairness under tribal law than would have been available in applying American jurisprudence in the areas of due process and equal protection.

C. Hypothetical Pitfalls of Rejecting ICRA

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127. Spurr v. Tribal Council, No. 12-005APP, at 4–6 (Nottawseppi Huron Band of Potawatomi Indians Sup. Ct. 2012) (quoting Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 39, 47–48); U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, ANTHROPOLOGICAL TECHNICAL REPORT—HURON POTAWATOMI, INC., *reprinted in* U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, PROPOSED FINDING—HURON POTAWATOMI, INC. 218, 226 (1995); Vanessa A. Watts, Towards Anishinaabe Governance and Accountability: Reawakening our Relationships and Sacred Bimaadziwin 77 (2006) (unpublished master's thesis, University of Victoria) (quoting interview by Vanessa A. Watts with Fred Kelly, member of the Onigaming First Nation (December 14, 2005)), *available at* http://dspace.library.uvic.ca:8080/ handle/1828/2222.

128. *See* Spurr, No. 12-005APP, at 7 (citing Crampton v. Election Bd., 8 Am. Tribal Law 295, 296 (Little River Band of Ottawa Indians Tribal Ct. May 8, 2009); Bailey v. Grand Traverse Band Election Bd., No. 2008-1031-CV-CV, 2008 WL 6196206, at *9, 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, Aug. 8, 2008) (en banc); Deckrow v. Little Traverse Bay Bands of Odawa Indians, No. C-006-0398, 1999 WL 35000425, at *2 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. Sept. 30, 1999)).

In the report, Dean Getches listed several ways in which federal courts are significantly deferring to tribal courts, including: requiring litigants to exhaust tribal remedies before challenging tribal jurisdiction;[129] recognizing continuing tribal court authority in Public Law 280 states;[130] enforcing off-reservation treaty regulations;[131] and enforcing laws against nonmembers after delegation from Congress.[132] Dean Getches also suggested that quick access to a fair forum was an important strength of tribal justice systems and that ICRA played an important role in guaranteeing fundamental fairness.[133]

Critics of tribal courts worry that the courts do not offer acceptable protections to litigants—especially to persons—not members of the tribe. Such criticism has sparked a mini-backlash against tribal jurisdiction in Congress.[134] Rejection of ICRA may fan the flames of those criticisms.

At least some of the justices on the United States Supreme Court in more recent years appear to share that view.[135] In 2001, Justice Souter authored an opinion deeply injurious to tribal interests in establishing regular civil jurisdiction over nonmembers. His concurrence in *Nevada v. Hicks*,[136] which quoted Getches's *Indian Courts and the Future*, raised serious concerns about fundamental fairness in tribal justice systems as they adjudicate the rights of nonmembers:

> Although some modern tribal courts "mirror American

129. *See* REPORT, *supra* note 5, at 88 (citing O'Neal v. Cheyenne River Sioux Tribe, 582 F.2d 1140 (8th Cir. 1975)). The Supreme Court later approved of the tribal court exhaustion doctrine in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).

130. *See* REPORT, *supra* note 5, at 88–89 (citing Bryan v. Itasca County, 426 U.S. 373 (1976)).

131. *See id.* at 89 (citing Settler v. Lameer, 507 F.2d 231 (9th Cir. 1975); United States v. Washington, 520 F.2d 676 (9th Cir. 1974), *cert. denied*, 419 U.S. 1032 (1974)).

132. *See* REPORT, *supra* note 5, at 89 (citing United States v. Mazurie, 419 U.S. 544 (1975)).

133. *See id.* at 89–90.

134. *See* S. REP. NO. 112-513, at 40–41, 51–55 (2012) (reporting minority views of senators arguing against expansion of tribal court jurisdiction).

135. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 115–17 (2002) (arguing that the Court sees a "democratic deficit" in tribal governance); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1221 (2010) (surveying tribal civil jurisdiction cases).

136. 533 U.S. 353 (2001).

> courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." . . . The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," NATIONAL AMERICAN INDIAN COURT JUDGES ASSN., INDIAN COURTS AND THE FUTURE 43 (1978), which would be unusually difficult for an outsider to sort out.[137]

Justice Souter's remarks generated an enormous amount of scholarly debate, almost all of it attacking a perceived bias in the Supreme Court against tribal interests or responding to Justice Souter's concerns.[138] Interestingly, and relevant to this Symposium, Dean Getches issued a powerful response to Justice Souter in the *Minnesota Law Review*, arguing that the Court was concerned with what he termed "difference"—that is, any court adopting a tradition that differed from the Anglo-American tradition was suspect—and that it was wrong to do so:

> In the tribal court jurisdiction cases, the issue was not the specific denial of any fundamental right, but a general concern with difference—the kind of difference that might be expressed with the laws of any other country or, indeed, among states which, in our federal system, may apply their own mix of laws ranging from the common law of England to unique local ordinances. In these cases, however, the Court has treated the matter as if the most powerful factors were the unfamiliarity of the tribal court to the defendant. The Court acknowledged the impact on the tribe's interests in maintaining reservation health and safety through the exercise of sovereignty over reservation activities but, unlike a traditional conflict of law analysis, gave no weight to the preference for the local law of the place of injury. If the Court's role in these cases had been to make a conflict of

137. Hicks, 533 U.S. at 384–85 (Souter, J., concurring) (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130–31 (1995)) (other citations omitted); REPORT, *supra* note 5, at 43.

138. *See, e.g.*, Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 407–08 (2007–2008).

> law balancing decision, even without applying Indian law principles, it arguably did not do so with a full appreciation of the tribal interests that were at stake.[139]

According to Dean Getches, the Court is concerned with "difference"—and when it comes to nonmembers haled into tribal courts against their will, "difference" makes all the difference.

One could argue that tribal courts walk a fine line when discarding or limiting the utility of ICRA. One could also argue that it does not matter, especially since the Supreme Court seemed to state in a later case that ICRA, merely a federal statute, does not carry the same weight as the United States Constitution and, therefore, provides insufficient protection for nonmembers in tribal court.[140] I have argued that the Supreme Court's concerns about tribal jurisdiction over nonmembers are largely irrelevant now and will become even more so with time and experience.[141] Because increasing numbers of nonmembers are consenting to tribal jurisdiction,[142] the Supreme Court's jurisprudence lives on borrowed time.

Moreover, the legitimacy of tribal common law to outsiders is of limited importance. In other words, only nonmembers subject to tribal civil jurisdiction and Indians subject to tribal criminal jurisdiction have the right to seek outside review of tribal court jurisdiction (in civil cases)[143] or review of a criminal conviction.[144] Tribal justice systems must fight an even greater battle first—demonstrating their legitimacy to the tribal membership.

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139. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267, 346–47 (2001).

140. *See* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 337 (2008) ("Tribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' The Bill of Rights does not apply to Indian tribes. Indian courts 'differ from traditional American courts in a number of significant respects.'" (citations omitted)).

141. *See* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1014–16 (2010).

142. *See* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 116, 120 (2012).

143. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985).

144. *See* 25 U.S.C. § 1303. As the law currently stands, only tribal members and other Indians are subject to tribal criminal jurisdiction. *See* United States v. Lara, 541 U.S. 193, 200 (2004); United States v. Wheeler, 435 U.S. 313, 324 (1978).

CONCLUSION

ICRA is a creature of Congress. While Congress may have intended that tribal justice systems be the primary interpreter of "due process" and "equal protection" in accordance with tribal customs and traditions, those concepts remain American concepts, not tribal concepts. ICRA has served, and will continue to serve, an important purpose in assisting tribal courts, litigants, and legislatures in providing the legal infrastructure necessary to guarantee fundamental fairness in Indian country. ICRA is a kind of crutch, a placeholder for tribes and tribal courts to lean upon until proper and legitimate tribal law arises to take its place.

That brings us full circle to the great Dean Getches and the remarkable *Indian Courts and the Future*. Dean Getches's introduction to the report noted that ICRA was a "challenge" to tribal justice systems—one he hoped tribal governments could meet. He wrote about his concerns that federal courts would be skeptical of tribal jurisdiction if tribal courts did not guarantee fundamental fairness to all litigants:

> In measuring Indian courts, federal courts are certain to examine acts of Congress, which deal with the operation of tribal judicial systems. The most sweeping and recent of such acts is the Indian Civil Rights Act. Unquestionably, the Act limits the sovereignty of Indian tribes because it insists upon a form of government not necessarily of their own choosing. They must adhere to concepts of due process and equal protection and assure their members a list of substantive rights borrowed from the United States Constitution, which may be alien to their own traditions of government. The familiarity of non-Indian courts with the federal Bill of Rights provides a ready index for evaluating Indian courts—a gauge for their degree of effectiveness as vehicles of preemption of state governmental activity, and of their exercise of tribal self-government. Yet the response of tribes and, significantly, of the federal establishment as their mentor and trustee has not been adequate to fulfill Congress' mandate and to meet the challenge of ICRA

fully.[145]

Dean Getches also worried about the tribal and federal response to ICRA, and he was right to do so, given the alien character of American law to many Indian communities. But he recognized that the federal Bill of Rights was familiar to most Indian people and certainly to Indian court judges. Federal rights could serve as an important guidepost, even if Indian courts eventually adapted their customs and traditions to meet modern needs. Dean Getches recognized that the goal was to develop tribal jurisprudence and common law with an eye toward tribal customs and traditions, and his work put that goal front and center.

145. REPORT, *supra* note 5, at 2–3 (citation omitted).

533 U.S. 353, 150 L.Ed.2d 398

[353] NEVADA, et al., Petitioners,

v.

Floyd HICKS, et al.

No. 99–1994.

Argued March 21, 2001.

Decided June 25, 2001.

State of Nevada and State officials brought action against member of Fallon Paiute–Shoshone Tribe and Fallon Tribal Court, seeking declaratory judgment that Tribal Court lacked jurisdiction over tribal member's civil rights and tort action filed against State officials in their individual capacities arising from execution of search warrant on allotted land within reservation for evidence of off-reservation poaching crime. The United States District Court for the District of Nevada, David W. Hagen, District Judge, 944 F.Supp. 1455, entered summary judgment for Tribe member and Tribal Court. State and officials appealed. The Court of Appeals for the Ninth Circuit, Betty B. Fletcher, Circuit Judge, 196 F.3d 1020, affirmed. State and officials petitioned for certiorari. The Supreme Court, Justice Scalia, held that: (1) tribal court did not have jurisdiction to adjudicate tort claims arising from state officials execution of process on reservation lands for evidence of an off-reservation crime; (2) tribal court did not have authority to adjudicate § 1983 claims; and (3) exhaustion of claims in tribal court was not required before seeking federal court relief.

Reversed and remanded.

immunity defense whatever without a warrant. See *California v. Acevedo,* 500 U.S. 565, 581, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) (SCALIA, J., concurring in judgment). One wonders whether, deprived of its *deus ex machina,* the concurrence would not alter the conclusion it reached in Part I of its opinion, and agree with us that a proper balancing of state and tribal interests would give the Tribes no jurisdiction over state officers pursuing off-reservation violations of state law.

Finally, it is worth observing that the concurrence's resolution would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court. The question (which we have avoided) whether tribal regulatory and adjudicatory jurisdiction are coextensive is simply answered by the concurrence in the affirmative. As Justice SOUTER'S separate opinion demonstrates, it surely deserves more considered analysis.

* * *

Because the Fallon Paiute–Shoshone Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties. Nor can the Tribes identify any authority to adjudicate respondent's § 1983 claim. And since the lack of authority is clear, there is no need to exhaust the jurisdictional dispute in tribal court. State officials operating on a reservation to investigate off-reservation violations of state law are properly held accountable for tortious conduct and civil rights violations in either state or federal court, but not in tribal court.

[375]The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with our opinion.

It is so ordered.

Justice SOUTER, with whom Justice KENNEDY and Justice THOMAS join, concurring.

I agree that the Fallon Paiute–Shoshone Tribal Court had no jurisdiction to entertain Hicks's claims against the petitioning state officers here, and I join the Court's opinion. While I agree with the Court's analysis as well as its conclusion, I would reach that point by a different route. Like the Court, I take *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), to be the source of the first principle on tribal-court civil jurisdiction, see *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 659, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001) (SOUTER, J., concurring). But while the Court gives emphasis to measuring tribal authority here in light of the State's interest in executing its own legal process to enforce state law governing off-reservation conduct, *ante,* at 2310–2313, I would go right to *Montana's* rule that a tribe's civil jurisdiction generally stops short of nonmember defendants, 450 U.S., at 565, 101 S.Ct. 1245, subject only to two exceptions, one turning on "consensual relationships," the other on respect for "the political integrity, the economic security, or the health or welfare of the tribe," *id.,* at 566, 101 S.Ct. 1245.[1]

Montana applied this presumption against tribal jurisdiction to nonmember conduct on fee land within a reservation; I would also apply it where, as here, a nonmember acts on tribal or trust land, and I would thus make it explicit that land status within a reservation is not a primary jurisdictional[376] fact, but is relevant only insofar as it bears on the application of one of *Montana's* exceptions to a particular case. Insofar as I rest my conclusion on the

1. The virtue of the Court's approach is in laying down a rule that would be unquestionably applicable even if in a future case the state officials issuing and executing state process happened to be tribal members (which they apparently are not here).

general jurisdictional presumption, it follows for me that, although the holding in this case is "limited to the question of tribal-court jurisdiction over state officers enforcing state law," *ante*, at 2309, n. 2, one rule independently supporting that holding (that as a general matter "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *ante*, at 2310) is not so confined.

I

Petitioners are certainly correct that "[t]ribal adjudicatory jurisdiction over nonmembers is . . . ill-defined," Reply Brief for Petitioners 16, since this Court's own pronouncements on the issue have pointed in seemingly opposite directions. Compare, *e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"), and *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"), with, *e.g.*, *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978) ("'[T]he limitation upon [tribes'] sovereignty amounts *to the right of governing every person within their limits except themselves*'" (quoting *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L.Ed. 162 (1810))). *Oliphant*, however, clarified tribal courts' criminal jurisdiction (in holding that they had none as to non-Indians), and that decision is now seen as a significant step on the way to *Montana*, "the pathmarking case concerning tribal civil authority over nonmembers," *Strate v. A-1 Contractors*, 520 U.S. 438, 445, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). The path marked best is the rule ⌊377 that, at least as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers.[2]

To be sure, *Montana* does not of its own force resolve the jurisdictional issue in this case. There, while recognizing that the parties had "raised broad questions about the power of the Tribe to regulate [the conduct of] non-Indians on the reservation," we noted that the issue before us was a "narrow one." 450 U.S., at 557, 101 S.Ct. 1245. Specifically, we said, the question presented concerned only the power of an Indian tribe to regulate the conduct of nonmembers "on reservation land owned in fee by nonmembers of the Tribe." *Ibid.* Here, it is undisputed, the acts complained of occurred on reservation land "controlled by a tribe." Pet. for Cert. 24. But although the distinction between tribal and fee land (and, accordingly, between *Montana* and this case) surely exists, it does not in my mind call for a different result. I see the legal principles that animated our presumptive preclusion of tribal jurisdiction in *Montana* as counseling a similar rule as to regulatory, and hence adjudicatory, jurisdiction here.

In *Montana*, the Court began its discussion of tribes' "inherent authority" by noting that "the Indian tribes have lost many of the attributes of sovereignty." 450 U.S., at 563, 101 S.Ct. 1245. ⌊378 In "distin-

2. The Court in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), referred to "nonmembers" and "non-Indians" interchangeably. In response to our decision in *Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), in which we extended the rule of *Oliphant* to deny tribal courts criminal jurisdiction over nonmember Indians (*i.e.*, Indians who are members of other tribes), Congress passed a statute expressly granting tribal courts such jurisdiction, see 105 Stat. 646, 25 U.S.C. § 1301(2). Because, here, we are concerned with the extent of tribes' inherent authority, and not with the jurisdiction statutorily conferred on them by Congress, the relevant distinction, as we implicitly acknowledged in *Strate*, is between members and nonmembers of the tribe. In this case, nonmembership means freedom from tribal-court jurisdiction, since none of the petitioning state officers is identified as an Indian of any tribe.

guish[ing] between those inherent powers retained by the tribe and those divested," *id.*, at 564, 101 S.Ct. 1245, the Court relied on a portion of the opinion in *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), from which it quoted at length:

> " 'The areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . .
>
> " 'These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.' "
>
> *Montana, supra*, at 564, 101 S.Ct. 1245.

The emphasis in these passages (supplied by the *Montana* Court, not by me) underscores the distinction between tribal members and nonmembers, and seems clearly to indicate, without restriction to the criminal law, that the inherent authority of the tribes has been preserved over the former but not the latter. In fact, after quoting *Wheeler*, the Court invoked *Oliphant, supra*, which (as already noted) had imposed a *per se* bar to tribal-court criminal jurisdiction over non-Indians, even with respect to conduct occurring on tribal land. The *Montana* Court remarked that, "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied" support a more "general proposition" applicable in civil cases as well, namely, that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S., at 565, 101 S.Ct. 1245. Accordingly, the Court in *Montana* repeatedly pressed the member-nonmember distinction, reiterating at one point, for example, that while "the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members," the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.*, at 564, 101 S.Ct. 1245; cf. *Oliphant v. Schlie*, 544 F.2d 1007, 1015 (C.A.9 1976) (Kennedy, J., dissenting) ("The concept of sovereignty applicable to Indian tribes need not include the power to prosecute nonmembers. This power, unlike the ability to maintain law and order on the reservation and to exclude nondesireable nonmembers, is not essential to the tribe's identity or its self-governing status"), rev'd *sub nom. Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

To *Montana's* "general proposition" confining the subjects of tribal jurisdiction to tribal members, the Court appended two exceptions that could support tribal jurisdiction in some civil matters. First, a tribe may "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." And second, a tribe may regulate nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S., at 565–566, 101 S.Ct. 1245.[3] But unless one of these exceptions

3. Thus, it is true that tribal courts' "civil subject-matter jurisdiction over non-Indians . . . is not automatically foreclosed, as an extension of *Oliphant* would require." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). "*Montana* did not extend the full *Oliphant* rationale to the civil jurisdictional question—which would have completely prohibited civil jurisdiction over nonmembers."

applies, the "general [380] proposition" governs and the tribe's civil jurisdiction does "not extend to the activities of nonmembers of the tribe."

In *Strate,* we expressly extended the *Montana* framework, originally applied as a measure of tribes' civil regulatory jurisdiction, to limit tribes' civil adjudicatory jurisdiction. We repeated that "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." 520 U.S., at 445, 117 S.Ct. 1404. Quoting *Montana,* we further explained that "[i]n the main" (that is, subject to the two exceptions outlined in the *Montana* opinion), " 'the inherent sovereign powers of an Indian tribe'—those powers a tribe enjoys apart from express provision by treaty or statute—'do not extend to the activities of nonmembers of the tribe.' " 520 U.S., at 445–446, 117 S.Ct. 1404. Equally important for purposes here was our treatment of the following passage from *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987), which seemed to state a more expansive jurisdictional position and which had been cited by the Tribal Court in *Strate* in support of broad tribal-court civil jurisdiction over nonmembers:

> " 'Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States,* 450 U.S. 544, 565–566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 152–153, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *Fisher v. District Court* [*of Sixteenth Judicial Dist. of Mont.*], 424 U.S. [382,] 387–389, 96 S.Ct. 943, 47 L.Ed.2d 106 [(1976)]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute . . . .' [480 U.S.], at 18, 107 S.Ct. 971." 520 U.S., at 451, 117 S.Ct. 1404.

The *Strate* petitioners fastened upon the statement that "civil jurisdiction over" the activities of nonmembers on reservation lands "presumptively lies in the tribal courts." But we resisted the overbreadth of the *Iowa Mutual* dictum. [381] We said that the passage "scarcely supports the view that the *Montana* rule does not bear on tribal-court adjudicatory authority in cases involving nonmember defendants," 520 U.S., at 451–452, 117 S.Ct. 1404, and stressed the "three informative citations" accompanying the statement, which mark the true contours of inherent tribal authority over nonmembers:

> "The first citation points to the passage in *Montana* in which the Court advanced 'the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,' with two prime exceptions. The case cited second is *Washington v. Confederated Tribes of Colville Reservation,* a decision the *Montana* Court listed as illustrative of the first *Montana* exception . . . . The third case noted in conjunction with the *Iowa Mutual* statement is *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.,* a decision the *Montana* Court cited in support of the second *Montana* exception. . . ." *Id.,* at 452, 117 S.Ct. 1404 (citations omitted).

Accordingly, in explaining and distinguishing *Iowa Mutual,* we confirmed in *Strate* what we had indicated in *Montana:* that as a general matter, a tribe's civil jurisdiction does not extend to the "activities of non-Indians on reservation lands," *Iowa Mutual, supra,* at 18, 107 S.Ct. 971, and that the only such activities that trigger civil jurisdiction are those that fit within one of *Montana's* two exceptions.

A-1 Contractors v. Strate, 76 F.3d 930, 937 (C.A.8 1996). Instead, "the [*Montana*] Court found that the tribe retained *some* civil jurisdiction over nonmembers, which the Court went on to describe in the *Montana* exceptions." *Ibid.*

After *Strate*, it is undeniable that a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted. The principle on which *Montana* and *Strate* were decided (like *Oliphant* before them) looks first to human relationships, not land records, and it should make no difference *per se* whether acts committed on a reservation ⌊382 occurred on tribal land or on land owned by a nonmember individual in fee. It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact.[4]

II

Limiting tribal-court civil jurisdiction this way not only applies the animating principle behind our precedents, but fits with historical assumptions about tribal authority and serves sound policy. As for history, Justice STEVENS has observed that "[i]n sharp contrast to the tribes' broad powers over their own members, tribal powers over nonmembers have always been narrowly confined." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (dissenting opinion). His point is exemplified by the early treaties with those who became known as the five civilized Tribes, which treaties "specifically granted the right of self-government to the tribes [but] specifically excluded jurisdiction over nonmembers." *Id.*, at 171, n. 21, 102 S.Ct. 894 (citing Treaty with the Cherokees, Art. 5, 7 Stat. 481 (1835), Treaty with the Choctaws and Chickasaws, Art. 7, 11 Stat. 612 (1855), and Treaty with the Creeks and Seminoles, Art. 15, 11 Stat. 703 (1856)). In a similar vein, referring to 19th-century federal statutes setting the jurisdiction of the courts of those five Tribes, this Court said in *In re Mayfield*, 141 U.S. 107, 116, 11 S.Ct. 939, 35 L.Ed. 635 (1891), that the "general object" of such measures was "to vest in the courts of the [Indian] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts ⌊383 of the United States jurisdiction of all actions to which its own citizens are parties on either side." And, in fact, to this very day, general federal law prohibits Courts of Indian Offenses (tribunals established by regulation for tribes that have not organized their own tribal court systems) from exercising jurisdiction over unconsenting nonmembers. Such courts have "[c]ivil jurisdiction" only of those actions arising within their territory "in which the defendant is an Indian, and of all other suits between Indians and non-Indians which are brought before the court by stipulation of the parties." 25 CFR § 11.103(a) (2000).

A rule generally prohibiting tribal courts from exercising civil jurisdiction over nonmembers, without looking first to the status of the land on which individual claims arise, also makes sense from a practical standpoint, for tying tribes' authority to land status in the first instance would produce an unstable jurisdictional crazy quilt. Because land on Indian reservations constantly changes hands (from tribes to nonmembers, from nonmembers to tribal members, and so on), a jurisdictional rule under which land status was dispositive would prove extraordinarily difficult to administer and would provide little notice to nonmembers, whose susceptibility to tribal-court jurisdiction would turn on the most recent property conveyances. Cf. *Hodel v. Irving*, 481 U.S. 704, 718, 107

4. Thus, it is not that land status is irrelevant to a proper *Montana* calculus, only that it is not determinative in the first instance. Land status, for instance, might well have an impact under one (or perhaps both) of the *Montana* exceptions. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659–660, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001) (SOUTER, J., concurring); cf. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) ("[T]here is a signifi-

S.Ct. 2076, 95 L.Ed.2d 668 (1987) (noting the difficulties that attend the "extreme fractionation of Indian lands").

The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given "[t]he special nature of [Indian] tribunals," *Duro v. Reina,* 495 U.S. 676, 693, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. See *Talton v. Mayes,* 163 U.S. 376, 382–385, 16 S.Ct. 986, 41 L.Ed. 196 (1896); F. Cohen, Handbook of Federal Indian Law 664–665 (1982 ed.) (hereinafter Cohen) ("Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes"). Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, 25 U.S.C. § 1302, "the guarantees are not identical," *Oliphant,* 435 U.S., at 194, 98 S.Ct. 1011,[5] and there is a "definite trend by tribal courts" toward the view that they "ha[ve] leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U.S. Supreme Court precedents 'jot-for-jot,'" Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L.Rev. 285, 344, n. 238 (1998). In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant,* namely, an overriding concern that citizens who are not tribal members be "protected . . . from unwarranted intrusions on their personal liberty," 435 U.S., at 210, 98 S.Ct. 1011.

Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." Melton, Indigenous Justice Systems and Tribal Society, 79 Judicature 126, 130–131 (1995). The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," National American Indian Court Judges Assn., Indian Courts and the Future 43 (1978), which would be unusually difficult for an outsider to sort out.

Hence the practical importance of being able to anticipate tribal jurisdiction by reference to a fact more readily knowable than the title status of a particular plot of land. One further consideration confirms the point. It is generally accepted that there is no effective review mechanism in place to police tribal courts' decisions on matters of non-tribal law, since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts. Cf., *e.g.,* 28 U.S.C. § 1441(a) (removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"); § 1257(a) (Supreme Court review of "judgments or decrees rendered by the highest court of a State" where federal law implicated). The result, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that "[t]ribal courts are often 'subordinate to the political branches of tribal governments,'" *Duro, supra,* at 693, 110 S.Ct. 2053 (quoting Cohen 334–335).

cant geographic component to tribal sovereignty").

5. See also Cohen 667 ("Many significant constitutional limitations on federal and state governments are not included in the [ICRA]").

§ 203. [Reserved]

§ 204. Law applicable

A. In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The Courts shall utilize Diné bi beenahaz'áanii (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations. The courts shall also utilize Diné bi beenahaz'áanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts.

B. To determine the appropriate utilization and interpretation of Diné bi beenahaz'áanii, the court shall request, as it deems necessary, advice from Navajo individuals widely recognized as being knowledgeable about Diné bi beenahaz'áanii.

C. The courts of the Navajo Nation shall apply federal laws or regulations as may be applicable.

D. Any matters not addressed by Navajo Nation statutory laws and regulations, Diné bi beenahaz'áanii or by applicable federal laws and regulations, may be decided according to comity with reference to the laws of the state in which the matter in dispute may have arisen.

History

CO-72-03, October 24, 2003.
CD-94-85, December 4, 1985.
CJA-1-59, January 6, 1959.

Cross References

The Foundation of the Diné, Diné Law and Diné Government, see 1 N.N.C. § 201 *et seq.*

Library References

Indians ⚷32.
Westlaw Topic No. 209.
C.J.S. Indians §§ 49, 51.

Research References

Construction and application of federal tribal exhaustion doctrine, 186 A.L.R. Fed. 71 (2003).
Federal question, 41 Am. Jur. 2d Indians, § 167.

Annotations

1. Navajo law and custom

"The Navajo Nation courts have the authority to apply "customs of the Navajo Nation" as law, 7 N.N.C. § 204 (A) (1995 ed.)." *In the Matter of the Estate of Kindle*, No. SC-CV-38-99, slip op. at 4 (Nav. Sup. Ct. August 2, 2001).

" ... [T]he customs and traditions of the Navajo people have the force of law. They provide a unique body of law known as Navajo common law." *Navajo Nation v. Platero*, 6 Nav. R. 422, 424 (Nav. Sup. Ct. 1991).

"Navajo custom and tradition may be shown in several ways: it may be shown through recorded opinions and decisions of the Navajo courts or through learned treatises on the Navajo way; it may be judicially noticed; or it may be established by testimony of expert witnesses who have substantial knowledge of Navajo common law in an area relevant to the issue before the court." *In the Matter of the Estate of Belone*, 5 Nav. R. 161, 165 (Nav. Sup. Ct. 1987).

RESOLUTION OF THE NAVAJO NATION COUNCIL

Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Diné

WHEREAS:

1. The Navajo Nation Council is the governing body of the Navajo Nation, as provided for in 2 N.N.C. §102 (A); and

2. The Diné have always been guided and protected by the immutable laws provided by the Diyin, the Diyin Diné é, Nahasdzáá and Yádilhil; these laws have not only provided sanctuary for the Diné Life Way but has guided, sustained and protected the Diné as they journeyed upon and off the sacred lands upon which they were placed since time immemorial; and

3. It is the duty of the Nation's leadership to preserve, protect and enhance the Diné Life Way and sovereignty of the people and their government; the Nation's leaders have always lived by these fundamental laws, but the Navajo Nation Council has not acknowledged and recognized such fundamental laws in the Navajo Nation Code; instead the declaration and practice of these fundamental laws have, up to this point in time, been left to those leaders in the Judicial Branch; and

4. The Navajo Nation Council is greatly concerned that knowledge of these fundamental laws is fading, especially among the young people; the Council is also concerned that this lack of knowledge may be a primary reason why the Diné are experiencing the many negative forms of behavior and natural events that would not have occurred had we all observed and lived by these laws; and

5. The Navajo Nation Council finds that the Diné Life Way must be protected and assured by incorporating these fundamental laws into the Navajo Nation Code in a manner that will openly acknowledge and recognize their importance and would generate interest to learn among all Diné; and

6. The Navajo Nation Council finds that the acknowledgement, recognition and teaching of these laws do not contravene 1 N.N.C. §4; the incorporation of these fundamental laws into the Navajo Nation Code is not governmental establishment of religion nor is it prohibiting the free exercise of religion; the Navajo Nation Council and the Diné have always recognized and respected the principle of these fundamental laws and the Diné Life Way that all Diné have the right and freedom to worship as they choose; and the Navajo Nation Council and the Diné recognize that the Diné Life Way is a holistic approach to living one's life whereby one does not separate what is deemed worship and what is deemed secular in order to live the Beauty Way; and

7. The Navajo Nation Council further finds that it is entirely appropriate for the government itself to openly observe these fundamental laws in its public functions such as the installation or inauguration of its leaders and using and placing the appropriate symbols of the Diné Life Way in its public buildings and during legislative and judicial proceedings; and

8. The Navajo Nation Council further finds that all elements of the government must learn, practice and educate the Diné on the values and principles of these laws; when the judges adjudicate a dispute using these fundamental laws, they should thoroughly explain so that we can all learn; when leaders perform a function using these laws and the symbols of the Diné Life Way, they should teach the public why the function is performed in a certain way or why certain words are used; and

9. The Navajo Nation Council further finds that all the details and analysis of these laws cannot be provided in this acknowledgement and recognition, and such an effort should not be attempted; the Navajo Nation Council finds that more work is required to elucidate the appropriate fundamental principles and values which are to be used to educate and interpret the statutory laws already in place and those that may be enacted; the Council views this effort today as planting the seed for the education of all Diné so that we can continue to Walk In Beauty; and

10. The Navajo Nation Council commends the Honorable Edward T. Begay, the Speaker of the Navajo Nation Council, Mr. Henry Barber and Legislative Staff, and all the medicine people and elders who assisted in the development of this proposed legislation; the Council deems it in the best interest of the Navajo Nation to adopt the proposed legislation attached hereto as Exhibit "A" and incorporated herein by reference.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Nation Council hereby amends Title 1 of the Navajo Nation Code by adopting the attached legislation, marked Exhibit "A".

2. The Navajo Nation Council directs the Office of Legislative Counsel to codify this legislation.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 45 in favor, 4 opposed and 1 abstained, this 1st day of November 2002.

Ralph Bennett, Jr.
Speaker Pro Tem
Navajo Nation Council
11-08-02
Date

Motion: Harold Wauneka
Second: Freddie Howard

ACTION BY THE NAVAJO NATION PRESIDENT:

1. I hereby give notice that I will not veto the foregoing legislation, pursuant to 2 N.N.C. Section 1005 (C) (10), on this 13th day of November 2002.

Kelsey A. Begaye, President
Navajo Nation

2. I hereby veto the foregoing legislation, pursuant to 2 N.N.C. Section 1005(C)(10) this _____ day of _____ 2002 for the reason(s) expressed in the attached letter to the Speaker.

Kelsey A. Begaye, President
Navajo Nation

Title 1
General Provisions
Chapter 1. The Foundation of the Diné, Diné Law and Diné Government

§ 1. Diné Bi Beehaz'áanii Bitsé Siléí -Declaration of the Foundation of Diné Law

We, the Diné, the people of the Great Covenant, are the image of our ancestors and we are created in connection with all creation.

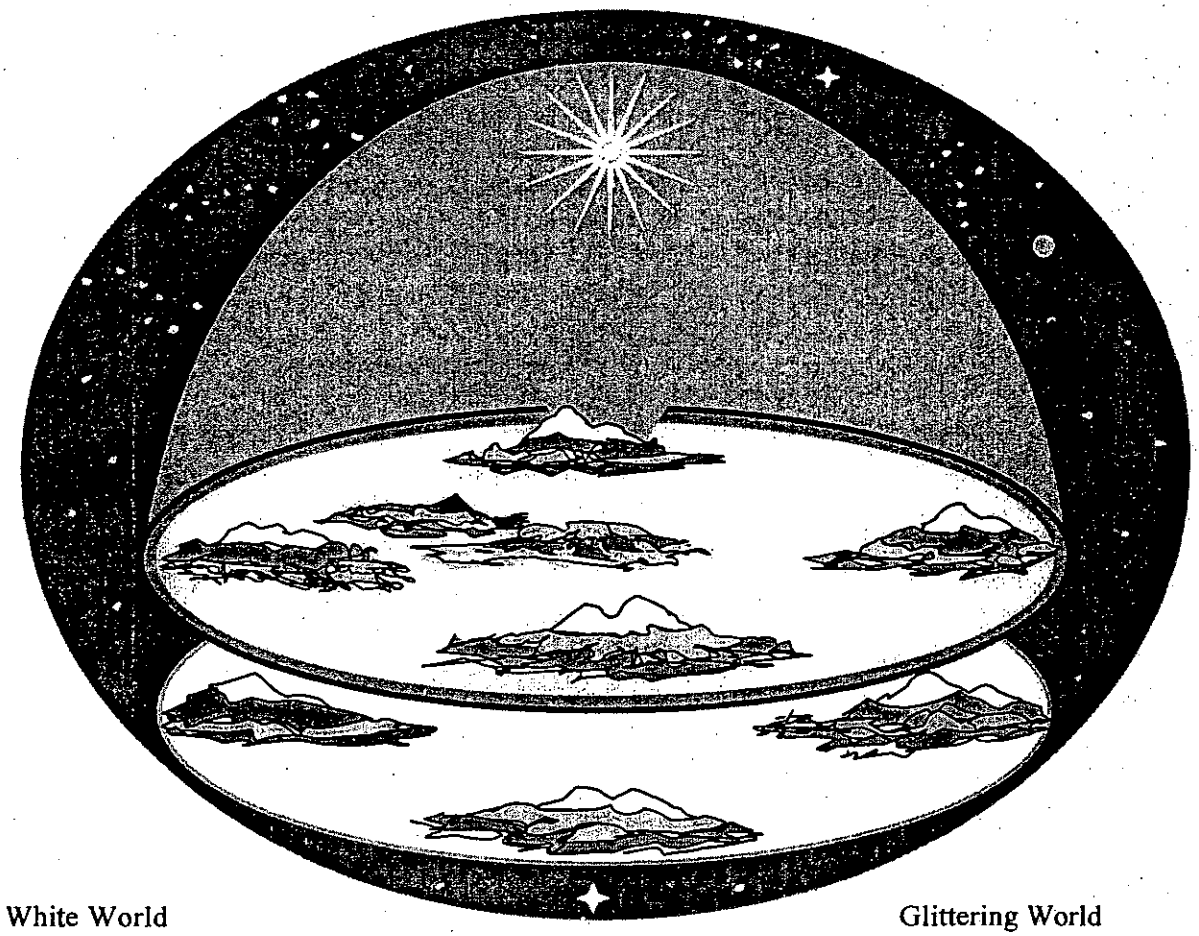
Diné Bi Beehaz'áanii Bitsí Siléí

Diyin Dine'é,
Sin dóó sodizin,
Bee
Nahasdzáán dóó yádiłhił nitsáhákees yił hadeidiilaa,
Tó dóó dził diyinii nahat'á yił hadeidiilaa,
Niłch'i dóó nanse' ałtaas'éí iiná yił hadediilaa,
Kǫ', adinídíín dóó ntł'iz náádahaniihjį' sihasin yił hadediilaa.
Díí ts'ídá aláąjį' nihi beehaz'áanii bitse siléí nihá' ályaa.
Nitsáhákees éí nahat'á bitsé silá.
Iiná éí sihasin bitsé silá.
Hanihi'diilyaadi díí nihiihdaahya' dóó bee hadíníit'é.
Binahji' nihéého'dílzingíí éíí:
Nihízhi',
Ádóone'é niidlíinii,
Nihinéí',
Nihee ó'ool ¡¡ł ',
Nihi chaha'oh,
Nihi kék'ehashchíín.
Díí bik'ehgo Diyin Nohookáá Diné nihi'doo'niid.
Kodóó dah'adíníisá dóó dah'adiidéél.
Áko dííshjíjgi éí nitsáhákees, nahat'á, iiná, saad, oodlą',
Dóó beehaz'áanii ał'ąą ádaat'éego nihitah nihwiileeh,
Ndi nihi beehaz'áanii bitsé siléí nhá ndaahya'ąą t'ahdii doo łahgo ánéehda.
Éí biniinaa t'áá nanihi'deelyáhąą doo níłch'i diyin hinááh nihiihdaahya'ąą ge'át'éigo,
T'áá Diné niidlíjgo náásgóó ahool'á.

The Holy People ordained,
Through songs and prayers,
That
Earth and universe embody thinking,
Water and the sacred mountains embody planning,
Air and variegated vegetation embody life,
Fire, light, and offering sites of variegated sacred stones embody wisdom.
These are the fundamental tenets established.
Thinking is the foundation of planning.
Life is the foundation of wisdom.
Upon our creation, these were instituted within us and we embody them.

Accordingly, we are identified by:
Our Diné name,
Our clan,
Our language,
Our life way,
Our shadow,
Our footprints.
Therefore, we were called the Holy Earth-Surface-People.
From here growth began and the journey proceeds.
Different thinking, planning, life ways, languages, beliefs, and laws appear among us,
But the fundamental laws placed by the Holy People remain unchanged.
Hence, as we were created and with living soul, we remain Diné forever.[1]

Mother Earth and Father Universe



White World

Glittering World

§ 2. Diné Bi Beenahaz'áanii

[1] The Navajo Nation is grateful to Mike Mitchell, Wilson Aronilth, Peggy Scott, Laura Wallace, the late Andrew Natonabah, and the late Dr. Dean Jackson who developed the declaration, with guidance from the Navajo Medicine-Men Association and Navajo Community College. The revision of the declaration interpretation was made by: Laura Wallace, Division of Diné Education; Roger Begay, Diné Language and Cultural Development – Division of Diné Education; and Henry Barber, Office of the Speaker.

The Diné bi beenahaz'áanii embodies Diyin bitsąądęę' beehaz'áanii (Traditional Law), Diyin Dine'é bitsąądęę' beehaz'áanii (Customary Law), Nahasdzáán dóó Yádiłhił bitsąądęę' beehaz'áanii (Natural Law), and Diyin Nohookáá Diné bi beehaz'áanii (Common Law).

These laws provide sanctuary for the Diné life and culture, our relationship with the world beyond the sacred mountains, and the balance we maintain with the natural world.

These laws provide the foundation of Diné bi nahat'á (providing leadership through developing and administering policies and plans utilizing these laws as guiding principles) and Diné sovereignty. In turn, Diné bi nahat'á is the foundation of the Diné bi naat'á (government). Hence, the respect for, honor, belief and trust in the Diné bi beenahaz'áanii preserves, protects and enhances the following inherent rights, beliefs, practices and freedoms:

A. The individual rights and freedoms of each Diné (from the beautiful child who will be born tonight to the dear elder who will pass on tonight from old age) as they are declared in these laws; and

B. The collective rights and freedoms of the Diyin Nihookáá Diné as a distinct people as they are declared in these laws; and

C. The fundamental values and principles of Diné Life Way as declared in these laws; and

D. Self-governance; and

E. A government structure consisting of Hózhǫǫjí Nahat'á (Executive Branch), Naat'ájí Nahat'á (Legislative Branch), Hashkééjí Nahatá (Judicial Branch), and the Naayee'jí Nahat'á (National Security Branch); and

E. That the practice of Diné bi nahat'á through the values and life way embodied in the Diné bi beenahaz'áanii provides the foundation of all laws proclaimed by the Navajo Nation government and the faithful adherence to Diné Bi Nahat'á will ensure the survival of the Navajo Nation; and

G. That Diné bi beenahaz'áanii provides for the future development and growth of a thriving Navajo Nation regardless of the many different thinking, planning, life ways, languages, beliefs, and laws that may appear within the Nation; and

H. The right and freedom of the Diné to be educated as to Diné Bi Beenahaz'áanii; and

I. That Diné Bi Beenahaz'áanii provides for the establishment of governmental relationships and agreements with other nations; that the Diné shall respect and honor such relationships and agreements and that the Diné can expect reciprocal respect and honor from such other nations; and

§3. Diyin Bits'áádéé' Beehaz'áanii -Diné Traditional Law

The Diné Traditional Law declares and teaches that:

A. It is the right and freedom of the Diné to choose leaders of their choice; leaders who will communicate with the people for guidance; leaders who will use their experience and wisdom to always act in the best interest of the people; and leaders who will also ensure the rights and freedoms of the generations yet to come; and

B. All leaders chosen by the Diné are to carry out their duties and responsibilities in a moral and legal manner in representing the people and the government; the people's trust and confidence in the leaders and the continued status as a leader are dependent upon adherence to the values and principles of Dine bi beenahaz'áanii; and

C. The leader(s) of the executive branch (Aláąjı Hózhǫǫjí Naat'ááh) shall represent the Navajo Nation to other peoples and nations and implement the policies and laws enacted by the legislative branch; and

D. The leader(s)of the legislative branch (Aláąjı' Naat'ájí Naat'ááh and Aláąjı' Naat'ájí Ndaanit'áii or Naat'aanii) shall enact policies and laws to address the immediate and future needs; and

E. The leader(s) of the judicial branch (Aláąji' Haskééjí Naat'ááh) shall uphold the values and principles of Diné bi beenahaz'áanii in the practice of peace making, obedience, discipline, punishment, interpreting laws and rendering decisions and judgments; and

F. The leader(s) of the security branch (Aláaji' Naayéé'jí Naat'ááh) are entrusted with the safety of the people and the government. To this end, the leader(s) shall maintain and enforce security systems and operations for the Navajo Nation at all time and shall provide services and guidance in the event of severe national crisis or military-type disasters; and

G. Our elders and our medicine people, the teachers of the traditional laws, values and principles must always be respected and honored if the people and the

government are to persevere and thrive; the teachings of the elders and medicine people, their participation in the government and their contributions of the traditional values and principles of the Diné life way will ensure the growth of the Navajo Nation; and from time to time, the elders and medicine people must be requested to provide the cleansing, protection prayers, and blessing ceremonies necessary for securing healthy leadership and the operation of the government in harmony with traditional law; and

H. The various spiritual healings through worship, song and prayer (Nahaghá) must be preserved, taught, maintained and performed in their original forms; and

I. The Diné and the government must always respect the spiritual beliefs and practices of any person and allow for the input and contribution of any religion to the maintenance of a moral society and government; and

J. The Diné and the government can incorporate those practices, principles and values of other societies that are not contrary to the values and principles of Diné Bi Beenahaz'áanii and that they deem is in their best interest and is necessary to provide for the physical and mental well-being for every individual.

§4. Diyin Dine'é Bitsáádéé Beehaz'áanii-Diné Customary Law

The Diné Customary Law declares and teaches that:

A. It is the right and freedom of the people that there always be holistic education of the values and principles underlying the purpose of living in balance with all creation, walking in beauty and making a living; and

B. It is the right and freedom of the people that the sacred system of k'é, based upon the four clans of Kiiyaa'áanii, Todích'iínii, Honagháahnii and Hashtł'ishnii and all the descendant clans be taught and preserved; and

C. It is the right and freedom of the people that the sacred Diné language (nihiinéí') be taught and preserved; and

D. It is the right and freedom of the people that the sacred bonding in marriage and the unity of each family be protected; and

E. It is the right and freedom of the people that every child and every elder be respected, honored and protected with a healthy physical and mental environment, free from all abuse.

F. It is the right and freedom of the people that our children are provided with education to absorb wisdom, self-knowledge, and knowledge to empower them to make a living and participate in the growth of the Navajo Nation.

§ 5. Nahasdzáán dóó Yádilhił Bits´ąądęę´ Beehaz´ąanii -Diné Natural Law,

Dine Natural Law declares and teaches that:

A. The four sacred elements of life, air, light/fire, water and earth/pollen in all their forms must be respected, honored and protected for they sustain life; and

B. The six sacred mountains, Sisnaajini, Tsoodził, Dook´o´ooslííd, Dibé Nitsaa, Dził Na´oodiłii, Dził Ch´ool´í´í, and all the attendant mountains must be respected, honored and protected for they, as leaders, are the foundation of the Navajo Nation; and

C. All creation, from Mother Earth and Father Sky to the animals, those who live in water, those who fly and plant life have their own laws and have rights and freedoms to exist and;

D. The Diné have the sacred obligation and duty to respect, preserve and protect all that was provided for we were designated as the steward for these relatives through our use of the sacred gifts of language and thinking; and

E. Mother Earth and Father Sky is part of us as the Diné and the Diné is part of Mother Earth and Father Sky; The Diné must treat this sacred bond with love and respect without exerting dominance for we do not own our mother or father.

F. The rights and freedoms of the people to the use of the sacred elements of life as mentioned above and to the use of land, natural resources, sacred sites and other living beings must be accomplished through the proper protocol of respect and offering and these practices must be protected and preserved for they are the foundation of our spiritual ceremonies and the Diné life way; and

G. It is the duty and responsibility of the Diné to protect and preserve the beauty of the natural world for future generations;

§6. Diyin Nohookáá Diné Bi Beehaz´ąanii- Diné Common Law,

The Diné Common Law declares and teaches that:

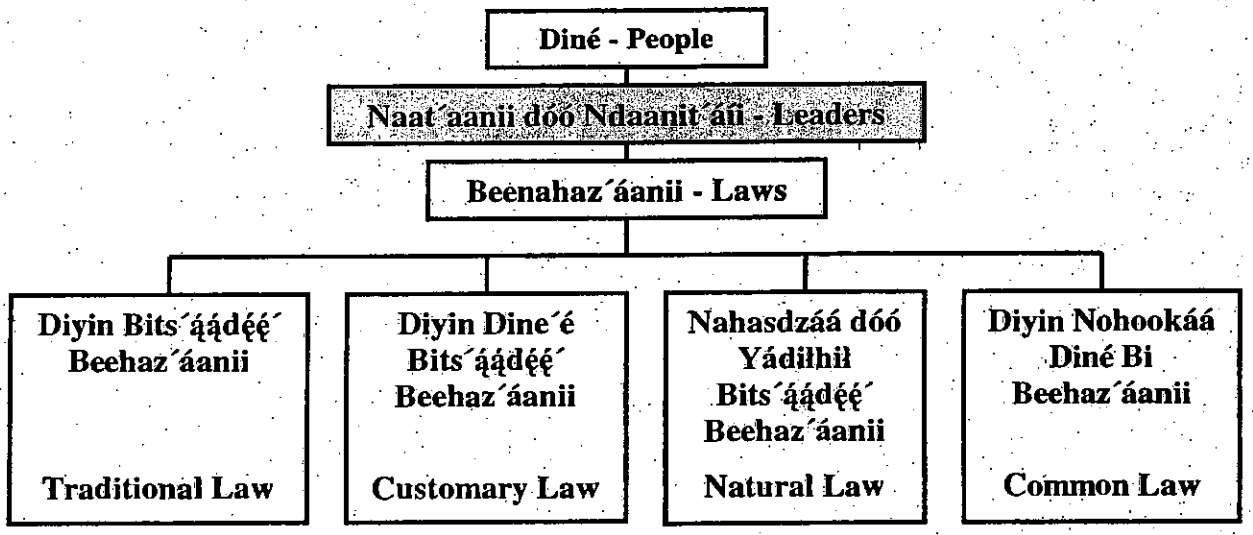
A. The knowledge, wisdom, and practices of the people must be developed and exercised in harmony with the values and principles of the Diné Bi

Beenahaz'áanii; and in turn, the written laws of the Navajo Nation must be developed and interpreted in harmony with Diné Common Law; and

B. The values and principles of Diné Common Law must be recognized, respected, honored and trusted as the motivational guidance for the people and their leaders in order to cope with the complexities of the changing world, the need to compete in business to make a living and the establishment and maintenance of decent standards of living; and

C. The values and principles of Diné Common Law must be used to harness and utilize the unlimited interwoven Diné knowledge, with our absorbed knowledge from other peoples. This knowledge is our tool in exercising and exhibiting self-assurance and self-reliance and in enjoying the beauty of happiness and harmony; and

Diné Original Law Structure



Ninth Circuit Judicial Conference 2016
Big Sky, Montana
July 11-14, 2016
Tribes and Territories Session
Primer on Tribal Courts
By Raymond D. Austin*

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1. Federally Recognized Tribes. There are 567 "federally recognized tribes" in the United States and more petitions for federal recognition by groups claiming to be "a tribe of Indians" are in the pipeline. Under current American law, federal recognition makes an Indian tribe an Indian nation with inherent sovereign powers (called tribal sovereignty). The United States Supreme Court has restricted tribal sovereignty in certain areas, including tribal criminal (adjudicatory) and civil jurisdiction (regulatory and adjudicatory) over non-Indians. Federally recognized tribes receive federal benefits and services, primarily through the Bureau of Indians Affairs (Department of the Interior), and engage in a government-to-government relationship with the federal government. Federally recognized tribes have the right to self-government so they operate governments that include dispute resolution systems. An Indian nation's dispute resolution system could be any of these: 1) U.S.-style courts only (trial court and appellate court); 2) a combination of U.S.-style courts and the tribe's traditional dispute resolution forum (generally called peacemaking); or 3) U.S.-style courts (for modern issues) and a separate traditional dispute resolution forum (for internal tribal matters).

2. Tribal Courts. The federal government's Indian removal, assimilation, and acculturation policies and practices of the nineteenth century led to the creation of the Court of Indian Offenses (an adversary system) in 1883, which were planted on Indian reservations a couple of years later. For centuries prior, Indian nations had used non-adversarial forums, now popularly called peacemaking, to settle disputes. The Secretary of the Interior, through the

Commissioner of Indian Affairs, created the Court of Indian Offenses as a tool to forcibly assimilate and acculturate (or as the U.S. Supreme Court often says – "civilize") Indian peoples into mainstream American society after they were relocated to reservations. The 1883 rules creating the Court of Indian Offenses also contained a short criminal code that criminalized Indian cultures, customs, practices, and religions.[1] Indian religious practices, social dances, traditional probate, traditional marriage and divorce, and traditional burial and mourning practices were made criminal and prosecuted in the Court of Indian Offenses. The usual punishment for conviction was withholding of rations.[2] In other words, abandon your cultures, religions, and practices or starve.

The federal government's other tools to "civilize" the Indians were the federal Indian boarding schools (started in 1878), the 1887 General Allotment Act (broke up communally held tribal lands), and Christianity. Civilizing meant stripping the Indian peoples of their cultures, languages, religious beliefs, and lands and then indoctrinating them with American ways of life, including American education, private property ownership, farming, and Christianity. The social, health, educational, and economic problems that Indian peoples face on reservations today are the consequences of the federal government's civilizing activities of the late 1800s and early 1900s.[3]

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[1] "Rules Governing the Court of Indian Offenses" (1883). Additional rules were added to the 1883 Rules and reissued in 1892 as "Punishment of Crimes and Misdemeanors Committed by Indians." The other name for Court of Indian Offenses is CFR court, because it applies regulations that are in volume 25 of the Code of Federal Regulations.

[2] After Indian peoples were placed on reservations, they were prohibited from travel off the reservation to hunt and fish and, therefore, became dependent on federal food distributions.

[3] Of all races and ethnics in the United States, American Indians have the highest rates of alcohol and drug abuse, suicide, crime, poor health, poverty, low educational achievement, unemployment, and lack of economic development.

Many of the tribal courts operated by Indian nations today are former Court of Indian Offenses. For example, the Navajo people used the Navajo Court of Indian Offenses from 1892 to 1958. In 1958, the Bureau of Indian Affairs relinquished control of the Navajo CFR court and the Navajo Nation turned it into the Navajo Nation court system.[4] Other Indian nations established their tribal courts using their constitutions as authority following passage of the 1934 Indian Reorganization Act (IRA).[5] The IRA authorized tribes to adopt constitutions and bylaws, with approval of the Secretary of the Interior, as a means of encouraging tribal self-government. Other Indian nations, like the Navajo Nation, continued to use the CFR courts after 1934 and later turned them into their present tribal courts. The cases filed in tribal courts today reflect the social problems on reservations, especially alcohol and drug abuse.

No one has an accurate count but at least one scholar has estimated that there are about 300 tribal courts in the United States today.[6] When I say tribal courts, I mean American-style courts or courts of the adversary kind – judge in a robe, lawyers, jury, rules of evidence, witnesses, etc. A tribal court is either: 1) a court system (trial and appellate courts) established and operated by a federally recognized tribe; or 2) a Court of Indian Offenses that is operated by the Bureau of Indian Affairs. The Bureau still operates about 19 Court of Indian Offenses today. It is now well-established that inherent tribal sovereignty is the source for Indian nation governments, including their court systems (excluding the CFR courts).

Although tribal courts cause uneasiness among non-Indians, they are actually structured like the federal and state courts, with a trial court and an appellate court. Tribal courts use court rules (civil procedure, criminal procedure, evidence, etc.) that are adopted from federal or state

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[4] The statutory laws on the Navajo Nation court system is in Title 7 of the Navajo Nation Code.
[5] 25 U.S.C. § 461 et. seq.
[6] Matthew L.M. Fletcher, Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited, 84 U. Colo. L. Rev. 59, 60 (2013).

court rules. Most tribes put their codes and court rules on the internet. Some tribal court decisions are posted in WestLaw and VersusLaw. Here is an important point: The majority of tribal courts (I estimate 95%) do not apply tribal customary laws but use American federal and state laws to decide issues. The modern trend is to encourage Indian nations to use their own cultures, languages, customs, traditions, and traditional methods, such as peacemaking, to solve disputes that arise within their jurisdictions, including those involving non-member parties.[7]

3. Tribal Court Jurisdiction. Nearly all of the tribal court civil cases that reach the federal courts deal with the regulatory and adjudicatory jurisdiction of the affected Indian nation over a non-Indian tribal court defendant. The primary test for determining whether a tribal court has civil jurisdiction over a non-Indian is set forth in Montana v. United States, 450 U.S. 544, 565-566 (1981).[8] Subsequent U.S. Supreme Court decisions have attempted to clarify the test in Montana, but so far all we have is a muddled mess.[9] The Supreme Court's lack of clear direction makes it difficult for a tribal court judge to determine whether the tribal court has civil jurisdiction over a non-Indian defendant or not.

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[7] Raymond D. Austin, Navajo Courts and Navajo Common Law, A Tradition of Tribal Self-Governance (Univ. of Minn. Press, 2009); Raymond D. Austin, American Indian Customary Law in the Modern Courts of American Indian Nations, 11 Wyo. L. Rev. 351 (2012).

[8] Montana states that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" subject to two exceptions: 1) "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements"; and 2) "A tribe may … exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. 565-66.

[9] Strate v. A-1 Contractors, 520 U.S. 438 (1997); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Nevada v. Hicks, 533 U.S. 353 (2001); and Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008).

The criminal cases coming from tribal courts to federal courts are habeas corpus petitions under the Indian Civil Rights Act.[10] The majority of these cases involve Indian defendants who have been convicted in a tribal court. The other habeas corpus petitions involve tribal members who have been banished or expelled from Indian lands.[11] The Violence Against Women Act (2013) allows Indian nations to exercise special domestic violence criminal jurisdiction over non-Indians who commit domestic violence against an Indian spouse or intimate Indian partner.[12] The non-Indian perpetrator must reside in Indian country or be employed by the Indian nation exercising jurisdiction. Expect VAWA tribal court cases to appear in federal courts pursuant to the habeas corpus provision of the Indian Civil Rights Act.

4. Non-Indian Attacks on Tribal Courts. Non-Indians normally use Justice Souter's concurrence in Nevada v. Hicks, 533 U.S. 353, 383-85 (2001), to attack tribal courts.[13] Justice Souter is concerned about "[t]he special nature of [Indian] tribunals ... which differ from traditional American courts in a number of significant respects." 533 U.S. at 383. Criticisms are usually general and directed at all 300 or so tribal courts in the United States: 1) tribal courts lack independence; 2) tribal court judges are subordinate to tribal councils; 3) tribal councils serve as tribal appellate courts; 4) tribal courts are biased against non-members; 5) tribal court judges do not have law degrees; 6) non-members do not serve on tribal court juries; 7) tribal courts do not use the U.S. Bill of Rights; 8) tribal courts have leeway in interpreting the due process and equal protection clauses of the Indian Civil Rights Act and do not follow U.S. Supreme Court

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[10] 25 U.S.C. § 1303.

[11] See as examples, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996)(tribal members could not be banished for "treason" without being accorded due process); Sweet v. Hinzman, 2009 WL 1175647 (W.D. Wash. 2009)(tribal council violated ICRA when it banished tribal members without due process).

[12] P.L. 113-4 (March 7, 2013); 25 U.S.C. § 1304.

[13] Justice Souter's concurrence is included in the conference materials.

precedent jot-for-jot; and 9) tribal courts use unwritten tribal customary law that's difficult for outsiders to find. Professor Bethany R. Berger addressed some of these concerns in her article, Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems, 37 Ariz. St. L.J. 1047 (2005). Professor Berger used the Navajo Nation courts to study the alleged bias of tribal courts against non-Indian litigants. She concluded that non-Indians win about half of the cases when they litigate against Navajos in the Navajo Nation courts. I address the other concerns below.

Inadequate or lack of resources, particularly insufficient funding, is the usual cause of most problems for tribal courts. Lack of court buildings, poor working conditions, poorly trained personnel, inadequate staffing, lack of equipment, part-time judges or lack of law school trained judges, lack of tribal bar association, poor record keeping, lack of law books, case precedent and research resources, and more, are all the result of insufficient funding of tribal courts. Funding for tribal courts comes from the federal government, through the Bureau of Indian Affairs, and the tribes themselves. With around 300 tribal courts of various sizes and at different stages of development, federal funding does not go very far. For example, the Navajo Nation has an average caseload of around 70,000 cases each year and federal funding is less than one million dollars each year. The Navajo Nation provides over five million dollars each year to operate its courts. Some smaller tribes are part-time operations with caseloads of less than 100 cases per year and funding could be just enough to pay a contract judge and a part-time court clerk.

Tribes that have court independence problems comprise a small group. Most tribal courts are competent, independent, and do very well at decision-making. Tribal court independence issues generally arise in two ways: 1) a trial judge decides cases and the tribal

council serves as an appellate court;[14] or 2) the tribal council fires a judge who rules against the tribe or the tribal council's interests. A tribal council performing dispute resolution functions actually has cultural roots. Before the advent of tribal courts, dispute resolution was one of the duties of tribal leaders. A few tribes carried this duty over to modern tribal court functions. Today's tribal nation-building scholars use every opportunity to discourage tribal councils from performing judicial functions because it creates a bad impression for all Indian-nation courts. The governor or tribal council resolves disputes in some New Mexico Pueblo tribes but these cases usually involve only tribe members and internal tribe issues (marriage, divorce, child custody, religious matters, land issues, etc.).

The second independence issue involves a tribal council that fires a judge who rules against its interest or against the tribe. Again, firing of tribal court judges for political reasons is not the norm but it does happen with some tribes. A judge might be dismissed if he allows suit against the tribe, allows criminal prosecution of a council delegate, or nullifies tribal council legislation, especially ones that involve expenditure of funds and imposing limits on council powers. Tribes that do not have laws that require judicial independence and provide for tenure of judges usually have problems with political interference in judicial business. To protect judges, legal scholars advise Indian nations to enact laws allowing limited waivers of sovereign immunity, judge-removal laws that ensure due process, judicial ethics codes, and laws ensuring judicial independence and separation of powers.

A criticism that implies lack of competence in the law states that tribal court judges do not have law degrees. Up to about 1990, most tribal court judges did not have law degrees because there were few American Indians with law degrees. Even now, many tribes do not have

[14] An example is Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Constr. Co., 607 F.3d 1268 (11th Cir. 2010).

a member who has a law degree. Many of the present tribal court judges have law degrees. Tribal court judges across the country are a mix of practicing attorneys (Indians and non-Indians), retired state judges (non-Indians), law professors (Indians and non-Indians), and tribe members without law degrees (but with years of experience as a tribal court advocate).[15] Non-Indians who serve as tribal court judges (trial and appellate judges) normally work on a contract basis (paid per case). More and more tribal courts are now establishing tribal bar associations that administer bar exams, character and fitness evaluations, continuing legal education courses, and committees on admissions, discipline, ethics, and judge evaluations. The Navajo Nation Bar Association has over 500 members (mostly non-Indian attorneys practicing in Arizona, New Mexico, Utah, and Colorado).[16] Tribal bar associations, the National Judicial College in Reno, Nevada, and the National Indian Justice Center out of Petaluma, California provide training programs/courses for tribal court judges and court staff.

At the time the U.S. Supreme Court decided Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978), non-Indians did not serve on most tribal court juries.[17] Although non-Indians serve on most tribal court juries today, the 1978 Oliphant argument continues to be made

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[15] Tribal court advocates do not have law degrees but can have a paralegal degree or a degree from a tribal college that trains advocates. Tribe members often cannot afford lawyers so they rely on advocates who either work for free or a minimal fee. Advocates understand the tribe's culture, language, and customary law and tribal court practice. See Tafoya v. Navajo Nation Bar Assoc., 6 Nav. Rptr. 141 (Nav. Sup. Ct. 1989), for a discussion of the advocate's role on the Navajo Nation.

[16] The Navajo Nation Bar Association (NNBA) has a president and other officers, a board of bar commissioners, and an office manager. The NNBA administers a bar exam twice a year and has committees on admissions, discipline, training, judicial evaluation, rules, and continuing legal education. The CLE courses offered by the NNBA fulfill the CLE requirements of the state bars of Arizona and New Mexico. See http://navajolaw.org for information on the NNBA.

[17] In Oliphant, the Court stated that the Indian Civil Rights Act provides many of the due process protections afforded in state and federal criminal proceedings. "However, the guarantees are not identical. Non-Indians, for example, are excluded from Suquamish tribal court juries." 435 U.S. at 194 (footnote omitted).

to show that all tribal courts are biased against non-Indians. For example, in the non-Indian petitioners' brief to the U.S. Supreme Court in Dollar General Corp. v. Mississippi Band of Choctaw Indians, Certiorari Petition No. 13-1496, the petitioners generally allege that "Non-members also tend to face juries composed of individuals from a tribe to which the [Indian] plaintiff belongs, but the [non-Indian] defendant does not (citing Oliphant, 435 U.S. at 194, and the Saginaw Chippewa and Ute Indian tribal codes)." Contrary to the petitioners' argument, the Code of the Ute Indian Tribe of the Uintah and Ouray Reservation does permit non-Indians and non-enrolled Indians to serve on its tribal court juries where "non-Indian parties are involved." Ute Indian Law and Order Code, § 1-6-1(2).

Justice Souter's concurrence in Hicks correctly states that the U.S. Bill of Rights (and the U.S. Constitution) does not apply to actions of tribal governments and their officials. Talton v. Mayes, 163 U.S. 376 (1896). The Bill of Rights does not apply to Indian nations because they are separate sovereigns and were not signatories to the U.S. Constitution. Congress passed the Indian Civil Rights Act in 1968 to impose on Indian nations most of the requirements found in the U.S. Bill of Rights. Some Indian nations have their own Bill of Rights and others have incorporated the Indian Civil Rights Act, verbatim, into their constitutions or codes.[18]

The Indian Civil Rights Act and the Bill of Rights of Indian tribes contain due process and equal protection provisions that tribal courts apply.[19] Criticisms involving these provisions

[18] The Navajo Nation Bill of Rights was enacted in 1967, 1 N.N.C. §§ 1–9, and contains similar protections that are found in the U.S. Bill of Rights and the Indian Civil Rights Act. For example, the Navajo Nation Bill of Rights has a provision that allows "the people to keep and bear arms for peaceful purposes …." 1 N.N.C. § 6.

[19] The Navajo Nation Bill of Rights states as follows: "Life, liberty, and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo

usually focus on how the tribal courts interpret due process and equal protection. Very few tribal courts use tribal customary law to interpret the due process and equal protection provisions of the Indian Civil Rights Act. Most tribal courts use federal and state cases to interpret due process and equal protection. Nonetheless, tribal courts are free to use tribe customary law to interpret any provision of the Indian Civil Rights act, including due process and equal protection. The Navajo Nation has used Navajo common law (customary law) to interpret due process and while doing so has provided more protections than would be allowed by federal and state courts.[20]

The Indian Civil Rights Act does not require tribes to provide indigent defendants with free legal counsel, but Navajo law requires the courts to appoint free counsel for indigent parties in criminal cases.[21] The Navajo courts also appoint free legal counsel for needy parties in civil cases on a discretionary basis. More tribes now have public defender services that provide indigent defendants with counsel.

The Indian Civil Rights Act permits a tribe to allow a jury trial on request in criminal cases only if the punishment calls for imprisonment.[22] Navajo law goes further – it provides for jury trial on request for both criminal and civil cases because the Navajo common doctrine of participatory democracy makes jury trial a fundamental right in Navajo culture.[23] Juries reflect a fair cross-section of the community in the Navajo Nation courts and include Navajos and non-

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Nation, nor be deprived of life, liberty or property, without due process of law. Nor shall such rights be deprived by any bill of attainder or ex post facto law." 1 N.N.C. § 3.

[20] In Atcitty v. Dist. Ct. for the Judicial Dist. of Window Rock, 7 Nav. Rptr. 227 (Navajo Sup. Ct. 1996), the Court stated that the Navajo common law doctrine of distributive justice requires it to provide a more generous interpretation of due process for public benefits cases than would a state or federal court.

[21] Navajo Nation Bill of Rights, 1 N.N.C. § 7.

[22] 25 U.S.C. § 1302(10).

[23] Downey v. Bigman, 7 Nav. Rptr. 176 (Nav. Sup. Ct. 1995).

Navajos because citizens from the parties' community can help return disputants to harmony, a Navajo fundamental concept.[24]

5. American Indian Customary Law. Most tribal courts in the United States do not use tribal customary laws but apply federal court and state court decisions to decide issues. American Indians are well-assimilated into American society and the majority of tribes have forgotten their languages, cultures, and traditional religions. In fact, many tribes do not have a member who knows the tribe's customary law. As we move forward, we encourage tribes that still have knowledge of their culture to use customary law, not only in tribal court decision-making, but also to codify them in their codes and use them in their governmental operations. A few tribes within the Ninth Circuit's jurisdiction, mainly Navajo, Hopi, and Apache in the southwest, use customary law in their court decisions. The Navajo Nation, with a population of around 340,000, is still strong in language, culture, and Navajo religion. The Navajo Nation is the leader among tribes in the application of Navajo customary law (called Navajo common law) in its court decisions and has codified some fundamental principles in its code.[25]

Although most Indian nations do not use customary law, they usually have a statute in their codes that permit the tribal court to apply the tribe's customary law (the tribe's choice of law statute).[26] Non-Indian litigants usually cite the tribe's choice of law statute to argue that the tribal court uses unwritten customary law that is "unusually difficult for an outsider to sort out"

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[24] Duncan v. Shiprock Dist. Ct., 8 Nav. Rptr. 581 (Nav. Sup. Ct. 2004).

[25] These are called the Diné Fundamental Laws, 1 N.N.C. §§ 201-206. Note: The original Navajo Nation Council Resolution enacting the fundamental laws is included in the conference materials.

[26] The Navajo choice of law statute requires the Navajo Nation courts to use customary law to interpret Navajo statutes and regulations and to apply customary law in the absence of statutory law. The choice of law statute also requires the courts to seek the advice of individuals widely recognized as knowledgeable on customary law (expert witnesses) whenever clarity is needed. 7 N.N.C. § 204(A)-(D). Note: The Navajo choice of law statute is included in the conference materials.

or find.[27] This argument does not make much sense to me when we train law students to research and find the law of any jurisdiction. As mentioned above, only a small number of tribal courts use tribal customary law. The choice of law statute in tribal codes that allows for use of tribal customary law is a remnant from the days of the Bureau of Indian Affairs Court of Indian Offenses. For example, the 1935 and 1937 Bureau regulations for the Navajo Court of Indian Offenses provided as follows:

> 161.23. Law applicable in civil actions. In all civil cases the Court of Indian Offenses shall apply … any ordinances or customs of the tribe, not prohibited by … Federal laws.
>
> Where any doubt arises as to the customs and usages of the tribe the Court may request the advice of counsellors familiar with these customs and usages.[28]

After Congress passed the IRA in 1934, tribes began adopting tribal codes. Because most tribes could not afford lawyers to draft codes, they simply adopted the Bureau of Indian Affairs regulations for the Court of Indian Offenses as their initial codes. Many of these former Bureau regulations have remained in the tribal codes either unchanged or slightly modified to the present day. Thus, a tribal court may not apply customary law at all, but its tribal code will have a choice of law statute that permits it to do so.

As we move forward, the federal courts should expect to see tribal court cases that apply customary law to decide civil and criminal issues, including the Montana jurisdiction test (because it relies on facts) and interpretations of the Indian Civil Rights Act, including banishment and exclusion from Indian lands. Indian common law will also appear in cases

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[27] Nevada v. Hicks, 533 U.S. at 385 (Justice Souter's concurrence). The certiorari petitioners in Dollar General Corp. v. Mississippi Band of Choctaw Indians rely on Justice Souter's concurrence to argue that non-Indian litigants in tribal courts "face distinct disadvantages" because tribes "require their courts to apply tribal law, custom, and traditions." The petitioners argue that outsiders find it difficult "to determine the requirements of tribal law." Petitioners' Brief at 6-7.

[28] 25 C.F.R. § 161.23 (1938).

brought directly by Indian plaintiffs in federal district courts, such as in religious and sacred sites cases, tort cases, and other cases.[29] Indian customary law/common law scares non-Indians. This fear is grounded in stereotypes, ignorance of Indian peoples, old western movies, lack of respect for difference, and racism. Indian common law, like English common law, is just plain human common sense.

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[29] A good example is Harvey v. United States, 685 F.3d 939 (10th Cir. 2012).

Department of the Interior
Synopsis of Insular Areas

DOI ADMINISTRATIVE AUTHORITY

The Office of Insular Affairs (OIA) is responsible for administering the Federal government's relationship with the U.S. territories of Guam, American Samoa, the United States Virgin Islands (USVI), and the Commonwealth of the Northern Mariana Islands (CNMI). OIA also administers the financial assistance provided to the freely associated states (FAS) of the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau under the Compacts of Free Association.

In the face of the territories and FAS's physical, institutional and environmental realities, the assistance that the OIA provides is a critical element in stabilizing their economies and fiscal resources and planning for climate resiliency. This assistance helps the territories and the FAS confront some of their pressing challenges, improve their quality of life, expand economic opportunity and promote efficient and effective governance, which is basically the mission of OIA.

In fiscal year 2015, OIA grants and payments to the seven insular areas contributed 25,642 jobs, $487.3 million in employee compensation and $945.3 million in gross domestic product.

Selected Insular Area Milestones

Milestones	American Samoa	CNMI	Guam	Virgin Islands
Population *(2015 Estimates)*	54,343	52,344	161,785	103,574
Acquired by United States	1900	1976	1898	1917
Granted U.S. Citizenship	U.S. Nationals	1986	1950	1927
Elected first local legislature with full or substantial legislative authority	1960	1977	1950	1936
Elected first governor	1977	1977	1970	1970
Received nonvoting delegate in U.S. House	1980	2008	1972	1972
Legal Government Framework	Constitution (1960)	Constitution	Organic Act	Organic Act
Immigration and Nationality Act (INA)	Exempt	Applies	Applies	Applies
U.S. Internal Revenue Code	Exempt	Applies	Applies	Applies

Source: DOI, Office of Insular Affairs

UNITED STATES TERRITORIAL COURTS

These are district courts which the Congress has established under the *Territorial Clause* of the U.S. Constitution (Article IV, Section 3, Clause 2) and exist in Guam, the USVI and the CNMI. The jurisdiction of these district courts is similar to that of a United States district court, but, despite the similarity of names, these district courts are not ***United States*** district courts although some refer to them as such. A ***United States*** district court is created under Article III of the Constitution and exists only in a Federal judicial district, which only the several States, the District of Columbia and Puerto Rico have.

The district courts in Guam, the Virgin Islands and the Northern Mariana Islands assume the jurisdiction of a Federal bankruptcy court in their respective territories as Guam, the USVI and the CNMI do not have separate Federal bankruptcy courts like the several States, the District of Columbia and Puerto Rico. Appeals from the district courts in Guam and the CNMI are taken to the U.S. Court of Appeals for the Ninth Circuit; those from the district court in the USVI are taken to the U.S. Court of Appeals for the Third Circuit.

There is no Federal court in American Samoa. Matters of Federal law arising in American Samoa are usually brought in the U.S. District Court for either the District of Hawaii or the District of Columbia. Unlike the other major unincorporated U.S. territories, American Samoa does not fall within the geographical jurisdiction of any Federal district court.[1,2] The U.S. Code does not provide for any direct appeal from the decisions of American Samoa's courts.

GUAM

Executive Order No. 10077 (September 7, 1949) transferred administrative responsibility for Guam from the Secretary of the Navy to the Secretary of the Interior. Executive Order No. 10137 (June 30, 1950) amended Executive Order No. 10077 to make the transfer effective on July 1, 1950. The Guam Organic Act was approved on August 1, 1950 (48 U.S.C. §§ 1421 *et seq*.), and declared Guam to be an unincorporated territory and provided that Guam's

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[1] The unincorporated U.S. territories are Navassa Island, Puerto Rico, and the U.S. Virgin Islands, all of which are in the Caribbean; and, in the Pacific, American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, the Northern Mariana Islands, and Wake Atoll. Of these unincorporated U.S. territories, eight are considered to be "minor": Navassa Island in the Caribbean, and, in the Pacific, Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, and Wake Atoll. Palmyra Atoll is not an unincorporated U.S. territory; instead, it is incorporated, i.e., the full corpus of the U.S. Constitution applies there. See https://www.doi.gov/oia/islands/politicatypes. Of all these territories, only Puerto Rico, Guam, the USVI, the CNMI, and American Samoa are permanently inhabited.

[2] Under the civil administration since December 1999 of the Assistant Secretary of the Interior for Fish, Wildlife and Parks, Navassa Island in the Caribbean is the only other major unincorporated U.S. territory which does not fall within the jurisdiction of a Federal district court. Between January 16, 1997 (Secretary's Order No. 3205), and December 3, 1999 (Secretary's Order No. 3210), OIA served as Navassa Island's civil administrator.

relationship with the Federal Government should be under the Secretary of the Interior's general administrative supervision. As a result of subsequent amendments to the Guam Organic Act, the voters of Guam also elect their Governor, Lieutenant Governor and Member of Congress.

The Supreme Court of Guam is the highest territorial judicial body in Guam. The Supreme Court of Guam hears all appeals from the Superior Court of Guam and is subject to original jurisdiction only in cases where a certified question is submitted to the Supreme Court of Guam by a Federal court, the Governor of Guam or the Guam Legislature. The Supreme Court of Guam is the ultimate judicial authority on local matters, and an appeal of its decisions can be heard only by the Supreme Court of the United States. The Supreme Court of Guam is composed of three justices who are appointed by the Governor of Guam and confirmed by the Guam Legislature. Justices serve for terms of good behavior, subject to a retention election every ten years after appointment. The three justices issue judgments on all cases brought before them and sit on the Judicial Council of Guam, which is ultimately in charge of the administration of the Guam Judiciary.

Judges of the Superior Court of Guam are appointed by the Governor of Guam with the advice and consent of the Guam Legislature for a term of eight years. If a judge of the Superior Court of Guam wishes to continue in office, the judge's name must be placed on the ballot at a general election and, in order to remain in office, the judge must win at least fifty per cent plus one of the ballots cast. The Superior Court of Guam is a court of general jurisdiction, and its seven judges preside over criminal, civil, juvenile, probate, small claims, traffic and child support cases brought before them. In December 2005 the Adult and Juvenile Drug Courts of Guam were recognized as courts of record of the Guam Judiciary. These are examples of *therapeutic justice* focusing on the rehabilitation of offenders and their reintegration into society. Judges are assigned to cases on a rotating basis, although one is rotated into assignment as the designated Drug Court Judge exclusively for a specified period, currently a year.

AMERICAN SAMOA

By Executive Order No. 125-A (February 19, 1900) the eastern islands of Samoa were placed under the Secretary of the Navy's administration. By Act of February 20, 1929 (48 U.S.C. 1661), the Congress stated that, until the Congress should provide for the government of American Samoa, "all civil, judicial and military powers shall be vested . . . in such manner as the President of the United States shall direct . . . ." This legislation is often referred to as the *Quasi*-Organic Act of American Samoa. The President vested these powers in the Secretary of the Interior by Executive Order No. 10264 (June 29, 1951). Secretary's Order No. 2657 (August 29, 1951) set forth the extent and nature of the authority of the American Samoa Government (ASG) and the manner in which ASG exercises that authority. Secretary's Order No. 3009 (September 13, 1977) provided for an elected Governor and Lieutenant Governor for American Samoa, whose first incumbents took office on January 3, 1978. Pursuant to Public L. No. 95-556 (October 31, 1978), the voters of American Samoa in November 1980 elected their first Member of Congress.

The highest court in American Samoa is the Appellate Division of the High Court, which consists of the Chief Justice of American Samoa and the Associate Justice of American Samoa,[3] the chief associate judge and four associate judges. Upon the recommendation of the Chief Justice, the Governor appoints the chief associate judge and the associate judges; the American Samoa Senate confirms them. The High Court of American Samoa has two other divisions:

- one for trials, and
- one for controversies relating to land and *matai* (chiefly) titles.

In addition, there are local district courts for misdemeanors and lesser civil suits and village courts for violations of village regulations.

U.S. VIRGIN ISLANDS

This territory was under the jurisdiction of the Department of the Navy from March 21, 1917, until March 18, 1931 (48 U.S.C. 1391), when responsibilities were transferred to the Secretary of the Interior pursuant to Executive Order No. 5566 (February 27, 1931). Organic legislation was first passed in 1936 (49 Stat. 1812) and was revised by Public L. No. 83-517, effective July 22, 1954. The latter has since been amended by the Congress in various respects. The first elected Governor and Lieutenant Governor the USVI took office on January 4, 1971.

The District Court in the Virgin Islands used to have jurisdiction over all local civil actions brought in the USVI, but in 1976 the USVI Legislature, as allowed by the Revised Organic Act of 1954, gave part of this jurisdiction to the former Territorial Court of the Virgin Islands, then a local trial court. The jurisdiction of the Territorial Court was expanded to all civil actions in 1990. Similarly, in 1985 the USVI Legislature gave the Territorial Court jurisdiction over certain criminal actions brought under USVI law and expanded that jurisdiction to all criminal cases in 1993, although the United States Attorney may still bring certain criminal actions in the District Court in some circumstances. In 2004 the Territorial Court was renamed the Superior Court of the Virgin Islands. Before the creation in 2007 of the Supreme Court of the Virgin Islands, the Appellate Division of the District Court in the Virgin Islands heard appeals from the Superior Court of the Virgin Islands in three-judge panels. Since 2007 the Supreme Court of the Virgin Islands hears these appeals exclusively, with its decisions subject to review by the Supreme Court of the United States if the latter decides to grant *certiorari*.

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[3] The Secretary of the Interior appoints these two justices, who are employees of OIA. ("There shall be a Chief Justice of American Samoa and an Associate Justice of American Samoa. Each shall be learned in the law and appointed by the Secretary of the Interior." A.S. Code 3.101(a), available at http://www.asbar.org/index.php?option=com_content&view=category&id=148&Itemid=172.)

NORTHERN MARIANA ISLANDS

On March 24, 1976, President Ford signed H.J.Res. 549, approving the *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America* (Public L. No. 94-241). Until the Covenant's implementation on November 3, 1986, the CNMI remained as it had since 1947: the Mariana Islands District of the Trust Territory of the Pacific Islands, which had come under the Secretary of the Interior's jurisdiction pursuant to Executive Order No. 11021 (May 7, 1962). Effective January 9, 1978, Secretary's Order No. 2989 (March 14, 1976) provided for the CNMI's separate administration and elected government and activated various sections of the Covenant. By Presidential Proclamation 5564 (November 3, 1986), the CNMI ceased to be a district of the Trust Territory of the Pacific Islands and achieved the status of a commonwealth in political union and under the sovereignty of the United States.

Created by local law on May 1, 1989, the Supreme Court of the Commonwealth of the Northern Mariana Islands is the highest court of the CNMI and exercises civil and criminal appellate jurisdiction over Commonwealth law. The Supreme Court of the CNMI consists of the Chief Justice and two Associate Justices. The CNMI does not have an intermediate Commonwealth court of appeals, meaning that the Supreme Court of the CNMI hears appeals directly from the trial-level Superior Court. The Covenant provided that prior to May 1989 the District Court in the CNMI would exercise:

- original jurisdiction over matters in controversy arising under Federal law, and
- appellate jurisdiction from the Superior Court of the CNMI.

Since May 1989 the District Court's appellate jurisdiction has been effectively eliminated. However, the Covenant provided that, for fifteen years following the creation of the Supreme Court of the CNMI, appeals from the decisions of the Supreme Court of the CNMI would go to the U.S. Court of Appeals for the Ninth Circuit just as if the District Court had rendered the decision. Since May 1, 2004, appeals from the Supreme Court of the CNMI can be taken directly to the Supreme Court of the United States, thus giving the Supreme Court of the CNMI relative parity with the highest courts of the several States.

FREELY ASSOCIATED STATES

The Compact of Free Association Act of 1985 was enacted in January 1986 (Public L. No. 99-239) and authorized funding over a fifteen-year period for the FSM and the RMI. In December 2003 President George W. Bush signed Public L. No. 108-188, which enacted amendments to the Compact of Free Association and provided twenty more years of guaranteed annual assistance to the FSM and the RMI. The OIA Director chairs the two bilateral economic management committees which meet semi-annually to decide the distribution of funds under the Amended Compact's sectors: health care, education, public infrastructure, private-sector development, public-sector capacity building and the environment.

The Compact of Free Association with Palau was enacted on November 14, 1986 (Pub. L. No. 99-658) and implemented on October 1, 1994. As the Compact with Palau was set to expire on September 30, 2009, Pub. L. No. 111-88 (October 30, 2009) extended the Compact's terms by one year. In fiscal year 2010 Palau signed the Compact Review Agreement with the United States. At present, funding is provided to Palau on an annual basis until such time as the U.S. Congress and the President signs a bill enacting the results of the 15-year review. Without such approval, funding is provided on an annual basis.

PUERTO RICO

OIA exercises only two duties regarding Puerto Rico:

The Congress directed OIA to facilitate the development and implementation of an energy plan for Puerto Rico. The Puerto Rico Electric Power Authority (PREPA) is in the process of developing an integrated resource plan (IRP) and other strategies to transform Puerto Rico's energy sector. The IRP will provide a full range of power alternatives under a variety of scenarios that will include both base load and renewable energy technologies. To be completed this spring, the IRP will describe a detailed and comprehensive path forward for PREPA's meeting its goal of providing reliable service to the people of Puerto Rico at the lowest possible cost. In both the George W. Bush and Obama Administrations OIA has served as the Secretary's representative on the President's Task Force on Puerto Rico.

VOTING RIGHTS on the FLOOR of the U.S. HOUSE of REPRESENTATIVES

Currently Members of Congress from the territories do not have the right to vote on the Floor of the House of Representatives. However, from February 1993 until January 1995 and again from January 2007 until January 2011, the Members of Congress from the territories possessed in the Committee of the Whole House on the State of the Union the same powers and privileges, including voting and presiding as Chairman, as the Members from the several States enjoy. Off of the Floor of the House there is no distinction between, on the one hand, Members from the territories and, on the other, those from the several States. The Members from the territories are elected to serve on House standing committees in the same manner as the Members from the several States and possess in the standing committees the same powers and privileges as those from the several States. The Members from the territories receive the same compensation, allowances and benefits as the Members from the several States. In addition, just as the Speaker does for Members from the several States, the Speaker may appoint Members from the territories as conferees on bills sent to any House-Senate conference committee considering legislation reported from a committee on which Members from the territories serve. Also, the Speaker may appoint Members from the territories to any select committee.

2016 NINTH CIRCUIT JUDICIAL CONFERENCE
BIG SKY, MONTANA
JULY 11-14, 2016

"TRIBES AND TERRITORIES" PANEL HANDOUT AND SUGGESTED READING

By Juan R. Torruella[1]

Given the limited amount of time to cover these diverse subjects, the purpose of this handout is to give you some background information that will help you in better understanding the panel's discussion and aid you in formulating your inquiries during the question-and-answer period.

TRIBES

Although the principal purpose of this handout is to offer legal and constitutional background for issues arising with regards to territories, we believe it useful to commence with a brief statement regarding the tribes. Although Indian lands and rights were first covered under the Northwest Ordinance's Articles of Compact, Indian law jurisprudence has focused on the Indian Commerce Clause,[2] and the President's authority under the Treaty Clause,[3] rather than the Territorial Clause.[4] Nevertheless the Indian Commerce Clause and the Treaty Clause have been held to support the exercise of authority by Congress over tribes similar to that conferred upon Congress by the Territorial Clause regarding the territories, giving Congress power over Indian affairs that is both plenary and exclusive of state law.[5] Additionally, the Commerce Clause recognizes Indian tribes as sovereigns along with foreign nations and states, and the Supremacy Clause acknowledges federal-Indian treaties as the supreme law of the land.[6] Additionally, Indian tribes, as non-signatories to the Constitution, are not bound by it in the same way as state governments.[7] Initially, members of Indian tribes were not considered U.S. citizens by birth,[8] but over time various statutes and treaties provided

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[1] U.S. Circuit Judge, U.S. Court of Appeals for the First Circuit. Sean Frink, at-large member of the Ninth Circuit Judicial Conference Executive Committee, also contributed to this document.

[2] U.S. Const. art. I, § 8, cl.3.

[3] U.S. Const. art. I., § 2, cl.2.

[4] U.S. Const. art. IV, § 3.

[5] *United States v. Lara*, 541 U.S. 193, 200 (2004).

[6] U.S. Const. art. IV, cl. 2.

[7] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978).

[8] *Elk v. Wilkins*, 112 U.S. 94 (1884).

paths to citizenship. In 1924, Congress enacted 8 U.S.C. § 1401(b), making all natural-born Indians U.S. citizens. Thus Indians are now considered citizens of their tribe and of the United States, and enjoy all of the constitutional protections that other individual citizens enjoy, including the right to vote for president and vice-president of the United States. The tribes do not have independent representatives in Congress, but they have voting representation through their state citizenship.

TERRITORIES

The first thing that can be said about "territories" (and this includes possessions for present purposes), is that the term encompasses a variety of legal/constitutional entities over which Congress exercises its plenary powers, mostly through the Territorial Clause of the Constitution. More than four million U.S. citizens and nationals live in the U.S. territories. In the case of the Commonwealth of the Northern Marianas ("CNMI"), Congress's powers may be subject to a quasi-treaty ("Covenant")[9] made possible by reason of the CNMI's former UN-trusteeship status. The Commonwealth of Puerto Rico, regarding which Congress in 1952 enacted a law "in the nature of a compact" authorizing local self-government, is an unincorporated territory of the United States,[10] as are Guam,[11] the U.S. Virgin Islands,[12] and American Samoa,[13] although the latter may be better classified as a possession.[14]

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[9] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America (1975), *reprinted in* 48 U.S.C. § 1801; Approval of text of Covenant to Establish a Commonwealth of the Northern Mariana Islands, Pub. L. 94-241, Mar. 24, 1976, 90 Stat. 263 (codified at 48 U.S.C. § 1801 (2015)).

[10] *See* Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec.10, 1898, 30 Stat. 1754, T.S. 343 [*hereinafter* Treaty of Paris]; Act of July 3, 1950, Pub. L. No. 600, 64 Stat. 319 (codified at 48 U.S.C. § 731 (b) (1994)); Joint Resolution Approving the Constitution of the Commonwealth of Puerto Rico, 82 Public Law 47, 66 Stat.327 (1952).

[11] *See* Treaty of Paris; 48 U.S.C. § 1421 (1950).

[12] *See* Convention Between the United States & Denmark for Cession of the Danish W. Indies, Jan. 25, 1917, 39 Stat 1706; TS 629; 7 Bevans 56; *see also* Organic Act of the Virgin Islands of the United States of 1936, Pub. L. 74-749, 74 Cong. Ch. 699, June 22, 1936, 49 Stat. 1807; An Act to Revise the Organic Act of the Virgin Islands of the United States, 83 Cong. Ch. 558, July 22, 1954, 68 Stat. 497.

[13] *See* Ratification Act of 1929, Pub. Res. 70-89, 45 Stat. 1253, Feb. 20, 1929 (codified at 48 U.S.C. § 1661) (accepting, ratifying, and confirming Treaty of Cession of Tutuila of 1900 and Treaty of Cession of Manu'a of 1904).

[14] There are also nine other insular areas, mostly uninhabited islands, owned by the United States: Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, Palmyra Atoll, Wake Island, and Navassa Island are unincorporated and unorganized territories. *See* Guano Islands Act, 48 U.S.C. §§ 1411-19. In 1900, Congress extended the Constitution in its entirety to Palmyra Atoll.

General federal administrative responsibility for the CNMI, Guam, the U.S. Virgin Islands, and American Samoa is vested in the Department of Interior. All departments, agencies, and officials of the executive branch treat Puerto Rico administratively "as if it were a state"; any matters concerning the fundamentals of the United States-Puerto Rico relationship are referred to the Office of the President.[15]

THE INSULAR CASES

As background to understanding the territories it is important to briefly discuss the *Insular Cases*.[16] These are a series of cases decided soon after the Spanish-American War of 1898 in which the Supreme Court decided to which of the newly acquired lands the Constitution applied and created a new doctrine to justify its determination: the doctrine of territorial incorporation. From this point onward, territories were classified as either "incorporated" (initially destined for statehood, to which the full Constitution applied) or "unincorporated" (not initially intended to become states, in which only fundamental constitutional rights were deemed to apply). The Court identified the Fifth Amendment privilege against self-incrimination as a fundamental right,[17] but not the right to trial by jury.[18] The Court cited the *Insular Cases* as valid law as recently as 2008 in *Boumediene v. Bush*.[19]

From here, it is perhaps best to compare the various specific attributes of each territorial jurisdiction, emphasizing the significant milestones of each:

PUERTO RICO - Organized, unincorporated territory

- Annexed by U.S. from Spain in 1898, under the Treaty of Paris, whereby the inhabitants would receive such rights as Congress deemed appropriate.
- Under the 1900 Foraker Act, Congress established a civil government for Puerto Rico and granted the Island a non-voting resident commissioner to sit in the House of Representatives, serving for four years.

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[15] Memorandum of the President, Nov. 30, 1992, 57 Fed. Reg. 57,093 (1992).

[16] *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetz v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*,182 U.S.243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901).

[17] *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

[18] *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

[19] 553 U.S. 723, 756-64 (2008); *see also Verdugo-Urquidez v. United States*, 494 U.S. 259, 268-69 (1990).

- In 1901, pursuant to the *Insular Cases*, Puerto Rico is declared an unincorporated territory, which meant that only fundamental constitutional rights would apply.[20]
- In 1917, U.S. citizenship is granted, but in 1922, in *Balzac v. Porto Rico,*[21] the Supreme Court held that Puerto Rico continued to be an unincorporated territory: All the grant of citizenship meant was that residents could move to the Mainland and there exercise full rights as citizens.
- In 1950, Congress authorizes Puerto Rico to enact a constitution and in 1952 Congress approves a constitution. Thereafter the Commonwealth of Puerto Rico is treated for many purposes as if it were a state.[22]
- As of 1961, appeals from the Supreme Court of Puerto Rico are made directly to the U.S. Supreme Court.[23]
- In 1966, an Article III court is created for Puerto Rico with appeals to the First Circuit.[24]
- Puerto Ricans cannot vote for President or Vice President nor do they have voting representatives in Congress.
- There are presently two cases before the Supreme Court of relevance to Puerto Rico's status: *Puerto Rico v. Sánchez Valle*,[25] in which the question is whether Puerto Rico is a separate sovereign for the purposes of the Double Jeopardy Clause, and *Puerto Rico v. Franklin California Tax-Free Trust*,[26] which turns on whether Chapter 9 of the Bankruptcy Code, by excluding Puerto Rico, preempts a Puerto Rico bankruptcy statue creating a mechanism for public utilities to restructure debts.

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[20] In general, fundamental rights, applicable to all individuals subject to the sovereignty of the United States, are "inherent, although unexpressed, principles which are the basis of all free government." *Dorr v. United States*, 195 U.S. 138, 147 (1904); *Downes*, 182 U.S. at 282-83. The Supreme Court has not defined precisely which parts of the Constitution establish fundamental rights. *Reid v. Covert*, 354 U.S. 1, 13 (1957).

[21] *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

[22] *E.g.*, *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (fundamental protections of the Constitution extend to the inhabitants of Puerto Rico); *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 (1976) (same re equal protection rights); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 (1974).

[23] 28 U.S.C. § 1258.

[24] P.L. 89-571.

[25] No. 15-108 (U.S. filed July 17, 2015).

[26] No.15-233 (U.S. filed Aug. 21, 2015); No. 15-255 (U.S. filed Aug. 26, 2015).

GUAM - Organized, unincorporated territory

- Annexed by U.S. in 1898 as in the case of Puerto Rico.
- From 1898-1950, it was considered an unorganized, unincorporated territory subject to the jurisdiction of the U.S. Navy.
- In 1950, an Organic Act established local civil government, granted U.S. citizenship, and created an Article IV territorial court with appeals to the Ninth Circuit.
- In 1968, the Elective Governor Act grants the right for Guamanians to elect their own governor.
- Has a non-voting representative in Congress, as in the case of Puerto Rico, serving for two years.
- Appeals from the Guam Supreme Court are made to U.S. Supreme Court.

AMERICAN SAMOA - Unorganized, unincorporated territory

- Acquired from Germany in 1899 and became a possession of the United States.
- From 1899-1951, it was under the jurisdiction of the U.S. Navy.
- In 1956, American Samoa was transferred to civilian authority under the jurisdiction of the U.S. Department of the Interior.
    - There are special issues regarding the community holding of land.
- In 1977, held first local election for governor.
- No birthright citizenship; residents are U.S. nationals (owe allegiance to U.S.). 8 U.S.C. § 1101(a)(21)-(22).
- No federal territorial court.
- Has the High Court of American Samoa, whose justices are appointed by the U.S. Secretary of the Interior.
- Federal cases are presented in the federal district courts in Hawaii or the District of Columbia.
- Has a non-voting delegate to Congress, serving for two years.

COMMONWEALTH OF NORTHERN MARIANAS (CNMI) - Organized, unincorporated territory[27]

- Originally a Spanish colony with Guam, was sold to Germany in 1898, was acquired by Japan as a Trust Territory under the League of Nations after World War I, and became a U.N. Trust Territory after World War II.

[27] While the CNMI may be classified as an unincorporated territory or commonwealth, as is true of Puerto Rico, the two territories are easily distinguishable by virtue of the conditions under which each attained that status: by a covenant accomplished via joint resolution changing its international status, in the case of the CNMI, and by domestic law, in the case of Puerto Rico.

- In 1976, the CNMI became a U.S. Trust Territory pursuant to a Covenant approved by the people of the CNMI and a joint resolution of Congress rather than a treaty. As a result, the U.S. Constitution does not apply *en toto* in the CNMI. For instance, residents of the CNMI have no right to a jury trial, non-indigenous persons may not own land, the Commerce Clause, and one-person-one-vote strictures do not apply.[28]
- In 1977, a non-Article III court was established.[29]
- In 1978, the CNMI Constitution entered into effect.
- In 1986, Congress extended U.S. citizenship to CNMI residents pursuant to the Covenant.
- In 1989, the CNMI Supreme Court was created pursuant to the Covenant, with appeals to the Ninth Circuit.
- In 1992, the Ninth Circuit recommended Article III status for the CNMI district court judge, recognizing that Article III status is "deemed essential for judicial independence" and that "the [CNMI] is now in exactly the same position as Puerto Rico before Congress granted Puerto Rico's judges Article III status."
- In 1993, in *U.S. ex rel Richards v. De Leon Guerrero,*[30] the Ninth Circuit decided that even if the Territorial Clause provided the constitutional basis for Congress' authority in the CNMI, its legislative power is limited by the Covenant, which "defines the boundaries" of the relationship between the United States and the CNMI.
- As of 2004, CNMI Supreme Court appeals are to be made to the U.S. Supreme Court.
- In 2009, in *CNMI v. United States*,[31] the U.S. District Court for the District of Columbia decided that, pursuant to the Covenant, Congress may legislate with regard to CNMI's internal affairs on immigration matters.
- Since 2009, CNMI has had a non-voting delegate in Congress, serving for two years.

U.S. VIRGIN ISLANDS - Organized, unincorporated territory

- In 1917, the United States purchased the Danish Virgin Islands for $17 million through the Treaty of Cession, agreeing to establish a free port therein.
- From 1917-1931, the USVI were under a military government under U.S. Navy jurisdiction.
- In 1927, U.S. citizenship was granted.[32]
- 1936 and 1954 Organic Acts created an Article IV territorial court and extended Amendments VI and VII, regarding jury trials. Appeals from the Article IV territorial court are made to the Third Circuit.
- In 1970, the first local elections took place.

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[28] P.L. 94-241, __ 203(c), 501(a), & 805.

[29] 48 U.S.C. _ 1821.

[30] 4 F.3d 749 (9th Cir. 1993).

[31] 670 F.Supp.2d 65 (D.D.C. 2009).

[32] 8 U.S.C. § 1406.

- As of 2012, appeals from the Supreme Court of the U.S.V.I. are made to the U.S. Supreme Court.
- Have a non-voting delegate to Congress, serving for two years.

LIST OF RECOMMENDED READING

Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL'Y J. 180, 180 (2003).

JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997).

JUAN TORRUELLA,THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985).

Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283 (2014).

HOWARD P. WILLENS & DEANNE C. SIEMER, CENTER FOR PACIFIC ISLAND STUDIES, UNIVERSITY OF HAWAII, AN HONORABLE ACCORD: THE COVENANT BETWEEN THE NORTHERN MARIANA ISLANDS AND THE UNITED STATES (2001).

DEFINITIONS

Unincorporated territory - A class of U.S. territory created by the *Insular Cases* that includes all lands acquired by the United States after 1898 not intended for statehood at the time of acquisition.

Incorporated territory - Territories which upon acquisition by the United States were destined to become states, i.e., Hawaii, Alaska.

Unorganized territory - Territory as to which Congress has not yet enacted an organic act establishing the civil government for the territory, i.e., American Samoa.

Overview of Federal Indian Law and Policy

2016 Ninth Circuit Conference in Big Sky, Montana

Prepared by Hilary C. Tompkins[1]

June 8, 2016

The United States has a unique trust responsibility to American Indians and Alaska Natives based on long-standing Supreme Court precedent and statutory authorities. The Department of the Interior ("DOI" or "Interior") is the principal federal agency that is responsible for providing programs and services to Indian tribes and individuals in a trustee capacity. This summary provides an overview of the historical and legal underpinnings to the federal-tribal trust relationship, the current state of the federal-tribal trust relationship, and Interior's current state of affairs in Indian law and policy.[2]

I. Historical Treatment of Indian Tribes

In order to understand modern day principles of federal Indian law, it is imperative to understand the various periods in history that influenced the key legal principles of tribal sovereignty, the trust responsibility, and tribal self-governance. The following discussion starts with the treaty-making period, followed by a description of subsequent chapters in history. Together, these various periods in history influence the state of the federal Indian law today in many significant ways.

From this nation's founding until Congress's decision in 1871 to end treaty making,[3] the United States entered into many treaties with Indian tribes under the authority granted by the Treaty Clause in the U.S. Constitution.[4] These treaties not only recognized tribal sovereign authority, but also often contained provisions providing for the protection of certain rights, such as hunting and fishing, and the provision of goods and services, such as food, education, and healthcare.[5] Treaties also were a means of acquiring vast tracts of Indian land, which was used

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[1] This paper is based on United States' legal briefs filed in various cases and was prepared with the assistance of attorneys in the Solicitor's Office, U.S. Department of the Interior. The author also relied on COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2012).

[2] This overview does not include a discussion of Native Hawaiians. It also does not address the unique legal principles that apply to Alaska Natives and other unique treatment under the law of certain regions, such as in Oklahoma or California.

[3] Act of Mar. 3, 1871, c. 120, § 1, 16 Stat. 566; (codified at 25 U.S.C. § 71) (ending with Indian tribes).

[4] U.S. CONST. art. VI, cl. 2 (Treaty Clause); *see also* U. S. DEPT. OF THE INTERIOR, KAPPLER'S INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler comp. & ed.) (1904) (Indian treaties).

[5] *See, e.g.*, 1837 Treaty with the Chippewa, July 29, 1837, 7 Stat. 536. By this treaty, the Chippewa Indians ceded certain lands in exchange for, among other things, money, food and supplies, *id.* at art. 2; the establishment of a school, *id.* at art. 2; and a guarantee that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure

for homesteading, rights-of-way, and the designation of reservations for use by the Tribe and for Indian allotments.[6] The treaties also set the stage for the themes of federal oversight of Indian affairs and federal protection of Indians against states and non-Indians, by recognizing the tribes' power to exclude non-Indians and through "bad men" provisions.[7] Treaties were also used as a means to secure "peace" with tribes that were in armed conflict with the United States.[8] The Supreme Court has recognized that treaties were "not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those [rights] not granted."[9] This fundamental principle -- that Indian tribes were not granted authorities or rights by the United States, but hold such powers inherently and prior to European contact -- pervades Indian law concepts. Over the course of history, these inherent powers and rights have been modified, reaffirmed, or diminished through various legal means such as federal legislation and judicial fiat, as more fully explained below.

Combined with treaty-making was an unrelenting pressure of westward expansion across the United States. This dynamic resulted in the relocation of tribes from the east to the west and the creation of Indian reservations to provide territorial enclaves for the use and occupancy of Indians. In the 1800s, the United States began an aggressive policy to forcibly acquire Indian lands in light of increased pressures from white settlement. This "Removal Era" was ushered in by President Andrew Jackson who obtained passage of the Indian Removal Act in 1830, which authorized the President to exchange lands west of the Mississippi for lands ceded by eastern Tribes.[10] As a result, numerous tribes in eastern and midwestern states were removed to areas in the West. The notorious and tragic "Trail of Tears" occurred during this era and was emblematic of the times.[11] Some tribes or tribal members did not relocate and remained in their original

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of the President of the United States," *id.* at art. 5. *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (affirming treaty hunting, fishing, and gathering rights set forth in Article 5 of the 1837 Treaty with the Chippewa).

[6] For a modern day examination of treaty provisions, *see generally* Opinion on the Boundaries of the Mille Lacs Reservation, Op. Solic. Interior M-37032 (Nov. 11, 2015), *available at* https://solicitor.doi.gov/opinions/M-37032.pdf.

[7] *See, e.g.*, Treaty with the Yakamas, June 9, 1855, art. II, 12 Stat. 951, 952 (reservation set aside "for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without the permission of the tribe and the superintendent and agent"); Treaty with the Ute Indians, Mar. 2, 1868, art. VI, 15 Stat. 619, 620 ("If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.").

[8] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at §§ 1.03[7]-[9] (Nell Jessup Newton ed., 2012) [hereinafter "COHEN'S"].

[9] United States v. Winans, 198 U.S. 371, 381 (1905).

[10] Act of May 28, 1830, ch. 148, §§ 2, 7, 4 Stat. 411, 412.

[11] *See generally* COHEN'S at §1.03[4]; Seminole Indians of the State of Florida, *et. al. v.* United States, 13 Ind. Cl. Comm. 326, 338-341 (1964) (discussing history of United States treaty-making and conflict with Seminole groups

aboriginal lands in the East, continuing to do so to this day.[12] With regard to tribes in the West, each region has unique historical circumstances during the 1800s that influenced the status of their land, such as the discovery of gold in California, the Treaty of Guadalupe Hidalgo between Mexico and the United States, and westward expansion along the Oregon Trail in the Pacific Northwest.[13]

With the increased pressure for westward expansion and accompanying settlement pressures, the United States implemented a shift in Indian policy away from the Removal Era policies in the late 1800s. Indian landholdings were reduced in order to provide "surplus" lands to non-Indian settlers, and to eventually integrate Indians into American society.[14] This era is referred to as the "Reservation Era," which led to the establishment of reservations through treaties and Presidential executive orders.[15] The legal instruments establishing the reservation typically contained provisions providing for individual tribal member land holdings, the cession of "surplus" lands, and the discontinuation of monetary annuities, which were to be replaced by vocational materials and training.[16] The United States' motivation for reservations was not wholly altruistic and was a means to control and contain the Indian population and acquire more lands for non-Indian use.[17] In addition, this new approach of setting aside territories for tribes also fueled criticism that treating tribes as separate entities with distinct territories apart from mainstream America would leave the Indian as "another lost race in the American melting pot."[18] This growing concern led to another shift in Indian law that sought to integrate the Indian

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seeking redress for extinguishment of aboriginal title in the state of Florida); Western Cherokee Indians v. United States, 27 Ct. Cl. 1 (1891) (discussing history of United States treaty-making with and rift between Western and Eastern Cherokee groups surrounding an initially agreed upon, then eventually forced, removal to Arkansas and then Indian Territory).

[12] A few of the many examples include the Narragansett Indian Tribe, Oneida Nation, Cayuga Nation, Saint Regis Mohawk Tribe, Penobscot Nation, Passamaquoddy Tribe, and Eastern Band of Cherokee Indians.

[13] COHEN'S at § 1.03[5] ("The discovery of gold in California transformed the non-Indian migration westward into a stampede."); *id.* (describing impact of Oregon Trail migration on Indian tribes); Treaty of Guadalupe Hidalgo, 9 Stat 922 (1848); Treaty of Peace, Friendship, Limits and Settlement, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

[14] COHEN'S at §§ 1.03[6], 1.04.

[15] Congress ended the use of Executive Orders to create reservations in 1919. Act of June 30, 1919, ch. 4, § 27, 41 Stat. 34 (codified at 43 U.S.C. § 150).

[16] *See, e.g.*, Treaty with Navajo Tribe of Indians, June 1, 1868, art. V, VIII, 15 Stat. 667; Treaty with the Crows, May 7, 1868, art. VI, IX, 15 Stat. 649. Distinct from reservations that were established in treaties, the origins of "rancherias" in California are a bit different in that typically the United States would purchase lands to be set aside for an Indian community as opposed to reserving land from cession to establish a reservation. *See, e.g.*, 51 Cong. Rec. 3550, 3577-78 (Feb. 17, 1914). However, in practice, there is no substantive distinction given that rancherias are held in trust and are treated akin to reservations. *See, e.g.*, 56 Cong. Rec. 3938, 3959 (Mar. 23, 1918) ("The Indians cannot sell the land which is now being purchased for them. It is held in trust by the Government."); *see also* William Wood, *The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias*, 44 TULSA L. REV. 317 (2008).

[17] COHEN'S at § 1.03[6].

[18] *Id.* at § 1.04.

into American society. However, this shift ultimately proved to be a dismal failure and there are hundreds of Indian reservations in the United States, many whose original boundaries remain intact today notwithstanding the advent of non-Indian settlement within those boundaries.[19]

This new shift to integrate the Indian into mainstream America occurred with the end of treaty-making and an attempt to abandon the reservation system. Instead of tribe-by-tribe engagement, Congress began to engage in more comprehensive legislative approaches to address issues in Indian Country. The first major piece of legislation emblematic of the times was the General Allotment Act of 1887, which is considered the start of the "Allotment and Assimilation Era."[20] This law sought to "civilize" Indians and make them part of mainstream, agricultural American life by transforming them into private landowners.[21] The Supreme Court described the General Allotment Act as an effort to "put an end to tribal organization" and to "dealings with Indians . . . as tribes."[22] As a result of the General Allotment Act, approximately 90 million acres of Indian lands were lost, not including tens of millions of other acres loss as "surplus" lands.[23] This irregular loss of land led to the jurisdictional "checkerboard" status of land in Indian Country today where there is a mix of non-Indian and Indian landholdings. In addition, the policy created a new dilemma that continues to plague Indian land management—fractionation. Fractionation refers to the result of allotments passing down through generations to ever-increasing numbers of heirs, as a result of which individual Indians today hold highly fractionated interests, rendering the land useless except for highly symbolic value to its owner as the last vestige of Indian land.[24]

Stripping Indians of their land by means of the General Allotment Act was one of many federal policies aimed at assimilating the American Indian. Others included the Court of Indian Offenses established on reservations to impose western legal regimes in tribal communities, the sending of Indian children to boarding schools, and the adoption of regulations and policies to ban religious and cultural practices.[25] American Indians were also given U.S. citizenship through various allotment acts and universally in 1924.[26] Despite these efforts, ultimately the allotment and assimilation era become highly discredited in the early 1900s. The seminal Meriam Report in 1928 concluded allotment was a failure that resulted in deplorable living

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[19] *See supra* n.6.
[20] Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887). The General Allotment Act is also known as the Dawes Act for its creator, Sen. Henry Laurens Dawes; s*ee* COHEN'S at § 1.04.
[21] *Id.*
[22] United States v. Celestine, 215 U.S. 278, 290 (1909).
[23] COHEN'S at § 1.04.
[24] U.S. Department of the Interior, LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 2015 STATUS REPORT (2015), pp. 7-10, *available at* https://www.doi.gov/sites/doi.gov/files/uploads/Buy-Back_Program_2015_Status_Report.pdf.
[25] COHEN'S at § 1.04.
[26] Act of June 2, 1924, Pub. L. 68-175, 43 Stat. 253[hereinafter IRA].

conditions for American Indians.[27] This failed effort allowed for another shift in federal Indian policy to more support for tribal identity and governance.

The "Indian Reorganization Era" commenced with the landmark Indian Reorganization Act ("IRA") in 1934.[28] The Supreme Court held that the "overriding purpose" of the IRA was to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[29] The Court further concluded that the IRA's purpose was to "rehabilitate the Indian's economic life," and "give the Indians the control of their own affairs and of their own property."[30] As Commissioner Collier acknowledged in his testimony before Congress during the introduction of the IRA:

> [t]he Indians are continuing to lose ground; yet Government costs must increase, while the Indians must still continue to lose ground, unless existing law be changed. . . . While being stripped of their property, these same Indians cumulatively have been disorganized as groups and pushed to a lower social level as individuals . . . . The disastrous condition peculiar to the Indian situation in the United States . . . is directly and inevitably the result of existing law – principally, but not exclusively, the allotment law and its amendments and its administrative complications.[31]

To that end, the IRA included provisions designed to encourage Indian tribes to reorganize and to strengthen Indian self-governance. Congress authorized Indian tribes to adopt their own constitutions and bylaws[32] and to incorporate.[33] It also allowed the residents of reservations to decide, by referendum, whether to opt out of the IRA's application.[34] In service of the broader goal of "recogn[izing] [] the separate cultural identity of Indians," the IRA encouraged Indian tribes to revitalize their self-government and to take control of their business and economic

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[27] The Institute for Govt. Research, Studies in Administration, THE PROBLEM OF INDIAN ADMINISTRATION (Johns Hopkins Press 1928 [hereinafter "Meriam Report"] at 461 n.7, 470.

[28] Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479).

[29] Morton v. Mancari, 417 U.S. 535, 542 (1974).

[30] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) [hereinafter *Mescalero*] (quoting H.R. Rep. No. 73-1804, (1934), and 78 CONG. REC. 11125 (1934) (statement of Sen. Wheeler). *See also* Meriam Report at 3-4, 189-345 (detailing the deplorable status of health); *id.* at 8, 430-60, 677-701(poverty); *id.* at 346-48 (education), *id.* at 460-79 (loss of land). The IRA did not confine itself to addressing the ills of allotment, as evidenced by the inclusion of Pueblos in the definition of "Indian tribe." 25 U.S.C. § 479.

[31] *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Committee on Indian Affairs*, Seventy-Third Congress, Second Session, 73d Cong. 15-16 (1934) [hereinafter House Hearings].

[32] 25 U.S.C. § 476.

[33] 25 U.S.C. § 477.

[34] 25 U.S.C. § 478.

affairs.[35] Congress also sought to assure that tribes maintained a solid territorial base by, among other things, "put[ting] a halt to the loss of tribal lands through allotment."[36] While laudable goals did not always achieve positive results on the ground, the IRA is still very relevant today. Many tribes operate governments under IRA constitutions. Tribes routinely ask Interior to place their fee lands into trust status under this law, and the Indian preference remains applicable today in hiring.[37] Congress also amended the IRA in 1994 to ensure that the United States equally treats all tribes regardless when they were federally-recognized, as well as to ensure that any federal determination that creates different classes of tribes will have no effect.[38] Soon after the IRA, Congress in 1946 established the Indian Claims Commission with the goal of resolving native land claims and trust accounting and management claims with finality, recognizing claims alleging a lack of "fair and honorable dealings."[39]

Despite making some progress during the Indian Reorganization Era, federal policy shifted backwards during the 1950s and 60s with the advent of the "Termination Era." Due to a variety of pressures and shifts in national politics in the aftermath of World War II, there was an aggressive push to reduce or eliminate federal programs and funds assisting tribes, to once again attempt to integrate American Indians into mainstream life, and to discharge the United States from its trust obligations to the tribes.[40] This push led to a number of "termination" statutes that ended the federal-tribal trust relationship with specific tribes.[41] This era also created the Relocation Program as a means to provide Native Americans vocational opportunities and integration into urban areas.[42] Another major legislative enactment during this time was P.L. 280, which transferred criminal and civil jurisdiction over Indian lands from federal to state governments in a number of states, namely California, Minnesota, Nebraska, Oregon, and

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[35] Graham Taylor, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM, 39 (1980); *see also* Act of June 18, 1934, 48 Stat. 984 ("An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form businesses and other organizations. . . .").

[36] *Mescalero*, 411 U.S. at 151.

[37] *See* 25 U.S.C. §§ 465, 472a.

[38] Pub. L. No. 103-263, 108 Stat. 709 (1994) (codified at 25 U.S.C. § 476(f)-(g)); *see also* Pub. L. 103-454, Title I, §104, 108 Stat. 4791(1994) (codified at 25 U.S.C. § 479a-1) (requiring Interior to publish a list of all Indian tribes recognized to be eligible for programs and services provided by the United States to Indians because of their status as such).

[39] Indian Claims Commission Act of 1946, Pub. L. No. 79-726, ch. 959, Act of August 13, 1946, 60 Stat. 1049.

[40] *See* H. Con. Res. 108, 83rd Cong. (1953), 68 Stat. B122 (providing that "it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States," and stating "the declared sense of Congress that" Indian tribes in certain states and their members "should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians").

[41] *See, e.g.*, Act of June 17, 1954, Pub. L. 83-399, 68 Stat.250 (providing for per capita distribution of Menominee tribal funds and terminating application of federal laws affecting Indians because of their status as Indians to Menominee tribal members).

[42] Indian Relocation Act of 1956, Pub. L. 84-959, Act of Aug. 3, 1956, 70 Stat. 986.

Wisconsin, and later Alaska.[43] Congress amended P.L. 280 in 1968 to allow the remaining States to assume such jurisdiction with the consent of the affected Tribe.[44]

As in prior eras, the profound impacts of the Termination Era era remain today. The Termination Era left many tribes with disastrous poverty and loss of tribal communities.[45] Since then, many of the terminated tribes have been restored, the trust claims eligible for filing under the Indian Claims Commission continue to be filed today under tolling statutes in the Court of Federal Claims.[46] Although the majority of P.L. 280 states continue to exercise jurisdiction over Indian lands some are returning jurisdiction to the United States.[47] There also remain significant urban Indian populations in cities across the west as a result of the Relocation Program.[48]

The final era is the one that we are presently living in and is described as the "Self-determination Era." With the advent of the civil rights movement in the early 1960s, other economic reform programs, and mobilization of Native activism, Congress and the executive branch repudiated the termination policy and renewed their support for tribal self-governance and sovereignty.[49] President Nixon is renowned for his support of Indian self-governance and repudiation of the termination policy, expressed in his special message to Congress in 1970 where he famously stated:

> Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.[50]

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[43] Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360, 1360 note).
[44] Pub. L. No. 90-284, title IV, §§ 401-402, 403, 82 Stat. 78 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1323).
[45] Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).
[46] *See, e.g.*, Pub. L. No. 111-8, 123 Stat. 524, 718-19 (2009).
[47] The Secretary of the Interior may grant retrocession requests after consultation with the Attorney General. Executive Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 21, 1968) (President Lyndon B. Johnson). *See, e.g.*, 44 Fed. Reg. 26,169 (May 4, 1979) (retrocession of jurisdiction by State of Oregon over Burns-Paiute Reservation); 50 Fed. Reg. 34,555 (Aug. 26, 1985) (retrocession of jurisdiction by State of Arizona over Pascua Yaqui Reservation); 65 Fed. Reg. 75,948 (Dec. 5, 2000) (retrocession of jurisdiction by State of Washington for the Tulalip Tribes).
[48] TINA NORRIS, PAULA L. VINES, & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS: THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION (Jan. 2012) p. 11, *available at* www.census.gov/history/pdf/c2010br-10.pdf.
[49] COHEN'S at § 1.07.
[50] Richard M. Nixon, Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564, 565 (July 8, 1970).

In the wake of this reaffirmation of tribal self-determination and self-government, the Indian Self Determination and Education Assistance Act of 1975, the Indian Financing Act of 1974, the Menominee Restoration Act of 1973, and the American Indian Policy Review Commission Report of 1977, among others, provided a powerful message from Congress to usher in this modern era of federal Indian policy.[51] New reforms in the decades to follow included the transfer from Interior to the tribes the management of and administration of education, governance, and social welfare programs under "638" contracts and self-governance compacts,[52] the treatment of tribes as states under a number of environmental laws such as the Clean Water Act and Clean Air Act,[53] and protection of cultural and religious practices in the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, and the Indian Arts and Crafts Act.[54] Congress also acted to enhance Indian education and protect Indian children in the foster care and adoption system during this era by enacting the Tribally Controlled Schools Act and the Indian Child Welfare Act.[55] These laws remain highly relevant and active in our modern age, providing tribes and the United States with the tools to administer numerous programs and services in Indian Country.

In the executive branch, nearly every administration in modern times has supported the self-determination policy and the unique government-to-government relationship between the United States and Indian tribes.[56] The most recent endorsement of the self-determination policy was President Obama's establishment of a White House Council on Native American Affairs with the

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[51] Indian Self-Determination and Education Assistance Act of 1975 (codified as amended at 25 U.S.C. §§ 450-458ddd); Indian Financing Act of 1974, Pub. L. 93-262, 88 Stat. 77 (codified as amended in scattered sections of 25 U.S.C.); Menominee Restoration Act of 1973, Pub. L. 93-197, 87 Stat. 770; AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT (May 17, 1977).

[52] Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994); Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988).

[53] 33 U.S.C. § 1377(e); 42 U.S.C. § 7601(d)(1)(A).

[54] 16 U.S.C. §§ 470aa-470mm; 25 U.S.C. §§ 3001-3013; 42 U.S.C. §§ 1996-1996a; 25 U.S.C. §§ 305-310.

[55] 25 U.S.C. §§ 2501-2511; 25 U.S.C. §§ 1901-1963.

[56] *See* President Barack Obama, Memorandum on Tribal Consultation (Nov. 5, 2009); Exec. Order No. 13,336, 69 Fed. Reg. 25,295 (May 5, 2004) (President George W. Bush) (to assist American Indian and Alaska Native students in meeting educational standards); Remarks to Indian and Alaska Native Tribal Leaders, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON (Apr. 29, 1994); Statement Reaffirming the Government-to- Government Relationship Between the Federal Government and Indian Tribal Governments, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE H. W. BUSH (Jun.14, 1991); Statement on Indian Policy, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN (Jan. 24, 1983); Remarks at a Meeting with American Indian Leaders, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GERALD R. FORD (July 16, 1976); Special Message on Indian Affairs, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD M. NIXON (July 8, 1970); Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON (March 6, 1968).

Secretary of the Interior serving as the Chair.[57] The Order requires cabinet-level participation and interagency coordination for the purpose of "establish[ing] a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities."

The road to the present state of embracing the government-to-government relationship with tribes has been a tumultuous one. Over the course of history, the United States has adopted less than honorable laws and policies that sought to remove and disempower tribes, outlaw their cultural identity and political systems, and forcibly integrate them into American society. Yet a persistent thread in the law recognizing the unique sovereign status of tribes and the trust relationship with the United States has persevered to become the prevailing theme today. While many challenges remain, it would be hard to imagine a future era where the fate of tribes would be in jeopardy akin to prior chapters in history.

II. The Trust Responsibility

With the benefit of the foregoing historical overview of federal Indian law and policy, the following discussion focuses on the legal underpinnings of the trust responsibility. This doctrine originated from the period of European contact and the establishment of the United States. The special trust relationship between Indian tribes and the United States is based on the inherent sovereignty of Indian tribes, treaties, the Constitution, Supreme Court precedent, and executive orders and legislative enactments. Like other aspects of Indian law and policy, this particular doctrine has evolved over time based on various influences.

A foundational principle at the heart of the doctrine is that Indian tribes are sovereign governments that possess inherent sovereignty that pre-dates European contact and the Constitution.[58] Upon the establishment of the United States government, the tribes were, and continue to be, "self-governing sovereign political communities."[59] This separate sovereign status was recognized in treaties and executive orders during the 1800s, as well as through the protection of Indian lands from alienation without consent from the Federal government in the Non-Intercourse Act.[60]

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[57] Exec. Order No. 13647, 78 Fed. Reg. 39, 539 (July 1, 2013)(establishing the White House Council on Native American Affairs).
[58] *See, e.g.*, United States v. Lara, 541 U.S. 193, 197 (2004).
[59] Wheeler v. United States, 435 U.S. 313, 322-23 (1978).
[60] 25 U.S.C. § 177. The Non-Intercourse Act is the name given to a series of statutes enacted between 1790 and 1834 barring the purchase of Indian lands without the consent of the federal government.

The Supreme Court also developed an extensive body of precedent that defines the scope of Indian tribes' political status and their relationship to the United States. In the landmark Cherokee cases in the 1830s, namely *Cherokee Nation v. Georgia*[61] and *Worcester v. Georgia,*[62] the Supreme Court addressed conflicts regarding whether state law applied within the Cherokee Nation's territory. The Court legally defined the unique federal-tribal relationship as that of a "ward to his guardian," and recognized tribes as "domestic dependent nations."[63] The Court also concluded that Georgia law had no effect within the Cherokee Nation, as that would "interfere forcibly with the relations established between the United States and the Cherokee nation…."[64] In its analysis the Court considered Cherokee treaties that "explicitly recognize[ed] the national character of the Cherokees and their right of self-government . . . [and] assum[ed] the duty of protection, and of course, pledging the faith of the United States for that protection."[65] These principles – the existence of tribal nations and sovereignty, the exclusion of state authority, and the federal protection of Indian nations - all form the basis of the special trust relationship between the United States and Indian tribes.

Later Supreme Court interpretations would fashion Congressional authority, i.e. "plenary power," from this premise of a general responsibility to protect Indian interests.[66] The Court has repeatedly cited as a source of this authority the Indian Commerce Clause, which provides that Congress shall have the power "[t]o regulate Commerce . . . with the Indian Tribes."[67] The Court has concluded that the scope of the plenary authority is vast and exclusive, whereby Congress is vested with the authority to legislate regarding the scope of the trust responsibility, the scope of tribal authority, the provisions of services and benefits, and the application of special protections or treatment based on the political status of Indian tribes.[68] Combined with the Supremacy Clause in the U.S. Constitution, the notion of federal preemption of state laws in the realm of Indian affairs is also pervasive.[69]

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[61] 30 U.S. (5 Pet.) 1 (1831).
[62] 31 U.S. (6 Pet.) 515 (1832).
[63] *Cherokee Nation*, 30 U.S. at 17.
[64] *Worcester*, 31 U.S. at 561.
[65] *Id.* at 556.
[66] *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 169 (1982).
[67] U.S. CONST. art. I, § 8, cl. 3; *see also Mancari*, 417 U.S. at 551-52 (citing Indian Commerce Clause as among the sources of Congressional authority to legislate in the field of Indian affairs).
[68] *See, e.g.*, *Lara*, 541 U.S. at 200(describing Congressional authority to legislate in the field of Indian affairs as "plenary and exclusive").
[69] COHEN'S at § 5.01[1]; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (holding no state taxation given the pervasive federal regulation of timber on the reservation and the underlying tradition of Indian sovereignty over their territory, and a "particularized inquiry" showing assessment of state motor carrier license tax would obstruct federal policies).

These well-established principles form the basis of the trust relationship between the United States and Indian tribes. Through Supreme Court jurisprudence, the scope of the trust duty has evolved over time with a gradual narrowing from a former recognition of a broad, historically-based trust relationship to a modern day, formulaic test arising from contentious and costly litigation giving preference to statutorily-defined fiduciary duties. Beginning with the *Mitchell* decisions more than thirty years ago,[70] and most recently in 2011's *United States v. Jicarilla Apache Nation*,[71] the Court has grown more reluctant to view the United States as completely analogous to a private trustee subject to common law standards, and now generally favors an approach that requires clear statutory direction in creating a trust obligation with money mandating damages.[72] However, tribes continue to assert that there is room for common law fiduciary standards to fill "gaps" not present in the statutory framework,[73] and that comprehensive and pervasive federal control gives rise to an enforceable trust duty.[74]

In the *Mitchell* cases, the Quinault Tribe (now the Quinault Indian Nation) alleged mismanagement of timber resources by the United States. The Court rejected certain statutes as a basis for a trust duty, but found the necessary elements of a common-law trustee on account of the Department's "elaborate control" over Indian forest resources, and on account of the statutes and regulations at issue which "clearly establish[ed] fiduciary obligations of the Government in the management and operation of Indian lands and resources." These statutes could "fairly be interpreted as mandating compensation" for damages sustained.[75] Rejecting the Government's position that duties imposed by these statutes could be enforced through declaratory, injunctive, or mandamus relief, the Court found such prospective equitable remedies to be "totally inadequate," because a "trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement."[76]

Twenty years later, the Court revisited the *Mitchell* decisions in the context of evaluating Interior's role in approving coal lease royalty rates negotiated between the Navajo Nation and Peabody Coal.[77] The Nation asserted that the Indian Mineral Leasing Act of 1938, the Indian Mineral Development Act of 1982, and/or 25 U.S.C. Section 399 provided the substantive law to

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[70] United States v. Mitchell, 445 U.S. 535 (1980) [hereinafter *Mitchell I*]; United States v. Mitchell, 463 U.S. 206 (1983) [hereinafter *Mitchell II*].

[71] United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011).

[72] The waiver of the United States' sovereign immunity for breach of trust claims seeking monetary damages lies in the Tucker Act, the Indian Tucker Act, and the Little Tucker Act, which provide for Court of Federal Claims review. 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1505; 28 U.S.C. § 1346(a)(2). Equitable relief claims are brought under the Administrative Procedures Act in federal district court. 5 U.S.C. §§ 701-706.

[73] Jicarilla Apache Nation v. United States, 100 Fed. Cl. 726, 736-738 (2011) (applying common law principles to "flesh out" general trust duties once a fiduciary relationship is established); Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (stating that the "general 'contours'" of the trust duty may be defined by statute but that "the interstices must be filled in through reference to general trust law.").

[74] *Cobell*, 240 F.3d at 1098-99 (quoting *Mitchell II*, 463 U.S. at 225).

[75] *Mitchell II*, 463 U.S. at 225-26.

[76] *Id.* at 227.

[77] United States v. Navajo Nation, 537 U.S. 488 (2003) [hereinafter *Navajo I*].

bestow trust obligations upon the Government, whose breach was actionable before the Court of Federal Claims. The Court detailed that a tribe must clear two hurdles in order to successfully invoke jurisdiction under the Indian Tucker Act: 1) the tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and that the Government has failed to faithfully perform those duties; and 2) the source of substantive law must be fairly interpreted to mandate compensation for damages as a result of that breach of those duties.[78] In declining to either give weight to the Government's "comprehensive control" over coal in Indian country or to rely on common law trust principles, the Court noted that in the absence of "a specific, applicable, trust creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating. Thus, neither the Government's 'control' over coal nor common law trust principles matter."[79]

That same term, the Court in *United States v. White Mountain Apache Tribe* offered a counter-point by affirming the White Mountain Apache Tribe's claims for repair and upkeep of the Fort Apache Military Reservation. There, the Court viewed Interior's control over the trust resource in light of common law trust principles as creating a money-mandating trust obligation.[80] In evaluating a 1960 statute directing the Reservation to be held in trust for the Tribe subject to the Secretary of the Interior's right of use, the Court found its language went far beyond a bare trust and expressly defined a fiduciary relationship where the Government had the discretion to make direct use of the trust corpus: control that was "at least as plenary" as the authority over timber resources in *Mitchell II*.[81] The level of control granted by statute, coupled with the express trust-creating language, brought the Court to confirm the common law duty of a trustee to preserve and maintain trust assets under "the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch."[82] In rejecting the Government's suggestion that the proper remedy for the Tribe was injunctive or equitable relief, the Court noted that such an approach would "bar courts from making the Tribe whole for deterioration already suffered, and shield the Government against the remedy whose very ability would deter it from wasting trust property in the period before a Tribe has gone to court for injunctive relief."[83]

The Court would reiterate a narrow interpretation of the trust duty in a second *Navajo* case, holding that the United States was not liable for approval of amendments to a coal lease between the Navajo Nation and Peabody Coal for an inadequate royalty rate, notwithstanding that the Secretary of the Interior had *ex parte* contact with Peabody Coal during negotiations.[84] The Court concluded that since the Indian Mineral Leasing Act promoted self-determination through empowering the tribe to negotiate the lease, the role of the Secretary in mere approval of the

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[78] *Id.* at 506.
[79] *Id.*
[80] United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003).
[81] *Id.* at 474-75.
[82] *Id.* at 475.
[83] *Id.* at 479.
[84] Navajo Nation v. United States, 537 U.S. 488 (2003) [hereinafter *Navajo II*].

amendment could not trigger a trust duty.[85] Without an enforceable statutory duty, the Court held the Nation had no cause of action under the Indian Tucker Act.[86]

Most recently in 2011 in *Jicarilla Apache Nation*, the Court had the opportunity to apply the frameworks established in the *Mitchell*, *Navajo*, and *White Mountain Apache* decisions and evaluate whether notions of a common law fiduciary exception to the attorney-client privilege could compel the Government to turn over to the Tribe documents it wished to withhold from production in litigation.[87] While acknowledging that *Mitchell* and *White Mountain* held the management of the tribal trust bore some resemblance to a private trustee, the Court found common law principles inapplicable, ultimately holding the trust obligations in this instance were expressly governed by statute, and that the Government acted pursuant to its sovereign interests rather than in the role of a private trustee.[88]

In sum, the Court's modern day precedent has resulted in a predominant theme in the litigation context that the scope of the United States' trust responsibility to the tribes is statutorily-defined. It remains to be seen whether the courts will deviate from or provide exceptions to this approach in the years to come. Regardless, in the policy realm there is more flexibility to provide continued support for the policy of tribal self-determination, which offers greater opportunities for tribes to manage their affairs, with a simultaneous commitment by the United States to provide services and programs in Indian country in a trustee capacity.

III. Additional Basic Legal Principles in Federal Indian Law

In addition to the trust responsibility, there are a number of other prevailing legal principles that have survived the test of time regarding the nature and scope of tribal sovereign authority, their land status, and with regard to particular statutory enactments. A general overview is provided below.

Some well-established legal principles define the contours of tribal sovereignty. First, like other sovereigns, tribes are immune from suit absent an express waiver or congressional abrogation of that immunity.[89] Second, the status of tribes as sovereigns has led to the principle that special treatment of tribes or tribal members is not unconstitutional since their unique status is based on a political classification, not a racial one.[90] Moreover, given that tribes are sovereign entities distinct from the United States, Indian tribes are not subject to the Bill of Rights.[91] Instead, they

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[85] *Id.* at 511.
[86] *Id*. at 514.
[87] *Jicarilla Apache Nation*, 564 U.S. at 178.
[88] *Id.* at 178-83, 186-87.
[89] Michigan v. Bay Mills Indian Cmty., 572 U.S. ___, 134 S. Ct. 2024, 2030-31 (2014) ("[w]e have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)" (quoting Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 756 (1998) (alteration and parenthetical in *Bay Mills*)).
[90] *Mancari*, 417 U.S. at 553, n.24.
[91] Talton v. Mayes, 163 U.S. 376 (1898).

are subject to the Indian Civil Rights Act of 1968,[92] which is customized to the unique cultural and political status of tribal governments. For example, some tribes are theocracies so there is no requirement for separation of church and state, and given economic challenges facing tribes there is not an automatic right to defense counsel. The latter issue is pending before the Supreme Court in *United States v. Bryant* on the question of whether an uncounseled tribal court conviction can count as a predicate-offense for purposes of a federal prosecution under 18 U.S.C. Section 117(a), which makes it a federal crime to "commit[] a domestic assault within . . . Indian country."[93] Third, given the separate sovereign status of tribes, double jeopardy does not bar the prosecution in both tribal court and a federal or state court arising out of the same incident because tribes are separate sovereigns.[94]

Another broad category in Indian law relates to tribal lands. Such land typically is held in trust or restricted fee by the United States on behalf of the tribe, and as a result, cannot be sold without federal approval and is generally free from state authority.[95] Tribes can acquire land in fee simple and request that Interior accept that land into trust status pursuant to the IRA via the "fee to trust" process, although in 2009 in the *Carcieri* case the Supreme Court requires a showing that the tribe was "under federal jurisdiction" in 1934—the year that the IRA was passed.[96] Tribes may hold trust or restricted fee lands located within or outside reservation boundaries, or may not have a formal reservation. With regard to reservations, there have been legal challenges by states or non-Indian inhabitants alleging that a reservation has been diminished in size or entirely disestablished. However, Supreme Court precedent strongly requires a clear, unequivocal expression by Congress to change the contours of a reservation and the subsequent demographics of the area are the least probative evidence.[97] For example, the Supreme Court ruled this term in *Nebraska v. Parker* that the Omaha reservation in Nebraska established by treaty remained intact, notwithstanding the sale of lands to non-Indians under subsequent congressional acts.[98] One other concept associated with tribal land is federally-protected water rights. Many tribes particularly in the West hold reserved water rights that are senior in priority and based on the *Winters* doctrine, which stands for the principle that a tribe is entitled to water rights sufficient to fulfill the purposes of its reservation.[99]

With regard to criminal jurisdiction, the Supreme Court in *Oliphant v. Suquamish Indian Tribe* ruled that Indian tribes do not have criminal jurisdiction over non-Indians.[100] The Court

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[92] 25 U.S.C. §§ 1301-1304.
[93] *See* United States v. Bryant, 769 F.3d 671 (9th Cir. 2014), *cert. granted* 2015 U.S. LEXIS 7929 (2015) (argued Apr. 19, 2016).
[94] United States v. Wheeler, 435 U.S. 313 (1978).
[95] COHEN'S at § 15.06.
[96] Carcieri v. Salazar, 555 U.S. 379 (2009); *see also* The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, Op. Solic. Interior M-37029 (Mar. 12, 2014), *available at* https://solicitor.doi.gov/opinions.html.
[97] Nebraska v. Parker, 577 U.S. ___, 136 S. Ct. 1072, 1078-79 (2016) (citing Solem v. Bartlett, 465 U.S. 463, 467-68, 470-72 (1984)).
[98] *Id.* at 1082-83.
[99] Winters v. United States, 207 U.S. 564 (1908).
[100] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

subsequently ruled that Indian tribes did not have criminal jurisdiction over non-member Indians;[101] however, Congress in the "*Duro* fix" authorized Tribes to exercise their inherent authority to prosecute non-member Indians,[102] and the Supreme Court upheld Congress's authority to do so.[103] Most recently in 2013, given the alarming rates of domestic violence in Indian Country, Congress in the Violence Against Women Act recognized tribes' inherent authority to prosecute certain non-Indian domestic violence offenders in tribal court.[104] Tribes are beginning to assert this jurisdiction today. The federal government has criminal jurisdiction to prosecute major crimes perpetrated by Indians in Indian country.[105] For other offenses, there is a complex mosaic of tribal, federal, and state jurisdiction depending on the identity of the offender and victim, and on the location of the crime.[106] Often cross-deputization agreements are used to navigate complex jurisdictional issues in Indian country.

On the civil jurisdictional side of the ledger, tribal governments have jurisdiction over their members within their territories.[107] The Supreme Court also has upheld tribal assertion of regulatory authority over non-Indians, such as in the arena of taxation, licensing, or land management.[108] The Court has placed tests or limits on the scope of tribal authority if non-Indians are involved on matters on fee lands within the reservation,[109] where Indians on Indian lands are subject to state process,[110] or where a claim arises on state rights-of-way through Indian lands.[111]

The landmark case of *Montana v. United States* established the test to determine whether tribes have civil jurisdiction over non-members for activity occurring on fee land. The two-prong test asks (1) whether there has been a consensual relationship between the non-Indian and the tribe through "commercial dealings, contracts, leases, or other arrangements," or (2) whether the tribe may exercise inherent authority because the conduct at issue "threatens or has some direct effect

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[101] Duro v. Reina, 495 U.S. 676 (1990).
[102] Pub. L. 101-511, Title VIII, § 8077(b)-(c) 104 Stat. 1892-93 (Nov. 5, 1990) (codified at 25 U.S.C. § 1301(2)).
[103] *Lara*, 541 U.S. at 210.
[104] Violence Against Women Reauthorization Act of 2013, 113 Pub. L. No. 4,127 Stat. 54 (March 7, 2013) (codified in scattered sections of 25 U.S.C.).
[105] 18 U.S.C. § 1153.
[106] COHEN'S at § 9.
[107] *Id.* at § 7.02[1].
[108] *See, e.g.*, *Merrion*, 455 U.S. at 169 (holding that tribe had authority to impose oil and gas severance tax on non-Indian company operating on tribal lands); Quechan Tribe v. Rowe, 531 F.2d 408 (9th Cir. 1976) (holding that the tribe has authority to regulate non-Indians who enter the reservation to hunt and fish); Water Wheel Camp Recreational Area, Inc. v. Larance, 642 F.3d 802 (9th Cir. 2011) (holding absent sufficient state interest, tribe had regulatory and adjudicative jurisdiction over non-Indians).
[109] Montana v. United States, 450 U.S. 544 (1981); *see also* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (holding that Navajo Nation could not levy tax on overnight hotel guest located on fee land within reservation).
[110] Nevada v. Hicks, 533 U.S. 353 (2001) (holding no tribal court jurisdiction over tribal member's claims against state officials for conducting a search warrant on tribal member's Indian land).
[111] Strate v. A-1 Contractors, 520 U.S. 438 (1997) (holding there was no tribal court jurisdiction to review non-Indian plaintiffs' claim against non-Indian truck driver for accident on state highway within reservation boundaries).

on the political integrity, the economic security, or the health or welfare of the tribe."[112] Courts have applied the *Montana* test in a variety of ways based on the unique facts in each case.

Currently before the Supreme Court is *Dollar General Corp. v. Mississippi Band of Choctaw Indians*,[113] case where a tribal court has asserted jurisdiction over the store to review a tort claim filed on behalf of an Indian minor who alleges sexual assault on the part of the Dollar General store manager. The company operates a Dollar General store on tribal trust land pursuant to a business license issued by the Tribe and has leased the premises since 2000 from an entity owned by the Tribe. The United States appeared as *amicus curiae* in support of the Tribe and the case is fully argued and pending before the Court. The outcome of the court's ruling will inform the scope of tribal civil adjudicatory jurisdiction involving non-members on tribal trust property moving forward.

Lastly, there are many federal laws that regulate specific activity involving Indian tribes, such as in the areas of education, gaming, child welfare, natural resources management and development, and protection of cultural resources. It would be too complicated here to discuss these laws in depth; however, a short discussion of two laws that Interior administers is set forth below.

With regard to gaming, in 1988 Congress enacted the Indian Gaming Regulatory Act ("IGRA") to address the dire need for economic development in Indian country and to provide a source of revenue to support tribal self-governance.[114] IGRA also provides a check and balance system between tribal and state sovereign authority to allow for intergovernmental compacts, approved by the Secretary of the Interior, for class III forms of gaming on "Indian lands."[115] IGRA requires that gaming revenue be used for tribal programs and welfare, that states negotiate compacts in good faith, prohibits state taxation of gaming revenue, and imposes certain restrictions on lands acquired after 1988.[116] Indian gaming is highly regulated by the National Indian Gaming Commission which works in concert with Interior to make legal determinations

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[112] *Montana*, 450 U.S. at 565-566.

[113] Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014), *cert. granted sub nom.* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, ___ U.S. ___, 135 S. Ct. 2833 (2015) (argued Dec. 7, 2015).

[114] Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701-2721). In enacting IGRA, Congress found that (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal government revenue; (2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts; (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands; (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self - sufficiency, and strong tribal governments; and tribes have the exclusive right to regulate gaming activity if the gaming activity is not specifically prohibited by Federal law, and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701.

[115] 25 U.S.C. § 2710(d)((1)(C); *see also* 25 U.S.C. § 2710(d)(3)(B).

[116] 25 U.S.C. § 2710(b)(2)(B) (limiting uses of gaming revenues to tribal programs and general welfare); 25 U.S.C. § 2710(d)(7)(B)(iii) (mandating that States negotiate in good faith); 25 U.S.C. § 2710(d)(4) (prohibiting state taxation); 25 U.S.C. § 2719(a) (imposing restrictions on gaming on Indian lands acquired after October 17, 1988).

and other authorizations regarding Indian gaming operations.[117] Today, 486 Indian tribes engage in gaming activities (class II or III) in 28 states, generating revenue estimated at $28.5 billion.[118]

Another area of focus is the protection of Indian children who are tribal members or eligible for such membership. Congress enacted the Indian Child Welfare Act ("ICWA") in 1978 to address the alarming rate of removal of Indian children from their families for placement with non-Indians.[119] ICWA establishes that the best interest of Indian children is not only to be in safe and loving homes, but also to not lose their cultural identity and integration as full-fledged members in a tribal community.[120] The statute imposes procedural and notice requirements on state courts, reinforces tribal court jurisdictional authority, and imposes placement preferences with extended family members, tribal members, or other tribes.[121] The Supreme Court's landmark case of *Mississippi Band of Choctaw Indians v. Holyfield* upheld Congress' intent in passing ICWA, stating that the act must "be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves."[122] Many of the challenges Congress identified in the 1970s remain today, and as a result, Interior recently issued comprehensive regulations that outline in detail the various requirements set forth in ICWA.[123] A more detailed discussion of ICWA and the new regulations is provided below.

IV. Current State of Indian Affairs at Interior[124]

The prior discussion on the historical background and legal overview of Indian law and policy sets the stage for the final discussion in this section, which provides a summary of Interior's current initiatives in federal law and policy in Indian Country.

At the beginning of the Obama Administration in 2009, one of the largest class action lawsuits in United States history was pending and had cast a very dark shadow over the trust relationship between the United States and Indian tribes. Nearly 500,000 individual Indians, under the

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[117] 25 U.S.C. § 2710(b)(2); *see also* 25 U.S.C. § 2710(d)(2)(B).

[118] National Indian Gaming Commission, Facts at a Glance (August 2015), *available at* http://www.nigc.gov/images/uploads/Fact%20Sheet%20August%202015.pdf.

[119] Pub. L. 95-608, § 2, 92 Stat. 3069 (Nov. 8, 1978) (codified at 25 U.S.C. §§ 1901-1963).

[120] 25 U.S.C. §§ 1901(4)-(5) (stating "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.").

[121] 25 U.S.C. § 1912 (imposing notice requirements on State courts), 1911 (Tribes have exclusive jurisdiction "as to any State" in child custody proceedings involving Indian child residing or domiciled on a reservation), 1915 (establishing placement preferences).

[122] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).

[123] The final ICWA regulations will be published in the Federal Register and can be found at http://www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm.

[124] *See* Appendix for an overview of Interior's offices and bureaus that are devoted to Indian Affairs matters.

leadership of Elouise Cobell, a member of the Blackfeet Tribe, had sued the United States for breach of trust, specifically alleging the failure to account for and properly manage individual Indian trust accounts for over a century. At the same time, approximately 100 tribes had similar breach of trust claims pending against the United States. These cases recounted darker periods in history, with accusations of mismanagement, neglect, fraud, and paternalism, to the detriment of generations of Native Americans.

Under the leadership of President Obama and former Secretary Ken Salazar, Interior along with the Department of Justice worked in a comprehensive and coordinated manner to settle the Cobell litigation, as well as nearly all of the other tribal trust cases. The Cobell litigation settled for $3.4 billion in 2010.[125] Upon the announcement of the Cobell settlement, President Obama stated:

> . . . I heard from many in Indian Country that the Cobell suit remained a stain on the Nation-to-Nation relationship I value so much . . . . I came to Washington with a promise to change how our government deals with difficult issues like this, and a promise that the facts and policies, and not politics, will guide our actions and decisions . . . . I congratulate all those in Indian Country that have waited for this news . . . .[126]

To date, approximately 86 tribes have settled their tribal trust cases, with proceeds of over $2.8 billion going to the tribes.[127]

In addition to the tribal trust settlements, the Department entered into the significant *Ramah* settlement for $940 million involving a nationwide class of tribes and tribal organizations, resolving a 25-year-old legal dispute related to contract support costs on February 23, 2016.[128] The settlement resolved claims that the government failed to appropriate sufficient funds to pay

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[125] It took an act of Congress to ratify the settlement, for among other reasons, to broaden the scope of the district court's jurisdiction to cover all potential claims including mismanagement of resources. Claims Resolution Act of 2010, Pub. L. 111-291, 124 Stat. 3064. Some class members challenged the settlement, but the settlement withstood challenge through the appeal process. The U.S. Supreme Court denied certiorari on June 24, 2010. Cobell v. Salazar, 561 U.S. 1020, 130 S. Ct. 3497 (2010). The Cobell Settlement included $1.9 billion to consolidate fractionated land interests and a Cobell Indian higher education scholarship program of up to $60 million.

[126] Statement by the President on the Settlement of Cobell Class-Action Lawsuit on Indian Trust Management (Dec. 8, 2009), *available at* https://www.whitehouse.gov/the-press-office/statement-president-settlement-cobell-class-action-lawsuit-indian-trust-management.

[127] *See* U.S. Dep't of the Interior, *Secretary Jewell Announces Historic $186 Million Settlement of Chickasaw and Choctaw Nations' Tribal Trust Lawsuit* (Oct. 6, 2015), *available at* https://www.doi.gov/pressreleases/secretary-jewell-announces-historic-186-million-settlement-chickasaw-and-choctaw.

[128] Salazar v. Ramah Navajo Chapter, 567 U.S. __, 132 S. Ct. 2181 (2012); Ramah Navajo Chapter v. Jewell, 2016 U.S. Dist. LEXIS 27624 (D.N.M. Mar. 2, 2016). The author, a member of the Navajo Nation, has voluntarily recused herself from this matter.

the tribes' contract support costs when it contracted and compacted with tribes and tribal organizations to operate BIA programs like law enforcement, forest management, fire suppression, road maintenance, housing, education, and other support programs. With the advent of these historic and unprecedented settlements, there has been less costly and adversarial litigation and more opportunities to partner with tribes to address the many pressing issues facing Indian Country.

To further reinvigorate the trust relationship, at the end of 2009, Interior established a Secretarial Commission on Trust Reform to obtain important recommendations from a panel of esteemed Indian law and policy experts.[129] In December 2013, the Commission provided a Final Report and Recommendations to Interior calling for important reforms to strengthen the trust relationship. Pertinent to this discussion, in response to the Final Report in August 2014, Secretary Sally Jewell issued Secretarial Order No. 3335 ("Order"), entitled "Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries."[130] This Order reaffirms the trust relationship with all federally recognized tribes and their members, as well as sets forth seven guiding principles that bureaus and offices will follow to advance the role of Interior as a trustee to all federally recognized tribes. The seven guiding principles are as follows:

Principle 1: Respect tribal sovereignty and self-determination, which includes the right of Indian tribes to make important decisions about their best interests.

Principle 2: Ensure to the maximum extent possible that trust and restricted fee lands, trust resources, treaty rights, and similarly recognized rights are protected.

Principle 3: Be responsive and informative in all communications and interactions with Indian tribes and individual Indian beneficiaries.

Principle 4: Work in partnership with Indian tribes on mutually beneficial projects.

Principle 5: Work with Indian tribes and individual Indian beneficiaries to avoid or resolve conflicts to the maximum extent possible in a manner that accommodates and protects trust and restricted fee lands, trust resources, treaty rights, and similarly recognized rights.

Principle 6: Work collaboratively and in a timely fashion with Indian tribes and individual Indian beneficiaries when evaluating requests to take affirmative action to protect trust and restricted fee lands, trust resources, treaty rights, and similarly recognized rights.

[129] U.S. Dep't of the Interior, Sec. Order No. 3292 (Dec. 8, 2009).
[130] U.S. Dep't of the Interior, Sec. Order No. 3335 (Aug. 20, 2014).

Principle 7: When circumstances warrant, seek advice from the Office of the Solicitor to ensure that decisions impacting Indian tribes and/or individual Indian beneficiaries are consistent with the trust responsibility.

In concert with these principles and with the benefit of the historic tribal trust settlements, Interior has engaged in a number of important initiatives to support self-determination and build a stronger government-to-government relationship with the 567 federally-recognized Indian tribes. To name of few, Interior is close to reaching its goal of restoring 500,000 acres of land to Indian tribes through the IRA's land into trust process.[131] This effort will provide lands for government offices, healthcare clinics, senior citizen centers, housing, schools, and other important projects to support tribal services to its members. Interior has also proposed a regulation that for the first time would allow Alaska Natives to ask the Department to take land into trust under the IRA on their behalf.[132] In addition, Interior has made significant gains in the Land Buy Back Program, which was a key component of the Cobell settlement that provided $1.9 billion to acquire fractionated Indian land interests from voluntary sellers and transfer the consolidated trust parcels to tribes within a 10 year period. To date, 34 tribes have entered into agreements with Interior to consolidate their lands and the Program has paid more than $740 million to Indian landowners to restore nearly 1.5 million acres of land for tribes to put to beneficial use.[133]

In addition to rebuilding tribes' land base, Interior has also adopted several new regulations that streamline and give tribes more approval authority over the leasing of their lands for various purposes.[134] This effort includes the implementation of the recently-enacted Hearth Act, which provides that tribes may exercise their own approval authority for land use leases under tribal regulations that are approved by the Secretary.[135] The leases may be used for a variety of

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[131] *See* U.S. Dep't of the Interior, *Secretary Jewell Announces Obama Administration's Largest Land into Trust Acquisition for Tribal Nations* (Jan. 15, 2016) (announcing acquisition into trust of almost 90,000 acres for the Pueblo of Isleta, stating that "this Administration has taken a total of 397,268 acres into trust during the past seven years. That total represents almost 80 percent of the Administration's goal of placing 500,000 acres into trust by the end of the President's term."), *available at* https://www.doi.gov/pressreleases/secretary-jewell-announces-obama-administration%E2%80%99s-largest-land-trust-acquisition.

[132] *See* Proposed Rule, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648, 24,649 (May 1, 2014). The U.S. District Court for the District of Columbia has enjoined the Department from taking any land into trust in Alaska until final resolution of the pending appeal in the D.C. Circuit. Akiachak v. Jewell, 995 F.Supp.2d 7 (D.D.C. 2014).

[133] *See* U.S. Dep't of the Interior, *Three Additional Tribes Sign Agreements with Interior Department to Implement Land Buy Back Program* (May 25, 2016) (announcing that the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; the Winnebago Tribe of Nebraska; and the Confederated Tribes and Bands of the Yakama Nation in Washington have entered into agreements with Interior to consolidate their fractionated lands), *available at* https://www.doi.gov/pressreleases/three-additional-tribes-sign-agreements-interior-department-implement-land-buy-back.

[134] Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012, Pub. L. 112-151, 126 Stat. 1150 (codified at 25 U.S.C. § 415) (providing a voluntary, alternative land lease process).

[135] 25 U.S.C. § 415(h).

purposes, including for public, religious, educational, recreational, residential, or business purposes, and the development of natural resources (excluding minerals), such as for grazing or farming purposes.[136] Other recent regulations in the area of rights-of-way and renewable energy development also provide for greater tribal autonomy and less bureaucratic hurdles.[137] In the related category of water resources, the Department has achieved 33 Indian water rights settlements since 1978 (including 8 in the current administration), which includes funding for important infrastructure projects that ensure protection of the tribal senior water right.[138] Combined, these efforts provide support to tribes in their efforts to self-govern and manage their valuable resources and protect their land base.

Another major initiative has been the reform of Bureau of Indian Education schools located across the country. Interior is responsible for managing 169 elementary and secondary schools, 2 post-secondary schools (Southwestern Indian Polytechnic Institute and Haskell Indian Nations University), and grants for 28 tribally-controlled colleges and universities and 2 tribal technical colleges.[139] These schools serve approximately 48,000 individual students in 23 states.[140] In support of tribal self-governance and self-determination, the Department is shifting its policy to provide for greater tribal control of schools, promotion of cultural and native language curriculum, improved teacher quality, and upgrade dilapidated school facilities.[141] These efforts are aimed at building the next generation of tribal leaders through the empowerment and education of tribal youth.

In addition to education, the Department recently promulgated Indian Child Welfare Act ("ICWA") regulations.[142] Congress enacted ICWA in 1978 to address "the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."[143] The underlying basis for

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[136] *Id.* at § 415(a).
[137] Rights-of-Way on Indian Land, 80 Fed. Reg 72,492 (Nov. 19, 2015) (to be codified at 25 C.F.R. part 169); Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,439 (Dec. 5, 2012) (codified at 25 C.F.R. part 162).
[138] CHARLES V. STERN, CONG. RESEARCH SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS (2015).
[139] FISCAL YEAR 2017, THE INTERIOR BUDGET-IN-BRIEF FEBRUARY 2016, BH-85.
[140] *Id.* at BH-86.
[141] *See* U.S. Dep't of the Interior, *President Obama's FY 2017 Budget Request for Indian Affairs Increases Funding that Supports Strong, Resilient Tribal Nations for Today and Future Generations* (Feb. 9, 2016) (announcing budget increase requests to support Bureau of Indian Education reforms), *available at* http://www.bia.gov/cs/groups/public/documents/text/idc1-033085.pdf.
[142] The final ICWA regulations will be published in the Federal Register and can be found at http://www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm; *see also* Opinion Regarding Implementation of the Indian Child Welfare Act by Legislative Rule, Op. Solic. Interior M-37037 (June 8, 2016).
[143] *Holyfield*, 490 U.S. at 32.

ICWA is the "special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people."[144] In particular, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[145]

To address these concerns, Congress directed Interior to adopt regulations to establish minimum federal standards to apply in child custody placement decisions, which typically occur in state courts. The "most important substantive requirement imposed on state courts" by ICWA is the placement preference.[146] For adoptions, ICWA requires that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[147] ICWA requires similar placement preferences for pre-adoptive placement and foster care placement.[148] These preferences reflect "Federal policy that, where possible, an Indian child should remain in the Indian community. . . ."[149] ICWA also provides for tribal court jurisdiction in certain circumstances. Tribal jurisdiction is generally exclusive over Indian child custody proceedings for on-reservation children,[150] and State courts must generally transfer proceedings involving an Indian child living off-reservation to Tribal court upon a petition by the child's parent, Indian custodian, or Tribe.[151] Interior's newly-finalized regulations are the first comprehensive regulations to implement the foregoing provisions of ICWA, as well as a myriad of other provisions. The impetus for the regulations was continued over-representation of Indian children in state child custody proceedings, as well as inconsistent application of ICWA standards by courts across the country.[152] Interior will be holding trainings across the country in the months

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[144] 25 U.S.C. § 1901.
[145] *Id.* at § 1901(3).
[146] *Holyfield*, 490 U.S. at 36-37.
[147] 25 U.S.C. § 1915(a).
[148] *Id.* at § 1915(a)-(b).
[149] House Report, *supra* n.3, at 23; *see also* Michael J., Jr. v. Michael J., Sr., 7 P.3d 960, 963 (Ariz. Ct. App. 2000) ("The Act is also based on the notion that protecting tribal interests best serves the interests of Indian children."); In re Appeal in Pima Cty. Juvenile Action No. S-903, 635 P.2d 187, 189 (Ariz. Ct. App. 1981) ("The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.").
[150] 25 U.S.C. at § 1911(a).
[151] *Id.* at § 1911(b). The exceptions to this rule are when there is good cause for State court jurisdiction, the Tribal court declines jurisdiction, or either of the child's parents objects to the transfer. *Id.*
[152] *See, e.g.*, ATTORNEY GENERAL'S ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 87 (Nov. 2014); Casey Family Programs, *Indian Child Welfare Act: Measuring Compliance* (2015), *available at* www.casey.org/media/measuring-compliance-icwa.pdf.

ahead to provide technical assistance for implementing the new regulations.[153] With more consistent application of ICWA, tribes will be able to participate in the placement of tribal member children in its role as an interested sovereign.

Another high priority for the Department is ensuring the public health, welfare, and safety of tribal communities. Violent crime rates in Indian country are more than 2.5 times the national rate; some reservations face more than 20 times the national rate of violence.[154] Certain tribes lack the funding and infrastructure to address these problems.[155] Indian country correctional facilities are inadequate in number with limited funding, with few alternatives to incarceration.[156] The Tribal Law and Order Act ("TLOA") was enacted in 2010 with the goal of addressing these problems and providing more tools and resources to combat crime in Indian Country.[157] Interior has been a partner with the Department of Justice in the implementation of the TLOA. Specific initiatives of Interior include providing more training options for law enforcement and judicial officials serving in tribal governments, the issuance of special law enforcement commissions to broaden the bench for enforcement of federal criminal laws on reservations, improved data collection and sharing processes (e.g., NICS, CJIS), support for and expansion of tribal court resources, and the creation of alternative treatment programs.[158] These measures are all aimed at empowering tribal governments to work with federal, state, and local partners to provide for safer communities in Indian country.

One significant change to the scope of tribal criminal jurisdiction was recently achieved in the Violence Against Women Act of 2013 ("VAWA"). American Indians are 2.5 times more likely to experience sexual assault crimes compared to all other races, and one in three Indian women reports having been raped during her lifetime.[159] VAWA was enacted to address these alarming rates of crime against Native women by improving the ability of federal and tribal authorities to respond to domestic violence offenders and protect victims in a variety of ways. The Act recognizes the tribes' inherent authority to exercise "special domestic violence criminal

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[153] *See* U.S. Dep't of the Interior, *Acting Assistant Secretary Roberts Issues Final Regulations to Strengthen Implementation of the Indian Child Welfare Act* (June 8, 2016) (announcing finalization of the ICWA regulation), *available at* http://www.bia.gov/cs/groups/public/documents/text/idc1-034237.pdf.

[154] U.S. DEPARTMENT OF JUSTICE, TRIBAL LAW AND ORDER ACT: LONG TERM PLAN TO BUILD AND ENHANCE TRIBAL JUSTICE SYSTEMS 2 (Aug, 2011).

[155] *Id.*

[156] *Id.*

[157] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261(codified as amended in various sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.)

[158] *Tribal Law and Order Act – Five Years Later: How Have the Justice Systems in Indian Country Improved?: Hearing Before the S. Comm. on Indian Affairs,* 114th Cong. (2015) (statement of Lawrence S. Roberts, Principal Deputy Asst. Secretary for Indian Affairs, U.S. Dep't of the Interior).

[159] U.S. DEPARTMENT OF JUSTICE, PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 23 (Nov. 2000).

jurisdiction" over those who commit acts of domestic violence or dating violence, or who violate certain protection orders in Indian country, regardless of their Indian or non-Indian status.[160] VAWA also advances tribal self-determination by recognizing that tribes have full civil jurisdiction to issue and enforce protection orders involving any person regardless of race.[161] Certain tribes participated in a pilot program when the law was first enacted, and as of March, 2015, all tribes can voluntarily elect to exercise their criminal jurisdiction over offenders for domestic violence, dating violence, and criminal violations of protection orders.[162] Other parameters as to what kinds of crimes are covered based on identity of parties, location of offense, and nature of offense apply, as well as certain rights provided to defendants.[163] The VAWA legislation is emblematic of the themes discussed throughout this paper where tribal inherent sovereign authority remains dormant, yet alive and available to be resurrected to ensure tribal governments have the tools necessary to govern effectively.

Conclusion

We are presently in a new age of engagement between the United States and Tribes where contentious battles in the courtroom have been settled and a path for reconciliation and collaboration between sovereigns is now open. One prevailing theme throughout this area of law is how profoundly the past history of federal Indian law and policy impacts the present state of affairs. The special trust relationship between the tribes and United States has endured many difficult chapters in the past, but notwithstanding these hardships and challenges, the relationship will likely remain resilient for generations to come.

[160] VAWA 2013 at § 904(b)(1).
[161] *Id.* at § 905(e).
[162] *Id.* at § 908.
[163] *Id.* at § 904(b)-(d).

APPENDIX

Department of the Interior Offices and Bureaus Responsible for Indian Affairs

Congress established the U.S. Department of the Interior in 1849 and vested the Secretary of the Interior with the "supervisory and appellate powers now exercised by the Secretary of the War Department in relations to all the acts of the Commissioner of Indian Affairs."[1] Today, the Secretary delegates her authority to the Assistant Secretary of Indian Affairs to oversee the majority of Indian affairs matters, along with the Special Trustee who implements specific trust accounting and management duties.[2] Under this structure, the bureaus that principally handle Indian affairs matters are the Bureau of Indian Affairs, the Bureau of Indian Education, and the Office of the Special Trustee. In addition, the Office of the Solicitor has a Division of Indian Affairs as well as other Indian law experts located in regional and field offices across the country. Below are some highlights of these offices' various roles and responsibilities.

The Bureau of Indian Affairs ("BIA") provides services to more than 2 million American Indians and Alaska Natives in the lower 48 states and Alaska.[3] The BIA provides a wide range of services and funding for tribal self-governance compacts and self-determination contracts, management of natural resources, land use authorizations, law enforcement, tribal justice support, and social service programs. These responsibilities include administration of mineral development on 56 million surface acres and 60 million subsurface acres of land, management and storage of water resources, protection of treaty hunting and fishing rights, support of tribal courts, administration of the Indian Child Welfare Act program, housing programs, and job placement and training programs. The BIA has regional directors and superintendents that oversee vast areas of Indian Country throughout the United States.

The Bureau of Indian Education ("BIE") manages a school system of 169 elementary and secondary schools and 14 dormitories providing educational services to 48,000 Indian students in 23 states.[4] The BIE also operates two post-secondary schools and administers grants for 28 tribally controlled colleges and 2 tribal technical schools.

The Office of Special Trustee ("OST") provides fiduciary guidance and management of tribal government trust accounts and individual Indian accounts, including the receipt, investment, disbursement and reporting of Indian trust funds, as well as real estate appraisals of Indian trust and restricted real property.[5] The OST manages nearly $4.9 billion held in accounts for more than 250 tribes and over 400,000 individual accounts. The OST also engages in the historical accounting of trust accounts, which also provides litigation support in a number of tribal trust lawsuits and settlements.

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[1] Act of Mar. 3, 1849, § 5, 9 Stat. 395 (1849).
[2] 25 U.S.C. §§ 2, 9; 25 U.S.C. § 4001.
[3] FISCAL YEAR 2017, THE INTERIOR BUDGET-IN-BRIEF FEBRUARY 2016, BH-86.
[4] *Id.*
[5] *Id.* at BH-98.

The Office of the Solicitor ("SOL") provides legal advice to the Department and has a Division of Indian Affairs in Washington DC and regional experts across the country specializing in federal Indian law. SOL provides legal advice on a wide variety of Indian law questions, including land into trust acquisitions, rights of way, trespass, leasing, mineral development and royalty collection, sovereign immunity, reservation boundaries, tribal jurisdiction, Indian Child Welfare Act, self-determination and self-governance issues, tribal taxation, federal preemption, water rights, treaty rights, tribal leadership disputes, Indian preference, eagle feather use and other religious freedom issues, Indian gaming, and environmental law matters. SOL also refers cases to the Department of Justice seeking participation of the United States in litigation protecting tribal hunting and fishing rights, reservation boundaries, tribal taxation authority, tribal court jurisdiction, and water rights protection.

The Solicitor has the authority to issue binding legal opinions on the Department.[6] The following in the field of Indian Affairs have been issued by the Solicitor since 2009: An interpretation of the Supreme Court's *Carcieri* decision to determine whether a tribe was under federal jurisdiction in 1934 and therefore eligible to have land taken into trust on its behalf; concluding that certain rivers within reservation boundaries are beneficially owned by Tribes and that reservation boundaries remain intact; examining the unique land status of New Mexico Pueblos when faced with mobile water boundaries; and the legal basis to enact regulations to implement the Indian Child Welfare Act.[7]

[6] M-Opinions are final legal interpretations on all matters within the jurisdiction of the Department of the Interior which are binding on all Departmental offices and officials. *See* 209 Interior's Departmental Manual § 3.2.A(11); *see also* 43 U.S.C. § 1455.

[7] The Meaning of "Under Federal Jurisdiction" for Purpose of the Indian Reorganization Act, Op. Soli. Interior M-37029 (Mar. 12, 2014); Opinion on the Boundaries of the Mille Lacs Reservation, Op. Solic. Interior M-37032 (Nov. 11, 2015); Boundary of the Skokomish Reservation Along the Skokomish River, Op. Solic. Interior M-37034 (Jan. 15, 2016); Opinion Regarding the Status of the Bed of the Clearwater River within the 1836 Treaty Boundaries of the Nez Perce Reservation (Idaho), Op. Solic. Interior M-37033 (Jan. 15, 2016); Applicability of the New Mexico Bureau of Land Management's Riparian Policy to Lands within the Boundaries of the Santa Clara Pueblo Grant, Op. Solic. M-37028 (June 21, 2013), Opinion Regarding Implementation of the Indian Child Welfare Act by Legislative Rule, Op. Solic. Interior M-37037 (June 8, 2016), *available at* https://solicitor.doi.gov/opinions.html.

WHEN LITIGANTS ARE RIGHTEOUSLY INDIGNANT:

MEDIATION TECHNIQUES FOR JUDGES, MEDIATORS & LAWYERS

NINTH CIRCUIT JUDICIAL CONFERENCE
2016

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PROGRAM OVERVIEW

Attorneys and parties in many different types of disputes and lawsuits often present as "righteously indignant." They believe they are right about the law, the facts, their negative views of their opponents, their philosophical or moral stances and their case analyses. And, they believe, their opponents are wrong. When the statutory basis for a lawsuit allows for shifting fees and costs to the loser, the tendency toward righteous indignation is especially strong.

These cases raise particular challenges. Judges, mediators and lawyers need tools and strategies to help participants make good decisions despite their deeply negative attitudes toward one another.

In this workshop, we share our understanding of the dynamics of these cases as well as some of the tools we find effective in handling them. The tools fall into three broad categories:

- Suggestions for convening and early intervention
- Interventions to use with the lawyers and parties
- Internal techniques for holding one's center in the presence of righteous indignation

MATERIALS

1. Outline for Phone Conference Before Mediation Session, adapted from Mediation Training Materials, U.S. District Court, Northern District of California

2. Cognitive Traps Affecting Righteous Indignation

3. "Mindfulness and Judging," Judge Jeremy D. Fogel, Director, Federal Judicial Center (FJC 2016)

4. Selected Bibliography

SUGGESTED OUTLINE FOR PHONE CONFERENCE BEFORE MEDIATION SESSION

I. INTRODUCTIONS

A. Introduce yourself
B. Make sure attorneys (and any participating clients) are introduced
C. If you intend to use first names, ask if this is okay
D. Emphasize your desire to serve needs of litigants and openness to suggestions within bounds of rule

Example: *"I want to make this process as useful for you and your clients as possible-and I am open, within the boundaries set by the court's rules, to your suggestions about steps we could take to improve the productivity of the mediation session."*

E. Ask if they've had experience with mediation

II. PURPOSES OF THIS CALL

A. Begin to build an effective working relationship with the participants on the phone conference
B. Let counsel/clients know what to expect and how to prepare
C. Diagnose potential problems, difficulties, and obstacles to resolution
   1. Readiness to mediate
   2. Psychological dynamics
   3. Authority issues
D. Decide on date, time, location, and who will attend

III. NATURE/STATUS OF THE CASE

A. Let them tell you a little about the case; perhaps ask some clarifying questions but do not allow the lawyers to get too far into arguing the merits
B. Demonstrate that you've read the pleadings and know enough about the area of law to be effective as the mediator
C. Determine the procedural posture of the case
   1. How much disclosure/discovery has been done or will be done by the mediation?
   2. Any pending motions?
   3. Any orders or stipulations?
   4. Any settlement discussions? Their status?

D. Determine the right timing for holding the mediation session

1. Is the case "ripe" for mediation, or would a delay be appropriate to allow for necessary disclosure/discovery or a ruling on a pending motion?
2. Are the parties and attorneys ready to discuss resolution, or is there a different timing that may give them a better chance to resolve the case?
3. What is the current deadline for holding the mediation?
4. If there is agreement that a delay in the mediation is appropriate and the current deadline is looming, have attorneys prepare a stipulation and proposed order for the assigned judge

IV. MEDIATION PROCESS

A. Ask counsel to familiarize themselves with relevant local ADR rules
B. Process is non-binding and confidential
C. Mediation is a flexible process and mediators differ widely in the way they prefer to work. Describe your mediation style and usual procedures. At a minimum, you should cover your practice concerning:
   1. The type of joint session and opening presentations you prefer;
   2. Use of separate caucuses, including the confidentiality rules you use for such caucuses;
   3. Participation by clients;
   4. Degree to which you will incorporate analysis of the strengths and weaknesses of the legal positions into the discussion;
   5. Use of written confidentiality agreement - if you intend to use one, send to all counsel in advance
D. If you are willing to adjust your style or process based on input from counsel, you should discuss this with them at this point

V. LOGISTICS

A. Determine:
   1. Location
   2. Date
   3. Time -- set aside half-day or whole day?

4. Who will attend?
    a. Emphasize importance of having appropriate representatives at the mediation session
    b. Which client representative will attend?
    c. Insurance representatives?
    d. Which attorneys?
    e. Special arrangements for phone or video participation?
5. Determine whether there are any particular physical or emotional needs and sensitivities that need to be accommodated

B. Remember: you are the "guardian" of the mediation process and owe it to the parties to use your best judgment to ensure that the session is effective and worthwhile
    1. Be sure you are comfortable that the parties and attorneys attending are the individuals who will ensure that the mediation session is productive and has a chance to lead to resolution
    2. If a party wants to participate by phone and you believe the likely result would be an ineffective mediation session, say so

VI. STATEMENTS

A. Content
    1. You may ask for a short discussion of specified legal issues
    2. Ask counsel to attach key documents (e.g., contracts, policies)
    3. Require parties to exchange statements; suggest that additional confidential statements can be submitted to the mediator only
B. Confirm due date - sufficiently in advance for separate follow up calls to each lawyer before the mediation session in needed

VII. PREPARATION

A. Discuss how much preparation you expect and how detailed the substantive presentations should be
B. Consider whether it makes sense to encourage parties to agree to specified, limited disclosure or discovery before the session
C. Pay attention to the emotional tenor of the case, and begin to develop a plan to defuse potential problems

D. Suggest specific preparation by counsel of their clients:
   1. Identify clients' interests, not just their positions, and consider how these interests could be met
   2. Anticipate other side's interests, and consider how these could be met
   3. Analyze best and worst alternatives to a negotiated settlement
   4. Analyze strengths and weaknesses of case
   5. Review estimated budget to litigate the case through trial
   6. Prepare clients to participate, and explain procedures
   7. If you believe it is appropriate, encourage the attorneys to prepare a negotiation plan with their clients, to include
      a. Their target number(s) and estimate of the other side's target number(s);
      b. Potential opening offer(s) and estimate of the other side's opening number(s);
      c. Their "bottom line" number(s) and estimate of the other side's "bottom line" number(s); and
      d. Their negotiation strategy for moving from their potential opening offer(s) toward their target number(s)

E. Bring key documents/evidence/photos, as appropriate

IX. CONCLUSION

A. Schedule further calls as appropriate, either with all counsel or separately
B. Make certain none of the participants has any final questions
C. In your own style, encourage the participants to take the mediation seriously to come prepared to enter productive negotiations
D. In your own style, remind the participants that because there is a conflict serious enough to lead to a lawsuit, it is likely that any negotiations attempting to resolve the conflict will be challenging
E. Express your optimism that with thorough preparation and willing participation, it is possible to resolve even the most difficult case through mediation

COGNITIVE TRAPS AFFECTING RIGHTEOUS INDIGNATION

1. NAÏVE REALISM

We overestimate the degree to which others share our perspective, that is, we think that everyone sees the world through the same lenses as do we.

We have great difficulty conveying information with which we are very familiar to those for whom the information is not familiar; we assume they understand what we are saying when they do not.

When our efforts to persuade others of the merits of our position fail, we are likely to conclude that the others are unreasonable, biased, and driven by improper motives. The more the others disagree with us, the more we believe they are displaying bias.

2. PERSPECTIVE BIAS

We evaluate the strengths of our own case more favorably than would a neutral person; once we take on the role of adversary we believe in the correctness of our position.

3. OVERCONFIDENCE & OTHER POSITIVE ILLUSIONS

We overestimate our ability to control outcomes that are determined by factors beyond our control. As negotiators we believe that we are more flexible, more purposeful, more fair, more competent, more honest, and more cooperative than our counterparts. 90% of us believe we are of above average intelligence.

4. CONFIRMATION BIAS & BIASED ASSIMILATION

We seek information that confirms rather than discredits our own views. We assimilate data in ways that are consistent with our pre-existing views.

5. FUNDAMENTAL ATTRIBUTION ERROR

We credit ourselves with good motives even in the face of our own bad behavior, ("I forgot to take out the trash"), while we attribute bad motives to others in the face of the same behavior. ("You're always shirking your responsibilities")

6. **SELF-SERVING BIAS**

We take personal credit for our successes and blame our failures on the situations in which they occurred.

7. **IRRATIONAL ESCALATION OF COMMITMENT**

We tend to escalate our commitment to an initial course of action, even if the course of action is not working. In the face of evidence to the contrary, we commit more resources to the course in the hope of a better outcome.

8. **THE BIAS BLIND SPOT**

While we tend to be willing to believe that others' views and behaviors are influenced by a myriad of influences, we are reluctant to accept that the same factors are at work in ourselves.

9. **TRIBALISM**

We both empathize and co-operate with those we perceive to be in our "in-group." We have difficulty empathizing and co-operating with those we perceive to be "out-of-group."

10. **STEREOTYPING**

We have basic knowledge structures that define our expectations about how the world operates, called *schemas. Schemas* fill in gaps in information and help us make inferences and judgments. *Stereotypes* are schemas that categorize people. Stereotypes consist of beliefs – favorable or unfavorable - about the characteristics of members of particular groups. We are likely to hold unfavorable, negative stereotypes of those we perceive to be "out-of-group" and positive, favorable stereotypes of those we perceive to be in our "in-group."

Mindfulness and Judging

Judge Jeremy D. Fogel
Director, Federal Judicial Center

Federal Judicial Center
2016

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FIRST PRINTING

Judges, as our title implies, make judgments. Sometimes the process of making a judgment is straightforward, as when a clearly written statute plainly applies to undisputed facts. But more often, the meaning or applicability of a statute requires interpretation, or factual disputes can be resolved only by determining the believability of human witnesses or by weighing conflicting circumstantial evidence.

If applying the law to the facts also involves the exercise of discretion, whether in resolving issues in a civil action or imposing sentence in a criminal case, the process of making a judgment may become complex and multidimensional. Most cases involve real people with important, often very personal interests at stake. A judge's decisions frequently are made in and affect an atmosphere infused with passions that can confound the detached rationality with which decisions—at least in theory—are supposed to be made.

As professional decision makers, judges typically become skilled at thinking reflectively and articulating reasons for their decisions. Most judges try to recognize and account for their reactions to the cases they hear and to avoid ruling impulsively. Judges also strive to treat people fairly. Yet despite these efforts, almost every experienced judge can think of cases in which a judgment missed the mark, in which the emotional impact of the situation made thoughtful reflection difficult or impossible, or in which there was lingering doubt about whether justice truly was done.

Judicial educators have recognized this reality for many years. Many have developed courses intended to help judges hone their decision-making skills and manage occupational stress. Some also have designed courses that explore unconscious psychological and cultural factors that can influence fact finding and decision making. More recently, there has been interest in understanding the extent to which empa-

thy—one's ability to understand a situation from another's perspective—affects how judges judge and how litigants experience the legal process.

Understanding Mindfulness

Another construct that is only beginning to be explored in connection with judging is mindfulness. Although it has been most deeply understood and articulated in practices such as meditation and yoga, mindfulness actually is a remarkably simple and universal concept. Its value has attracted increasing attention in business, education, medicine, and, in the legal context, mediation. In essence, it involves slowing down one's mental processes enough to allow one to notice as much as possible about a given moment or situation, and then to act thoughtfully based on what one has noticed. It sometimes is described as approaching each moment with a "beginner's mind" or "thinking about thinking while thinking." While much of the discussion of mindfulness in relation to judges so far has focused on health and wellness, mindfulness also has obvious implications for the actual work that judges do. The following examples may be helpful.

A Thoughtful Approach to Repetitive Tasks

Many trial-level judges preside over busy criminal calendars in the course of which they take multiple guilty pleas. Because appellate courts have provided detailed guidance with respect to the contents of a plea colloquy, and because many criminal cases have similar fact patterns, it is easy for the process of taking a plea to become routine, especially over time. While few judges knowingly "mail the process in," it is not

uncommon for such repetitive tasks to receive less-focused attention than other judicial work, particularly when a judge is operating in a chronically stressful environment.

Mindfully taking a plea involves approaching each plea as a new and unique situation. The judge notices consciously things that otherwise might tend to be noticed only in passing, if at all: the defendant's tone of voice and body language, the way the defendant and counsel appear to be communicating (or not communicating) with each other, the defendant's physical appearance, whether friends or family members of the defendant (or victims) appear to be in the courtroom, and so on. None of these things necessarily changes the outcome of the process, yet taken as a whole they can help the judge learn more about the defendant and assess more fully whether the defendant is entering a knowing and voluntary plea. And perhaps just as importantly, the attentiveness shown by the judge is communicated to the defendant and everyone else who is present.

A Way of Limiting Unconscious Assumptions

A core competency of trial court judges is assessing credibility. Judges decide regularly whom to believe and how much to believe them, not only in evaluating witnesses who are testifying under oath but also in dealing with lawyers and parties in the course of managing cases. Both consciously and unconsciously, judges draw upon their professional and personal life experience and respond to cues that they believe have been reliable in the past. And again, particularly under stressful circumstances, the process of doing this can become somewhat automatic.

As our society has become increasingly diverse, there are more cases in which a person's behavior may have a differ-

ent valence when viewed in cultural context. For instance, a judge reflexively may view a witness's lack of eye contact when testifying as an indication that the witness is not telling the truth. Yet in some cultures, making direct eye contact in certain settings is seen as disrespectful. Creating additional capacity for reflection can allow the judge to notice his or her reflexive response and to consider what significance, if any, to attach to the witness's manner of testifying. The same is true with respect to a judge's perception of any number of other behavioral differences.

Mindfulness and Judicial Demeanor

At least from the perspective of those with whom he or she interacts, perhaps the most important attributes of a judge are demeanor and temperament. While lawyers and parties undoubtedly hope that a judge will rule in their favor, often what matters most to them is the way they are treated: whether they feel listened to, heard, understood, and respected. While judges have a wide range of personalities and dispositions, all judges at one time or another experience states of mind, such as anger, frustration, distraction, or fatigue, that make it difficult or impossible for them to live up to these aspirations.

Noticing as fully as possible what is occurring in the moment makes a judge more aware of his or her own physical and mental state. A judge with such awareness is more conscious of his or her emotional reactions to a lawyer, litigant or situation, and is able to choose an appropriate response rather than ignoring the reactions or losing control. Often the optimal response will be to set one's feelings aside, but sometimes an intentional, considered expression of emotion may be exactly what is needed to show that a judge is engaged and respectful. In either case, it is more likely that the

judge's demeanor will reflect the seriousness and thoughtfulness that our society hopes for in its judiciary.

The Value of Reflective Thinking

In his best-selling book, *Thinking, Fast and Slow*, the Nobel laureate Daniel Kahneman makes a useful distinction between intuition, in which one reacts to stimuli immediately and instinctively, and reflection, in which one thinks consciously about what one is experiencing. Kahneman observes that intuitive ("system 1") thinking is particularly active when one is doing routine tasks or when reflection is inhibited by stress. While intuitive thinking can be an efficient and even a necessary response to a given situation, its accuracy can be limited by one's life experience and unchecked assumptions. Kahneman suggests that reflective ("system 2") thinking allows for a more careful assessment of the circumstances, including the ability to notice and when appropriate question one's intuitive responses. One is able to be more intentional in the moment as well as after the fact.

Although "system 2" would appear to be normative for judges in our professional role, the demands of our job can cause "system 1" to operate more frequently than we might want. One way of understanding mindfulness is as a means of strengthening our ability to be in "system 2" by heightening our self-awareness and building our capacity to be reflective. Mindfulness can improve judicial functioning not only by mitigating the unbidden intrusion of "system 1" thinking but also by increasing the richness of "system 2" thinking. While slowing down one's thought processes may result in a given task taking somewhat longer to complete, Kahneman and others point out that the additional time involved typically is relatively minimal. And because reflective thinking can be expected to reduce the "unforced errors" that often

are present in "system 1," mindfulness actually can improve one's net efficiency.

The Personal Benefits of Mindfulness

As the current interest in mindfulness in the context of health and wellness suggests, the benefits of mindfulness are not limited to more nuanced decision making and better emotional regulation. One of the consequences of chronic stress is that its symptoms can become one's "new normal." One's mind and body literally can forget how it feels to relax, to breathe deeply, and to appreciate being in the present, which in turn can have significant negative consequences for one's health. Mindfulness is a powerful way of counteracting these effects. It allows one to notice what is happening and think about and take remedial measures.

Fortunately, cultivating and practicing mindfulness is a natural and accessible process. Perhaps because of its popular association with meditation, yoga, and other traditional ways of developing and sustaining it, some may think of mindfulness as an element of a particular cultural style or worldview. But looking at mindfulness in this way misapprehends its nature. Its purpose is not to tell one what to think or do but rather to help one think and act as one chooses with the benefit of deeper reflection and more fully conscious intent. For judges, whose judgments can have profound effects on others, it can be both an enormously effective tool and a key to a more satisfying professional life.

Judicial Resources on Mindfulness

If you would like to learn more about mindfulness, here are some additional resources. These materials describe simple steps for developing mindfulness in daily life and provide additional examples of ways in which mindfulness can improve both one's health and one's professional effectiveness.

Getting Started

Jon Kabat-Zinn, Mindfulness—An Introduction (YouTube)

Jon Kabat-Zinn, The 9 Attitudes of Mindfulness (YouTube)

J. Patton Hyman, *The Mindful Lawyer: Mindfulness Meditation and Law Practice*, Vt. B.J., Summer 2007, at 40

Scott Rogers, *Stop, Look, and Listen: Regain your Focus Through Mindfulness*, Young Lawyer, vol. 15, no. 4, at 3 (2011)

Timothy Tosta, Editorial, *The Mindful Lawyer: Not Your Usual Law Conference*, L.A. Daily J., Dec. 3, 2010, at 7

Ellen Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?*, Nev. L.J., vol. 10, issue 2, art. 10 (2010)

Robert Zeglovitch, *The Mindful Lawyer*, 70 Tex. B.J. 234 (2007)

J. Kabat-Zinn, Mindfulness for Beginners (2012)

Books and Articles

Pamela Casey, Minding the Court: Enhancing the Decision-Making Process: A White Paper of the American Judges Association Making Better Judges (State Justice Inst. and Nat'l Center for State Cts. 2012)

Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, Int'l J. for Ct. Admin., Feb. 2013

Alan S. Gold, Mindfulness—A Challenge for Our Times (Fed. Bar Assoc. 2012)

J. Kabat-Zinn, Wherever You Go, There You Are: Mindfulness in Everyday Life (1994)

Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 Cal. L. Rev. 1485 (2010)

Susan R. Miles, What is Mindfulness Based Stress Reduction and Why Should I Care? (Minn. Bar Assoc., Aug. 2015)

Tess M.S. Neal & Eve M. Brank, *Could Mindfulness Improve Judicial Decision Making?* (abstract), Monitor on Psychology, 2014, vol. 45, no. 3

Gregory C. O'Brien, Jr., *Confessions of an Angry Judge*, Judicature, vol. 87, no. 5, March–Apr. 2004

Evan R. Seamone, *Judicial Mindfulness*, 70 U. Cin. L. Rev. 1023 (2002)

Video

Terry A. Maroney, Are Angry Judges Bad Judges? (YouTube)

Websites

Headspace (online app), https://www.headspace.com

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Reference Guide on Neuroscience

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I. Introduction

Science's understanding of the human brain is increasing exponentially. We know almost infinitely more than we did 30 years ago; however, we know almost nothing compared with what we are likely to know 30 years from now. The results of advances in understanding human brains—and of the minds they generate—are already beginning to appear in courtrooms. If, as neuroscience indicates, our mental states are produced by physical states of our brain, our increased ability to discern those physical states will have huge implications for the law. Lawyers already are introducing neuroimaging evidence as relevant to questions of individual responsibility, such as claims of insanity or diminished responsibility, either on issues of liability or of sentencing. In May 2010, parties in two cases sought to introduce neuroimaging in court as evidence of honesty; we are also beginning to see efforts to use it to prove that a person is in pain. These and other uses of neuroscience are almost certain to increase with our growing knowledge of the human brain as well as continued technological advances in accurately and precisely measuring the brain. This chapter strives to give judges some background knowledge about neuroscience and the strengths and weaknesses of its possible applications in litigation in order to help them become better prepared for these cases.[1]

The chapter begins with a brief overview of the structure and function of the human brain. It then describes some of the tools neuroscientists use to understand the brain—tools likely to produce findings that parties will seek to introduce in court. Next, it discusses a number of fundamental issues that must be considered when interpreting neuroscientific findings. Finally, after discussing, in general, the issues raised by neuroscience-based evidence, the chapter concludes by analyzing a few illustrative situations in which neuroscientific evidence is likely to appear in court in the future.

II. The Human Brain

This abbreviated and simplified discussion of the human brain describes the cellular basis of the nervous system, the structure of the brain, and finally our current understanding of how the brain works. More detailed, but still accessible, informa-

1. The Law and Neuroscience Project, funded by the John D. and Catherine T. MacArthur Foundation, is preparing a book about law and neuroscience for judges, which should be available by 2011. A Primer on Neuroscience (Stephen Morse & Adina Roskies eds., forthcoming 2011). The Project has already published a pamphlet written by neuroscientists for judges, with brief discussions of issues relevant to law and neuroscience. A Judge's Guide to Neuroscience: A Concise Introduction (M.S. Gazzaniga & J.S. Rakoff eds., 2010). One early book on a broad range of issues in law and neuroscience also deserves mention: Neuroscience and the Law: Brain, Mind, and the Scales of Justice (Brent Garland ed., 2004).

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tion about the human brain can be found in academic textbooks and in popular books for general audiences.[2]

A. Cells

Like most of the human body the nervous system is made up of cells. Adult humans contain somewhere between 50 trillion and 100 trillion human cells. Each of those cells is both individually alive and part of a larger living organism.

Each cell in the body (with rare exceptions) contains each person's entire complement of human genes—his or her genome. The genes, found on very long molecules of deoxyribonucleic acid (DNA) that make up a human's 46 chromosomes, work by leading the cells to make other molecules, notably proteins and ribonucleic acid (RNA). We now believe that there are about 23,000 human genes. Cells are different from each other not because they contain different genes but because they turn on and off different sets of genes. All human cells seem to use the same group of several thousand "housekeeping" genes that run the cell's basic machinery, but skin cells, kidney cells, and brain cells differ in which other genes they use. Scientists count different numbers of "types" of human cells, with estimates ranging from a few hundred to a few thousand (depending largely on how narrowly or broadly one defines a cell type).

The most important cells in the nervous system are called neurons. Neurons pass messages from one neuron to another in a complex way that appears to be responsible for brain function, conscious or otherwise.

Neurons (Figure 1) come in many sizes, shapes, and subtypes (with their own names), but they generally have three features: a cell body (or "soma"), short extensions called dendrites, and a longer extension called an axon. The cell body contains the nucleus of the cell, which in turn contains the 46 chromosomes with the cell's DNA. The dendrites and axons both reach out to make connections with other neurons. The dendrites generally receive information from other neurons; the axons send information.

Communication between neurons occurs at areas called synapses (Figure 2), where two neurons almost meet. At a synapse, the two neurons will come within

2. The Society for Neuroscience, the very large scholarly society that covers a wide range of brain science, has published a brief and useful primer about the human brain called *Brain Facts*. The most recent edition, published in 2008, is available free at www.sfn.org/index.aspx?pagename=brainfacts.

Some particularly interesting books about various aspects of the brain written for a popular audience include Oliver W. Sacks, The Man Who Mistook His Wife for a Hat and Other Clinical Tales (1990); Antonio R. Damasio, Descartes' Error: Emotion, Reason, and the Human Brain (1994); Daniel L. Schacter, Searching for Memory: The Brain, the Mind, and the Past (1996); Joseph E. LeDoux, The Emotional Brain: The Mysterious Underpinnings of Emotional Life (1996); Christopher D. Frith, Making Up the Mind: How the Brain Creates Our Mental World (2007); and Sandra Aamodt & Sam Wang, Welcome to Your Brain: Why You Lose Your Car Keys But Never Forget How to Drive and Other Puzzles of Everyday Life (2008).

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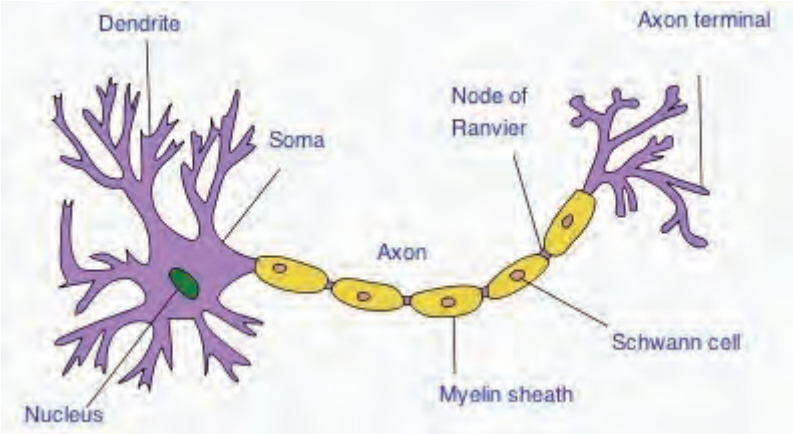
Figure 1. Schematic of the typical structure of a neuron.



Source: Quasar Jarosz at en.wikipedia.

less than a micrometer (a millionth of a meter) of each other, with the presynaptic side, on the axon, separated from the postsynaptic side, on the dendrite, by a gap called the synaptic cleft. At synapses, when the axon (on the presynaptic side) "fires" (becomes active) it releases molecules, known as neurotransmitters, into the synaptic cleft. Some of those molecules are picked up by special receptors on the dendrite that is on the postsynaptic side of the cleft. More than 100 different neurotransmitters have been identified; among the best known are dopamine, serotonin, glutamate, and acetylcholine. Some of the neurotransmitters released into the synaptic cleft are picked up by special receptors on the postsynaptic side of the cleft by the dendrite.

At the postsynaptic side of the cleft, neurotransmitters binding to the receptors can have a wide range of effects. Sometimes they cause the receiving (postsynaptic) neuron to "fire," sometimes they suppress (inhibit) the postsynaptic neuron from firing, and sometimes they seem to do neither. The response of the receiving neuron is a complicated summation of the various messages it receives from multiple neurons that converge, through synapses, on its dendrites.

A neuron that does fire does so by generating an electrical current that flows down (away from the cell body) the length of its axon. We normally think of electrical current as flowing in things like copper wiring. In that case, free electrons move down the wire. The electrical currents of neurons are more complicated. Molecules with a positive or negative electrical charge (ions) move through the neuron's membrane and create differences in the electrical charge between the inside and outside of the neuron, with the current traveling along the axon, rather like a fire brigade passing buckets of water in only one direction

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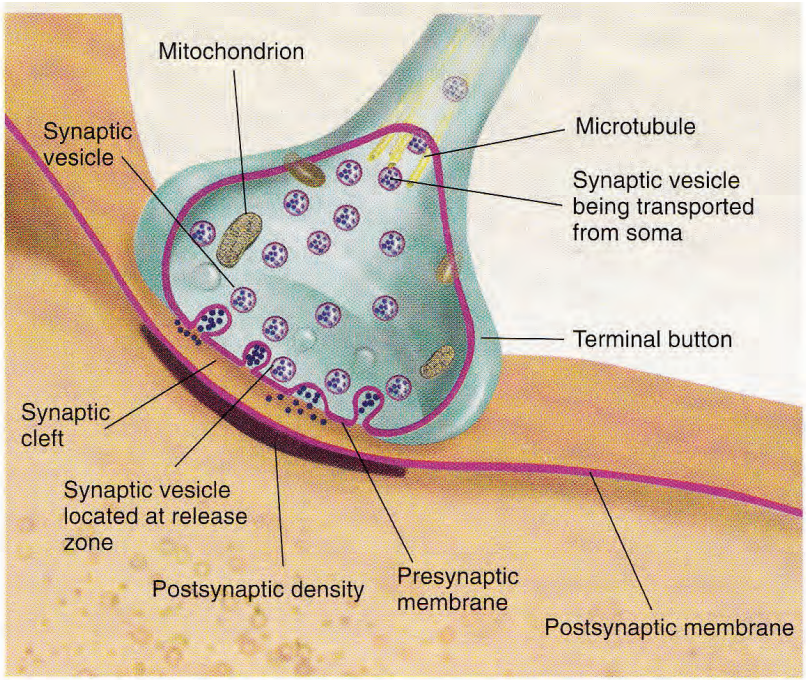
Figure 2. Synapse. Communication between neurons occurs at the synapse, where the sending (presynaptic) and receiving (postsynaptic) neurons meet. When the presynaptic neuron fires, it releases neurotransmitters into the synaptic cleft, which bind to receptors on the postsynaptic neuron.



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down the line. Firing occurs in milliseconds. This process of moving ions in and out of the cell membrane requires that the cell use large amounts of energy. When the current reaches the end of the axon, it may or may not cause the axon to release neurotransmitters into the synaptic cleft. This complicated part-electrical, part-chemical system is how information passes from one neuron to another.

The axons of human neurons are all microscopically narrow, but they vary enormously in length. Some are micrometers long; others, such as neurons running from the base of the spinal cord to the toes, are several feet long. Longer axons tend to be coated with a fatty substance called myelin. Myelin helps insulate the axon and thus increases the strength and efficiency of the electrical signal, much like the insulation wrapped around a copper wire. (The destruction of this myelin sheathing is the cause of multiple sclerosis.) Axons coated with myelin appear white; thus areas of the nervous system that have many myelin-coated axons are referred to as "white matter." Cell bodies, by contrast, look gray, and so areas with many cell bodies and relatively few axons make up our "gray matter." White matter can roughly be thought of as the wiring that connects gray matter to the rest of the body or to other areas of gray matter.

What we call nerves are really bundles of neurons. For example, we all have nerves that run down our arms to our fingers. Some of those nerves consist of neurons that pass messages from the fingers, up the arm, to other neurons in the spinal cord that then pass the messages on to the brain, where they are analyzed and experienced. This is how we feel things with our fingers. Other nerves are bundles of neurons that pass messages from the brain through the spinal cord to nerves that run down the arms to the fingers, telling them when and how to move.

Neurons can connect with other neurons or with other kinds of cells. Neurons that control body movements ultimately connect to muscle cells—these are called motor neurons. Neurons that feed information into the brain start with specialized sensory cells (i.e., cells specialized for detecting different types of stimuli—light, touch, heat, pain, and more) that fire in response to the appropriate stimulus. Their firings ultimately lead, directly or through other neurons, into the brain. These are sensory neurons. These neurons send information only in one direction—motor neurons ultimately from the brain, sensory neurons to the brain. The paralysis caused by, for example, severe damage to the spinal cord both prevents the legs from receiving messages to move that would come from the brain through the motor neurons and keeps the brain from receiving messages from sensory neurons in the legs about what the legs are experiencing. The break in the spinal column prevents the messages from getting through, just as a break in a local telephone line will keep two parties from connecting. (There are, unfortunately, not yet any human equivalents to wireless service.)

Estimates of the number of cells in a human brain vary widely, from a few hundred billion to several trillion. These cells include those that make up blood vessels and various connective tissues in the brain, but most of them are specialized brain cells. About 80 billion to 100 billion of these brain cells are neurons; the

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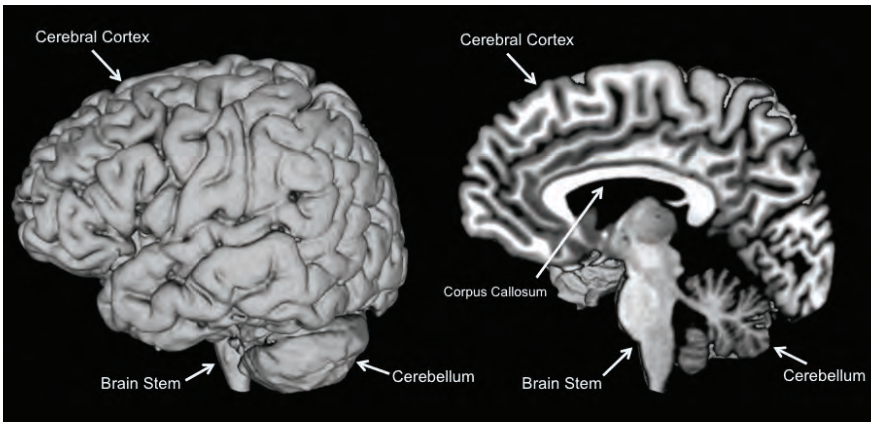
other cells (and the source of most of the uncertainty about the number of cells) are principally another class of cells referred to generally as glial cells. Glial cells play many important roles in the brain, including, for example, producing and maintaining the myelin sheaths that insulate axons and serving as a special immune system for the brain. The full importance of glial cells is still being discovered; emerging data suggest that they may play a larger role in mental processes than as "support staff." At this point, however, we concentrate on neurons, the brain structures they form, and how those structures work.

B. Brain Structure

Anatomists refer to the brain, the spinal cord, and a few other nerves directly connecting to the brain as the central nervous system. All the other nerves are part of the peripheral nervous system. This reference guide does not focus on the peripheral nervous system, despite its importance in, for example, assessing some aspects of personal injuries. We also, less fairly, ignore the central nervous system other than the brain, even though the spinal cord, in particular, plays an important role in modulating messages going into and coming out of the brain.

The average adult human brain (Figure 3) weighs about 3 pounds and fills a volume of about 1300 cubic centimeters. If liquid, it would almost fill two standard wine bottles with a little space left over. Living brains have a consistency about like that of gelatin. Despite the softness of brains, they are made up of regular shapes and structures that are generally consistent from person to person. Just as every nondamaged or nondeformed human face has two eyes, two ears,

Figure 3. Lateral (left) and mid-sagittal (right) views of the human brain.



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one nose, and one mouth with standard numbers of various kinds of teeth, every normal brain has the same set of identifiable structures, both large and small.

Neuroscientists have long worked to describe and define particular regions of the brain. In some ways this is like describing parcels of land in property documents, and, like property descriptions, several different methods are used. At the largest scale, the brain is often divided into three parts: the brain stem, the cerebellum, and the cerebrum.[3]

The brain stem is found near the bottom of the brain and is, in some ways, effectively an extension of the spinal cord. Its various parts play crucial roles in controlling the body's autonomic functioning, such as heart rate and digestion. The brain stem also contains important regions that regulate processing in the cerebrum. For example, the substantia nigra and ventral tegmental area in the brain stem consist of critical neurons that generate the neurotransmitter dopamine. While the substantia nigra is crucial for motor control, the ventral tegmental area is important for learning about rewards. The loss of neurons in the substantia nigra is at the core of the movement problems of Parkinson's disease.

The cerebellum, which is about the size and shape of a squashed tennis ball, is tucked away in the back of the skull. It plays a major role in fine motor control and seems to keep a library of learned motor skills, such as riding a bicycle. It was long thought that damage to the cerebellum had little to no effect on a person's personality or cognitive abilities, but resulted primarily in unsteady gait, difficulty in making precise movements, and problems in learning movements. More recent studies of patients with cerebellar damage and functional brain imaging studies of healthy individuals indicate that the cerebellum also plays a role in more cognitive functions, including supporting aspects of working memory, attention, and language.

The cerebrum is the largest part of the human brain, making up about 85% of its volume. The cerebrum is found at the front, top, and much of the back of the human brain. The human brain differs from the brains of other mammals mainly because it has a vastly enlarged cerebrum.

There are several different ways to identify parts of, or locations in, the cerebrum. First, the cerebrum is divided into two hemispheres—the famous left and right brain. These two hemispheres are connected by tracts of white matter—of axons—most notably the large connection called the corpus callosum. Oddly, the right hemisphere of the brain generally receives messages from and controls the movements of the left side of the body, while the left hemisphere receives messages from and controls the movements of the right side of the body.

Each hemisphere of the cerebrum is divided into four lobes (Figure 4): The frontal lobe in the front of the cerebrum (behind the forehead), the parietal lobe at

3. The brain also is sometimes divided into the forebrain, midbrain, and hindbrain. This classification is useful for some purposes, particularly in describing the history and development of the vertebrate brain, but it does not entirely correspond to the categorization of cerebrum, brain stem, and cerebellum, and it is not used in this reference guide.

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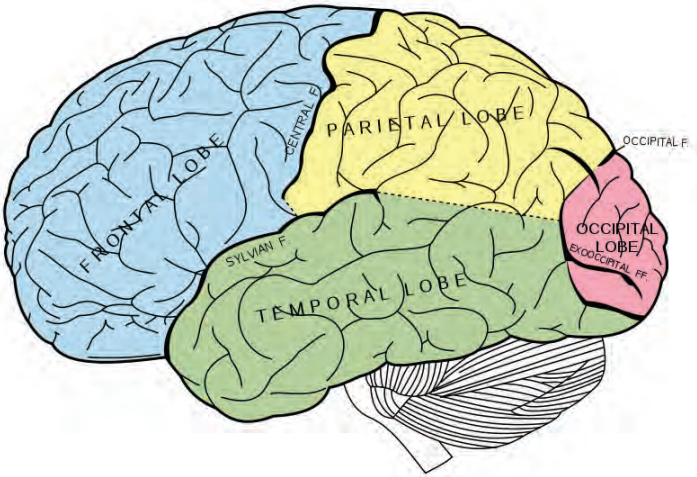
Figure 4. Lobes of a hemisphere. Each hemisphere of the brain consists of four lobes—the frontal, parietal, temporal, and occipital lobes.



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the top and toward the back, the temporal lobe on the side (just behind and above the ears), and the occipital lobe at the back. Thus, one could describe a particular region as lying in the left frontal lobe—the frontal lobe of the left hemisphere.

The surface of the cerebrum consists of the cortex, which is a sheet of gray matter a few millimeters thick. The cortex is not a smooth sheet in humans, but rather is heavily folded with valleys, called sulci ("sulcus" in the singular), and bulges, called gyri ("gyrus"). The sulci and gyri have their own names, and so a location can be described as in the inferior frontal gyrus in the left frontal lobe. These folds allow the surface area of the cortex, as well as the total volume of the cortex, to be much greater than in other mammals, while still allowing it to fit inside our skulls, similar to the way the many folds of a car's radiator give it a very large surface area (for radiating away heat) in a relatively small space.

The cerebral cortex is extraordinarily large in humans compared with other species and is clearly centrally involved in much of what makes our brains special, but the cerebrum contains many other important subcortical structures that we share with other vertebrates. Some of the more important areas include the thalamus, the hypothalamus, the basal ganglia, and the amygdala. These areas all connect widely, with the cortex, with each other, and with other parts of the brain to form complex networks.

The functions of all these areas are many, complex, and not fully understood, but some facts are known. The thalamus seems to act as a main relay that carries

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information to and from the cerebral cortex, particularly for vision, hearing, touch, and proprioception (one's sense of the position of the parts of one's body). It also is, importantly, involved in sleep, wakefulness, and consciousness. The hypothalamus has a wide range of functions, including the regulation of body temperature, hunger, thirst, and fatigue. The basal ganglia are a group of regions in the brain that are involved in motor control and learning, among other things. They seem to be strongly involved in selecting movements, as well as in learning through reinforcement (as a result of rewards). The amygdala appears to be important in emotional processing, including how we attach emotional significance to particular stimuli.

In addition, many other parts of the brain, in the cortex or elsewhere, have their own special names, usually with Latin or Greek roots that may or may not seem descriptive today. The hippocampus, for example, is named for the Greek word for seahorse. For most of us, these names will have no obvious rhyme or reason, but merely must be learned as particular structures in the brain—the superior colliculus, the tegmentum, the globus pallidus, the substantia nigra, the cingulate cortex, and more. All of these structures come in pairs, with one in the left hemisphere and one in the right hemisphere; only the pineal gland is unpaired. Brain atlases include scores of names for particular structures or regions in the brain and detailed information about the structures or regions.

Some of these smaller structures may have special importance to human behavior. The nucleus accumbens, for example, is a small subcortical region in each hemisphere of the cerebrum that appears important for reward processing and motivation. In experiments with rats that received stimulation of this region in return for pressing a lever, the rats would press the lever almost to the exclusion of any other behavior, including eating. The nucleus accumbens in humans appears linked to appetitive motivation, responding in anticipation of primary rewards (such as pleasure from food and sex) and secondary rewards (such as money). Through interactions with the orbital frontal cortex and dopamine-generating neurons in the midbrain (including the ventral tegmental area), the nucleus accumbens is considered part of a "reward network." With a hypothesized role in addictive behavior and in reward computations, more broadly, this putative reward network is a topic of considerable ongoing research.

All of these various locations, whether defined broadly by area or by the names of specific structures, can be further subdivided using directions: front and back, up and down, toward the middle, or toward the sides. Unfortunately, the directions often are not expressed in a straightforward manner, and several different terminological conventions exist. Locations toward the front or back of the brain can be referred to as either anterior or posterior or as rostral or caudal (literally, toward the nose, or beak, or the tail). Locations toward the bottom or top of the brain are termed inferior or superior or, alternatively, as ventral or dorsal (toward the stomach or toward the back). A location toward the middle of the brain is called medial; one toward the side is called lateral. Thus, different loca-

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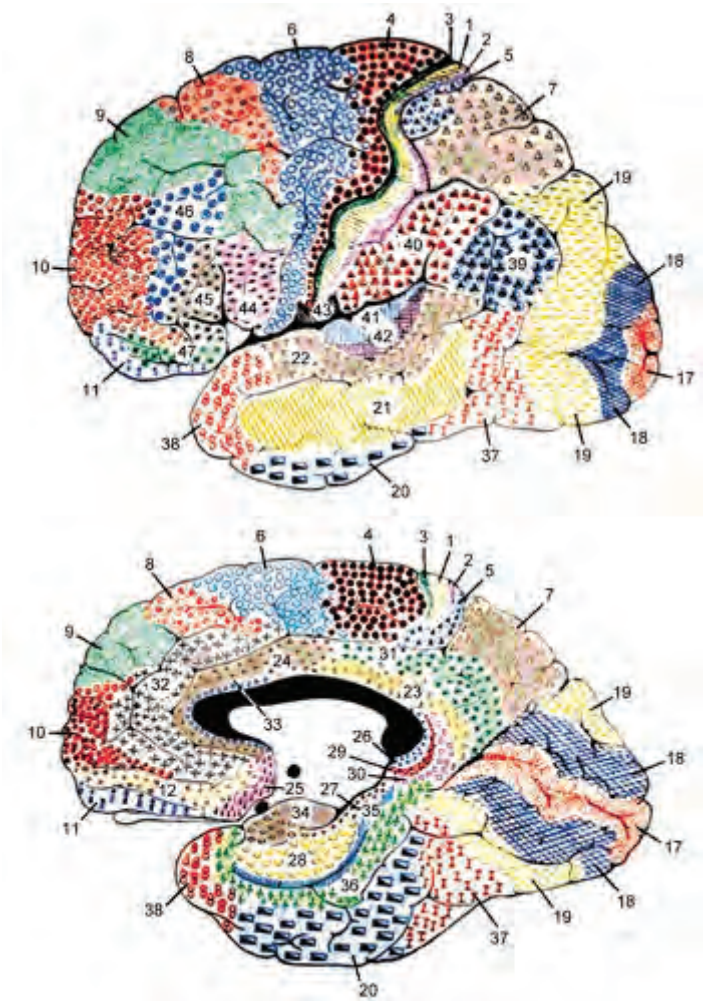
tions could be described, for example, as in the left anterior cingulate cortex, in the dorsal medial (or sometimes dorsomedial) prefrontal cortex, or in the posterior hypothalamus.

Finally, one other method often is used, a method created by Korbinian Brodmann in 1909. Brodmann, a neuroanatomist, divided the brain into about 50 different areas or regions (Figure 5). Each region was defined on the basis of the

Figure 5. Brodmann's areas. Brodmann divided the cortex into different areas based on the cell types and how they were organized.



Source: Prof. Mark Dubin, University of Colorado.

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kinds of neurons found there and how those neurons are organized. A location described by Brodmann area may or may not correspond closely with a structural location. Other organizational schemes exist, but Brodmann's remains the most widely used to describe the approximate locations of findings in modern human brain imaging studies.

C. Some Aspects of How the Brain Works

Most of neuroscience is dedicated to finding out how the brain works, but although much has been learned, considerably more remains unknown. We could use many different ways to describe what is known about how the brain works. This section discusses a few important aspects of brain function and makes several general points about the localization and distribution of functions, as well as brain plasticity, before commenting on the effects of hormones and other chemical influences on the brain.

Some brain functions are localized in, or especially dependent on, particular regions of the brain. This has been known for many years as a result of studies of people who, through traumatic injury, stroke, or cancer, have lost, or lost the use of, particular regions of their brains. For example, in the 1860s, French anatomist Paul Broca discovered through autopsies of patients that damage to a region in the left inferior frontal lobe (now known as Broca's area) caused an inability to speak. It is now known that some functions cannot normally be performed when particular brain areas are damaged or missing. The visual cortex, located at the back of the brain in the occipital lobes, is as necessary for vision as the eyes are; the hippocampus is necessary for the creation of many kinds of memory; and the motor cortex is necessary for voluntary movements. The motor cortex and the parallel somatosensory cortex, which is essential for processing sensory information such as the sense of touch from the body, are further subdivided, with particular regions necessary for causing motion or sensing feelings from the legs, arms, fingers, face, and so on. Other brain regions also will be involved in these actions or sensations, but these regions are necessary to them.

At the same time, the fact that a region is necessary to a particular class of sensations, behaviors, or cognition does not mean either that it is not involved in other brain functions or that other brain regions do not also contribute to these particular abilities. The amygdala, for example, is involved in our feelings of fear, but it is also involved broadly in emotional reactions, both positive and negative. It also modulates learning, memory, and even sensory perception. Although some functions are localized, others are widely distributed. For example, the visual cortex is essential to vision, but actual visual perception involves many parts of the brain in addition to the occipital lobes. Memories appear to be stored over much of the cortex. Networks of brain regions participate in many of these functions.

For example, if you touch something very hot with your left index finger, your spinal cord, through a reflex loop, will cause you to pull your finger back

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very quickly. Then the part of your right somatosensory cortex devoted to the index finger will be involved in receiving and initially interpreting the sensation. Other areas of your brain will recognize the stimulus as painful, your motor regions will be involved in waving your hand back and forth or bringing your finger to your mouth, widespread parts of your cortex may lead to your remembering other instances of burning yourself, and your hippocampus may play a role in making a new long-term memory of this incident. There is no brain region "for" burning your finger; many regions, both specific and general, contribute to the brain's response.

In addition, brains are at least somewhat "plastic" or changeable on both small and large scales. Anyone who can see has a working visual cortex, and it is always located in the back of the brain (in the occipital lobe), but its exact borders will vary slightly from person to person. In other cases, the brain may adjust and change in response to a person's behavior or changes in that person's anatomy. For example, a right-handed violinist may develop an enlarged brain region for controlling the fingers of the left hand, used in fingering the violin. If a person loses an arm to amputation, the parts of the motor and somatosensory cortices that had dealt with that arm may be "taken over" by other body parts. In some cases, this brain plasticity can be extreme. A young child who has lost an entire hemisphere of his or her brain may grow up to have normal or nearly normal functionality as the remaining hemisphere takes on the tasks of the missing hemisphere. Unfortunately, the possibilities of this kind of extreme plasticity do diminish with age, but rehabilitation after stroke in adults sometimes does show changes in the brain functions undertaken by particular brain regions.

The picture of the brain as a set of interconnected neurons that fire in networks or patterns in response to stimuli is useful but not complete. In addition to neuron firings, other factors affect how the brain works, particularly chemical factors.

Some of these are hormones, generated by the body either inside or outside the brain. They can affect how the brain functions, as well as how it develops. Sex hormones such as estrogen and testosterone can have both short-term and long-term effects on the brain. So can other hormones, such as cortisol, associated with stress, and oxytocin, associated with, among other things, trust and bonding. Endorphins, chemicals secreted by the pituitary gland in the brain, are associated with pain relief and a sense of well-being. Still other chemicals, brought in from outside the body, can have major effects on the brain, both in the short term and the long term. Examples include alcohol, caffeine, nicotine, morphine, and cocaine. These can trigger very specific brain reactions or can have broad effects.

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III. Some Common Neuroscience Techniques

Neuroscientists use many techniques to study the brain. Some of them have been used for centuries, such as autopsies and the observation of patients with brain damage. Some, such as the intentional destruction of parts of the brain, can be used ethically only in research on nonhuman animals. Of course, research with nonhuman animals, although often helpful in understanding human brains, is of less value when examining behaviors that are uniquely developed among humans. The current revolution in neuroscience is largely the result of a revolution in the tools available to neuroscientists, as new methods have been developed to image and to intervene in living brains. These methods, particularly the imaging methods that allow more precise measurements of human brain structure and function in living people, are giving rise to increasing efforts to introduce neuroscientific evidence in court.

This section of this chapter focuses on several kinds of neuroimaging—computerized axial tomography (CAT) scans, positron emission tomography (PET) scans, single photon emission computed tomography (SPECT) scans, and magnetic resonance imaging (MRI), as well as an older method, electroencephalography (EEG), and its close relative, magnetoencephalography (MEG). Some of these methods show the structure of the brain, others show the brain's functioning, and some do both. These are not the only important neuroscience techniques; several others are discussed briefly at the end of this section. Genetic analysis provides yet another technique for increasing our understanding of human brains and behaviors, but this chapter does not deal with the possible applications of human genetics to understanding behavior.

A. Neuroimaging

Traditional imaging technologies have not been very helpful in studying the brain. X-ray images are the shadows cast by dense objects. Not only is the brain surrounded by our very dense skulls, but there are no dense objects inside the brain to cast these shadows. Although a few features of the brain or its blood vessels could be seen through methods that involved the injection of air into some of the spaces in the brain or of contrast media into the blood, these provided limited information. The opportunity to see inside a living brain itself only goes back to about the 1970s, with the development of CAT scans. This ability has since exploded with the development of several new techniques, three of which, with CAT, are discussed on the following pages.

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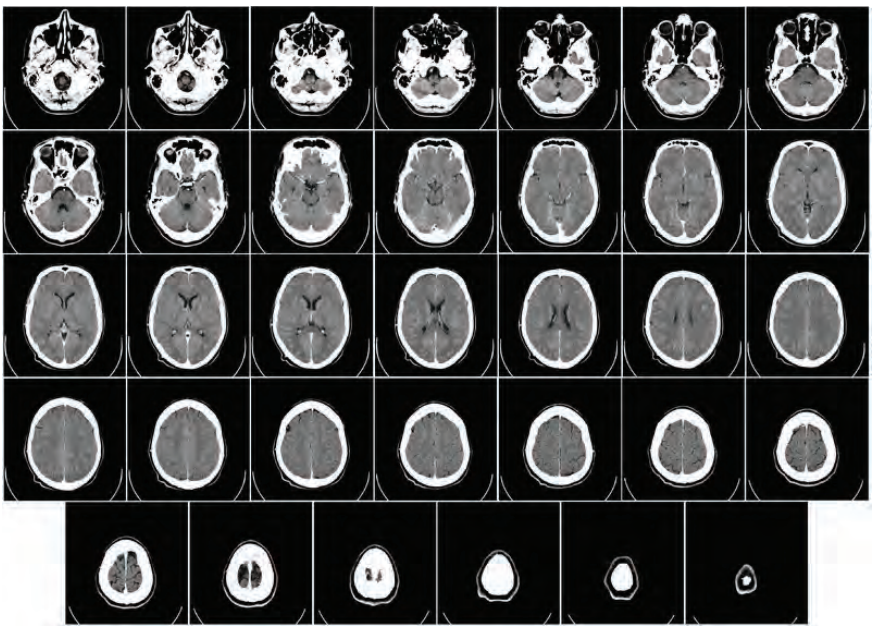
1. CAT scans

The CAT scan is a multidimensional, computer-assisted X-ray machine. Instead of taking one X ray from a fixed location, in a CAT scan both the X-ray source and (180 degrees opposite the source) the X-ray detectors rotate around the person being scanned. Rather than exposing negatives to make "pictures" of dense objects, as in traditional X rays, the X-ray detectors produce data for computer analysis. A complete modern CAT scan includes data sufficient to reconstruct the scanned object in three dimensions. Computerized algorithms can then be used to produce an image of any particular slice through the object. The multiple angles and computer analysis make it possible to pick out the relatively small density differences within the brain that traditional X-ray technology could not distinguish and to use them to produce images of the soft tissue (Figure 6).

Figure 6. CAT scan depicting axial sections of the human brain. The ventral most (bottom) surface of the brain is at upper left and the dorsal most (top) surface is at the lower right.



Source: http://en.wikipedia.org/wiki/File:CT_of_brain_of_Mikael_H%C3%A4ggstr%C3%B6m_large.png. Image in the public domain.

The CAT scan provides a structural image of the brain. It is useful for showing some kinds of structural abnormalities, but it provides no direct information

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about the brain's functioning. A CAT scan brain image is not as precise as the image produced from an MRI, but because the procedure is both quick and (relatively) inexpensive, CAT scanners are common in hospitals. Medically, brain CAT scans are used mainly to look for bleeding or swelling inside the brain, although they also will record sizeable tumors or other large structural abnormalities. For neuroscience, the great advantage of the CAT scan was its ability, for the first time, to reveal some details inside the skull, an ability that has been largely superseded for research by MRI. CAT scans have been used in courts to argue that structural changes in the brain, shown on the CAT scan, are evidence of insanity or other mental impairments. Perhaps their most notable use was in 1982 in the trial of John Hinckley for the attempted assassination of President Ronald Reagan. A CAT scan of Hinckley's brain that showed widened sulci (the "valleys" in the surface of the brain) was introduced into evidence to show that Hinckley suffered from organic brain damage in the form of shrinkage of his brain.[4]

2. PET scans and SPECT scans

Traditional X-ray machines and their more sophisticated descendant, the CAT scan, project X rays through the skull and create images based on how much of the X rays are blocked or absorbed. PET scans and SPECT scans operate very differently. In these methods, a substance that emits radiation is introduced into the body. That radiation then is detected from outside the body in a way that can determine the location of the radiation source. These scans generally are not used for determining the brain's structure, but for understanding how it is functioning. They are particularly good at measuring one aspect of brain structure—the density of particular receptors, such as those for dopamine, at synapses in some areas of the brain, such as the frontal lobes.

Radioactive decay of atoms can take several forms, producing alpha, beta, or gamma radiation. PET scanners take advantage of isotopes of atoms that decay by giving off positive beta radiation. Beta decay usually involves the emission of an electron; positive beta decay involves the emission of a positron, the positively charged antimatter equivalent of an electron. When positrons (antimatter) meet electrons (matter), the two particles are annihilated and converted into two photons of gamma radiation with a known energy (511,000 electron volts) that follow directly opposite paths from the site of the annihilation. Inside the body, the collision between the positron and electron and the consequent production of the gamma radiation photons takes place within a short distance (a millimeter or two) of the site of the initial radioactive decay that produced the positron.

4. The effects of this evidence on the verdict are unclear. *See* Lincoln Caplan, The Insanity Defense and the Trial of John W. Hinckley, Jr. (1984) for a discussion of the case and its consequences for the law.

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PET scans, therefore, start with the introduction into a person's body of a radioactive tracer that decays by giving off a positron. One common tracer is fluorodeoxyglucose (FDG), a molecule that is almost identical to the simple sugar, glucose, except that one of the oxygen atoms in glucose is replaced by an atom of fluorine-18, an isotope of the element fluorine with nine protons and nine neutrons. Fluorine normally found in nature is fluorine-19, with 9 protons and 10 neutrons, and is stable. Fluorine-18 is very unstable and decays, through positive beta decay, quickly losing about half of its mass every 110 minutes (its half-life). The body treats FDG as though it were glucose, and so the FDG is concentrated where the body needs the energy supplied by glucose. A major clinical use of PET scans derives from the fact that tumor cells use energy, and hence glucose, at much higher rates than normal cells.

After giving the FDG time to become concentrated in the body, which usually takes about an hour, the person is put inside the scanner itself. There, the person is entirely surrounded by a very sensitive radiation detector, tuned to respond to gamma radiation of the energy produced by annihilated positrons. When two "hits" are detected by two sensors at about the same time, the source is known to be located on a line connecting the two. Very small differences in the timing of when the radiation is detected can help determine where along that the line the annihilation took place. In this way, as more gamma radiation from the decaying FDG is detected, the general location of the FDG within the body can be determined and, as a result, tissue that is using a lot of glucose, such as a tumor, can be located.

In neuroscience research, PET scans also can be taken using different molecules that bind more specifically to particular tissues or cells. Some of these more specific ligands use fluorine-18, but others use a different radioactive tracer that also decays by emitting a positron—oxygen-15. This can be used to determine what parts of the brain are using more or less oxygen. Oxygen-15, however, has a much shorter half-life (2 minutes) and so is more difficult and expensive to use than FDG. Similarly, carbon-11, with a half-life of 20 minutes, also can be used. Carbon-11 atoms can be introduced into various molecules that bind to important receptors in the brain, such as receptors for dopamine, serotonin, or opioids. This allows the study of the distribution and function of these receptors, both in healthy people and in people with various mental illnesses or neurological diseases.

The result of a PET scan is a record of the locations of positron decay events in the brain. Computer visualization tools can then create cross-sectional images of the brain, showing higher and lower rates of decay, with differences in magnitude typically depicted through the use of different colors (Figure 7).

PET scans are excellent for showing the location of various receptors in normal and abnormal brains. PET scans are also very good for showing areas of different glucose use and, hence, of different levels of metabolism. This can be very useful, for example, in detecting some kinds of brain damage, such as the damage that occurs with Alzheimer's disease, where certain regions of the brain become abnormally inactive, or in brain regions that have been damaged by a stroke.

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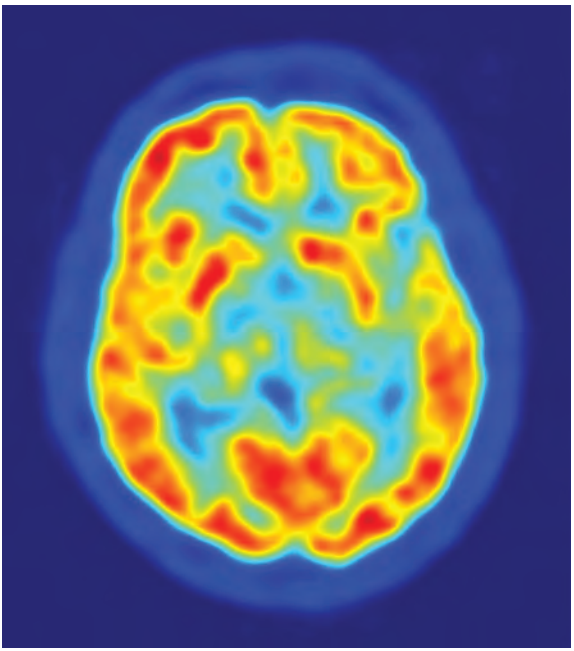
Figure 7. PET scan depicting an axial section of the human brain.



Source: http://en.wikipedia.org/wiki/Positron_emission_tomography. Image in the public domain.

In addition, the comparison (subtraction) of two PET scan measurements, one scan when a person is engaged in a task that is thought to require particular brain functions and a second control (or baseline) scan that is not thought to require these functions, allows researchers indirectly to measure brain function. PET scans were initially used in this way in research to show what areas of the brain were used when people experienced various stimuli or performed particular tasks. PET has been substantially superseded for this purpose by functional MRI, which is less expensive, does not involve radiation exposure, provides better spatial resolution, and allows a longer period of testing.

SPECT scans are similar to PET scans. Each can produce a three-dimensional model of the brain and display images of any cross section through the brain. Like PET scans, they require the injection of a radioactive tracer material; unlike PET scans, the radioactive tracer in SPECT directly emits gamma radiation rather than emitting positrons. These kinds of tracers are more stable, more accessible, and much cheaper than the positron-emitting tracers needed for PET scans. With a PET scan, the gamma detector entirely surrounds the person; with a SPECT scan, one to three gamma detectors are rotated around the body over about 15 to

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20 minutes. As with PET scans, the SPECT tracers can be used to measure brain metabolism or to attach to specific molecular receptors in the brain. The spatial resolution of a SPECT scan, however, is poorer than with a PET scan, with an uncertainty of about 1 cm.

Both PET and SPECT scans are most useful if coupled with good structural images. Contemporary PET and SPECT scanners often include a simultaneous CAT scan; there is some experimental work aimed at providing simultaneous PET and MRI scans.

3. MRI—structural and functional

MRI was developed in the 1970s, first came into wide use in the 1980s, and is currently the dominant neuroimaging technology for producing detailed images of the brain's structure and for measuring aspects of brain function. MRI operates on completely different principles than either CAT scans or PET or SPECT scans; it does not rely on X rays passing through the brain or on the decay of radioactive tracer molecules inside the brain. Rather, MRI's workings involve more complicated physics. This section discusses the general characteristics of MRI and then focuses on structural MRI, diffusion tensor imaging, and finally, functional MRI.

The power of an MRI scanner is measured by the strength of its magnetic field, measured in units called tesla (T). The magnetic field of a small bar magnet is about 0.01 T. The strength of the Earth's magnetic field is about 0.00005 T. The MRI machines used for clinical purposes use magnetic fields of between 0.2 T and 3.0 T, with 1.5 T or 3.0 T being the systems most commonly used today. MRI machines for human research purposes have reached 9.4 T. In general, the stronger the magnetic field, the better the image, although higher fields also can create their own measurement difficulties, especially when imaging brain function. MRI machines achieve these high magnetic fields through using superconducting magnets, made by cooling the electromagnet with liquid helium at a temperature 4° (Celsius) above absolute zero. For this and other reasons, MRI systems are complicated, with higher initial and continuing maintenance costs compared with some other methods for functional imaging (e.g., electroencephalography; *see infra* Section III.B).

In most MRI systems (Figure 8), the subject, on an examination table, slides into a cylindrical opening in the machine so that the part of the body to be imaged is in the middle of the magnet. Depending on the kind of imaging performed, the examination or experiment can take from about 30 minutes to more than 2 hours; throughout the scanning process the subject needs to stay as motionless as possible to avoid corrupting the images. The main sensations for the subject are the loud thumping and buzzing noises made by the machine, as well as the machine's vibration.

MRI examinations appear to involve minimal risk. Unlike the other neuroimaging technologies discussed above, MRI does not involve any high-energy

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Figure 8. MRI machine. Magnetic resonance imaging systems are used to acquire both structural and functional images of the brain.

Source: Courtesy of Anthony Wagner.

radiation. The magnetic field seems to be harmless, at least as long as magnetizable objects are kept away from it. MRI subjects need to remove most metal objects; people with some kinds of implanted metallic devices, with tattoos with metal in their ink, or with fragments of ferrous metal anywhere in their bodies cannot be scanned because of the dangerous effects of the field on those bits of metal.

When the subject is positioned in the MRI scanner, the powerful field of the magnet causes the nuclei of atoms (usually the hydrogen nuclei of the body's water molecules) to align with the direction of the main magnetic field of the magnet. Using a brief electromagnetic pulse, these aligned atoms are then "flipped" out of alignment from the main magnetic field, and, after the pulse stops, the nuclei then

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rapidly realign with the strong main magnetic field. Because the nuclei spin (like a top), they create an oscillating magnetic field that is measured by a receiver coil. During structural imaging, the strength of the signal generated partially depends on the relative density of hydrogen nuclei, which varies from point to point in the body according to the density of water. In this manner, MRI scanners can generate images of the body's anatomy or of other scanned objects. Because an MRI scan can effectively distinguish between similar soft tissues, MRI can provide very-high-resolution images of the brain's anatomy, which is, after all, made up of soft tissue.

Structural MRI scans produce very detailed images of the brain (Figure 9). They can be used to spot abnormalities, large and small, as well as to see normal variation in the size and shape of brain features. Structural MRI can be used, for example, to see how brain features change as a person ages. Previously, getting that kind of detailed information about a brain required an autopsy or, at a minimum, extensive neurosurgery. This ability makes structural MRI both an important clinical tool and a very useful technique for research that tries to correlate human differences, normal and abnormal, with differences in brain structure, as well as for research that seeks to understand brain development.

Another structural imaging application of brain MRI has become increasingly prevalent over the past decade: diffusion tensor imaging (DTI). As noted above, neuronal tissue in the brain can be divided roughly into gray matter (the bodies of neurons) and white matter (neuronal axons that transmit signals over distance). DTI uses MRI to see what direction water diffuses through brain tissue. Tracts of white matter are made up of bundles of axons coated with fatty myelin. Water will diffuse through that white matter along the direction of the axons and not, generally, across them. This method can be used, therefore, to trace the location of these bundles of white matter and hence the long-distance connections between different parts of the brain. Abnormal patterns of these connections may be associated with various conditions, from Alzheimer's disease to dyslexia, some of which may have legal implications.

Functional MRI (fMRI) is perhaps the most exciting use of MRI in neuroscience for understanding brain function. This technique shows what regions of the brain are more or less active in response to the performance of particular tasks or the presentation of particular stimuli. It does not measure brain activity (the firing of neurons) directly but, instead, looks at how blood flow changes in response to brain activity and uses those changes, through the so-called BOLD response (the blood-oxygen-level dependent response), to allow the researcher to infer patterns of brain activity.

Structural MRI generally creates its images through detecting the density of hydrogen atoms in the subject and flipping them with radio pulses. For fMRI, the scanner detects changes in the ratio of oxygenated hemoglobin (oxyhemoglobin) and deoxygenated hemoglobin (deoxyhemoglobin) in particular locations in the brain. Hemoglobin is the protein in red blood cells that carries oxygen from the lungs to the body. On the basis of metabolic demands, hemoglobin molecules

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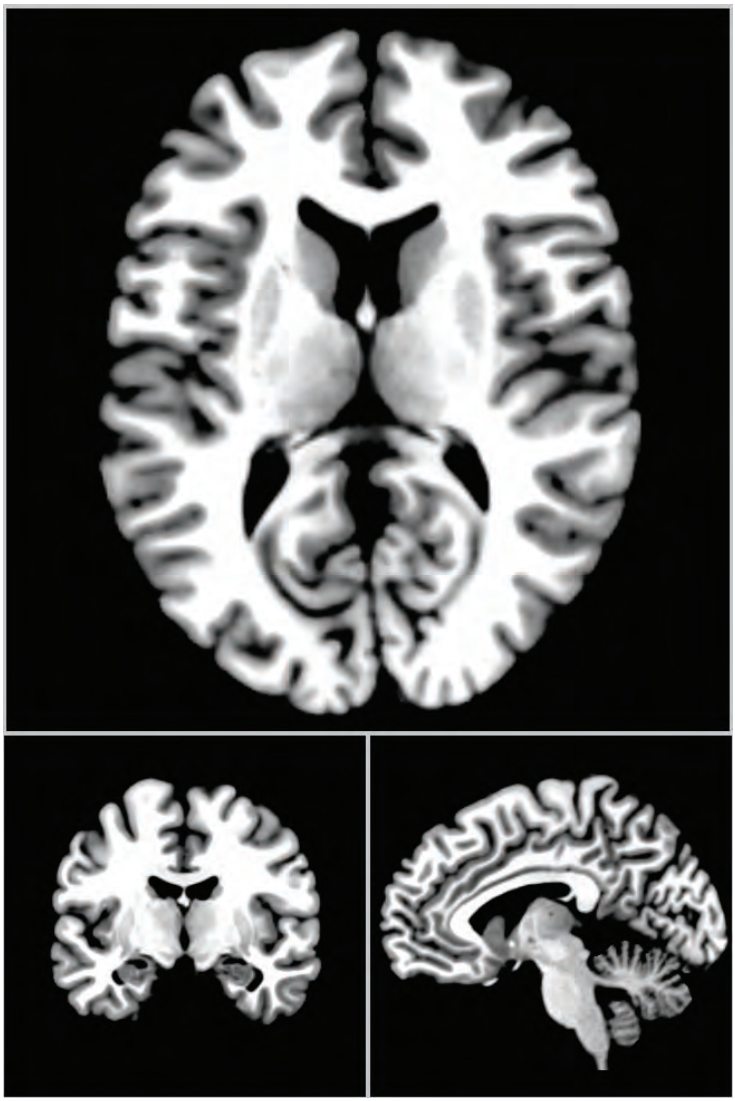
Figure 9. Brain MRI scan depicting an axial (upper), coronal (lower left), and sagittal (lower right) image of the human brain.



Source: Courtesy of Anthony Wagner.

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supply oxygen for the body's needs. Accordingly, "fresher" blood will have a higher ratio of oxyhemoglobin to deoxyhemoglobin than more "used" blood. Importantly, because deoxyhemoglobin (which is found at a higher level in "used" blood) causes the fMRI signal to decay, a higher ratio of oxyhemoglobin to deoxyhemoglobin will produce a stronger fMRI signal.

Neural activity is energy intensive for neurons, and neurons do not contain any significant reserves of oxygen or glucose. Therefore, the brain's blood vessels respond quickly to increases in activity in any one region of the brain by sending more fresh blood to that area. This is the basis of the BOLD response, which measures changes in the ratio of oxyhemoglobin to deoxyhemoglobin in a brain region several seconds after activity in that region. In particular, when a brain region becomes more active, there is first, perhaps more intuitively, a *decline* in the ratio of oxyhemoglobin to deoxyhemoglobin immediately after activity in the region, apparently corresponding to the depletion of oxygen in the blood at the site of the activity. This decline, however, is very small and very hard to detect with fMRI. Immediately after this decrease, there is an infusion of fresh (oxyhemoglobin-rich) blood, which can take several seconds to reach maximum; it is this infusion that results in the *increase* in the oxy/deoxyhemoglobin ratio that is measured in BOLD fMRI studies. Because even this subsequent increase is relatively small and variable, fMRI experiments typically involve many trials of the same task or class of stimuli in order to be able to see the signal amidst the noise.

Thus, in a typical fMRI experiment the subject will be placed in the scanner and the researchers will measure differences in the BOLD response throughout his or her brain between different conditions. A subject might, for example, be told to look at a video screen on which images of places alternate with images of faces. For purposes of the experiment, the computer will impose a spatial map on the subject's brain, dividing it into thousands of little cubes, each a few cubic millimeters in size, referred to as "voxels." Either while the data are being collected (so-called "real-time fMRI"[5]) or after an entire dataset has been gathered, a computerized program will compare the BOLD signal for each voxel when the screen was showing *places* to that when the screen contained *faces*. Regions that showed a statistically significant increase in the BOLD response several seconds after the face was on the video screen compared with the effects several seconds after a screen showing a place appeared will be said to have been "activated" by seeing the face. The researchers will infer that those regions were, in some way, involved in how the brain processes images of faces. The results typically will be shown as a structural brain image on which areas of more or less activation, as shown by a statistical test, will be shown by different colors (Figure 10).[6]

5. Use of this "real-time" fMRI has been increasing, but it is not yet clear whether the claims for it will stand up.

6. This example is actually a simplified version of experiments performed by Professor Nancy Kanwisher at MIT in the early 2000s that explored a region of the brain called the fusiform face area

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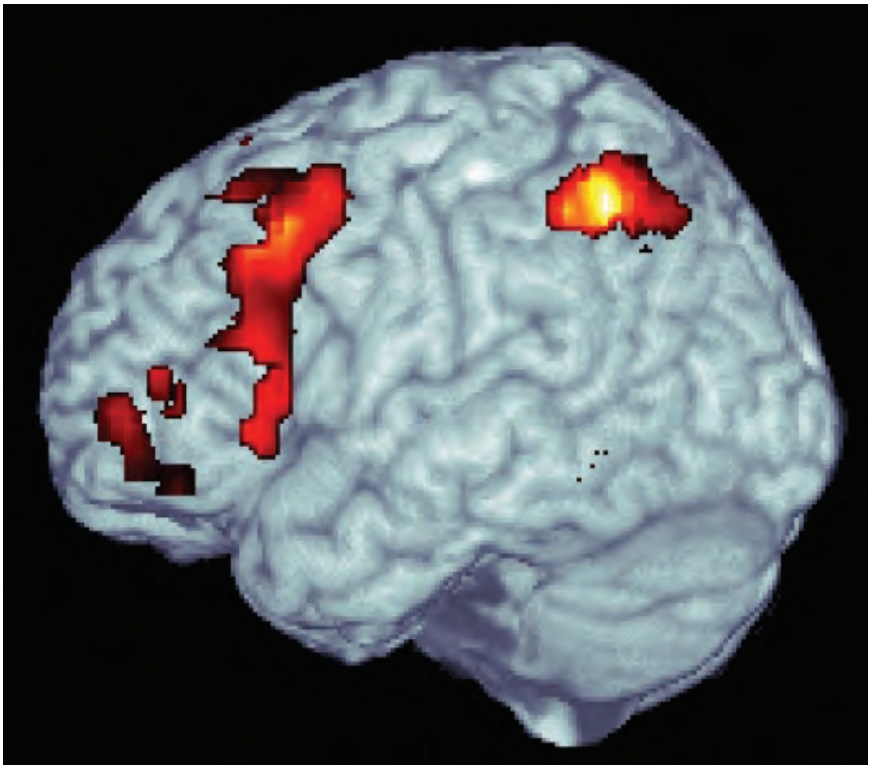
Figure 10. fMRI image. Functional MRI data reveal regions associated with cognition and behavior. Here, regions of the frontal and parietal lobes that are more active when remembering past events relative to detecting novel stimuli are depicted.



Source: Courtesy of Anthony Wagner.

Functional MRI was first proposed in 1990, and the first research results using BOLD-contrast fMRI in humans were published in 1992. The past decade has seen an explosive increase in the number of research articles based on fMRI, with nearly 2500 articles published in 2008—compared with about 450 in 1998.[7]

which is particularly involved in processing visions of faces. *See* Kathleen M. O'Craven & Nancy Kanwisher, *Mental Imagery of Faces and Places Activates Corresponding Stimulus-Specific Brain Regions*, 12 J. Cog. Neurosci. 1013 (2000).

7. *See* the census of fMRI articles from 1993 to 2008 in Carole A. Federico et al., *Intersecting Complexities in Neuroimaging and Neuroethics*, *in* Oxford Handbook of Neuroethics (J. Illes & B.J. Sahakian eds., 2011). This continued an earlier census from 1993 to 2001. Judy Illes et al., *From Neuroimaging to Neuroethics*, 5 Nature Neurosci. 205 (2003).

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MRI (functional and structural) is quite safe, and MRI machines are widespread in developed countries, largely for clinical use but increasingly for research use as well. Although fMRI research is subject to many questions and controversies (discussed *infra* Section IV), this technique has been responsible for most of the recent interest in applying neuroscience to law, from criminal responsibility to lie detection.

B. EEG and MEG

EEG is the measurement of the brain's electrical activity as exhibited on the scalp; MEG is the measurement of the small magnetic fields generated by the brain's electrical activity. The roots of EEG go back into the nineteenth century, but its use increased dramatically in the 1930s and 1940s.

The process uses electrodes attached to the subject's head with an electrically conductive substance (a paste or a gel) to record electrical currents on the surface of the scalp. Multiple electrodes are used; for clinical purposes, 20 to 25 electrodes are commonly used, although arrays of more than 200 electrodes can be used. (In MEG, superconducting "squids"[8] are positioned over the scalp to detect the brain's tiny magnetic signals.) The electrical currents are generated by the neurons throughout the brain, although EEG is more sensitive to currents emerging from neurons closer to the skull. It is therefore more challenging to use EEG to reveal the functioning of structures deep in the brain.

Because EEG and MEG directly measure neural activity, in contrast to the measures of blood flow in fMRI, the timing of the neural activity can be measured with great precision (the temporal resolution), down to milliseconds. On the other hand, in comparison to fMRI, EEG and MEG are poor at determining the location of the sources of the currents (the spatial resolution). The EEG/MEG signal is a summation of the activity of thousands to millions of neurons at any one time. Any one pattern of EEG or MEG signal at the scalp has an infinite number of possible source patterns, making the problem of determining the brain source of measured EEG/MEG signal particularly challenging and the results less precise.

The results of clinical EEG and MEG tests can be very useful for detecting some kinds of brain conditions, notably epilepsy, and are also part of the process of diagnosing brain death. EEG and MEG are also used for research, particularly in the form of event-related potentials, which correlate the size or pattern of the EEG or MEG signal with the performance of particular tasks or the presentation of particular stimuli. Thus, as with the hypothetical fMRI experiment described above, one could look for any consistent changes in the EEG or MEG signal when a subject sees faces rather than a blank screen. Apart from the determina-

8. SQUID stands for superconducting quantum interference device (and has nothing to do with the marine animal). This device can measure extremely small magnetic fields, including those generated by various processes in living organisms, and so is useful in biological studies.

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tion of brain death, where EEG is already used, the most discussed possible legally relevant uses of EEG have been lie detection and memory detection.

EEG is safe, cheap, quiet, and portable. MEG is safe and quiet, but the technology is considerably more expensive than EEG and is not easily portable. EEG methods can tolerate much more head movement by the subject than PET or MRI techniques, although movement is often a challenge for MEG. EEG and MEG have good temporal resolution, distinguishing between milliseconds, which makes them very attractive for research, but their spatial resolution is inadequate for many research questions. As a result, some researchers use a combination of methods, integrating MRI and EEG or MEG data (acquired simultaneously or at different times) using sophisticated data analysis techniques.

C. Other Techniques

Functional neuroimaging (especially fMRI) and EEG seem to be the techniques that are most likely to lead to efforts to introduce neuroscience-based evidence in court, but several other neuroscience techniques also might have legal applications. This section briefly describes four other methods that may be discussed in court: lesion studies, transcranial magnetic stimulation, deep brain stimulation, and implanted microelectrode arrays.

1. Lesion studies

One powerful way to test whether particular brain regions are associated with particular mental processes is to study mental processes after those brain regions have been destroyed or damaged. Observations of the consequences of such lesions, created by accidents or disease, were, in fact, the main way in which localization of brain function was originally understood.

For ethical reasons, the experimental destruction of brain tissue is limited to nonhuman animals. Nonetheless, in addition to accidental damage, on occasion human brains will need to be intentionally damaged for clinical purposes. Tumors may have to be removed or, in some cases, epilepsy may have to be treated by removing the region of the brain that is the focus for the seizures. Valuable knowledge may be gained from following these subjects.

Our understanding of the role of the hippocampus in creating memories, as one example, was greatly aided by study of a patient known as H.M.[9] When he was 27 years old, H.M. was treated for intractable epilepsy, undergoing an

9. H.M.'s name, not publicly released until his death, was Henry Gustav Molaison. Details of his life can be found in several obituaries, including Benedict Carey, *H.M., An Unforgettable Amnesiac, Dies at 82*, N.Y. Times, Dec. 4, 2008, at A1, and *H.M., A Man Without Memories*, The Economist, Dec. 20, 2008. The first scientific report of his case was W.B. Scoville & Brenda Milner, *Loss of Recent Memory After Bilateral Hippocampal Lesions*, 20 J. Neurol., Neurosurg. Psychiatry 11 (1957).

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experimental procedure that surgically removed his left and right medial temporal lobes, including most of his two hippocampi. The surgery was successful, but from that time until his death in 2008, H.M. could not form new long-term memories, either of events or of facts. His short-term memory, also known as working memory, was intact, and he could learn new motor, perceptual, and (some) cognitive skills (his "procedural memory" still functioned). He also could remember his life's events from before his surgery, although his memories were weaker the closer the events were to the surgery. Those brain regions were clearly involved in *making* new long-term memories for facts or events, but not in storing old ones.

2. Transcranial magnetic stimulation (TMS)

TMS is a noninvasive method of creating a temporary, reversible functional brain "lesion." Using this technique, researchers disrupt the organized activity of the brain's neurons by applying an electrical current. The current is formed by a rapidly changing magnetic field that is generated by a coil held next to the subject's skull. The field penetrates the scalp and skull easily and causes a small current in a roughly conical portion of the brain below the coil. This current induces a change in the typical responses of the neurons, which can block the normal functioning of that part of the brain.

TMS can be done in a number of ways. In some approaches, TMS happens at the same time as the subject performs the task to be studied. These concurrent approaches include single pulses or paired pulses as well as rapid (more than once per second) repetitive TMS that is delivered during task performance. Another method uses TMS for an extended period, often several minutes, before the task is performed. This sequential TMS uses slow (less than once per second) repetitive TMS.

The effects of single-pulse/paired-pulse and concurrent repetitive TMS are present while the coil is generating the magnetic field, and can extend for a few tens of milliseconds after the stimulation is turned off. By contrast, the effects of pretask repetitive TMS are thought to last for a few minutes (about half as long as the actual stimulation). When TMS is repeated regularly in nonhumans, long-term effects have been observed. Therefore, guidelines regarding how much stimulation can be applied in humans have been established.

The Food and Drug Administration (FDA) has approved TMS as a treatment for otherwise untreatable depression. The neuroscience research value of TMS stems from its ability to alter brain function in a relatively small area (about 2 cm) in an otherwise healthy brain, thus allowing for targeted testing of the role of a particular brain region for a particular class of cognitive abilities. By blocking normal functioning of the affected neurons, this can be equivalent, in effect, to a temporary lesion of that area of the brain. TMS appears to have minimal risks, but its long-term effects are not known.

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3. Deep brain stimulation (DBS)

DBS is an FDA-approved treatment for several neurological conditions affecting movement, notably Parkinson's disease, essential tremor, and dystonia. The device used in DBS includes a lead that is implanted into a specific brain region, a pulse generator (generally implanted under the shoulder or in the abdomen), and a wire connecting the two. The pulse generator sends an electric current to the electrodes in the lead, which in turn affect the functioning of neurons in an area around the electrodes.

The precise manner by which DBS affects brain function remains unclear. Even for Parkinson's disease, for which it is widely used, individual patients sometimes benefit in unpredictable ways from placement of the lead in different locations and from different frequency or power of the stimulation.

Researchers are continuing to experiment with DBS for other conditions, such as depression, minimally conscious state, chronic pain, and overeating that leads to morbid obesity. The results are sometimes surprising. In a Canadian trial of DBS for appetite control, the obese patient did not ultimately lose weight but did suddenly develop a remarkable memory. That research group is now starting a trial of DBS for dementia.[10] Other surprises have included some negative side effects from DBS, such as compulsive gambling, hypersexuality, and hallucinations. These kinds of unexpected consequences from DBS make it of continuing broader research interest.

4. Implanted microelectrode arrays

Ultimately, to understand the brain fully one would like to know what each of its 100 billion neurons is doing at any given time, analyzed in terms of their collective patterns of activity.[11] No current technology comes close to that kind of resolution. For example, although fMRI has a voxel size of a few cubic millimeters, it is looking at the blood flow responding to thousands or millions of neurons at each point in the brain. Conversely, while direct electrical recordings allow individual neurons to be examined, and manipulated, it is not easy to record from many neurons at once. While still on a relatively small scale, recent developments now offer one method for recording from multiple neurons simultaneously by using an implanted microelectrode array.

A chip containing many tiny electrodes can be implanted directly into brain tissue. Some of those electrodes will make useable connections with neurons and can then be used either to record the activity of that neuron (when it is firing or

10. *See* Clement Hamani et al., *Memory Enhancement Induced by Hypothalamic/Fornix Deep Brain Stimulation*, 63 Annals Neurol. 119 (2008).

11. See the discussion in Emily R. Murphy & Henry T. Greely, *What Will Be the Limits of Neuroscience-Based Mindreading in the Law? in* The Oxford Handbook of Neuroethics (J. Illes & B.J. Sahakian eds., 2011).

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not) or to stimulate the neuron to fire. These kinds of implants have been used in research on motor function, both in monkeys and in occasional human patients. The research has aimed at understanding better what neuronal activity leads to motion and hence, in the long run, perhaps to a method of treating quadriplegia or other motion disorders.

These arrays have several disadvantages as research tools. Arrays require neurosurgery for their implantation, with all of its consequent risks of infection or damage. They also have a limited lifespan, because the brain's defenses eventually prevent the electrical connection between the electrode and the neuron, usually over the span of a few months. Finally, the arrays can only reach a tiny number of the billions of neurons in the brain; current arrays have about 100 microelectrodes.

IV. Issues in Interpreting Study Results

Lawyers trying to introduce neuroscience evidence will almost always be arguing that, when interpreted in the light of some preexisting research study, some kind of neuroscience-based test of the brain of a person in the case—usually a party, though sometimes a witness—is relevant to the case. It might be a claim that a PET scan shows that a criminal defendant was likely to have been legally insane at the time of the crime; it could be a claim that an fMRI of a witness demonstrates that she is lying. The judge will have to determine whether the scientific evidence is admissible at all under the Federal Rules of Evidence, and particularly under Rule 702. If the evidence is admissible, the finder of fact will need to consider the validity and strength of the underlying scientific finding, the accuracy of the particular test performed on the party or witness, and the application of the former to the latter.

Neuroscience-based evidence will commonly raise several scientific issues relevant to both the initial admissibility decision and the eventual determination of the weight to be given the evidence. This section of the reference guide examines seven of these issues: replication, experimental design, group averages, subject selection and number, technical accuracy, statistical issues, and countermeasures. The discussion focuses on fMRI-based evidence, because that seems likely to be the method that will be used most frequently in the coming years, but most of the seven issues apply more broadly.

One general point is absolutely crucial. The various techniques discussed in Section III, *supra*, are generally accepted scientific procedures, both for use in research and, in most cases, in clinical care. Each one is a good scientific tool in general. The crucial issue is not likely to be whether the techniques meet the requirements for admissibility when used for *some* purposes, but whether the techniques—*when used for the purpose for which they are offered*—meet those requirements. Sometimes proponents of fMRI-based lie detection, for example, have argued that the technique should be accepted because fMRI is the subject of more than 12,000 peer-reviewed

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publications. That is true, but irrelevant—the question is the application of fMRI to lie detection, which is the subject of far fewer, and much less definitive, publications.

A. Replication

A good general rule of thumb in science is never to rely on any experimental finding until it has been independently replicated. This may be particularly true with fMRI experiments, not because of fraud or negligence on the part of the experimenters, but because, for reasons discussed below, these experiments are very complicated. Replication builds confidence that those complications have not led to false results.

In many scientific fields, including much of fMRI research, replication is sometimes not as common as it should be. A scientist often is not rewarded for replicating (or failing to replicate) another's work. Grants, tenure, and awards tend to go to people doing original research. The rise of fMRI has meant that such original experiments are easy to conceive and to attempt—anyone with experimental expertise, access to research subjects (often undergraduates), and access to an MRI scanner (found at any major medical facility) can try his or her own experiments and, if the study design and logic are sound and the results are statistically significant, may well end up with published results. Experiments replicating, or failing to replicate, another's work are neither as exciting nor as publishable.

For example, as discussed in more detail below, more than 15 different laboratories have collectively published 20 to 30 peer-reviewed articles finding some statistically significant relationship between fMRI-measured brain activity and deception. None of the studies is an independent replication of another laboratory's work. Each laboratory used its own experimental design, its own scanner, and its own method of analysis. Interestingly, the published results implicate many different areas of the brain as being activated when a subject lies. A few of the brain regions are found to be important in most of the studies, but many of the other brain regions showing a correlation with deception differ from publication to publication. Only a few of the laboratories have published replications of their own work; some of those laboratories have actually published findings with different results from those in their earlier publications.

That a finding has been replicated does not mean it is correct; different laboratories can make the same mistakes. Neither does failure of replication mean that a result is wrong. Nonetheless, the existence of independent replication is important support for a finding.

B. Problems in Experimental Design

The most important part of an fMRI experiment is not the MRI scanner, but the design of the underlying experiment being examined in the scanner. A poorly

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designed experiment may yield no useful information, and even a well-designed experiment may lead to information of uncertain relevance.

A well-designed experiment must focus on the particular mental state or brain process of interest while minimizing any systematic biases. This can be especially difficult with fMRI studies. After all, these studies are measuring blood flow in the brain associated with neuronal responses in particular regions. If, for example, in an experiment trying to assess how the brain reacts to pain, the experimental subjects are consistently distracted at one point in the experiment by thinking about something else, the areas of brain activation will include the areas activated by the distraction. One of the earliest published lie detection experiments was designed so that the experimental subjects pushed a button for "yes" only when saying (honestly) that they held the card displayed; they pushed the "no" button both when they did not hold the card displayed and when they did hold it but were following instructions to lie. They were to say "yes" only 24 times out of 432 trials.[12] The resulting differences might have come from the differences in thinking about telling the truth or telling a lie—but they also may have come from the differences in thinking about pressing the "no" button (the most common action) and pressing the "yes" button (the less frequent response). The results themselves cannot distinguish between the two explanations.

Designing good experiments is difficult, but in some respects the better the experiment, the less relevant it may prove to a real situation. A laboratory experiment attempts to minimize distractions and differences among subjects, but such factors will be common in real-world settings. Perhaps more important, for some kinds of experiments it will be difficult, if not impossible, to reproduce in the laboratory the conditions of interest in the real world. As an extreme example, if one is interested in how a murderer's brain functions during a murder, one cannot conduct an experiment that involves having the subject commit a murder in the scanner. For ethical reasons, that condition of interest *cannot* be tested in the experiment.

The problem of trying to detect deception provides a different example. All published laboratory-based experiments involve people who know that they are taking part in a research project. Most of them are students and are being paid to participate in the project. They have received detailed information about the experiment and have signed a consent form. Typically, they are instructed to "lie" about a particular matter. Sometimes they are told what the lie should be (to deny that they see a particular playing card, such as the seven of clubs, on a screen in the scanner); sometimes they are told to make up a lie (about their most recent

12. Daniel D. Langleben et al., *Telling Truth from Lie in Individual Subjects with Fast Event-Related fMRI*, 26 Human Brain Mapping 262 (2005). See discussion in Nancy Kanwisher, *The Use of fMRI in Lie Detection: What Has Been Shown and What Has Not*, *in* Emilio Bizzi et al., Using Imaging to Identify Deceit: Scientific and Ethical Questions (2009), at 10, and in Anthony Wagner, *Can Neuroscience Identify Lies? in* A Judge's Guide to Neuroscience, *supra* note 1, at 30.

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vacation, for example). In either case, they are following instructions—doing what they *should* be doing—when they tell the "lie."

This situation is different from the realistic use of lie detection, when a guilty person needs to tell a convincing story to avoid a high-stakes outcome such as arrest or conviction—and even an innocent person will be genuinely nervous about the possibility of an incorrect finding of deception. In an attempt to parallel these real-world characteristics, some laboratory-based studies have tried to give subjects some incentive to lie successfully; for example, the subjects may be told (falsely) that they will be paid more if they "fool" the experimenters. Although this may increase the perceived stakes, it seems unlikely that it creates a realistic level of stress. These differences between the laboratory and the real world do not mean that the experimental results of laboratory studies are unquestionably different from the results that would exist in a real-world situation, but they do raise serious questions about the extent to which the experimental data bear on detecting lies in the real world.

Few judges will be expert in the difficult task of designing valid experiments. Although judges may be able themselves to identify weaknesses in experimental design, more often they will need experts to address these questions. Judges will need to pay close attention to that expert testimony and the related argument, as "details" of experimental design may turn out to be absolutely crucial to the value of the experimental results.

C. The Number and Diversity of Subjects

Doing fMRI scans is expensive. The total cost of performing an hour-long research scan of a subject ranges from about $300 to $1000. Much fMRI research, particularly work without substantial medical implications, is not richly funded. As a result, studies tend to use only a small number of subjects—many fMRI studies use 10 to 20 subjects, and some use even fewer. In the lie detection literature, for example, the number of subjects used ranges from 4 to about 30.

It is unclear how representative such a small group would be of the general population. This is particularly true of the many studies that use university students as research subjects. Students typically are from a restricted age range, are likely to be of above-average intelligence and socioeconomic background, may not accurately reflect the country's ethnic diversity, and typically will underrepresent people with serious mental conditions. To limit possible confounding variables, it can make sense for a study design to select, for example, only healthy, right-handed, native-English-speaking male undergraduates who are not using drugs. But the very process of selecting such a restricted group raises questions about whether the findings will be relevant to other groups of people. They may be directly relevant, or they may not be. At the early stages of any fMRI research, it may not be clear what kinds of differences among subjects will or will not be important.

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D. Applying Group Averages to Individuals

Most fMRI-based research looks for statistically significant associations between particular patterns of brain activation across a number of subjects. It is highly unlikely than any fMRI pattern will be found always to occur under certain circumstances in *every* person tested, or even that it will always occur under those circumstances in any one person. Human brains and their responses are too complicated for that. Research is highly unlikely to show that brain pattern "A" follows stimulus "B" each and every time and in every single person, although it may show that A follows B most of the time.

Consider an experiment with 10 subjects that examines how brain activation varies with the sensation of pain. A typical approach to analyzing the data is to take the average brain activation patterns of all 10 subjects combined, looking for the regions that, across the group, have the greatest changes—the most statistically significant changes—when the painful stimulus is applied compared with when it is absent. Importantly, though, the most significant region showing increased activation on average may not be the region with the greatest increase in activation in any particular one of the 10 subjects. It may not even be the area with the greatest activation in *any* of the 10 subjects, but it may be the region that was most consistently active across the brains of the 10 subjects, even if the response was small in each person.

Although group averages are appropriate for many scientific questions, the problem is that the law, for the most part, is not concerned with "average" people, but with individuals. If these "averaged" brains show a particular pattern of brain activation in fMRI studies and a defendant's brain does not, what, if anything, does that mean?

It may or may not mean anything—or, more accurately, the chances that it is meaningful will vary. The findings will need to be converted into an assessment of an individual's likelihood of having a particular pattern of brain activation in response to a stimulus, and that likelihood can be measured in various ways.

Consider the following simplified example. Assume that 1000 people have been tested to see how their brains respond to a particular painful stimulus. Each is scanned twice, once when touched by a painfully hot metal rod and once when the rod is room temperature. Assume that all of them feel pain from the heated rod and that no one feels pain from the room temperature rod. And, finally, assume that 900 of the 1000 show a particular pattern of brain activation when touched with the hot rod, but only 50 of the 1000 show the same pattern when touched with the room temperature rod.

For these 1000 people, using the fMRI activation pattern as a test for the perception of this pain would have a sensitivity of 90% (90% of the 1000 who felt the pain would be correctly identified and only 10% would be false negatives). Using the activation as a test for the *lack* of the pattern would have a specificity of 95% (95% of those who did not feel pain were correctly identified and only

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5% were false positives). Now ask, of all those who showed a positive test result, how many were actually positive? This percentage, the positive predictive value, would be 94.7%—900 out of 950. Depending on the planned use of the test, one might care more about one of these measures than another and there are often tradeoffs between them. Making a test more sensitive (so that it misses fewer people with the sought characteristic) often means making it less specific (so that it picks up more people who do not have the characteristic in question). In any event, when more people are tested, these estimates of sensitivity, specificity, and positive predictive value become more accurate.

There are other ways of measuring the accuracy of a test of an individual, but the important point is that some such conversion is essential. A research paper that reveals that the average subject's brain (more accurately, the "averaged subjects' brain") showed a particular reaction to a stimulus does not, in itself, say anything useful about how likely any one person is to have the same reaction to that stimulus. Further analyses are required to provide that information. Researchers, who are often more interested in identifying possible mechanisms of brain action than in creating diagnostic tests, will not necessarily have analyzed their data in ways that make them useful for application to individuals—or even have obtained enough data for that to be possible. At least in the near future, this is likely to be a major issue for applying fMRI studies to individuals, in the courtroom, or elsewhere.

E. Technical Accuracy and Robustness of Imaging Results

MRI machines are variable, complicated, and finicky. The machines come in several different sizes, based on the strength of the magnet, with machines used for clinical purposes ranging from 0.2 T to 3.0 T and research scanners going as high as 9.4 T. Three companies dominate the market for MRI machines—General Electric, Siemens, and Philips—although several other companies also make the machines. Both the power and the manufacturer of an MRI system can make a substantial difference in the resulting data (and images). These variations can be more important with functional MRI (though they also apply to structural MRI) so that a result seen on a 1.5-T Siemens scanner might not appear on a 3.0-T General Electric machine. Similarly, results from one 3.0-T General Electric machine may be different from those on an identical model.

Even the exact same MRI machine may behave differently from day to day or month to month. The machines frequently need maintenance or adjustments and sometimes can be inoperable for days or even weeks at a time. Comparing results from even the same machine before and after maintenance—or a system upgrade—can be difficult. This can make it hard to compare results across different studies or between the group average of one study and results from an individual subject.

These issues concern not only the quality of the scans done in research, but, even more importantly, the credibility of the individual scan sought to be intro-

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duced at trial. If different machines were used, care must be taken to ensure that the results are comparable. The individual scans also can have other problems. Any one scan is subject not only to machine-derived artifacts and other problems noted above, but also to human-generated artifacts, such as those caused by the subject's movements during the scan.

Finally, another technical problem of a different kind comes from the nature of fMRI research itself. The scanner will record changes in the relative levels of oxyhemoglobin to deoxyhemoglobin for thousands of voxels throughout the brain. During data analysis, these signal changes will be tested to see if they show any change in the response between the experimental condition and the baseline or control condition. Importantly, with fMRI, there is no definitive way to quantify precisely how large a change there was in the neural response compared to baseline; hence, the researcher must set a somewhat arbitrary statistical cutoff value (a threshold) for saying that a voxel was activated or deactivated. A researcher who wants only to look at strong effects will require a large change from baseline; a researcher who wants to see a wide range of possible effects will allow smaller changes from baseline to count.

Neither way is "right"—we do not know whether there is some minimum change in the BOLD response that means an "important" amount of brain activation has taken place, and if such a true value exists, it is likely to differ across brain regions, across tasks, and across experimental contexts. What this means is that different choices of statistical cutoff values can produce enormous differences in the apparent results. And, of course, the cutoff values used in the studies and in the scan of the individual of interest must be consistent across repeated tests. This important fact often may not be known.

F. Statistical Issues

Interpreting fMRI results requires the application of complicated statistical methods.[13] These methods are particularly difficult, and sometimes controversial, for fMRI studies, partly because of the thousands of voxels being examined. Fundamentally, most fMRI experiments look at many thousands of voxels and try to determine whether any of them are, on average, activated or deactivated as a result of the task or stimulus being studied. A simple test for statistical significance asks whether a particular result might have arisen by chance more than 1 time in 20 (or 5%): Is it significant at the .05 level? If a researcher is looking at the results for thousands of different voxels, it is likely that a number of voxels will show an effect above the threshold *just* by chance. There are statistical ways to control the rate of these false positives, but they need to be applied carefully. At the same time, rigid control of false positives through statistical correction (or the use of

13. For a broad discussion of statistics, see David H. Kaye & David A. Freedman, Reference Guide on Statistics, in this manual.

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a very conservative threshold) can create another problem—an increase in the false-negative rate, which results in failing to detect true brain responses that are present in the data but that fall below the statistical threshold. The community of fMRI researchers recognizes that these issues of statistical significance are difficult to resolve.

Over the past decade, other statistical techniques are increasingly being used in neuroimaging research, including techniques that do not look at the statistical significance of changes in the BOLD response in individual voxels, but that instead examine changes in the distributed patterns of activation across many voxels in a region of the brain or across the whole brain. These techniques include methods known as principal component analysis, multivariate analysis, and related machine learning algorithms. These methods, the details of which are not reviewed in this chapter, are being used increasingly in neuroimaging research and are producing some of the most interesting results in the field. The techniques are fairly complex, and determining how to interpret the results of these tests can be controversial. Thus, these methods alone may require substantial and potentially confusing expert testimony in addition to all the other expert testimony about the underlying neuroscience evidence.

G. Possible Countermeasures

When neuroimaging is being used to compare the brain of one individual—a defendant, plaintiff, or witness, for example—to others, the individual undergoing neuroimaging might be able to use countermeasures to make the results unusable or misleading. And at least some of those countermeasures may prove especially hard to detect.

Subjects can disrupt almost any kind of scanning, whether done for structural or functional purposes, by moving in the scanner. Unwilling subjects could ruin scans by moving their bodies, heads, or, possibly, even by moving their tongues. Blatant movements to disrupt the scan would be apparent, both from watching the subject in the scanner and from seeing the results, leading to a possible negative inference that the person was trying to interfere with the scan. Nonetheless, that scan itself would be useless.

More interesting are possible countermeasures for functional scans. Polygraphy may provide a useful comparison. Countermeasures have long been tried in polygraphy with some evidence of efficacy. Polygraphy typically looks at the differences in physiological measurements of the subject when asked anxiety-provoking questions or benign control questions. Subjects can use drugs or alcohol to try to dampen their body reactions when asked anxiety-provoking questions. They can try to use mental measures to control or affect their physiological reactions, calming themselves during anxiety-provoking questions and increasing their emotional reaction to control questions. And, when asked control questions, they can try to increase the physiological signs the polygraph measures through physical means.

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For example, subjects might bite their tongues, step on tacks hidden in their shoes, or tighten various muscles to try to increase their blood pressure, galvanic skin response, and so on. The National Academy of Sciences report on polygraphs concluded that

> Basic science and polygraph research give reason for concern that polygraph test accuracy may be degraded by countermeasures, particularly when used by major security threats who have a strong incentive and sufficient resources to use them effectively. If these measures are effective, they could seriously undermine any value of polygraph security screening.[14]

Some of the countermeasures used by polygraph subjects can be detected by, for example, drug or alcohol tests or by carefully watching the subject's body. But purely mental actions cannot be detected. These kinds of countermeasures may be especially useful to subjects seeking to beat neuroscience-based lie detection. For example, some argue that deception produces different activation patterns than telling the truth because it is mentally harder to tell a lie—more of the brain needs to work to decide whether to lie and what lie to tell. If so, two mental countermeasures immediately suggest themselves: make the lie easier to tell (through, perhaps, memorization or practice) or make the brain work harder when telling the truth (through, perhaps, counting backward from 100 by sevens).

Countermeasures are not, of course, potentially useful only in the context of lie detection. A neuroimaging test to determine whether a person was having the subjective feeling of pain might be fooled by the subject remembering, in great detail, past experiences of pain. The possible uses of countermeasures in neuroimaging have yet to be extensively explored, but at this point they cast additional doubt on the reliability of neuroimaging in investigations or in litigation.

V. Questions About the Admissibility and the Creation of Neuroscience Evidence

The admissibility of neuroscience evidence will depend on many issues, some of them arising from the rules of evidence, some from the U.S. Constitution, and some from other legal provisions. Another often-overlooked reality is that judges may have to decide whether to order this kind of evidence to be created. Certainly, judges may be called to pass upon the requests for criminal defendants (or convicts seeking postconviction relief) to be able to use neuroimaging. They may also have to decide motions in civil or criminal cases to compel neuroimaging. One could even imagine requests for warrants to "search the brains" of possible

14. *See* National Research Council, The Polygraph and Lie Detection 5 (2003). This report is an invaluable resource for discussions of not just the scientific evidence about the reliability of the polygraph, but also for general background about the application of science to lie detection.

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witnesses for evidence. This guide does not seek to resolve any of these questions, but points out some of the problems that are likely to be raised about admitting neuroscience evidence in court.

A. Evidentiary Rules

This discussion looks at the main evidentiary issues that are likely to be raised in cases involving neuroscience evidence. Note, though, that judges will not always be governed by the rules of evidence. In criminal sentencing or in probation hearings, among other things, the Federal Rules of Evidence do not apply,[15] and they apply with limitations in other contexts.[16] Nonetheless, even in those circumstances, many of the principles behind the Rules, discussed below, will be important.

1. Relevance

The starting point for all evidentiary questions must be relevance. If evidence is not relevant to the questions in hand, no other evidentiary concerns matter. This basic reminder may be particularly useful with respect to neuroscience evidence. Evidence admitted, for example, to demonstrate that a criminal defendant had suffered brain damage sometime before the alleged crime is not, in itself, relevant. The proffered fact of the defendant's brain damage must be relevant. It may be relevant, for example, to whether the defendant could have formed the necessary criminal intent, to whether the defendant should be found not guilty by reason of insanity, to whether the defendant is currently competent to stand trial, or to mitigation in sentencing. It must, however, be relevant to *something* in order to be admissible at all, and specifying its relevance will help focus the evidentiary inquiry. The question, for example, would not be whether PET scans meet the evidentiary requirements to be admitted to demonstrate brain damage, but whether they have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[17] The brain damage may be relevant to a fact, but that fact must be "of consequence to the determination of the action."

2. Rule 702 and the admissibility of scientific evidence

Neuroscience evidence will almost always be "scientific . . . knowledge" governed by Rule 702 of the Federal Rules of Evidence, as interpreted in *Daubert v. Merrell Dow Pharmaceuticals*[18] and its progeny, both before and after the amendments to Rule 702 in 2000. Rule 702 allows the testimony of a qualified expert "if

15. Fed. R. Evid. 1101(d).
16. Fed. R. Evid. 1101(e).
17. Fed. R. Evid. 401.
18. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

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(1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." In *Daubert*, the Supreme Court listed several, nonexclusive guidelines for trial court judges considering testimony under Rule 702. The Committee that proposed the 2000 Amendments to Rule 702 summarized these factors as follows:

> The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.[19]

The tests laid out in *Daubert* and in the evidentiary rules governing expert testimony have been the subjects of enormous discussion, both by commentators and by courts. And, to the extent some neuroscience evidence has been admitted in federal courts (and the courts of states that follow Rule 702 or *Daubert*), it has passed those tests. We do not have the knowledge needed to analyze them in detail, but we will merely point out a few aspects that seem especially relevant to neuroscience evidence.

Neuroscience evidence should often be subject to tests, as long as the point of the neuroscience evidence is kept in mind. An fMRI scan might provide evidence that someone was having auditory hallucinations, but it could not prove that someone was not guilty by reason of insanity. The latter is a legal conclusion, not a scientific finding. The evidence might be relevant to the question of insanity, but one cannot plausibly conduct a scientific test of whether a particular pattern of brain activation is always associated with legal insanity. One might offer neuroimaging evidence about whether a person is likely to have unusual difficulty controlling his or her impulses, but that is not, in itself, proof that the person acted recklessly. The idea of testing helps separate the conclusions that neuroscience might be able to reach from the legal conclusions that will be beyond it.

Daubert's stress on the presence of peer review and publication corresponds nicely to scientists' perceptions. If something is not published in a peer-reviewed journal, it scarcely counts. Scientists only begin to have confidence in findings after peers, both those involved in the editorial process and, more important, those who read the publication, have had a chance to dissect them and to search intensively for errors either in theory or in practice. It is crucial, however, to recognize that publication and peer review are not in themselves enough. The publications need to be compared carefully to the evidence that is proffered.

19. Fed. R. Evid. 702 advisory committee's note.

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First, the published, peer-reviewed articles must establish the specific scientific fact being offered. An (accurate) assertion that fMRI has been the basis of more than 12,000 peer-reviewed publications will help establish that fMRI can be used in ways that the scientific community finds reliable. By themselves, however, those publications do not establish any particular use of fMRI. If fMRI is being offered as proof of deception, the 20 or 30 peer-reviewed articles concerning its ability to detect deception are most important, not the 11,980 articles involving fMRI for other purposes.

Second, the existence of several peer-reviewed publications on the same general method does not support the accuracy of any one approach if those publications are mutually inconsistent. There are now about 20 to 30 peer-reviewed publications that, using fMRI, find statistically significant differences in patterns of brain activation depending on whether the subjects were telling the truth or (typically) telling a lie when instructed to do so. Many of those publications find patterns that are different from, and often inconsistent with, the patterns described in the other publications. Multiple *inconsistent* publications do not add weight, and may indeed subtract it, from a scientific method or theory.

Third, the peer-reviewed publication needs to describe in detail the method about which the expert plans to testify. A commercial firm might, for example, claim that its method is "based on" some peer-reviewed publications, but unless the details of the firm's methods were included in the publication, those details were neither published nor peer reviewed. A proprietary algorithm used to generate a finding published in the peer-reviewed literature is not adequately supported by that literature.

The error rate is also crucial to most neuroscience evidence, in two different senses. One is the degree to which the machines used to produce the evidence make errors. Although these kinds of errors may balance out in a large sample used in published literature, any scan of any one individual may well be affected by errors in the scanning process. Second, and more important, neuroscience evidence will almost never give an absolute answer, but will give a probabilistic one. For example, a certain brain structure or activation pattern will be found in some percentage of people with a particular mental condition or state. These group averages will have error rates when they are applied to individuals. Those rates need to be known and presented.

The issue of standards and controls also is important in neuroscience. This area is new and has not undergone the kind of standardization seen, for example, in forensic DNA analysis. When trying to apply neuroscience findings to an individual, evidence from the individual needs to have been acquired in the same way, with the same standards and conditions, as the evidence from which the scientific conclusions were drawn—or, at least, in ways that can be made readily comparable. For example, there is no one standard in fMRI research for what statistical threshold should be used for a change in the BOLD signal to "count" as a meaningful activation or deactivation. An individual's scan would need to

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be analyzed under the same definition for activation as was used in the research supporting the method, and the effects of the chosen threshold on finding a false positive or false negative must be considered.

The final consideration, general acceptance in the scientific community, also needs to be applied carefully. There is clearly general acceptance in the scientific community that fMRI can provide scientifically and sometimes clinically useful information about the workings of human brains, but that does not mean there is general acceptance of any particular fMRI application. Similarly, there may be general acceptance that fMRI can provide some general information about the physical correlates of a particular mental state, but without general acceptance that it can do so reliably in an individual case.

3. Rule 403

Rule 702 is not the only test that neuroscience evidence will need to pass to be admitted in court. Even evidence admissible under that rule must still escape the exclusion provided by Rule 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

As discussed in detail in a recent article,[20] Rule 403 may be particularly important with some attempted applications of neuroscience evidence because of the balance it requires between the value of evidence to the decisionmaker and its costs.

The probative value of such evidence may often be questioned. Neuroscience evidence will rarely, if ever, be definitive. It is likely to have a range of uncertainties, from the effectiveness of the method in general, to questions of its proper application in this case, to whether any given individual's reactions are the same as those previously tested.

The other side of Rule 403, however, is even more troublesome. The time necessary to introduce such evidence, and to educate the jury (and judge) about it, will usually be extensive. The possibilities for confusion are likely to be great. And there is at least some evidence that jurors (or, to be precise, "mock jurors") are particularly likely to overestimate the power of neuroscience evidence.[21]

20. Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 Stan. L. Rev. 1119 (2010).

21. *See* Deena Skolnick Weisberg et al., *The Seductive Allure of Neuroscience Explanations*, 20 J. Cog. Neurosci. 470 (2008); David P. McCabe & Alan D. Castel, *Seeing Is Believing: The Effect of Brain Images on Judgments of Scientific Reasoning*, 107 Cognition 343 (2008). These articles are discussed in Brown & Murphy, *supra* note 20, at 1199–1202. *But see* N.J. Schweitzer et al., *Neuroimages as Evidence in a Mens Rea Defense: No Impact*, Psychol. Pub. Pol'y L. (in press) providing the experimental results that seem to indicate that showing neuroimages to mock jurors does not affect their decisions.

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A high-tech "picture" of a living brain, complete with brain regions shown in bright orange and deep purple (colors not seen in an actual brain), may have an unjustified appeal to a jury. In each case, judges will need to weigh possibilities of confusion or prejudice, along with the near certainty of lengthy testimony, against the claimed probative value of the evidence.

4. Other potentially relevant evidentiary issues

Neuroscience evidence will, of course, be subject in individual cases to all evidentiary rules, from the Federal Rules of Evidence or otherwise, and could be affected by many of them. Four examples follow where the application of several such rules to this kind of evidence may raise interesting issues; there are undoubtedly many others.

First, in June 2009 the U.S. Supreme Court decided *Melendez-Diaz v. Massachusetts*,[22] where the five-justice majority held that the Confrontation Clause required the prosecution to present the testimony at trial of state laboratory analysts who had identified a substance as cocaine. This would seem to apply to any use by the prosecution in criminal cases of neuroscience evidence about a scanned defendant or witness, although it is not clear who would have to testify. Would testimony be required from the person who observed the procedure, the person who analyzed the results of the procedure, or both? If the results were analyzed by a computerized algorithm, would the individual (or group) that wrote that algorithm have to testify? These questions, and others, are not unique to neuroscience evidence, of course, but will have to be sorted out generally after *Melendez-Diaz*.

Second, the Federal Rules of Evidence put special limits on the admissibility of evidence of character and, in some cases, of predisposition.[23] In some cases, neuroscience evidence offered for the purpose of establishing a regular behavior of the person might be viewed as evidence of character[24] or predisposition (or

22. 129 S. Ct. 2527 (2009).

23. Fed. R. Evid. 404, 405, 412–415, 608.

24. Evidence about lie detection has sometimes been viewed as "character evidence," introduced to bolster a witness's credibility. The Canadian Supreme Court has held that polygraph evidence is inadmissible in part because it violates the rule limiting character evidence.

> "What is the consequence of this rule in relation to polygraph evidence? Where such evidence is sought to be introduced, it is the operator who would be called as the witness, and it is clear, of course, that the purpose of his evidence would be to bolster the credibility of the accused and, in effect, to show him to be of good character by inviting the inference that he did not lie during the test. In other words, it is evidence not of general reputation but of a specific incident, and its admission would be precluded under the rule. It would follow, then, that the introduction of evidence of the polygraph test would violate the character evidence rule." R. v. Béland, 60 C.R. (3d) 1, ¶¶ 71–72 (1987).

The Canadian court also held that polygraph evidence violated another rule concerning character evidence, the rule against "oath-helping."

> "From the foregoing comments, it will be seen that the rule against oath-helping, that is, adducing evidence solely for the purpose of bolstering a witness's credibility, is well grounded in authority. It

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lack of predisposition). Whether such evidence could be admitted might hinge on whether it was offered in a civil case or a criminal case, and, if in a criminal case, by the prosecution or the defendant.

Third, Federal Rule of Evidence 406 allows the admission of evidence about a habit or routine practice to prove that the relevant person's actions conformed to that habit or routine practice. It is conceivable that neuroscience evidence might be used to describe "habits of mind" and thus be offered under this rule.

The fourth example applies to neuroscience-based lie detection. Although New Mexico is the only U.S. jurisdiction that generally allows the introduction of polygraph evidence,[25] several jurisdictions allow polygraph evidence in two specific situations. First, polygraph evidence is sometimes allowed when both parties have stipulated to its admission in advance of the performance of the test. (This does lead one to wonder whether a court would allow evidence from a psychic or from a fortune-telling toy, like the Magic Eight Ball, if both parties stipulated to it.) Second, polygraph evidence is sometimes allowed to impeach or to corroborate a witness's testimony.[26] If a neuroscience-based lie detection technique were found to be as reliable as the polygraph, presumably those jurisdictions would have to consider whether to extend these exceptions to such neuroscience evidence.

B. Constitutional and Other Substantive Rules

In many contexts, courts will be asked to admit neuroscience evidence or to order, allow, or punish its creation. Such actions may implicate a surprisingly large number of constitutional rights, as well as other substantive legal provisions. Most of these would be rights against the creation or use of neuroscience evidence, although some would be possible rights to its use. And one constitutional provision, the Fourth Amendment, might cut both ways. Again, this section will not seek to discuss all possible such claims or to resolve any of them, but only to raise some of the most interesting issues.

1. Possible rights against neuroscience evidence

a. The Fifth Amendment privilege against self-incrimination

Could a person be forced to "give evidence" through a neuroscience technology, or would that violate his or her privilege against self-incrimination? This has

is apparent that, since the evidence of the polygraph examination has no other purpose, its admission would offend the well-established rule." R. v. Béland, 60 C.R. (3d) 1, ¶ 67(1) (The court also ruled against polygraph evidence as violating the rule against prior consistent statements and, because the jury needs no help in assessing credibility, the rule on the use of expert witnesses).

25. Lee v. Martinez, 96 P.3d 291 (N.M. 2004).

26. *See, e.g.,* United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989) (en banc). *See also* United States v. Allard, 464 F.3d. 529 (5th Cir. 2006); Thornburg v. Mullin, 422 F.3d 1113 (10th Cir. 2005).

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already begun to be discussed by legal scholars in the context of lie detection.[27] One issue is whether the neuroscience evidence is "testimonial evidence." If it were held to be "testimonial" it would be subject to the privilege, but if it were nontestimonial, it would, under current law, not be. Examples of nontestimonial evidence for purposes of the privilege against self-incrimination include incriminating information from a person's private diaries, a blood alcohol test, or medical X rays. An fMRI scan is nothing more than a computer record of radio waves emitted by molecules in the brain. It does not seem like "testimony." On the other hand, fMRI-based lie detection currently involves asking the subject questions to which he or she gives answers, either orally, by pressing buttons, or by some other form of communication. Perhaps those answers would make the resulting evidence "testimonial."

It is possible, however, that answers may not be necessary. Two EEG-based systems claim to be able to determine whether a person either recognizes or has "experiential knowledge" of an event (a memory derived from experience as opposed to being told about it).[28] Very substantial scientific questions exist about each system, but, assuming they were to be admitted as reliable, they would raise this question more starkly because they do not require the subject of the procedure to communicate. The subject is shown photographs of relevant locations or read a description of the events while hooked up to an EEG. The brain waves,

27. The law review literature, by both faculty and students, discussing the Fifth Amendment and neuroscience-based lie detection is already becoming voluminous. *See, e.g.*, Nita Farahany, *Incriminating Thoughts*, 64 Stan. L. Rev., Paper No. 11-17, *available at* SSRN: http://ssrn.com/abstract=1783101 (2011); Dov Fox, *The Right to Silence as Protecting Mental Control*, 42 Akron L. Rev. 763 (2009); Matthew Baptiste Holloway, *One Image, One Thousand Incriminating Words: Images of Brain Activity and the Privilege Against Self-Incrimination,* 27 Temp. J. Sci. Tech. & Envtl. L. 141 (2008); William Federspiel, *Neuroscience Evidence, Legal Culture, and Criminal Procedure*, 16 Wm. & Mary Bill Rts. J. 865 (2008); Sarah E. Stoller & Paul Root Wolpe, *Emerging Neurotechnologies for Lie Detection and the Fifth Amendment*, 33 Am. J.L. & Med. 359 (2007); Michael S. Pardo, *Neuroscience Evidence, Legal Culture, and Criminal Procedure*, 33 Am. J. Crim. L. 301 (2006); and Erich Taylor, *A New Wave of Police Interrogation? "Brain Fingerprinting," the Constitutional Privilege Against Self-Incrimination, and Hearsay Jurisprudence*, U. Ill. J.L. Tech. & Pol'y 287 (2006).

28. The first system is the so-called Brain Fingerprinting, developed by Dr. Larry Farwell. This method was introduced successfully in evidence at the trial court level in a postconviction relief case in Iowa; the use of the method in that case is discussed briefly in the Iowa Supreme Court's decision on appeal, Harrington v. Iowa, 659 N.W.2d 509, 516 n.6 (2003). (The Court expressed no view on whether that evidence was properly admitted. *See id.* at 516.) The method is discussed on the Web site of Farwell's company, Brain Fingerprinting Laboratories, www.brainwavescience.com. It is criticized from a scientific perspective in J. Peter Rosenfeld, *"Brain Fingerprinting": A Critical Analysis*, 4 Sci. Rev. Mental Health Practice 20 (2005). See also the brief discussion in Henry T. Greely & Judy Illes, *Neuroscience-Based Lie Detection: The Urgent Need for Regulation*, 33 Am. J.L. & Med. 377, 387–88 (2007).

The second system is called Brain Electrical Oscillation Signature (BEOS) and was developed in India, where it has been introduced in trials and has been important in securing criminal convictions. *See* Anand Giridharadas, *India's Novel Use of Brain Scans in Courts Is Debated*, N.Y. Times, Sept. 15, 2008, at A10.

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it is asserted, demonstrate whether the subject recognizes the photographs or has "experiential knowledge" of the events—no volitional communication is necessary. It might be harder to classify these EEG records as "testimonial."

b. Other possible general constitutional protections against compulsory neuroscience procedures

Even if the privilege against self-incrimination applies to neuroscience methods of obtaining evidence, it only applies where someone invokes the privilege. The courts and other government bodies force people to answer questions all the time, often under penalty of criminal or civil sanctions or of the court's contempt power. For example, a plaintiff in a civil case alleging damage to his health can be compelled to undergo medical testing at a defendant's appropriate request. In that case, the plaintiff can refuse, but only at the risk of seeing his case dismissed. Presumably, a party could similarly demand that a party, or a witness, undergo a neuroimaging examination, looking for either structural or functional aspects of the person's brain relevant to the case. If the privilege against self-incrimination is not available, or is available but not attractive, could the person asked have any other protection?

The answer is not clear. One might try to argue, along the lines of *Rochin v. California*,[29] that such a procedure violates the Due Process Clause of the Fifth and Fourteenth Amendments because it intrudes on the person in a manner that "shocks the conscience." Alternatively, one might argue that a "freedom of the brain" is a part of the fundamental liberty or the right to privacy protected by the Due Process Clause.[30] Or one might try to use language in some U.S. Supreme Court First Amendment cases that talk about "freedom of thought" to argue that the First Amendment's freedoms of religion, speech, and the press encompass a broader protection of the contents of the mind. The Court never seems to have decided a case on that point. The closest case might be *Stanley v. Georgia*,[31] where the Court held that Georgia could not criminalize a man's private possession of pornography for his own use. None of these arguments is, in itself, strongly supported, but each draws some appeal from a belief that we should be able to keep our thoughts, and, by extension, the workings of our brain, to ourselves.

c. Other substantive rights against neuroscience evidence

At least one form of possible neuroscience evidence may already be covered by statutory provisions limiting its creation and use—lie detection. In 1988, Congress

29. 342 U.S. 165 (1952).

30. *See* Paul Root Wolpe, *Is My Mind Mine? Neuroethics and Brain Imaging*, *in* The Penn Center Guide to Bioethics (Arthur L. Caplan et al. eds., 2009).

31. 394 U.S. 557 (1969). In the context of finding that the First Amendment forbids criminalizing mere possession of pornography, in the home, for an adult's private use, the Court wrote "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." The leap from that language, or that holding, to some kind of mental privacy, is not small.

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passed the federal Employee Polygraph Protection Act (EPPA).[32] Under this Act, almost all employers are forbidden to "directly or indirectly, . . . require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test" or to "use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee."[33] The Act defines a "lie detector" broadly, as "a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual."[34] The Department of Labor can punish violators with civil fines, and those injured have a private right of action for damages.[35] The Act does provide narrow exceptions for polygraph tests in some circumstances.[36]

In addition to federal statutes, many states passed their own versions of the EPPA, either before or after the federal act. The laws passed after EPPA generally apply similar prohibitions to some employers not covered by the federal act (such as state and local governments), but with their own idiosyncratic set of exceptions. Many states have also passed laws regulating lie detection services. Most of these seem clearly aimed at polygraphy, but, in some states, the language used is quite broad and may well encompass neuroscience-based lie detection.[37]

States also may provide protection against neuroscience evidence that goes beyond lie detection and could prevent involuntary neuroscience procedures. Some states have constitutional or statutory rights of privacy that could be read to include a broad freedom for mental privacy. And in some states, such as California, such privacy rights apply not just to state action but to private actors as well.[38] Most employment cases would be covered by EPPA and its state equivalents, but such state privacy protections might be used to help decide whether courts could

32. Federal Employee Policy Protection Act of 1988, Pub. L. No. 100-347, § 2, 102 Stat. 646 (codified as 29 U.S.C. §§ 2001–2009 (2006)). See generally the discussion of federal and state laws in Greely & Illes, *supra* note 28, at 405–10, 421–31.

33. 29 U.S.C. § 2002 (1)–(2) (2006) (The section also prohibits employers from taking action against employees because of their refusal to take a test, because of the results of such a test, or for asserting their rights under the Act); and *id*. § 2001 (3)–(4) (2006).

34. *Id*. § 2001(3) (2006).

35. *Id*. § 2005 (2006).

36. *Id*. § 2001(6) (2006).

37. *See generally* Greely & Illes, *supra* note 28, at 409–10, 421–31 (for both state laws on employee protection and state laws more broadly regulating polygraphy).

38. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." (emphasis added). Calif. Const. art. I, § 1. The words, "and privacy" were added by constitutional amendment in 1972. The California Supreme Court has applied these privacy protections in suits against private actors: "In summary, the Privacy Initiative in article I, section 1 of the California Constitution creates a right of action against private as well as government entities." Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 644 (Cal. 1994).

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compel neuroimaging scans or whether they could be required in nonemployment relationships, such as school/student or parent/child.

d. Neuroscience evidence and the Sixth and Seventh Amendment rights to trial by jury

One might also argue that some kinds of neuroscience evidence could be excluded from evidence as a result of the federal constitutional rights to trial by jury in criminal and most civil cases. In *United States v. Scheffer,*[39] the Supreme Court upheld an express ban in the Military Rules of Evidence on the admission of any polygraph evidence against a criminal defendant's claimed Sixth Amendment right to introduce the evidence in his defense. Justice Thomas wrote the opinion of the Court holding that the ban was justified by the questionable reliability of the polygraph. Justice Thomas continued, however, in a portion of the opinion joined only by Chief Justice Rehnquist and Justices Scalia and Souter, to hold that the Rule could also be justified by an interest in the role of the jury:

> It is equally clear that Rule 707 serves a second legitimate governmental interest: Preserving the jury's core function of making credibility determinations in criminal trials. A fundamental premise of our criminal trial system is that "the *jury* is the lie detector." *United States v. Barnard,* 490 F.2d 907, 912 (CA9 1973) (emphasis added), *cert. denied,* 416 U.S. 959, 40 L. Ed. 2d 310, 94 S. Ct. 1976 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 35 L. Ed. 371, 11 S. Ct. 720 (1891).[40]

The other four justices in the majority, and Justice Stevens in dissent, disagreed that the role of the jury justified this rule, but the question remains open. Justice Thomas's opinion did not argue that exclusion was *required* as part of the rights to jury trials in criminal and civil cases under the Sixth and Seventh Amendments, respectively, but one might try to extend his statements of the importance of the jury as "the lie detector" to such an argument.[41]

39. 523 U.S. 303 (1998).

40. *Id.* at 312–13.

41. The Federal Rules of Criminal Procedure effectively give the prosecution a right to a jury trial, by allowing a criminal defendant to waive such a trial only with the permission of both the prosecution and the court. Fed. R. Crim. P. 23(a). Many states allow a criminal defendant to waive a jury trial unilaterally, thus depriving the prosecution of an effective "right" to a jury.

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2. Possible rights to the creation or use of neuroscience evidence

a. The Eighth Amendment right to present evidence of mitigating circumstances in capital cases

In one of many ways in which "death is different," in *Lockett v. Ohio*,[42] the U.S. Supreme Court held that the Eighth Amendment guarantees a convicted defendant in a capital case a sentencing hearing in which the sentencing authority must be able to consider any mitigating factors. In *Rupe v. Wood*,[43] the Ninth Circuit, in an appeal from the defendant's successful habeas corpus proceeding, applied that holding to find that a capital defendant had a constitutional right to have polygraph evidence admitted as mitigating evidence in his sentencing hearing. The court agreed that totally unreliable evidence, such as astrology, would not be admissible, but that the district court had properly ruled that polygraph evidence was not that unreliable. (The Washington Supreme Court had previously decided that polygraph evidence should be admitted in the penalty phase of capital cases under some circumstances.[44]) Thus, capital defendants may argue that they have the right to present neuroscience evidence as mitigation even if it would not be admissible during the guilt phase.

b. The Sixth Amendment right to present a defense

The *Scheffer* case arose in the context of another right guaranteed by the Sixth Amendment, the right of a criminal defendant to present a defense. It seems likely that neuroscience evidence will first be offered by parties who have been its voluntary subjects and who will argue that it strengthens their cases. In fact, the main use of neuroimaging in the courts so far, at least in criminal cases, has been by defendants seeking to demonstrate through the scans some element of a defense or mitigation. If jurisdictions were to exclude such evidence categorically, they might face a similar Sixth Amendment challenge.

The Supreme Court has held that some prohibitions on evidence in criminal cases violate the right to present a defense. Thus, in *Rock v. Arkansas*,[45] the Court struck down a *per se* rule in Arkansas against the admission of hypnotically refreshed testimony, holding that it was "arbitrary or disproportionate to the purposes [it is] designed to serve." The *Scheffer* case probably provides the model for how arguments about exclusions of neuroscience evidence would play out. Eight of the Justices in *Scheffer* agreed that the reliability of polygraphy was sufficiently

42. 438 U.S. 586 (1978).

43. 93 F.3d 1434, 1439–41 (9th Cir. 1996). *But see* United States v. Fulks, 454 F.3d 410, 434 (4th Cir. 2006). *See generally* Christopher Domin, *Mitigating Evidence? The Admissibility of Polygraph Results in the Penalty Phase of Capital Trials*, 41 U.C. Davis L. Rev. 1461 (2010), which argues that the Supreme Court should resolve the resulting circuit split by adopting the Ninth Circuit's position.

44. State v. Bartholomew, 101 Wash. 2d 631, 636, 683 P.2d 1079 (1984).

45. 483 U.S. 44, 56, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987).

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questionable as to justify the *per se* ban on its use. Justice Stevens, however, dissented, finding polygraphy sufficiently reliable to invalidate its per se exclusion.

3. The Fourth Amendment

The Fourth Amendment raises some particularly interesting questions. It provides, of course, that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

On the one hand, an involuntary neuroscience examination would seem to be a search or seizure, and thus "unreasonable" neuroscience examinations are prohibited. To that extent, the Fourth Amendment would appear to be a protection against compulsory neuroscience testing.

On the other hand, if, say, an fMRI scan or an EEG were viewed as a "search or seizure" for purposes of the Fourth Amendment, presumably courts could issue a warrant for such a search or seizure, given probable cause and the relevant procedural requirements. The use of such a warrant might (or might not) be limited by the privilege against self-incrimination or by some constitutional privacy right, but, if such rights did not apply, would such warrants allow our brains to be searched? This is, in a way, the ultimate result of the revolution in neuroscience, which identifies our incorporeal "mind" with our physical "brain" and allows us to begin to draw inferences from the brain to the mind. If the brain is a physical thing or a place, it could be searchable, even if the goal in searching it is to find out something about the mind, something that, as a practical matter, had never itself been directly searchable.

VI. Examples of the Possible Uses of Neuroscience in the Courts

Neuroscience may end up in court wherever someone's mental state or condition is relevant, which means it may be relevant to a vast array of cases. There are very few cases, civil or criminal, where the mental states of the parties are not at least theoretically relevant on issues of competency, intent, motive, recklessness, negligence, good or bad faith, or others. And even if the parties' own mental states were not relevant, the mental states of witnesses almost always will be potentially relevant—are they telling the truth? Are they biased against one party or another? The mental states of jurors and even of judges occasionally may be called into question.

There are some important limitations on the use of neuroscience in the courtroom. First, it is unlikely to be used that often, particularly if it remains expensive.

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With the possible exception of lie detection or bias detection, most cases will not present a practical use for it. The garden variety breach of contract or assault and battery is not likely to provide a plausible context for convincing neuroscience evidence, especially if there is no evidence that the actor or the actions were odd or bizarre. And many cases will not provide, or justify, the resources necessary for a scan. Those costs could come down, but it seems unlikely that such evidence would commonly be admitted without expert testimony, and the costs of that seem likely to remain high.

Second, neuroscience evidence usually has a "time machine" problem. Neuroscience seems unlikely ever to be able to discern a person's state of mind in the past. Unless the legally relevant action took place inside an MRI scanner or other neuroscience tool, the best it may be able to do is to say that, based on your current mental condition or state, as shown by the current structure or functioning of your brain, you are more or less likely than average to have had a particular mental state or condition at the time of the relevant event. If the time of the relevant event is the time of trial (or shortly before trial)—as would be the case with the truthfulness of testimony, the existence of bias, or the existence of a particular memory—that would not be a problem, but otherwise it would be.

Nonetheless, neuroscience evidence seems likely to be offered into evidence for several issues, and in many of them, it already has been offered and even accepted. In some cases it will be, and has been, offered as evidence of "legislative facts," of realities relevant to a broader legal issue than the mental state of any particular party or witness. Thus, amicus briefs in two Supreme Court cases involving the punishment of juveniles—one about capital punishment and one about life imprisonment without possibility of parole—and to some extent the Court itself, have discussed neuroscience findings about adolescent brains.[46] Three of

46. In *Roper v. Simmons,* 543 U.S. 551 (2005), the Court held that the death penalty could not constitutionally be imposed for crimes committed while a defendant was a juvenile. Two amicus briefs argued that behavioral and neuroscience evidence supported this position. *See* Brief of Amicus Curiae American Medical Association et al., *Roper v. Simmons*; and Brief of Amicus Curiae American Psychological Association and the Missouri Psychological Association Supporting Respondent (No. 03-633).

In *Roper,* the Court itself did not substantially rely on the neuroscientific evidence and does not cite those amicus briefs. The Court's opinion noted the scientific evidence only in passing as one part of three relevant differences between adults and juveniles: "First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' [citation omitted]" 543 U.S. at 569. Justice Scalia, however, did take the majority to task for even this limited invocation of science and sociology. 543 U.S. at 616–18.

In *Graham v. Florida,* 2010 U.S. Lexis 3881, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), the Court held that defendants could not be sentenced to life without the possibility of parole for nonhomicide crimes committed while they were juveniles. Two amicus briefs similar to those discussed in *Roper* were filed. *See* Brief of Amicus Curiae American Medical Association (No. 08-7412) and Brief Amicus Curiae American Academy of Child & Adolescent Psychiatry (No. 08-7621) Supporting Neither

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the handful of published cases in which fMRI evidence was offered in court concerned challenges to state laws requiring warning labels on violent videogames.[47] The states sought, without success, to use fMRI studies of the effects of violent videogames on the brains of children playing the games to support their statutes.[48]

These "wholesale" uses of neuroscience may (or may not) end up affecting the law, but the courts would be more affected if various "retail" uses of neuroscience become common, where a party or a witness is subjected to neuroscience procedures to determine something relevant only to that particular case. An incomplete list of some of the most plausible categories for such retail uses includes the following:

- Issues of responsibility, certainly criminal and likely also civil;
- Predicting future behavior for sentencing;
- Mitigating (or potentially aggravating) factors on sentencing;

Party; and Brief of Amicus Curiae American Psychological Association et al. Supporting Petitioners (Nos. 08-7412, 08-7621). The Court did refer more directly to the scientific findings in *Graham*, directly citing the amicus briefs:

> "No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *See* Brief for American Medical Association et al. as Amici Curiae 16–24; Brief for American Psychological Association et al. as Amici Curiae 22–27.

Justice Thomas, in a dissent joined by Justice Scalia, reviewed some of the evidence from these amicus briefs:

> "In holding that the Constitution imposes such a ban, the Court cites 'developments in psychology and brain science' indicating that juvenile minds 'continue to mature through late adolescence,' *ante*, at 17 (citing Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for American Psychological Association et al. as *Amici Curiae* 22–27 (hereinafter APA Brief)), and that juveniles are 'more likely [than adults] to engage in risky behaviors,'" *id*. at 7. But even if such generalizations from social science were relevant to constitutional rulemaking, the Court misstates the data on which it relies.

47. Entm't Software Ass'n v. Hatch, 443 F. Supp. 2d 1065 (D. Minn. 2006); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); Entm't Software Ass'n v. Granholm, 404 F. Supp. 2d 978 (E.D. Mich. 2005). Each of the three courts held that the state statutes violated the First Amendment.

48. The courts, sitting in equity and so without juries, all considered the scientific evidence and concluded that it was insufficient to sustain the statutes' constitutionality. In *Blagojevich* the court heard testimony for the state directly from Dr. Kronenberger, the author of some of the fMRI-based articles on which the state relied, as well from Dr. Howard Nusbaum, for the plaintiffs, who attacked Dr. Kronenberger's study. After a substantial discussion of the scientific arguments, the district court judge, Judge Matthew Kennelly, found that "Dr. Kronenberger's studies cannot support the weight he attempts to put on them via his conclusions," and did not provide a basis for the statute. *Blagojevich*, 404 F. Supp. at 1063–67. Judge Kennelly's discussion of this point may be a good example of the kind of analysis neuroscience evidence may force upon judges.

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- Competency, now or in the past, to take care of one's affairs, to enter into agreements or make wills, to stand trial, to represent oneself, and to be executed;
- Deception in current statements;
- Existence or nonexistence of a memory of some event and, possibly, some information about the status of that memory (true, false; new, old, etc.);
- Presence of the subjective sensation of pain;
- Presence of the subjective sensation of remorse; and
- Presence of bias against a party.

Many, but not all, of these issues have begun to be discussed in the literature. A few of them, such as criminal responsibility, mitigation, memory detection, and lie detection, are appearing in courtrooms; others, such as pain detection, have reached the edge of trial. This chapter does not discuss all of these topics and does not discuss any of them in great depth, but it will describe three of them—criminal responsibility, detection of pain, and lie detection—in order to provide a flavor of the possibilities.

A. Criminal Responsibility

Neuroscience may raise some deep questions about criminal responsibility. Assume we had excellent scientific evidence that a defendant could not help but commit the criminal acts because of a specific brain abnormality?[49] Should that affect the defendant's guilt and, if so, how? Should it affect his sentence or other subsequent treatment? The moral questions may prove daunting. Currently the law is not very interested in such deep questions of free will, but that may change.

Already, though, criminal law is concerned with the mental state of the defendant in many more specific contexts. A conviction generally requires both an *actus reus* and a *mens rea*—a "guilty act" and a "guilty mind." An unconscious person cannot "act," but even a conscious act is often not enough. Specific crimes often require specific intents, such as acting with a particular purpose or in a knowing or reckless fashion. Some crimes require even more defined mental states, such as a requirement for premeditation in some murder statutes. And almost all crimes can be excused by legal insanity. In these and other ways the mental state of the defendant may be relevant to a criminal case.

Neuroscience may provide evidence in some cases to support a defendant's claim of nonresponsibility. For example, a defendant who claims to have been insane at the time of the crime might try to support his or her claim by alleging that he or she is seeing and hearing hallucinations. Neuroimaging may be able

49. *See* Henry T. Greely, *Neuroscience and Criminal Responsibility Proving "Can't Help Himself" as a Narrow Bar to Criminal Liability, in* Law and Neuroscience, Current Legal Issues 13 (Michael Freeman ed. 2011).

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to provide some evidence about whether the defendant is, in fact, hallucinating, at least at the time when he or she is in the scanner. Such imaging might show that the defendant had a stroke or tumor in a particular part of the brain, which then could be used to argue in some way against the defendant's criminal responsibility.[50]

Neuroimaging has been used more broadly in some criminal cases. For example, as noted above, in the trial of John Hinckley for the attempted assassination of President Reagan, the defense used CAT scans of Hinckley's brain to support the argument, based largely on his bizarre behavior, that he suffered from schizophrenia. The scientific basis for that conclusion, offered early in the history of brain CAT scans, was questionable at the time and has become even weaker since, but Hinckley was found not guilty by reason of insanity. More recently, in November 2009, testimony about an fMRI scan was introduced in the penalty phase of a capital case as mitigating evidence that the defendant suffered from psychopathy. The defendant was sentenced to death, but after longer jury deliberations than defense counsel expected.[51] (This appears to have been the first time fMRI results were introduced in a criminal case.[52])

Neuroscience evidence also may be relevant in wider arguments about criminal justice. Evidence about the development of adolescent brains has been referred to in appellate cases concerning the punishments appropriate for people who committed crimes while under age, including, as noted above, U.S. Supreme Court decisions. More broadly, some have urged that neuroscience will undercut much of the criminal justice system. The argument is that neuroscience ultimately will prove that no one—not even the sanest defendant—has free will and that this will fatally weaken the retributive aspect of criminal justice.[53]

50. In at least one fascinating case, a man who was convicted of sexual abuse of a child was found to have a large tumor pressing into his brain. When the tumor was removed, his criminal sexual impulses disappeared. When his impulses returned, so had his tumor. The tumor was removed a second time and, again, his impulses disappeared. J.M. Burns & R.H. Swerdlow, *Right Orbitofrontal Tumor with Pedophilia Symptom and Constructional Apraxia Sign*, 60 Arch. Neurology 437 (2003); *Doctors Say Pedophile Lost Urge After Tumor Removed*, USA Today, July 28, 2003. *See* Greely, *Neuroscience and Criminal Responsibility*, *supra* note 49 (offering a longer discussion of this case).

51. The defendant in this Illinois case, Brian Dugan, confessed to the murder but sought to avoid the death penalty. *See* Virginia Hughes, *Head Case*, 464 Nature 340 (2010) (providing an excellent discussion of this case).

52. Other forms of neuroimaging, particularly PET and structural MRI scans, have been more widely used in criminal cases. Dr. Amos Gur at the University of Pennsylvania estimates that he has used neuroimaging in testimony for criminal defendants about 30 times. *Id*.

53. *See, e.g.*, Robert M. Sapolsky, *The Frontal Cortex and the Criminal Justice System*, *in* Law and the Brain (Semir Zeki & Oliver Goodenough eds., 2006); Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, in Law and the Brain (Semir Zeki & Oliver Goodenough eds., 2006).

This argument has been forcefully attacked by Professor Stephen Morse. *See*, *e.g.*, Stephen J. Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 Minn. J.L. Sci. & Tech. 1 (2008); Stephen J. Morse, *The Non-Problem of Free Will in Forensic Psychiatry*

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The application of neuroscience evidence to individual claims of a lack of criminal responsibility should prove challenging.[54] Such claims will suffer from the time machine problem—the brain scan will almost always be from after, usually long after, the crime was committed and so cannot directly show the defendant's brain state (and hence, by inference, his or her mental state) at or before the time of the crime. Similarly, most of the neuroscience evidence will be from associations, not from experiments. It is hard to imagine an ethical experiment that would scan people when they are, or are not, committing particular crimes, leaving only indirect experiments. Evidence that, for example, more convicted rapists than nonrapists had particular patterns of brain activation when viewing sexual material might somehow be relevant to criminal responsibility, but it also might not.

Careful neuroscience studies, either structural or functional, of the brains of criminals are rare. It seems highly unlikely that a "responsibility region" will ever be found, one that is universally activated in law-abiding people and that is deactivated in criminals (or vice versa). At most, the evidence is likely to show that people with particular brain structures or patterns of brain functioning commit crimes more frequently than people without such structures or patterns. Applying this group evidence to individual cases will be difficult, if not impossible. All of the problems of technical and statistical analysis of neuroimaging data, discussed in Section IV, apply. And it is possible that the to-be-scanned defendants will be able to implement countermeasures to "fool" the expert analyzing the scan.

The use of neuroscience to undermine criminal responsibility faces another problem—identifying a specific legal argument. It is not generally a defense to a criminal charge to assert that one has a predisposition to commit a crime, or even a very high statistical likelihood, as a result of social and demographic variables, of committing a crime. It is not clear whether neuroscience would, in any more than a very few cases,[55] provide evidence that was not equivalent to predisposition evidence. (And, of course, prudent defense counsel might think twice before presenting evidence to the jury that his or her client was strongly predisposed to commit crimes.)

We are at an early stage in our understanding of the brain and of the brain states related to the mental states involved in criminal responsibility. At this point, about all that can be said is that at least some criminal defense counsel, seeking to represent their clients zealously, will watch neuroscience carefully for arguments they could use to relieve their clients from criminal responsibility.

and Psychology, 25 Behav. Sci. & L. 203 (2007); Stephen J. Morse, *Moral and Legal Responsibility and the New Neuroscience*, *in* Neuroethics: Defining the Issues in Theory, Practice, and Policy (Judy Illes ed., 2006); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio St. J. Crim. L. 397 (2005).

54. A good short discussion of these challenges can be found in Helen Mayberg, *Does Neuroscience Give Us New Insights into Criminal Responsibility? in* A Judge's Guide to Neuroscience, *supra* note 1.

55. *See* Greely, *Neuroscience and Criminal Responsibility*, *supra* note 49 (arguing for a very narrow neuroscience-based defense).

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B. Lie Detection

The use of neuroscience methods for lie detection probably has received more attention than any other issue raised in this chapter.[56] This is due in part to the cultural interest in lie detection, dating back in its technological phase nearly 90 years to the invention of the polygraph.[57] But it is also due to the fact that two commercial firms currently are offering fMRI-based lie detection services for sale in the United States: Cephos and No Lie MRI.[58] Currently, as far as we know,

56. For a technology whose results have yet to be admitted in court, the legal and ethical issues raised by fMRI-based lie detection have been discussed in an amazingly long list of scholarly publications from 2004 to the present. An undoubtedly incomplete list follows: Nita Farahany, *supra* note 27; Brown & Murphy, *supra* note 20; Anthony D. Wagner, *supra* note 12; Frederick Schauer, *Can Bad Science Be Good Evidence?: Neuroscience, Lie-Detection, and the Mistaken Conflation of Legal and Scientific Norms,* 95 Cornell L. Rev. 1191 (2010); Frederick Schauer, *Neuroscience, Lie-Detection, and the Law: A Contrarian View,* 14 Trends Cog. Sci. 101 (2010); Emilio Bizzi et al., Using Imaging to Identify Deceit: Scientific and Ethical Questions (2009); Joelle Anne Moreno, *The Future of Neuroimaged Lie Detection and the Law,* 42 Akron L. Rev. 717 (2009); Julie Seaman, *Black Boxes: fMRI Lie Detection and the Role of the Jury*, 42 Akron L. Rev. 931 (2009); Jane Campbell Moriarty, *Visions of Deception: Neuroimages and the Search for Truth*, 42 Akron L. Rev. 739 (2009); Dov Fox, *supra* note 27; Benjamin Holley, *It's All in Your Head: Neurotechnological Lie Detection and the Fourth and Fifth Amendments,* 28 Dev. Mental Health L. 1 (2009); Brian Reese, *Comment: Using fMRI as a Lie Detector—Are We Lying to Ourselves?* 19 Alb. L.J. Sci. & Tech. 205 (2009); Cooper Ellenberg, Student Article: *Lie Detection: A Changing of the Guard in the Quest for Truth in Court?* 33 Law & Psychol. Rev. 139 (2009); Julie Seaman, *Black Boxes*, 58 Emory L.J. 427 (2008); Matthew Baptiste Holloway, *supra* note 27; William Federspiel, *supra* note 27; Greely & Illes, *supra* note 28; Sarah E. Stoller & Paul R. Wolpe, *supra* note 27; Mark Pettit, *FMRI and BF Meet FRE: Braining Imaging and the Federal Rules of Evidence*, 33 Am. J.L. & Med. 319 (2007); Jonathan H. Marks, *Interrogational Neuroimaging in Counterterrorism: A "No-Brainer" or a Human Rights Hazard?* 33 Am. J.L. & Med. 483 (2007); Leo Kittay, *Admissibility of fMRI Lie Detection: The Cultural Bias Against "Mind Reading" Devices*, 72 Brook. L. Rev. 1351, 1355 (2007); Jeffrey Bellin, *The Significance (if Any) for the Federal Criminal Justice System of Advances in Lie Detector Technology*, Temp. L. Rev. 711 (2007); Henry T. Greely, *The Social Consequences of Advances in Neuroscience: Legal Problems; Legal Perspectives*, *in* Neuroethics: Defining the Issues in Theory, Practice and Policy 245 (Judy Illes ed., 2006); Charles N.W. Keckler, *Cross-Examining the Brain: A Legal Analysis of Neural Imaging for Credibility Impeachment*, 57 Hastings L.J. 509 (2006); Archie Alexander, *Functional Magnetic Resonance Imaging Lie Detection: Is a "Brainstorm" Heading Toward the "Gatekeeper"?* 7 Hous. J. Health L. & Pol'y (2006); Michael S. Pardo, *supra* note 27; Erich Taylor, *supra* note 27; Paul R. Wolpe et al., *Emerging Neurotechnologies for Lie-Detection: Promises and Perils*, 5 Am. J. Bioethics 38, 42 (2005); Henry T. Greely, *Premarket Approval Regulation for Lie Detection: An Idea Whose Time May Be Coming*, 5 Am. J. Bioethics 50–52 (2005); Sean Kevin Thompson, Note: *The Legality of the Use of Psychiatric Neuroimaging in Intelligence Interrogation,* 90 Cornell L. Rev. 1601 (2005); Henry T. Greely, *Prediction, Litigation, Privacy, and Property: Some Possible Legal and Social Implications of Advances in Neuroscience*, *in* Neuroscience and the Law: Brain, Mind, and the Scales of Justice 114–56 (Brent Garland ed., 2004); and Judy Illes, *A Fish Story? Brain Maps, Lie Detection, and Personhood*, 6 Cerebrum 73 (2004).

57. An interesting history of the polygraph can be found in Ken Alder, The Lie Detectors: The History of an American Obsession (2007). Perhaps the best overall discussion of the polygraph, including some discussion of its history, is found in the National Research Council report, *supra* note 14, commissioned in the wake of the Wen Ho Lee case, on the use of the technology for screening.

58. The Web sites for the two companies are at Cephos, www.cephoscorp.com (last visited July 3, 2010); and No Lie MRI, http://noliemri.com (last visited July 3, 2010).

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evidence from fMRI-based lie detection has not been admitted into evidence in any court, but it was offered—and rejected—in two cases, *United States v. Semrau*[59] and *Wilson v. Corestaff Services, L.P.,*[60] in May 2010.[61] This section will begin by analyzing the issues raised for courts by this technology and then will discuss these two cases, before ending with a quick look at possible uses of this kind of technology outside the courtroom.

1. Issues involved in the use of fMRI-based lie detection in litigation

Published research on fMRI and detecting deception dates back to about 2001.[62] As noted above, to date between 20 and 30 peer-reviewed articles from about 15 laboratories have appeared claiming to find statistically significant correlations between patterns of brain activation and deception. Only a handful of the published studies have looked at the accuracy of determining deception in individual subjects as opposed to group averages. Those studies generally claim accuracy rates of between about 75% and 90%. No Lie MRI has licensed the methods used by one laboratory, that of Dr. Daniel Langleben at the University of Pennsylvania; Cephos has licensed the method used by another laboratory, that of Dr. Frank A. Kozel, first at the Medical University of South Carolina and then at the University of Texas Southwestern Medical Center. (The method used by a British researcher, Dr. Sean Spence, has been used on a British reality television show.)

All of these studies rely on research subjects, typically but not always college students, who are recruited for a study of deception. They are instructed to answer some questions truthfully in the scanner and to answer other questions inaccurately.[63] In the Langleben studies, for example, right-handed, healthy, male

59. No. 07-10074 M1/P, Report and Recommendation (W.D. Tenn. May 31, 2010).

60. 2010 NY slip op. 20176, 1 (N.Y. Super. Ct. 2010); 900 N.Y.S.2d 639; 2010 N.Y. Misc. LEXIS 1044 (2010).

61. In early 2009, a motion to admit fMRI-based lie detection evidence, provided by No Lie MRI, was made, and then withdrawn, in a child custody case in San Diego. The case is discussed in a prematurely entitled article, Alexis Madrigal, *MRI Lie Detection to Get First Day in Court*, WIRED SCI. (Mar. 16, 2009), *available at* http://blog.wired.com/wiredscience/2009/03/noliemri.html (last visited July 3, 2010). A somewhat similar method of using EEG to look for signs of "recognition" in the brain was admitted into one state court hearing for postconviction relief at the trial court level in Iowa in 2001, and both it and another EEG-based method have been used in India. As far as we know, evidence from the use of EEG for lie detection has not been admitted in any other U.S. cases. *See supra* note 28.

62. The most recent reviews of the scientific literature on this subject are Anthony D. Wagner, *supra* note 12; and S.E. Christ et al., *The Contributions of Prefrontal Cortex and Executive Control to Deception: Evidence from Activation Likelihood Estimate Meta-Analyses*, 19 Cerebral Cortex 2557 (2009). *See also* Greely & Illes, *supra* note 28 (for discussion of the articles through early 2007). The following discussion is based largely on those sources.

63. At least one fMRI study has attempted to investigate self-motivated lies, told by subjects who were *not* instructed to lie, but who chose to lie for personal gain. Joshua D. Greene & Joseph M. Paxton, *Patterns of Neural Activity Associated with Honest and Dishonest Moral Decisions*, 106 Proc. Nat'l Acad. Sci. 12,506 (2009). The experiment was designed to make it easy for subjects to realize they

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University of Pennsylvania undergraduates were shown images of playing cards while in the scanner and asked to indicate whether they saw a particular card. They were instructed to answer truthfully except when they saw one particular card. Some of Kozel's studies used a different experimental paradigm, in which the subjects were put in a room and told to take either a watch or a ring. When asked in the scanner separately whether they had taken the watch and then whether they had taken the ring, they were to reply "no" in both cases—truthfully once and falsely the other time. When analyzed in various ways, the fMRI results showed statistically different patterns of brain activation (small changes in BOLD response) when the subjects were lying and when they were telling the truth.

In general, these studies are not guided by a consistent hypothesis about which brain regions should be activated or deactivated during truth or deception. The results are empirical; they see particular patterns that differ between the truth state and the lie state. Some have argued that the patterns show greater mental effort when deception is involved; others have argued that they show more impulse control when lying.

Are fMRI-based lie detection methods accurate? As a class of experiments, these studies are subject to all the general problems discussed in Section IV regarding fMRI scans that might lead to neuroscience evidence. So far there are only a few studies involving a limited number of subjects. (The method used by No Lie MRI seems ultimately to have been based on the responses of four right-handed, healthy, male University of Pennsylvania undergraduates.[64]) There have been, to date, no independent replications of any group's findings.

The experience of the research subjects in these fMRI studies of deception seems to be different from "lying" as the court system would perceive it. The subjects knew they were involved in research, they were following orders to lie, and they knew that the most harm that could come to them from being detected in a lie might be lesser payment for taking part in the experiment. This seems hard to compare to a defendant lying about participating in a murder. More fundamentally, it is not clear how one could conduct ethical but realistic experiments with lie detection. Research subjects cannot credibly be threatened with jail if they do not convince the researcher of the truth of their lies.

Only a handful of researchers have published studies showing reported accuracy rates with individual subjects and only with a small number of subjects.[65]

would be given more money if they lied about how many times they correctly predicted a coin flip. Investigators could not, however, determine if a subject lied in any particular trial.

64. Daniel D. Langleben et al., *Telling Truth from Lie in Individual Subjects with Fast Event-Related fMRI,* 26 Hum. Brain Mapping 262, 267 (2005).

65. See discussion in Anthony D. Wagner, *supra* note 12, at 29–35. Wagner analyzes 11 peer-reviewed, published papers. Seven come from Kozel's laboratory; three come from Langleben's. The only exception is a paper from John Cacciopo's group, which concludes " [A]lthough fMRI may permit investigation of the neural correlates of lying, at the moment it does not appear to provide a very accurate marker of lying that can be generalized across individuals or even perhaps across types

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Some of the studies used complex and somewhat controversial statistical techniques. And although subjects in at least one experiment were invited to try to use countermeasures against being detected, no specific countermeasures were tested.

Beyond the scientific validity of these techniques lie a host of legal questions. How accurate is accurate enough for admissibility in court or for other legal system uses? What are the implications of admissible and accurate lie detection for the Fourth, Fifth, Sixth, and Seventh Amendments? Would jurors be allowed to consider the failure, or refusal, of a party to take a lie detector test? Would lie detection be available in discovery? Would each side get to do its own tests—and who would pay?

Accurate lie detection could make the justice system much more accurate. Incorrect convictions might become rare; so might incorrect acquittals. Accurate lie detection also could make the legal system much more efficient. It seems likely that far fewer cases would go to trial if the witnesses could expect to have their veracity accurately determined.

Inaccurate lie detection, on the other hand, holds the potential of ruining the innocent and immunizing the guilty. It is at least daunting to remember some of the failures of the polygraph, such as the case of Aldrich Ames, a Soviet (and then Russian) mole in the Central Intelligence Agency, who passed two Agency polygraph tests while serving as a paid spy.[66] The courts already have begun to decide whether and how to use these new methods of lie detection in the judicial process; the rest of society also will soon be forced to decide on their uses and limits.

2. Two cases involving fMRI-based lie detection

On May 31, 2010, U.S. Magistrate Judge Tu M. Pham of the Western District of Tennessee issued a 39-page report and recommendation on the prosecution's motion to exclude evidence from an fMRI-based lie detection report by Cephos in the case of *United States v. Semrau*.[67] The report came after a hearing on May 13–14 featuring testimony from Steve Laken, CEO of Cephos, for admission, and from two experts arguing against admission. (The district judge adopted the magistrate's report during the trial.)

The defendant in this case, a health professional accused of defrauding Medicare, offered as evidence a report from Cephos stating that he was being truthful

of lies by the same individuals." G. Monteleone et al., *Detection of Deception Using fMRI: Better Than Chance, But Well Below Perfection*, 4 Soc. Neurosci. 528 (2009). However, that study only looked at one brain region at a time, and it did not test combinations or patterns, which might have improved the predictive power.

66. *See* Senate Select Committee on Intelligence, Assessment of the Aldrich H. Ames Espionage Case and Its Implications for U.S. Intelligence (1994).

67. *See supra* note 59. The district court judge assigned to the case had a scheduling conflict on the date of the hearing on the prosecution's motion, and so the hearing was held before a magistrate judge from that district.

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when he answered a set of questions about his actions and knowledge concerning the alleged crimes.

Judge Pham first analyzed the motion under Rule 702, using the *Daubert* criteria. He concluded that the technique was testable and had been the subject of peer-reviewed publications. On the other hand, he concluded that the error rates for its use in realistic situations were unknown. Furthermore, he found there were no standards for its appropriate use. To the extent that the publications relied on by Cephos to establish its reliability constituted such standards, those standards had not actually been followed in the tests of the defendant. Cephos actually scanned Dr. Semrau 2 times on 1 day, asking questions about one aspect of the criminal charges during the first scan and then about another aspect in the second scan. The company's subsequent analysis of those scans indicated that the defendant had been truthful in the first scan but deceptive in the second scan. Cephos then scanned him a third time, several days later, on the second subject but with revised questions, and concluded that he was telling the truth that time. Nothing in the publications relied upon by Cephos indicated that the third scan was appropriate. Finally, Judge Pham found that the method was not generally accepted in the relevant scientific community as sufficiently reliable for use in court, citing several publications, including some written by the authors whose methods Cephos used.

The magistrate judge then examined the motion under Rule 403 and found that the potential prejudicial effect of the evidence outweighed its probative value. He noted that the test had been conducted without the government's knowledge or participation, in a context where the defendant risked nothing by taking the test—a negative result would never be disclosed. He noted the jury's central role in determining credibility and considered the likelihood that the lie detection evidence would be a lengthy and complicated distraction from the jury's central mission. Finally, he noted that the probative value of the evidence was greatly reduced because the report only gave a result concerning the defendant's general truthfulness when responding to more than 10 questions about the events but did not even purport to say whether the defendant was telling the truth about any particular question.

Earlier that month, a state trial court judge in Brooklyn excluded another Cephos lie detection report in a civil case, *Wilson v. Corestaff Services, L.P.*[68] This case involved a claim by a former employee under state law that she had been subject to retaliation for reporting sexual harassment. The plaintiff offered evidence from a Cephos report finding that her main witness was truthful when he described how defendant's management said it would retaliate against the plaintiff.

That case did not involve an evidentiary hearing or, indeed, any expert testimony. The judge decided the lie detection evidence was not appropriate under New York's version of the *Frye* test, noting that, in New York, "courts have advised that the threshold question under *Frye* in passing on the admissibility

68. Wilson v. Corestaff Services, L.P., *supra* note 60.

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of expert's testimony is whether the testimony is 'within the ken of the typical juror.'"[69] Because credibility is a matter for the jury, the judge concluded that this kind of evidence was categorically excluded under New York's version of *Frye*. He also noted that "even a cursory review of the scientific literature demonstrates that the plaintiff is unable to establish that the use of the fMRI test to determine truthfulness or deceit is accepted as reliable in the relevant scientific community."[70]

3. fMRI-based lie detection outside the courtroom

Lie detection might have applications to litigation without ever being introduced in trials. As is the case today with the polygraph, the fact that it is not generally admissible in court might not stop the police or the prosecutors from using it to investigate alleged crimes. Similarly, defense counsel might well use it to attempt to persuade the authorities that their clients should not be charged or should be charged with lesser offenses. One could imagine the same kinds of pretrial uses of lie detection in civil cases, as the parties seek to affect each other's perceptions of the merits of the case.

Such lie detection efforts could also affect society, and the law, outside of litigation. One could imagine prophylactic lie detection at the beginning of contractual relations, seeking to determine whether the other side honestly had the present intention of complying with the contract's terms. One can also imagine schools using lie detection as part of investigations of student misconduct or parents seeking to use lie detection on their children. The law more broadly may have to decide whether and how private actors can use lie detection, determining whether, for example, to extend to other contexts—or to weaken or repeal—the Employee Polygraph Protection Act.[71]

The current fMRI-based methods of lie detection provide one kind of protection for possible subjects—they are obvious. No one is going to be put into an MRI for an hour and asked to respond, repeatedly, to questions without realizing something important is going on. Should researchers develop less obtrusive or obvious methods of neuroscience-based lie detection, we will have to deal with the possibilities of involuntary and, indeed, surreptitious lie detection.

C. Detection of Pain

No matter where an injury occurs and no matter where it seems to hurt, pain is felt in the brain.[72] Without sensory nerves leading to the brain from a body

69. *Id.* at 6, *citing* People v. Cronin, 60 N.Y.2d 430, 458 N.E.2d 351, 470 N.Y.S.2d 110 (1983).

70. *See* Wilson, *supra* note 60, at 7.

71. *See supra* text accompanying note 32.

72. *See* Brain Facts, *supra* note 2, at 19–21, 49–50, which includes a useful brief description of the neuroscience of pain.

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region, there is usually no experience of pain. Without the brain machinery and functioning to process the signal, no pain is perceived.

Pain turns out to be complicated—even the common pain that is experienced from an acute injury to, say, an arm. Neurons near the site of the injury called nociceptors transmit the pain signal to the spinal cord, which relays it to the brain. But other neurons near the site of the injury will, over time, adapt to affect the pain signal. Cells in the spinal cord can also modulate the pain signal that is sent to the brain, making it stronger or weaker. The brain, in turn, sends signals down to the spinal cord that cause or, at least, affect these modulations. And the actual sensation of pain—the "ouch"—takes place in the brain.

The immediate and localized sensation is processed in the somatosensory cortex, the brain region that takes sensory inputs from different body parts (with each body part getting its own portion of the somatosensory cortex) and processes them into a perceived sensation. The added knowledge that the sensation is painful seems to require the participation of other regions of the brain. Using fMRI and other techniques, some researchers have identified what they call the "pain matrix" in the brain, regions that are activated when experimental subjects, in scanners, are exposed to painful stimuli. The brain regions identified as part of the so-called pain matrix vary from researcher to researcher, but generally include the thalamus, the insula, parts of the anterior cingulate cortex, and parts of the cerebellum.[73]

Researchers have run experiments with subjects in the scanner receiving painful or not painful stimuli and have attempted to find activation patterns that appear when pain is perceived and that do not appear when pain is absent. (The subjects usually are given nonharmful painful stimuli such as having their skin touched with a hot metal rod or coated with a pepper-derived substance that causes a burning sensation.) Some have reported substantial success, detecting pain in more than 80% of the cases.[74] Other studies have found a positive correlation between the degree of activation in the pain matrix and the degree of subjective pain, both as reported by the subject and as possibly indicated by the heat of the rod or the amount of the painful substance—the higher the temperature or the concentration of the painful substance, the greater the average activation in the pain matrix.[75]

Other neuroscience studies of individual pain look not at brain function during painful episodes but at brain structure. Some researchers, for example, claim that different regions of the brain have different average size and neuron densities

73. A good review article on the uses of fMRI in studying pain is found in David Borsook & Lino R. Becerra, *Breaking Down the Barriers: fMRI Applications in Pain, Analgesia and Analgesics,* 2 Molecular Pain 30 (2006).

74. *See, e.g.,* Irene Tracey, *Imaging Pain*, 101 Brit J. Anaesth. 32 (2008).

75. *See, e.g.,* Robert C. Coghill et al., *Neural Correlates of Interindividual Differences in the Subjective Experience of Pain*, 100 Proc. Nat'l Acad. Sci. 8538 (2003).

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in patients who have had long-term chronic pain than in those who have not had such pain.[76]

Pain is clearly complicated. Placebos, distractions, or great need can sometimes cause people not to sense, or perhaps not to notice, pain that could otherwise be overwhelming. Similarly, some people can become hypersensitive to pain, reporting severe pain when the stimulus normally would be benign. Amputees with phantom pain—the feeling of pain in a limb that has been gone for years—have been scanned while reporting this phantom pain. They show activation in the pain matrix. In some fMRI studies, people who have been hypnotized to feel pain, even when there is no painful stimulus, show activation in the pain matrix.[77] And in one fMRI study, subjects who reported feeling emotional distress, as a result of apparently being excluded from a "game" being played among research subjects, also showed, on average, statistically significant activation of the pain matrix.[78]

Pain also plays an enormous role in the legal system.[79] The existence and extent of pain is a matter for trial in hundreds of thousands of injury cases each year. Perhaps more importantly, pain figures into uncounted workers' compensation claims and Social Security disability claims. Pain is often difficult to prove, and the uncertainty of a jury's response to claimed pain probably keeps much litigation alive. We know that the tests for pain currently presented to jurors, judges, and other legal decisionmakers are not perfect. Anecdotes of and the assessments by pain experts both are convincing that some nontrivial percentage of successful claimants are malingering and only pretending to feel pain; a much greater percentage may be exaggerating their pain.

A good test for whether a person is feeling pain, and, even better, a "scientific" way to measure the amount of that pain—at least compared to other pains felt by that individual, if not to pain as perceived by third parties—could help resolve a huge number of claims each year. If such pain detection were reliable, it would make justice both more accurate and more certain, leading to faster, and

76. *See, e.g.*, Vania Apkarian et al., *Chronic Back Pain Is Associated with Decreased Prefrontal and Thalamic Gray Matter Density*, 24 J. Neurosci. 10,410 (2004); *see also* Arne May, *Chronic Pain May Change the Structure of the Brain*, 137 Pain 7 (2008); Karen D. Davis, *Recent Advances and Future Prospects in Neuroimaging of Acute and Chronic Pain*, 1 Future Neurology 203 (2006).

77. Stuart W. Derbyshire et al., *Cerebral Activation During Hypnotically Induced and Imagined Pain*, 23 NeuroImage 392 (2004).

78. Naomi I. Eisenberg, *Does Rejection Hurt? An fMRI Study of Social Exclusion*, 302 Science 290 (2003).

79. The only substantial analysis of the legal implications of using neuroimaging to detect pain is found in Adam J. Kolber, *Pain Detection and the Privacy of Subjective Experience*, 33 Am. J.L. & Med. 433 (2007). Kolber expands on that discussion in interesting ways in Adam J. Kolber, *The Experiential Future of the Law*, 60 Emory L.J. 585, 595–601 (2011). The possibility of such pain detection was briefly discussed earlier in two different 2006 publications: Henry T. Greely, *Prediction, Litigation, Privacy, and Property: Some Possible Legal and Social Implications of Advances in Neuroscience*, *supra* note 56, at 141–42; and Charles Keckler, *Cross-Examining the Brain, supra* note 56, at 544.

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cheaper, resolution of many claims involving pain. The legal system, as well as the honest plaintiffs and defendants within it, would benefit.

A greater understanding of pain also might lead to broader changes in the legal system. For example, emotional distress often is treated less favorably than direct physical pain. If neuroscience were to show that, in the brain, emotional distress seemed to be the same as physical pain, the law might change. Perhaps more likely, if neuroscience could provide assurance that sincere emotional pain could be detected and faked emotional distress would not be rewarded, the law again might change. Others have argued that even our system of criminal punishment might change if we could measure, more accurately, how much pain different punishments caused defendants, allowing judges to let the punishment fit the criminal, if not the crime.[80] A "pain detector" might even change the practice of medicine in legally relevant ways, by giving physicians a more certain way to check whether their patients are seeking controlled substances to relieve their own pain or whether they are seeking them to abuse or to sell for someone else to abuse.

In at least one case, a researcher who studies the neuroscience of pain was retained as an expert witness to testify regarding whether neuroimaging could provide evidence that a claimant was, in fact, feeling pain. The case settled before the hearing.[81] In another case, a prominent neuroscientist was approached about being a witness against the admissibility of fMRI-based evidence of pain, but, before she had decided whether to take part, the party seeking to introduce the evidence changed its mind. This issue has not, as of the time of this writing, reached the courts yet, but lawyers clearly are thinking about these uses of neuroscience. (And note that in some administrative contexts, the evidentiary rules will not apply in their full rigor, possibly making the admission of such evidence more likely.)

Do either functional or structural methods of detecting pain work and, if so, how well? We do not know. These studies share many of the problems outlined in Section IV. The studies are few in number, with few subjects (and usually sets of subjects that are not very diverse). The experiments—usually involving giving college students a painful stimulus—are different from the experience of, for example, older people who claim to have low back pain. Independent replication is rare, if it exists at all. The experiments almost always report that, on average, the group shows a statistically significant pattern of activation that differs depending on whether they are receiving the painful stimulus, but the group average does not in itself tell us about the sensitivity or specificity of such a test when applied to individuals. And the statistical and technical issues are daunting.

In the area of pain, the issue of countermeasures may be the most interesting, particularly in light of the experiments conducted with hypnotized subjects. Does remembered pain look the same in an fMRI scan as currently experienced

80. Adam J. Kolber, *How to Improve Empirical Dessert*, 75 Brook. L. Rev. 429 (2009).
81. Greg Miller, *Brain Scans of Pain Raise Questions for the Law*, 323 Science 195 (2009).

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pain? Does the detailed memory of a kidney stone pain look any different from the present sensation of low back pain? Can a subject effectively convince himself that he is feeling pain and so appear to the scanner to be experiencing pain? The answers to these questions are clear—we do not yet know.

Pain detection also would raise legal questions. Could a plaintiff be forced to undergo a "pain scan"? If a plaintiff offered a pain scan in evidence, could the defendant compel the plaintiff to undergo such a scan with the defendant's machine and expert? Would it matter if the scan were itself painful or even dangerous? Who would pay for these scans and for the experts to interpret them?

Detecting pain would be a form of neuroscience evidence with straightforward and far-reaching applications to the legal system. Whether it can be done, and, if so, how accurately it can be done, remain to be seen. So does the legal system's reaction to this possibility.

VII. Conclusion

Atomic physicist Niels Bohr is credited with having said "It is always hard to predict things, especially the future."[82] It seems highly likely that the massively increased understanding of the human brain that neuroscience is providing will have significant effects on the law and, more specifically, on the courts. Just what those effects will be cannot be accurately predicted, but we hope that this guide will provide some useful background to help judges cope with whatever neuroscience evidence comes their way.

82. This quotation has been attributed to many people, especially Yogi Berra, but Bohr seems to be the most likely candidate, even though it does not appear in anything he published. See discussion in Henry T. Greely, *Trusted Systems and Medical Records: Lowering Expectations*, 52 Stan. L. Rev. 1585, 1591–92 n.9 (2000). One of the authors, however, recently had a conversation with a scientist from Denmark, who knew the phrase (in Danish) as an old Danish saying and not something original with Bohr.

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Constructing Evidence and Educating Juries: The Case for Modular, Made-In-Advance Expert Evidence About Eyewitness Identifications and False Confessions

Jennifer L. Mnookin*

Over the last several decades, research psychologists have entered the courtroom with increasing frequency to testify on behalf of criminal defendants. Their role has primarily been to show how social-science evidence complicates the conventional wisdom about certain kinds of critical and often-used evidence. These witnesses challenge, and sometimes even debunk, commonsense views about categories of evidence that juries tend, on the whole, to find very persuasive, like eyewitness identification testimony and even that so-called "queen of proofs," the confession.[1] These experts educate judges and juries about the substantial body of research that shows, for example, that eyewitnesses—even those who have a great deal of genuine confidence about their own accuracy—are sometimes mistaken when they identify someone as the perpetrator.[2] They teach the fact finders

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1. As John Langbein wrote, "[t]he maxim of the medieval Glossators . . . aptly describes American law: *confessio est regina probationum*, confession is the queen of proof." John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 14 (1978).

2. The psychological literature on eyewitness identification is voluminous. For a recent effort to canvas and evaluate the field, see NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 108 (2014) [hereinafter IDENTIFYING THE CULPRIT], noting that "self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy." For other overviews of the social-science findings in the area, see generally BRIAN L. CUTLER & MARGARET BULL KOVERA, EVALUATING EYEWITNESS IDENTIFICATION (2010), identifying best practices for evaluating eyewitness testimony and guidelines for interactions between attorneys and expert witnesses; BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995), evaluating the effectiveness of mechanisms meant to safeguard defendants from faulty eyewitness testimony by reviewing empirical research, finding that official safeguards are less effective than expert psychological testimony educating jurors on the frailties of eyewitness memory; JAMES MICHAEL LAMPINEN, JEFFREY S. NEUSCHATZ & ANDREW D. CLING, THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION (2012), chronicling the variables that impact

that memory operates not at all like a point-and-shoot camera; rather, honestly held beliefs about what a witness claims to have seen or experienced may be distorted, inaccurate, or even completely wrong.[3] They describe the dangers of certain lineup procedures that may increase the chances that a witness makes an erroneous identification.[4] They describe the reality, surprising to many, that innocent suspects under interrogation by the police sometimes really do confess to crimes in which they actually played no role at all.[5]

The judicial reception of these forms of psychological evidence has been stuttering and somewhat rocky, but overall it is fair to say that there is growing acceptance of the legitimacy of these kinds of expertise. In fact, a number of courts have held that when an eyewitness identification by a stranger is at the heart of the prosecutor's case, the trial court's exclusion of a qualified defense expert who could have educated the jury about relevant social-science findings about the danger of mistaken identifications can even be reversible error.[6] Courts in recent years have shown increasing

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the accuracy of eyewitness identifications and describing the beneficial effects of expert testimony offered to educate juries about questionable eyewitness statements; and ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979), creating a framework that examines empirical studies relating to eyewitness testimony and explaining how eyewitness testimony has impacted the American legal system.

3. *See, e.g.*, IDENTIFYING THE CULPRIT, *supra* note 2, at 69–70 (concluding that "[m]emory is often far from a faithful record of what was perceived, . . . its contents can be forgotten or contaminated at multiple stages, it can be biased by the very practices designed to elicit recall, and it is heavily swayed by emotional states"). *See generally* sources cited *supra* note 2.

4. *See, e.g.*, United States v. Brownlee, 454 F.3d 131, 138 (3d Cir. 2006) (noting the inherently suggestive nature of lineup procedures that can induce witnesses to make unreliable identifications); IDENTIFYING THE CULPRIT, *supra* note 2, at 106–07 (recommending the use of double-blind methods in lineups and photo arrays to avoid bias inadvertently suggested by the administrator).

5. *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 7–8, 14–44 (2011) (discussing expert testimony in the context of false confessions and explaining that some 16% of exonerees studied gave false confessions in response to police interrogation, often even incorporating details of the crime likely provided to them by the police); G. Daniel Lassiter et al., *Introduction: Police Interrogations and False Confessions—An Overview*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 3, 4–5 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (summarizing studies indicating that common procedural errors of interrogations can result in false confessions); DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 121 (2012) (noting that false confessions "have been observed in 15–25 percent of the known exonerations"); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 933–43 (2004) (presenting a collection of examples of interrogation-induced false confessions, including an extensive list of specific, proven false confessions).

6. For one of the earliest such cases, see *State v. Chapple*, 660 P.2d 1208, 1223–24 (Ariz. 1983). Other cases finding exclusion to be error (often depending on quite fact-specific dimensions of the case, such as the centrality of the identification to the prosecution's case coupled with little corroborating evidence or the existence of a cross-racial identification) include *Brownlee*, 454 F.3d at 144; *People v. McDonald*, 690 P.2d 709, 727 (Cal. 1984); *State v. Guilbert*, 49 A.3d 705, 729 (Conn. 2012); *Benn v. United States*, 978 A.2d. 1257, 1275 (D.C. 2009);

concern and interest in the problem of unduly suggestive lineup procedures as well.[7] For false-confession evidence, the trend line remains somewhat more uneven; while some courts do continue to exclude the evidence, often on the grounds that it is unnecessary or invades the province of the jury (by indirectly opining on credibility), many others do permit such expertise.[8]

The recent increased focus on and knowledge about wrongful convictions have spotlighted the importance of these kinds of psychological evidence. The rise of DNA evidence and the concomitant Innocence Movement have exposed the significant dangers of erroneous eyewitness identifications and false confessions, among other kinds of evidence. In a close look at the first several hundred DNA exonerations, Brandon Garrett found that around three-quarters of the cases involved some form of mistaken eyewitness identification.[9] False confessions were less commonplace but still far from rare, appearing in nearly one-sixth of the cases he examined.[10]

This prevalence of mistaken eyewitness identifications and false confessions among known wrongful convictions strongly suggests that fact finders sometimes risk overvaluing or misinterpreting these kinds of evidence. By educating the jury about social-science research, expert psychological evidence may give the jury better tools for assessing probative value more accurately. Teaching about risk factors for erroneous identification or mistaken confession may enable savvier assessment of these kinds of proof in the particular case—and helping fact finders to assess these kinds of evidence with an informed, critical eye may even help reduce wrongful convictions.

That said, expert psychological evidence is only one possible method among several for attempting to reduce wrongful convictions based on erroneous eyewitness identification or inaccurate and false confessions. Moreover, realistically it is simply not an approach that can feasibly be used in the very large number of cases in which these forms of evidence play a starring role. Experts are simply too few in number and too expensive to be able to be called in as many cases as they would have meaningful relevance. Given their cost and scarcity, psychological experts are inevitably going to be a "couture" approach to evidence, available only when either a defendant

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Stephenson v. State, 226 S.W.3d 622, 627 (Tex. App.—Amarillo 2007, no pet.); and *State v. Clopten*, 223 P.3d 1103, 1115 (Utah 2009).

7. *See, e.g.*, State v. Henderson, 27 A.3d 872, 897–902 (N.J. 2011) (discussing various lineup procedures); State v. Lawson, 291 P.3d 673, 686–88 (Or. 2012) (en banc) (same).

8. *See, e.g.*, United States v. Adams, 271 F.3d 1236, 1246 (10th Cir. 2001) (holding that trial judge acted within his discretion in disallowing expert testimony); Miller v. State, 770 N.E.2d 763, 773–74 (Ind. 2002) (holding exclusion of expert testimony to be reversible error).

9. *See* GARRETT, *supra* note 5, at 48 (reporting eyewitness misidentifications in 190 of 250 cases).

10. *Id.* at 18 (noting false confessions in 40 out of 250 cases). *See also* SIMON, *supra* note 5, at 121 (noting multiple cases and studies documenting instances of false confessions).

has means or a judge can be persuaded to provide funding for this purpose.[11] This individualized, custom, haute couture approach cannot in its current form be transformed into a ready-to-wear alternative that could be used in the great mass of cases; by its nature, it does not easily scale.

In this Article, I want to suggest a method by which we could, in fact, transform this couture approach into a ready-to-wear alternative, accessible by far more defendants for very little cost. Specifically, I want to argue that a credible, nonpartisan, well-respected organization (or multiple organizations partnering together) should spearhead and oversee the creation of premade, canned, modular testimony on these topics. These made-in-advance modules could, at the defendant's election, be introduced as a form of testimony to teach a fact finder about what research psychology shows about relevant aspects of eyewitness identification, or the operation of memory, or lineup procedures, or false confessions.

Such an approach is, I admit, unusual. Testimony in our adjudicatory system is typically understood as something case specific, as an individual testifying live and in person, face-to-face before a fact finder. I am instead proposing a kind of testimony that would be produced in advance of any given trial and that could be used and reused whenever appropriate in the many different trials in which the same social-science related issues recur.

I first suggested the possibility of this kind of "repeat-play" modular testimony in a forthcoming piece in a symposium in honor of the great—and often maverick—trial judge Jack Weinstein.[12] In that article, I put forward the idea of modular testimony for certain, limited kinds of expert evidence as one of two possible evidentiary innovations I proposed that linked to aggregation, technology, and justice.[13] In that piece, I presented an overview of both ideas as "'objects to think with'; as ideas to spark our collective evidentiary imagination and encourage us to think expansively about how we might improve the quality of information to which juries have access . . . in the interest of enhancing the fairness and accuracy of our adversarial process."[14]

In this Article, I want to compare this idea of modular testimony to several alternative methods for trying to reduce the dangers of inaccurate

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11. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 72, 86–87 (1985) (determining that a defendant has a due process right to the assistance of a psychiatrist for the determination of sanity but leaving open the extent to which this due process right requires courts to fund other kinds of expert assistance helpful to mounting a defense). In practice, there is a great deal of judicial discretion regarding the funding of experts for indigent defendants. *See* Paul C. Giannelli, Ake v. Oklahoma: *The Right to Expert Assistance in a Post*-Daubert, *Post-DNA World*, 89 CORNELL L. REV. 1305, 1312–13 (2004) (noting that judges have the ability to restrict or deny funding for defense experts).

12. Jennifer L. Mnookin, *Repeat-Play Evidence: Jack Weinstein, "Pedagogical Devices," Technology, and Evidence*, 64 DEPAUL L. REV. (forthcoming 2015).

13. *Id.*

14. *Id.* (citations omitted).

eyewitness identifications and false confessions. Specifically, I will look at the possibility of having judges assess the reliability of these kinds of evidence directly, and I will also assess the viability of using expanded jury instructions as an educational device. I will argue that modular, repeat-play evidence is conceptually preferable to jury instructions and more institutionally appropriate than a strong version of a substantive reliability assessment by the court. On the question of whether modular, made-in-advance expert testimony it is a better approach than using a traditional expert witness, I am more equivocal. There are both gains and potential losses to replacing a live expert with a set of prerecorded modules—but realistically, the use of live expert witnesses in these cases is, like the bespoke suit, a rarity. Therefore, at a minimum, modular testimony offers a potential second-best solution that would permit the content of expert testimony to be used in a far larger number of cases in which they are relevant.

As we shall see, the current doctrines for the judicial evaluation of these kinds of evidence invoke reliability considerations around the edges, but in fact hardly regulate them at all. By contrast, for scientific and expert evidence *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[15] and its progeny have required judges to play an active gatekeeping role, assessing validity and reliability in order to determine admissibility.[16] Some have suggested a similar gatekeeping role for judges vis-à-vis these other kinds of evidence as well. I will suggest, however, that judges usually do not in fact have a legitimate basis for determining reliability in a given instance; while we do have significant social-science knowledge about these areas, that knowledge does not translate into a validated method for diagnosing the accuracy of a particular identification or confession.

Jury instructions offer another alternative for reducing the dangers of eyewitness misidentification or wrongful confessions. In fact, several jurisdictions, most notably New Jersey, have invested substantial energy in the production of social-science-based jury instructions, particularly about the social-science research on eyewitness identifications, to be used as a far lower cost alternative to experts in appropriate cases. But this use of instructions, while an understandable and well-intentioned response to the importance of the issue and the practical reality that not every deserving defendant will be able to call an expert, is, I suggest, a wrong turn. They are, in a way, a category mistake: an effort to turn something that is fundamentally *evidence* into an appropriate topic for judicial instruction.

This category mistake, however, does reflect something important and relatively unusual about these kinds of evidence. At least a significant

15. 509 U.S. 579 (1993).

16. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

part—and perhaps virtually all—of the value offered by these kinds of experts is simply not case specific. These social-science experts are describing the state of a field, the findings of experiments, and what is known and understood about circumstances or risk factors that make, for example, faulty identifications or false confessions more likely.[17] It is this quality—which we could call "framework" evidence,[18] or meta-expertise,[19] or instructional or educational expertise,[20] or even legislative facts[21]—that makes jury instructions a tempting, if problematic, direction in which to head. And it is precisely this same quality that makes modular, premade testimony a plausible alternative to our traditional, particularized, case-by-case use of an expert.

In what follows, my main focus is on psychological experts on eyewitness identification, though I also discuss false-confession evidence as well, albeit to a lesser extent. However, the modular, repeat-play approach could plausibly be used in other settings as well. This approach could make sense in any area in which (1) the same social-science or empirical issues arise in largely the same form over a broad array of cases, or (2) the core contributions of the expert to the trial are at the "meta" or "framework" level rather than in assessing particularized dimensions of the specific facts and their implications. For example, another fruitful area for modular testimony might be the scientific reliability of certain forms of forensic science. Currently, experts do occasionally testify on the extent of scientific research in fingerprint, firearms, bite mark, or handwriting identification.[22] These testifying experts are often not themselves forensic

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17. *See generally* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987) (describing the rise of social frameworks as an alternative to the rigid distinction between social science being used to prove legislative or adjudicative facts and proposing ways to incorporate the general findings of such research into the adjudicative process).

18. *Id.* at 568, 598.

19. *See* Simon A. Cole, *Out of the Daubert Fire and into the Fryeing Pan? Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in* Frye *Jurisdictions*, 9 MINN. J.L. SCI. & TECH. 453, 456–57 (highlighting that, when courts must evaluate the validity of claims where the appropriate reference community is not obvious, courts must turn to "meta-experts" who have evaluated the empirical and rational validity of those claims); Jennifer L. Mnookin, *Atomism, Holism, and the Judicial Assessment of Evidence*, 60 UCLA L. REV. 1524, 1577–78 (2013) (discussing the widespread practice of scientific experts using meta-analytic techniques to aggregate evidence and data in their own domain).

20. *See* Samuel R. Gross & Jennifer L. Mnookin, *Expert Information and Expert Evidence: A Preliminary Taxonomy*, 34 SETON HALL L. REV. 141, 163 (2003) (defining "instruction" as "general information about some common issue or phenomenon . . . rather than specific information about a particular problem or case").

21. *See* Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955) (explaining the general nature of legislative facts).

22. *See, e.g.*, United States v. Saelee, 162 F. Supp. 2d 1097, 1101–03 (D. Alaska 2001) (describing a nonforensic practitioner's testimony regarding the lack of scientific research for handwriting identification); Michael J. Saks, *Banishing* Ipse Dixit*: The Impact of* Kumho Tire *on Forensic Identification Science*, 57 WASH. & LEE L. REV. 879, 897–99 (2000) (describing cases

practitioners of the discipline upon which they are commenting, and they typically do not offer any specific conclusion about whether the fingerprints, bullets, bite marks, or handwriting specimens actually match.[23] As with testimony by research psychologists, in many cases in which such forensic science meta-expertise would be helpful no one is called to testify, sometimes for lack of funds, often for lack of know-how (and sometimes because some courts have resisted permitting it).[24]

Although my focus is criminal trials, where resource differentials are most acute and our methods for managing them less developed, there are many uses of framework testimony in civil cases as well, and it might be possible for modular, made-in-advance testimony to be used on the civil side as well.[25]

This Article proceeds as follows. The next Part describes this idea of modular testimony in slightly more detail. The following Part then turns to issues relating to judicial evaluation of the reliability of eyewitness identification evidence and confessions, beginning with a brief historical overview that shows the lack of judicial focus on the substantive reliability of these kinds of proof. I suggest that this lack of direct focus on reliability may be one factor contributing to the rise of expert evidence in these areas; if concerns about the design of a lineup or flaws in an identification procedure or interrogation rarely lead to its outright exclusion, these same

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where expert testimony was offered regarding the extent of scientific research for identification evidence).

23. *See, e.g.*, *Saelee*, 162 F. Supp. 2d at 1101–03 (experts testified before the court as to the reliability of handwriting analysis generally, rather than in reference to the specific facts of the case).

24. *See, e.g.*, *In re* Castro, Nos. H036045, H034813, 2012 WL 271339, at *3 (Cal. Ct. App. 2012) (discussing defense counsel's failure to hire a handwriting expert); Howard v. State, 945 So. 2d 326, 334 (Miss. 2006) (describing defense counsel's failure to obtain funds for a bite mark expert); State v. Clopten, 223 P.3d 1103, 1106 (Utah 2009) (noting the trial court's refusal to allow an eyewitness expert's testimony). Note that I have on rare occasions testified about the scientific foundation (and limits to that foundation) for fingerprint evidence and in one case was excluded from court because I was not myself a fingerprint expert.

25. *See* U.S. Courts, *The Patent Process: An Overview for Jurors*, YOUTUBE (Nov. 22, 2013), https://www.youtube.com/watch?v=ax7QHQTbKQE&list=PL4bcxoLSIaXeVdyUI1500VSrfuKyIXLfJ&index=2, *archived at* https://perma.cc/HL3Q-T357 (an effort by the Federal Judicial Center to produce a video explaining the patent process to jurors in a nonpartisan, balanced manner, for Federal District Courts to use to educate jurors during patent trials). Although this made-in-advance video presentation is not precisely an example of the kind of modular testimony that I am suggesting in this Article, it nonetheless deserves our notice, particularly because it represents an effort by a nonpartisan organization to create a fair depiction of a set of issues that are "repeat play," in the sense that they frequently arise in nearly identical form in different cases. However this patent video is, in important ways, quite different from what I am proposing because the patent video is an introductory lecture, not testimony—there is no direct or cross-examination by lawyers, nor are the topics discussed based on social science research. Notwithstanding these important differences, this patent video is an interesting example of an effort to gain efficiencies—and increased fairness—via technology. Many thanks to Joe Cecil for drawing my attention to this video.

concerns provide part of the justification for permitting expert testimony—but expert testimony, I suggest, cannot possibly be used as a practical matter in all of the cases in which it might be helpful. In the following Part, I therefore look at two already-established alternatives to expert evidence: judicial gatekeeping, in the form of a more serious examination of reliability, and jury instructions designed to teach jurors about the social science in this area. I suggest that a more robust reliability screen for these kinds of evidence, while superficially appealing, is unlikely to be highly accurate in evaluating correct and incorrect identifications or in distinguishing true from false confessions, and therefore raises significant institutional concerns about the boundary between the role of the judge and that of the fact finder. As for jury instructions in this area, I argue that this approach conflates instruction with evidence in troubling ways and inevitably fail to provide nuanced information about relevant social science (or its limits). Then, in the final Part, I return to modular testimony and address briefly how it compares to traditional expert evidence. I suggest that modular testimony invites us to ask directly whether we think experts in these areas ought ever to be able to testify in a case-specific, particularized way, or should be limited to a description of the general research. If the latter, modular testimony's made-in-advance, non-case-specific format becomes a feature rather than a bug, because it structurally prevents experts from commenting on how the social science bears on the particular case—after all, the testifying experts aren't even in the courtroom. If, however, it is sometimes appropriate for an expert to engage more particularistically, then it is a downside of modular testimony that such particularistic engagement is not available. Nonetheless, given the high cost of live experts, on the one hand, and the limited effectiveness of both reliability assessments and jury instructions, on the other hand, I argue that modular testimony is, at a minimum, a second-best solution worth a try.

I. Modular, Repeat-Play Testimony: An Introduction

My core idea is quite simple: courts should permit defendants to make use of made-in-advance "modules" in which psychological experts provide testimony about key aspects of eyewitness identification and false-confession evidence. These modules would be structured like regular testimony in that they would include both direct examination and cross-examination and, like regular testimony, they would proceed in the question and answer format to which we are accustomed.

When I describe the testimony as modular, I mean to suggest it should consist of a variety of distinct subparts in both the direct and cross-examination portions, each of which corresponds to a particular topic that frequently arises within trials in which expert testimony of these sorts is used (e.g., a discussion of the research on cross-racial identification could be one module, while discussion of the research on weapons focus, or the

relationship between confidence and accuracy of an identification, or the relationship between observation time and accuracy could be others). Each module should to the greatest possible degree be substantively self-contained so that a defendant could separate them and make use of only the ones that bore on the issues in the specific case.

For this idea to be effective and successful, the experts who participate in this project would need to be some of the best regarded leading experts in the field. The lawyers who participate—on both the "defense" side and for the "prosecution," though I use those terms in scare quotes because the lawyers would not in fact be representing a specific client as they questioned the expert—should also be of the highest caliber with extensive experience in precisely these areas and themselves extremely knowledgeable about the social science. All the participants should be compensated appropriately for their time and energy in producing the modules. Nor should the use of these modules—which would, as I already indicated, include cross-examination—subject the experts to being subpoenaed by the prosecution in any case in which the module was used, though if the prosecutor wished to call a live rebuttal witness, nothing about the existence of modules ought to prevent her from doing so.

For this idea to be workable, the modules would need to be produced by a well-regarded, structurally neutral organization, not affiliated with either the defense bar or the prosecutors. It might also be possible for the content of the modules to be vetted or assessed by experts to provide a form of peer review to assess its fundamental fairness and legitimacy.

My basic claim is that this form of modular evidence deserves to be a tool in our trial toolbox. Many, indeed most, courts are willing to permit experts to testify on eyewitness identification issues, and a growing number are permitting false-confession experts as well. Given the framework nature of this evidence and the basic reality that most of what an expert testifies to will not be—and quite likely should not be—case specific, why do we continue to hew to the idea that the evidence must be produced in an individualized, case-specific manner?

Permitting modular expert evidence will require some creativity on the part of judges and an openness to innovation, and it is quite possible that it will be loudly opposed by both prosecutors and defense counsel alike. But given the simple reality that expert witnesses are unlikely to be available in the vast majority of cases in which they would be useful, it seems worthwhile to be open to efforts to create wholesale rather than retail methods of engagement about these social science findings. Indeed, the turn in some states to increasingly detailed and science-based jury instructions represents precisely such an effort—but I contend that modular testimony in fact is more institutionally appropriate than science-based instructions. Similarly, modular testimony may also be more respectful of the appropriate roles for judge and jury than a direct judicial effort to assess

the reliability of confessions or eyewitness identifications. We turn now to look briefly at how the courts currently think about reliability, with respect to eyewitness identification and confessions in turn.

II. Judicial Assessments of Reliability

A. *The* Brathwaite *Test for Assessing the Reliability of an Eyewitness Identification*

It is perhaps stating the obvious to say that we would like to make use of eyewitness identifications and confessions in court whenever they are likely to be adequately reliable. While not technically a corollary, it seems equally reasonable to say that when confessions or eyewitness identifications are very likely to be unreliable, we ought *not* to permit them as evidence (unless we have confidence that the fact finder can do its own reasonably accurate assessment of the evidence's reliability).

However, for both eyewitness identifications and confessions, it is far from clear that our current doctrinal tests for admissibility map onto reliability and validity in any meaningful way. In 1977, the Supreme Court in *Manson v. Brathwaite*[26] laid out the test that is largely still used today in federal courts and in most states for determining when, if ever, due process mandates exclusion of eyewitness identification.[27] An undercover policeman made a narcotics purchase and shortly afterwards described the seller to two fellow officers.[28] The undercover agent was shown a single photograph of a possible suspect, a method of identification known as a "showup," and identified him as the seller.[29] Based on this identification, the suspect was charged with possession and sale of heroin.[30] Subsequently at trial, this photograph from the showup was introduced into evidence, and the narcotics agent on the stand made a positive, in-court identification of the defendant (who claimed to have been ill at home, elsewhere, all day on the date in question).[31] Almost entirely on the basis of these identifications, the defendant was convicted of both counts.[32] The defendant appealed, arguing that the identification procedure—a single photograph, rather than a

26. 432 U.S. 98 (1977).

27. This case built on earlier jurisprudence about eyewitness evidence, police conduct, and suggestibility. *See, e.g.*, Neil v. Biggers, 409 U.S. 188, 195–96 (1972) (raising the issue of whether the victim's identification of the respondent in a lineup violated due process); Stovall v. Denno, 388 U.S. 293, 302 (1967) (acknowledging that while "[t]he practice of showing suspects singly to persons for the purpose of identification . . . has been widely condemned[,]" the totality of the circumstances in the record did not suggest due process had been violated).

28. *Brathwaite*, 432 U.S. at 99–101.

29. *Id.* at 101.

30. *Id.*

31. *Id.* at 102.

32. *Id.*

lineup or any kind of comparison to others—was unnecessarily suggestive and violated his due process rights.[33] Although the court of appeals agreed with the defendant,[34] the Supreme Court did not.[35] While asserting that "reliability is the linchpin in determining the admissibility of identification testimony[,]" the Court also found that due process required protecting this "evidentiary interest" only to a "limited extent."[36] Identifications ought to be excluded, the Court said, only when there is "a very substantial likelihood of irreparable misidentification"[37]—note, particularly, the double modifier, not merely a *substantial* likelihood, but a *very* substantial likelihood—and "[s]hort of that point, such evidence is for the jury to weigh."[38] The Court continued: "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature."[39]

The Court asserted, in essence, that eyewitness identifications should be admissible unless they are *extremely* likely to be wrong, largely because of its faith in the jury's good sense as a mechanism for separating the valid from the mistaken.[40] *Brathwaite* laid out factors courts should examine when considering the "totality of the circumstances"[41] to determine the procedural adequacy of an identification:

> These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.[42]

Finally, the Court found that defects—like the fact that the officer made the identification based on a single photo—most often go to weight rather than admissibility.[43] Thus, under *Brathwaite*, even identifications that are the result of highly suggestive identification procedures may be

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33. *Id.* at 103.

34. Brathwaite v. Manson, 527 F.2d 363, 372 (2d Cir. 1975).

35. *Brathwaite*, 432 U.S. at 117.

36. *Id.* at 113–14 (emphasis omitted).

37. *Id.* at 116 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)) (internal quotation marks omitted).

38. *Id.*

39. *Id.*

40. *See id.*

41. *Id.* at 113 (quoting Stovall v. Denno, 388 U.S. 293, 302 (1967)) (internal quotation marks omitted).

42. *Id.* at 114.

43. *Id.* at 117.

introduced in court, so long as the court's estimation of the totality of the circumstances does not suggest a very substantial likelihood that the identification is wrong.

There are two points worth emphasizing. First, by the Court's own acknowledgement, and indeed by design, it takes a lax and limited approach to the scrutiny of eyewitness identifications.[44] A court's purpose is not to assure that they are valid, nor even strongly to incentivize lineup procedures designed to maximize reliability. Rather, a court's inquiry is meant to offer a limited last-ditch check on egregiously unreliable identifications—and, even then, only if the unreliability is produced by some improper action of the state vis-à-vis the identification process.[45] In recent years, the Court has continued to embrace this approach, explaining in *Perry v. New Hampshire*[46] in 2012 that "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness."[47]

Second, the characteristics suggested by the Court as deserving analysis may indeed be common sense, but that does not make them especially useful at reliably distinguishing valid from invalid identifications. It turns out that several of them—perhaps most notably the level of certainty expressed in court at the time of confrontation—do not, according to social science research, bear significantly on accuracy in most circumstances and may themselves be matters about which witnesses can be highly suggestible.[48] More pointedly: a little police nudging can go a long way toward increasing witness confidence, and according to the research, the relationship between well-after-the-fact confidence level and accuracy is basically nonexistent.[49] Moreover, like any qualitative, multifactor

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44. *Id.* at 110 (describing the totality of the circumstances approach employed by the court as the "more lenient[] approach").

45. *See, e.g.*, Perry v. New Hampshire, 132 S. Ct. 716, 726 (2012) ("The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct.").

46. 132 S. Ct. 716 (2012).

47. *Id.* at 728.

48. Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 460 (2012).

49. *See* Kevin Krug, *The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Era of Research*, 3 APPLIED PSYCHOL. CRIM. JUST. 7, 9 (2007) (concluding that the bulk of social-science research suggests "that confidence is a poor indicator of memory accuracy"); Gary L. Wells & R. C. L. Lindsay, *Methodological Notes on the Accuracy–Confidence Relation in Eyewitness Identifications*, 70 J. APPLIED PSYCHOL. 413, 418 (1985) (same). For a meta-analysis finding a limited but nonzero relationship between confidence and accuracy at the time of selection, see Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence–Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 315–17 (1995). For an example of the particular issues relating to retrospective certainty, see Amy L. Bradfield et al., *The Damaging Effect of*

balancing test—especially one tilted so explicitly in favor of admissibility—few facts on the ground will actually mandate exclusion of an identification. How much delay between crime and identification is too much? What would make a viewing opportunity so limited as to justify exclusion? Given the vagueness of the factors, any court that cares to admit a particular identification can likely tell an adequate story to justify its decision, even for quite dubious identification evidence produced through suggestive methods.[50]

This deferential approach to admitting eyewitness identifications, coupled with substantial, emerging social-science research conducted by psychologists, created a substantial opening (and need) for expert testimony in this area. To put it differently, if nearly all identifications are admissible, and if defects typically are understood to go to weight rather than admissibility, then clearly the defendant should have the opportunity to argue that a particular identification does not actually deserve much—or any—weight. Simultaneously, social-science research began to provide some powerful fodder for challenges to weight by identifying and studying a range of "estimator factors" that appear to effect the accuracy of identification—factors like whether a gun or other weapon was involved, whether the identification was of someone of a different race from the observer, or whether the observer was under substantial stress at the time of making the observation.

B. The Judicial Assessment of Confessions: The Emphasis on Voluntariness, Not Reliability

With respect to confession evidence, substantive reliability is—if it is possible—even less regulated by courts than it is with eyewitness identification. Although reliability was deemed an important concern in assessing confessions in the nineteenth and early twentieth centuries, beginning in the middle of the twentieth century the courts took a jurisprudential turn away from reliability and toward inquiries focused on

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Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy, 87 J. APPLIED PSYCHOL. 112, 112–14 (2002).

50. In fact, for example, in Garrett's examination of DNA exonerations, none of the nearly forty defendants who alleged some form of police impropriety in the identification procedure which led to their (erroneous) identification were granted relief. GARRETT, *supra* note 5, at 187. In addition, many courts will permit an in-court identification by the witness even if they have excluded the earlier identification on the dubious theory that the witness's in-court identification has an "independent origin" of the events (and is therefore directly mentally matching the in-court identification to the actual event, unmediated by the problematic intermediate identification process). Garrett, *supra* note 48, at 465–66. For a description of the operation of this approach and a strong critique of it, see generally *id.* However, some states have begun to take more aggressive approaches than the federal courts to the judicial assessment of the reliability of eyewitness identification. For a discussion of some recent state developments, see Jules Epstein, *Irreparable Misidentifications and Reliability: Reassessing the Threshold for Admissibility of Eyewitness Identification*, 58 VILL. L. REV. 69, 79–81 (2013).

voluntariness and coercion.[51] While initially the language of voluntariness was deployed in the service of concerns about trustworthiness and reliability, "voluntariness" gradually became instead a purely procedural concern grounded in the Due Process Clause of the Fourteenth Amendment and focused not on accuracy per se but on the confessor's self-determination and the freedom to speak or choose silence in the face of police methods.[52] Consider, for example, this language from the 1961 Supreme Court case *Culombe v. Connecticut*:[53]

> The ultimate test remains that . . . of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confessions offends due process.[54]

The key question is not reliability, but whether the speaker's will is "overborne" or remains free. The real issue at the heart of the voluntariness inquiry, as the Court made absolutely explicit in a later case, was not accuracy as an independent value, but rather the presence of illegitimate police coercion.[55]

But even if reliability is not central to admissibility, that obviously does not make it irrelevant to the evaluation of an admissible confession's probative value. Though the area is not as substantially researched as eyewitness identifications (and is also by its nature harder to study

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51. For an account of this transition and an argument to revive a focus on reliability, see Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 779–80 (2013) (detailing the shift in the Court's jurisprudence). *See also* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 310 (1998) (providing a historical account of the shift in standard).

52. Leo et al., *supra* note 51, at 780–81. *See also* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 10–11 (1980) (contending that the term "voluntariness" was originally a "*synonym* for the 'trustworthiness' or 'reliability' test").

53. 367 U.S. 568 (1961).

54. *Id.* at 602.

55. Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"). To be sure, coercion and accuracy may well be related—coercive processes may significantly increase the chance of inaccurate confessions. But sometimes coercive methods may in fact produce accurate confessions—for reasons independent of accuracy we may well deem their use unacceptable, but the reason for that is not accuracy itself. Similarly, strong evidence exists to show that even when confessions are voluntary and no illegal coercion has been applied, they are not therefore necessarily accurate. Leo et al., *supra* note 51, at 765–67 (describing how even seemingly innocuous police activity, like disclosure of nonpublic crime details, can lead to inaccurate confessions). *See generally* Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 249, 251 (2008) (describing various characteristics and interrogation techniques that increase the likelihood of false confessions).

effectively through experiments),[56] a growing body of research contributes to our understanding of the causes and circumstances that increase the risks of false confessions, including both characteristics of the suspect (e.g., juveniles and those with mental disabilities may be at increased risk to confess falsely), as well as characteristics of the interrogation process (including the length of the interrogation or the police falsely claiming to have strong evidence pointing to the suspect).[57] This research also reveals some of the characteristics often present within confessions subsequently found to be false—like the police frequently "feeding" the correct information to the suspect rather than eliciting through questioning (accurate) information about the crime previously unknown to them or "contaminating" the interrogation by providing information not publicly known about the crime and then treating it as evidence of guilt when the defendant repeats back this information.[58]

In some ways, to be sure, the lack of doctrinal focus on reliability is conceptually separate from the question of the use of expert evidence in these areas. Even if courts engaged in robust reliability assessments as a prerequisite to admissibility of confessions and eyewitness identification testimony, presumably the admissibility decision by a judge would not remove from the fact finder the responsibility to assess the appropriate probative value of the eyewitness identification or the confession—and assessing reliability is (or at a minimum should be) a central part of determining that probative value.[59] Therefore, expert testimony could well still be of assistance to the fact finder even if the court had a more robust reliability requirement underlying admissibility. Alternatively, if social-science research had few significant findings relating to these areas, expert

56. For both areas, archival or field studies raise complicated issues about knowing "ground truth." But eyewitness identification is much more easily studied in an experimental setting than false confession—it is not difficult to design an experiment to test people's ability to make a correct identification (though, to be sure, it is difficult to create experimental conditions that are as stressful and potentially traumatic as a real crime). It is more difficult to create experimental conditions that could induce false confessions in circumstances with serious consequences akin to a police interrogation.

57. Kassin, *supra* note 55, at 250–52.

58. Brandon Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 408–15 (2015); Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L., 332, 337 (2009).

59. We see precisely this situation with *Daubert*—that is to say the judge's gatekeeping responsibility vis-à-vis expert evidence requires a direct focus on validity and reliability—but clearly, parties ought nonetheless to be able to challenge the reliability of any given item of expert evidence, notwithstanding that the judge has already made her own assessment of reliability prior to permitting the evidence. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594–95 (1993) (holding that the inquiry into expert evidence is concentrated on scientific validity, evidentiary relevance, and reliability).

testimony might not be of assistance to a jury, regardless of whether or not the court meaningfully evaluated reliability.[60]

C. The (Limited) Rise of Expert Identification and False Confession Evidence

It is speculative, to be sure, but there may well be some degree of connection between the lack of any serious reliability inquiry by the court and the rise of expert-witness evidence in these areas. This combination—a well-developed social-science literature examining factors relating to reliability and a lack of judicial assessment—creates a particularly ample conceptual space for expert testimony at trial. An emerging body of research bears directly on the validity of key forms of evidence, but courts have decided, structurally, not to engage with this literature when assessing admissibility.

This lack of consideration of reliability in admissibility decisions may, therefore, over time have created hydraulic pressure to consider it elsewhere in the trial process, and this may in part explain the increasing willingness on the part of courts to admit expert testimony, particularly vis-à-vis the limits of eyewitness identification. The rise of knowledge about wrongful convictions and the important role that erroneous identifications (and false confessions) have played in many of the known wrongful convictions no doubt further contribute to the increased willingness, in recent years, to admit these forms of testimony to assist the jury in its evaluation of the evidence.[61]

Indeed, in its recent report on eyewitness identification, the National Academy of Sciences urges courts to take very seriously the use of expert evidence in this area to assist the fact finder.[62] As the report states:

> Contrary to the suggestion of some courts, the committee recommends that judges have the discretion to allow expert testimony on relevant precepts of eyewitness memory and identifications. Expert witnesses can explain scientific research in detail, capture the nuances of the research, and focus their testimony

60. Rule 702 of the Federal Rules of Evidence allows expert evidence only when "the expert's scientific, technical, or other specialized knowledge will *help* the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702(a) (emphasis added). Therefore, courts regularly exclude expert evidence if they do not believe it will assist the trier of fact. *See, e.g.*, Boyd v. State Farm Ins. Cos., 158 F.3d 326, 331 (5th Cir. 1998) (commenting on the trial court's "broad discretion to rule on the admissibility of the expert's evidence").

61. On wrongful convictions see, for example, GARRETT, *supra* note 5, at 251. In the 250 exonerees Garrett studied in his book, he found that misidentification by an eyewitness was present in 76% of the cases. *Id.* at 8–9. He also found that 16% of the exonerees in his sample confessed to crimes they did not commit. *Id.* at 18. For similar findings from a broader examination of exonerations, see generally SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012 (2012).

62. IDENTIFYING THE CULPRIT, *supra* note at 2, at 111.

> on the most relevant research. Expert witnesses can convey current information based on the state of the research at the time of a trial. Expert witnesses can also be cross-examined, and limitations of the research can be expressed to the jury.[63]

In urging greater use and acceptance of expert witnesses in this area, the committee is both reflecting a sea change well underway and, likely, encouraging its further development.

But that said, there is little doubt that expert testimony is still only used in a small fraction of those cases in which it might be relevant.[64] This state of affairs results sometimes because it is still excluded—but far more often there is simply no serious attempt to introduce it in the first place.[65] In many cases, defense attorneys may not be able to get funding for an expert or—and in practice it leads to the same result—may not believe they can get funding and hence may not even try.[66] Though numbers are scarce, a set of authors, including leading eyewitness-identification experts, estimated (albeit, back in 1998) that the total number of American cases in which experts provided testimony in the area could not possibly much exceed five hundred.[67] By contrast, an equally dated figure based on a survey of practices suggests that eyewitness identification is the most critical evidence in just under 80,000 criminal arrests a year.[68] Even if, given the prevalence of plea bargaining,[69] we assume that only 5% of those arrests actually go to trial, this would suggest that experts are testifying in only roughly 8% of those cases involving eyewitness identification as a *crucial* form of evidence. To be sure, both of these numbers should be taken with a large grain of salt, and they are also dated by more than fifteen years. But the fundamental reality is, without a doubt, that expert

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63. *Id.*

64. *See* George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 114–16 (2011) (noting that while there has been a recent trend in both federal and state courts toward the acceptance of expert eyewitness testimony, judicial approaches still vary across jurisdictions); *infra* notes 67–70 and accompanying text.

65. *See* IDENTIFYING THE CULPRIT, *supra* note 2, at 40 (explaining that the expense of eyewitness-identification experts can be a deterrent to their use).

66. As *Identifying the Culprit* recognizes, this problem is likely more acute in state courts than in federal courts. *Id.*

67. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 609 (1998).

68. Alvin G. Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71, 73 (1989). Specifically, they estimated about 77,313 people were arrested in cases in which the eyewitness identification was "crucial," extrapolating this figure from a survey of district attorneys. *Id.*

69. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES, Mar. 22, 2012, http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html, *archived at* http://perma.cc/BH3U-8KJ6 (stating that plea bargains end 97% of federal cases and 94% of state cases); Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 (2005).

eyewitness (and false confession) testimony is only used in a small percentage of the cases in which it might be both appropriate and helpful.[70]

This means, in essence, that some defendants win the expert-access lottery and others—not a few, but most—don't even get a lottery ticket, much less any winnings. Some get to sport couture attire, while others are (metaphorically) naked.

III. Alternatives to Expert Witnesses

Live testimony by expert witnesses is used in only a small fraction of cases in which their testimony might assist the jury. There is absolutely no reason to believe that this situation can or will change dramatically. The costs of experts, their scarcity, and the number of cases in which they might be advisable make it impossible to imagine that we could use expert psychological witnesses in all the cases in which they might have relevant, helpful information.[71]

That reality invites a search for alternative methods for either preventing unreliable testimony from reaching the jury in the first place or for educating it about its possible limitations. In what follows, I will explore two possible alternatives, showing in each case why they are ultimately quite unsatisfactory even though they are superficially appealing. Furthermore, the inadequacy of these alternatives strengthens the case for taking more radical steps toward new methods of jury education, such as modular testimony.

A. Judicial Gatekeeping

I turn first to the possibility of judicial gatekeeping for reliability. As I suggested earlier, it is plausible to think that the lack of a direct judicial focus on reliability contributed, over time, to a greater openness to (and need for) psychological experts in these areas.[72] But perhaps a more intensive judicial inquiry into reliability could itself serve as an alternative to the use of expert psychological evidence. As I stated above, the two are not direct substitutes for each other—even if judges were stronger gatekeepers with regard to the reliability of confession and eyewitness testimony, defendants might well wish to use expert social scientists to inform the jury about what is known about circumstances and factors that

70. *See, e.g.*, CRIM. JUSTICE SECTION, AM. BAR ASS'N, REPORT TO HOUSE OF DELEGATES 104D, at 2–3 (2008) (finding the problem of "mistaken eyewitness identification . . . a serious problem in the United States" and recommending increased use of expert testimony on "cross-racial identification" to combat the issue).

71. The American Bar Association recognizes this and explicitly "opposes exclusive reliance on expert witnesses" due to their cost and the fact that only a "small number of persons [are] qualified to testify as expert witnesses on cross-racial identification"). *Id.* at 3–4.

72. *See supra* subpart II(C).

increase the risk of inaccuracy.[73] A stricter admissibility standard would not obviate the need for experts to help the jury assess the appropriate weight of the admitted testimony. But the question is how we might decrease the chances that mistaken eyewitness evidence or false confessions lead fact finders to the use of expert evidence from psychologists. Put bluntly, if fewer false confessions or mistaken eyewitness identifications were admitted in the first place, there would be less need of expert testimony designed to educate juries about the limits to these forms of evidence and the possibilities for error.

Indeed, the recent National Academy of Science report on eyewitness identification makes an important recommendation connected directly to these issues of judicial assessment of reliability and the use of experts. First, the committee recommends that judges engage in more robust pretrial inquiry into reliability and that they should even do so independent of a party's request or objection to the evidence.[74] The committee suggested that judges should routinely examine key aspects of lineup design when assessing an eyewitness identification and also look at whether lineup procedures existed in documented form and, if so, whether they were in fact followed.[75] The committee recommendation continues: "If these initial inquiries raise issues with the identification process, a judge could conduct a pretrial hearing to review the reliability and admissibility of eyewitness identification evidence."[76] At this point, the committee report backs off slightly, suggesting that if indicia of unreliability are found, the judge "should apply applicable law"[77] in deciding whether to exclude or take any other action—but given the flaccid state of the applicable law on this score, this entreaty to apply it may, practically speaking, be asking for rather little. Nonetheless, the committee's recommendation certainly provides a meaningful nudge toward more substantial evaluations of reliability by judges.

A more robust assessment by judges of the reliability of eyewitness identifications and confessions as a precondition for admissibility would certainly be one possible method by which to reduce the number of false confessions and faulty or mistaken identifications used in court. Indeed, in addition to the gestures in that direction by the recent National Academy of Science report on eyewitness identification, several scholars have recently argued in favor of meaningful assessment of the reliability of any given

73. *Id.*
74. IDENTIFYING THE CULPRIT, *supra* note 2, at 109–10.
75. *Id.* at 110.
76. *Id.*
77. *Id.*

eyewitness identification or confession as a prerequisite to its admissibility.[78]

On the face of it, direct judicial assessment of the reliability of these powerful yet problematic forms of evidence is indeed appealing. In the context of expert evidence, judges regularly assess reliability as a precondition for determining admissibility—why not apply a similar approach to these powerful forms of evidence as well? Presumably if judges managed to exclude confessions or eyewitness evidence likely to be unreliable, that would indeed be a valuable safeguard against the danger of erroneous convictions.

However nice such an approach sounds in theory, there is a significant problem in practice: we do not actually have validated methods by which to distinguish precisely, in a specific case, an accurate eyewitness identification from an inaccurate one or a true confession from a false one. Psychological research has shown us a good deal about tendencies in the aggregate and about, for example, estimator factors that appear to increase the risk of making an inaccurate identification.[79] But these are aggregate tendencies with varying (and sometimes quite limited) effect sizes. Going from knowledge about these aggregate tendencies to a diagnostic conclusion about reliability in a specific case usually goes well beyond our current state of scientific and psychological knowledge.

Let us briefly consider one example. The presence of a weapon during the event appears to decrease the accuracy of identifications made afterwards—but obviously, this does not mean that all, or even most, identifications made in relation to crimes involving weapons are therefore inaccurate. This "weapons focus" phenomenon has been found in most (though not all) laboratory studies that have examined it, but the effect sizes are often moderate and sometimes the presence of the weapon in an experiment seems to hurt the accuracy of feature recall but not necessarily

78. For arguments in favor of a reliability-based approach to the judicial assessment of eyewitness identification, see, for example, Epstein, *supra* note 50, at 96–100, arguing for an acknowledgedly amorphous sliding-scale approach to admissibility of eyewitness identification focused on reliability; Sandra Guerra Thompson, Daubert *Gatekeeping for Eyewitness Identifications*, 65 SMU L. REV. 593, 596 (2012), arguing that *Daubert*'s reliability focus should apply more stringently to eyewitness identifications; and Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1495 (2008), advocating for a corroboration requirement when the state presents eye witness testimony. For arguments in favor of reliability-focused reforms for confession evidence, see, for example, Richard A. Leo et al., *supra* note 51, at 764, proposing a framework for analyzing reliability of confession evidence, and Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 486–87, arguing that recording custodial interrogations should be a prerequisite of reliability.

79. *See, e.g.*, Wells et al., *supra* note 67, at 603, 613–17 (describing factors that contribute to a false eyewitness identification). *See generally* sources cited *supra* note 2.

the ability to identify someone accurately.[80] Furthermore, how do these experimental findings translate into the real world? This is not altogether clear—indeed, some of the few studies focusing on real-world situations have not found a clear weapons focus effect at all, though there are also plausible reasons to discount these findings (both because of difficulties in making reliable inferences when we don't actually know ground truth and also because in field studies, as opposed to experiments, the underlying scenarios, because they are real, are inevitably so much more complex that any specific issue, like weapons focus, may be swamped by other characteristics of the identification circumstances).[81]

My point is not the details of the weapons focus effect—a topic on which many dozens of papers have been written. The point is more general. There are numerous estimator variables that have been shown across a number of studies to have some statistically significant effect on memory, recall, and identification. But this effect does not necessarily mean that the presence of a given variable—or even several—signals an inaccurate identification. It means, at most, that if all other aspects are equal, an identification with this concerning estimator variable may be more likely to be erroneous than an identification without it. But the effect size of any given variable may be quite modest. Moreover, in the real world, to say that "all other aspects are equal" is more or less meaningless. Individuals vary in their attention to detail or their general observational accuracy. Moreover, any given estimator variable needs to be understood alongside the other dimensions of the particular identification circumstances. A witness who has a longer time to observe the perpetrator may be more accurate, even when a weapon is involved, than one who has only a short opportunity for observation. But how the different aspects of an identification interrelate has received far less careful experimental study to date than individual estimator (or system) variables.[82]

Given this state of affairs, ought we to really wish for judges to make reliability determinations about an identification based on their evaluations of the estimator variables? These variables can, to be sure, legitimately

80. *See, e.g.*, Jonathan M. Fawcett et al., *Of Guns and Geese: A Meta-Analytic Review of the 'Weapon Focus' Literature*, 19 PSYCHOL. CRIME & L. 35, 44 (2013) ("[W]eapon presence appears to be clearly detrimental to feature accuracy (e.g., recall), but only sporadically affects identification accuracy."); Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 420–21 (1992) (concluding as a result of meta-analysis of several previous experiments that the weapon-focus effect is statistically significant, but the magnitude of the effect is not great).

81. Steblay, *supra* note 80, at 422.

82. *See* IDENTIFYING THE CULPRIT, *supra* note 2, at xiii–xiv (noting the lack of certainty surrounding the interplay of reliability factors in eyewitness identifications).

raise red flags—but if they cannot be truly diagnostic, is it appropriate for the judge to determine reliability, and in turn admissibility, on their basis?[83]

To make the point in a slightly different fashion, consider that we do not let experts opine in court on whether a specific eyewitness identification is or is not reliable. When experts testify, they are generally permitted to describe the factors relevant to the specific case that have been studied and what research has shown about them, but they are not permitted to tell the jury that it therefore should or should not believe any given witness. As one psychological expert put it on direct examination vis-à-vis his role in the case:

> Q ARE YOU HERE TO GIVE AN OPINION AS TO THE ACCURACY OF THE WITNESSES IN THIS CASE IN THEIR IDENTIFICATIONS?
>
> A OH, NO, NO. AS I UNDERSTAND IT, AGAIN, MY ROLE IS QUITE NARROW. IT'S TO AVOID GIVING ANY OPINIONS THAT MIGHT EXPRESS TO YOU ALL, THE TRIERS OF FACT, THAT I HAVE SOME SORT OF TAKE ON WHETHER THE WITNESSES ARE RIGHT OR WRONG OR CORRECT OR INCORRECT, AND TO JUST EXPLAIN THE CURRENT STATE OF THE SCIENCE. IN MY VERY NARROW AREA OF EXPERTISE OF MEMORY AND SUGGESTIBILITY TO THE TRIERS OF FACT.[84]

Later in the direct examination, the expert reiterated the point:

> THERE'S CERTAINLY NOTHING I COULD GIVE YOU ALL THAT CAN BE QUANTIFIED AS, "THIS IS IT." THESE ARE JUST FACTORS THAT HAVE BEEN FOUND TO AFFECT WITNESSES BOTH IN THE FIELD AND THEN AS DEMONSTRATED IN THE LABORATORY.[85]

On cross, the point was made even more strongly that the expert could testify to the relevant phenomenon, but not apply it to the specific case:

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83. The same difficulty applies to false-confession evidence. Consider contamination. There is substantial evidence that many false confessions contain examples of interrogators providing information about the crime during the course of the interrogation. When that information appears in the confession, it enhances the apparent validity. Leo et al., *supra* note 51, at 765–66. But it may also be that true confessions frequently reveal examples of contamination by interrogators as well. Until we know substantially more about the base-rate frequency of contamination in true and false confessions—along with the base rates for true and false confessions themselves—we cannot possibly know that a confession is unreliable simply because some degree of contamination can be pointed to. This inability to diagnose falseness from characteristics like contamination means that reliability hearings for false-confession evidence, while superficially appealing, are in fact unlikely to be effective. *See id.* at 779.

84. Transcript of Record at 2434, State v. White, 2007 WL 5248507 (Cal. Super. Ct. L.A. Cnty. Sept. 20, 2007) (No. B204494).

85. *Id.* at 2454.

> Q NONE OF THE STUDIES THAT YOU'VE SHARED WITH US TALK ABOUT UNIVERSAL TRUTHS, CORRECT?
>
> A NO, I WOULDN'T TAKE IT TO THAT LEVEL.
>
> Q YOU BASICALLY SHARE WITH US SOME STUDIES WHICH FOUND CERTAIN THINGS? . . .
>
> . . . .
>
> Q YOU'RE ESSENTIALLY SAYING, DOCTOR, ISN'T IT, THAT YOU CANNOT PREDICT WHETHER OR NOT STRESS AFFECTED AN EYEWITNESS, AN EYEWITNESS'S MEMORY?
>
> A IN ANY GIVEN CASE?
>
> Q YES.
>
> A NO. THAT IS CLEARLY UP TO THE TRIERS OF FACT AND ALL MY JOB IS, AS I UNDERSTAND IT, IS TO EXPLAIN GENERALLY-ACCEPTED FINDINGS IN THE RESEARCH THAT MIGHT BE BEYOND THE COMMON KNOWLEDGE OF FOLKS WHO DON'T DO RESEARCH IN THIS AREA AS THEY EVALUATE AND WEIGH THE EVIDENCE ON THEIR OWN.[86]

And with respect to the weapons focus issue in particular:

> Q WEAPON FOCUS. THE STUDIES THAT YOU'VE DESCRIBED FOR US BASICALLY INDICATE THAT IN SOME SITUATIONS SOME WITNESSES FOCUS ON WEAPONS, ON THE WEAPON INVOLVED?
>
> A YES.
>
> Q IT DOESN'T MEAN THAT IT HAPPENS ALL THE TIME, CORRECT?
>
> A OH, NO. EVERYONE RESPONDS DIFFERENTLY TO A WEAPON BEING PRESENT, I WOULD SAY.[87]

I have used excerpts from this transcript as an example, but the expert's testimony is quite typical in this respect. Psychological experts in these areas do not tell the jury directly whether or not to believe the eyewitness identification.[88] The reasons for this limitation are twofold: first, and most important, that the science simply does not presently support this degree of specific, diagnostic conclusion about a particular witness;[89] and second, that especially given the lack of scientific basis for reaching a

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86. *Id.* at 2459, 2472.

87. *Id.* at 2479.

88. Chelsea Moore, *Is Perception Reality?: An Argument Against the Use of Rule 403 for the Exclusion of Eyewitness Identification Expert Testimony*, 6 FIU L. REV. 163, 177 (2010).

89. *See* IDENTIFYING THE CULPRIT, *supra* note 2, at 112 (noting that "the committee has seen no evidence that the scientific research has reached the point that would properly permit an expert to opine . . . on the accuracy of an identification by an eyewitness in a specific case").

conclusion about a given witness, for the expert to opine in this way to the fact finder would invade the province of the jury, impermissibly entering into their legitimate sphere of judgment about credibility.[90]

But if we do not permit the experts to opine about reliability, why should we allow judges to do so? If the experts themselves lack a legitimate scientific basis for reaching a conclusion about reliability in a given case, surely the (less expert) judges will also lack a legitimate scientific basis for theirs as well. Nor is it at all obvious that a judge's evaluation of the reliability of any given eyewitness identification would be more accurate than that of a jury, especially a jury who has had the opportunity to be educated about what the social-science evidence does and does not show about relevant factors in the case. If judges could in fact distinguish accurate from inaccurate identifications with a high degree of accuracy, or in any event a significantly higher degree of accuracy than a jury, having them evaluate reliability as a prerequisite for admissibility would be an attractive and perhaps justifiable policy. But if their error rate would be substantial or similar to that of the jury, this suggests we should avoid the policy and leave the assessment to the fact finder.

It is fair to ask the following question: if judges cannot assess accuracy reliably, why ought we believe that juries can plausibly handle the task? The honest answer is that juries will—and do, as we know from the many wrongful conviction cases that have come to light[91]—make errors as well. But there are nonetheless two reasons to prefer having juries—preferably educated in some way by experts—reach these judgments about reliability rather than judges doing it themselves.

First, as a matter of system design, credibility judgments under conditions of uncertainty are typically something we leave to the jury. The issue at stake is going from a set of general inferences—about factors influencing the accuracy of eyewitnesses or the validity of a confession—to a specific determination about the case at issue and the credibility of and weight to be given to a particular witness. Judging matters like credibility and the weight of a specific item of evidence are, within our system, core jury functions.[92] So unless we have good grounds for believing that the judge will achieve a significantly higher degree of accuracy, from an institutional design perspective this task is better left with the jury.

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90. Scott Woller, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identifications in New York*, 48 N.Y.L. SCH. L. REV. 323, 325 n.15 (2003).

91. *See* GARRETT, *supra* note 5, at 213–22 (documenting various cases of wrongful convictions); GROSS & SHAFFER, *supra* note 61, at 43–50 (documenting exonerations following erroneous convictions and surveying contributing causes).

92. *See* Goldman v. United States, 245 U.S. 474, 477 (1918) (holding that the appellate court cannot invade "the province of the jury by determining questions of credibility and weight of evidence"). On the jury's role as "lie detector" and credibility assessor, see generally George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575 (1997).

Moreover, part of what the jury may be better situated to do is to evaluate this evidence holistically in relation to the other evidence in the case. If the identification is corroborated by substantial other evidence, the jury can (and indeed should) consider this other evidence in assessing the identification. Conversely, if the experts teach the jury about how the characteristics of this identification reveal reasons for possible concern about accuracy, and the identification is in fact the only evidence in the case, the lack of other evidence coupled with the concerns about the eyewitness identification or confession could legitimately give the jury pause.

By contrast, typically admissibility decisions about a given item of evidence are made in a fairly atomistic manner;[93] it would be somewhat odd if a judge admitted an identification in a given circumstance because other nonidentification evidence also pointed toward the guilt of the perpetrator but would have excluded the same item of evidence without the corroboration.[94] To be sure, we do sometimes have corroboration requirements as a precondition for admissibility. But to assess reliability based partly on the strength of other evidence in the case goes against the typical grain of how judges make such decisions—and potentially creates significant dangers of cognitive bias as well.

The reality, then, is that judges simply do not have a legitimate basis for reaching reliability determinations about eyewitness identification or confessions in most circumstances—unless their concerns about reliability derive from concerns about the illegitimacy of the procedures by which the information was extracted. In some circumstances, judges could indeed endeavor to regulate these kinds of evidence by giving their *procedural* analyses more teeth. For example, suggestive behaviors by the police during interrogation or lineup could be grounds for exclusion—even without a "very substantial likelihood"[95] of error. Failure to adhere to social-science-based best practices for lineup design could also be grounds for exclusion. Similarly, failure to videotape the entirety of an interrogation

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93. *See* Mirjan Damaška, *Atomistic and Holistic Evaluation of Evidence: A Comparative View*, *in* COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY 91, 91–98 (David S. Clark ed., 1990) (suggesting the Anglo-American adversarial system has strongly atomistic tendencies, especially as compared to the Continental civil law systems); John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1213 (2006) (noting an "atomic" tendency as a characteristic of evidence law); Jennifer L. Mnookin, *Atomism, Holism, and the Judicial Assessment of Evidence*, 60 UCLA L. REV. 1524, 1531 (2013) (describing holism as the counterpoint to the default approach to admissibility).

94. There are some limited circumstances where judges do consider corroboration in assessing admissibility—for example, in the hearsay exception for statements against interest. FED. R. EVID. 804(b)(3)(B). For a discussion of corroboration in relation to the atomism and holism of judicial decision making in evidence, see Mnookin, *supra* note 93, at 1551.

95. Manson v. Brathwaite, 432 U.S. 98, 116 (1976) (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

process could, unless exigent circumstances excuse the lapse, mean exclusion. As a matter of public policy, holding police accountable for their compliance with best practices is probably a sound idea. Moreover, in the aggregate this would presumably enhance reliability—the best practices are (or at least ought to be) designed precisely to maximize accuracy.[96] Rejecting evidence when these practices are not followed would strongly incentivize compliance by police and investigators—and presumably, this would also enhance the accuracy of the evidence permitted in court.

However, much of the research on eyewitness identification does not relate to police behavior. Estimator variables simply do not have anything to do with how the police behave in a lineup procedure. Regulating lineup design just does not speak to this dimension of the problem. In other areas, we may not know enough yet to insist upon best practices with confidence. There are, to be sure, some areas where we probably do have an adequate knowledge base to drive policy: for example, the benefits of blinding procedures during lineups, making certain that the officer interacting with a witness during a lineup does not herself know which individual is the suspect, in order to avoid purposely or inadvertently signaling that information to the witness and thereby biasing the response.[97] But for other aspects of lineup design we may not know enough to insist on specific process design as a *sine qua non* of admissibility. Even sequential lineups versus simultaneous lineups, a topic that has received much attention and study in recent years, remains sufficiently controversial that it would be hard to justify making a given design a requirement for admissibility.[98]

Thus, while enhanced procedural scrutiny may be valuable, it will certainly not obviate the need for expert testimony on system variables, as well as the pros and cons of any given lineup design. Similar arguments hold sway for confession evidence as well—enhanced procedural requirements and enforcement via judicial exclusion if they are not followed may well be worthwhile and accuracy enhancing. But it is far from clear that the reliability of a given confession can be consistently assessed accurately by judges (or by experts themselves).

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96. I am oversimplifying, here, in that accuracy is not simply one thing. Some methods might decrease false positives but also decrease true positives. Whether and to what degree we have a preference between type I and type II errors might affect how we evaluate best practices in the area. IDENTIFYING THE CULPRIT, *supra* note 2, at 86 n.43.

97. Wells et al., *supra* note 67, at 627.

98. *See, e.g.*, Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 468–71 (2001) (concluding that sequential lineup procedure is generally superior to simultaneous but expressing reluctance to recommend its categorical adoption due to uncertainty in the practical application of the sequential procedure).

B. Jury Instructions

So far, we have seen that routinizing the use of psychological experts is simply not feasible given their cost and scarcity. Furthermore, I have suggested that attempting to regulate at the front end by implementing a robust reliability screen by judges has its own difficulties. What else then might we do? In the face of this dilemma, many courts, commentators, and scholars have argued that jury instructions could be a valuable substitute for expert testimony. If the key, central social findings could be presented succinctly to the jury through instructions, then access to this information could become far more widespread and fairly distributed among defendants.

For example, in a concurring opinion Seventh Circuit Judge Frank Easterbrook ruminated as follows about the powers of judges to incorporate science into how they operate their courts:

> Similarly a judge, recognizing the main conclusions of the scholarly study of memory—that "accuracy of recollection decreases at a geometric rather than arithmetic rate (so passage of time has a *highly* distorting effect on recollection); accuracy of recollection is *not* highly correlated with the recollector's confidence; and memory is highly suggestible—people are easily 'reminded' of events that never happened, and having been 'reminded' may thereafter hold the false recollection as tenaciously as they would a true one," could block a lawyer from arguing that a given witness is *sure* of his recollection, and therefore is more likely to be right. The judge could inform jurors of the rapid decrease of accurate recollection, and the problem of suggestibility, without encountering the delay and pitfalls of expert testimony. Jurors are more likely to accept that information coming from a judge than from a scholar, whose skills do not lie in the ability to persuade lay jurors (and whose fidgeting on the stand, an unusual place for a genuine scholar, is apt to be misunderstood). Altogether it is much better for judges to incorporate scientific knowledge about the trial process *into* that process, rather than to make the subject a debatable issue in every case. There remains a question about where judges acquire scientific knowledge, for they too may be mistaken in what they think they know. Still, professional adjudicators who attend continuing judicial education programs and read the scholarly literature are more likely to absorb the lessons of science than are jurors force fed a little information during a trial.[99]

For Easterbrook, instructions trump actual experts as a method of providing meta-information, or educational materials.[100] Instructions are

99. United States v. Hall, 165 F.3d 1095, 1120 (7th Cir. 1999) (citations omitted).
100. *Id.*

more authoritative.[101] They are more efficient.[102] They provide information in an across-the-board manner applicable to many cases, rather than treating it as a "debatable issue" over and over again.[103]

This instruction-focused approach to some of the insights from the psychology of memory and perception is beginning to take hold in a few jurisdictions. Massachusetts,[104] Oregon,[105] and New Jersey[106] have all engaged in serious efforts to develop jury instructions that thoughtfully incorporate the scientific findings into digestible descriptions.

At first blush, this approach indeed seems promising. As Judge Easterbrook recognized, it is efficient and may well be seen by the fact finder as more neutral than had similar information been presented by a party via expert evidence. It is also inexpensive—it can be used at any trial at which it is relevant; unlike traditional expert testimony, it can easily be scaled up to meet demand. Indeed, some of those who have tepidly supported jury instructions have done so primarily because of the stark reality of the cost issues relating to experts that make it simply impossible to use them in their traditional form in all the cases in which they would legitimately be called for.[107]

However, I would suggest that jury instructions are akin to using a Band-Aid on a head wound: perhaps better than nothing, but not the right solution to a serious problem. In practice, some jury instructions are disingenuous and misleading about the source of their authority. Others are more candid, but thereby reflect a kind of mistake in which that which is actually evidence is presented as instruction.

Some jury instructions—those I consider disingenuous—implicitly reference social-science findings but don't recognize them as such. Consider the following suggested instruction on cross-racial identification:

> In this case, the identifying witness is of a different race than the defendant. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race . . . has affected the accuracy of . . . [an] identification. You should consider

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101. *Id.*

102. *Id.*

103. *Id.*

104. *See* SUPREME JUDICIAL COURT STUDY GRP. ON EYEWITNESS IDENTIFICATION, REPORT AND RECOMMENDATIONS TO THE JUSTICES 3–4 (2013).

105. State v. Lawson, 291 P.3d 673, 685–88 (Or. 2012). *See also* Rebecca Brown & Stephen Saloom, *The Imperative of Eyewitness Identification Reform and the Role of Police Leadership*, 42 U. BALT. L. REV. 535, 546–47, 551–52 (2013) (explaining the Oregon and New Jersey Supreme Courts' approaches to incorporating scientific findings into eyewitness identifications).

106. State v. Henderson, 27 A.3d 872, 924–25 (N.J. 2011).

107. IDENTIFYING THE CULPRIT, *supra* note 2, at 40–41. *See also* CRIM. JUSTICE SECTION, AM. BAR ASS'N, *supra* note 70, at 3–4 (noting the existence of just a "handful" of experts in Los Angeles and none in many rural areas and considering that in many areas it is a struggle to pay for attorneys, and it is simply inconceivable that judges will fund experts in the bulk of the cases).

> that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.[108]

The serious problem with this instruction is that it locates the relevant source of knowledge undergirding its point in "ordinary human experience" rather than psychology or social-science research. It basically tells the jury members that if they have found in their ordinary experience that identifying people of other races can be harder, then they may consider that experience in their evaluation of the evidence in the case. But what if this is not the perceived experience of the jurors? What if they do not believe that they have found in their experience any difference in making identifications across race? In that circumstance, this instruction gives them absolutely nothing useful to work with. To whatever extent the point is actually counterintuitive, rather than consistent, with their lived experience the jury instruction becomes utterly irrelevant. This jury instruction recasts what are actually research findings[109] as common-sense intuitions—when they may not be common sense at all, but rather potentially discordant with the jury's perceptions and intuition of the world.

The reason why some courts and commentators elect to use disingenuous instructions like this is because it makes them, in form, ordinary instructions. There is nothing wrong with alerting jurors to the possible need to consider matters that they have found based on their common sense and experience. So if their experiences formed the source of knowledge and belief for many jurors in assessing these questions—if it really were common sense—then this instruction would not be problematic. We might still wonder how much effect such an instruction would have—perhaps it would serve just as a reminder nudge of sorts to the jury to consider something that many of them already knew—but it would, at least as a formalistic matter, be quite legitimate.[110] But if this information is not common sense—but rather the not-altogether-intuitive findings of social science—then to cast it as if it were common sense is misleading, indubitably a legal fiction, designed to get this information about cross-racial identifications in front of the jurors even if oddly cast.

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108. CRIM. JUSTICE SECTION, AM. BAR ASS'N, *supra* note 70, at 4.

109. *See* IDENTIFYING THE CULPRIT, *supra* note 2, at 96–97 (describing the own-race bias).

110. There is a substantial literature on the effectiveness of jury instructions; overall, it suggests some skepticism about their effectiveness. In the eyewitness context in particular, there have been a handful of studies looking at the effectiveness of instructions on modifying juries' attitudes and beliefs. For a review of these studies, see Richard A. Wise et al., *An Examination of the Causes and Solutions to Eyewitness Error*, 5 FRONTIERS PSYCHIATRY, art. no. 102, at 3–5 (2014), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4131297/pdf/fpsyt-05-00102.pdf, *archived at* http://perma.cc/L3S4-KUBR.

Recently, the state of New Jersey, which used to have an instruction similar to the one quoted above,[111] decided to take more radical steps. *State v. Henderson*,[112] after canvassing the scientific literature in substantial length, ended up deciding to require detailed jury instructions that reference scientific findings as their source.[113] In 2012, New Jersey indeed promulgated new jury instructions, and these, unlike most of the predecessor instructions in New Jersey and elsewhere, explicitly located their authority in scientific research. Given the novelty of this approach, I will quote the instructions at some length:

> Eyewitness identification evidence must be scrutinized carefully. Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.
>
> . . . .
>
> Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. . . . Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.
>
> In deciding what weight, if any, to give to the identification testimony, you should consider the following factors that are related to the witness, the alleged perpetrator, and the criminal incident itself.
>
> . . . .
>
> Weapon Focus: You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the

111. *See Henderson*, 27 A.3d at 882–83.
112. 27 A.3d 872 (N.J. 2011).
113. *Id.* at 925–26, 928.

> witness may have to adapt to the presence of the weapon and focus on other details.
>
> . . . .
>
> Confidence and Accuracy: You heard testimony that (insert name of witness) expressed his/her level of certainty that the person he/she selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.
>
> . . . .
>
> Cross-Racial Effects: Research has shown that people may have greater difficulty in accurately identifying members of a different race. You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification.[114]

Notice the frequent and explicit references to research. On the one hand, this is a definite improvement compared to the numerous states that pretend that the appropriate epistemic authority for these inquiries is the jury's common sense and experience, when it is in fact nothing of the sort. These findings come from psychological research, and many of them are certainly not common sense (at least not yet). The New Jersey instructions do not disingenuously suggest otherwise and instead locate these concerns quite explicitly in the register of research and as findings of scientific inquiry.

While as a matter of epistemic legitimacy that approach is quite right, the problem is that it is both strange and inappropriate to instruct the jury about scientific findings in this manner in a criminal case. These research findings are not matters about which the court can legitimately take judicial notice—they are not actually adjudicative facts (the only sort which the relevant federal rule applies to)—and besides, in criminal cases, judicial notice is not binding upon the fact finder.[115]

The fundamental problem is that these matters are, in fact, *evidence*. They are not incontestable. They are not certain. They are also not findings

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114. New Jersey Criminal Model Jury Instructions, *Identification: In-Court Identification Only* (July 19, 2012), *available at* http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf, *archived at* http://perma.cc/22Y2-SMV7 (emphasis omitted) (citations omitted). The new jury instructions were made available through a link from a press release. *See* Press Release, N.J. Courts, Supreme Court Releases Eyewitness Identification Criteria for Criminal Cases (July 19, 2012), *available at* http://www.judiciary.state.nj.us/pressrel/2012/pr120719a.htm, *archived at* http://perma.cc/SJJ5-C3MX.

115. FED. R. EVID. 201(f).

that are ideally reduced to a single sentence or two. Consider the instruction about confidence and accuracy. Essentially, the fact finder is told that science shows that confidence is not a reliable indicator of accuracy—except sometimes, when it is. This instruction invites any thinking person to ask further questions: Do we know when high confidence does in fact correlate with accuracy? In what circumstances? How often? And does lack of confidence correlate with lower-than-typical accuracy? The jury instruction, as a form for providing information, does not permit any genuine degree of exploration of these issues—they operate as gestures about some knowledge about some categories and nothing more.

By contrast, with an expert witness there is the chance to explore the research findings, their robustness, their blind spots, their degree of consistency or controversy, and so on. With an expert, the proffering party can offer significantly greater detail about the research findings and how strong they are. Similarly, the opposing party has a real opportunity to cross-examine the expert and to explore the limits of our scientific knowledge or its inapplicability to this case—and, if the party wishes, to call an expert of its own.

Out of a noble goal to reduce juries' reliance on erroneous eyewitness evidence, then, the state of New Jersey has made a category error: taking a set of issues that are properly understood as evidence and attempting to turn them into instructions instead. Although the instructions are reasonably detailed, considering that they are instructions rather than evidence, they nonetheless are unlikely to provide a jury with enough information to make an intelligent decision about the applicability of the research findings to a given case. The instructions say nothing about the strength or consistency of the research findings. They say nothing about the effect sizes of the various issues mentioned. To be sure, experts testifying do not always go into that degree of detail either—but expert testimony offers far more potential for educating the jury in a more thoughtful and nuanced way than a sentence or two on some of the hot-button items can.[116]

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116. For a tepid endorsement of instructions as a second-best solution compared to experts, see IDENTIFYING THE CULPRIT, *supra* note 2, at 40–43. To be fair, with expert testimony as well there are questions of effectiveness and whether expert testimony actually modifies juries' behavior or understanding. Some studies do find that expert testimony produces greater skepticism about eyewitness identification, but whether it produces greater sensitivity to the differences in strength depending on particular qualities of the specific identification is far less clear. *See, e.g.*, Michael R. Leippe & Donna Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, *in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 169, 184–86 (Brian L. Cutler ed., 2009) (discussing various studies conducted on whether expert testimony impacts jurors' willingness to believe eyewitnesses and determining that while expert testimony increases skepticism, such testimony may be discarded in favor of believing the eyewitness).

IV. In Defense of Modular, Repeat-Play Expert Testimony

Against this backdrop of plausible but problematic alternatives, I return now in my final Part to the possibility of modular testimony. This recent turn to jury instructions based explicitly on science should conceptually open the door to modular testimony as well. As I said at the outset, this category mistake reflects something important and relatively unusual about these kinds of evidence. They are in great part simply not case specific. The key social-science findings repeat in case after case.[117] The framework, the science, the key research papers, the methodological strengths and weaknesses—these do not change from case to case. The specific variables at play in any given case can, of course, be different, but if the case involves a cross-race identification, an extremely short observation time, or a weapon, then the social science relevant to that is the same in Nebraska as in Nevada. To be sure, it may change and develop over time, but that is a matter of years, not days or weeks or months. This modularity and consistency of relevant information over cases is what makes jury instructions even quasi-thinkable as a method for providing the fact finder with information about these issues. And it is this same framework, repeat-play quality that makes modular, premade testimony a plausible alternative to our traditional, particularized, case-by-case use of an expert.

Therefore, at a minimum, I wish to argue that we should seriously consider adding this form of modular testimony to the available tools in our adjudicatory toolbox. It may (perhaps) be worse than expert testimony in its traditional live-and-in-person form, but the simple, undeniable reality is that many defendants never get access to such experts even in cases in which they are well warranted.

There are, to be sure, many design details that would need to be worked out and some complexities, practical and doctrinal, that modular testimony would have to overcome. Some of these are doctrinal—like how the modules would get around the hearsay rule, or the critical question of whether prosecutors could legitimately complain about having to accept a kind of substituted cross-examination in lieu of an opportunity to cross-examine the expert themselves. I would suggest that prosecutors have no legitimate cause for complaint, considering the symmetry of this proposal:

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117. *See, e.g.*, State v. Guilbert, 49 A.3d 705, 715 (Conn. 2012) (discussing proposed expert testimony on the impact of stress, time, and police interrogation techniques on the accuracy of eyewitness identifications); Commonwealth v. Walker, 92 A.3d 766, 773, 791 (Penn. 2014) (allowing expert testimony offered to show the phenomenon of weapon focus and the impact of stress and police tactics on eyewitness-identification accuracy); State v. Clopten, 223 P.3d 1103, 1105, 1118 (Utah 2009) (ruling to include expert testimony on factors impacting the accuracy of eyewitness testimony including "cross-racial identification, the impact of violence and stress during an event, the tendency to focus on a weapon rather than . . . facial features, and the suggestive nature of certain identification procedures used by police").

while they are required to accept substituted cross-examination, the defendants are also accepting substituted direct examination. Given that prosecutors' rights to cross-examination are rooted in the due process clause, if the process of creating modules were nonpartisan and fair, why would due process be violated by this symmetrical reliance on substituted questioning? In this regard, it is worth noting that with the use of the social-science based jury instructions in New Jersey, the prosecutor has no opportunity at all to produce evidence questioning or suggesting limitations to what the research is said to show[118]—so substituted cross-examination would be significantly more informative than that baseline.

Clearly only the defendant could make the preliminary election for the use of modules because of the defendant's Confrontation Clause rights.[119] It could be, however, that in some instances a prosecutor would wish to use a module as rebuttal evidence to show how certain risk-generating variables were not present in the case. Having elected to make use of modules herself, a defendant ought not to be able to prevent the prosecutor from doing the same, at least within the same general topic area. Mechanisms would have to be developed to make sure the modules were accurate and fair; one could imagine some kind of vetting of their content or some form of peer review, in addition to their production by and through organizations with nonpartisan reputations and substantial authority in the worlds of both science and law. It would also be appropriate to investigate the effects of video testimony on juror comprehension as compared with live expert testimony. Does the technologically mediated nature of the testimony affect its reception? If so, is it more persuasive or less so?

There are many questions, to be sure. But with vision and effort, there does not seem to me to be any insurmountable obstacle to producing and using this form of repeat-play testimony. The key point is that modular testimony could provide a valuable, ready-to-wear alternative: providing a practical, affordable, second-best solution to the great bulk of defendants for whom couture, in the form of the psychological expert hired for the particular case, is not a viable option.

Albeit tentatively, I might even go one step further. In certain respects, modular, premade testimony might actually be better than the traditional kind. Better how? It could certainly be less expensive and more widely available. In addition, the lawyers who conducted the premade testimony are likely to be more knowledgeable and more experienced than many—perhaps even most—of the defense attorneys and prosecutors who engage with this testimony in the usual way. These are significant advantages and ought not to be dismissed lightly.

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118. *See supra* note 114 and accompanying text.

119. *See* U.S. CONST. amend. VI (guaranteeing the defendant in a criminal prosecution the right "to be confronted with the witnesses against him").

But even beyond these practical benefits, premade testimony for certain kinds of expert evidence might even be *epistemically* better—because through its in-advance, and therefore by necessity *generic* structure, modular testimony would limit and cabin the substance of the expert's testimony in ways that are harder to achieve with live testimony. Testimony produced in advance of any given case cannot, by definition, reach any specific conclusions about that specific case. It can only speak to the general research findings: what they are, their robustness, their applicability, and their limits. It can speak hypothetically about some issues of inference—the degree to which, for example, tests conducted in laboratory settings may or may not be applicable to the more complex realities of the messier real world. But an expert is not a soothsayer; the produced-in-advance testimony designed to educate the fact finder about the relevant social-science findings cannot possibly answer or address whether any particular identification, or lineup procedure, or memory, or confession warrants belief by the fact finder.

To be sure, often psychological experts are very clear about their inability to make any case-specific judgments—as we saw in the transcript excerpts above.[120] But unsurprisingly, given their roles and their jobs, attorneys on both sides attempt to push against that boundary. Consider the following excerpt from a transcript of a psychological expert on eyewitness identification:

> [MR. THERRIEN:] Okay. Let me pose some hypothetical questions to you.
>
> Suppose a bank robbery takes place, the robber has a gun which he brandishes and which is clearly visible to all the witnesses. Immediately after the robbery, the witness to the robbery identifies a photo of a suspect as the robber. Based on the pictures of the actual robber from the bank surveillance system, the suspect identified by the witness doesn't look very much like the actual robber.
>
> Say a period of time later, say a year later, the witness claims to remember the robber being a bank customer she knows both by appearance and by voice[.] What would you conclude about the reliability of the witness's second identification, the one of the known customer?
>
> MS. KIRK: Objection. Invades the province of the jury.
>
> THE COURT: Sustained.
>
> MR. THERRIEN: Judge, can we be at side bar just for a second.
>
> THE COURT: All right.

120. *See supra* notes 84–87 and accompanying text.

> (AT SIDEBAR:)
>
> MR. THERRIEN: I think an expert can testify as to the information that he has before him in hypotheticals.
>
> THE COURT: The problem is, in my mind—well, let me hear from the government.
>
> MS. KIRK: It's too close to the facts. If it was just—he can testify to the theories, and they apply the theories to the facts.
>
> THE COURT: The problem that I perceive is you cannot possibly put in all of the perceptions that were ongoing. For example, the one lady sitting at a desk looking at the man directly sees a firearm that looks like, she calls it a revolver. Whether it's a revolver or pistol, we don't know. I also think that it basically is an opinion on guilt or innocence, or gets awfully close to guilt or innocence, which is a fact that the trier of fact has to determine.
>
> I also think that you have, at this point, all of the principals of learning that are available that the jury can use, but to then ask the hypothetical where he has not seen any of the evidence, or if he has, it's been replicated after the event, puts him in a position of making—providing an opinion which really does invade the province of the jury. That's my reaction.
>
> MR. THERRIEN: Okay. Well, I was just—I didn't ask him about Michelle Rhode.
>
> THE COURT: No, I know that.
>
> MR. THERRIEN: I was just asking him under that hypothetical. So I'm not allowed to ask him any hypotheticals?
>
> THE COURT: No, I didn't say that. But at least that hypothetical would not be applicable.[121]

We see here the defense attorney making a valiant effort to ask the expert about the array of key indicators in the case—as a hypothetical question—and wanting the expert to opine about reliability on that basis. The prosecutor and the court both resist this effort to engage in such a specific, concrete manner. They articulate both that the hypothetical is incomplete compared to the events itself, and that it also invades the province of the jury by being too close to the facts—it is at once too specific and incomplete. The court suggests that what the jury really should gain from the expert are "principles of learning" rather than this form of direct opinion on a version of the facts of the case.[122] Interestingly, neither the judge nor prosecutor articulates the argument in the sidebar that, in fact, the expert lacks adequate *expertise* to opine on that kind of hypothetical, but

121. Transcript of Record at 23–25, United States v. Gipson, 2008 WL 8762440 (E.D. Wash. July 23, 2008) (No. CR-07-2056-LRS-1).

122. *Id.* at 25.

that argument would have been legitimate as well, since the form that psychological knowledge about eyewitnesses takes does not permit moving from the general to the reliability of the individual's identification on the basis of the science alone.[123]

The point is that, as this example suggests, there may sometimes be pressure on experts to go beyond the realm of the research findings and what they can legitimately indicate about risk factors. Experts may be asked—and sometimes may be willing—to opine in a more specific manner. If we think that experts ought to remain firmly in the framework setting, offering only meta-expertise without any case-specific commentary, then modular testimony may even offer advantages compared to traditional testimony. To whatever extent those limitations on experts are both valuable and not always easily or completely adhered to under the adversary pressures and the bustle and immediacy of the trial process, then modular testimony offers the added benefit of enforcing these limits through its structural form. Moreover, the fact that modular testimony is, by necessity, less "tailored" may even enhance its credibility with the fact finder, because the jury would know the expert was not part of the defense 'team'.[124]

Where, then, are we left? In short, if we wish to hew firmly to this boundary line between the specific and the general, modular, repeat-play evidence provides a useful method for ensuring experts'—and attorneys'—adherence. From this perspective, modular testimony may actually be better than traditional live testimony, precisely because of the way that it structurally enforces the boundary between the specific and the general.

By contrast, if we believe that experts can and should sometimes offer more specific evaluations of the applicability of the social science to the particular case—or the inapplicability of some findings to the specific case—then modular testimony pales in comparison to the more traditional

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123. *See* Christian Sheehan, Note, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 688 (2011) ("A court is especially likely to disallow an expert's testimony if it appears that the expert is commenting on the reliability of a specific witness in the case.").

124. With modular testimony, the fact finder would presumably understand that the expert was not a partisan, hired by the specific party, and potentially shading and tailoring his or her testimony specifically for that particular trial. With the typical expert, not only is there a risk of partisanship, given adversarial pressures and the dynamics of "team" membership, but there is the related-but-distinct concern that a jury needs to assess the expert's partisanship and assess credibility in light of it. In other words, with case-specific experts, the fact finder must determine credibility while recognizing that the expert has been hired by a particular party and that his or her testimony may be affected by this role. With modular testimony, the expert was not hired by any party in particular. His or her role is more thoroughly that of a social scientist providing information about relevant research. This lack of case-specific tailoring might make his or her ready-to-wear testimony more reliable and, perhaps, more credible as well. Thanks to Jaci Seelagy for helpful discussions on this point.

form.[125] In that case, modular testimony would be a second-best solution, to be sure, but it would still be far more institutionally appropriate than a strong judicial reliability test, far more detailed and informative than a set of jury instructions, and far less costly than a traditional expert.

Whether modular expert evidence is a second best solution or in some ways an improvement to our traditional approach to experts, the key point is that either way, it deserves to be taken seriously as a potential tool in our evidentiary toolbox. The regular use of modular, repeat-play testimony would expand access to knowledge about the limits of eyewitness identification and the risk factors for false confessions far beyond the lucky few who currently get access to live expert witnesses. And, precisely because it is still testimony, premade modules would provide this information in a more accurate and thoughtful way than jury instructions can ever do. There are, to be sure, practical and doctrinal difficulties that would have to be overcome, but these are only insurmountable if we elect to be so hidebound that we make them so. It is high time, then, for us to supplement our current couture approach to expert framework testimony with a viable ready-to-wear alternative.

125. For example: could an expert legitimately opine that a lineup design was so flawed as to be unreliable? This might be more legitimate, scientifically, than an opinion that a particular eyewitness was mistaken. In the former case, the expert would not be opining on the identification itself from the lineup, but on the legitimacy of the lineup method used given what the research has shown. This issue may be significant on cross too, where a prosecutor might want to ask specifically about the factors *not* present in the given case. Clearly modular testimony makes this kind of inquiry challenging—though the prosecutor could potentially make the same point through her own use of modules about the factors that assist reliability combined with effective use of argument.

NEUROSCIENCE AND THE LAW — SCIENCE AND SOCIETY

The neuroscience of memory: implications for the courtroom

Joyce W. Lacy and Craig E. L. Stark

Abstract | Although memory can be hazy at times, it is often assumed that memories of violent or otherwise stressful events are so well encoded that they are effectively indelible and that confidently retrieved memories are almost certainly accurate. However, findings from basic psychological research and neuroscience studies indicate that memory is a reconstructive process that is susceptible to distortion. In the courtroom, even minor memory distortions can have severe consequences that are partly driven by common misunderstandings about memory — for example, that memory is more veridical than it may actually be.

Pioneers in neuroscience such as Ramón y Cajal, Hebb and Marr introduced the idea that memory is encoded in the patterns of synaptic connectivity between neurons. Changes in the strengths of these synapses encode our experiences and thereby shape our future behaviour. Our understanding of the complex mechanisms that underlie learning and memory has progressed dramatically in recent decades, and studies have not provided evidence that memories are indelible. Quite the contrary, it is becoming clear that there are several ways through which memories can change.

The 'imperfection' of memory has been known since the first empirical memory experiments by Ebbinghaus[1], whose famous 'forgetting curve' revealed that people are unable to retrieve roughly 50% of information 1 hour after encoding. In addition to simple forgetting, memories routinely become distorted[2–7]. The public perception of memory, however, is typically that memory is akin to a video recorder[8] (BOX 1). This distinction between the perception and reality of memory has important consequences in the context of the courtroom. In the legal system, like among the general public, it is generally assumed that memory is highly accurate and largely indelible, at least in the case of 'strong' memories.

The fallibility of memory obviously has implications for the question of how much weight should be given to eyewitness testimony in court cases. Recently, some regional jurisdictions in the United States, such as New Jersey[9,10], Massachusetts[11], Texas[12] and North Carolina[13], have implemented procedural changes designed to mitigate effects of memory biases and to preserve accurate memories of eyewitnesses as well as possible. However, the legal system writ large has been slow to adapt to research findings on memory, even though these findings have implications not only for eyewitness testimony but also for how jurors remember and weigh evidence. Interest in research on memory processes and their relevance to the courtroom has increased since the advent of DNA evidence, which has exonerated hundreds of individuals who were falsely convicted on the basis of eyewitness testimony.

Common misunderstandings

In many countries, the justice system relies on judges or jurors weighing evidence from multiple sources with varying levels of credibility. The belief that a confident memory is always highly accurate and resistant to distortion or loss is an unfortunate misunderstanding about memory[8] that has important consequences in court. The testimony of eyewitnesses whose memories may have been distorted can lead to the conviction of innocent people while true perpetrators remain free. The Innocence Project in New York City, USA (BOX 2), which advocates the use of DNA testing to exonerate wrongfully convicted people, lists 310 exonerated individuals (as of 8 July 2013). These individuals were typically convicted on the basis of eyewitness testimony and spent an average of 13.6 years in confinement before being released. They are thought to be only a small sample of the total number of wrongfully convicted people, as DNA evidence is only available in a limited number of cases (for example, those involving sexual assault).

Most individuals outside the field of memory research (including jurors) are largely unaware of the substantial malleability of memory[2,8,14–16] (however, also see REF. 17). Early studies on the public awareness of memory phenomena showed that when college students were asked how various factors influence memory (for example, cross-race identification, stress and the wording of questions), they were only 54% correct[2]. Although the students scored higher than chance, the score was surprisingly low considering the implications of these factors in court cases. Similar surveys have replicated these findings in non-traditional (that is, older, working) students and in citizens of Washington DC, USA. In both of these studies, the respondents' accuracy was below 50%, suggesting that college students may be slightly better informed about factors that influence memory than the general public[14].

More recent studies revealed that judges and law enforcement personnel are not much more aware of memory phenomena than are college students[16]. For example, on a 30-item questionnaire about memory-related topics, potential jurors (that is, citizens who have been summoned to jury duty), judges and law enforcement personnel (including detectives, police officers and special agents) responded differently from eyewitness testimony experts on 87%, 60% and 60% of items, respectively[16]. Thus, although judges and law enforcement personnel agreed with memory experts on more statements regarding memory myths than did jurors, their understanding of most memory myths still differed from that of memory experts. There is evidence that some populations, such as a surveyed sample of Canadian citizens, hold beliefs that are more in line with those of experts[17]. However, the most recent studies show that there remains a large discrepancy between public knowledge of memory and expert consensus[8] (BOX 1).

One memory phenomenon of which the general public (and therefore also juries) is often unaware is cross-race bias[16,18] — a reduction in accuracy when identifying faces of a race or ethnic background that is different from one's own[2,19]. This phenomenon is due to the fact that we use our entire existing body of knowledge and experiences to filter what we perceive, attend to and use in memory reconstruction (this is known as memory's 'bias' (REF. 20)). In the case of facial identification, we may often be most familiar and knowledgeable about the facial features of our own race and less so of other races or ethnic backgrounds owing to a simple lack of experience with faces of other races (such experience can reduce or eliminate the effect).

Bartlett[21] first drew attention to memory's 'bias' in his famous study on the War of the Ghosts, in which participants had difficulty

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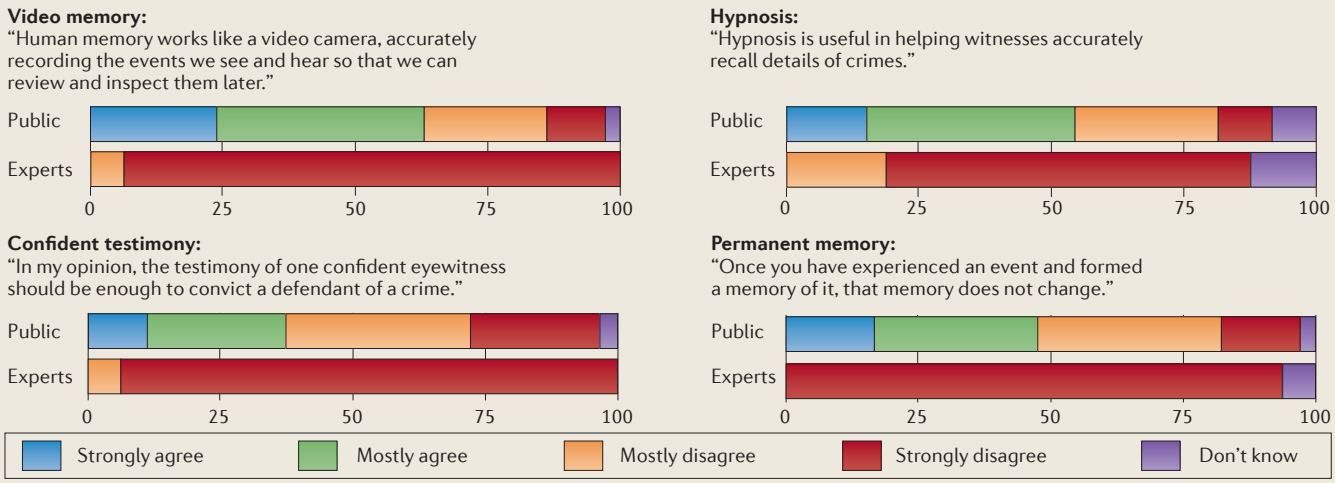
Box 1 | **Is memory common sense? Public opinion versus memory experts**

When asked about statements regarding memory-related phenomena in a national survey across the United States, members of the general public (n = 1,500) accepted many phenomena that were not endorsed by experts in the field (that is, professors with more than 10 years of experience in memory research), who showed strong consensus among themselves (see the figure)[8]. Such misunderstandings of memory can have significant consequences in court, where judges and jurors often assume memory to be more accurate and veridical than is indicated by the neurobiologically reconstructive nature of memory. Note that one limitation of these surveys is that expert opinion about memory-related phenomena may change over time as more research findings become available. For example, a 1989 study[15] showed that expert opinion regarding the phenomenon of weapon focus had changed compared with a survey published in 1982 (REF. 14), and further changes in expert opinion regarding weapon focus as well as other phenomena were shown in 2001 (REF. 18). Although expert opinion about memory-related phenomena may sometimes be wrong, it is presumably the best indication of the true nature of such phenomena. The authors of one recent study[17] suggested that public opinion and expert opinion are beginning to converge. However, other studies suggest that, in some aspects, lay beliefs are still quite different from those of experts. There is, therefore, a need for periodic updating of both expert and public opinion. Data from REF. 8.



recalling short stories word for word when the stories did not fit into their conceptual framework. Barlett's work was later developed by Neisser[22], who famously likened memory retrieval to palaeontology by saying, "out of a few stored bone chips, we remember a dinosaur". Put simply, if we think an event should have happened in a certain way on the basis of our previous experiences, we are likely to think that the event did indeed happen this way. For example, when people read a brief passage about a wild and unruly girl and are told that it is about Helen Keller, they are more likely to mistakenly remember, a week later, the text saying 'she was deaf, dumb and blind' than if they were told that the passage is about a fictitious Carol Harris[23]. Thus, if people expect certain things to occur during a crime or expect a particular group of people to be more or less involved in crimes, it should perhaps not come as a surprise that their memories reflect these biases.

Another commonly held belief among the general public is that an eyewitness's confidence in the accuracy of his or her memory is a strong indicator of the actual accuracy of the memory[16]. Jurors often place great weight on how confident an eyewitness is regarding their memory of the event — enough to convict an individual even if eyewitness testimony is the only condemning evidence (BOX 1). Meta-analyses have reported that mistaken eyewitness identification occurred in 75% or more of cases in which a convicted individual was later exonerated on the basis of DNA evidence[24]. Importantly, memory experts generally do not endorse the idea that the confidence and accuracy of a memory are always tightly linked[8,18]. Although studies in cognitive psychology have shown a positive correlation between memory confidence and accuracy[25,26], these studies were typically laboratory-based, used neutral stimuli, and observed general memory phenomena rather than the attributes of memory that are most relevant to court. Research that specifically examines eyewitness testimony or the memory of traumatic events has shown weak[27] or even negative[6] correlations between a person's confidence in the accuracy of a memory and the actual accuracy of that memory. One reason for these weak correlations is that confidence can be influenced independently of accuracy: for example, by post-identification feedback, which has no influence on accuracy (see below). Such decoupling between memory confidence and accuracy can be seen when college students or law enforcement personnel are given instructions on how to detect behavioural cues of deception. This lie detection training tends to increase confidence in evaluating whether a witness's testimony is truthful or deceitful without necessarily improving the actual accuracy of deception detection[28–30]. Thus, the relationship between confidence and accuracy is far more complicated than is often acknowledged. Accuracy often produces confidence, but confidence does not necessarily indicate accuracy.

Misunderstandings about memory can have effects on criminal cases even before they make it to court. The belief that confident, detailed memories are always accurate and reliable is contrary to research that suggests the opposite is possible — confidently recalled recollections can sometimes be inaccurate, and real memories are not always highly confident and detailed. Especially in cases involving violence and high levels of stress, real traumatic memories — which can be disjointed — may sound unreliable to law enforcement personnel and to the general public and may therefore never make it to court. One striking example of this is that an estimated 86% of sexual assaults are never prosecuted on the grounds that the victim's testimony does not seem to be reliable[31].

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How memory distortions occur

Memory distortions can occur in different ways. Many distortions involve some form of explicit or covert misleading information. One form of this phenomenon, the misinformation effect, has been thoroughly studied for the past 30 years[4]. This effect refers to a distortion of an original memory after being exposed to misleading information related to that memory: for example, an impairment in the memory of the face of a perpetrator after being exposed to a photo of a police suspect who was not the true perpetrator. This 'misinformation' is considered misleading in that it detracts from the original memory, not because it is purposefully deceitful. Laboratory studies have shown that it is possible to induce memories in a participant that are entirely false, such as a special hospital visit at the age of 4 years when no such visit happened[4]. Misleading information is often given unintentionally and can be as subtle as slight variations in the wording of a question. For example, when participants viewed footage of a car accident, the question 'how fast were the cars going when they smashed into each other?' elicited reports of 20% greater travelling speeds than the question 'how fast were the cars going when they hit each other?', despite the fact that participants in both conditions viewed the same footage[2]. The question with the word 'smashed' was also more likely to elicit a false memory of broken glass at the site of the crash[2]. Witnesses are often called to testify on specific details such as these, and their reports may influence the likelihood of conviction and the degree of punishment — for example, a harsher crime sentence for travelling at higher speeds.

Distortions in memory can also occur from feedback provided to the witness after their testimony. Positive post-identification feedback, such as informing a witness that their choice in a suspect line-up matched the police suspect or was the same as that of other witnesses, increases the eyewitness's level of confidence in their choice[32,33]. Positive post-identification feedback also increases a witness's later estimate of the amount of attention that he or she paid to the crime and of how well they could see the scene and/or perpetrator[33,34]. Conversely, negative feedback can deflate confidence in a memory and other measures[32,35]. In addition, non-verbal feedback via body language and facial expressions can occur if the officers conducting the line-up are aware of which individual is the police suspect[36]. Even in the absence of feedback, mere repeated questioning about an event can increase a witness's confidence in the accuracy of their memory[37]. Such changes in a witness's reported estimations of confidence and attention are highly relevant in the courtroom, as judges and jurors often use these factors as indications of the accuracy and reliability of a witness's testimony.

Memory distortions can even occur in highly trained individuals. One series of studies examined highly trained, specifically selected military personnel in survival school who received a week of classroom instruction on how to handle stressful interrogations before they were exposed to a mock prisoner of war camp (POWC; see BOX 3)[38,39]. The mock POWC provides a controlled setting, which simulates realistic and personally relevant stress. In one study of over 500 active-duty military personnel, participants were asked to identify their interrogator after being released from the mock POWC. These individuals had had a clear view of their assailant during the 30–40-minute interrogation. However, only approximately one-third of the identifications were correct. Strikingly, the subjects identified someone in the line-up as the interrogator in almost two-thirds of cases in which the actual interrogator was not present in the line-up[38]. A related study involving a population of over 800 military personnel revealed that interrogator identifications were also easily influenced by misinformation. For example, exposure to a misleading photograph (that is, a photograph of someone who was not the interrogator) before identification increased the likelihood of a false identification[39]. The misidentifications that occurred with and without exposure to misinformation were robust, despite the fact that these studies involved a select group of individuals thought to be superior in their ability to handle stressful situations. Although a limitation of these studies is that subject selection may be biased because they involved participants who chose to enrol in survival school, their findings converge with data from laboratory-based studies of eyewitness testimony under highly stressful situations[40,41] and the misinformation effect[4].

Memory distortions can also occur simply with the passage of time and with repeated recounting of events. Although it might not be surprising that mundane memories become weaker and more susceptible to distortion over time, emotional and traumatic 'flashbulb memories' are also susceptible to these automatic distortions. For example, after the terrorist attacks of 11 September 2001 on New York City, US citizens were asked to remember when they first heard about the attacks. They were asked to recall this episode approximately 1–2 weeks after the attacks, 1 year later and 3 years later[6]. Memories of the details had changed in 37% of the people after 1 year and in 43% after 3 years. Interestingly, despite the drop in memory accuracy, confidence in the accuracy of the memory remained high — an example of a negative relationship between memory confidence and accuracy — and was driven primarily by attention paid to media reports and by talking about the attack in the intervening time[6].

Box 2 | **The Innocence Project**

In 1981, Linda Mae Craig, a young sales associate, was abducted from her car on her way home from work. The next day, her body was found in a church parking lot, beaten and sexually assaulted. Days later, 20-year-old Nicholas Yarris was stopped for a routine traffic violation, which escalated into a physical altercation and resulted in Yarris being taken into custody. In a bid to speed his release from custody, Yarris told police that he believed an acquaintance was involved in the murder. However, when the acquaintance's alibi was cleared, Yarris became the chief suspect. After a short trial, which involved eyewitness testimony from the victim's co-workers, Yarris was sentenced to death row and solitary confinement for the kidnapping, rape and murder of Craig. Yarris spent over 21 years behind bars before he was exonerated through DNA testing. He was the thirteenth individual in the United States to be exonerated from death row.

Yarris's story is one of hundreds recorded by the Innocence Project, a non-profit ligation organization in the United States. According to their data, exonerees spend an average of 13.6 years in prison before being released. After exoneration, there is little support or assistance. The average compensation, which is not guaranteed, amounts to US$24,000 per year for each year spent behind bars, often capping at a maximum of 10 years. This does not take into consideration the money exonerees have spent on legal fees. Not only have they lost precious and prime years of their life, many exonerees are never acknowledged as victims of legal injustice. They find it difficult to regain a normal life after release from prison. Many have lost friends and family over the years in confinement and bear the social stigma of being regarded as a criminal, which leads to difficulties in finding employment, even after their record is cleared.

Eyewitness testimony plays a part in roughly 75% of all cases in which individuals are wrongfully convicted[24]. The Innocence Project aims to reform the criminal justice system by raising awareness of these issues and advocating changes in public policy.

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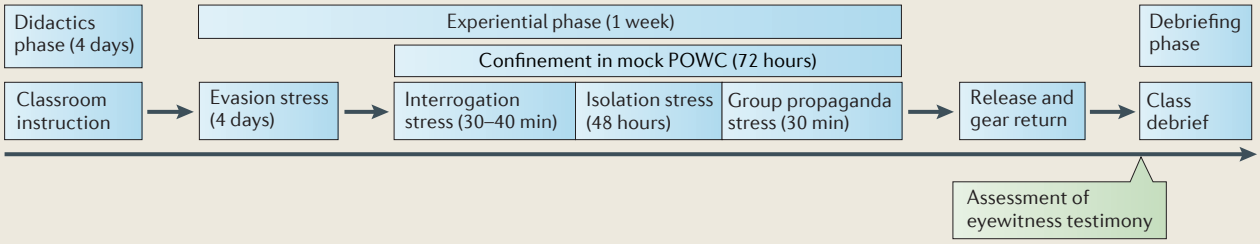
Box 3 | **Mock-'prisoner of war camp' studies on eyewitness identification**

Although eyewitness testimony has been empirically studied for decades, most research involved videotaped scenes or live simulations of crimes. A critique of such laboratory experiments is that they lack personally relevant and realistic stress. A few studies did involve actual crimes[27,89,90], but these studies suffered from a lack of control over the amount and duration of stress as well as objective data on the true perpetrator. The mock-'prisoner of war camp' (POWC) portion of military survival school, which enlists only the most highly trained military personnel, provides an ideal venue to study eyewitness identification in a highly realistic but controlled setting. High levels of personally relevant stress can be applied in a uniform and consistent manner to all participants. The levels of stress induced in mock-POWC participants have noticeable physiological and psychological effects[91] that are on par with real-world threats such as combat.

Survival school begins with a week of training to prepare students for the mock POWC, including training to withstand intense interrogation and to resist counter-cultural propaganda. During the mock POWC, each participant is placed in isolation, deprived of food and uniform sleep for approximately 48 hours and is interrogated in a manner that threatens physical violence (for example, slapping, punching and submission positions[39]). Interrogations last 30–40 minutes, and participants have a clear view of their interrogator the entire time. The participants are asked to identify their interrogator approximately 24 hours after being released from the mock POWC and after being given access to food and sleep (see the figure). In some cases, they were given misinformation before making identifications.

One mock-POWC study with over 500 survival camp attendees implemented three different types of line-up[38]: live, in-person line-ups; simultaneous photo line-ups, in which photos of possible interrogators are shown at the same time, and witnesses must select the interrogator (if present) in the photo spread; and sequential photo line-ups, in which photos of possible interrogators are shown one at a time, and witnesses must decide for each of them whether they were the perpetrator. Participants correctly identified their interrogator in ~33% of cases in which the interrogator was present in the line-up. When the interrogator was not present in the line-up, participants made false-positive identifications (that is, they identified an 'innocent' person as the interrogator) in almost 66% of cases. These mock-POWC results support previous findings that sequential line-ups elicit fewer misidentifications than do simultaneous line-ups[84]. Another POWC study involving a separate population of over 800 military personnel[39] has replicated findings of the misinformation effect[4]: exposure to misleading photographs or leading questions increased the likelihood of false identifications or inaccurate memories.

The participants of survival school are successful military personnel who are often selected for their perceived ability to handle high-stress situations. Strikingly, these mock-POWC studies show that even such highly trained individuals are susceptible to memory distortions and making false identifications, and are influenced by misinformation. Figure is modified, with permission, from REF. 39 © (2013) Elsevier.



These types of memory distortion increase as we age. For example, false memory for words that were not in a list of words presented to the participant but that were semantically related to the words on the list (a test known as the Deese–Roediger–McDermott paradigm) increases with age[3]. Similarly, when shown lists of objects, some of which are similar but not identical to previously seen objects, older participants are more likely than younger participants to incorrectly identify these as being repeated objects[42]. By contrast, correct identifications of repeated items and of novel items unrelated to the listed items are largely unaffected by age. Thus, ageing seems to be associated with an over-generalization of memories, such that an event that is similar to a prior event is more often remembered as being identical to the prior event. Aged individuals are also more susceptible to the misinformation effect than are young adults[4,5]. Thus, as people age, memory for the gist of an event may remain intact, but memory for specific details of the event degrades, and individuals are more likely to falsely incorporate similar information into their memories.

The fallibility of memory has implications for the question of how much weight should be given to eyewitness testimony in court cases. In addition, jurors are subject to memory biases. For example, when mock jurors listened to audio recordings of a mock trial, they 'recalled' 15% of details of that were not mentioned in the trial but that fit a typical crime description (for example, 'pulled out a gun' was never stated but fits the description of a robbery)[43]. This reflects people's natural bias to 'fill in the gaps' of a memory, but such fill-ins are inaccurate accounts of the actual events. The occurrence of false memories can be increased by leading questions, such as those that might be asked by prosecutors. Mock jurors 'recalled' 25.8% of details that were implied in leading questions from the prosecuting attorney in a mock trial but that were not stated by the eyewitness of the trial, suggesting that jurors have difficulty in sorting statements from eyewitnesses and attorneys. Moreover, even when mock jurors were given explicit instructions to focus on the testimony of witnesses and not on information implied from attorneys, they still 'recalled' 20.4% of details that were not mentioned in the eyewitness testimony[43]. Thus, such instructions to jurors only marginally reduced the effect of leading questions and did not completely prevent it.

Insights from the neuroscience of memory

Our understanding of the neurobiological mechanisms of memory formation, consolidation and retrieval can explain, at least to some extent, why some types of memory distortions occur and why imperfect memory is the norm. At the cellular and molecular levels, these mechanisms are thought to involve processes linked to long-term potentiation (LTP) and long-term depression (LTD).

LTP and LTD. Hebb[44] proposed a conceptual framework that linked associative memory formation to activity-dependent changes in the strength of connections in a network, and Bliss and Lømo[45] provided the first direct evidence for such a link. They found that by strongly stimulating the perforant pathway from the entorhinal cortex to the

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Glossary

Lie detection training
Classroom instruction given to law enforcement personnel on how to detect subtle cues of deception.

Misinformation effect
A distortion in an original memory or the creation of a false memory after being exposed to misleading information related to the memory. The 'misinformation' is considered 'misleading' as it detracts from the true memory, not because it is purposefully deceitful.

War of the Ghosts
A Native American fable. It was used by Barlett to show that it was difficult for English participants to recall the fable precisely because it did not fit into their conceptual framework; that is, English participants were not familiar with Native American traditions, and they therefore tended to reinterpret the story in a context more in line with English culture.

Weapon focus
The tendency for a witness's attention to be drawn to a weapon, thereby increasing subsequent memory for the weapon but impairing memory for the perpetrator.

dentate gyrus, they had increased the ease with which neurons in the entorhinal cortex could excite neurons in the dentate gyrus. This strengthening of the connections remained quite stable and was dubbed LTP. LTP is activity-dependent and requires coincident firing of pairs of neurons. Thus, the learning rule underlying LTP corresponds quite well to the associative learning rule posited by Hebb. There is now substantial evidence that LTP, or at least a similar process that shares many mechanisms with LTP, underlies numerous forms of learning and memory[46].

A great deal has been learnt about LTP, its mechanisms, and its various forms. For example, depolarization without activation of NMDA receptors and protein synthesis results in an 'early' Hebbian form of LTP that only lasts for several hours. By contrast, NMDA receptor-dependent LTP leads to structural changes that show little sign of degradation with time[47]. This could suggest that once a memory undergoes such 'synaptic consolidation' and is associated with the structural changes of late-phase LTP, it is immutable. Unfortunately, this is not the case; as these changes are not permanent, nor are the memories that have been thus encoded indelible. Although coincident firing of neurons can lead to LTP and the strengthening of a memory, if the neurons fire in an uncorrelated way (as may be the case if the neurons individually activate in different experiences and therefore in different memories) this leads to the opposite effect — namely, a reduction in the strength of the same synapses that were strengthened by LTP. Thus, there is a mechanism, known as LTD, for weakening synaptic connections — and therefore presumably memories — as well. Importantly, LTP and LTD occur at the level of individual synapses, and the same individual neurons and synapses are probably involved in several or many memories[48], leading to the potential for interference of one memory with another[49] and suggesting that the learning of new information can overwrite previously learned information by changing the strengths of the synapses that had been used to encode that information. Conversely, as noted above, previously learned information (experiences, biases, and so on) can influence the learning of new information.

Moreover, there is evidence at the molecular level that memories can be lost or altered. First, the maintenance of LTP appears to be an active process, as administering zeta-inhibitory peptide can depotentiate synapses and erase memories[50,51]. Second, the act of retrieving a memory (that is, reactivating a memory) is thought to put that memory and the potentiated synapses associated with the memory into a labile state, from which it must restabilize in order to persist. Without this process, known as 'reconsolidation' (which, like long-lasting LTP, requires protein synthesis), the information is lost[52]. This reconsolidation process is thought to be functionally beneficial, as it provides the system with an opportunity to strengthen or weaken a memory or to update its contents[53]. If the content of a memory is updated at the time of retrieval, memory distortion could occur, of which the individual would presumably be entirely unaware[53].

Note that thus far, we have discussed how the contents of an existing memory may be changed. There is also reason to believe that more recent memories can compete with older memories at the time of retrieval, leading to memory errors when trying to retrieve the original information[54]. That is, if two different memories of an event exist (for example, the original memory and a memory formed while retelling the event) or if there are two overlapping memories (for example, the original memory of the event in question and memories of a subsequent event that shares several of the same components), attempting to retrieve the original event may inadvertently and unknowingly draw upon information from the second event. There are neurobiological findings that support this mechanism for altering memory performance. For example, the extinction of a conditioned response engages many (although perhaps not all) of the same mechanisms that were engaged during the initial learning of the response[55], supporting the notion that extinction is not simply the loss of an existing association but involves new learning. The phenomena of spontaneous recovery (reappearance of a previously extinguished memory) and disinhibition (re-emergence of a conditioned response after experiencing a novel stimulus) also support this notion.

Generalization over time and with retrieval. Memory distortions in humans may occur simply with the passage of time. This is partly because over time, memories typically become less episodic (highly detailed and specific) and more semantic (more broad and generalized), as the information is repeatedly retrieved and re-encoded in varying contexts. This generalization of a memory over time has also been observed in animals. For example, if a rodent receives an electric footshock in a particular context, subsequent exposures to that context induce a 'freezing' behaviour[56]. The specificity of the memory can be probed by exposing the animal to a different context. Comparing the levels of freezing in the two contexts reveals how well the animal discriminates between them (FIG. 1). A typical finding is that freezing in the training environment may not degrade much with delay (that is, the animal shows little forgetting of the memory) and that the level of freezing in the other context is initially very low. However, freezing in the other context typically increases with delay, indicating a reduction in the ability to discriminate between the contexts in memory or an increased reliance on the 'gist' of a context than on specific contextual details[57,58]. Thus, even highly salient, strong memories, such as the memory of receiving a shock, that are initially detailed and specific become more generalized with the passage of time. Such generalization is stronger for similar contexts than for highly dissimilar ones, and the hippocampus is required to differentiate between contexts, as it maintains the representations of the details that distinguish them[59]. Interestingly, a recent study in mice suggests that it may be possible to experimentally induce a false fear memory by stimulating the hippocampal neuronal representation of context A while the rodent is being shocked in context B[60].

During the formation of a new episodic memory, information about a related memory can be automatically retrieved.

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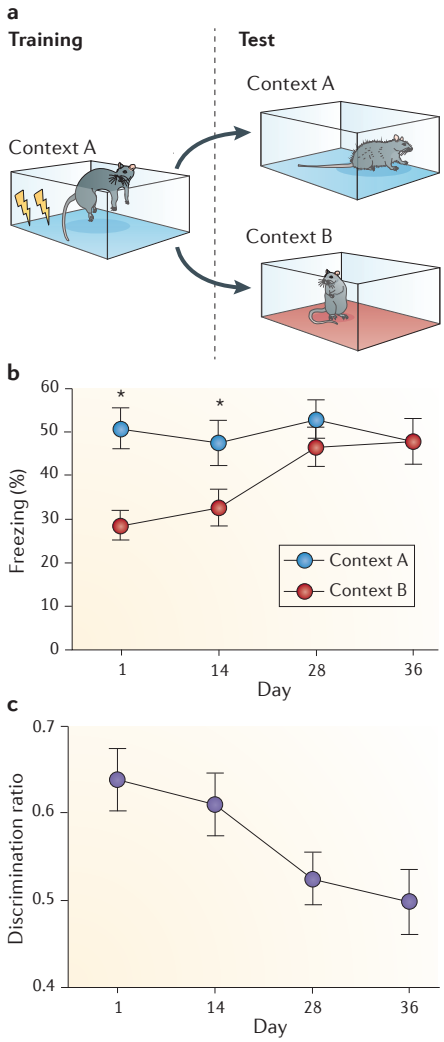

Figure 1 | **Memory generalization over time in rodents.** **a** | Rats were exposed to a training context (context A) and given a small shock in that context, which induces 'freezing' behaviour (a common fear response in rodents). After a delay, they were placed in either the training context (context A) or a novel context (context B). Memory for the shock and the specific environment in which it was given was assessed by measuring the amount of time the rats spent freezing in each context. **b** | One day after training, rats froze less in the novel context than they did when re-exposed to the training context. This behaviour indicates memory of the specific context in which they were shocked. **c** | This ability to discriminate between the two contexts (that is, the discrimination ratio) decreases with time: rats that were tested 4 weeks after training froze an equal amount of time in the training context and the novel context. This suggests that at this time, both the training and test contexts (both of which involve the rat being removed from the home cage, taken to another room and placed in a box) match the contents of the memory. Parts **b** and **c** are modified, with permission, from REF. 57 © (2007) Cold Spring Harbor Press.

New learning taking place to encode this new episode can 'spill over' and alter the contents of this automatically retrieved information. For example, in one study[61], rats were exposed to two distinct contexts (A and B) every day for several days, so that some association would probably be formed between the two contexts (A–B). The rats were then exposed to one of the contexts (B). Given the prior training, rats probably retrieved a memory of the other context (A), and at this point, rats were given a shock. Subsequently, the level of freezing the animals showed in context A was higher than that in a novel context (C)[61]. This finding is consistent with the idea that being placed in the B context reactivated the memory of context A, so that the association between context B and shock 'spilled over' to form a false association between context A and shock. Just like the learning of accurate associations, the learning of this inaccurate retrieval-mediated association relies on NMDA receptors in the hippocampus[62].

Thus, experiencing an event can lead to the automatic retrieval of information that is not present but has previously been associated with similar events. Given that a goal of our memory system should be the use of prior information to guide current behaviour in an adaptive manner, such automatic retrieval of memories from related events would be expected. The problem is that learning is occurring at this point and that it does not clearly discriminate between the current event and retrieved information from specific prior events or from generalized expectations of what should happen in such an event. As a result, whatever happens in this event becomes associated not just with elements that are actually present but also with what we expect to be present based on our prior experiences and biases. This phenomenon was shown in an elegant functional MRI (fMRI) study in humans[63]. Here, participants initially encoded a series of image pairs (A–B) while undergoing fMRI. After testing the memory for these pairs, they again encoded a series of image pairs during fMRI. Some of these pairs repeated an element from the initial encoding list (A–C). During this second encoding phase, activity of the hippocampus provided evidence for the reactivation of previous, related events (A–B). The amount of hippocampal activity for the original A–B event during this related A–C retrieval predicted how much of the original A–B information was lost and how much of the novel A–C information was retained[63].

It is important to note that even without considering the notion of deception, it is difficult to distinguish true memories from false memories by examining brain activity. The relative amount of hippocampal activity during the encoding of an event and during subsequent encoding of misinformation predicts which version will be remembered, even when participants are confident in the accuracy of their false memory[64]. Thus, the formation of true and false memories appears to involve the same processes. At the time of retrieval, differences in activity in early sensory regions for true versus false memories can be observed[65,66], which is consistent with findings that true memories contain greater sensory detail than false memories[3,67]. Some regions in the prefrontal cortex may be more active during the formation and/or retrieval of false memories than they are during the formation and/or retrieval of true memories[68]. However, these differences in activation cannot discriminate true from false on a trial-by-trial basis[68]. These differences may also fade over time. This is important in the context of eyewitness testimony, as the time elapsed between witnessing an event and testifying about it in court may render brain activity measures useless for distinguishing true from false memories. Last, most differences in brain activity are observed in early sensory regions of the cortex, which are not typically associated with conscious awareness, suggesting that we may not be able to consciously know the truth even if some regions of our brains could differentiate true from false memories.

The closest that experimenters have come in being able to distinguish true from false memories on a trial-by-trial basis is with the use of multivoxel pattern analysis (MVPA), a relatively novel method of analysing fMRI data using pattern classifiers that learn to use stimulus-related activity across voxels to categorize stimuli. MVPA can distinguish subjectively remembered images (that is, images for which the person has the mnemonic perception that he or she has seen them before) from forgotten images with ~70–75% accuracy[69]. However, MVPA classifiers performed either at chance or only marginally above chance when trying to distinguish between objectively true and false memories — far below their accuracy for subjective memory[69]. Thus, even the most cutting-edge neuroimaging techniques are currently unable to distinguish between objectively true and false memories by analysing brain activity.

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Stress and memory. It is well established that arousal and the stress hormones adrenaline and cortisol that are released during arousal can modulate synaptic consolidation and memory strength[70]. Decades of research have supported the view that emotional arousal leads to activation of the basolateral amygdala (BLA), which modulates memory storage, leading to more strongly encoded memories[70]. This does not imply, however, that memories encoded during a state of heightened arousal cannot be lost or distorted. In fact, high levels of stress during an event are not necessarily associated with an increase in memory strength for that event and can even result in a reduced memory for the event. Indeed, in both animals and humans, there is an inverted U-shaped dose–response relationship between plasma stress hormone levels and memory performance[70,71]. Very high levels of stress during an event are not necessarily associated with an increase in memory strength for that event and can even result in a reduced memory for the event. For example, high levels of either endogenous or exogenous cortisol in humans can impair declarative memory formation[72]. Thus, in states of high arousal, such as witnessing a crime or being a victim of crime, memory encoding may be enhanced or impaired depending on the person's individual stress response.

Emotional arousal during an event has effects during retrieval of the memory of that event as well. The retrieval of arousing information leads to a reactivation of the BLA, which can lead to further strengthening of memory[73]. However, distortions can occur if any aspect of the retrieval or reconstruction of the memory is erroneous: as the retrieved information is re-encoded, these distortions (whether they are self-generated or externally suggested) can potentially become part of the memory. In addition, in humans, high levels of the stress hormone cortisol during retrieval (either administered exogenously[74] or induced endogenously[75]) have been shown to impair the retrieval of personal autobiographical memory. Importantly, arousal may enhance memory for some aspects of an event and impair memory for other aspects. For example, violence and trauma tend to improve memory for the central gist of an event (for example, witnessing a homicide) but impair memory of the peripheral details of the event (for example, the clothing of the perpetrator)[40,41].

Clearly, the relationship between stress and memory is complicated. Veridical memories may not always be accompanied by a high level of confidence and details. In particular, victims of violent or otherwise upsetting crimes may have vague and disjointed memories of the event, especially during a first interview soon after the crime, when stress levels are still high. It should not be surprising if a second interview, conducted when the stress hormones have returned closer to baseline levels, contains a more coherent story, with additional details that were not recalled on the first interview. Even without stress, memory retrieval is a probabilistic process. This was first shown by Ebbinghaus[1] for retrieval of simple, neutral lists of syllables. As stress is added into the process, the picture is clouded even more. The data discussed above suggest that the stress of witnessing a crime or the stress of the first interview can either enhance or impair the encoding and retrieval of the crime event. Stress will therefore also affect the likelihood of establishing false memories during a second interview. Laboratory studies have shown that over time, false memories are more likely to be endorsed as real memories, and these false memories tend to include more peripheral details with time[76–78]. Thus, there is no set rule that information retrieved across multiple interviews is inherently true or false. A broader understanding of memory processes (including the effects of emotion and time), situational factors (how stressful was the experience to the witness), and testimony consistency (what information was consistent or incongruent across interviews) must be taken into account when considering information provided by eyewitnesses.

Application to courts

The data reviewed above show that memory is imperfect and that we cannot assume that this is well understood by the general public and by the courts. Relatively simple changes in procedures can help to reduce the occurrence of memory distortions. Even in situations in which the possibility of memory distortions cannot be avoided, judges and jurors can be better educated on the limitations of memory. The fact that memory is imperfect cannot be changed, but perhaps we can change how much weight is placed on evidence drawn from memory and on the confidence ascribed to memory.

Most of the time, peripheral details of events are of low importance and are therefore often not well recalled. However, in the courtroom, witnesses are often called to testify on precisely such very specific details. Some witnesses may give accounts that are missing details, that are hazy in places and that may even have some amount of demonstrable distortion. They may report that they are unconfident about much of the memory as well. Other witnesses with the same actual amount of information available for retrieval may present far clearer, more detailed accounts, with strong confidence in the accuracy of their memory. In these witnesses, the extra information presented and the confidence in the recall would be driven by the reconstructive nature of memory retrieval, as described above. Thus, although in general, accurate memories are more confidently recalled and more detailed than inaccurate memories, jurors should be aware that sometimes vague, somewhat distorted memories may be more veridical than very detailed and confident accounts. Given what we know about the neurobiology of memory and the cognitive psychological research on memory, 'perfect' memories that are accompanied by a high level of confidence and detail should be taken with a grain of salt, and 'imperfect' memories that are vague and missing details should not be immediately discredited. However 'good' a witness's memory of an event may be, their memory may not actually be accurate, and currently there is no clear way to measure the accuracy. This does not mean that memory-based evidence should be disregarded but rather that police, judges and jurors should be educated on these nuances so that they may give memory-based evidence its proper weight.

Interviewing eyewitnesses. Although the relationship between confidence in the accuracy of a memory and the actual accuracy of a memory is complex, confidence statements should be recorded immediately after an interview or suspect identification[24], before the witness's subjective feeling of confidence can be influenced by post-identification feedback[32–35] or other factors[36,37]. If confidence is to be used as an indicator of memory accuracy, this would be the best estimate of confidence to use.

There is a large literature on different approaches to interviewing eyewitnesses. The cognitive interview, sometimes referred to as the 'enhanced' cognitive interview, was developed by psychologists in response to a request from law enforcement for better interviewing methods[24,79]. Here, we will review the general outline of the cognitive interview, as it lays a solid foundation for best practices.

Interviewing should begin with a transfer of control to the witness; that is, witnesses should be put at ease and made to feel comfortable. This is important in avoiding unintentional bias, as witnesses may

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be easily manipulated by individuals with perceived power and authority, such as law enforcement personnel. It is recommended that officers ask the witness to mentally recreate the scene of the crime. This is based on research on context-dependent memory, which has shown that recall is better when it occurs in the same context as learning[80].

Testimony ought to begin with an open-ended narrative; that is, witnesses should be encouraged to recall as much detail as possible, even if they recall events out of order or the details seem trivial. The interviewer should allow time for long pauses while the eyewitness thinks, relaxes and gathers his or her thoughts. This approach contrasts with standard police interviews, in which a witness may often be interrupted and asked to report events in a specific order. Allowing witnesses to report events in their own order and at their own pace results in a more detailed and more accurate report[24]. Witnesses should be asked to indicate when they are unsure and should be informed that they should not guess.

After the free narrative, the interviewer can follow up with open-ended questions, keeping in mind that the wording of a question can lead to memory distortions (as discussed above). Indefinite articles should be used over definite articles. For example, asking whether the witness saw 'the gun' as opposed to 'a gun' implies that a gun was present[2]. Last, it should be kept in mind that congruency among multiple eyewitness accounts does not necessarily entail greater accuracy, as witnesses may communicate with each other and all are susceptible to the same memory errors.

Identification of suspects. There are many guidelines for constructing and conducting suspect line-ups. These guidelines suggest that each line-up should only contain one suspect and that the suspect should not stand out from the rest of the line-up. Fillers (other non-suspects in the line-up) should be selected on the basis of the eyewitness's description of the perpetrator. If an innocent suspect fits the description of the perpetrator more than the other people in the line-up, there is a higher likelihood that the suspect will be misidentified as the perpetrator. In a truly unbiased line-up, naive 'mock witnesses' who did not witness the crime should not select any one individual more frequently than the others[2,24].

Although no line-up method can completely eliminate false identifications and increase the likelihood of a correct identification, some recommendations will reduce the number of misidentifications without substantially reducing the likelihood of a correct identification. The first is to warn witnesses that the true perpetrator may not be present in the line-up. Research has found that experimental witnesses have a tendency to select a suspect even if the actual target is not in the line-up[38,39]. The instruction that the suspect may not be present in the line-up has substantially reduced the number of misidentifications, especially in line-ups in which the target was absent. Although the number of correct identifications was also reduced in these studies, this was only to a small degree[24,81]. Second, sequential line-ups (in which the potential suspects are shown one after the other) tend to produce fewer false identifications than simultaneous line-ups (in which all potential suspects are shown together) (BOX 3). This approach also reduces the number of correct identifications but typically only to a small degree[82,83]. The adoption of these procedures has met resistance, which is generally based on the fear that it may lead to fewer convictions of guilty suspects[84]. Although these procedures may indeed increase the number of type I errors (no identification of guilty suspects and therefore fewer convictions), they reduce the number of type II errors (wrongful identification of innocent suspects and therefore wrongful convictions) without a cost to overall accuracy; that is, they lead to a shift towards more conservative identification, which favours protecting innocent suspects.

As previously discussed, distortions in memory can occur as a result of post-identification feedback, whether intentional or not[32–35]. Double-blind line-ups, in which the official who administers the line-up does not know who the police suspect is, would reduce such unintentional bias[24]. One critique against using double-blind line-ups has been the cost of and need for extra manpower to administer these line-ups. However, computer programs can be used to administer the line-ups in a blind fashion by showing photos of suspects on a computer screen without any police officers being present, thereby alleviating this concern.

Recommendations for judges and jurors. It is important to remember that the courtroom also places large demands on the memory of judges and jurors. Jurors are often faced with complex legal instructions and procedures. Simple, clearly written instructions from judges help to clarify the deliberation process. In particular, given the data described above concerning misinformation[2,4], jurors should be warned of the effects of misleading questions by attorneys. Jurors are subjected to prosecutors and defence attorneys who may deliberately try to confuse them, redirect their attention and play to their emotions. There are opportunities for retroactive and proactive interference, as lawyers interject arguments during the court proceedings. In particular, misleading questions may imply that facts were presented in evidence by a witness that were not actually presented. Although such education does not eliminate the tendency to incorporate information based on biases, it does reduce its effects[43].

Jurors should likewise be instructed that the memory of an eyewitness should not be considered indelible, even if the event was traumatic[38–41]; that a person's biases and expectations will change with time and new information (or misinformation[4,39]), and that this can alter the memory; that a witness's confidence that their memory is accurate is no guarantee that the memory is indeed accurate[6,27,30,33–35]; and that even what is encoded in the first place is filtered by a person's preconceived notions and schemas[85], and that people have a tendency to 'fill in the gaps' in a memory[43]. An understanding of these issues may help jurors to realize that eyewitness testimony is not equivalent to DNA evidence in terms of probative value. Some regional jurisdictions the United States, such as New Jersey[9,10], Massachusetts[11], Texas[12] and North Carolina[13], have begun to provide instructions to jurors on how to approach eyewitness testimony[9,11–13].

In addition, it is recommended that jurors be allowed to take notes, as the sheer amount of information presented to jurors often exceeds reasonable demands on memory capacity. As jurors are eyewitnesses to the events in the courtroom, their memories of these events may also be vague and may be reconstructed based on biases, prior beliefs and expectations, and misinformation. Courtroom transcripts may be available, but they are often not useful because jurors have difficulty finding the pertinent information in the lengthy transcripts. Taking notes not only provides a source of reference but improves the memory itself[86]. Although some might argue that a juror who takes notes might dominate deliberations, encouraging all jurors to take notes could overcome this problem. Like eyewitnesses, a juror espousing great confidence in his or her recollection is more likely to be trusted. It would be beneficial to at least have this trust based on notes rather than on memory alone.

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Conclusions

Memory is imperfect and susceptible to distortion and loss. There are adaptive reasons for generalization and forgetting[7]. Indeed, Luria's famous report of the mnemonist S.[87] readily shows how an inability to forget can severely impair normal functioning. In addition, the neurobiological mechanisms that underlie the occurrence of distortions in memory also allow memories to be updated and strengthened. Unfortunately, in the courtroom, 'memory' is often misunderstood and undue assumptions are made about its veridicality.

Thus, there needs to be greater education and awareness of memory processes in judicial settings and in daily life. Society would benefit from a better understanding of what factors affect the accuracy of memory and of their complexity and potentially counterintuitive nature. Second, the legal system needs to re-evaluate the probative value of memory. Witnessing a potentially traumatic event does not produce an unbiased, indelible memory of the event. Memory is an adaptive process based on reconstruction. It works well for what it is intended — guiding current and future behaviour. However, it is not infallible and therefore should not be treated as such. For these reasons, some have argued that the legal system should not convict individuals based on eyewitness testimony alone but rather should require corroborative evidence[84,88]. Last, more research ought to be carried out on the complex mechanisms that underlie memory so that we can better understand its limits, improve its reliability and detect when it has gone awry.

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FURTHER INFORMATION
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Mindfulness and Judging

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Federal Judicial Center
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FIRST PRINTING

Judges, as our title implies, make judgments. Sometimes the process of making a judgment is straightforward, as when a clearly written statute plainly applies to undisputed facts. But more often, the meaning or applicability of a statute requires interpretation, or factual disputes can be resolved only by determining the believability of human witnesses or by weighing conflicting circumstantial evidence.

If applying the law to the facts also involves the exercise of discretion, whether in resolving issues in a civil action or imposing sentence in a criminal case, the process of making a judgment may become complex and multidimensional. Most cases involve real people with important, often very personal interests at stake. A judge's decisions frequently are made in and affect an atmosphere infused with passions that can confound the detached rationality with which decisions—at least in theory—are supposed to be made.

As professional decision makers, judges typically become skilled at thinking reflectively and articulating reasons for their decisions. Most judges try to recognize and account for their reactions to the cases they hear and to avoid ruling impulsively. Judges also strive to treat people fairly. Yet despite these efforts, almost every experienced judge can think of cases in which a judgment missed the mark, in which the emotional impact of the situation made thoughtful reflection difficult or impossible, or in which there was lingering doubt about whether justice truly was done.

Judicial educators have recognized this reality for many years. Many have developed courses intended to help judges hone their decision-making skills and manage occupational stress. Some also have designed courses that explore unconscious psychological and cultural factors that can influence fact finding and decision making. More recently, there has been interest in understanding the extent to which empa-

thy—one's ability to understand a situation from another's perspective—affects how judges judge and how litigants experience the legal process.

Understanding Mindfulness

Another construct that is only beginning to be explored in connection with judging is mindfulness. Although it has been most deeply understood and articulated in practices such as meditation and yoga, mindfulness actually is a remarkably simple and universal concept. Its value has attracted increasing attention in business, education, medicine, and, in the legal context, mediation. In essence, it involves slowing down one's mental processes enough to allow one to notice as much as possible about a given moment or situation, and then to act thoughtfully based on what one has noticed. It sometimes is described as approaching each moment with a "beginner's mind" or "thinking about thinking while thinking." While much of the discussion of mindfulness in relation to judges so far has focused on health and wellness, mindfulness also has obvious implications for the actual work that judges do. The following examples may be helpful.

A Thoughtful Approach to Repetitive Tasks

Many trial-level judges preside over busy criminal calendars in the course of which they take multiple guilty pleas. Because appellate courts have provided detailed guidance with respect to the contents of a plea colloquy, and because many criminal cases have similar fact patterns, it is easy for the process of taking a plea to become routine, especially over time. While few judges knowingly "mail the process in," it is not

uncommon for such repetitive tasks to receive less-focused attention than other judicial work, particularly when a judge is operating in a chronically stressful environment.

Mindfully taking a plea involves approaching each plea as a new and unique situation. The judge notices consciously things that otherwise might tend to be noticed only in passing, if at all: the defendant's tone of voice and body language, the way the defendant and counsel appear to be communicating (or not communicating) with each other, the defendant's physical appearance, whether friends or family members of the defendant (or victims) appear to be in the courtroom, and so on. None of these things necessarily changes the outcome of the process, yet taken as a whole they can help the judge learn more about the defendant and assess more fully whether the defendant is entering a knowing and voluntary plea. And perhaps just as importantly, the attentiveness shown by the judge is communicated to the defendant and everyone else who is present.

A Way of Limiting Unconscious Assumptions

A core competency of trial court judges is assessing credibility. Judges decide regularly whom to believe and how much to believe them, not only in evaluating witnesses who are testifying under oath but also in dealing with lawyers and parties in the course of managing cases. Both consciously and unconsciously, judges draw upon their professional and personal life experience and respond to cues that they believe have been reliable in the past. And again, particularly under stressful circumstances, the process of doing this can become somewhat automatic.

As our society has become increasingly diverse, there are more cases in which a person's behavior may have a differ-

ent valence when viewed in cultural context. For instance, a judge reflexively may view a witness's lack of eye contact when testifying as an indication that the witness is not telling the truth. Yet in some cultures, making direct eye contact in certain settings is seen as disrespectful. Creating additional capacity for reflection can allow the judge to notice his or her reflexive response and to consider what significance, if any, to attach to the witness's manner of testifying. The same is true with respect to a judge's perception of any number of other behavioral differences.

Mindfulness and Judicial Demeanor

At least from the perspective of those with whom he or she interacts, perhaps the most important attributes of a judge are demeanor and temperament. While lawyers and parties undoubtedly hope that a judge will rule in their favor, often what matters most to them is the way they are treated: whether they feel listened to, heard, understood, and respected. While judges have a wide range of personalities and dispositions, all judges at one time or another experience states of mind, such as anger, frustration, distraction, or fatigue, that make it difficult or impossible for them to live up to these aspirations.

Noticing as fully as possible what is occurring in the moment makes a judge more aware of his or her own physical and mental state. A judge with such awareness is more conscious of his or her emotional reactions to a lawyer, litigant or situation, and is able to choose an appropriate response rather than ignoring the reactions or losing control. Often the optimal response will be to set one's feelings aside, but sometimes an intentional, considered expression of emotion may be exactly what is needed to show that a judge is engaged and respectful. In either case, it is more likely that the

judge's demeanor will reflect the seriousness and thoughtfulness that our society hopes for in its judiciary.

The Value of Reflective Thinking

In his best-selling book, *Thinking, Fast and Slow*, the Nobel laureate Daniel Kahneman makes a useful distinction between intuition, in which one reacts to stimuli immediately and instinctively, and reflection, in which one thinks consciously about what one is experiencing. Kahneman observes that intuitive ("system 1") thinking is particularly active when one is doing routine tasks or when reflection is inhibited by stress. While intuitive thinking can be an efficient and even a necessary response to a given situation, its accuracy can be limited by one's life experience and unchecked assumptions. Kahneman suggests that reflective ("system 2") thinking allows for a more careful assessment of the circumstances, including the ability to notice and when appropriate question one's intuitive responses. One is able to be more intentional in the moment as well as after the fact.

Although "system 2" would appear to be normative for judges in our professional role, the demands of our job can cause "system 1" to operate more frequently than we might want. One way of understanding mindfulness is as a means of strengthening our ability to be in "system 2" by heightening our self-awareness and building our capacity to be reflective. Mindfulness can improve judicial functioning not only by mitigating the unbidden intrusion of "system 1" thinking but also by increasing the richness of "system 2" thinking. While slowing down one's thought processes may result in a given task taking somewhat longer to complete, Kahneman and others point out that the additional time involved typically is relatively minimal. And because reflective thinking can be expected to reduce the "unforced errors" that often

are present in "system 1," mindfulness actually can improve one's net efficiency.

The Personal Benefits of Mindfulness

As the current interest in mindfulness in the context of health and wellness suggests, the benefits of mindfulness are not limited to more nuanced decision making and better emotional regulation. One of the consequences of chronic stress is that its symptoms can become one's "new normal." One's mind and body literally can forget how it feels to relax, to breathe deeply, and to appreciate being in the present, which in turn can have significant negative consequences for one's health. Mindfulness is a powerful way of counteracting these effects. It allows one to notice what is happening and think about and take remedial measures.

Fortunately, cultivating and practicing mindfulness is a natural and accessible process. Perhaps because of its popular association with meditation, yoga, and other traditional ways of developing and sustaining it, some may think of mindfulness as an element of a particular cultural style or worldview. But looking at mindfulness in this way misapprehends its nature. Its purpose is not to tell one what to think or do but rather to help one think and act as one chooses with the benefit of deeper reflection and more fully conscious intent. For judges, whose judgments can have profound effects on others, it can be both an enormously effective tool and a key to a more satisfying professional life.

Judicial Resources on Mindfulness

If you would like to learn more about mindfulness, here are some additional resources. These materials describe simple steps for developing mindfulness in daily life and provide additional examples of ways in which mindfulness can improve both one's health and one's professional effectiveness.

Getting Started

Jon Kabat-Zinn, Mindfulness—An Introduction (YouTube)

Jon Kabat-Zinn, The 9 Attitudes of Mindfulness (YouTube)

J. Patton Hyman, *The Mindful Lawyer: Mindfulness Meditation and Law Practice*, Vt. B.J., Summer 2007, at 40

Scott Rogers, *Stop, Look, and Listen: Regain your Focus Through Mindfulness*, Young Lawyer, vol. 15, no. 4, at 3 (2011)

Timothy Tosta, Editorial, *The Mindful Lawyer: Not Your Usual Law Conference*, L.A. Daily J., Dec. 3, 2010, at 7

Ellen Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?*, Nev. L.J., vol. 10, issue 2, art. 10 (2010)

Robert Zeglovitch, *The Mindful Lawyer*, 70 Tex. B.J. 234 (2007)

J. Kabat-Zinn, Mindfulness for Beginners (2012)

Books and Articles

Pamela Casey, Minding the Court: Enhancing the Decision-Making Process: A White Paper of the American Judges Association Making Better Judges (State Justice Inst. and Nat'l Center for State Cts. 2012)

Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, Int'l J. for Ct. Admin., Feb. 2013

Alan S. Gold, Mindfulness—A Challenge for Our Times (Fed. Bar Assoc. 2012)

J. Kabat-Zinn, Wherever You Go, There You Are: Mindfulness in Everyday Life (1994)

Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 Cal. L. Rev. 1485 (2010)

Susan R. Miles, What is Mindfulness Based Stress Reduction and Why Should I Care? (Minn. Bar Assoc., Aug. 2015)

Tess M.S. Neal & Eve M. Brank, *Could Mindfulness Improve Judicial Decision Making?* (abstract), Monitor on Psychology, 2014, vol. 45, no. 3

Gregory C. O'Brien, Jr., *Confessions of an Angry Judge*, Judicature, vol. 87, no. 5, March–Apr. 2004

Evan R. Seamone, *Judicial Mindfulness*, 70 U. Cin. L. Rev. 1023 (2002)

Video

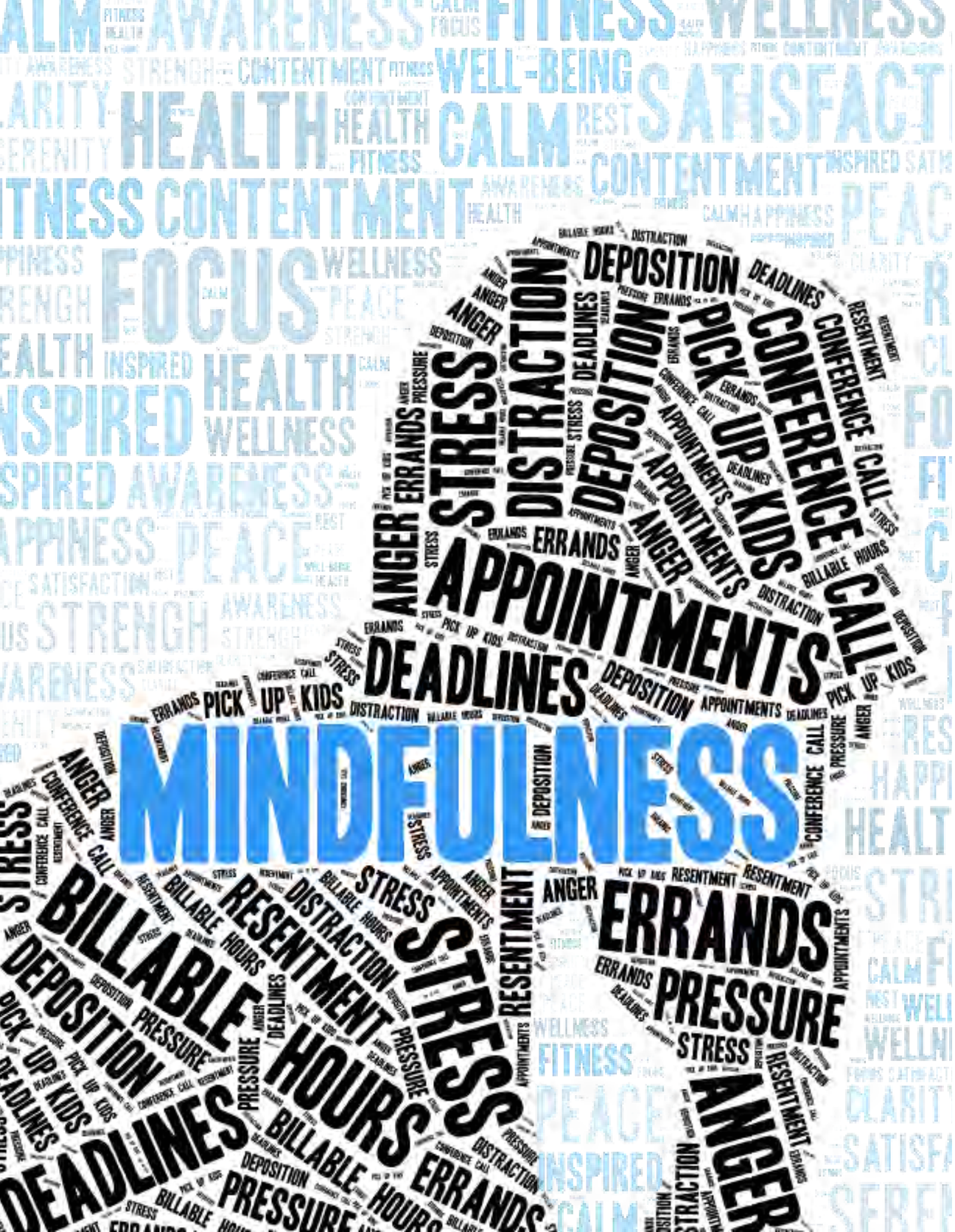
Terry A. Maroney, Are Angry Judges Bad Judges? (YouTube)

Websites

Headspace (online app), https://www.headspace.com

The Mindful Judge: Non-Judgmental Awareness in Action, The Institute for Mindfulness Studies (website presents programs and resources by judges for judges), http://www.themindfuljudge.com

Mindfulness: Legal Education and Practice, Jon Cavicchi, University of New Hampshire Law Library, http://law.unh.libguides.com/content.php?pid=632009



The Art of Being Mindful in the Legal World: A Challenge for Our Times

by Judge Alan S. Gold

"Finding peace in a stressed-out digitally dependent culture may just be a matter of thinking differently."
—"The Mindfulness Revolution"/*Time*

"We cannot solve a problem with the same mind that created it."
—Albert Einstein

You may be asking why a senior U.S. district judge is writing about mindfulness practice. That is a fair question. I will answer it directly. For me, it started in early 2001 when my cardiologist told me I needed open-heart surgery for a mitral valve repair. This surgery was not going to be a walk in the park. I wondered how in the world did I get into this situation, and what could I do to minimize future medical problems? It was at that point that I started to learn about mindfulness practice and meditation in earnest. It occurred to me that "heart surgery" was a metaphor for changing my life.

After I came back to the bench, I experienced a heightened awareness of the relationship between stress and civility. I found that mindfulness practice helped me do my job better, and also helped the lawyers relax and perform more effectively. No, I am not telling you that mindfulness is a silver bullet. It is not a pill you take once and you are cured. It is about purposely changing your way of living every day. Some days are better than others, but that is okay. I came to better appreciate that my job, as a judge, was to assist lawyers and others to do their jobs without my adding unnecessarily to their stresses. I am not here to tell you that I always have been successful. What I am here to do is pass on some important lessons that I have learned in the hope that my experiences may be of some benefit to you and to our profession.

The Relationship Between Mindfulness, Health, and More Effective Lawyering and Judging

My topic is the relationship between our health and mindfulness; that is, the ability to live in and enjoy the present moment in a civil manner. Why should this topic concern lawyers and judges? We constantly hear, both as lawyers and judges, about the "lack of civility" in the practice of law. The Florida Bar membership surveys continue to reflect that, besides earning money, the most significant concerns that face us as lawyers and judges are balancing family and work, high stress, and lack of professionalism and ethics. In June 2013,the Florida Supreme Court recognized that "[s]urveys of both lawyers and judges continue to reflect that lack of professionalism is one of the most significant adverse problems that negatively impacts the practice of law in Florida today."[1]

What have we done about it as a profession? First, the Florida Supreme Court amended the Oath of Admission "to recognize the necessity for civility in the inherently contentious setting of the adversary process."[2] Now, as part of our oath, we pledge to opposing parties and their counsel, fairness, integrity, and civility…not only in court, but also in all written and oral communications.

Second, on June 6, 2012, the Florida Supreme Court adopted the "Code for Resolving Professionalism Complaints." The code creates a structure for "affirmatively addressing unacceptable professional conduct." Violators can be sent to ethics school, professionalism workshops, stress management workshops, or, in serious cases, the Attorney Consumer Assistance and Intake Program may forward a complaint to The Florida Bar's Lawyer Regulation Department for further consideration.

I do not take issue with what the Florida Supreme Court has adopted and implemented. I just do not think it goes far enough to address the *root causes* of lack of civility and professionalism. My premisis that the root cause of incivility and lack of professionalism is the extreme and cumula-

I am not asking you, as lawyers or as judges, to do anything to diminish your effectiveness or to give up your edge. To the contrary, in addition to managing stress, improving health, and increasing civility, my recommendations are directed to enhancing your skills and effectiveness.

tive stresses that we, as lawyers and judges, find ourselves coping with daily. This is especially true given our uncertain and challenging economic times, and the increased alienation we experience from each other because of our technology. I believe there is a more comprehensive way to deal with the problem, and, in this article, I offer three specific recommendations.

First, let me be clear. In offering my recommendations, I am not asking you, as lawyers or as judges, to do anything to diminish your effectiveness or to give up your edge. To the contrary, in addition to managing stress, improving health, and increasing civility, my recommendations are directed to enhancing your skills and effectiveness. Does this sound too good to be true? Not so. What I am suggesting to you is no more than how martial art's masters deal with moments of intense conflict; that is, from the center, flowing with the breath. We can apply these same martial arts skills to the practice of law and achieve an energized calm, and with it, a proactive and focused choice that adds to our power to tread through the turbulent storm.

Recommendation 1: Teach Lawyers and Judges About the Medical and Physiological Effects of Stress So We Can Become More Self-Aware

Problem? What problem? Let us acknowledge that we are adrenaline junkies. We are drawn to a profession that, at times, gives a rush by challenging us often in dramatic ways. Therefore, some degree of stress is inherent in what we do, and many of us can cope pretty well most of the time. But, what are the medical effects of extreme, cumulative stress? We all have seen them in action or experienced them. They include inappropriate anger, impatience, overreaction, anxiety, fear, irritability, and resentment (just to name a few). People under extreme and cumulative stress are overloaded with more than they can cope. They may be unable to concentrate or think clearly. They may be constantly active but accomplish little.

Yes, we, as judges, are susceptible, too. As noted by author Isaiah M. Zimmerman, "Judges work at the convergence of powerful demands… heavy dockets; restrictions on speech and behavior, intense media exposure; public ignorance of the role the courts, and the relative isolation of the judicial position…."[3] May I also add that, in Florida, our state colleagues face elections, bar polls, grievance procedures, never-ending pro se cases, and peer pressure to dispose of cases quickly. These challenges create unique stresses, personally and professionally. Lawyers are sometimes surprised that a judge's life is not so easy as it appears.

Here is what the medical literature says about the effects of extreme stress. There has been a revolution in medicine concerning how we think about diseases of the body and mind. It begins with recognizing the interaction between the body and mind and the ways in which emotions and personality can have a tremendous impact on the functioning and health of virtually every cell in our body. It is about the role of excess stress in making us more vulnerable to disease, including psychological impairments, or making diseases that we are coping with that much worse. We have come to recognize the vastly complex intertwining of our biology and our emotions, the endless ways in which our personalities, feelings, and thoughts both reflect and influence the events in our bodies.

Put simply, excess stress can make us sick or sicker. Perhaps it is more correct to say that excess stress increases our risk of getting diseases that make us sick, or if we have such a disease, excess stress can increase the risk of our bodily defenses being overwhelmed by the disease. Medical research has shown that chronic stress is linked to six leading causes of death: heart disease, cancer, lung ailments, accidents, cirrhosis of the liver, and suicide. Besides fatalities, when we become exhausted, the visible effects are evidenced by bad behavior that we label as "incivility."

A large body of evidence suggests that stress-related disease, both physical and emotional, emerges, predominantly, out of the fact that we so often activate a physiological system that has evolved for responding to acute physical emergencies, but we turn it on for months on end, worrying about our clients, our cases, our economics, our careers, and our families. We worry about how to be the "best" at all of our endeavors, and are confounded as to how to balance them.

What makes things worse is that the stress response may be mobilized not only in response to physical or psychological pressures or insults, but by the *expectation* of them. If we repeatedly turn on the stress response, or if we cannot turn it off at the end of a stressful event, our stress-related

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We can come to the transformative recognition that we are always the one doing the choosing, and that our choice can be to change into a greater self, and to do this right here and right now. Granted, this is not easy. It takes real courage and effort to break old habits.

problems simply compound and grow worse.

Another feature of the stress response is that, with sustained stress, our perceptions of pain become blunted. We numb ourselves and are not even aware of what we are doing, how we are doing it, or why we are doing it. It becomes habitual. In fact, a well-known Johns Hopkins study has found that lawyers are more prone to depression than members of any other profession. Given all of the scientific explanation, is there any wonder that lawyers and judges often can be "uncivil" to each other and exhibit behaviors in court and in life that are unacceptable and unproductive?

Recommendation 2: Teach Lawyers and Judges How To Better Cope With Stress *Before* We Fall Over the Cliff

The key question: Are there available tools we can use *before* extreme stresses take over and affect our health and well-being? According to *Time Magazine*, "Scientists have been able to prove that *meditation and rigorous mindfulness* training can lower cortisol levels and blood pressure, increase immune response and possibly even affect gene expression."[4] In fact, "Scientific study is also showing that meditation can have an impact on the structure of the brain itself."[5] One answer to better health, then, lies with meditation and rigorous mindfulness techniques.

What then is "mindfulness" and how does it work? Simply put, mindfulness is mental training of the brain. It is the ability to pay attention in a particular way in the present moment and without self-judgment. It is about obtaining a mind of calmness and clarity, with a good self-attitude, regardless of the situation. It is an indispensable tool for coping — both emotionally and practically — with the daily onslaught. It is about silencing that nattering voice in your head and cutting off that internal dialogue that is negative and self-referential.

What is your reaction to this information? Does it all sound too "new age"? Is your gut reaction that if you learn mindfulness you will be seen as "weak" by your partners, your clients, or the courts? "Law practice," you say, "is dog eat dog. I have to earn a living. That is my reality."

Here is my response: Whether you realize it or not, mental training tied to meditation and mindfulness practice is happening in Fortune 500 companies, with Silicon Valley entrepreneurs, and even with Pentagon chiefs. It is a revolution in process. Would it surprise you to learn that in 2012, there were 477 scientific papers published on mindfulness and more each year that has followed? Would it surprise you that even a U.S. Congressman, Tim Ryan, has published a book, *A Mindful Nation: How A Simple Practice Can Help Us Reduce Stress, Improve Performance, and Recapture the American Spirit*? New age sounding or not, mindfulness practice is becoming mainstream and is taking root even in the practice of law.

Here is what I am suggesting. I am not asking you to change your reality or to diminish your earning capacity. I am suggesting that you have the *freedom to choose how you deal with your reality,* and, in turn, increase your effectiveness, health, and earning capacity. First, take a good look at your present-day reality. This alone is no easy feat. It is like taking a step backward and honestly observing, with some detachment, what you are doing and how you are doing it. Then, make a choice about what kind of life you want to live.

What do you choose? Every time you act or react, some choice is made. Sometimes, these choices are conscious, and sometimes they are not. I am talking about choosing to increase your awareness that you have the power to choose another way to deal with your stresses.

Yes, admittedly, we carry within ourselves many factors that we believe limit our freedom to choose and which obscure our awareness. There are layers of emotions and physiological tendencies that we have formed over a lifetime. Yet, through a rigorous mindful practice, it is possible to take responsibility for all that we are. We can come to the transformative recognition that we are always the one doing the choosing, and that our choice can be to change into a greater self, and to do this right here and right now. Granted, this is not easy. It takes real courage and effort to break old habits. Even then, we can slip back into our old ways. No problem. We simply refocus and plow ahead. It is really a moment-to-moment commitment.

It Is as Simple as Breathing

There are many techniques to help us change. At the heart of many of these techniques, there is one constant: the awareness of the breath through meditation. We are breathing continuously from the moment of birth to the moment of death. Breath and life are synonymous. It is the bridge between your mind and your body, but breathing is not continuous. There are gaps. The breath goes out, then for a moment, breathing pauses. Then breath comes in. In that gap between breaths, anything is possible. Sincere observation and attention will help you feel the gap. If you feel the gap, you can choose to use that moment to calm the mind and your turbulent emotions and interrupt your "mind-

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streaming" — that constant source of mental junk mail. You just do not have to believe your own thoughts. How do you do this? Simply focus on your breath and observe its passage. The point is this. If you can train yourself to keep attention on something as neutral as your breath, then you can keep your attention on anything else.

You can achieve an amazing goal: By observing your body, your thoughts, and emotions in any stressful situation *before* you react, you can respond more effectively and go from compulsion to choice. In sum: stop, breathe, notice, reflect, and then respond. This is the formula for the more effective and mindful practice of law, whether you are arguing in court, sitting on the bench, or dealing with difficult clients, partners, or other lawyers. This is empowerment. When you act boldly, there will be pushback in different forms, so to complete what you started, you need to relax, reaffirm your original intention, and hold your seat.

Here are five steps to mindfulness meditation to help you become more effective and healthier. First, sit with a good posture and close your eyes. Second, notice your breathing, but focus on the sensation of air moving in and out of your lungs. Third, as thoughts come into your mind and distract you from your breathing, acknowledge those thoughts and then return to focusing on your breathing each time. Fourth, do not judge yourself or try to ignore distractions. Your job is simply to notice that your mind has wandered and to bring your attention back to your breathing. Finally, start by doing this five minutes a day for a week. Then try 10 minutes, and so on.

I grant you that it is challenging to maintain a mindfulness practice particularly when you are faced with stressful circumstances. One of your first thoughts will be, "I cannot do this." Staying with your breath and observing what is happening to you in the moment can seem impossible. It is not impossible. Do not be upset if thoughts come and go. Just observe them and how your body reacts. The more you meditate, the easier it will be to keep your attention where you want it.

You may say, "Thank you, Judge Gold, but I do not have time for all of this in my busy life. I do not want to take on yet another self-help project to feel guilty about." You may say, "I am perfect the way I am. I am doing just fine. Just ask anybody."

Maybe you are one of the lucky ones. If so, I offer my admiration. For the rest of us, I can understand your resistance. Old habits and patterns are hard to break. You may think you are just fine and see no need to change, but consider this: Everything in life is changing all the time, including you, whether you realize it or not. It is just that we look for ways to believe we are exempt from it. *So, I suggest you breathe as though your life depended on it. It does.* We are talking about a critically important priority for your health, your civility, and your well-being. You can do this. There are lots of ways to fit meditation into your busy life. With practice, it might just help you use your time better.

How do you reinforce your efforts to change? This question leads to my final recommendation.

Recommendation 3: Take Control of Our Lives with the Help of Allies and Reclaim the Nobility of the Profession

We cannot easily make real changes alone. It takes courage to move against the ingrained resistance of our profession. The legal profession inherently discourages changes that may help us individually, but may be perceived by some as "weaknesses" potentially threatening the economic bottom line or how we are viewed as judges. Like it or not, our profession is already changing rapidly and significantly. Clients are unhappy paying legal fees based on billable hours; associates are unhappy with unreasonable professional demands; partners are unhappy with their compensation or status and readily move their "book of business" across the street. Everyone complains about the lack of a balanced life and the effects of practice on their health and relationships. The level of anger and frustration is readily evident by incivility and lack of courtesy that we experience on a daily basis.

It is time to speak the truth about such things. What has been missing in our profession is an organized means to join with others with an interest in the subject matter at issue. In response, the Miami-Dade County Bar Association, in conjunction with the Miami-Dade Federal Bar Association, has created a Task Force on the Mindful Practice of Law. There are three components. First, an information component that offers a website and newsletters, identifying mindfulness-related resources. Second, the associations have held conferences and workshops on health and mindfulness practice. Third, regular meetings are offered to interested judges and lawyers to meditate together and to discuss how to live and practice mindfully. One area of discussion is how we can acknowledge that all of us are in this together, and that we need to cut each other a break in court and in life. These issues can never be addressed too soon; law schools are introducing mindfulness into their curriculum, with the University of Miami's Mindfulness in Law Program serving as a model for schools across the country. Alongside courses offered to students as part of the curriculum, CLE programs are offered to members of the legal community.

Where will all this lead? Perhaps to redefining what it means to practice law. Perhaps to returning to those values that caused many of us to become lawyers in the first place. The invitation is hereby extended to other local bar associations, The Florida Bar, and to the various Florida judge's conferences to join in these efforts and to create a statewide network of mindfulness practitioners and resources.

Will mindfulness really work in a law firm? One major Florida firm says "yes." The Berger Singerman law firm has undergone a seven-week mindfulness training course similar to the one offered by Google to its employees. The firm leadership was so impressed with the results that it funded and sponsored its own conference for judges and lawyers that it called, "Raising the Consciousness of the Bench and Bar." When asked at the conference about its purpose, the firm's senior partner answered, "We want to share it; not keep it a secret. We yearn to do what we do in service of something larger than ourselves."

Can, and should, the experience of Berger Singerman be replicated elsewhere? Can we meet the challenge of serving something larger than just ourselves? The publication of this Florida Bar *Journal* offers reasons to believe that the potential to accomplish meaningful change is upon us. What follows are anecdotal experiences of practitioners who explain how mindfulness practice has affected them. Meanwhile, it comes back to you. Are you ready for a change? It is like the famous saying from India: "Wisdom is not something you learn; it is something you become." So, come along for the ride. Let us see where we go.❑

[1] *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280 (Fla. 2013), *available at* https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/749BEA14F62EB68785257DE90075250A/$FILE/Code%20for%20Resolving%20Professionalism%20Complaints%20SC13-688%20updated.pdf?OpenElement.

[2] *In re Oath of Admission to The Florida Bar*, 73 So. 3d 149 (Fla. 2011), *citing In re Snyder*, 472 U.S. 634, 647 (1985), *available at* https://casetext.com/case/in-re-oath-of-admission-to-the-florida-bar.

[3] Isaiah M. Zimmerman, *Helping Judges in Distress*, 90 JUDICATURE 1, 15 (July/August 2006), *available at* http://www.judicialfamilyinstitute.org/pdf/Zimmerman_901JudgesDistress.pdf.

[4] Kate Pickert, *The Mindful Revolution: The Science of Finding Focus in a Stressed-out, Multitasking Culture*, TIME (Feb. 3, 2014).

[5] *Id.*

Judge Alan S. Gold *is a senior U.S. district judge for the Southern District of Florida. Prior to his confirmation in July 1997, Judge Gold was a circuit court judge in the family and criminal divisions of the Florida 11th Judicial Circuit Court and before that, he was a principal shareholder in the Greenberg Traurig law firm. He co-founded the DBCA/FBA Mindfulness in Law Task Force and is a frequent lecturer on mindfulness and the law for national, state, and local organizations.*

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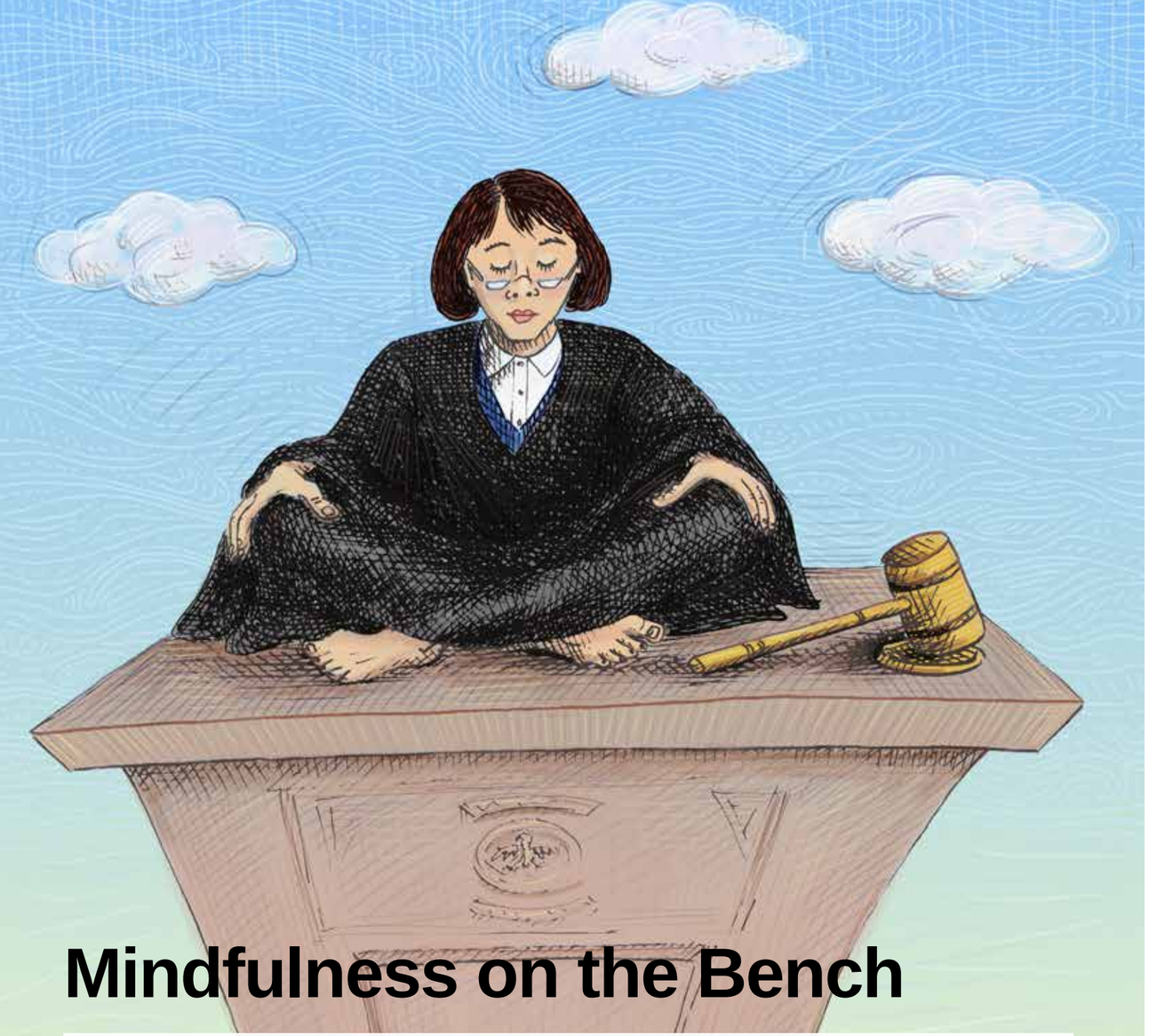

Mindfulness on the Bench

Why do we speak of mindfulness for judges? Most judges, after all, do their jobs well without reference to mindfulness or calling on mindfulness practices. Without doubt, there are plenty of outstanding judges who have not considered the subject. I find it meaningful, in my work as a judge, as a means to focus on and enhance certain qualities important to judging.

Mindfulness practices are designed to enhance our ability to be present, in the moment, to our experience. The practice is one of focusing our attention on what is happening in our perceptions, thoughts, emotions, and body, without judgment. We simply observe. Anyone who has tried knows this is simple, but not easy. Over time we notice a shift, an opening, in our perception of outside events, and our internal experience. As Jon Kabat-Zinn famously wrote: "Wherever you go, there you are"; and for those who go to work as judges, mindfulness has clear benefits at work.

The practice encourages our open-minded awareness of what is happening before us. Courtrooms can be busy and distracting places, yet judges are expected to accurately perceive the argument of counsel, the testimony of witnesses, the behavior of jurors, and more. When we are distracted by other thoughts, this diminishes perception.

Importantly, mindfulness practice is not about eliminating wise discernment; but it is about minimizing prejudgment. With this, judges can better deliver procedural fairness. For example, much has been written about bias, that is, attitudes and stereotypes that often operate outside our conscious awareness, and research is pointing to the role mindfulness may play in bringing them to light, clarifying our perception. When a judge is able to whole-heartedly pay attention, without the distortion of habit, bias, or assumptions, that judge is more likely to treat people, and manage a courtroom, in a manner that encourages confidence in our system of justice.

—Judge Chris McAliley,
U.S. District Court, Southern District of Florida

A few years ago, I was in the midst of a contentious trial where the two attorneys were having great difficulty focusing their examinations on the crucial factual issues, and they were each also raising objections that were overly technical. A couple hours into the trial, I noticed I was having trouble following the testimony because of the erratic questioning and frequent objections, and I was starting to run out of patience with the attorneys. I decided to take a recess to gather my thoughts.

I spent the 15-minute recess sitting, just focusing on my breath and settling myself into a peaceful, calm state. Once I did that, I was able to formulate instructions I could give to the attorneys which I believed would help them stay focused and reduce the number of unnecessary objections, without embarrassing them in front of their clients. I also knew if I were feeling calmer, I could be more attentive and less distracted if the attorneys went off track on their questioning or objections.

It worked. The attorneys seemed grateful for my instruction as to where I wanted them to focus their witness examinations and relieved they did not need to make so many objections. I also suspect they may have been able to observe I was calmer and more patient after the break. The trial proceeded in a more methodical way after the recess and I was able to enter a prompt ruling.

—Judge Colleen Brown,
U.S. Bankruptcy Judge, District of Vermont

As a general practice, I apply mindfulness principles in my courtroom. First, I fully prepare for the hearings, so that I can concentrate on the actual issues at hand. Next, as I come into the courtroom, I block out from my mind any matters other than the case I'm addressing. Then, in the course of the proceedings, I ensure that everyone receives my full attention and that courtesy and civility are observed. Maintaining a mindful courtroom has helped me navigate through many contentious hearings, particularly those where counsel have become "personally" involved in their clients' disputes.

—Judge Alicia Otazo-Reyes,
Magistrate Judge, Southern District of Florida

My meditation and contemplative practices have led to my being more responsive and less reactive in the process of deciding appeals. The panel I was sitting on had an oral argument on an appeal. Prior to the oral argument, I had preliminarily concluded that the appellee should prevail on an issue of statutory construction. During the oral argument, the appellant's attorney made an argument that I thought might not give guidance to parties in the future who were relying on the statute, so I posed a hypothetical to the attorney to see how his construction of the statute might affect different parties. The attorney, who probably could sense from the tenor of the argument that he was losing, commented that my question might be appropriate for a sociology course, but this was a court of law and we were limited by the language of the statute. Rather than react, my contemplative practices automatically kicked in and I simply let it go, thinking that the lawyer was lashing out because he knew he was losing the argument and wanted to deflect the result I was inquiring about. The comment had no effect on how we decided the case or on our award of attorneys' fees incurred on appeal.

—Judge Donn Kessler,
Arizona Appellate Court

One afternoon, on a heavily over-set calendar, at 5:45 p.m., I began a hearing in a felony probation violation in which the probation officer was recommending that the offender's sentence be executed. Although the probationer admitted a serious violation, both through his attorney and through his own elocution, he made an emotional plea to be reinstated on probation. His mother was present in the courtroom, and the two were shedding visible tears while exhorting that he would be compliant if given another chance. When the arguments concluded, I checked in and realized I was both mentally and physically fatigued, and I was very late for a personal appointment. My first instinct was to just make my decision out of a sense of frustration and impatience. Instead, I called a recess, left the bench, and headed for the nearest private window. There, I gazed out into the evening sky settling over the surrounding valley and found a still center within. Remaining so for several minutes, the important and relevant factors that I had to weigh began to surface. Once there, I remained in stillness for another minute and returned to the courtroom confident that I was making my decision to execute the offender's sentence for justifiable reasons. He, too, had the opportunity to recognize that I took this decision seriously. By the time I pronounced execution of his sentence, he was ready to accept his fate and even thanked me for my time and patience. At the end of the day, I found solace in the fact that I was able to instill a sense of dignity and calm in a proceeding which otherwise could have seemed perfunctory and heartless.

—Judge Susan Miles,
10th Judicial District Judge
Washington County, Minnesota

The practice of mindfulness enables me to greet negative or rancorous advocacy with serenity. In fact, when argument descends from enlightenment to bellicosity, I am always reminded of the serene alternative awaiting in mindfulness, to which I repair immediately.

—Judge Arthur Rothenberg,
Senior Judge, 11th Judicial Circuit of Florida

Mindfulness: Attorney Perspectives

I was on a gurney in the hospital having been prepared for a major surgery. The surgeon, whom I had met only briefly before the procedure, greeted me and told me that I should feel completely comfortable because she was 53 percent present and feeling ready to perform my surgery.

On another day, after nearly a year of pretrial motion practice and discovery in a "bet-the-company" case, my trial judge took the bench and announced that he was prepared to proceed with opening statements and the trial, and that he wished both sides to know that he had read 53 percent of our respective submissions and was prepared to proceed.

Thankfully, neither of the incidents described above occurred. But they could have. An often-cited Harvard University study from 2010 confirms that most of us are "off task," *i.e.*, not focused on what we are doing or supposed to be doing in the present moment about 46.7 percent of the time. This data is very impactful to me.

Perhaps one of the most valuable benefits from the study and practice of mindfulness that I have enjoyed is developing a greater awareness of when I am off task. I have found it immensely useful — and sometimes absolutely frightening — to be aware of when I am regretting the past or worrying about the future. Only with the enhanced awareness of when I am not in the present can I make an effort to return to the present — the only place I can make a difference and the place that contains all the data — free for the observation of it — that allows me to be more knowledgeable and powerful in advancing my mission. To be sure, while the mission may be my professional life and client service, it is equally as effective in my personal life and in my personal relationships. How many of our friends, family members, spouses, and partners wouldn't appreciate our being more present and observant in our interactions and conversations with them.

For the "tough guy" and "tough gal" lawyers reading this who may reject the notion of studying and practicing mindfulness for fear that it is inconsistent with the "tough" image, try this: Many people, myself included, believe that knowledge is power. Knowledge is derived from data. I know that I am better at observing and collecting data when I am focused on the present. I believe that we lawyers can perform better in all of our endeavors — both personal and professional — if we collect and process data with a greater sense of awareness, and I believe that the study and practice of mindfulness allows me to do that. I would want my surgeon or the judge presiding over my client's bet-the-company case to be completely present and focused on my cause, getting 100 percent of the available data — not 53 percent.

For those who remain skeptical about the performance-enhancing benefits of the study and practice of mindfulness, take just a few minutes to investigate the number of Fortune 100 companies in multiple sectors, including Aetna and Nike, which offer mindfulness training. Various branches of the U.S. military offer mindfulness training as well. So, too, does the Seattle Seahawks; NFL players are rarely accused of being "soft." These companies and organizations are not offering mindfulness training to be nice; they are doing it to enhance the performance of their employees, soldiers, and players. They are doing it to enhance the return they are making on their investment of financial or human resources in their respective organizations.

In my few years of studying and practicing mindfulness, I have averted innumerable problems in my personal and professional life by increasing my awareness of data in the form of my own personal thoughts and feelings in the moment, data regarding my counter-party(ies) in an interaction, and data regarding the environment in which I find myself.

The study and practice of mindfulness has changed my life profoundly and for the better. I am grateful to my friends, former federal district court Judge Alan Gold and Professor Scott Rogers, for introducing me to the study and practice of mindfulness and to other thinkers and writers on mindfulness.

If I have succeeded in piquing your interest — even a little — then please invest the time to read this extraordinary edition of The Florida Bar *Journal*. I promise the return on that investment will be high. Then keep reading and start your own mindfulness practice. It will take work, and it truly will enhance your personal and professional performance.

To be sure, I have a very long way to go. The study and practice of mindfulness has made it easier for me to be aware of that, too.

—Paul Steven Singerman,
Berger Singerman LLP

I find that mindfulness helps keep in check what James McElhaney memorably calls our "inner Mongo," responding quickly and emotionally to a stressful situation. Mindfulness helps us to feel the emotion, but take a moment longer before reacting. One instance I recall is reviewing a project from an associate that fell short of what I expected and thought him capable of producing. Rather than immediately engage in a critical analysis of exactly what was wrong with the work — which would have been "correct" but probably unhelpful to his confidence and ability to truly hear what I was saying — I brought awareness to the breath. Doing so, I became more aware of my emotions (*fear*…of not being in control, of losing the motion), evaluated the reality of the situation, and had a more productive conversation where I did more listening and less talking. This is one example; there are plenty where I did it the other way (unfortunately), but I find practicing mindfulness helps bring about the more constructive and helpful response.

—Harley Tropin, Kozyak Tropin
Throckmorton LLP

I teach from a mindful perspective and draw upon my own life experiences to enliven a theme around which a classroom discussion will revolve. One morning, as I was pondering the idea of awareness, and how to depict it in a lecture, I had the following experience: A spider had spun a single thread across my doorway at the height of my forehead. I became entangled and broke the thread. The next day, I used the same door, at the same time, and encountered another single thread at the same height. I broke the thread. This went on for four days! On the fifth day, I opened the door at the usual time, and I looked up at the single thread of a spider web about an inch above my head. Now I had something to talk about. This story comes as a way to remind me of a vision of mindfulness as a way of life through heightened awareness, and that all is connected.

—George Knox
Florida International
University Law

I have found mindfulness to be especially helpful when talking to clients, be it an interview in my office or in the courtroom, so that I am able to truly listen to what the client has to stay. There can be so many things going on, and so many thoughts in my mind, that I find myself struggling to be in the moment. This is when taking a few deep breaths has proved invaluable. Even after only taking a few breaths — aware of the sensations of breathing — I find myself becoming more present and attentive. This practice has also been helpful when in trial, especially during jury selection and prior to cross examination, two areas when keen observation and listening skills are crucial.

—Robert Coppel
Miami-Dade Public Defender's Office

I was asked to step in at the 11th hour on a matter that had been ongoing for years to assist in preparing responses to numerous objections to discovery. Needless to say the responses were due in short order. The day before the responses were to be filed, I was working on a holiday; I had been in the office very early and was very focused, working feverishly, and was very stressed. My daughter called me to chat but I was conflicted as I really needed to complete the task at hand. My daughter sensed my tension and said, "Mom, you need to check your snow globe!" That caused me to pause, smile, catch my breath (which I desperately needed), refocus, and move on. You see, I had shared with my daughter something Scott Rogers had shared with my firm when he first introduced mindfulness to us, which was when our minds are cluttered and stressed, it is as if you had shaken a snow globe. When a snow globe is shaken, you cannot see through it. You have to wait until the snow settles in order to see clearly. With mindfulness, we can calm our snow globes so that we can see clearly and be more effective lawyers (and people). To this day, I keep a snow globe on my desk as a reminder of that day in particular, and in general to remember to "check my snow globe" periodically.

—Debi Galler
Berger Singerman LLP

I was representing a client in a rather litigious matter and out of nowhere, an opening to settle the case emerged, and we scheduled a mediation. I remember feeling uncomfortable in my skin and anxious the first time I met opposing counsel, whom I believe was driving a lot of the unnecessary litigation and defensive positions. Ultimately, the deal fell through. The next day, I received an accusatory letter founded on untruths accompanied by a motion for sanctions. To complicate matters, we were in front of a judge who tended not to side with plaintiff's attorneys. Needless to say, I was genuinely scared of the potential sanctions and felt it necessary to consult with an ethics attorney. I cancelled all of my plans and spent many late nights and weekends at the office. This case even entered my dreams — a first for me. The only thing I didn't give up during this period, however, was regular meditation and yoga practice. Though the situation and subject matter often felt constrictive, I was able to frequently remember my breath and hold onto the bigger picture. During depositions, I would often close my eyes and take a conscious breath as I thought of my next question or where I wanted to head next. This intentional slowing down helped me remain present and as much in control of the situation as I could be. Overall, the practice served as a healthy balance to the discomforting parts of the case and also helped me remain grounded and not got lost in the exhilarating parts of the case. The matter turned out very well for my client and I am grateful for mindfulness practice for helping me not get lost during this intense period.

—Douglas Chermak
Lozeau Drury, LLP
(Oakland, CA)

One afternoon, I was scheduled to present a seminar and confronted numerous obstacles. I struggled through horrendous traffic only to learn that the coordinator had provided an incorrect address. When I finally arrived, the AV equipment was not working and some of my co-presenters were not prepared. Feelings of anger and thoughts of impending disaster were quickly penetrating my being. Fortunately, my mindfulness practice caused me to be aware of these thoughts and feelings (and my rising heart rate), so I elected to use mindfulness to push my "reset button." I walked out of the room, found a window, looked out at the sky and trees with a soft focus, paused, closed my eyes, and focused on my breath for a few minutes. After these few moments, I regained a calm perspective on the situation and was able to return to the presentation room and respond with positive energy and productive suggestions.

—Jan Jacobowitz
University of Miami School of Law

Mindfulness Tips

Throughout the workday, there are moments when I am waiting for something. Waiting for the computer to start, waiting for a document or email to open, on hold on the phone, waiting for the elevator. Rather than get frustrated or annoyed, which I used to do, I now use it as an opportunity to practice a mindfulness exercise known as "STOP." Stop. Take a Breath (or two or 10). Observe. Proceed. I turn what was otherwise an annoying moment into one that is very refreshing. It allows me to check in with myself, dispel any stress or anxiety, take a mini vacation, then get back to work.

—Debi Galler

Sometimes when the phone rings or I am about to make a call, I put my hand on it and pause for a moment (one ring's worth will do) and notice the experience of mindful presence. Then I pick up the phone and proceed.

—J. Patton Hyman

I have found it helpful to pause and sense my breath, body, and the activity of my mind between tasks. Doing so contributes to deliberate and clear thought, the efficient structuring of work projects and time management, lower levels of stress, and overall satisfaction during the day. The pause helps me remember during overwhelming times that I am doing my very best (which, of course, is all that I can do), and during times of tedium or elation that "this too shall pass." I have also found that this pause helps me be less reactive to another's hostility.

—Chelsea Gaberdiel

Before entering any situation you anticipate to be stressful, like a difficult hearing or a telephone call with a contentious adversary, pause for a moment, feeling your feet making contact with the floor and coming into awareness of your body as a whole, letting go of any sensations of physical and mental tension while taking a few, deep breaths.

—Judge Susan Miles

Every day for 20 minutes I practice mindfulness in my office, usually by listening to a guided recording. I have done this for many years and find the following to be helpful: 1) Pick a time each day; 2) make it a habit; 3) let people know — they will be sympathetic; 4) close your door; and 5) just do it. Not perfectly; just regularly.

—Harley Tropin

"Throughout the workday, there are moments when I am waiting for something. Rather than get frustrated or annoyed, which I used to do, I now use it as an opportunity to practice a mindfulness exercise known as 'STOP.' Stop. Take a Breath (or two or 10). Observe. Proceed."

For 10 or 15 minutes twice a day I sit peacefully. I relax and think about nothing or as little as possible.

—Justice Stephen Breyer
CNN interview with Amanda Enayati, "Seeking Serenity: When lawyers go zen," May 11, 2011

Since consistency is key, I have found the greatest success in waking up a little earlier than normal and meditating in the morning, before the caffeine, emails, phone calls, deadlines, and deliverables render meditating unlikely or impossible.

—Tony Recio

"Listen to your breath" is a mantra frequently repeated by my yoga teacher. For me, that act of listening to my breath is one of my most centering acts. We have many ways to make this personal connection with our breath. For me, I am committed to daily walking. During my daily walks, I enjoy the sounds of nature around me. Sometimes I walk with close friends, and sometimes I walk alone. I never ever listen to music when I walk. I love music, but during my walks I prefer to hear my breath, and also my thoughts, and take the opportunity to use the time to reflect on dreams and goals, as well as personal challenges. The movement of walking stimulates the breath, as well as the occasion for me to listen deeply to that breath. Whether you walk, or engage in another form of daily practice, keep listening to that breath. Observing and remaining aware of your breath enhances every moment in life and awakens us, as Mary Oliver so eloquently notes, to "the unexpected joy of being alive."

—Janet Stearns

I find it helpful to create white space on my calendar; space in between appointments, depositions, and court appearances when there is nothing scheduled. Even just 15 or 20 minutes of white space makes a huge difference in my day. That way I'm not running flat out; and when things run over, I'm less stressed. Those white spaces — small oases — give me time to slow down, think, reflect... and just breathe.

—Walt Hampton

I try to practice amazement at the commonplace. When I am amazed

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that clean water flows out of my tap with the gentle twist of a nozzle, doing the dishes is much more enjoyable.

—Christina Sava

Prior to any calendar in which I have to meet with two other judges to tentatively resolve five to 12 appeals and hear oral arguments, I leave my house very early and stop to sit and meditate over tea or coffee at a quiet vegan restaurant. This helps me to relieve the stress of the calendar and to center my thoughts. Also, during exhausting days, I will close my door, ask my staff not to interrupt, and I sit for 15-20 minutes, focusing on my breath.

—Judge Donn Kessler

I try to bring mindfulness to the walking I do during the day. I have a tendency to walk fast and mindlessly, usually thinking about the next thing I have to do. So when I am walking, I try to just walk — no emails, calls, or texts on my cellphone. I try to feel my feet on the floor and perhaps say hello or smile to people walking by. This helps me to slow down and bring more mindfulness into the flow of my day.

—Alice Lash

Often I will look up from my desk or look around while I'm walking down a corridor or street, or while I'm driving, get someone in my line of sight, and say, silently, to myself, "I wish you well," or "have a really nice day." Just thinking about someone else and wishing them well relieves stress. It fosters a positive state of mind that helps me turn back to the tasks at hand (thinking or planning) with open-mindedness and greater care for the other people involved.

—Judi Cohen

When I find myself starting to experience stress, I stop, take a breath, and try to look at the situation objectively, getting the sense I am observing it from the outside. This is crucial to my getting out of the reactive mode. Having engaged with stressful situations in this way over many years, it is much easier now to step back and get this perspective, and respond (rather than react) to challenging situations. I am grateful every day for the benefits of my mindfulness practice and in particular for the space and calm it brings to my life.

—Judge Colleen Brown

I find that body awareness and physical movement can break the daily rut and bring a fresh perspective on life. The movement can be vigorous, like jumping, or subtle, like deep breathing. Sometimes, during the day, when I am getting tired or feel stuck, I move my body for a few minutes and inevitably feel energized, more alert, and even happier.

—Professor William Blatt

"I was mortified when I started my journey of the study and practice of mindfulness by how often I interrupted others. I have worked hard to reduce my interruption rate. One tip that I use and recommend is to keep track of how long I can go without interrupting."

When I want to practice mindfulness during the day, I make sure to do a sitting before lunch because I know that I will feel the benefits for the rest of the day. One can always find a couple of minutes.

—Jonathan Erbstein

Mindfulness helps me to listen carefully to others and to listen to my own body. Many of those who appear before me appear without a lawyer. People in court without a lawyer tend to be very emotional and may not present their arguments in a coherent or logical way. In addition to outbursts, many self-represented repeat themselves over and over, even if I have already ruled. Practicing mindfulness gives me the ability to listen carefully through the emotions to try to understand the underlying argument and also helps me measure my response when I become frustrated — breathing, listening, and consciously controlling my voice and reaction. This helps me avoid escalating a tense situation, which is good for the nonlawyer, for me, and for others in court.

—Judge Laurel Isicoff

I was mortified when I started my journey of the study and practice of mindfulness by how often I interrupted others. I have worked hard to reduce my interruption rate by staying more present in my communications with others. One tip that I use and recommend is to keep track of how long I can go without interrupting. I suggest that if you are like me, it will be harder than you might think. In addition to being more courteous and less rude, I have gathered more and better data about myself, my counter-party, and the environment around me by listening and observing more intently and interrupting less.

—Paul Steven Singerman

When I find myself in a situation where I feel irritated by someone's actions, I notice my thoughts and emotions, pause, and internally encourage myself to find compassion for that person and where he or she may be coming from...and sometimes that person is myself. By consciously infusing compassion into moments when I'd least expect to feel it, I diffuse my irritation and more thoughtfully, calmly, and productively address situations.

—Marla S. Grant

I like to take five deep, slow breaths before I begin an assignment. It is a brief exercise that I can practice multiple times a day for every assignment. These breaths do not take up much time, and they help focus my thoughts on the task at hand.

—Greg Accarino

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Don't Just Do Something, Sit There

by Timothy A. Tosta

In the late '90s, I was on the faculty of a land use seminar in Santa Fe, N.M. I had a little time on my hands, so I strolled down to Collected Works Bookstore, a shop located adjacent to the city's main plaza. I was looking for "Light on Yoga," written by B.K.S. Iyengar, the founder of the school of yoga that I practice. The book I sought was not available. But while nosing around in the Eastern philosophy section, I came across a newly published book called "Stumbling Toward Enlightenment." The author, Geri Larkin, is a scrappy Midwestern progressive, who somehow became a Zen priest.

As I subsequently have learned, there are a lot of scrappy progressive Zen priests who have made Buddhism almost as accessible as a Starbucks coffee. But this article is secular. It's about meditation. Larkin's book was the first that I had read that explained meditation in a way that made sense to me. I have been meditating now for over 10 years. I engage in what is called mindfulness meditation, which consists of sitting quietly in a chair, or on the floor, in a comfortable position, with my back, neck and head in a natural supported alignment. I focus on my breath. I sit every morning before doing anything else. My "sit" is generally 15 minutes. Some days I go longer, a half hour or more.

> *"Meditation has allowed me to see a number of simple but profound truths."*

The discipline I maintain in holding to my sitting practice is probably one of the greatest gifts that I have ever given myself. Meditation has allowed me to see a number of simple but profound truths.

As I sit in meditation, the object of my attention is my breath. I note silently "in" on an inhale and "out" on an exhale. Usually, before I get to my fifth breath, a thought occurs, and I follow it. When I finally come to recognize that I am no longer attending my breath, but following my thought, I consciously return my attention to the breath. At the beginning, most of my meditation period was spent returning to my breath. So the first truth: Thoughts happen. Whether I ask for them or not, I am constantly bombarded by thoughts. They are unbidden. I have no conscious control over their content.

That may not seem extraordinary, but the second truth is: I am not my thoughts. If I follow my thoughts, I cede conscious control to them. I unconsciously accept them and give up my presence and dwell on their content.

The third truth: Just because I have a thought doesn't mean that is true. Let's say, for example, that I have formed a critical self-judgment that recurs randomly. I now am aware of and can examine that thought, in a dispassionate way, at a later time. That little bit of distance between me and that self-judgment provides an opportunity to free myself of its recurrence. I continue to breathe. Can I let that thought go? I pay attention to how my body responds. Over time, recurring thoughts lose their power as I let them go. They come less frequently and, eventually, they go away.

Another example: Suppose an opposing counsel has a way of getting under my skin. I sit in meditation. Lo and behold, his disturbing image comes to mind. Not just the image, but all of the bodily reactions that the image evokes from me. I go back to my breathing. I notice my body releases almost immediately. My shoulders and neck relax. My gut quiets. The image loses its power. I begin to see that it is not my opposing counsel who causes my difficulty, it is my reaction that does so. As I begin to acknowledge and release my reaction, "his" ability to disturb me goes away - first in my meditation, then in life.

A final example: When my mother died a little over two years ago, her image returned to me at every sitting. I knew that I was in mourning. I understood that it was OK to feel this extraordinary loss. I returned to my breath because that was my practice. I didn't banish my mother's image, but I didn't hold it either. So the fourth truth is that just because I have thoughts doesn't mean that I have to dwell on them. In fact, as I became acclimated to the practice, I began to see that by returning to my breath I created space between my thoughts and my reactions to them. At the beginning, the space was almost unnoticeable. As I practiced, I began to see that the space created by returning to my breath offered me the opportunity to make a conscious choice as to how to react. In effect, I was slowing down in the space created by my meditative stillness. I became grounded. I became aware.

This kind of awareness is rather extraordinary. As lawyers, we default to our cognitive abilities. In the 1950s, there were science fiction movies about brains contained in vats that maintained their cognitive ability for purposes of world dominance or some perverted

notion of eternal love. But in all of those movies, things did not go well for the "living" brain. Similarly, focused cognitive perception does not fully serve us as lawyers.

In the meditative space, awareness arises as to the state of my body, my emotions, my mood, my spirit and my environment. Over time, that growing awareness manifests as intuition. I find that I am able to respond to circumstances with an "intelligence" that exceeds that which I previously possessed. It is an intelligence born of more than mind. I can walk into a negotiation and, following a moment of stillness, understand where the parties are in that moment. That is powerful insight.

All that I have been describing here happens over time. As I said, I have been meditating for more than a decade. My rewards came incrementally. For me, the true magic of meditation was how my insights, while sitting, began to manifest as I returned to everyday life. So as I sit, for example, in a protracted public hearing and a disturbing new fact emerges of which I had no previous knowledge, my self-critic does not respond quite so loudly, and thus does not interfere with my ability to measure what I am to do with this new information. Or if a judge fails to understand the gravamen of a precedent, I do not default to a reactive judgment of his or her lack of competence, but rather immediately find an artful means of communicating my reply.

Let me give you one final example of how meditative awareness changed me. I once read the story of a battered women's center that had painted over its entrance archway the following slogan: "It begins with the words." Violence first manifests in language. Action follows.

I had come to understand that I swore most frequently when I had lost my center. Use of this violent language did nothing to improve my situation. In fact, it further distracted me from regaining my footing and, frankly, added verbal violence to the environment. I decided to go cold turkey. I stopped swearing. That was a few years ago. Of course, I am not always successful in the endeavor, but I do know that when I begin to swear, there is something wrong. I catch myself and try to identify the source of the discomfort. I also note what effect I have had on those around me through use of this language. And, most often, I apologize. So, for me, meditation has been a source of patience, wisdom, calmness, a place to reflect and a fount of creativity. It all arises from that space created by my attention to breathing.

One more thing: It is easier to meditate with others than on your own. There are meditation groups in most communities. A great majority of them are secular. There is nothing about meditation that requires religion. I also regularly attend an annual lawyers retreat at Spirit Rock in Marin County. It is sponsored by the Center for Contemplative Mind in Society. For four days, we sit in silence, meditating some six hours each day, creating a profound and extraordinarily unique community of lawyers.

I urge you to investigate meditation as a practice. It just may change your life. Several Bay Area law firms have groups that meditate together.

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Victor's Story

by Timothy A. Tosta

Every Monday, at about 4:30 p.m., I depart from my law office in Rincon Center for Laguna Honda Hospital, where I serve the evening shift as a volunteer in Ward C-2, the hospice. As I reach the crest of Market Street, as it turns into Portola, I pass through a veil into a world of heightened awareness, consciousness and caring.

Laguna Honda is a public hospital, serving San Francisco's impoverished, dispossessed and disenfranchised - those who have outlived their families, the homeless and recent immigrants, legal or not.

In C-2, there is a tremendous sense of community amongst the staff, volunteers, the 26 residents, their families and friends. Ours is highly transient community. Our residents generally survive for only weeks, sometimes months, and occasionally, for years. In all of this transience, there remains an environment of caring and reverence, for both life and death. It imbues C-2 with a sense of openness, awareness, resilience and love.

"In all of this transience, there remains an environment of caring and reverence, for both life and death. It imbues C-2 with a sense of openness, awareness, resilience and love."

About two years into my service, I knew that I wanted to integrate the extraordinary C-2 environment into the rest of my life. While I had entered into the hospice service to better understand death and care for others, I was receiving an extraordinary gift of insight and awareness about everyday life from my volunteer service that I wanted to share with the "outside world."

In 2006, I began writing stories about the residents whom I had served. Based on those stories, in early 2007, I began speaking to people in the legal and business communities on "*Lessons for the Living*." I revealed what my hospice experience had taught me about change, control, perception, discovery and human relationships, and how those lessons were invigorating and enriching my life and the lives of those around me.

I also would tell audiences how these lessons had changed the way I practice law. This often was met with skeptical looks and requests for elaboration. Just two weeks ago, I received a forceful reminder of this connection. I thought that it might be worthy of sharing with you.

Victor had arrived that Monday afternoon, shortly before me, from San Francisco General Hospital, where he was being treated for complications arising from end stage AIDS. Victor was a Mexican immigrant to California. He appeared to be in his early 50s. We were informed that Victor was extremely restless and already had thrown himself out of his bed twice. The nursing staff requested that the volunteers sit by his bedside to secure him from injury. It was not unusual to see new arrivals, agitated and confused. We often would sit with them as they acclimated to their new surroundings. Victor had been prescribed a sedative to reduce his anxiety, but it could not be administered until after his evening meal. As volunteers, we have no directive as to whom we attend during our shift. But, upon hearing of Victor's plight, I offered my evening to him.

As I approached his bedside, I saw his suffering. The head of his hospital bed was raised at a 30 degree angle, but Victor was uncomfortably slouched at the bottom of the incline. Victor's body presented a Hieronymus Bosch-like image from *The Last Judgment*. An orange sweatshirt with hood was fitted too tightly around his neck. The garment body was twisted tightly to the left of his upper torso. His exposed abdomen was distended by the gases and accumulated fluids caused by his rapidly failing internal organs. His sheets and blankets were twisted amongst themselves and again around Victor's upper body, waist and legs. His diaper rested uselessly up on his upper thighs, exposing his buttocks and genitals, as he convulsed on his bed.

I considered our prime directive to prevent Victor from throwing himself on the floor. But I also considered what more that I could do at his bedside. I would attempt to disentangle him from the knotted mess of clothing, sheets and blankets. Once I disentangled him, I would try to get him warm. Then, I could ask a CNA (certified Nurse Assistant) to fit him with a new diaper. Maybe I could provide him some small respite from his arduous day.

But, all didn't go "according to plan." As I tried to disentangle Victor, he rolled around, while attempting to move his legs over the edge of his bed. I simply couldn't keep him on the bed, while attempting to disentangle him. Victor wasn't all that large, but even a small person carries considerable weight and power. As

time dragged on, I found myself more wrestling with, rather than attending to, Victor.

I stopped a passing CNA to ask her about his sedative. She advised that Victor had refused his medication. I asked her if she would ask the ward nurse to join me at his bedside. The nurse joined me and again offered Victor his sedative, which despite his turmoil, he clearly refused. She rolled her eyes and said "Well, I can't make him take it." As the nurse left, I knew that I was in for a long evening.

For a few moments I just sat with Victor. I stopped wrestling with his legs. I watched him and quieted myself down. I began to see that I had not served him well. I had taken someone else's interpretation of his behavior as true. Maybe Victor was not attempting to get out of bed to escape the ward. His agitation might be arising from elsewhere.

As I sat with Victor, ignoring his thrashing legs, I began to see his great difficulty in breathing. I could hear his lung congestion and almost feel Victor's exertion as he tried to gather the oxygen needed to carry on. A few moments into my non-intervention, Victor was able to force himself up to a seated position. I moved my chair directly in front of him, bracing my inner knees against his outer thighs and gently resting my right hand over his heart, as he weaved in his now precarious seated position. An amazing thing happened. He did not resist my support, he welcomed it. He used his right arm to further brace himself, holding the bed's railing. As we sat, Victor relaxed. His agitation subsided. His breathing became more measured.

Breathing was what Victor's restlessness had been about. He was not "throwing himself out of bed," he was trying to sit up to gain more oxygen into his highly congested lungs. Alone, Victor did not have the stamina to remain upright. Consequently, he fell. We all had had the story wrong! I supported the upright Victor for about a half hour. When the nurse next went by, I asked her if we could move Victor to a Gerichair, a reclining padded chair, with a restraint device that would allow Victor to sit upright, but not stand. The nurse saw how Victor's restlessness had subsided. She told me she would need a doctor's order for the move, but advised that she would have it within a few minutes. Shortly, the Gerichair arrived. Victor was changed into more comfortable clothes and a clean diaper. He then was fitted with a crane-like device which lifted him from the bed to the Gerichair, which then was wheeled down to outside the nurse's station.

It had been a hard afternoon for Victor, as he struggled with his breathing. But he now was comfortable. I sat with him a while longer as he further relaxed and eventually slept.

I was exhausted. But, I couldn't help but consider the lesson I had been taught that evening - a lesson which applies to my law practice and my life, in general. Sometimes we are asked to undertake an action based on faulty premises. If I am not fully aware of myself, my surroundings and the events transpiring before me, I assume what I have been told is the "truth". I forego the opportunity to test that "truth," to create solutions more consistent with my observations and experience. I make mistakes. In such circumstances, I must slow my mind, make space for new information coming my way, and check what that information is telling me. Sometimes it will confirm what I've been asked to do. Sometimes it won't.

"Few of us operate at all times from adequate spaciousness and awareness. Regrettably, we often are so filled with reactive behavior that we fail to make important inquiries."

Few of us operate at all times from adequate spaciousness and awareness. Regrettably, we often are so filled with reactive behavior that we fail to make important inquiries. I almost failed Victor. But, I caught myself. He died three days later. I was honored that, in a small way, I was able to help him.

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The Mindful Lawyer: Not Your Usual Law Conference

by Timothy A. Tosta

At the end of October, I attended a two and a half day program hosted by UC Berkeley School of Law. It was sponsored by a number of entities including the law schools at the University of Buffalo, City University of New York, University of Florida and University of San Francisco. There were participating law professors from UC Berkeley, Hastings College of the Law, University of Florida, Temple University, University of Denver, Creighton University, Seton Hall, University of Missouri, and Vanderbilt.

Over 175 participants were drawn to the conference from the ranks of private law firms, large and small, in-house counsel, public interest firms, mediators, public agency lawyers, district attorneys, and law students. Participants also included a former chief justice of the Utah Supreme Court, a U.S. District Court judge, a justice from the Arizona Court of Appeals and senior staff from the U.S. District Court, Northern California District.

Themes at the conference included improving professional skills, enhancing client services, building diversity, reducing stress, creating a deeper commitment to ethical practice, and enhancing attorney satisfaction and happiness. We were joined by clinical psychologist Philippe Golden of Stanford University and Shawna Shapiro, professor of counseling psychology at Santa Clara University.

And, if the title didn't already give it away, conference faculty included Norman Fischer, Zen priest, former abbot of the San Francisco Zen Center, poet and author of "*Sailing Home: Using the Wisdom of Homer's Odyssey to Navigate Life's Perils and Pitfalls*," and Jack Kornfield, co-founder of Spirit Rock Meditation Center in Woodacre, and author of numerous books including "*A Path with Heart*" and "*After Ecstasy, the Laundry.*"

What drew this extraordinary and eclectic group of legal minds together was the desire to meet with other legal professionals from throughout the United States, all of whom engaged in meditation or other contemplative practices and to learn from one another about how our respective contemplative practices affected our legal careers and lives. For almost a decade, a small group of legal professionals has been meeting annually in California for a five day meditative retreat. Other retreats have been held in the East. Under the leadership of Charles Halpern, a pioneer in the public interest law movement and an innovator in professional education, and now Scholar-in-Residence at UC Berkeley School of Law, a national audience was convened to share experiences, to create a broader community of interest and to advance to the broader legal community the benefits that we all had experienced through our respective practices.

"What drew this extraordinary and eclectic group of legal minds together was the desire to meet with other legal professionals from throughout the United States, all of whom engaged in meditation or other contemplative practices and to learn from one another about how our respective contemplative practices affected our legal careers and lives."

Although most meditative and contemplative practices have their roots in religious and spiritual domains, these practices can be, and most frequently are, entirely secular. Buddhism, which generally is considered in the east to be a form of religion, is most often considered in the west to be psychology. Meditators frequently retain the religious orientation of their upbringing from Judaism to Catholicism to agnosticism.

What meditators have to share, irrespective of their spiritual orientation, is a desire to quiet the mind to gain greater capacity for insight. The Bay Area Working Group on Law and Meditation, a small group of practicing lawyers, judges, legal educators and mediators, has been meeting monthly for over seven years with Norman Fischer to explore how meditation has impacted their lives and the profession. Their work has spurred discussions at the annual California meditation retreats, sponsored by Spirit Rock Meditation Center and the Center for Contemplative Minds in Society.

As part of the conference materials, the Working Group issued its paper on the "Meditative Perspective" that has been evolving over the recent course of years. Their findings best articulate the experiences of those attending the conference. The Working Group maintains that meditation fosters "a more profound

relationship with our thoughts, emotions and, ultimately, ourselves." This relationship gives rise to "more choice and flexibility in thinking and feeling, as well as an increased capacity to embrace paradox and opposing view points." It's an outlook that develops through meditative practices, and leads to "enhanced appreciation and understanding of the impact of our actions in the world." The meditative perspective, according to the Working Group, allows for attorneys to open themselves to "new approaches and strategies, helping us to solve problems and accomplish judgments more effectively." Moreover, it allows "greater competence and clarity in our commitment to an ethical path." It permits "clear and focused presence which enhances effectiveness, promotes stability and calmness." The meditative perspective reduces reactivity to challenging situations, "allowing one to view problems as challenges to be solved, transforming anger and self righteousness into creative energies to serve the needs of our clients." Finally, the perspective "heightens our sensitivity to suffering, allowing us to better apprehend difficult situations and handle them with their greater sense of ease."

Golden presented a cutting edge research, confirming what neuroscientists are learning about the benefits of contemplative practices. Shapiro spoke to how mindfulness practices enable the cultivation of greater personal happiness, health and freedom. Panelists discussed examples from other professions, such as medicine, social work and higher education as to how contemplative practices were being incorporated in those fields to allow for greater professionalism, for stress reduction, and greater levels of professional satisfaction.

A panel of judges spoke to their experiences on bringing a meditative perspective to the bench, reflecting on how it has transformed their work as judges and altered the processes of the courtroom. Another panel of mediators discussed how mindfulness has affected their approach to mediation. Yet another panel of practicing lawyers spoke on how a mindful lawyer's practice looks from the inside out, while a student panel spoke to how meditation has affected their law school experiences.

All in all, it was far from your usual law conference. It was an affirmation that there is a greater contemplative community seeking to improve our relationship with the profession by finding support through meditation and being willing to support one another in the endeavor.

I was heartened by the number of people who have had experiences similar to mine in which they have felt reduced stress, greater creativity and more positive outcomes by operating through a meditative perspective, not only in their career but also throughout their lives. I wanted to make you aware of this conference because of the great hope it offers our profession, not because there are a growing number of meditators engaged in the practice of law, but for the fact that there are so many extraordinary talented individuals in the practice of law who are seeking to make it more creative, more wise, more ethical and more effective.

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Is Law Bringing Meaning to Your Life? Then Call It a Calling

by Timothy A. Tosta

The following insight of a 13th century Sufi poet, Rumi, survived eight centuries because of its truth, its clarity and its uncanny ability even now, in the 21st century, to still bring us up short: "There is one thing in this world you must never forget to do. Human beings come into this world to do particular work. That work is their purpose, and each is specific to the person. If you forget everything else and not this, there's nothing to worry about. If you remember everything else and forget your true work, then you will have done nothing with your life."

Although we spend less time in our lives devoted to our "work" than our ancestors did, work still manages to constitute some 70 percent of our waking existence. Given this extraordinary life commitment, it continues to amaze me how little time we devote to the examination of our work's meaning.

What does your work mean to you? How do you consider your "time spent" in its pursuit?

One useful inquiry describes three approaches to the notion of work - a "job" that focuses primarily on financial rewards; a "career" that centers on growing talent and accumulating recognition out of a desire for personal gain and advancement; and a "calling" that arises from an intrinsic commitment to an individual's core values, which is pursued in its own right, without regard for money and advancement.

This structure corresponds to the "hierarchy of needs," described by psychologist Abraham Maslow, in which he postulated the self-actualized human being, fully and constructively engaged in life. So, it is not a surprise to find Maslow supporting our Sufi poet and declaring "One must respond to one's fate or one's destiny or pay a heavy price. One must yield to it; one must surrender to it; one must permit one's self to be chosen."

With both mystics and scientists confirming the importance of finding one's calling, how does one proceed?

First, let's take a moment to find out where you are now. If you find that: you like what you do, but don't expect much from your work; or your work is a vehicle to fund the balance of your life; or you are not excited to start a new work week; or you build your life around your vacations and opportunities for time off; or you think too much of your life is spent at work and you would prefer not to think of it during your off hours, your work is probably a job. If your primary motivation in your work is to become a success; if you view your career in its relationship to your standing with peers or competitors; if the goal of your work is to rise to the top of your field; if your greatest professional experiences center on achieving recognition from others, you are likely in a career. But if you tend to lose yourself in your work; if you feel that you are continually in "flow" almost without a conscious sense of the passage of time; if you are working to truly make a difference in the world; if you see the source of your achievement as coming from something bigger than yourself; if you do what you do just because you love it; or if you believe that what you do allows you to utilize your natural gifts, you are probably in a calling.

"*With both mystics and scientists confirming the importance of finding one's calling, how does one proceed?*"

Of course, as with all categorization systems, there are no bright lines. In my own 35 years of practice, I certainly have had jobs. Although I believe most of my work has been in the career category, in the last few years I have begun to fully appreciate the calling of my work. But in any given workweek, there are work aspects that could more honestly be categorized as a job or career. For me, it's hard to find practice group administration or attention to billings as anything other than a job. How does your work look to you?

Another consideration, as you examine your place in the work hierarchy, is the exploration of whether you have found the right occupation. Many of us made career decisions when we were quite young. Others were greatly influenced by our family or culture in choosing our careers. Even if you possess the intellect and proficiency to excel in law, is it the match for you? Positive psychologist Nicholas Hall conducts research in the area of psychological profiles of various occupations. His research identifies unique profiles of character strengths for various occupations, particularly when compared to the population at large. Hall cites, for example, how artists have appreciation for beauty and excellence as their top strengths, while lawyers

rank particularly low in spirituality. Hall currently is conducting research to see if he can identify special characteristics in those who see their occupations as a calling, and to ascertain if their character profiles are distinguishable from others in the field, who don't see their work as a calling. While such research may prove useful, the fundamental inquiry remains personal. What are you doing with your life in this work?

From my own experience, I have found that the job/career/calling inquiry is too narrowly framed. I began to see the calling aspects of my career only as I undertook completely unrelated work as a hospice volunteer at a community hospital. There, I changed my perception of what was important. I accessed personal capacities that I had not known existed. And, I developed a profound curiosity for seeing how these changed perceptions and expanded capabilities could be applied to my legal work.

In other words, by doing service of an entirely different nature from my profession, I obliterated the line between work life and non-work life so that I was able to access my life purpose, values and intentions. I adapted my professional life to create a resonance that gives my work the aspects of a calling.

Try this exercise. Find a quiet place to sit, where you are likely not to be disturbed. Bring with you some paper and a writing implement with which to take notes. Give yourself five minutes to simply slow down, breath and quiet your mind. Now imagine that you are 95 years old. You are looking back on your life. Consider your responses to the following: What is it that you would have wanted to accomplish? What type of person would you have been to accomplish these things? How would you have had to spend your time? What would you have learned? What type of relationships would have surrounded you? What would you have wanted to experience? How would you want to feel about yourself? What brought the most meaning to your life? What did you contribute to the world? How well did you love others? What opportunities did you give others to love you?

These are not an easy questions. It takes patience. In fact, it may be hard to complete this exercise in one, two or even three sittings. But what these reflections do, as you spend time with them, is help you see what is important to you. From the inquiries that you can't answer, you are given some direction as to further inquiry. Thinking about these questions also has a way of putting your work in its proper perspective. As you work through this exercise, you may begin to see, through this imaginary retrospective, what your purpose in life could be. And, you may find that some of that purpose has a direct and powerful link to your current work. If that is so, make that connection in your work and expand upon it.

Twentieth century poet Rainer Marie Rilke wrote a series of letters to an aspiring young poet, encouraging him in his work. His words are particularly relevant to this inquiry. "Be patient with all that is unresolved in your heart and try to love the questions themselves ... Do not now seek the answers which cannot be given you because you have not been able to live them. And the point is to live everything. Live the questions now. Perhaps you will then, gradually, without noticing it, live along some distant day into the answer."

Good luck on your journey.

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Overcoming 'Stickiness'

by Timothy A. Tosta

We, as lawyers, have the opportunity to free ourselves from where we may be "stuck" in our lives. For many of us, this arises from how we are functioning in our careers. But our lives can be stuck in other domains. "Stickiness" may arise in a marriage, or in our relationships with our parents or children, or in the absence of meaningful friendships. It may manifest in chronic illness or addictive behaviors. Or, our stickiness may appear across domains where nothing particular is terribly wrong but life simply is not fulfilled.

Or, this may apply to you. It may be about a loved one, a close friend or colleague. It may be about someone you mentor. If you are in firm management, stickiness may manifest, with changing economic fortunes, throughout your business.

Ultimately, we all wish for productive, fulfilled, connected and happy lives for ourselves, our loved ones and our friends and colleagues. Let's see if, working together, we can make some progress.

I write this a not from the perspective of an "expert." Rather, I write from the path of a fellow traveler on this extraordinary life journey as a lawyer. I have been a land use and environmental lawyer for 35 years. I also am a certified integral coach, an 18-year cancer survivor and a fifth-year hospice volunteer, working with the dying at San Francisco's Laguna Honda Hospital.

In his 2002 book "Authentic Happiness," positive psychologist and University of Pennsylvania professor Martin Seligman devoted an entire discussion to why lawyers are so unhappy. Seligman observed: "By any measure, lawyers embody the paradox of money losing its hold: they are the best-paid profession, and yet they are disproportionately unhappy and unhealthy. And lawyers know it."

Seligman attributed the demoralization of lawyers to three causes. First, lawyers, are trained pessimists. Seligman noted that while pessimism is maladaptive in most careers, it is not in law: "[S]eeing troubles as pervasive and permanent is a component of what the law profession deems prudence. Unfortunately, though, a trait that makes you good at your profession does not always make you a happy human being."

Second, Seligman observed most lawyers experience "low decision latitude in high-stress situations." The number of choices the lawyer has - or believes one has - on the job is severely constrained by his or her position in the firm, the constraints of the client and a limited understanding of the circumstances surrounding the issue. Third, Seligman observed that American law has become increasingly a win-lose game. As such, lawyers have increasingly more negative emotion in their daily lives.

> *"While Seligman identifies some symptoms of the legal malaise, his analysis does not go far enough. I believe that the "unhappiness dilemma" is created by our inability to shape a functional perspective, allowing us to thrive in the profession despite Seligman's "causes."*

While Seligman identifies some symptoms of the legal malaise, his analysis does not go far enough. I believe that the "unhappiness dilemma" is created by our inability to shape a functional perspective, allowing us to thrive in the profession despite Seligman's "causes."

Such, functional perspectives are both individual and constantly evolving. Business psychologist and psychotherapist Douglas LaBier wrote in the Washington Post: "In the office, [the key to success and well-being] has meant being clear about your goals and working your way up a fairly predictable set of steps ... But, like the stock market, that dependable formula has taken a nosedive."

Nowhere has a "dependable formula" nosedived more than in the last several months in the legal industry. Suspended summer programs, "deferred" start dates for first years, layoffs and "de-equitizations" of capital partners plague our industry.

LaBier suggests that people look for value in their work, in addition to profiting from it. He suggests that we need to subordinate self-interest and assume qualities such as cooperation and altruism which, in his estimate, have become "both survival skills and keys to competitiveness." He urges us to become proactive, innovative and creative, and to keep growing and developing within our changing environments. LaBier adds that a psychologically healthy life involves building those qualities into one's conduct. LaBier concludes that while it is human to have self-serving tendencies, it's healthy to keep them at bay.

What is one to do with all this advice?

Let's begin by taking a closer look at how humans operate. Psychologists tell us that by age 6, we generally have developed a "narrative" about our lives. The narrative is a very useful tool. It allows us to interpret information coming to us from the environment, to make assumptions and conclusions about that information in a fairly efficient manner, which leads us to beliefs, followed by actions based on those beliefs. Over the course of our lives, our narrative becomes more elaborate with accumulated life experiences. But its principal structure remains the same. We just interpret, assume, believe and act at more sophisticated levels. It is a largely effective and efficient system.

"Getting "unstuck" begins with recognizing your situation for what it is – patterned behavior."

But there is a downside to our narratives. They can become inflexible or resistant to our inevitably shifting environments. This can lead to actions and outcomes inappropriate for high-level functioning. Evidence of the need to change our narrative often appears when we find ourselves in the same difficult circumstances time and again (the third career change, the second failed marriage) or in personal crisis (cancer, being laid off). In all such circumstances, we know something is wrong, but don't know what to do about it.

Chris Argyris, professor emeritus at Harvard Business School, spent his career in the fields of experiential and organizational learning. He developed the ladder of inference, popularized in Peter Senge's "The Fifth Discipline: The Art and Practice of the Learning Organization." The ladder explains how we get stuck and what makes it difficult to move on. Step one of the ladder consists of taking in the universe of data and experiences arising from any particular situation. Step two is what we choose to observe from Step one. Inevitably we filter out some things and select other things for observation. Step three is where we attribute meaning to the chosen data, based on our experience. In step four, we draw conclusions from the meaning that we attribute to the data. In step five, we adopt beliefs of the world, based on our step four conclusions. At step six, we take action based on our beliefs.

The ladder actually is better visualized as a circle. It is in the circle that we begin to see the self-reinforcing nature of the structure. It is our beliefs from past experience that influence the data we select and experiences we pay attention to. And because we pay attention to only those things (often overlooking important new information), we reinforce our meanings, conclusions and beliefs that govern our subsequent actions. If our actions are successful, our beliefs are confirmed. If they are not, we are dumbfounded by the outcome.

Let's take an example. You've been given a plum assignment by your department head, Partner A. You produce what you believe to be a first-class piece of work. When you turn the assignment in, Partner A barely looks up at you and mumbles "thanks." You don't hear back from him. A couple of weeks pass and you come to the conclusion that A didn't like your work and doesn't like you. You find yourself avoiding A and his office. You shy away from him at social functions. In fact, you change your area of practice in an effort to restart your career. A year later, you decide to tell your new department head, Partner B, about the background of your practice shift. Partner B remarks that she actually heard high praise from A concerning your work. However, at the time, he had been privately preoccupied with a cancer diagnosis affecting his wife. Your narrative failed you. What fear led you to believe that shifting practices would produce a better outcome?

Getting "unstuck" begins with recognizing your situation for what it is - patterned behavior. Then get really curious about it. What awareness can I bring to this issue? Bringing awareness is not a struggle. It is about relaxing to create an opening to see more of your environment and your patterns. Notice what you are paying attention to. Ask a friend or loved one for support. What can you learn from others about your patterns? What might someone be able to tell you about what you are missing? Accept your and others' observations provisionally. Test them out. Observe. Try a new behavior to see what shifts. Stick with it for awhile. Stay curious. Observe. You got where you are over time. There is no quick fix. Notice if your curiosity, awareness and experimentation don't begin to become their own rewards.

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The Side Effects of Practicing Law

by Timothy A. Tosta

The combative nature of the practice of law exposes you daily to the world of anger and grievance. If you can remain detached, conducting yourself professionally, you can do great work. Yet, you may find yourself experiencing the negative emotions that arise from your work environment. For your own sake and that of your clients and colleagues, family and friends, you must understand the nature of anger and grievance in order to avoid and release it.

Anger arises from a perception of interference with something that you are doing, feeling or expecting. There is a frustration. Something happened that you did not intend to happen or something did not happen, which you had intended to occur. There are times when anger has its place. But the situations in which it is warranted are few. Anger rarely resolves the problem that initiated the emotion. Anger often leads to an inappropriate response to the triggering event. And, if anger becomes habitual, it presents not only long-term problems for your happiness, but for your physical health.

> *"Anger arises from a perception of interference with something that you are doing, feeling or expecting. There is a frustration."*

A grievance arises from anger that has not been released. There has been an interference to which you could not appropriately respond. You may have lacked the skills. It may have been entirely beyond your control. But the event and its emotions linger. Sometimes you even lose track of the particulars of the event. You simply swim in its residual emotional soup. You think about it too much. In the words of Fred Luskin, co-founder and director of the Stanford University Forgiveness Project and author of *"Forgive for Good-A Proven Prescription for Health and Happiness,"* you let the grievance rent too much space in your mind.

Grievances can become a part of your narrative, the story you tell about yourself that shapes your habitual reactions as well as your beliefs and judgments about the world. They reinforce your self-image. Bad things happen to you because you are too tall, too short, too heavy, too thin, too light skinned, too dark, too Jewish, too Christian. You know why. You have come to expect them.

Grievances cause suffering. It is best to relieve yourself of grievances sooner than later. Relief of your suffering should be reason enough. But there is more. The attention that you pay to your grievances makes them stronger over time. Grievance making can become habit, making it likely that future interference also gives rise to grievance. Finally, grievance grants the offender power over you.

Do you know if you have a grievance? Is there an upset, recent or historical, about which you think or talk about repeatedly? Do you dwell on that upset many times a day? Do you think about that upset more than you think about things that are good in your life? When you consider this upset, do you become physically uncomfortable or emotionally upset? Do you find yourself telling the story of what happened again and again in your mind or to others? Could a close friend repeat the story for you? If the answer to three or more of the above is yes, you are carrying a grievance. Consider how much of your life is being given over to the past and how much of your present you are losing as a consequence.

According to Luskin, three core components give rise to grievances: an exaggerated feeling of personal offense; blaming the offender for how you feel; and creation of the grievance story. These components can keep hurt alive indefinitely.

When something negative occurs to you, through the action of another, you must examine whether or not the transgression was personal. Many things happen to us at the hands of others that are entirely unintentional. They may have arisen out of negligence, inattentiveness or stupidity, but the actor had no intention of causing you harm. If no harm was intended and you just happened to be at the wrong place, at the wrong time, what is the point of taking it personally? Does it make the harm go away? It does not mean that you have to like the transgression. Nor does it mean that you should deny its impact. But, if you can get outside of your narrative, you can begin to distinguish between those aspects of an event that are personal from those that are not.

Blame is the second step in the grievance process. When adversity strikes, your first reaction is to look for a cause. Then, you fix blame. Whose fault was this? Depending on your narrative, almost irrespective of the circumstance, you have a preference for either blaming others (an individual, a group,

your parents, your God or the universe) or yourself. Blame is a hypothesis, not a fact. It is supposed to make things better, but does not. Blame seeks to create a story, by linking to similar past events, which serve to confirm your existing worldview.

Blame, however, does not promote healing. It only sustains suffering. When you blame, you allow your emotions to block your ability to clearly see what is going on. Blame allows you to sustain your misperceptions indefinitely.

> *"The most insidious effect of blame is that it cedes someone else power over you."*

The most insidious effect of blame is that it cedes someone else power over you. As you blame, you become a victim. You tie yourself emotionally to the person you blame. Consequently, you will need action from others to release its hold. This victimization keeps you in the past, depletes your energy, impairs your health and causes you suffering. None of this is to suggest that you do not hold people accountable for their actions when such actions have caused you harm. But, accountability is not blame. Blame is emotional.

Last is the creation of a grievance story. Remarkably, describing the adverse event is only of secondary importance. The primary purpose of a grievance story is to put the experience into a personal context. Because you live inside your narrative, your memories, expectations, beliefs and judgments, will shape the story for you. The story you first tell then will determine how you remember the event and calculate its significance.

How do you know when you are telling a grievance story? Here are some clues: Have you told your story more than once to the same person? Does telling the story agitate you? Does this story remind you of other painful events? Is there a villain in your story? Is the villain the central character? Do you have fantasy conversations with your central character? Is this story about your pain and loss? Can you not help but tell your story to friends and acquaintances, even strangers? Have you ever checked your story's details for accuracy? If you are coming up with a lot of yes answers, you are probably telling a grievance story. Notice that in telling your grievance story, you repeatedly subject yourself and others to your pain and suffering.

In the end, Luskin notes grievances arise from trying to enforce unenforceable rules. You create an unenforceable rule so that you can write a mental ticket to punish the perceived wrongdoer. An unenforceable rule might be: "He should love me like I love him" or "She should come home directly after work to be with me." It is unenforceable because you don't have ultimate power to affect the outcome. But, since the rule is unenforceable, the only person you end up hurting is yourself. Unenforceable rules evoke anger, helplessness, depression, and frustration. The more unenforceable rules you have, the worse it gets. Living in the world of unenforceable rules impairs your judgment and leads to further suffering.

With awareness, you can begin to identify when you are evoking unenforceable rules. Simple recognition is a powerful first step. Constructing only those rules, which you can enforce, is next. Know the limits of your ability to influence outcomes. Make only realistic "bite sized" rules. Regain your power by discarding unenforceable rules as you observe their appearance. Control is often illusory. Fewer rules, fewer grievances. You lighten your load. You discover renewed energy. And, you become ready to forgive.

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The Power of Listening

by Timothy A. Tosta

Recently, I found myself speaking on the issue of "transformative listening." I started speaking on this subject as part of a longer talk entitled "Lessons for the Living," in which I tell of how my work as a public hospital hospice volunteer reshaped not only the way that I practiced law but my way of living life. It has become one of my most requested talks and I have delivered it throughout the state to lawyers, judges, business and real estate executives, government officials as well as community groups.

The long and the short of transformative listening is this - if you learn how to listen in an authentic and empathetic way, you will change your relationship with your speaker and yourself; access greater meaning; and become empowered to reach better outcomes. This is not a work practice. It is a life practice. It will enrich your professional encounters. But, more importantly, it will build and enhance sustainable relationships throughout your life.

"The long and the short of transformative listening is this – if you learn how to listen in an authentic and empathetic way, you will change your relationship with your speaker and yourself; access greater meaning; and become empowered to reach better outcomes."

Generally, how do we listen?
The unfortunate answer is that, generally, we don't. We are distracted. We are multitasking, which is a form of insult to the speaker. We listen to meet societal expectations. Think, for example, about how closely you attend to the words of a police officer writing you a ticket after you have made a "California" stop. We listen to confirm what we already know or to make distinctions. This is selective listening. Lawyers excel at this. We listen for agreement ("Yes, I know that") or for disagreement ("No, that's not right"). But, in all events, we are not attending to the entirety of the communication. We are either hyper-focused on some particular aspect or generally disengaged.

What message do you believe is being conveyed to the speaker by our actions? And, given that message, how do you expect the speaker to attend to you when it is your turn to speak? Early in the talk, I ask my audience to find a partner, preferably someone that they do not know. I ask each to identify an event of some emotional content, which can safely be disclosed to the other. I give them a few pointers that are likely to enhance the listening experience (be open and face on, do not cross legs or arms, assume a relaxed posture). Then the first speaker addresses the listener for three minutes without interruption. The listener then has two minutes to repeat back what she heard, in her own language. The parties then reverse the process, with the first speaker becoming the listener. Then, as a group, we discuss the experience. What is so remarkable about this 10-minute interlude is how surprising it is to the audience to experience genuine listening. There is an excitement generated by the experience. At the same time there is connection, because emotional experiences have been exchanged.

Henry David Thoreau once said, "The greatest compliment paid to me was when someone asked me what I thought and attended to my answer." Listening is a much-overlooked talent. It gives us an opportunity to look through another's eyes to expand our creative potential. It allows us to connect and understand one another. It allows for real dialogue, which often enables both parties to shift perspectives.

Why should we listen? Because it serves you. It allows you to better connect to the speaker. Effectively done, it keeps you calm and grounded. From that state, more information becomes available to you, without the background noise of your own narrative's filter. This, in turn, allows you to better respond, leading to better results.

What is transformative listening? It is what happens when you suspend your memory, desire, beliefs and judgments and, for a few moments, exist only for the other person. Its essence is empathy. It is best to think about it not as a need we have, but as a gift we give - the gift of our attention and understanding. That gift makes the speaker feel validated and valued. Do not underestimate the value of this gift. We spend much of our lives wishing to be "seen" by our loved ones, family, colleagues and friends. We go to extremes to achieve "recognition," when all that we really may need is simply to be heard.

This lesson is one that I never forget. It has been taught to me by every dying person with whom I have had the honor to serve at their bedside. To be seen is to be "real." And, remarkably, you need not be an intimate, or even a friend. You can be seen by someone with whom you have had great difficulties. And, in the

course of being seen, you inevitably and irreversibly alter your relationship. Listening is a form of healing for both the speaker and listened.

Transformative listening brings with it a "beginner's mind" - an absence of predetermined belief or judgment. It leaves room for silence, and silence honors the speaker. It allows for deeper thoughts to emerge, which permits the real issues to surface. Transformative listening teaches us to recognize our defensive reactions and to take charge of our responses. It confirms that we are most reactive to those perceived negative characteristics of the speaker that we secretly accuse ourselves of.

And how else do we achieve transformative listening? By focusing on the speaker. Only 7 percent of the perceived meaning of our communications is expressed through words. The remaining 93 percent is communicated through gestures and facial expressions, combinations of speech rate, rhythm, patterns, tone and emphasis. If you are not fully aware of where you are in your body and where the speaker is in hers, you risk missing the great majority of what is being communicated.

So, watch the speaker and listen to the speaker's patterns, rhythm and emphasis. Never interrupt. Wait for the speaker to pause. Advise...only if asked. Remember, being a transformative listener is first about the speaker, not you. Once the speaker is done, genuinely acknowledge and appreciate what you have heard. And, if you have done this right, there is a very good chance that the speaker will be prepared to listen to you.

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The Power of Story

by Timothy A. Tosta

As attorneys, our "output," orally and in writing, predominantly is confined to providing information, offering counsel, or engaging in advocacy. Regrettably, I believe that we have lost intimacy with one of the most powerful communication types - storytelling. In reconnecting to the power of story, I believe we can become more effective communicators, not only as counselors and advocates, but as colleagues, friends, family members and fulfilled human beings.

Stories are how humans have communicated through the millennia. They are how we know our heritage, our culture and our perceived place in the world. Your sense of self is a narrative composed of the myriad of stories that you remember, were told or made up to support your desired image. Stories invoke power beyond the sum of the facts that they report. They include emotional content, contextual framework and wisdom reaching far beyond rational analysis. They are as close as you can get to taking someone else for a walk in your shoes.

> *"Your sense of self is a narrative composed of the myriad of stories that you remember, were told or made up to support your desired image."*

Stories allow the listener to experience something that cannot be communicated any other way. Consequently, stories are "more true" than the facts they contain, because they are multidimensional. They fold together different realities and allow us to perceive in a new way - connecting people. Simple stories can convey deep truths. A Turkish proverb offers that: "To speak is to sow, to listen is to reap."

Storytelling includes three components: the teller, the telling and the listener. Powerful stories access three intelligences: cognitive (head), emotional (heart) and somatic (body). The art lies in weaving the components and intelligences together. Research has shown that in oral communication, only 7 percent of meaning is attributable to the words. Tone, speech rate, rhythm and emphasis account for 38 percent of meaning. Gestures and facial expressions convey the remaining 55 percent.

How do these components and intelligences combine to create "story power?" I offer three neuroscience metaphors. First, stories are synesthetic, that is, they appeal to more than one sense at the time. A synesthetic individual may hear music, but concurrently see colors associated with it. A good story, in addition to the information conveyed, triggers visual or auditory senses, or invokes a smell or a body sensation.

Stories invoke power beyond the sum of the facts that they report.

Second, when in the company of others, humans are not a "closed loop" system. Rather, through limbic brain resonance, we are constantly dancing in physiological and emotional relationships with others. So while we may believe that we are regulating ourselves, others actually are participating in that regulation with us. A story is like a companion.

Third, and related, is the system of mirror neurons. These neurons fire in our brains when we are observing someone else in action. Likewise, many of our actions are mirrored in the brain by those around us. A powerful story can become something that the listener emulates. Even though no one is present, a story can evoke a response from us as if someone else were present and acting.

In our work, our communications are focused, almost entirely, on the cognitive domain. As a consequence, they utterly fail to reach the emotional and somatic domains from which decisions are typically made. Facts and arguments alone cannot create story. It is up to the teller to weave those facts and arguments into something powerful that allows for a deeper connection with the listener. As T.S. Eliot said, "At the end of all our exploring we will arrive to where we started and know the place for the first time." That exploring is what stories do.

An archetypical story consists of: a starting point - status quo; change - drama; a turning point - climax; and the aftermath - denouement. Throughout any engagement, consider that you are working to "make" story. How will you tell the story of what has happened in the past, of what presently is going on and what a future outcome might be?

How do you create powerful stories? In the words of Ralph Waldo Emerson, "Self trust is the first secret of success." Remember, truth is more important than the facts. The truth is what you "know" in your gut as much

as your mind. Find the truth first, and notice how the facts support it. As a storyteller, see and hear like a child. The simple story resonates with greater truth. Take your experience and make it the experience of your listener.

To tell an effective story you need to know your intention in its telling. You must want to engage, to connect, to evoke your listener's curiosity and to persuade. What is the most important thing for your story to convey? What is the next most important thing? Who are the appropriate characters? What are the relevant actions? How clear can you make the experience?

You must also know your listeners. What do you know about your intended audience? How does that help you make your story connect? How are you inviting the listeners into the story? What offer are you making to them?

There are substantial differences between written and oral conveyance of story. Writing, in some ways, is a highly constrained medium. It is more difficult to engage the emotional and somatic intelligences. You have to make do with words, punctuation, typography, and, possibly, pictures. Writing is linear. You start here and proceed to there. However, it does allow the opportunity for immediate review. Oral storytelling allows you to use tonality, gestures, posture, and expressive facial behavior. You can use pacing, pauses, rhythm, volume, and tempo for emphasis. You are constrained by time and once you have spoken, the words are gone. But, you do have the advantage of establishing intimacy though a spatial relationship with your listener.

Be conscious of the strengths and weaknesses of your medium. A written story may vary considerably from the same story orally delivered. If your story can be both written and orally delivered, use the synergies available from the strengths of each. But, always speak in one voice. Appeal to all five senses. Think in scenes. Trigger images in the listener's mind. Never underestimate the power of metaphor. Metaphor opens the door to new perceptions of reality. Read your story aloud. Is it musical or cacophonous? Consider your pacing. Create "pauses" in your writing. In oral presentation, leave room for silence. Create room for your message to be understood. Be specific, concise and evocative. Use humor, if appropriate. It is a powerful persuader, emotionally and somatically. Build in appropriate repetitions, in the nature of a musical refrain.

Powerful storytelling takes practice, practice and more practice. Don't memorize it, own it. Storytelling requires a grounded presence, a desire to connect with the listener and access to all three intelligences. So when preparing, relax your body, release your habitual tensions, and assume an open posture.

Finally, always pay attention to the story your actions tell. Your story can never be true if you or your characters act contrary to it. Storytelling is at its best when the story cannot be separated from the teller and when it creates resonance between and among the intelligences of the teller and the listener.

Begin your practice now.

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Metaphors Matter

by Timothy A. Tosta

In 1980, linguist George Lakoff and philosopher Mark Johnson shook up the prim and proper world of linguistics by their publication of "Metaphors We Live By." They argued that metaphors are not matters of linguistic construction. Metaphors extend well beyond language. Rather, they are primarily a conceptual construction. Metaphors structure what we perceive, how we think and how we act. Reminding us that the essence of a metaphor is an understanding and experience of one thing in terms of another, Lakoff and Johnson examined as their first metaphor for analysis "argument is struggle." That metaphor, they maintained, structures what we do and how understand what we are doing when we argue.

Lakoff and Johnson suggested that we talk about arguments as struggle because we conceive of them that way - and we act according to the way we conceive of things. In arguments, we "attack a position." Claims are "indefensible." Criticisms are "right on target." Argument are "shot down." In structuring an argument, we look for "new lines of attack." We "gain ground" in making an argument or we are "wiped out." Finally, arguments are "won" or "lost."

Lakoff and Johnson warn that one of the difficulties of a metaphorical concept is that it can keep us from focusing on other aspects of the engagement that are inconsistent with that metaphor. For example, the argument is struggle metaphor causes us to lose sight of the cooperative and developmentally creative aspects of argument.

The limitation of the argument is struggle metaphor is that it structures our belief of what arguments are, channels our actions in a certain direction consistent with that belief and allows us to ignore opportunities that are inconsistent with the metaphor's premise.

So, please power up your Internet search engine and type in the words "lawyers" and "jokes." I send you here because the structure of humor is premised on the cultural acceptance of certain concepts, which are entirely metaphorical. That is, in order to be funny, a punchline generally has to be culturally known and accepted. The stretch or tension of the metaphorical concept is the energy behind the humor. As I engaged in my search, I found a predominant lawyer metaphor. At first, I thought it was lawyers are sharks, amoral predators, sea scavengers, unconscious, killing machines. Remarkably, this metaphor not only holds ground with legal critics, but finds considerable acceptance with the profession itself. Lawyers talk about some law firms as "shark tanks." We also hold certain practices to be "predatory." James Woods portrayed Sebastian Stark, a hard-driven, unscrupulous defense attorney turned prosecutor for the television series "Shark," which ran from 2006 to 2008. But I found other metaphorical candidates. One was vultures. Another was snakes. Using, no doubt, a much less rigorous methodology than Lakoff and Johnson, I concluded from my research that the predominant American metaphorical concept of our profession is that lawyers are non-human.

"The limitation of the argument is struggle metaphor is that it structures our belief of what arguments are, channels our actions in a certain direction consistent with that belief and allows us to ignore opportunities that are inconsistent with the metaphor's premise."

Lakoff and Johnson are the first to point out that the metaphorical concept is not truth. It is a belief, usually derived from culture and/or experience. From my perspective, this lawyer as non-human metaphor is all too pervasive in our culture. It damages not only those of us in the profession, but those who believe it to true about the profession. As Lakoff and Johnson note, metaphors "create realities for us." In this sense, metaphors can be self-fulfilling prophecies. What is a prominent belief becomes a guideline for action, which reinforces the metaphor. Thus, in its simplest form, a client may seek out counsel known for ruthlessness and, in the effort to satisfy the client's expectations, the lawyer supplies ruthlessness. And if this behavior proves effective, it is reinforced as a modality of successful lawyering, despite its incremental damage to the practitioner and the profession. Others, modeling on the ruthless lawyer's success spread the conduct, until it tips to become the predominant professional modality. As Lakoff and Johnson observe "What is at issue is not the truth or falsity of a metaphor, but the perceptions and inferences that follow from it and the actions that are sanctioned by it."

I would like to propose a new metaphor for the profession. It is one that I adopted a few years ago for my own practice. Unfortunately, it is esoteric; it requires explanation; and

consequently and it is not particularly catchy. But I previously have offered it to hundreds of lawyers to whom I have made presentations. And, it appears to have some traction. I am confident that one of you will find a way to improve on it. You ready? Here goes: Law practice is Aikido.

Aikido is a unique martial art form, created by Morihei Ueshiba in the early 20th century. Ueshiba, also known as O Sensei, or "Great Teacher," developed Aikido out of his need to harmonize his passivist philosophy with his extraordinary martial skills. Even into his 80s, Ueshiba could disarm any foe, resist any number of attackers and pin an opponent with a single finger. In essence, Aikido teaches that when confronted by an attack, the Aikidoist does not strike, but rather enters and blends with the energy of the attacker. That is, he or she moves toward the attacker, and then, at the last moment, slightly off the line of attack, turns so as to look momentarily at the situation from the attacker's viewpoint. As described by George Leonard in "The Way of Aikido," "From this position, many possibilities exist, including a good chance of reconciliation."

"By substituting "game" for "conflict," Aikido shifts its entire focus, energy and tone from struggle to active, creative engagement."

According to Leonard, Aikido conceptualizes an entirely different perspective of what an opponent is. That is, Aikido adopts on alternative metaphor. Leonard instructs Aikidoists to "be especially welcoming to your opponent. He or she is your guest, someone who has come to help you play the game. The better the opponent, the better the game. Accordingly, your opponent is to be treated in a gracious manner."

Nothing about this attitude suggests that you bring anything less to the game than your full attention, energy and competency. In fact, Leonard further instructs "Never ease up, this is the finest gift you can offer a true competitor. ... You can expect the same in return."

By substituting "game" for "conflict," Aikido shifts its entire focus, energy and tone from struggle to active, creative engagement. The "Ki" of Aikido references universal energy, the same energy known in Chinese healing systems as "chi" and the focus of which is concentrated in the "chakras" in another healing tradition. Ki unites all life forms. Thus, a "hit" in Aikido is recontextualized as a transfer of energy. The recipient of the energy considers it a gift to be put to more positive use.

And, consistent with Aikido's metaphorical framework, the teaching, "protect the attacker," is neither radical nor paradoxical. The moves in Aikido are designed to protect both the one attacked and, as possible, the attacker. That is the nature of the game.

Consider the differences in the quality of the legal profession if the predominant metaphor shifted to lawyers as Aikidoists. If Aikido became the prevailing concept of the profession, what opportunities would reside with individual practitioners, the profession at large and the culture in which our services are performed?

As Leonard notes, to view a situation from the attacker's viewpoint, while remaining centered and balanced, can lead to seemingly miraculous outcomes. Or, in the words of Ueshiba, "The way of a warrior ... is to stop trouble before it starts. ... The way of a warrior is to establish harmony."

What if we were to substitute in place of argument is struggle the metaphor argument is collaborative, creative, opportunity? How would our lives be better?

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Pay It Forward: Transgression and Atonement

by Timothy A. Tosta

A transgression is your inappropriate response to an interference with your plans or expectations that negatively impacts another. Transgressions can "rent too much space in your mind." You may harbor the belief that you ultimately will "pay" for your transgressions, but you continue to do nothing about them. This continued failure to "make amends" is an unconscious burden that impairs your ability to fully engage in the present.

Your transgressions become part of your narrative, shaping your perceptions, beliefs and judgments. Transgressions can also become habit, hurting your self-image and leading to deterioration of your health. But above all, transgressions cause suffering: A transgression inflicts harm on another, while contemporaneously inflicting harm on yourself.

> *"It is important to understand the nature of the transgression to determine whether it is right for atonement, its priority, and what may be the appropriate amends to make."*

There is a lot of self-denial around transgressions. You treat them as if they were impersonal, harmless acts. You blame the victims of your transgressions, attempting to make the victims the "cause" of your thoughtless acts. You create "excuse stories" that seek to blend your transgressions into the larger setting of your family, work, or culture, trying to minimize their impact. But as time goes on, the weight of these transgressions forces you to pay attention.

Atonement is the process through which you make amends to another for the consequences of your incompetency - to make things "whole" or "right" or "as good as they can be." Atonement allows you to unburden yourself from transgression. The path of atonement is healing. Making amends also allows you to comprehend how to avoid future misdeeds, to relieve yourself of the burdens of past actions, and to open yourself up to the practice of "paying it forward" - doing good simply for its own sake.

Transgressions arise from a multitude of circumstances and are almost infinite in kind and severity. But you can consider any single transgression from each of four vantage points: subjective, objective, relational and environmental. It is important to understand the nature of the transgression to determine whether it is right for atonement, its priority, and what may be the appropriate amends to make.

Let's begin with the subjective quadrant. Assuming your harmful response, what led to it? Was your act intentional, incompetent, or negligent? Was your action retaliatory or revengeful? Did you respond from fear, based on a perceived immediate threat or as a preventative measure? Did you misperceive the circumstances or the other party's intention? Was your action prompted by a particular, cultural circumstance - i.e. a "gunfight?" Did you intend your action to cause harm? If so, why and to what degree? Obviously, an action taken with the intention to cause harm occupies one extreme, while an action negligently taken without harm intended occupies the other.

The inquiry of the objective quadrant concerns how your harmful act is perceived "objectively." Irrespective of your subjective perception, did your act appear intentional, incompetent or negligent? Did you appear to be acting in a retaliatory or vengeful manner? And so on. The witnesses to your action came away with their own perceptions, despite your intentions. Those perceptions were as real to the observers, as your intentions were to you. In making amends, these perceptions will trump yours in measuring amends, unless or until you can realign those perceptions through your words and actions.

The next inquiry concerns how your action has framed others' perceptions of you. Intentionality, degree of harm, what was at stake, all will be blended into a story about you, which in some circumstances will be viewed as an aberration and, in others, as a confirmation of existing belief. As the story is repeated, spread and confirmed or denied by other stories, your relationship with your community evolves for better or worse.

Finally, the fourth quadrant assesses the impact of your action on the environment. Can the harm you caused realistically be assessed? Is it reparable? If so, over what time period? What resources will be needed to aid in reparation? What actions of other parties instigated, contributed to or aggravated the

harm of your act? Maybe you intended to cause harm and failed miserably. Lucky you! Perhaps, you actions were completely defensive but you caused significant harm nonetheless. Too bad! In this quadrant, intention becomes irrelevant. This is about bringing the world back into balance, as a consequence of your acts.

Alcoholics Anonymous and other 12 step programs have worked with hundreds of thousands of addicted individuals on atonement issues since the late 1930s. The AA experience is instructive in how to effectively make amends: Step 8 of the program provides, "Make a list of all persons you have harmed and become willing to make amends to them all." Step 9 provides, "Make direct amends to such people wherever possible, except when to do so would injure them or others."

As one AA commentator notes, "If we've continually harmed people and haven't made any effort toward amends, then we've got a lot of people, places and things to avoid. Large areas of life become closed off to us. When you're willing to make amends, those areas open up again. You don't have to avoid people anymore. This is true not only for people in recovery, but for all of us."

In carrying out Step 8, there is a consensus in the program's literature to do the following: Make an inventory of your transgressions and review it with a supportive person in your life. In collaboration, determine to whom you should or should not make amends.

Prioritize your inventory. Generally, there are three categories: immediate amends; eventual demands (those that you will make amends to, but not today); and "probably never" amends.

For those on the immediate amends list, take the first person and write down all the acts for which you seek to make amends. Review your notes with your supporter.

After you have gone through the list, review the specifics that you have written about each person and generalize. Chances are that there are patterns as to how you have acted. For example, you recall having ruined a specific family event, but then come to see that similar behavior has ruined many events with different people.

For each person, precisely script your admission of transgressions, apology and proposed amends, and review with your supporter. When the appointed time comes, you will want to work from your script.

Remember that atonement is intended to directly restore that which you have broken or damaged. However, if that is not possible, you may make restoration indirectly. An apology may be part of atonement, but alone is not sufficient. If you borrow a sum of money from a friend and fail to repay it, an apology would be, " I'm sorry that I borrowed money and didn't repay you." An amend would be that apology plus "Here is your money with interest."

Step 9 contains the caveat "whenever possible, except when to do so would injure...others." Sometimes direct amends are impossible. For instance, the person you injured has subsequently died. You still can make an "amend" by changing a specific behavior to serve as reparation, such as undertaking a regular practice of community service. Admitting an affair to a loved one may clear your conscience, but only at your loved one's expense. Your indirect amend may be to return home all of your attention, energy, and love.

Make amends at the first opportunity, except when to do so would cause further harm. In damaged relationships, unresolved conflicts continue to exist. In making amends, you do not wish to aggravate old antagonisms and resentments. You will need to make an initial inquiry as to whether your atonement conversation is appropriate. If an invitation is accepted, you still must have a proper attitude. You must have forgiven yourself and the other for any and all grievances between you. You cannot succeed in making amends if you are still angry or defensive.

You must state your apology without reservation, enumerating your transgressions and proposing your amends. You will need to be prepared for any response, without becoming angry. You must remain grounded, accepting and open to whatever transpires. The injured party has a right to refuse to your apology and offer. You can leave an open invitation to talk later, when circumstances are more comfortable. Recognize that you may never speak again.

Know that if you come to understand your actions clearly, regret their impact, forgive yourself, and commit to change future behavior, you will know, intuitively, whether or when to approach the person you harmed, what to say, and what an appropriate amend should be.

Atonement is an empathy and compassion building practice. It sharpens your awareness and makes you more competent in dealing with disruptions. As you atone, life simply gets better. You see yourself in a better light. You become more approachable as your transgressions evaporate. Friends and relationships multiply without effort. Finally, you may find a new capacity for generosity. You may begin to "pay it forward" by undertaking acts of kindness, almost unconsciously.

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Redemption

by Timothy A. Tosta

Michael's story is dedicated to my friends and colleagues in the criminal justice system. I am not drawing any conclusions or suggesting any lessons. All I know is that one individual emerged from the system, expecting something more of himself than his circumstances would have been expected to allow. And, he reached his goal.

On Monday, June 28, I received an e-mail transmittal from Eric, the Zen Hospice Project Volunteer Coordinator at Laguna Honda Hospital, informing us that Mike had passed that morning. He was 40 years old. He died of congestive heart failure. He had been with us since late September, 2009, and had undergone a metamorphosis. Whether he knew it or not, Mike flew away from us fully loved and respected, not only for the wonderful person that he was, but for the long and difficult journey that we had witnessed.

"Surrounded each and every day with volunteers who moved from weary to caring in very short order, Mike was supported in his quest to become a "nice guy."

Mike told me shortly after his entry to the ward: "Around the age of two, my mother left me at a shopping mall in Nashville. She went away and never came back. I never really knew her. I have no recollection of my father. I guess she figured that if I was found by a decent family at the mall, I would stand a better chance than if I had remained with her."

Mike had come to us from San Francisco General Hospital where he had been taken from the streets, after suffering an episode occasioned by his failing heart. It was determined that Mike's heart could not survive surgery and arrangements were made for his transfer to the hospice ward. Upon arriving to the ward, he told us.

"My life has been surrounded by madness. I just try to shut it out. I'm not proud of this, but I've been in prison most of my life. I'm illiterate, can't read or write. I have an ex-wife and 3 kids, ages 16, 18 and 22, but I have been ordered to stay away from them."

In fact, no one had found Mike at the Nashville mall. He slipped in and out of various state administered foster care programs and, ultimately, at the age of 17 found himself in the federal penitentiary. Following his stint in Tennessee, he served time in federal facilities in Florida, Ohio and California. Along the way, he became addicted to heroin, which, on his occasional release, led to crimes that returned him to prison.

By the time of his release in San Francisco, Mike could do no better than live on the streets, supporting his drug habit and watching his ever deteriorating health. Despite his circumstances, he regularly reported to his parole officer, avoiding his return to prison.

Despite his past, Mike held a lofty goal for himself. Upon being admitted to hospice, Mike declared, "I don't want to be remembered as a criminal. I want to be remembered as...a nice guy. I want to be at peace with myself."

Upon arriving at C-2, Mike struggled to make a new home. It was difficult. Mike began in the ward by carving out "his space," something learned from his prison years. At about 6 feet tall, approaching 200 lbs, with a stocky build, defining his "territory" really wasn't an issue for Mike. In the early days, he often paraded around the ward shirtless. His body was covered with prison tattoos and scars suggesting that he had been on the receiving end of several sharp objects. In establishing his "territory," Mike frightened many residents.

But, creating a safe place was critical to Mike. He once told me,

"You know what it's like to sleep in prison? When your cell mate, for almost nothing, can be "convinced" to do you in? You start to sleep really differently. Like, with one eye open."

Over time, and with some counseling, Mike began to understand that there was no risk posed to him at the ward. Surrounded each and every day with volunteers who moved from weary to caring in very short order, Mike was supported in his quest to become a "nice guy." At first, Mike was aloof in his interactions with other residents. However, he soon made friends with Jeff, an acerbic wisecracker, who also had spent considerable time behind bars. Jeff was at the end stage of colon cancer, making important human connections and attempting to hide his considerable pain.

Mike began sharing his "penitentiary cuisine" with the residents. Mike told us how with a hot plate and Spartan ingredients, he

could concoct a wide variety of dishes. One of his early favorites was pickled hard boiled eggs, which consisted of shelled hard boiled eggs being placed in a jar of jalapeÃ±os peppers for a day or so, until they turned a light green/blue grayish hue. He began by "selling" his product to volunteers and residents in order to buy more food stuff for other meals. Soon, he learned that selling in the ward ran afoul of our culture. He was surprised to find that people would just give him the food if he cooked and shared it with others.

Over the months of his stay, Mike moved from sharing food to simply sharing his presence, engaging residents in conversation and becoming the "watch dog" for those most vulnerable. He befriended Maria, a Filipina in her 70's and a devout Christian. Maria introduced Mike to bible study. Mike would attempt memorize what Maria read. He would sit quietly with Maria as she painted water colors.

As he recovered his strength and energy through a program of regular meals, a clean bed and good hygiene, Mike considered leaving the ward. He started working with the Social Services Department to secure a small apartment of his own.

When able, Mike would visit his parole officer, go to movies (accompanied by Hospice volunteers), and make runs to the grocery store for his cooking supplies.

As Mike opened up to volunteers and other residents, he began to find acceptance and caring coming his way for the first time in his life. His entire countenance softened. There was less of an edge. If Mike was a bear, he was morphing toward the teddy type. He began to express his feelings and articulate his care for others. Mike was visibly shaken when Jeff unexpectedly passed. He said, "I have to be really careful now about who I make friends with. You get close to someone here and then you have to watch them die. It's too much!"

As Mike felt the growing respect for him in the community, his kindness blossomed. He found a way of making his own "rounds" by checking in with individuals to see how they were doing. Eventually, an apartment was located for Mike. He, a social worker and one of the volunteers traveled by bus to visit it. Mike was excited by the prospect of being on his own and contemplated having guests to his new home. Perhaps, even a woman friend. But, above all, he looked forward to cooking his first meal there...macaroni and cheese.

In his last days at C-2, it seemed that Mike was beginning to appreciate how much love surrounded him and how well he functioned there. While he looked forward to the move, he also knew he would be losing a community that appreciated him and saw him the way he had wished to be seen. Mike was scheduled to move to his apartment on Tuesday, June 29. By late Sunday, all of his belongings had been organized and packed for his departure. On Monday morning he had breakfast and, somewhat uncharacteristically, decided to take a nap. He died in his sleep.

"As Mike opened up to volunteers and other residents, he began to find acceptance and caring coming his way for the first time in his life."

We all knew that Mike was vulnerable to his failing heart. But no one had expected his passing so soon. E-mails flowed around the volunteer community expressing love toward him and great sorrow at this sudden passing.

A volunteer remarked that a few months ago, he had taken Mike to the movie theatre to see *Avatar*. He reported that Mike had said, "You know, every action movie, in the end, also is really just a love story." And so it was for Mike, his action movie in the end was a love story. And, he died, remembered for his kindness.

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