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Court Review

Volume 51, Issue 3

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 51, Issue 3

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EDITOR'S NOTE

We are trying out two new features in this issue, and we hope you enjoy them.

First, you'll find a law-related crossword puzzle on page 122. The puzzle was written by Vic Fleming, a district judge in Little Rock, Arkansas. He has been a district judge since 1996, teaches a seminar at the University of Arkansas at Little Rock Bowen School of Law (his alma mater) on law and literature, and has written both legal humor columns and crossword puzzles for many years. He is willing to provide crossword puzzles for us in future issues as well.

Second, you'll find a new column, "Thoughts from Canada," by Canadian judge Wayne Gorman. He is a judge of the Provincial Court of Newfoundland and Labrador, as well as an active member of the Canadian Association of Provincial Court Judges. We have nearly 200 Canadian members of the American Judges Association; they find benefit in reading not only materials in *Court Review* that cover social-science topics (thus usually transcending national boundaries) but also discussions of legal issues as they are resolved in the United States. We think that our U.S. judges will also find interest in how Canadian courts resolve similar issues, and Judge Gorman is willing to provide examples of that in each issue.

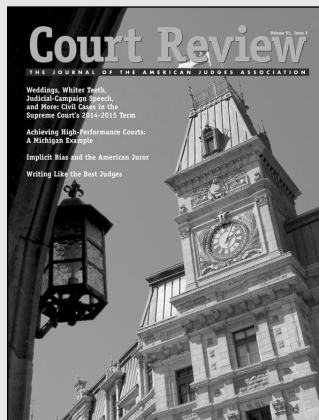
Please let us know what you think of these new features—along with any other suggestions you may have for articles or authors or subjects you'd like to see. You can contact me (sleben56@gmail.com) or my coeditor, Eve Brank (ebrank2@unl.edu).

Our issue begins with Professor Todd Pettys' annual review of the past Term's United States Supreme Court civil cases. The civil cases were especially interesting this year, and Professor Pettys has done his usual masterful job of reviewing them. If you have a chance, please thank him for his contribution.

Our second article looks at efforts to improve court performance in the courts of Ottawa County, Michigan. Most courts could benefit from a similar project, so we think you'll find it of interest.

Our third article considers whether it might be possible to lessen the effects of implicit bias on jurors. Researchers at the National Center for State Courts conducted an experiment to see whether a specific jury instruction about the issue might be helpful.

Finally, we have a review of Ross Guberman's new book on judicial writing, *Point Taken: How to Write Like the World's Best Judges*. We found the book worth reading for any judge who writes opinions. (After the book review was prepared, we noticed that the Oxford University Press had purchased an ad for the book in this issue too. The ad was purchased through our association staff; the editors of *Court Review* are not involved in selling ads for the issues, and we don't make any editorial decisions based on ad sales.)—SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 115 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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

Cover photo, Mary S. Watkins (maryswatkins@mac.com). The cover photo is of the Old Quebec City Courthouse, which opened in 1887 and served as a courthouse for nearly a century before its present use for the Quebec Ministry of Justice.

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President's Column

Brian MacKenzie

In my first column as president of the American Judges Association (AJA), I wrote about how our organization was working to improve itself. In the time since, I believe that effort has proven to be successful.

The growing number of Canadian judges in the AJA is a reflection of our commitment to representing all judges across North America. In this issue, you will see a new column from Canadian judge Wayne Gorman with the heading "Thoughts from Canada." He has provided some very practical advice on the issue of recusal, along with an overview of Canadian recusal rules.

It is not simply an influx of new Canadian judges that has fueled the renewed growth of our organization. Rather, the AJA has worked hard to spread its message that it is the Voice of the Judiciary®, with goals to reflect the diversity of judges across North America while keeping its commitment to Making Better Judges®.

As part of that effort, this year we began publishing a series of email broadcasts entitled "The Rundown" in an effort to explain how the AJA represents its members. If you haven't provided your email address or your spam filter has prevented you from receiving the emails, you can find them at this link: <http://amjudges.org/updates/>.

In October, the AJA's newest position paper, "Procedural Fairness and Drug Treatment Courts: Making The Judge The Key Component," will be presented at our annual educational conference. This position paper builds off the groundbreaking work on procedural fairness that has been a hallmark of the AJA. Our efforts to bring the four principles of procedural fairness to the forefront of the judicial conversation will continue next year, as we have reached an agreement to work with the National Association for Court Management to develop a joint

position paper and benchbook on the topic of the procedurally fair court.

This year, former AJA president Elliott Zide led an effort to revise our bylaws. In this issue of *Court Review*, there is a discussion of these proposed bylaws changes. (See pp. 126-27.) They are designed to modernize the AJA's governing structure so that it is better able to withstand challenges in the 21st century. The new bylaws will be voted upon by the membership at

the Seattle conference, so I hope you will take a moment to read about these proposed changes. Even if you're not going to be at the conference, please let us know what you think.

If you are thinking about attending the conference, it will be held October 4-7 at the Sheraton in downtown Seattle. This year the AJA has partnered with the Washington State Judiciary and the National Association of State Judicial

Educators (NASJE). Bringing together three organizations into one conference was challenging and exhilarating. Every year I look forward to the AJA conference, but as a result of these joint efforts, the scope of the offerings is truly exceptional. If you haven't been to an AJA conference, perhaps this is the time to attend. In closing, let me repeat the challenge that I made in my first column: Do more than be a member. Join one of the many AJA committees, and share your thoughts about making us all better judges. Think about running for the Board of Governors and working to grow the AJA. Get involved, if in no other way than by sending the incoming president John Conery an email with advice and asking him to share it with the membership. Lend us your voice to strengthen our voice in the ongoing debate about role of judges. I hope you enjoy the rest of this issue of *Court Review*; when you set it down, I hope that you will take up the AJA.



On Recusal Standards: The Yukon Francophone School Board Case

Wayne K. Gorman

Over the last number of years, a significant number of Canadian judges have joined the American Judges Association (Judge Russell Otter of the Ontario Court of Justice is the current AJA vice president). This has resulted in these Canadian judges receiving copies of *Court Review*. This has provided Canadian judges with an excellent source of information concerning the law as it exists and unfolds in the United States of America. Though there are substantial differences between the constitutions and legal systems of our two countries, there are also great similarities. Thus, *Court Review* provides Canadian judges with information that is useful and relevant to their consideration and application of Canadian law in the daily fulfillment of their judicial duties.

But no similar Canadian publication provides information on Canadian law to American judges, though such information might be of interest or use to American judges.

The purpose of this column in *Court Review* is to provide such information concerning the Canadian legal system to American judges. Thus, the editors willing and the readers being interested, for each issue of *Court Review* I will write a brief column on a development in Canadian law that, because of its universal nature, might be of interest to an American judge.

The Canadian cases I refer to may be at any level of court, but because this edition of *Court Review* includes the first of two articles reviewing the past Term of the United States Supreme Court, I have chosen to review a recent decision of the Supreme Court of Canada that I believe might be of interest and of use to American judges.

YUKON FRANCOPHONE SCHOOL BOARD V. YUKON (ATTORNEY GENERAL)

The test for recusal based upon an allegation of reasonable apprehension of bias is essentially the same in Canada, England, and the United States: it is an objective test, which asks whether a reasonable person would conclude that the presiding judge was unable to carry out his or her function impartially.¹ In *Yukon Francophone School Board v. Yukon (Attorney General)*,² the Supreme Court of Canada had a recent opportunity to consider when a judge should recuse himself or herself. One of the interesting things about this decision is that it con-

siders the issue from the perspective of intervention in the trial process by the trial judge and in relation to the trial judge's involvement with an association with similar goals as one of the litigants.³

The Background:

In *Yukon Francophone School Board v. Yukon (Attorney General)*, the Yukon Francophone School Board sued the Yukon government "for what it claimed were deficiencies in the provision of minority language education. The trial judge ruled in the Board's favour on most issues." On appeal to the Yukon Court of Appeal, a new hearing was ordered. The Court of Appeal concluded that there was a reasonable apprehension of bias on the part of the trial judge based upon a number of incidents during the trial as well as the trial judge's involvement as a governor of a philanthropic Francophone community organization in Alberta. An appeal was taken to the Supreme Court of Canada.

The Supreme Court agreed, in part, with the Court of Appeal's conclusion that the trial judge's actions during the hearing raised a reasonable apprehension of bias.

The Trial Judge's Behavior During the Trial:

During the course of the trial, the trial judge acted in an unfortunate manner. The Supreme Court of Canada referred to the trial judge's behavior as being "troubling and problematic" (at paragraph 44). This included not providing counsel for the Attorney General an opportunity to be heard; suggesting, without evidence, that counsel's request for an adjournment was a delay tactic; and treating counsel with a general lack of respect (such as making disparaging remarks).

The Test:

The Supreme Court of Canada indicated that the test for determining whether a reasonable apprehension of bias has arisen is an objective one: "what would a reasonable, informed person think." The Court noted, at paragraph 22, that the "objective of the test is to ensure not only the reality, but the appearance of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality." However, the Supreme Court also indicated that this does not mean that

Footnotes

1. See *Wewaykum Indian Band v. Canada*, [2003] S.C.R. 259 (Can.); *Caperton v. A.T. Massey Coal Co.*, 566 U.S. 868 (2009); and *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*, [2000] Q.B. 451 (A.C. 1999) (U.K.). For cases in the United Kingdom involving an actual conflict of interest, courts have referred to these as "automatic disqualification cases." See *Locabail (U.K.) Ltd.*, [2000] Q.B. 451, 463-64 (U.K.).
2. 2015 S.C.C. 25 (Can.).

3. Matthew Groves suggests that the "facts raised in support of a claim of bias will always depend upon the wider context of the case in which they are raised but [in] most cases may be located within what Deane J described in *Webb v The Queen* as the 'four distinct, though sometimes overlapping main categories' of bias. Those categories are interest, conduct, association and extraneous information." Matthew Groves, *Empathy, Experience & the Rule Against Bias in Criminal Trials*, 36 CRIM. L. J. (Aus.) 84 (2012).

a judge can have “no prior conceptions [or] opinions” (at paragraphs 33 and 34):

Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge’s identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one.

A judge’s identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand “life” — their own and those whose lives reflect different realities.

The Trial Judge’s Interventions:

The Supreme Court of Canada agreed with the Court of Appeal that the trial judge’s conduct during the application raised a reasonable apprehension of bias. The Supreme Court concluded that though appellate courts “are rightfully reluctant to intervene on the grounds that a trial judge’s conduct crossed the line from permissibly managing the trial to improperly interfering with the case” (at paragraph 54), the “fine balance” was “inappropriately tipped in this case” (at paragraph 55):

While the threshold for a reasonable apprehension of bias is high, in my respectful view, the “fine balance” was inappropriately tipped in this case. The trial judge’s actions in relation to the confidentiality of student files, the request to have Mr. DeBruyn testify by affidavit, the disparaging remarks, and the unusual costs award and procedure, taken together and viewed in their context, would lead a reasonable and informed person to see the trial judge’s conduct as giving rise to a reasonable apprehension of bias.

The Trial Judge’s Involvement with a Francophone Association:

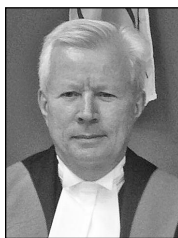
The Supreme Court of Canada disagreed with the Court of Appeal’s conclusion that the trial judge’s involvement in a Francophone organization raised a reasonable apprehension of bias. The Supreme Court held that the mere involvement of the trial judge in an organization similar to one of the litigants was insufficient to establish a reasonable apprehension of bias (at paragraph 62):

In this case, the Court of Appeal found that the trial judge’s involvement as a governor of the Fondation franco-albertaine was problematic. There is, however, little in the record about the organization. In particular, it is

difficult to see how, based on the evidence, one could conclude that its vision “would clearly align” with certain positions taken by the Board in this case or that the trial judge’s involvement in the organization foreclosed his ability to approach this case with an open mind. Standing alone, vague statements about the organization’s mission and vision do not displace the presumption of impartiality. While I agree that consideration of the trial judge’s current role as a governor of the organization was a valid part of the contextual bias inquiry in this case, I am not persuaded that his involvement with an organization whose functions are largely undefined on the evidence, can be said to rise to the level of a contributing factor such that the judge, as the Court of Appeal said, “should not have sat on [this case]” (at para. 200).

CONCLUSION

Normally we can avoid applications for recusal, suggesting that a reasonable apprehension of bias exists, before they are raised by declining to hear a particular case. However, once the case commences, excessive intervention will invariably lead to such an argument being raised. We do not have adopt a “sphinx-like” demeanor,⁴ but the Alberta Court of Appeal has suggested that there will be few “occasions during a trial where the accused is represented by counsel that a judge may question a witness without creating the impression that he or she is entering the fray and leaving judicial impartiality behind.”⁵ Similarly, the Ontario Court of Appeal has indicated that trial judges “are, at bottom, listeners” and thus, it “is counsel’s job, not the trial judge’s, to explore inconsistencies in a witness’ testimony.”⁶ Thus, although excessive intervention is one potential basis for someone to claim a reasonable apprehension of judicial bias, it is a basis that we can easily avoid.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (*Keeping Up is Hard to Do: A Trial Judge’s Reading Blog*) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (*Of Particular Interest to Provincial Court Judges*) for the Canadian Provincial Judges’ Journal.

Judge Gorman’s work has been widely published. His latest article is *Ours is to Reason Why: The Law of Rendering Judgment*, 62 *Criminal Law Quarterly* 301 (2015). Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca. For United States judges who may want to read in full one of the Canadian decisions referred to here, you can contact Judge Gorman and he will forward a copy to you by email.

4. See *R. v. McGrath*, [2014] 2014 NLCA 40, 2014 CarswellNfld 317, Nfld. & P.E.I.R. 252, ¶ 27 (Can. Nfld.).
5. *R. v. Crawford*, [2015] 2015 ABCA 175, 2015 CarswellAlta 879, ¶ 7 (Can. Alta.).
6. *R. v. Huang*, [2013] 2013 ONCA 240, 2013 CarswellOnt 4225, 115 O.R. (3d) 596, ¶ 33 (Can. Ont.). A distinction, however, has been made between comments or questions to a witness and “statements made by a judge during a colloquy,” see *R. v. Elliott*, [2015]

2015 BCCA 295, 2015 CarswellBC 1957, ¶ 21 (Can. BC.). The following comment by the trial judge to the accused during the accused’s testimony in *Huang* led to the Court of Appeal concluding that a reasonable apprehension of bias had been established: “I’m going to have you stop right there for a minute. Do you understand what perjury is, Sir? Do you want to take a minute with your counsel and she will instruct you what perjury is and that usually it incorporates about a year in custody.” 2013 ONCA 240, ¶ 10.



Writing Like the Best Judges

Steve Leben

ROSS GUBERMAN, *POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES*, Oxford University Press, 2014. 376 pp. \$24.95.

With more than 30,000 judges in the United States alone, you'd expect to find an impressive array of judicial-training materials. And there are some good ones—the American Judges Association's video training series for handling domestic-violence cases (education.amjudges.org) stands out as one recent example. But there's not much out there specifically on judicial writing, and what's out there is generally limited in scope (reflecting the idiosyncratic views of a single author or even of a committee), outdated, or . . . well, boring.

Legal-writing consultant Ross Guberman has entered the market with a new book on judicial writing. Any judge who writes opinions should read it.

Guberman organized his book, *Point Taken: How to Write Like the World's Best Judges*, around opinion excerpts taken from 34 judges well known for their writing abilities. The chosen judges are mostly appellate judges (six are trial judges); mostly from the United States (six are from Canada, the United Kingdom, or Australia); and mostly still on the bench (13 are no longer active). The current judges include John G. Roberts, Jr., Antonin Scalia, Ruth Bader Ginsburg, and Elena Kagan from the United States Supreme Court; United States appellate judges Marsha Berzon, Edward Carnes, Frank Easterbrook, Brett Kavanaugh, Alex Kozinski, Richard Posner, O. Rogeriee Thompson, and Diane Wood; and Canadian Chief Justice Beverley McLachlin. The former judges include Benjamin Cardozo, Lord Denning, Learned Hand, Robert Jackson, John Paul Stevens, Roger Traynor, and Patricia Wald.

With that lineup and Guberman's review of hundreds of their opinions, it's no surprise that *Point Taken* is filled with example after example not just of great writing, but also great judging.

This book follows the format of Guberman's book on writing for lawyers, *Point Made: How to Write Like the Nation's Top Advocates*, now in its second edition (2014). In both books, Guberman covers key points—micro and macro—in brief writing and opinion writing, using examples from top lawyers and judges to demonstrate the goals and techniques he urges readers to adopt.

At the macro level, *Point Taken* covers crafting opinion openers, reporting the facts, and constructing an effective legal analysis. The micro level focuses on words and phrases to use or avoid, elements of style (like the effective use of em dashes, semicolons, and colons), and what Guberman calls stylistic “nice-to-haves”: metaphors, similes, analogies, literary references, and rhetorical devices.

Guberman's goal is to “[g]o bold on judicial opinions,” providing a “guide that will transform the work of some of the world's best judges into a concrete step-by-step method acces-

sible to judges at all levels and across jurisdictions.” A lofty goal, and Guberman largely succeeds.

My favorite part of the book is his section on openers. Those of us who write a large number of opinions under time pressure may opt for a standard format we can use to turn out opinions quickly. Or your court may have a preferred (or at least standard) method of writing opinions. Guberman has identified four basic styles for the opener, and he provides examples and suggestions for each style. Just reading through these took me out of the rut I had been in and got me to try something different for the next opinion on my plate. Guberman provides useful suggestions about when each opener may be most appropriate and about how best to approach each style.

The four types of openers break down along two variables—length and whether they answer the case's main question. Guberman calls a short opener that answers the main question a “sound bite” and a longer one an “op-ed.” If the opener leaves the result unresolved, a succinct one is a “teaser” and a detailed one is a “trailer.”

In the section on openers alone, Guberman provides 28 examples from great writers (as well as a clunker from Justice Anthony Kennedy for contrast). You immediately see that a great opinion can start with any of these methods.

Since the value of the book comes through its examples, let's look at some of the openers he included. We'll start with a teaser from Alex Kozinski—only four sentences, but you know what the issue is, and you're ready to read more:

Long after the public spotlight has moved on in search of fresh intrigue, the lawyers remain. And so we find ourselves adjudicating a decade-old dispute between Gennifer Flowers and what she affectionately refers to as the “Clinton smear machine”: James Carville, George Stephanopolous and Hillary Clinton. Flowers charges that said machine destroyed her reputation by painting her as a fraud and a liar after she disclosed her affair with Bill Clinton. We decide whether Flowers's claims are timely and, if so, whether they survive a motion to dismiss.

You might respond that it's easy to make a case between Flowers and the “Clinton smear machine” into a good read. But Guberman offers a three-sentence teaser from Antonin Scalia that quite effectively sets up a much more mundane issue:

Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws. A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution. We consider whether, when the defendant produces some evidence supporting such a defense, the Government must prove beyond a reason-

able doubt that he did not withdraw outside the statute-of-limitations period.

And Guberman offers a teaser from Lord Denning that's hard to beat for sheer fun: "This is the case of the barmaid who was badly bitten by a big dog."

For an example of a trailer opener, Guberman breaks down in detail one that Richard Posner used to start an immigration appeal:

Questor Cecaj, who together with his wife is seeking asylum in the United States, was active in the Democratic Party of Albania at a time when the country was ruled by the Socialist Party. Persecution of Democratic Party activists during this period has been found in a number of cases. In 1998, Cecaj—whom the immigration judge found wholly credible—was arrested following a political protest in which he had participated. He was detained for six days and during that period was beaten by masked police with rubber truncheons and also kicked, suffering injuries that required his hospitalization. A few days after his release from the hospital a member of the Socialist Party accosted Cecaj on the street and fired a gun near his head, an act that Cecaj sensibly interpreted as a threat. He fled to Greece but returned in 2000 and resumed his political activity with the New Democratic Party, which is related to the Democratic Party, though the precise relationship is obscure. The following year, after an unsuccessful run for mayor of his hometown, he stood for the Albanian parliament on the New Democratic Party ticket in his hometown, which was dominated by the Socialist Party. Although he was a well-known local figure and candidate for public office, he was arrested during the campaign and beaten by the police, ostensibly for not having identification papers on him. He also received threatening phone calls, which he believed came from the police. The last straw was the kidnapping of his 10-year-old brother by unknown persons who told the child that he was being kidnapped because of Cecaj's political activity and that the child "would end up dead" if Cecaj "didn't do what they say." The child was released unharmed after a few hours but Cecaj received a call in which they "said that [the kidnapping] was the last warning." Cecaj prudently abandoned his candidacy and left Albania with his wife.

The immigration judge ruled that Cecaj's testimony did not establish that he had been persecuted.

Guberman spends more than a page analyzing this Posner opener. He points out that it shows "how skilled writers use the passive voice on purpose": "The passive voice improves the flow of the first two sentences: the construction 'was ruled by' helps keep 'country' closer to Albania, and the 'has been found in a number of cases' keeps 'activists' closer to the previous sentence, which is about politics, not case law." He continues to analyze the additional uses of passive voice that kept the focus on Cecaj and his story, notes the strong, vivid verbs (fled, fired, ruled, accosted, kicked, dominated, stood for, abandoned, left), and the use of em dashes to slow down the reader

when Posner reported a key fact—that the immigration judge found Cecaj "wholly credible."

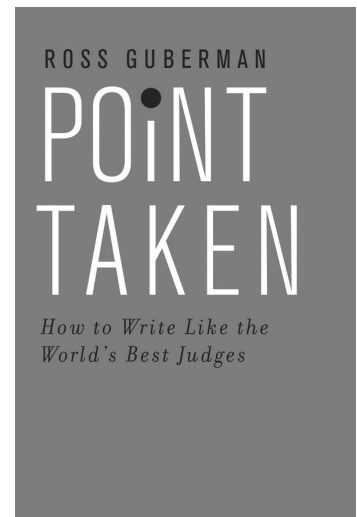
But Guberman also points to reasons Posner's style "is not always to everyone's liking"—using a tone that "is so cocksure and so one-sided that the immigration judge is made to sound like a fool" (Guberman assumes that "there must be some counterargument") and including expressions of opinion ("Cecaj sensibly interpreted," "Cecaj prudently abandoned") when the facts were quite strong enough on their own.

Examples and discussions like this are what make the book so strong. We see some of the very best judicial writers at their very best. Guberman identifies what works about their approaches as well as what doesn't. He raises questions judges must consider that go beyond craft to how they see their role as a judge. And judges reading the book get to decide what makes sense for their own work.

After covering how to write clear, engaging openers, Guberman moves on to address the other main tasks of an opinion—telling the facts and providing the legal analysis. Here too, Guberman fills each chapter with examples of great writing and explains why some methods work better than others, especially in certain types of cases. For example, in presenting the facts, he urges taking out all details that play no part in the analysis, while providing detailed treatment of the facts that are the most important to your reasoning. In legal analysis, when citing or distinguishing cases, he again urges homing in on only the key facts that link—or distinguish—two cases.

Guberman provides advice on grammar and writing style both in footnotes to the opinion excerpts found throughout the book and in separate sections on style and punctuation. The footnotes are easy to skip for readers who want to stick to the main topic but are rich in useful comments about writing style. In addition to pointing out Posner's skilled use of passive voice, for example, Guberman uses footnotes to compliment John Roberts for purposefully splitting infinitives to keep his message clear. (Roberts, by the way, is clearly a Guberman favorite. Not only does Guberman include a great many Roberts opinions with gushing praise ["[t]he magic of Roberts's writing"], Guberman also spares Roberts from criticism he gives to others. When Roberts uses "the fact that" [p. 90], nary a word is said. When Patricia Wald uses it [p. 129], Guberman inserts a tsk-tsk footnote citing to Strunk and White.)

Guberman also devotes a chapter to dissents. Here, he takes a position that may not be applicable to all multi-member courts: "The best dissents aren't written like majority opinions that just so happen to reach a different conclusion. They use the majority opinion as a springboard instead, poking holes in



the majority's reasoning and highlighting points of disagreement, all the while tipping a hat to the court's authority and dignity."

Someone I respected—and I'm sorry that I can't recall who—once told me the opposite. He suggested writing at least the first draft of the dissent as if it were a majority opinion, crafting responses to the majority only after you first have a coherent opinion going the other way. At least some of the time, that may be a better way both to maintain the collegiality of a court and, if further review is still possible, to convince a higher court to take and reverse the decision. Doing so keeps the main point—the issue before the court—as the main point, avoiding potential focus on what may seem an altogether non-collegial attack, especially to one's colleagues.¹ For example, Guberman suggests that in some cases a dissent can point to the majority as elitists with no concern for their limits, in other cases as populists pandering to popular will. No doubt that can be done, and Guberman's advice aptly reflects several dissents from the United States Supreme Court that he includes as examples. On most courts, though, I would think that biting dissents should be used sparingly.²

The book offers more for appellate judges than trial judges, but there's enough to satisfy both audiences. For example, trial judges often set out facts (or even conclusions of law) in separately numbered paragraphs; some appellate courts now do this too as an aid to public-domain citations. In either case, Guberman explains why good headings can still help the reader process facts or legal analysis.

If Guberman decides to do a second edition of the book (as he's already done for *Point Made*), he could do a bit more for trial judges on how they might make factual findings that are readable yet effective in allowing appellate review. He also could add some current state-court judges, presently unrepre-

sented in his sample. And he should provide some advice on the important question he introduces at the front of his book: Just whom should the judge regard as the audience for the opinion? An opinion written for a lay audience would surely differ from one written for lawyers. In today's environment, with respect for public institutions, including the judiciary, at historically low levels, and with much greater Internet access to judicial opinions, we might all benefit from making judicial opinions more accessible to the lay reader.

But my suggestions and occasional criticisms should not be overstated. Guberman's *Point Taken* is—by far—the best book I've seen on judicial writing.

Guberman has compiled excellent examples of judicial writing (as well as a few examples of poor writing). He explains the craftsmanship these exemplary judges use. And he provides solid guidance for how you could at least attempt to do similar work.

Any judge who studies the book will become a better writer. And an already talented writer who reads the book will also become a better judge.



Steve Leben is a judge on the Kansas Court of Appeals and the coeditor of *Court Review*. The National Center for State Courts awarded him the William H. Rehnquist Award for Judicial Excellence in 2014 in recognition of his recent efforts promoting procedural fairness in America's courts and his long-time commitment to judicial-system improvements.

Footnotes

1. One case I handled with this approach was *State v. Morlock*, 190 P.3d 1001, 1016-33 (Kan. Ct. App. 2008) (Leben, J., dissenting), *rev'd* 218 P.3d 801 (Kan. 2009).
2. I do not suggest that I am above such a dissent. See *Fischer v. State*, 206 P.3d 13, 16-22 (Kan. Ct. App. 2008) (Leben, J., dissenting) (criticizing majority opinion requiring that convicted murderer be brought to rural courthouse 287 miles from his

prison for brief hearing rather than participating by phone; concluding, "The court's opinion in this case will undoubtedly become one of the most widely read decisions in every prison and jail library in Kansas. It didn't need to be."), *rev'd* 295 P.3d 560 (Kan. 2013). I have admittedly omitted reference to my dissenting opinions that have gathered only dust, not further review by my state's supreme court.

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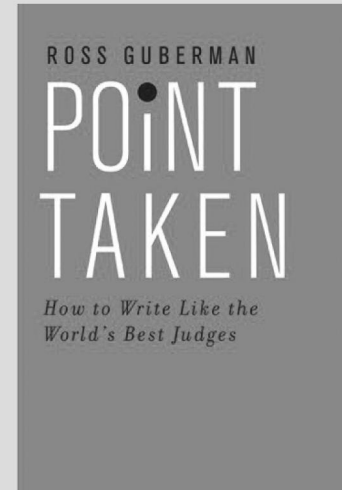
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Weddings, Whiter Teeth, Judicial-Campaign Speech, and More: Civil Cases in the Supreme Court's 2014-2015 Term

Todd E. Pettys

There can be little doubt about the ruling for which the Supreme Court's 2014-2015 Term will best be remembered. In its penultimate public session—and over four fierce dissenting opinions—the Court struck down all remaining state bans on same-sex marriage, thereby simultaneously setting in place an enormous milestone in the legal rights of America's gays and lesbians and, for the ruling's opponents, raising the specter of *Lochner* and judicial illegitimacy. We will begin by briefly revisiting that landmark ruling and then will turn to the Term's other significant decisions, concerning issues involving administrative law, antitrust, due process, elections and redistricting, employment discrimination, evidence, executive power, fair housing, federal jurisdiction, health care, religion, speech, takings, taxation, and more.

SAME-SEX MARRIAGE

It is inconceivable that this Term summary will be the first to carry the news to anyone that, in *Obergefell v. Hodges*,¹ the Supreme Court ruled that the Fourteenth Amendment grants same-sex couples the right to marry and to have their marriages recognized in all states. Joined by the Court's four Democratic appointees, Justice Kennedy found that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty.”² With respect to the equal-protection claim, the Court did not settle upon a standard of review for sexual-orientation classifications but did twice say that sexual orientation is an immutable trait—a finding that likely helps to lay the groundwork for finding heightened scrutiny appropriate in a future case. The Court's four other Republican appointees each filed dissenting opinions excoriating the majority for, in their view, ignoring the limits of the Constitution and of the judicial role and halting midstream a dynamic public debate about the marital rights of same-sex couples.

Given the ruling's familiarity among all readers, a novel approach to summarizing the majority and principal dissenting opinions seems in order. Here, then, are simply words and phrases from those two texts. Taken together, these snippets nicely capture the stark disagreements that so sharply divided the Court.

From Justice Kennedy's opinion for the majority (with quotation marks omitted): Identity. Profound hopes and aspirations. Centrality. Immutable nature. Fundamental. Individual dignity and autonomy. A lonely person might call out only to find no one there. Loving and nurturing. Keystone of our social order. Demeans gays and lesbians. Stigma and injury. Disparage their choices and diminish their personhood. Disrespect and subordinate. Urgency. Substantial and continuing harm.

From the principal dissent, written by Chief Justice Roberts (with quotation marks again omitted): Not a legislature. Government of laws, not of men. Stealing this issue from the people. Dramatic social change. Act of will, not legal judgment. Just who do we think we are? If I were a legislator. Indefensible as a matter of constitutional law. *Dred Scott*. Aggressive application of substantive due process. Breaks sharply from decades of precedent. Marriage as traditionally defined. *Lochner*. Exalts the role of the judiciary. Celebrate. But [the Constitution] had nothing to do with it.

ADMINISTRATIVE LAW

For nearly 20 years, following its decision in *Paralyzed Veterans of America v. D.C. Arena L.P.*,³ the District of Columbia Circuit had held that, although the Administrative Procedure Act does not require notice-and-comment procedures when an agency issues a rule interpreting one of its own regulations,⁴ such procedures *are* required when an agency wishes to replace one of its existing interpretations with a new interpretation that is significantly different. In *Perez v. Mortgage Bankers Association*,⁵ the Supreme Court unanimously rejected the *Paralyzed Veterans* doctrine, finding it inconsistent with the APA's plain language.⁶ When poised to withdraw an earlier regulatory interpretation concerning whether mortgage-loan officers are covered by the Fair Labor Standards Act, therefore, the Department of Labor was not required to provide the public with notice or an opportunity to comment.

Perhaps even more importantly, a few justices used the case as an opportunity to signal—for the second time in three years—that major changes may be coming to this area of the law. Two terms ago, in *Decker v. Northwest Environmental Defense Center*,⁷ Justice Scalia filed a separate opinion casting doubt on *Bowles v. Seminole Rock & Sand Co.*⁸ and *Auer v. Rob-*

Footnotes

1. 135 S. Ct. 2584 (2015).
2. *Id.* at 2604.
3. 117 F3d 579 (D.C. Cir. 1997).
4. See 5 U.S.C. § 553(b)(A).
5. 135 S. Ct. 1199 (2015).

6. See *id.* at 1206 (“Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.”).
7. 133 S. Ct. 1326 (2013).
8. 325 U.S. 410 (1945).

bins,⁹ the two leading cases calling for judicial deference to agencies' interpretations of their own regulations. Chief Justice Roberts and Justice Alito filed a short opinion in *Decker*, saying that Justice Scalia had raised important issues for determination in a future case. Here in *Mortgage Bankers Association*, Justice Scalia filed another opinion reiterating his concerns,¹⁰ Justice Thomas argued at length that *Seminole Rock* and *Auer* raise separation-of-powers problems,¹¹ and Justice Alito filed an opinion stating that Justices Scalia and Thomas had "offer[ed] substantial reasons why" the deference prescribed by those cases "may be incorrect" and declaring that these issues should be "explored through full briefing and argument" in a future case.¹² An invitation has plainly been issued.

An even more familiar form of deference—deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹³ to administrative agencies' reasonable interpretations of ambiguous statutory provisions—also drew the justices' attention this Term. As noted under the Health Care heading below, the Court in *King v. Burwell*¹⁴ found *Chevron* deference categorically inappropriate in the Term's major ruling on the Patient Protection and Affordable Care Act, in large part because the "extraordinary case" involved the expenditure of billions of dollars and the health care of millions of people and thus wasn't likely regarded by Congress as an appropriate occasion for deferring to the Internal Revenue Service. In its ruling handed down several days later in *Michigan v. EPA*,¹⁵ the Court applied the *Chevron* framework but found deference to the EPA inappropriate, concluding that the agency's interpretation of the Clean Air Act was unreasonable. Potentially even more significant in that case was Justice Thomas's concurrence, in which he suggested that the entire *Chevron*-deference regime might be unconstitutional under separation-of-powers principles.

ANTITRUST

If you live in North Carolina and are interested in whitening your teeth, North Carolina's dentists are eager—perhaps a bit too eager, it turns out—to win your business. Beginning in 2006, the North Carolina State Board of Dental Examiners, on which many practicing dentists sit, began sending cease-and-desist letters to non-dentists who were offering teeth-whitening services. The Board contended that those non-dentists were engaged in the unlicensed practice of dentistry. When the Federal Trade Commission (FTC) charged the Board with anticompetitive conduct, the Board sought the shelter of state-action immunity.

The Supreme Court ruled against the Board in *North Car-*

*olina State Board of Dental Examiners v. FTC.*¹⁶ Writing for a six-member majority, Justice Kennedy acknowledged that the nation's antitrust laws "confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity."¹⁷ Yet the dentist-laden Board was not entitled to that immunity here, Justice Kennedy explained, because its actions against non-dentists had not been supervised by the State itself and thus State officials were not politically accountable for the Board's anticompetitive actions. Absent such political accountability, the Court reasoned, there was too great a risk that the Board's dentists would restrain trade to advance their private interests. Joined in dissent by Justices Scalia and Thomas, Justice Alito argued that the majority's holding was contrary to the Court's precedent, was in tension with principles of federalism, and would create confusion about what, precisely, a state must do in order to ensure that a given agency can successfully claim immunity.

DUE PROCESS

In *Kerry v. Din*,¹⁸ Fauzia Din—an American citizen whose spouse formerly worked in Afghanistan's Taliban regime—claimed a violation of her Fifth Amendment procedural-due-process rights. The State Department had denied her husband's visa application and, when it did so, provided no statement of reasons beyond citing the federal statute that withholds visas from persons who have engaged in terrorist activities. A fractured Court rejected Din's claim that, on the strength of a liberty interest in living with her husband in the United States, she was entitled to a more complete explanation of the government's reasons.

Joined by the Chief Justice and Justice Thomas, Justice Scalia concluded that Din did not have any constitutionally protected liberty interest at stake, finding Din's assertion to the contrary "absurd" under the original meaning of the Due Process Clause.¹⁹ Justices Kennedy and Alito found that, even if Din did have a protected liberty interest, she had received all of the process she was owed when the State Department cited the terrorism statute. Joined by Justices Ginsburg, Sotomayor, and

If you live in North Carolina and are interested in whitening your teeth, North Carolina's dentists are eager—perhaps a bit too eager, it turns out—to win your business.

9. 519 U.S. 452 (1997).

10. See *Mortgage Bankers Ass'n*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment) ("The agency is free to interpret its own regulations with or without notice or comment; but courts will decide—with no deference to the agency—whether that interpretation is correct.").

11. See *id.* at 1213 (Thomas, J., concurring in the judgment) ("Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to pre-

cisely the abuses that the Framers sought to prevent.").

12. *Id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment).

13. 467 U.S. 837 (1984).

14. 135 S. Ct. 2480 (2015).

15. 135 S. Ct. 2699 (2015).

16. 135 S. Ct. 1101 (2015).

17. *Id.* at 1110 (citing *Parker v. Brown*, 317 U.S. 341 (1943)).

18. 135 S. Ct. 2128 (2015).

19. *Id.* at 2133 (plurality op.).

The Court found that Elauf could prevail merely by showing that her “need for an accommodation was a motivating factor in [Abercrombie’s] decision.”

Kagan, Justice Breyer dissented, concluding that spouses have a liberty interest in living together and that “[t]he generality of the statutory provision cited and the lack of factual support mean that here, the reason given is analogous to telling a criminal defendant only that he is accused of ‘breaking the law.’”²⁰

ELECTIONS AND REDISTRICTING

Led by Justice Ginsburg and joined by Justices Kennedy, Breyer, Sotomayor, and Kagan, the Court held in *Arizona State Legislature v. Arizona Independent Redistricting Commission*²¹ that the Elections Clause does not bar Arizona voters from using that state’s initiative process to shift from the legislature to an independent commission the task of drawing federal congressional districts. The Elections Clause states that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations”²² The Arizona Legislature argued that, in light of that clause’s use of the phrase “the Legislature thereof,” it had the sole power to draw the state’s districts for congressional elections. While concluding that the legislature did have standing to bring that claim (because it was “an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers”²³), the Court rejected the legislature’s claim on the merits. The Court concluded that the term “legislature” often refers broadly to the law-making power (rather than, more narrowly, to an elected representative body), and that the term carries that broader meaning in the Elections Clause. The clause’s main purpose, the Court said, “was to empower Congress to override state election rules, not to restrict the way States enact legislation.”²⁴ Even if the nation’s founders did not foresee that citizens in some states would one day make heavy use of initiatives as a law-making method, Justice Ginsburg said, “the invention of the initiative was in full harmony with the Constitution’s conception of the people as the font of governmental power.”²⁵

Chief Justice Roberts wrote the principal dissent, arguing that the majority had failed to “explain how a constitutional provision that vests redistricting authority in ‘the Legislature’ permits a State to wholly exclude ‘the Legislature’ from redistricting.”²⁶ If the term “legislature” really were as capacious as

the majority found, the Chief Justice argued by way of example, there would have been no need for the Seventeenth Amendment, which transferred the Senator-selecting power from “the Legislature” of each state to “the people thereof.”²⁷

EMPLOYMENT DISCRIMINATION ACCOMMODATION

Frequenters of American shopping malls know that Abercrombie & Fitch operates a chain of music-pumping, sexuality-celebrating clothing stores for the younger set. Until just this year, Abercrombie applied a strict “Look Policy” to its employees while they were on the job, regulating their clothing, hair color, nail length, piercings, and more. Samantha Elauf, a practicing Muslim, alleged that she was denied a job at an Abercrombie store because she wore a headscarf; “caps” were among the things the policy banned, and Elauf wore a headscarf to her interview. The Equal Employment Opportunity Commission (EEOC) filed a Title VII suit on her behalf, alleging that Abercrombie had discriminated against her because of her religion.²⁸ A jury returned a verdict in Elauf’s favor, but the Tenth Circuit reversed, finding that Abercrombie could not be held liable because Elauf had not told Abercrombie that she would require a religious accommodation.

Led by Justice Scalia, the Court reversed in *EEOC v. Abercrombie & Fitch Stores, Inc.*²⁹ Distinguishing between motives and knowledge, the Court explained that “an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.”³⁰ The Court found that Elauf could prevail merely by showing that her “need for an accommodation was a motivating factor in [Abercrombie’s] decision.”³¹

CONCILIATION

If the EEOC finds there is “reasonable cause” to believe that a complainant’s employer has violated Title VII, the agency is statutorily obliged to “endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”³² In *Mach Mining, LLC v. EEOC*,³³ the Court unanimously ruled that courts may review the EEOC’s compliance with that conciliation-seeking requirement but that the scope of the review is narrow. The Court rejected Mach Mining’s argument that courts should “do a deep dive into the conciliation process” akin to courts’ immersive involvement in supervising employers’ and unions’ statutory duty to negotiate with one another in good faith.³⁴ Rather, Justice Kagan explained, a court only has the power to satisfy itself (on the strength of an EEOC affidavit or otherwise) that the

20. *Id.* at 2146 (Breyer, J., dissenting).

21. 135 S. Ct. 2652 (2015).

22. U.S. Const. art. I, § 4, cl. 1.

23. *Arizona State Legislature*, 135 S. Ct. at 2664.

24. *Id.* at 2657.

25. *Id.*

26. *Id.* at 2678.

27. See U.S. Const. art., I, § 3; *id.* at amend. XVII.

28. See 42 U.S.C. § 2000e-2(a)(1).

29. 135 S. Ct. 2028 (2015). Justice Alito concurred in the judgment, while Justice Thomas concurred in part and dissented in part.

30. *Id.* at 2033.

31. *Id.* at 2032.

32. 42 U.S.C. ¶ 2000e-5(b).

33. 135 S. Ct. 1645 (2015).

34. *Id.* at 1653-54.

agency has notified the employer of the plaintiffs' allegations and has given the employer some form of "opportunity to discuss the matter in an effort to achieve voluntary compliance."³⁵

PREGNANCY DISCRIMINATION

In 1978, Congress amended Title VII by adopting the Pregnancy Discrimination Act, which says two things: that discrimination based upon pregnancy is a form of forbidden sex-based discrimination and that an employer must treat "women affected by pregnancy, childbirth, or related medical conditions . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."³⁶ In *Young v. United Parcel Service*,³⁷ the Court took up the meaning of the latter provision. Peggy Young alleged that her employer, United Parcel Service, violated the Act's second provision by refusing to accommodate her temporary, pregnancy-created inability to lift heavy objects, while nevertheless accommodating certain other (albeit not *all*) classes of employees who were temporarily unable to work. Led by Justice Breyer, a divided Court ruled that the Fourth Circuit had erred when it affirmed the district court's entry of summary judgment for UPS. When a plaintiff brings a disparate-treatment claim alleging intentional discrimination based upon the plaintiff's status as a pregnant woman, the Court said, she may rely upon *McDonnell Douglas's* familiar, three-phase burden-shifting framework.³⁸ That is, the plaintiff may first try to present evidence sufficient to support a prima facie claim of intentional pregnancy-based discrimination. If the plaintiff succeeds on that score, the employer may then offer nondiscriminatory reasons for its actions. The plaintiff can then try to prove that the employer's explanation is merely a pretext for forbidden discrimination. When trying to demonstrate pretext, the Court said, a plaintiff may argue that "the employer's policies impose a significant burden on pregnant workers," that the employer's proffered rationale for its actions is "not sufficiently strong to justify the burden," and that an inference of intentional justification is thus appropriate.³⁹ Here, the majority found that Young had created an issue of material fact on the first of those three phases of analysis and so remanded for further proceedings.⁴⁰

Joined by Justices Kennedy and Thomas in dissent, Justice Scalia argued that, under the Act, Young was entitled to—and had received—"accommodations *on the same terms* as other workers with disabling conditions."⁴¹ By injecting a discussion of "significant burden[s]" and "sufficiently strong" justifications into the analytic framework for disparate-treatment claims, Justice Scalia said, the Court had strayed far from the text of the statute and had muddied Title VII's distinction between disparate-treatment claims and claims alleging disparate impact.⁴²

35. *Id.* at 1652.

36. 42 U.S.C. § 2000e(k).

37. 135 S. Ct. 1338 (2015).

38. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

39. *Young*, 135 S. Ct. at 1354.

40. Justice Alito concurred in the judgment.

41. *Id.* at 1362 (Scalia, J., dissenting) (emphasis in the original).

42. *Id.* at 1364-65 (Scalia, J., dissenting).

EVIDENCE

In *Warger v. Shauers*,⁴³ the Court rejected a plaintiff's effort to secure a new trial based upon alleged juror misconduct. After a jury ruled in favor of the defendant in a personal-injury case, one of the jurors provided the plaintiff with an affidavit indicating that, during the jury's deliberations, another juror had made statements which, if true, indicated that she might have lied during *voir dire*. Based upon that account of the jury's deliberations, the plaintiff sought a new trial, but the Court ruled the evidence inadmissible. Rule 606(b)(1) of the Federal Rules of Evidence states that, "[d]uring an inquiry into the validity of a verdict . . . , a juror may not testify about any statement made . . . during the jury's deliberations . . ."⁴⁴ The Court found that entertaining the plaintiff's motion for a new trial would entail just such an inquiry.

EXECUTIVE POWER & PASSPORTS

Virtually all readers will recall Justice Jackson's famous admonition that the President's powers are at their "lowest ebb" when he acts contrary to the will of Congress.⁴⁵ In *Zivotofsky v. Kerry*,⁴⁶ we saw that, even when the President's powers are at low tide, they can still be sufficient to deliver him a victory.

The case concerned Menachem Binyamin Zivotofsky's desire to have Israel listed as his place of birth both on his passport and on the consular report of his birth abroad. A 2002 federal statute purported to give him precisely that right. Because Zivotofsky had been born in Jerusalem, however, the State Department declined his request, in keeping with the Executive Branch's long-standing refusal to acknowledge any single country's sovereignty over that coveted and contested city. With Justice Kennedy writing for the majority, the Court found that Congress could not compel the State Department to satisfy Zivotofsky's request. Justice Kennedy explained that, by directing the President to "receive Ambassadors and other public Ministers,"⁴⁷ the Constitution gives the President the "recognition power"—the power to decide whether the United States recognizes a given entity as a legitimate state. Based upon that text, together with historical practices, prior Court rulings, and the practical need for the nation to speak with one voice on such matters, the Court held that the President has the exclusive "power to recognize or decline to recognize a foreign state and its territorial bounds."⁴⁸ By trying to compel the State

[T]he Court held that the President has the exclusive "power to recognize or decline to recognize a foreign state and its territorial bounds."

43. 135 S. Ct. 521 (2014).

44. Fed. R. Evid. 606(b)(1) (emphasis added).

45. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 635-38 (1952) (Jackson, J., concurring).

46. 135 S. Ct. 2076 (2015).

47. U.S. Const. art. II, § 3.

48. *Zivotofsky*, 135 S. Ct. at 2094.

[T]he Court ruled 5-4 . . . that the Fair Housing Act permits disparate-impact claims, such that a person or entity may be liable . . . even in the absence of discriminatory intent.

her passport but that Congress could control such matters on consular reports of births abroad pursuant to its powers under the Naturalization Clause.⁴⁹ Justice Scalia dissented, joined by the Chief Justice and Justice Alito. He rejected the majority's finding that the President's powers in this area are exclusive, arguing that the statute on which Zivotofsky relied had nothing to do with formally recognizing Israel's sovereignty over Jerusalem, that the statute was a permissible exercise of the Naturalization Clause, and that the majority was facilitating tyranny by allowing the President to claim sole control over foreign-sovereignty issues.

FAIR HOUSING ACT

In one of the Term's most closely watched cases among civil-rights activists, the Court ruled 5-4 in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,⁵⁰ that the Fair Housing Act (FHA) permits disparate-impact claims, such that a person or entity may be liable under the statute even in the absence of discriminatory intent. The FHA declares, among other things, that it is impermissible to "refuse to sell or rent . . . or otherwise make unavailable . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin."⁵¹ Writing for the majority, Justice Kennedy zeroed in on the "otherwise make unavailable" language and found that, with that phrasing, Congress was targeting "the consequences of an action rather than the actor's intent."⁵² The Court relied heavily upon its reading of Title VII in *Griggs v. Duke Power Co.*⁵³ and on the fact that, when amending the FHA in 1988, Congress took no steps to reject the rulings of nine different circuit courts of appeals that the FHA permits disparate-impact claims. Justice Kennedy emphasized, however, that disparate-impact claims should be allowed only under limited circumstances, such as when gov-

ernment officials cannot identify "valid interest[s] served by their policies."⁵⁴

Department to issue statements that contradict the President's own recognition judgments about Jerusalem, the Court said, Congress was illegitimately trying to exercise the recognition power for itself. Justice Thomas concurred in part and dissented in part, distinguishing between passports and consular reports of births abroad. He concluded that none of Congress's enumerated powers authorizes it to demand that Israel be listed as a Jerusalem-born American citizen's place of birth on his or

ernment officials cannot identify "valid interest[s] served by their policies."⁵⁴

Joined by Chief Justice Roberts and Justices Scalia and Thomas, Justice Alito wrote the principal dissent, arguing that the phrase "because of" in the statutory language quoted above requires the presence of discriminatory motive or intent. He further contended that *Griggs* is far from a model of admirable statutory interpretation and that the Court's ruling threatened to make it more difficult for government officials to take steps aimed at providing acceptable housing for their poorest residents, lest those steps (such as rodent-infestation treatment) drive up the cost of housing and thereby make that housing less affordable for racial minorities.

FEDERAL JURISDICTION PLEADING REQUIREMENTS

In a brief per curiam reversal of the Fifth Circuit, the Court ruled in *Johnson v. City of Shelby*⁵⁵ that it was error to enter summary judgment for the municipal defendant when the plaintiffs failed to declare explicitly in their complaint that they were making their claims under Section 1983. A plaintiff "must plead facts sufficient to show that her claim has substantive plausibility," the Court explained, but "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim."⁵⁶

REMOVAL AND THE AMOUNT-IN-CONTROVERSY REQUIREMENT

Over the dissent of four justices who believed the issue was not properly before them, the Court ruled in *Dart Cherokee Basin Operating Co. v. Owens*⁵⁷ that, when a defendant attempts to remove a case to federal court on diversity-jurisdiction grounds, the notice of removal need not contain evidence substantiating the defendant's good-faith allegation that the amount-in-controversy requirement is met. Rather, the defendant must submit supporting evidence only if the plaintiff or the court subsequently challenges that allegation.

INJUNCTIVE RELIEF, THE SUPREMACY CLAUSE, AND EX PARTE YOUNG

Dividing 5-4, the Court ruled in *Armstrong v. Exceptional Child Center, Inc.*,⁵⁸ that neither the Supremacy Clause nor the principles of equity famously illustrated by *Ex parte Young*⁵⁹ enable health-care providers to sue for an injunction that would force a state to comply with Section 30(A) of the Medicaid Act. Section 30(A) requires a state "to assure that [Medicaid] payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to

49. See U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . .").

50. 135 S. Ct. 2507 (2015).

51. 42 U.S.C. § 3604(a).

52. *Texas Department of Housing*, 135 S. Ct. at 2518.

53. 401 U.S. 424 (1971).

54. *Texas Department of Housing*, 135 S. Ct. at 2522.

55. 135 S. Ct. 346 (2014).

56. *Id.* at 347.

57. 135 S. Ct. 547 (2014).

58. 135 S. Ct. 1378 (2015).

59. 209 U.S. 123 (1908).

the extent that such care and services are available to the general population in the geographic area.”⁶⁰ Providers of habitation services in Idaho filed a lawsuit alleging that the state’s reimbursement rates were lower than Section 30(A) permits. The Ninth Circuit held that the Supremacy Clause supplied the providers with a cause of action for an injunction compelling the state to increase its rates, but the Supreme Court reversed.

All nine members of the Court agreed that the Supremacy Clause does not itself create causes of action but instead merely “instructs courts what to do when state and federal law clash.”⁶¹ The Court divided 5-4, however, on whether relief was available under principles of equity and *Ex parte Young*. Writing for the five-member majority, Justice Scalia found that two aspects of the Medicaid Act signaled Congress’s desire to foreclose private enforcement of Section 30(A): Congress’s decision to authorize the Secretary of Health and Human Services to withhold Medicaid funds from a state that violates Section 30(A) and the “judicially unadministrable,” “judgment-laden . . . complexity” of Section 30(A)’s requirements.⁶² Writing for the dissent, Justice Sotomayor argued that Congress surely anticipated that equitable relief would be available, that the remedy of withholding Medicaid funds was far too heavy-handed to be plausibly regarded by Congress as an effective lone remedy, and that the ease with which the majority deemed equitable relief precluded “threatens the vitality of our *Ex parte Young* jurisprudence.”⁶³

BANKRUPTCY JUDGES, ARTICLE III, AND CONSENT

In its ruling four years ago in *Stern v. Marshall*,⁶⁴ the Court held that Article III does not permit a bankruptcy judge to issue a final judgment on a state common-law claim that “is in no way derived from or dependent upon bankruptcy law.”⁶⁵ The issues last Term in *Wellness International Network v. Sharif*⁶⁶ were whether a creditor’s particular claim amounted to a *Stern* claim and, if it did, whether *Stern*’s constitutional bar still stood if the parties consented to the bankruptcy court’s adjudication of the claim. Wellness (the creditor) sought a bankruptcy court’s declaration that a trust the debtor administered was actually the debtor’s alter ego and that the trust’s assets should therefore be treated as part of the debtor’s estate. Led by Justice Sotomayor, the Court ruled 6-3 that, even if the claim was indeed “a *Stern* claim” (an issue the majority declined to reach), the bankruptcy court could take jurisdiction of it. Because “Article III courts retain supervisory authority” over proceedings in bankruptcy courts, the Court said, “allowing bankruptcy litigants to waive the right to Article III

adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts.”⁶⁷ Writing the principal dissent,⁶⁸ Chief Justice Roberts—the author of *Stern*—argued that Wellness’s claim was not a *Stern* claim and that the bankruptcy court should be allowed to take jurisdiction of the claim on those narrow grounds. By finding that the parties’ consent empowers a bankruptcy court to take jurisdiction of a claim that is indeed a *Stern* claim, the Chief Justice argued, the Court was deviating from Article III’s requirements and was setting a precedent that invites further “erosion of [Article III courts’] constitutional power.”⁶⁹

Justice Kagan reasoned that there is a strong yet rebuttable presumption that statutory limitations periods may be equitably tolled

EQUITABLE TOLLING

In *United States v. Wong*,⁷⁰ the Court ruled 5-4 that the two limitations periods set out in the Federal Tort Claims Act (FTCA)—the two-year period for seeking administrative review and the six-month period for seeking judicial review—are subject to equitable tolling. Relying heavily upon the Court’s 1990 decision in *Irwin v. Department of Veterans Affairs*,⁷¹ Justice Kagan reasoned that there is a strong yet rebuttable presumption that statutory limitations periods may be equitably tolled, and she found no persuasive evidence that Congress had intended to exempt the FTCA’s time bars from such adjustment. The Government’s primary argument had been that the FTCA’s limitations periods were jurisdictional and thus beyond courts’ power to disregard. The Solicitor General pointed out, for example, that Congress framed those time bars in emphatic language, stating that a claim “shall be forever barred” if the statute’s deadlines are not met.⁷² The majority found the statute’s language unremarkable. Instead, the Court focused on Congress’s decision not to “speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts”⁷³ when describing the limitations periods and on Congress’s physical separation of the provisions concerning the filing deadlines and district courts’ jurisdiction to hear FTCA claims.

Writing for the dissent, Justice Alito argued that “[t]he statutory text, its historical roots, and more than a century of precedents show that [the FTCA’s] absolute bar is not subject to equitable tolling.”⁷⁴ Pointing to the statute’s unqualified lan-

60. 42 U.S.C. § 1396a(a)(30)(A).

61. *Armstrong*, 135 S. Ct. at 1383; see also *id.* at 1391 (Sotomayor, J., dissenting) (stating that “the Court is correct that it is somewhat misleading to speak of an implied right of action contained in the Supremacy Clause”) (internal quotation omitted).

62. *Id.* at 1385.

63. *Id.* at 1392 (Sotomayor, J., dissenting).

64. 131 S. Ct. 2594 (2011).

65. *Id.* at 2618.

66. 135 S. Ct. 1932 (2015).

67. *Id.* at 1944-45.

68. It is not clear why the Chief Justice labeled his opinion a dissent rather than a concurrence in the judgment: both he and the majority agreed that the bankruptcy court could adjudicate the claim.

69. *Id.* at 1950 (Roberts, C.J., dissenting).

70. 135 S. Ct. 1625 (2015).

71. 498 U.S. 89 (1990).

72. 28 U.S.C. § 2401(b).

73. *Wong*, 135 S. Ct. at 1633 (internal quotations omitted).

74. *Id.* at 1639 (Alito, J., dissenting).

The Court declined to defer to the IRS's interpretation, finding that with "billions of dollars" and the healthcare of "millions of people" at stake, this was an "extraordinary case" in which Chevron deference was inappropriate.

guage, for example, Justice Alito wrote that "it is beyond me how *Irwin's* judge-made presumption announced in 1990 can trump the obvious meaning of a statute enacted many decades earlier."⁷⁵

PATIENT PROTECTION AND AFFORDABLE CARE ACT

In a major victory for the Obama Administration, the Court in *King v. Burwell*⁷⁶ rejected a potentially eviscerating attack that had been brought against the Patient Protection and Affordable Care Act. In one of that legislation's previously obscure

provisions—Section 36B—Congress had adopted language declaring that taxpayers purchasing health-insurance policies would be eligible for certain federal tax credits only if they purchased their insurance on "an Exchange established by the State."⁷⁷ Only 16 states had established their own health-insurance exchanges under the legislation, however, leaving the federal government to establish the exchanges in the other 34. The Internal Revenue Service had interpreted the statute as authorizing tax credits in all states, regardless of which sovereign had established the exchanges.

By a vote of 6-3, and in an opinion by Chief Justice Roberts, the Court ruled that tax credits are indeed available for policies purchased on all exchanges, regardless of whether the state or the federal government set them up. The Court declined to defer to the Internal Revenue Service's interpretation, finding that with "billions of dollars" and the healthcare of "millions of people" at stake, this was an "extraordinary case" in which *Chevron* deference was inappropriate.⁷⁸ The Chief Justice also conceded that Section 36B's plain language appeared to support the challengers' interpretation. The Court nevertheless found that other portions of the statute rendered the "established by the State" language ambiguous. Moreover, when considering the legislation's overarching goals, the Court found it implausible that Congress would have wanted to deny tax credits in those states in which the federal government had established the exchanges. Without federal tax credits in those states, far fewer individuals would have been able (and required) to purchase health insurance, thus keeping many healthy premium payers out of the insurance pool—and with those healthy individuals on the sidelines, the costs of coverage would have risen even higher, thereby making coverage

financially accessible to even fewer people and putting the whole system into "a death spiral."⁷⁹

Justice Scalia was joined by Justices Thomas and Alito in dissent. He argued that "[w]ords no longer have meaning if an Exchange that is *not* established by a State is 'established by the State'"⁸⁰ and that, just as he believed it had three years earlier in *National Federation of Independent Business v. Sebelius*,⁸¹ the Court was abandoning standard principles of statutory interpretation just for the sake of upholding legislation it favored.

RELIGIOUS FREEDOM

The unanimity that eluded the Court in *Burwell v. Hobby Lobby Stores, Inc.*⁸²—the high-profile religious-freedom ruling that came down at the end of the 2013-2014 Term—proved achievable this year in *Holt v. Hobbs*.⁸³ Led by Justice Alito, the undivided Court ruled that the Arkansas Department of Corrections had violated the statutory religious-freedom rights of Gregory Holt, a Muslim inmate. Holt wanted to grow a half-inch beard in accordance with his religious beliefs, but prison officials refused, citing security concerns. The Court held that, contrary to the demands of the Religious Land Use and Institutionalized Persons Act of 2000, Arkansas was substantially burdening Holt's religious practice without a powerful justification for doing so. With respect to Arkansas's suggestion that Holt could successfully conceal contraband in a half-inch beard, for example, the Court believed that prison guards could search Holt's proposed beard as readily as they could search the top of a prisoner's hirsute head.

RESTATEMENTS

One might sensibly ask why "Restatements" appears as a heading in a Term summary of this sort. Here's the answer. In *Kansas v. Nebraska*,⁸⁴ the Court adopted a Special Master's recommendations for resolving a water dispute between Kansas and Nebraska. Of broadest interest to judges, practitioners, and scholars will be Justice Scalia's skeptical remarks regarding the law-defining value of Restatements. In a separate, one-paragraph opinion, he wrote:

[M]odern Restatements . . . are of questionable value and must be used with caution. The object of the original Restatements was "to present an orderly statement of the general common law." Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. . . . Restatement sections [that aim to extend the law in one direction or another] should be given no weight whatsoever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar. And it cannot safely be

75. *Id.* at 1643 (Alito, J., dissenting).

76. 135 S. Ct. 2480 (2015).

77. 26 U.S.C. § 36B(c).

78. *King*, 135 S. Ct. at 2488-89 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

79. *Id.* at 2492-94.

80. *Id.* at 2497 (Scalia, J., dissenting).

81. 132 S. Ct. 2566 (2012).

82. 134 S. Ct. 2751 (2014).

83. 135 S. Ct. 853 (2015).

84. 135 S. Ct. 1042 (2015).

assumed, without further inquiry, that a Restatement provision describes rather than revises current law.⁸⁵

SPEECH

The Term produced three noteworthy free-speech rulings: one on judges' campaign speech, one on specialty license plates, and one on local sign ordinances.

In *Williams-Yulee v. Florida Bar*,⁸⁶ the case concerning judges' campaign speech, the 5-4 Court handed down a rare defeat for a speaker who found herself on the receiving end of a content-based speech restriction. Florida is among the 39 states that select at least some of their judges through popular elections, and is among the 30 states that—in keeping with the American Bar Association's Model Code of Judicial Conduct—do not allow judicial candidates to personally solicit campaign funds. Lanell Williams-Yulee, who was seeking a seat on a Florida county court, sent local voters a letter seeking campaign contributions. The Florida Bar successfully brought ethics charges against her.

Everyone agreed that Florida was discriminating against Williams-Yulee's speech because of its content. For seven justices—Chief Justice Roberts and Justices Sotomayor and Kagan on one side, and Justices Scalia, Kennedy, Thomas, and Alito on the other—that meant strict scrutiny was in order. (Joined by Justice Breyer, Justice Ginsburg wrote separately to argue that states should have “substantial latitude” to limit the role of money in judicial elections.⁸⁷ These two justices joined the rest of the Chief Justice's opinion.) Led by Chief Justice Roberts, the majority concluded that this was “one of the rare cases in which a speech restriction” could survive that demanding analysis.⁸⁸ The Court first found that Florida had a “compelling interest in preserving public confidence in the integrity of the judiciary.” Recent campaign-finance cases in which the Court took a narrower view of the government's compelling interests were inapposite, the Chief Justice said, because those cases concerned politicians, rather than judges who are obliged to pay no regard to the preferences of their supporters.

Turning to the issue that most sharply divided the Court, Chief Justice Roberts then concluded that the law was narrowly tailored. Florida's regulation of judicial candidates' speech was admittedly underinclusive, he said, insofar as the state allowed judges' campaign committees to solicit contributions and allowed judges to send thank-you notes to donors. In an especially important passage, however, the majority found that underinclusiveness is not itself a freestanding problem in free-speech cases. Rather, underinclusiveness becomes problematic when it signals that the government is not actually pursuing the objective it has declared or when it indicates that the law is not actually advancing the government's declared interests. In the

eyes of the majority, neither of those problems was present here. Nor did the Court find the law troublingly overinclusive by virtue of the fact that it barred judicial candidates from personally soliciting campaign contributions by any means of communication, from any person, and in any amount. Strict scrutiny does not demand “perfect tailoring,” Chief Justice Roberts said, and he refused to “wade into th[e] swamp” of trying to distinguish between the integrity-compromising effects of solicitations communicated by one means rather than another, or sent to one group of prospective donors rather than another, or seeking one amount rather than another.

Joined by Justice Thomas, Justice Scalia found Florida's rule “wildly disproportionate” to its “ill-defined interest” in preserving the reality and appearance of judicial integrity.⁸⁹ Justice Scalia argued, for example, that it makes no sense to bar a judicial candidate from seeking campaign contributions from close friends and family members or from sending out mass solicitations that do not “target any listener in particular.”⁹⁰ Justice Kennedy filed a separate dissent to underscore the importance of protecting free speech in elections of all kinds, and Justice Alito filed a dissent arguing that Florida's law was “about as narrowly tailored as a burlap bag.”⁹¹

As an entryway into the Court's license-plate ruling in *Walker v. Texas Division, Sons of Confederate Veterans*,⁹² Justice Alito (again finding himself in dissent) proposed that you take the following test. You are sitting near a roadway in Texas and, as cars pass by, you see many specialty license plates. Some, for example, say “I'd Rather Be Golfing,” some say “Roll, Tide, Roll” (accompanied by the University of Alabama's logo), some say “Always One of a Kind” (accompanied by an image of a can of Dr. Pepper), some say “Get It Sold with Re/Max (accompanied by an image of that real-estate company's famous balloon), and so forth. Would you regard those messages as the speech of the cars' drivers or as the speech of the State of Texas itself? The occasion for the thought experiment arose when Texas refused to honor the Sons of Confederate Veterans' request that the state issue a specialty license plate bearing that non-profit organization's name and logo, together with an image of the Confederate flag.

Writing for the five-member majority (consisting of the Court's Democratic appointees and Justice Thomas), Justice Breyer found that all Texas license plates—even plates whose

The Term produced three noteworthy free-speech rulings: one on judges' campaign speech, one on specialty license plates, and one on local sign ordinances.

85. *Id.* at 1064 (Scalia, J., concurring in part and dissenting in part) (quoting *Introduction to RESTATEMENT OF CONFLICT OF LAWS*, at viii (1934)) (citations omitted).

86. 135 S. Ct. 1656 (2015).

87. *Id.* at 1673 (Ginsburg, concurring in part and concurring in the judgment). Justice Breyer also joined the entirety of Chief Justice Roberts's opinion. Justice Ginsburg joined all except the brief

section concluding that strict scrutiny was appropriate.

88. *Id.* at 1666.

89. *Id.* at 1676, 1677 (Scalia, J., dissenting).

90. *Id.* at 1679 (Scalia, J., dissenting).

91. *Id.* at 1685 (Alito, J., dissenting).

92. 135 S. Ct. 2239 (2015).

Writing for an eight-member majority . . . , Chief Justice Roberts first found that the government's duty to pay just compensation for physical takings applies to takings of personal property and not just to real property.

messages and designs have been proposed by the likes of golfers, Alabama alumni, the manufacturer of Dr. Pepper, and Re/Max—are Texas's own governmental speech and that the First Amendment rules regarding content- and viewpoint-based discrimination thus do not apply. The Court relied heavily upon its 2009 ruling in *Pleasant Grove City v. Summum*,⁹³ in which the justices held that monuments in a municipal park are government speech even when they are designed by private parties, and that—without fear of First Amendment liability—Pleasant Grove City thus could decline to erect a monument bearing a

religious organization's core principles. Justice Breyer found that specialty plates fall into the same category. Like monuments, he said, states have commonly used license plates to convey messages; Texas takes ownership of any privately prepared license-plate designs that it adopts; and the state has maintained control over which messages the plates convey.

Writing for the Court's four dissenting members, Justice Alito found it implausible that anyone would regard personalized messages of the sort listed above as coming from the State of Texas itself, a conclusion that he bolstered with an appendix showing nearly 60 specialty plates that Texas has approved. In his view, the state had created a limited public forum through its specialty-plate program and thus could not commit viewpoint discrimination when deciding which proposed messages to accept.

The Court's nine members all agreed on the appropriate outcome in *Reed v. Town of Gilbert*;⁹⁴ what divided them was the best path to get there. The Town of Gilbert, Arizona, had an elaborate sign ordinance that, on its face, plainly treated signs differently based upon their content. Signs with "ideological" content could be up to 20 square feet and could be posted indefinitely, for example, while a "temporary directional sign relating to a qualifying event" could be no more than 6 square feet and had to be removed within one hour of the advertised event's conclusion. A small church that met in alternating locations and relied heavily upon temporary directional signs challenged the ordinance, saying that it violated the members' First Amendment rights.

Joined by the Chief Justice and Justices Scalia, Kennedy, Alito, and Sotomayor, Justice Thomas concluded that the ordinance was indeed unconstitutional. Because the ordinance was content-based on its face, Justice Thomas explained, it was automatically subject to strict scrutiny, regardless of the pur-

poses that drove the town to enact it. Even if the town's proffered purposes were compelling (namely, preserving the town's beauty and promoting traffic safety), the Court held that the ordinance's content distinctions were "hopelessly underinclusive." Temporary directional signs, for example, are no more or less attractive or dangerous than many of the signs that the town permitted to be larger and to be erected for longer periods. The Court thus found that the ordinance was not actually serving the town's articulated objectives. (*Reed* and *Williams-Yulee* likely will be cited for years to come as the leading pair of cases on underinclusiveness in free-speech analysis.)

Joined by Justices Kennedy and Sotomayor, Justice Alito filed a concurring opinion aimed at assuring readers that, through content-neutral sign regulations, cities will be able to achieve their safety and aesthetic goals. Justice Breyer concurred in the judgment, arguing that strict scrutiny should not *automatically* apply to all content-based speech regulations and that—relying on content discrimination "as a rule of thumb"—a court should instead ask "whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives."⁹⁵ Joined by Justices Ginsburg and Breyer, Justice Kagan similarly concurred in the judgment. She argued that the majority's ruling placed countless sign ordinances across the country in jeopardy and that—rather than hold that strict scrutiny automatically applies to all sign ordinances that make content distinctions—the Court should simply have said that the town's ordinance "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."⁹⁶

TAKINGS

Imagine you are a raisin grower. After you have harvested your raisins each year, a large truck backs up to your facility at the direction of the Department of Agriculture's Raisin Administrative Committee and takes a portion of your crop (47 percent of it in 2002-2003, less of it in others). Whether you are paid anything at all for the seized raisins will depend on whether there is any money left over after the Committee deducts expenses that it incurs in selling or otherwise disposing of the raisins as part of its overall effort to maintain a stable raisin market. In some years, there will be no such funds remaining; in some years, the funds you are paid will amount to less than the costs you incurred to grow the raisins. Yet you presumably derive benefits from the Committee's effort to maintain a healthy raisin market, and those benefits might be substantial. One year, you dig in your heels and refuse to grant the truck access to your crops, and in return the Department of Agriculture fines you in an amount equal to the value of the raisins you refused to hand over, plus an additional sum for your disobedience. Has your property been taken, without just compensation, in violation of the Fifth Amendment's Takings Clause? The Horne family found itself in that situation and brought precisely that claim. And in *Horne v. Department of Agriculture*,⁹⁷ the Court ruled in favor of the Horne family.

93. 555 U.S. 460 (2009).

94. 135 S. Ct. 2218 (2015).

95. *Id.* at 2235-36 (Breyer, J., concurring in the judgment).

96. *Id.* at 2239 (Kagan, J., concurring in the judgment).

97. 135 S. Ct. 2419 (2015).

Writing for an eight-member majority (all except Justice Sotomayor), Chief Justice Roberts first found that the government's duty to pay just compensation for physical takings applies to takings of personal property and not just to real property. Distinguishing between regulatory and physical takings, the Court could find nothing in the text or history of the Fifth Amendment to indicate otherwise. The Chief Justice then found that the fact that there had been a physical taking for which just compensation was owed was not negated by the Committee's occasional payments to raisin growers of any net proceeds or by the fact that raisin growers could simply grow other crops if they did not wish to participate in the federal raisin program.

In the most divisive part of the Court's ruling—a part that Justices Breyer, Ginsburg, and Kagan refused to join—the majority refused to remand the case for a calculation that the Government had argued was appropriate. The Government had insisted that remand was needed to determine whether just compensation was owed (and thus whether any Fifth Amendment violation had actually occurred) because, it said, the value of the benefits that the Hornes had derived from the federal raisin program might well have exceeded the value of the raisins that the Government wished to collect. The majority declined to take that approach, however, finding instead that the benefits of a regulatory program cannot themselves constitute just compensation for a physical taking. Rather, just compensation must be measured by the value of the physically taken property itself. Joined by Justices Ginsburg and Kagan, Justice Breyer embraced the Government's argument on this point, finding that if the benefits of the federal raisin program exceeded the value of the raisins taken, then there had been no violation of the Fifth Amendment.

TAXATION

Those who have earned income in multiple states over the course of a single year know that states commonly offer their residents an income-tax credit for taxes paid to other states on income earned in those other jurisdictions. Maryland chose not to fully provide such a credit,⁹⁸ and so residents like Brian and Karen Wynne found themselves being taxed twice on the same portion of their income. In *Comptroller of the Treasury of Maryland v. Wynne*,⁹⁹ the Court ruled 5-4 that Maryland's taxation system violated the dormant Commerce Clause. Joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Sotomayor, Justice Alito explained that, under the Court's precedents, the Constitution forbade Maryland from implementing a system of taxation that treated interstate economic activity less favorably than it treated economic activity within its own borders. Applying the "internal consistency test," the Court asked whether interstate commerce would be disadvantaged, relative to intrastate commerce, if every state in the

Union adopted a taxation system identical to Maryland's.¹⁰⁰ The Court found that it would and that Maryland's system was thus indistinguishable from a tariff.

Joined by Justices Scalia and Kagan in dissent, Justice Ginsburg argued that the majority's ruling robbed Maryland of its ability to make a constitutionally permissible policy choice and that the Wynnes' remedy lay in their state's political processes. Joined in relevant part by Justice Thomas, Justice Scalia wrote separately to underscore his skepticism about much of the dormant Commerce Clause enterprise and to argue that, while the "internal consistency test" might resemble one formulation of Immanuel Kant's categorical imperative, it has no roots in the Constitution's text or structure. In a separate dissent, Justice Thomas reiterated his previously announced willingness to abandon the dormant Commerce Clause altogether.

Meanwhile, to facilitate its own tax-collection efforts, Colorado enacted a law requiring retailers that do not themselves collect Colorado sales and use taxes to notify consumers of their state tax obligations and to provide the Colorado Department of Revenue with periodic reports on the retailers' transactions with Colorado residents. The Direct Marketing Association—a trade group that includes online retailers and others who market their products directly to consumers—challenged the law. They argued that, among other things, the law was simply a device to evade *Quill Corp. v. North Dakota*,¹⁰¹ the 1992 case in which the Court held that retailers cannot be compelled to collect sales taxes from customers in states with which the retailers lack a "substantial nexus." The Tenth Circuit held that the Tax Injunction Act barred federal courts from enjoining enforcement of the Colorado law. In *Direct Marketing Association v. Brohl*,¹⁰² the Court unanimously reversed, finding that an order blocking Colorado's notice and reporting requirements would not (in the words of the Tax Injunction Act) "enjoin, suspend or restrain the assessment, levy or collection" of Colorado taxes.¹⁰³

The retailers' victory celebration was undoubtedly tempered by Justice Kennedy's concurrence. Acknowledging that the issue was not now properly before the Court, Justice Kennedy wrote separately to say that online retail sales have grown stratospherically in the years since *Quill* was decided, that *Quill* is "inflicting extreme harm and unfairness on the States," and that the Court should find an opportunity to reconsider *Quill*'s "doubtful authority."¹⁰⁴ Should the Court indeed abandon *Quill* in a future case, online retailers might look back on *Direct Marketing Association* as a brief and largely inconsequential victory.

[T]he Court ruled 5-4 that Maryland's taxation system violated the dormant Commerce Clause.

98. Maryland provided the credit for what it called the "state" portion of its income taxes but not for what it called the "county" portion of its income taxes.

99. 135 S. Ct. 1787 (2015).

100. *Id.* at 1802.

101. 504 U.S. 298 (1992).

102. 135 S. Ct. 1124 (2015).

103. 28 U.S.C. § 1341.

104. *Direct Marketing Ass'n*, 135 S. Ct. at 1134 (Kennedy, J., concurring).

OTHER NOTABLE RULINGS

In *Integrity Staffing Solutions, Inc. v. Busk*,¹⁰⁵ the Court held that federal law does not require employers to pay employees for the time they spend undergoing antitheft security screenings at the end of their shifts.

In *T-Mobile South, LLC v. City of Roswell*,¹⁰⁶ the Court ruled that, when denying an application to build a cell-phone tower, a locality must provide a written statement of the reasons for the denial and—although the notification of the denial and the statement of reasons need not appear in the same document—the two must be provided “essentially contemporaneously” with one another.¹⁰⁷

Divided 5-4, the Court ruled in *Michigan v. EPA*¹⁰⁸ that—even though the EPA eventually conducted cost-benefit analyses indicating that the benefits of regulating fossil-fuel-fired power plants would easily justify the costs—the EPA erred by not considering costs at all when initially determining whether such regulation was (in the language of the Clean Air Act Amendments of 1990) “appropriate and necessary.”

The Court divided 5-4 on several issues in *Alabama Legislative Black Caucus v. Alabama*,¹⁰⁹ including on whether the plaintiffs had pled an Equal Protection Clause claim of district-specific racial gerrymandering. A majority of the justices concluded that they had. Led by Justice Scalia, the dissenters accused the majority of “act[ing] as standby counsel for sympathetic litigants” and of “invit[ing] lower courts similarly to depart from the premise that ours is an adversarial system whenever they deem the stakes sufficiently high.”¹¹⁰

Resolving a circuit split, the Court ruled unanimously in *Bullard v. Blue Hills Bank*¹¹¹ that a bankruptcy court’s refusal to confirm a debtor’s proposed repayment plan under Chapter 13 is not a final order that the debtor can immediately appeal as of right, so long as the court’s order “leaves the debtor free to propose another plan.”¹¹²

The Bankruptcy Code authorizes bankruptcy trustees to hire attorneys and other professionals to assist them with their duties. In *Baker Botts L.L.P. v. ASARCO LLC*,¹¹³ the Court held that the Bankruptcy Code does not authorize a bankruptcy court to award attorneys’ fees to those professionals for time they spend defending their fee applications.

Drawing from the law of trusts, the Court held in *Tibble v. Edison International*¹¹⁴ that the beneficiaries of a retirement plan covered by ERISA may bring an action against their plan’s fiduciaries for failure “to properly monitor investments and remove imprudent ones,” so long as the alleged breach of that ongoing

fiduciary obligation occurred within the prior six years.¹¹⁵

In *Kimble v. Marvel Entertainment, LLC*,¹¹⁶ the Court refused to abandon its 1964 ruling in *Brulotte v. Thys Co.*¹¹⁷ that a patent holder cannot charge royalties for the use of his or her invention after the patent’s term has expired. Marvel Entertainment was thus allowed to escape from a contract in which it had agreed to pay royalties—apparently in perpetuity—to the inventor of a toy that allows one to shoot foam from the palm of one’s hand, à la Spider Man. And with that gift-shopping idea, we bring this year’s Term summary to a close.

LOOKING AHEAD

Among the headlines next Term will be the Court’s ruling in *Fisher v. University of Texas at Austin*,¹¹⁸ in which the justices will return to the divisive topic of affirmative action in higher education. Another attention-grabbing case will be *Friedrichs v. California Teachers Association*,¹¹⁹ in which the Court will re-examine whether public-sector employees can be compelled to make financial contributions to unions (a question on which some of the justices have recently expressed strong doubts, as signaled by the “Doubting Abood” title of last year’s Term summary). Among the many other civil-law issues currently slated for the justices’ attention are whether Indian tribal courts may adjudicate tort claims against nonmembers,¹²⁰ whether a state can be sued in another state’s courts without its consent,¹²¹ whether the focus should be on total population or on voter population when deploying the Equal Protection Clause’s “one person, one vote” principle,¹²² the test for calculating the statute of limitations in federal constructive-discharge claims,¹²³ the breadth of Congress’s power to confer standing for claims of statutory violations,¹²⁴ and the appropriate use of statistical averages when evaluating whether class certification is appropriate.¹²⁵



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105. 135 S. Ct. 513 (2014).

106. 135 S. Ct. 808 (2015).

107. *Id.* at 812.

108. 135 S. Ct. 2699 (2015).

109. 135 S. Ct. 1257 (2015).

110. *Id.* at 1275 (Scalia, J., dissenting).

111. 135 S. Ct. 1686 (2015).

112. *Id.* at 1692; *see also id.* (“This is so, first and foremost, because only plan confirmation—or case dismissal—alters the status quo and fixes the rights and obligations of the parties.”).

113. 135 S. Ct. 2158 (2015).

114. 135 S. Ct. 1823 (2015).

115. *Id.* at 1828-29.

116. 135 S. Ct. 2401 (2015).

117. 379 U.S. 29 (1964).

118. No. 14-981.

119. No. 14-915.

120. *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, No. 13-1496.

121. *Franchise Tax Board of California v. Hyatt*, No. 14-1175.

122. *Evenwell v. Abbott*, No. 14-940.

123. *Green v. Donahoe*, No. 14-613.

124. *Spokeo, Inc. v. Robins*, No. 13-1339.

125. *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146.

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Making Continuous Improvement a Reality:

Achieving High Performance in the Ottawa County, Michigan, Circuit and Probate Courts

Brian J. Ostrom, Matthew Kleiman, Shannon Roth & Alicia Davis

Today, a well-functioning court is expected to resolve large volumes of work in a fair and orderly way within demanding time frames. The overall goal is quality administration in all phases of court operations, yet achieving this goal in practice means navigating the shoals of tight budgets, workplace politics, and the heavy press of daily business. Courts are under enormous stress these days, and as a result it should come as no surprise that too many courts are infected with pessimistic court leadership. Winston Churchill is often reported to have said, “The pessimist sees difficulty in every opportunity, the optimist sees the opportunity in every difficulty.”¹ A high-performance court makes the effort to reject pessimism as it looks to improve its administrative practices, even in tough times. To seize the opportunity for continuous improvement and rally support throughout the court, though, takes coordinated planning and follow-through.

The bottom line is that court leaders need to work together at organizational change. In two recent articles in *Court Review*, we emphasized the necessity of judicial involvement and commitment if administrative improvement is to take hold and thrive. One point was that developing shared, court-wide agreement among judges on how court personnel should work together requires accepting two primary responsibilities: the role each judge has in making decisions and the administrative role judges have in making the system work. Judges benefit from orderly and stable court administration because it helps enhance preparation of all parties, augments the understanding of outstanding issues, and clarifies future procedural events necessary to bring final resolution. However, in any courthouse, making effective administrative practices a reality is a team effort; it requires conscious effort to organize work processes in a way that clarifies and engages the joint contributions of judges and court staff.²

A second point was that courts have different organizational cultures, and as a result, each court must build its own path to high performance by taking into account its own particular circumstances. Deciding what course of action to take and how to structure a court’s management requires deep understanding

of the court’s internal dynamics. As a consequence, what works in a given court is highly dependent on the personalities, skills, and interests of the sitting judges and executive court administration. Knowledge of a court’s culture is a crucial factor when seeking to improve operational effectiveness.³

This article takes key themes from these earlier pieces, including sharing the leadership vision, having a clear customer focus, exploring the culture, measuring performance, and getting everyone involved, and it shows the specific and practical steps one court has used to put them in place and to sustain court improvement over time. That court, the 20th Circuit Court and the Ottawa County Probate Court (hereafter the Ottawa Court), located in western Michigan, has used a strategic-planning process for more than 10 years to establish agreement on what quality judicial administration means and to initiate actions to make its plan a reality. While strategic planning is a process that holds great promise for organizational improvement, the hard truth is that more than 75% of such efforts fail. For this reason, looking more closely at the Ottawa experience and path to success offers practical insight into how to avoid a common end result—the strategic plan as “doorstop or dust collector.”

The key to the Ottawa Court’s success is the commitment to strong judicial and court executive leadership, creation of a culture congenial to innovation, inclusion of staff at all levels of the court, and consistent follow-through and accountability to each other. Learning how to make the most effective use of the court’s limited resources by focusing on established priorities is a key attribute necessary to create a high-performance court. As part of its continuous improvement efforts, the Ottawa Court invited the National Center for State Courts to evaluate the court’s strategic-planning process using the High Performance Court Framework.

In 2010, the National Center for State Courts developed the High Performance Court Framework (hereafter the Framework) to clarify what court leaders can do to chart a clear course for court improvement.⁴ Because quality court administration is a goal to be achieved, not a given, the high-perfor-

Footnotes

1. See Richard Langworth, *Churchill on Pessimists and Optimists*, <https://richardlangworth/optimistspessimists> (last visited Aug. 21, 2015).
2. The close connection that exists between the administration of the legal process and how well the legal process serves litigants is discussed in Brian Ostrom, Roger Hanson & Kevin Burke, *Creating a New Generation of Courts*, 47 CT. REV. 80 (2011).
3. Strategies and tools to better understand court culture are discussed in Brian Ostrom & Roger Hanson, *Understanding and Diagnosing Court Culture*, 45 CT. REV. 104 (2009).
4. BRIAN J. OSTROM & ROGER A. HANSON, NATIONAL CENTER FOR STATE COURTS, *ACHIEVING HIGH PERFORMANCE: A FRAMEWORK FOR COURTS* (2010), available at www.ncsc.org/hpc.

mance concept asks two basic questions: *are we doing things right* and *are we doing the right things*? Operational court management focuses on doing things right, and many tools have been developed to foster improvement (e.g., *CourTools*⁵). In developing the Framework, the concept of performance has been broadened to add strategic or performance-management concerns, which address the second question: *are we doing the right things*? In courts, as with any organization, it is the strategy, driven by the vision of leadership, that defines what the right things are. Process improvements alone cannot guarantee that a court will be successful or fulfill its mission. The effort of the Ottawa Court to enhance the two aspects of management, strategic and operational, aligns with many of the concepts and approaches detailed in the Framework. Its experience provides a powerful example of how to develop a court's total management capabilities.

What the Ottawa Court has accomplished is neither easy nor obvious. And at all times, ultimate success or failure of this ongoing effort rides with the court's judges and their engagement. For this reason, we hope judges from outside this particular jurisdiction will appreciate the specific strategies, techniques, and examples of how judges and court staff can better work together to improve overall court operations and customer satisfaction.

In this article, the Framework provides the lens by which to appraise performance management in the Ottawa Court. Therefore, the article begins by highlighting relevant aspects of the Framework. It then turns to a summary of the court's strategic thinking and planning process with an emphasis on how the court keeps it meaningful, illustrated by some examples of implementation. The article concludes with observations and practical suggestions from Ottawa County court leaders to others seriously interested in building and sustaining a robust commitment to strategic management.

HIGH PERFORMANCE COURT FRAMEWORK

The Framework's rationale is to encourage court leaders to strive for excellence in the administration of justice and to better communicate their efforts to a wide audience, including members of the public and policymakers. There is benefit from taking a systematic approach to the study and practice of high performance. Operating from a comprehensive framework helps translate a court's mission statement and overall business strategy into specific, quantifiable goals and allows for the monitoring of the organization's performance. It helps demonstrate how a court's objectives are affected by its managerial culture, identifies measurable categories of performance, and suggests approaches on how to assemble and learn from performance information. Absent a framework, "it is very difficult to predict which change efforts will work, to see how new programs might conflict, or to anticipate potential trade-offs among performance areas. A framework helps make clear how performance results can be used by courts to reshape their day-to-day

operations and strengthen their institutional performance."⁶

Because management practices and court workflow processes can always be improved, courts should continually seek to do better than what they are doing already. The role of performance management is to identify which processes are most in need of improvement (doing the right things). This requires attention to strategy, which informs the allocation of resources for undertaking improvement efforts of the most strategically important processes in the near term and long term. To develop and sustain this capacity, the Framework suggests court personnel at all levels should strive to enhance four areas of performance management.

First, setting and communicating a leadership vision or "picture of the future" is a critically important and deeply strategic activity that many court leaders fail to adequately do. While it may seem like a simple activity for the court executive team to share a strategic vision of where they would like their court to go and the obstacles that must be overcome to get there, many do not take the time needed to share this vision with all members of the court. Important steps to create and effectively benefit from a shared vision include the ability of the chief judge and court administrator to create or elicit the initial vision; to translate that vision into administrative activities that make the vision real; and to articulate and sell this vision to other judges, managers, and staff members as either the right or best way to reach the goal. Court leaders need to provide a comprehensive vision for their court that a significant number of judges and other court staff will embrace and support.

Second, deciding what strategies to employ, what course of action to take, and how to structure a court's management requires a deep understanding of the court's internal dynamics—what is often referred to as the court's culture. This dimension addresses leaders' and employees' understanding and agreement with stated values. What distinguishes maturity is the extent to which those values move beyond virtuous words in a mission statement to actually being understood and practiced by all working in the court. Evidence of a mature court organizational culture includes a thoughtful application of change-management principles and practices by court leadership; the degree of ownership court staff members feel for the vision and values; their degree of participation in shaping the court's culture and ways of working; and the level of trust and communication throughout the court. The centrality of culture is highlighted by the words of Louis Gerstner, the former CEO of IBM, who stated, "I came to see . . . that culture isn't just one aspect of the game—it is the game."⁷

Third, a key perspective for improving operations overall is the recognition that the interests, values, and rights of all participants in the legal process is a court responsibility. Courts deliver services, and participants in the legal process are their valued customers. From that perspective, customer needs should shape thinking when court practices are evaluated, policies are implemented, and court staff are trained. This idea

5. BRIAN J. OSTROM, DANIEL J. HALL, RICHARD Y. SCHAUFFLER & NEAL B. KAUDER, NATIONAL CENTER FOR STATE COURTS, *COURTOOLS*, (2010), available at www.courtools.org.
6. BRIAN J. OSTROM & ROGER A. HANSON, *ACHIEVING HIGH PERFOR-*

MANCE: A FRAMEWORK FOR COURTS, at ix (2010).

7. LOUIS V. GERSTNER, JR., *WHO SAYS ELEPHANTS CAN'T DANCE: INSIDE IBM'S HISTORIC TURNAROUND* 182 (2002).

spans across all interactions the court has with the public and is a cultural issue as much as it is anything else. Customer-focused courts think about what they can do to make the customer experience better. With the exception of repeat players (i.e., attorneys and parties with regular court experience), court customers often have considerable uncertainty about the legal process. This is particularly true of self-represented parties. As a result, a high-performance court tries to reduce confusion and make the process less intimidating by being readily accessible, providing clear information, and adhering to predictable, orderly, and timely proceedings.

Fourth, knowing whether and to what degree a court is high performing is a matter of results. A high-performance court is evidence based in establishing success in meeting the needs and expectations of its constituents. Without a useful set of performance measures, court managers are “flying blind.” Most courts have learned to measure some things, such as the number of incoming cases, money spent, cases disposed, or compliance with requirements of outside agencies. But courts should look beyond everyday operations to develop performance measures that are aligned to the strategic plan and vision of the court. Features to look for in performance measures are metrics derived from and related to the strategy; measures that focus on outcomes and results; measures that are compiled frequently enough to guide decision making; measures of “team” and division performance, not just court-wide measures; and a balanced set of measures that cover a range of dimensions important to high-performance court success.

The Framework’s attention to performance management emphasizes the role of effective leadership, supportive culture, clear customer focus, and meaningful performance measures in creating a high-performance court. However, for a court to make performance management more than just a collection of management maxims, court leaders actually need to make something happen; they need to walk the talk. Over the past decade, the Ottawa Court has sought to embed continuous improvement into its management practices in a formal way. Of course, the road to continuous improvement is never straightforward, and Ottawa’s experience provides an opportunity to take an in-depth look at its methods to give other court leaders and managers a sense of the problems and roadblocks encountered as well as ideas about how to overcome them.

20TH CIRCUIT AND OTTAWA COUNTY PROBATE COURTS PERFORMANCE MANAGEMENT

In 2004, the Ottawa Court sought to enhance its performance-management capacity through a comprehensive process of strategic planning. As shown in Exhibit 1, it is a mid-sized court with four circuit judges and one probate judge handling a mix of several thousand cases.⁸

EXHIBIT 1: OTTAWA COUNTY

Circuit Court:

- 4 judges

- 116 full-time staff, 3 part-time staff, 18 temporary staff, 4.5 Ottawa County sheriff’s deputies, 10 intermediate-school-district teachers (for juveniles)
- 1,511 Trial Division filings (criminal, civil, appeals)
- 3,891 Family Division filings (domestic, juvenile, child-protective proceedings, etc.)
- 12,000+ open Title IV-D files
- 40-bed secure juvenile-detention facility

Probate Court:

- 1 judge
- 5 full-time staff
- 1 Guardianship Review Specialist (contractual)
- 984 Probate Court filings
- 8,000+ open files



Ottawa Court leaders were aware from the outset that strategic planning can be time consuming and cost money, and because the court has limited resources in both areas, they deemed it essential to make sure the effort was right for a court of its size and situation. They decided to move forward based on the belief that strategic planning, well executed, can provide even smaller courts an opportunity to improve their existing services as well as build capacity to sustain and expand their services in an uncertain environment.

Strategy development is not a cookbook process; rather, it is a challenging task that draws extensively on strategic thinking and management. For Ottawa, the effort to do the right things involved several traits: (a) early and active leadership from judges and the court administrator; (b) promoting a culture open to including staff of various levels and positions in the planning process; (c) encouraging a strong court-wide commitment to meeting the needs and expectations of court customers; and (d) developing a set of balanced performance measures aligned with the court’s strategic goals.

LEADERSHIP

Ottawa Court leaders introduced and developed the current strategic plan through three complementary phases. Phase one was establishing a strategic-planning task force made up of 20 members from different areas of the court, including judges, administrators, mid-level supervisors, staff, and union officials. The task force was purposely designed to be inclusive and representative of all levels of the court. The court administrator commented that “when I’ve worked with other courts and looked at how their strategic-planning process is organized, they tend to look more like blue-ribbon teams. They are the high-functioning, high-position people in the court. We chose not to go in that direction . . . we have a good mix of staff that I think keeps us grounded in the day-to-day work of the court.” In addition, consciously spreading opportunity throughout the court reduces any appearance of favoritism.

8. For more information about the Ottawa Court and its divisions, including their strategic plans, please go to www.miottawa.org/Courts/20thcircuit.

In phase two, six focus-group sessions were held to gather input from external stakeholders and court staff on identified opportunities and priorities. In phase three, the task force developed the content of the court's strategic plan. This included completing a trends analysis and an organizational assessment, developing mission and vision statements, and identifying five strategic-issue areas and initial strategic initiatives/projects.⁹ The strategic plan outlined the future direction and priorities for the court and was anchored by the mission statement: "To administer justice and restore wholeness in a manner that inspires public trust."

To implement the plan, the strategic-planning task force was transformed into the Strategic Planning Oversight Team (SPOT). SPOT has 20 members, including the chief circuit judge, the chief probate judge, the court administrator, the division directors (trial-division director, friend of the court, juvenile-services director, and probate register), and a range of line staff. This group meets three times a year to review progress on court initiatives and when necessary adjust and refine the strategic plan. SPOT provides guidance to five strategic-issue action teams that are aligned with the five strategic-issue areas identified in the plan. The action teams are: (1) Resources; (2) Access to Courts; (3) Efficient/Effective Operations and Services; (4) Positive External Relations; and (5) Employee Opportunities and Satisfaction. The action teams meet monthly to review progress on specific programs and projects underway in their strategic area. The teams are made up of judges, managers, and line staff and are co-chaired by members of the SPOT team.

SUPPORTIVE CULTURE

Court leaders are proactive in translating the strategic plan's vision into action. Key to preserving the momentum of desired change is building a court culture that promotes an open, two-way line of communication between judges, administrators, managers, and line staff. Through a series of regularly scheduled meetings and other forms of communication, everyone working in the Ottawa Court is kept informed on the progress of completing the latest initiatives. For example, the Court Leadership Team, made up of the court administrator and the division directors, meets every two weeks. For each meeting, the strategic plan is a standing agenda item, and updates from the five strategic-issue action teams are shared. Requiring an update on current projects maintains a sense of urgency in staff and creates an incentive for each of the teams to "get things done." Additionally, the court administrator provides updates on the strategic plan and team initiatives to judges at the quarterly judges' meetings and to all employees through emails and the court newsletter. Finally, projects successfully completed under the strategic plan are celebrated and showcased at the annual all-staff meeting. The all-staff meeting is an opportunity to recognize staff who have made significant contributions and to recruit new members to the five strategic-issue action teams. One member of the leadership team commented that "we do

our very best to institutionalize the plan by getting as many people involved as reasonably possible; we want to show that strategy is everyone's job."

Ultimately, there needs to be one leader with responsibility for sustaining the effort. The point person for keeping focus on strategic vision, plans, and initiatives in Ottawa is the court administrator. He willingly takes the role of "champion" to promote and inform the court and the community about strategic priorities and projects currently underway. A clearly stated goal of senior court management is to support the opportunity for each of the teams to develop innovative and creative initiatives—and to be held accountable for making progress. The court administrator strives not to micromanage the staff. The upside is greater trust between upper management and staff, encouraging all employees to share ideas and take opportunities to grow in their careers. The supporting role of the court administrator is consistent with Lao Tzu's views on leadership: "To lead people, walk behind them."

The court administrator sees it as his job to assist the teams with finding the resources they need for their initiatives or to push them to find external resources needed to move their project to the next level. Additionally, the court administrator ensures that new initiatives and ideas align with the strategic plan, and he frequently reminds staff to remember the mission of the court. The court administrator stated that "I repeatedly ask people to connect the dots and say how what you're doing advances our mission You come to work at 8:00 in the morning, you go at it until 5:00 in the evening, you put on your coat, and go home. But in those hours, I ask them to reflect on what they have done today to advance the mission of the court."

CUSTOMER FOCUS

The court's strategic plan and related governance structure chart a course for action. Within this framework, the five strategic-issue action teams have undertaken a number of initiatives that have helped advance the court's mission over the last decade. A primary focus of these efforts is on improving customer satisfaction. The Ottawa Court has embraced this view and seeks to organize administrative practices to deliver high-quality services to all individuals who enter the courthouse doors. Court customers react to both the services delivered and the manner of delivery. As a result, courts want to ensure that they are both readily accessible and exhibit fair processes in all court proceedings. Moreover, people want the process to be clear and well-designed. That is, they want the process to convey a logical, rational connection between key events and end with a definitive outcome.

In the Ottawa Court, a strong customer focus guided the strategic-planning process from the outset. At first, many of the projects were smaller in scope and did not require a great deal of effort or resources. For example, obtaining new and better signage in the courthouses cost the court virtually nothing but was viewed very favorably by the public. By starting

9. Please see Brenda J. Wagenknecht-Ivey & Kevin J. Bowling, *A Strategic Planning Process That Has Yielded Significant Results: The Experience of Two Michigan Courts*, 23 CT. MANAGER 10 (2007).

This article provides a complete overview of the development of the court's strategic plan.

smaller, the court was able to meet some objectives right away and give the plan added momentum moving forward.

As the plan gained support, the action teams took on larger tasks with the associated challenge of obtaining the necessary resources. Highlights from each team include:

- Team 1 (Resources) successfully partnered with local universities to establish a volunteer internship program. Drawing on unpaid interns (they receive college credit) proved a cost-effective way to help stay current with workload by covering duties of vacant staff positions during the fiscal bad times. Some of the tasks the interns perform for the court include maintaining case files, data collection, and data entry. In addition, the intern program serves as a way to provide relevant work experience, build specific skills, and identify top candidates when positions for full-time employees in the court come open. On average, the court has about 10 interns.
- Team 2 (Access to Courts) has deployed the *CourTools* Access and Fairness Survey (Measure 1) on two separate occasions to evaluate court-customer views on the accessibility of services and the fairness of decision-making procedures. It provides relevant feedback to court leaders on whether people believe the court is “doing the right things.” This instrument measures individual satisfaction with the ability to make use of the court’s dispute-resolution services (access) and how the legal process dealt with their issue, interest, or case (fairness). Additionally, the team took the lead on one of the court’s most significant projects, the development of a legal self-help center.
- Team 3 (Efficient/Effective Operations and Services) developed a technology master plan designed to assess what technology the court was using at the time and to identify areas for potential improvement within each division. Document imaging proved to be the highest strategic priority and, with support from Team 1, the team was eventually able to secure federal funding to support implementation of the project.
- Team 4 (Positive External Relations) established an annual bench/bar meeting. Part of the court’s public outreach is to strengthen bonds with local attorneys by more effectively sharing information on new developments (e.g., drug courts) and furthering discussion over possible revisions to current court policies and practices. In addition, Team 4 organizes an annual juvenile-related community program, referred to as the PACK meeting (Professionals Advocating and Caring for Kids). This effort brings together the courts, law enforcement, schools, treatment providers, and more to discuss programming issues and topics of mutual concern regarding at-risk youth. Most recently, Team 4 organized the first Domestic Law Summit as a more targeted bench/bar meeting for family-law practitioners.
- Team 5 (Employee Opportunities and Satisfaction) has used the *CourTools* Employee Satisfaction Survey (Measure 9) and worked with senior management to provide free professional-development opportunities for staff. A couple of examples of these opportunities include a “Lunch and Learn” series covering a variety of topics chosen from employee-survey results, and several work-related skill-building sessions offered by the County Human Resources Department. This team also assisted court leadership in

design considerations for a new courthouse built in Grand Haven, as well as upgrades in the Fillmore and Holland locations.

A closer look at two specific initiatives illustrates the court’s skillful use of performance management to enact change.

Development of a Legal Self-Help Center. In 2009, Team 2 (Access to Courts) began work on the development of a legal self-help center to fill a perceived gap in litigant services. At the time, many cases were being adjourned as a result of pro per litigants filing incorrect or incomplete motions (e.g., motion to modify child support; motion to modify custody). While court staff was able to provide forms to civil and probate pro per litigants, they were often too busy to fully answer questions and were prohibited from providing any legal advice. In response, staff members of Team 2 attended national trainings and began researching what other jurisdictions had done to successfully set up a legal self-help center. Collaborating with staff from Team 1 (Resources), external-funding sources were found, and grant funding for a part-time position was secured. Staff then spent several months getting operations up and running, including obtaining access to computers, recruiting, and training volunteers (e.g., law students and paralegals) for the center, and developing forms and packets for different types of motions (e.g., initial divorce pleadings). The legal self-help center opened at the Ottawa County Courthouse in Grand Haven in January 2010.

After opening, the program kept detailed statistics about the number and types of users (e.g., gender, race, military service, income level, and education), reasons for contact, and the types of services provided by the self-help center. Buttressed by these analytics, the court was able to successfully show the county board of commissioners the value of the center and subsequently received funding for a full-time director. The court administrator stated that “now when people come in unprepared and uncertain about what paperwork they need or what to do, staff will say, ‘go down the hall to the self-help center, talk to the people there, and come back as soon as you’re ready.’ This has had a dramatic, positive impact on litigants and the court’s docket.” In recent years, the legal self-help center has expanded to provide free services at two additional court locations in the county. The self-help center is able to provide assistance to pro per litigants who wish to resolve a variety of non-criminal matters, including child support, paternity, divorce, guardianship, conservatorship, estates, small claims, landlord/tenant, and garnishment. Since 2010, the number of individuals using the center has doubled.

Employee Satisfaction. The current strategic plan places an emphasis on creating a healthy work environment with engaged and satisfied employees, the idea being that employee attitudes shape the culture of the court. In the area of customer service, employees committed to the mission are important because they are the face of the court to the public. Research suggests that satisfaction is related to the extent to which employees feel passionate about their jobs, embrace the vision and values, and put discretionary effort into their work. Satisfied employees are motivated to do more than the bare minimum needed to keep their jobs.

To gauge how employees of the court perceive their workplace, Team 5 (Employee Opportunities and Satisfaction) drew on the *CourTools* Employee Satisfaction Survey (Measure 9). The survey was first used in 2007, establishing a baseline of satisfaction levels and pinpointing specific issues for the strategic-issue action team to focus on (e.g., keeping staff informed about matters that affect them in the workplace). Repeated deployment in 2009, 2011, and 2013 allowed the court to evaluate the impact of strategic interventions and refined work practices.

Although most employees won't turn down a raise, the Ottawa Court, like courts everywhere, operates within a tight budget. So while the team worked to update the wage scale and employee classifications, court leaders also looked hard to find less expensive changes that could improve employee engagement. The employee-satisfaction survey identified five areas that court leaders have tried to address: communication, performance evaluation, flexibility, staff support and recognition, and training. Since 2007, the court has undertaken a number of initiatives to increase employee engagement. For example, the court has worked to enhance communication about court policies, practices, and activities by hosting an annual all-staff meeting, developing newsletters and court blogs, and establishing several committees to assist in the sharing of information (e.g., Labor Management Cooperation Committee; Training Committee; Wage and Classification Committee). Additionally, the court has developed one consistent performance-evaluation tool for all staff and has hosted picnics, potlucks, and holiday parties.

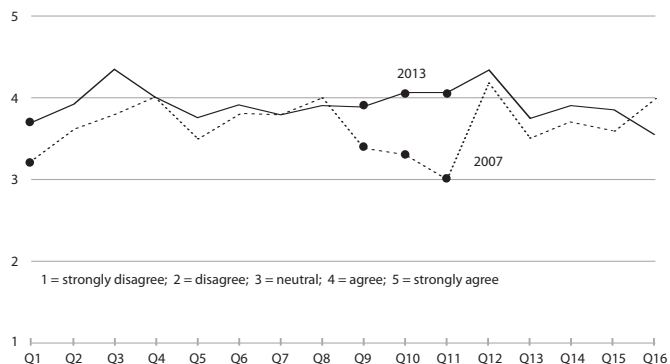
Furthermore, court leaders recognize that employees appreciate more control over their schedules. Therefore, the court has made flextime an option. Many employees have demanding schedules outside of work and value a boss who considers work-life balance. Court leaders also take time to celebrate success and recognize staff accomplishments. The chief judge noted that celebrating wins reminds everyone of the goal that was set and why it was set in the first place. Plus it reminds everyone that the court's strategic-planning process works. The regular meetings of the Strategic Planning Oversight Team and the annual all-staff meeting provide multiple opportunities to motivate staff to continue good work, connect with coworkers in a way that is not just work related, and reward specific employees who have gone above and beyond.

The court also invests in employee growth by providing training and encouraging staff to learn new skills. The court has embraced staff development through multiple training avenues,

including support of staff for ongoing education through the Institute for Court Management (ICM) and allowing staff to receive Leadership Gold and 4 C's (customer service, communication, continuous improvement, cultural intelligence) training. In fact, the talent development and talent management of court employees was the subject of a joint ICM Fellowship research project conducted by three members of the court-leadership team. This research project culminated in the development and implementation of "*Building Bench Strength*" (BBS) as a new court initiative to support the professional development of staff and to ensure the court has "the right people with the right skills in the right place at the right time."¹⁰

The benefits to staff morale from these efforts can be seen in a comparison of survey results from 2007 and 2013 (see Exhibit 2).¹¹ For example, responses to Q1 (I am kept informed about matters that affect me in my workplace), Q9 (the people I work with take a personal interest in me), Q10 (I have the resources necessary to do my job well), and Q11 (on my job, I know exactly what is expected of me) have all significantly increased. Despite these improvements, Team 5 continues to develop a number of specific recommendations for improved employee satisfaction. Recent recommendations include considering the development of standardized electronic training materials that are tied to each division's policy-and-procedure manual and a commitment to using existing training dollars to send more front-line staff to outside trainings.

EXHIBIT 2: A COMPARISON OF EMPLOYEE-SATISFACTION SURVEY RESULTS: 2007 TO 2013¹²



10. Further details regarding BBS are available at www.ncsc.org/~media/files/pdf/education%20and%20careers/cedp%20papers/2011/building%20bench%20strength%20-%20succession%20planning%20readiness.ashx.
 11. The *CourTools* Employee Satisfaction Survey was significantly modified in 2011. Exhibit 2 displays the survey questions that were similar in content between 2007 and 2013.
 12. Q1=I am kept informed about matters that affect me in my workplace; Q2=The Court is respected in the community; Q3=I understand how my job contributes to the overall mission of the Court; Q4=I am treated with respect; Q5=When I do my job well, I am likely to be recognized and thanked by my supervisor; Q6=My

working conditions and environment enable me to do my job well; Q7=I feel valued by my supervisor based on my knowledge and contribution to my department, unit, or division; Q8=I enjoy coming to work; Q9=The people I work with take a personal interest in me; Q10=I have the resources necessary to do my job well; Q11=On my job, I know exactly what is expected of me; Q12=I am proud that I work at the Court; Q13=Communication within my division is good; Q14=My co-workers work well together; Q15=I have opportunities to express my opinion about how things are done in my division; Q16=In the last 6 months, a supervisor/manager has talked with me about my performance/career development.

PERFORMANCE MEASURES

The Ottawa Court has made a strong commitment to use performance-related data to manage and improve its operations. Performance data allows for an empirical, non-anecdotal assessment of whether established goals are being reasonably achieved and which areas are in need of improvement. The court has actively made use of performance data to investigate the effectiveness of strategic-planning initiatives, to assess and refine case-management practices, and to meet the requirements for budget submissions to the Michigan State Court Administrative Office (SCAO).

Ottawa is currently evaluating its use of performance measures to support quality improvement within the court (internal quality improvement) as well as determining what to share with the public through the Ottawa County website (external quality reporting). As part of its continuous improvement efforts, the court periodically assesses the measures it uses for internal quality improvement using three basic steps: 1) identify problems or opportunities for improvement; 2) select appropriate measures of these areas; and 3) obtain a baseline assessment of current practices and then re-measure to assess the effect of improvement efforts on measured performance. By annually revisiting its performance criteria in conjunction with budget preparation, the court can gauge whether measures remain in line with strategic goals and if not, set new measurement priorities as part of the strategic plan.

The court's interest in developing a public dashboard for external reporting corresponded with a 2012 SCAO statewide initiative: "Courts Working Smarter for a Better Michigan." The initiative called for all Michigan courts to identify performance measures, set goals, and post performance results on public dashboards. To meet this directive, the court chose to align its efforts with the principles of the High Performance Court Framework and sought direct assistance from the National Center for State Courts (NCSC). The goal of the project was to design and implement a balanced scorecard approach to performance measurement that linked to the court's strategic priorities and ongoing improvement efforts. The court looked to develop a comprehensive performance dashboard to use in monitoring and maintaining the provision of high-quality judicial services to citizens and litigants. To provide guidance and direction to this project, the court formed the Ottawa High Performance Court Committee (OHPCC), comprised of individuals representing each division of the 20th Circuit Court (Trial Division, Friend of the Court, and Juvenile Services), the Ottawa County Probate Court, the 58th District Court, and the Ottawa County Clerk's Office. The purpose of the OHPCC was to work directly with the NCSC team to review existing performance indicators, assess data availability and quality, clarify internal and external requirements, and develop a comprehensive performance dashboard.

As a first step, NCSC staff used the High Performance Court Self-Assessment survey to gather perspectives on the effectiveness of current court operations from judges, managers, super-

visors, and line staff working in the different divisions of the district, circuit, and probate courts and the clerk's office.¹³ The survey results help court leaders identify specific areas where they believe they are successful, as well as identify targets for improvement.

The survey results showcased a number of areas of perceived strengths. Throughout the court, respondents said the organization was successful in many aspects of strategic management, including clear commitment to treating all court users with courtesy and respect; actively looking for ways to better meet customer needs (e.g., self-help center); regular opportunities for staff to express their opinions about how things are done in their division; meaningful ways for staff to participate in shaping and improving processes and procedures; and widespread belief that court leaders effectively manage the organizational changes needed to improve court administrative practices. It is notable that these viewpoints reflect a shared understanding and agreement among all employees with the values articulated in the strategic plan.

On the other hand, the survey results also identified opportunities for improvement. In evaluating current court-management practices, lower survey scores were largely attached to issues around performance measurement, including: ensuring a report on performance measures is a regular item on the agenda at judges' meetings; creating opportunities for structured discussion on how best to use performance results to improve caseload-management practices; conducting periodic training for all court personnel and judicial officers in case-management practices; providing staff education and training in court-performance monitoring, analysis, and management; willingness to share court-wide what has been done to improve performance and refine practices; and making select performance-measurement results available on the court website.

The survey results were shared with OHPCC and provided a platform for discussion about the court's current use of performance measures, alignment of measures with strategic goals, and how best to use performance information to support decision making. Additionally, the results confirmed an interest of court personnel to focus on the external dissemination of performance results. Finally, getting systematic input from both judges and court staff at the outset has helped solidify agreement over the direction the court will go with performance information for internal and external audiences.

SUMMING UP

At West Point, Army cadets study tactical thrusts and strategic plans, the small-scale movements and the big picture. Court leaders face something similar, a balance between tactics and strategy. Tactics are the how, while strategy is the where, when, and why. Taking time to focus on strategy is essential to choosing a good path through what can be a confusing labyrinth. Thinking back, the Ottawa court administrator said, "Our approach to strategic planning has emphasized a few key elements. We've tried to communicate openly and often, we

13. The purpose of the High Performance Court Self-Assessment survey is to familiarize a court with the success factors associated with becoming a high-performance court in relation to its own

current practices and to help court leaders identify specific areas where they believe they are doing well or areas where they believe improvement is needed.

support stretch goals and giving people the opportunity to work to their potential, and then I get out of the way. Ultimately, it comes down to trusting the teams.”

LESSONS LEARNED

In 2014, the Ottawa Court marked a 10-year anniversary in its use of strategic planning. There’s widespread belief throughout the court that its plan is working and leading to meaningful improvement in how the Ottawa Court does business. What’s its secret? When asked, judicial and court administrative leaders were able to boil down what’s worked for them into a set of seven lessons learned. The ongoing relevance of strategic planning to court operations is clear in that they are about to begin updating and implementing a new three-year plan.

1. The culture needs to support and sustain the plan. As stated by the chief judge, “It became obvious to me that while the initial decision to engage in strategic planning needed to be pushed by an individual, if it was going to succeed, the effort needed to move from being personality driven to being institutionalized and part of our culture.” To do that, the court has sought wide and diverse staff participation in all phases of the planning process. In particular, court leadership has been visible and actively involved not only in setting the vision but in all implementation and oversight phases. Having the bench engaged is essential to the success of strategic planning. When judges see and believe in the benefits of a plan, they can help “sell it” to the rest of the court staff. Also, the five action teams are made up of court staff on many levels, giving them a voice in the process. The creation of teams and sub-teams provides many opportunities to participate, helping the rationale and need for the plan to percolate down through all levels of the organization. The result is that the court has created a culture with top-down support and bottom-up ideas and initiative.

2. Be willing to invest the necessary time. All court leaders stressed that, as one judge put it, “You have to be willing to put in time up front and keep your eyes on the prize over the long haul.” At the outset, time is needed to design the content of the plan, assign responsibilities, develop a communication plan, and prepare judges and staff for putting the plan in place. The court administrator stated that, once the process got rolling, “I needed to devote time to my role as coordinator to keep enthusiasm up, keep forward momentum on different projects, and continually remind everyone that what they’re doing with these strategic-planning projects is key to how we fulfill the overall mission of the court.” Successful change doesn’t happen overnight. The chief judge went on to say that he thinks it took about four years for strategic management to become the way the Ottawa Court does things:

In the first year, many employees are thinking, “What is a strategic plan anyway? I don’t even understand what that is.” As projects started to move in the second year, it became more personal, and we had employees asking, “What is it going to mean to me? Does it mean I have to work harder or differently? Will I be negatively impacted by this?” And then by the third year, people saw we were serious, they knew about the action teams and that things were happening. They saw people being recognized for their involvement and projects coming to fruition. They saw people being promoted because, among other things,

they have on their resumé that they were involved in the strategic-planning process. Names become known to judges and upper-level management for the work that they’ve done on various projects. And then, in the fourth year you have folks saying, “Hey, how about I get involved in that?” Or, “I’ll volunteer to participate.”

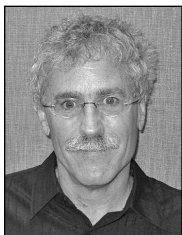
3. Make it real. A first step was to produce a written plan and make it easily accessible on the website by anyone, including the public and staff. One judge noted, “When you make the plan public, you’re saying, ‘Here’s who we are, here’s what we think is important, and here’s what we pledge to do.’” From this position, court leaders have sought to create ownership among staff by giving the teams real authority, support, and resources to put the plan into action. The chief judge said it this way: “I don’t want them to try to guess how I think it should be done. I want to give them real discretion to do what they think is right, and I’ll support them as long as it is not an abuse of discretion.” His last point confirms that, in the Ottawa Court, discretion comes with accountability. A mix of monthly team meetings, SPOT meetings every four months, and the annual all-staff meeting ensure there are regular progress reports and timely feedback. As stated by the court administrator, “You can tell who’s doing the work and who’s not doing the work. And nobody wants to appear as though they’re not doing the work.” The other side of the accountability coin is recognition. The regular meeting schedule also provides many opportunities to reward and recognize tasks accomplished and promote self-motivation. A judge summed it up, “We want to be sure staff is not toiling in obscurity and that they’re recognized for their participation and successes.”

4. Set attainable goals. While, not surprisingly, the projects carried out under the auspices of strategic planning should meet strategic priorities, they should also be attainable. Resolving the tension between good ideas and budget realities is imperative. A judge stated that, “Sometimes we dream big, but we just can’t make it happen—that is particularly true for getting money for new positions.” While big ideas can work out (e.g., the legal self-help center), the Ottawa Court also builds in some quick-success scenarios like better signage, a book drive for the juvenile-detention center, and a recycling program for the courthouse that don’t cost a lot of money but still carry value. Relatedly, because there is a lot of energy and excitement for the strategic-planning effort, Ottawa Court leaders try to avoid undue delay (and associated frustration) by deciding in a timely way whether projects that require more substantial funding will get the green light. They are also creative in generating outside support for good ideas. For example, the courthouse where probate cases are handled was retrofitted to have a barrier-free entrance wide enough to accommodate a wheelchair, yet it initially lacked a button to automatically open the door. People in wheelchairs were unable to open the door themselves and were forced to wait outside until someone else opened the door. On multiple occasions, the court’s request for funding to install a button was denied by the board of supervisors (a cost of roughly \$5,000). When the court conducted the *CourTools* Access and Fairness survey, many court users lodged complaints about the physical facilities, including handicap access. The public feedback proved persuasive, and the automatic-door button was funded and installed by the county.

5. Bring in an experienced outside facilitator to jumpstart the process. The court found using an outside consultant to help with the creation of the original strategic plan to be extremely beneficial. An individual with expertise in strategic planning brings fresh perspective. He or she can provide best practices in how to structure an effective meeting and offer immediate clarity on the organizational principles needed to craft a mission statement and develop an action plan.

6. Explicitly link projects and practices to the mission statement. Ottawa Court leadership want all personnel to understand the big picture embodied in the court's mission statement and how that guides how work gets done. In addition, the mission needs to be translated to the county board of commissioners as the funding unit, and court leaders must make sure they understand that the whole budget process is tied to the strategic plan. The court administrator put it this way: "I keep asking the action team leaders and team members how does each proposed project relate to being able to better serve the public. If you can't draw a straight line from what you're doing to how it's serving the mission of the court, you need to stop doing it and do something different."

7. Look at the big picture. There is no one best way or precise path for courts to follow to achieve higher performance. Success depends on navigating and working within the local budgetary, political, and cultural environment. Yet the daily press of business is real, and it is easy to lose sight of the forest when trees are burning. A key value of strategic planning is to encourage administrative leaders to periodically step back from operational issues and putting out fires to address long-term strategy. The High Performance Court Framework supports these efforts to see the big picture and helps ensure that a court's strategic and action plans are comprehensive, recognize the role of existing organizational culture and capacity, focus on customers, and support the effective use and communication of performance results. That is, the Framework is designed to help courts plan how they can achieve and sustain quality in the administration of justice. The chief judge summed up the rationale for strategic planning when he stated that without a plan, "you're vulnerable to criticism. Unless you have a plan, you're going to bounce around on the sea of life like so much flotsam and jetsam responding to the current and the winds. And once you have a plan, you can hold your head up and say, 'we're not just reacting to life here, we are actually moving forward in a planned and orderly fashion.' And I just think that makes everybody feel better about what they're doing and the organization they work for."



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Implicit Bias and the American Juror

Jennifer K. Elek & Paula Hannaford-Agor

On August 9, 2014, white police officer Darren Wilson shot an unarmed black civilian named Michael Brown. In the wake of the extensive media coverage and public scrutiny that followed, the tragic incident triggered a federal civil-rights investigation and renewed a broader national dialogue about the perception of black males as inherently dangerous, threatening, or criminal—and the role of those perceptions in perpetuating racial inequality in the United States.¹ A grand jury decision not to indict Wilson on murder charges elicited highly polarized reactions from the general public, which ranged from wholehearted support for Officer Wilson to further accusations of racial bias against the prosecutor in the case and against the predominantly white grand jury charged with making the decision.² The President of the United States addressed the diverse sentiments of the American people:

There are Americans who agree with it [the Ferguson grand jury decision] and there are Americans who are deeply disappointed—even angry. . . . We have made enormous progress in race relations over the course of the past several decades. I have witnessed that in my own life, and to deny that progress, I think, is to deny America's capacity for change. But what is also true is that there are still problems—and communities of color aren't just making these problems up. Separating that from this particular decision, there are issues in which the law too often feels as if it is being applied in a discriminatory fashion.³

On March 4, 2015, the United States Department of Justice (DOJ) released a report of findings in its investigation of the Ferguson, Missouri, criminal-justice system. The report contributed to the still-growing body of literature acknowledging contemporary racial inequality and recognizing that these disparities may not be explained on the basis of people's explicit, intentional biases alone. In the report, the DOJ described evidence of systematic racial discrimination in the community's

policing and municipal court practices. Observed disparities in treatment were “unexplainable on grounds other than race and evidence that racial bias, whether implicit or explicit, has shaped law enforcement conduct,” resulting in what they concluded to be disproportionate harm to Ferguson's African-American residents.⁴ In discussing the DOJ report, Attorney General Eric Holder described Ferguson as “a community where this harm frequently appears to stem, at least in part, from racial bias—both implicit and explicit.”⁵

Although the possible effects of implicit bias on justice-system outcomes should be considered at each decision point in case processing, we focus in this article on the potential effects of implicit bias in the decision making of everyday American citizens who are randomly selected to serve on grand juries and in jury trials. We begin with a brief explanation of the concept of implicit bias and examine one type of intervention that some believe could address this subtler form of racial bias in jury decision making: a specialized jury instruction.

IMPLICIT BIAS AND ITS ROLE IN JUROR DECISION MAKING

In understanding how racial bias can continue to operate in the context of the modern American jury, one must account for both forms of racial bias identified by the Attorney General and by the DOJ in the Ferguson report. This includes explicit bias, the form of bias that a person intentionally endorses (and the traditional definition of racial prejudice that most people recognize), but also *implicit bias*, a form of bias that occurs when a person makes associations between a group of people and particular traits that then operate without self-awareness to affect one's perception of, understanding of, judgment about, or behavior toward others.⁶ People develop these associations (*i.e.*, attitudes and stereotypes) between particular social groups and particular qualities (for example, one study showed that many participants implicitly associate “black” with “guilty,” and other

Footnotes

1. Associated Press, ‘Hands Up, Don't Shoot’ Becomes Rallying Cry Despite Questions Whether Hands Were Raised High, FOX NEWS, November 27, 2014, available at <http://www.foxnews.com/us/2014/11/27/hands-up-dont-shoot-becomes-rallying-cry-despite-questions-whether-hands-were/>; Mychal Denzel Smith, *Three Years Later, the Legacy of Trayvon Martin and #BlackLivesMatter*, THE NATION, February 26, 2015, available at <http://www.thenation.com/blog/199337/three-years-later-legacy-trayvon-martin-and-blacklivesmatter#>.
2. Kimberly Kindy & Carol D. Leonnig, *In Atypical Approach, Grand Jury in Ferguson Shooting Receives Full Measure of Case*, WASHINGTON POST, September 7, 2014, available at http://www.washingtonpost.com/politics/in-atypical-approach-grand-jury-in-ferguson-shooting-receives-full-measure-of-case/2014/09/07/1dec6ffe-339b-11e4-8f02-03c644b2d7d0_story.html.
3. Bill Chappell, *Obama Discusses Ferguson Jury Decision in Michael Brown Case*, NPR, November 24, 2014, available at <http://www.npr.org/blogs/thetwo-way/2014/11/24/366442184/obama-to-discuss-ferguson-jury-decision>.

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5. Eric Holder, Update on Investigations in Ferguson, Missouri [remarks prepared for delivery] (March 4, 2015), available at <http://www.justice.gov/opa/speech/attorney-general-holder-delivers-update-investigations-ferguson-missouri>.
6. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995). After a Florida jury acquitted Hispanic neighborhood-watch coordinator George Zimmerman of second-degree-murder and manslaughter charges in the death of unarmed black teen Trayvon Martin, one outspoken juror explained her reasoning in the case to the media. She said she had “no doubt” that Zimmerman “feared for his life” in his encounter with Martin and that “anybody would think anybody walking down the road, stopping and turning and looking—if that's exactly what [Martin did]—is suspicious.” Scientists and legal scholars have concluded that

studies have shown associations between African-Americans and negative characteristics such as aggression and hostility) as they learn from their social environment (e.g., media, parental, or peer role models).⁷ The influence of these attitudes or stereotypes in producing a discriminatory response may occur involuntarily and without a person's conscious intent. That is, individuals may explicitly report egalitarian racial attitudes but can nevertheless still make racially biased decisions and behave in racially biased ways.⁸

Findings in the scientific research literature demonstrate how implicit bias can operate to distort a person's interpretations of the evidence in a case. Racial stereotypes have been found to play a role in how people perceive and interpret otherwise ambiguous events. For example, one study found that people interpret ambiguously hostile behavior as more hostile when performed by a black compared with a white actor.⁹ Similarly, people who test high on implicit racial bias were found to be more likely to interpret ambiguous expressions in a negative manner (i.e., as angrier) on black faces (but not white faces) compared with those who test low on implicit racial bias.¹⁰ Another recent study found that presenting mock jurors with images of darker-skinned (compared to lighter-skinned) perpetrators biased their interpretations of ambiguous evidence. Biased interpretations of the evidence, in turn, predicted subsequent guilty verdicts.¹¹

ADDRESSING IMPLICIT BIAS WITH JURORS

In recent years, court leaders across the country have recognized the challenge posed by implicit forms of bias and have focused on addressing this issue in the criminal-justice system through in-depth education and training of judges and court

staff.¹² However, unlike with judges and court staff, the courts have limited opportunities to educate jurors about the pernicious effects of complex psychological phenomena like implicit bias. Most jurors in this country serve only for the duration of a trial (typically two to three days) and then are released from service. There is no time available during this short period to provide the type of in-depth education that judges and court staff may receive on strategies to reduce the impact of implicit bias in their decision making. Other solutions that might operate effectively in other settings are not always feasible for use in jury trials, where these time constraints and additional resource limitations (e.g., funding, staffing, technology) often prohibit more elaborate interventions. For primarily practical reasons, courts have historically relied on jury instructions to guide juror decision making.¹³

Presently, pattern jury instructions developed for use in state and federal jury trials typically rely on the simple admonition that jurors should not let "bias, sympathy, prejudice, or public opinion influence [their] decision."¹⁴ Only a few studies have attempted to explore the utility of standard pattern jury instructions, but they have produced mixed findings.¹⁵ Specifically, one meta-analysis of 16 mock-juror studies (a) found that mock jurors were likely to "render longer sentences for other-race defendants," (b) found that racial bias in these mock-juror studies was "more pronounced . . . for Black participants; when community members were participants; and in published studies," but (c) concluded that racial bias in mock juror verdicts "decrease[d] when ecologically relevant procedures [were] used."¹⁶ Alternatively, one recent study showed that pattern presumption-of-innocence instructions, "a core legal principle specifically designed to eliminate bias," actually primed greater

legal decision makers "are often unaware of the extent to which implicit racial bias can influence perceptions of fear and reasonableness determinations in self-defense cases"—meaning that, "in the run-of-the-mill case, when an individual claims he shot and killed a Black person in self-defense, legal decision makers are likely to find reasonable the individual's claim that he felt his life was being threatened." See Dana Ford, *Juror: 'No Doubt' That George Zimmerman Feared for His Life*, CNN, July 16, 2013, available at <http://www.cnn.com/2013/07/15/justice/zimmerman-juror-book/index.html>. See also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1559, 1562, 1577 (2013).

- Justin D. Levinson et al., *Guilty by Implicit Bias: The Guilty-Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989), available at <http://dx.doi.org/10.1037/0022-3514.56.1.5>.
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- Judicial Conference Criminal Jury Instructions, CALCRIM No. 101 (2013).
- Specifically on burden of proof and relevant caselaw; e.g., Jeffrey E. Pfeifer & James Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED PSYCHOL. 1721 (1991); Erick L. Hill & Jeffrey E. Pfeifer, *Nullification Instructions and Juror Guilt Ratings: An Examination of Modern Racism*, 16 CONTEMP. SOC. PSYCHOL. 6 (1992).
- See 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, 630 (2005). Relevant jury instructions differed across studies. Researchers coded each study to indicate whether jury instructions were present or absent from the research design.
- Danielle M. Young et al., *Innocent until Primed: Mock Jurors'*

attention to race (i.e., to attend more to black individuals) among mock jurors compared to an alternative matched-length instruction.¹⁷ This type of attentional bias, in which decision-makers focus more of their visual attention on black individuals, has been shown in other research to lead to racially biased interpretations of events and racially biased decisions.¹⁸ When considering this mixed evidence in combination with (a) research indicating that people may not be able to consciously correct for the effect(s) of their implicit biases because they are often unaware that these biases exist and (b) evidence of racial discrimination in actual jury trials, standard legal instructions do not appear to offer a complete or reliable solution.¹⁹

As a next step, to address concerns of both implicit and explicit racial bias among jurors, some judges and lawyers have expressed interest in developing a specialized jury instruction, with at least one midwestern district court judge (now retired) having already used a specialized jury instruction on implicit bias at trial.²⁰ Crafting clear, effective jury instructions on the topic of implicit bias, however, requires extensive subject-matter expertise for two main reasons. First, subject-matter expertise is necessary to ensure that the language and strategies used in the instruction are accurate reflections of the state of the science. The high level of subject-matter expertise necessary to leverage lessons learned from existing research and provide jurors with appropriate debiasing strategies may not be available among the law-trained professionals who typically comprise committees that draft pattern jury instructions. Second, subject-matter expertise is also needed to ensure that the developed instruction intervention does not incorporate communication strategies known to exacerbate expressions of racial bias in certain subpopulations. For example, strategies that impress an extrinsic motivation to be non-prejudiced (i.e., mandates and other authoritarian language typical of jury instructions) may provoke hostility and resistance from some individuals, failing to reduce and perhaps even exacerbating expressions of prejudice.²¹ Instead, communications designed to foster intrinsic egalitarian motivations may more effectively reduce both explicit and implicit expressions of prejudice without eliciting

such backfire or backlash effects.²² These and other research findings are important to consider for those looking to adopt a jury instruction to minimize expressions of implicit biases in juror judgment.

Any new jury instruction should be carefully evaluated to determine its actual impact on decision making before broadly promoting the instruction as a solution for general use in the courtroom. Jury instructions designed to achieve specific cognitive processing or decision-making objectives are not always a completely effective solution, as has been well documented in prior studies on instructions to disregard inadmissible evidence.²³ Empirical scrutiny is particularly important with any jury instruction on implicit biases given the possibility that a specialized instruction (a) may successfully reduce expressions of racial bias with some jurors yet exacerbate expressions of bias in others and/or (b) may serve to increase juror attention to race in a way that might increase the likelihood of biased outcomes.²⁴ To date, no known studies have examined the efficacy of a specialized jury instruction informed by the research on reducing implicit forms of bias.

IMPLICIT-BIAS JURY INSTRUCTIONS: A MOCK-JUROR EXPERIMENT

In the present study, we examined for the first time the efficacy of a specialized jury instruction in reducing racial disparities in juror judgments. The National Center for State Courts (NCSC) consulted with nationally recognized social-science and legal experts on implicit bias to develop a specialized jury instruction for use in a web-based experiment with jury-eligible U.S. citizens.²⁵ In the study, NCSC adapted a trial scenario from a seminal research study that had effectively demonstrated racial bias in juror decision making (an effect which has since been replicated in several experiments using similar if not identical research methodologies). The trial scenario featured a defendant who was charged with assault and battery with intent to cause serious bodily injury. The defendant and victim were described as teammates on a college basketball team, and the alleged assault resulted from a locker-room fight. Prior studies showed that white jurors tended to judge black defendants more harshly

Racially Biased Response to the Presumption of Innocence, 9 PLOS ONE 1, 1, available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0092365>.

18. See, e.g., Jennifer J. Ratcliff et al., *The Hidden Consequences of Racial Salience in Videotaped Interrogations and Confessions*, 16 PSYCHOL. PUB. POLY & L. 200 (2010); Sophie Trawalter et al., *Attending to Threat: Race-based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322 (2008).
19. Brian Nosek, *Implicit-Explicit Relations*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 65 (2007); Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017 (2012); David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).
20. See Kang et al., *supra* note 12. In addition, the American Bar Association Criminal Justice Section assembled a task force that attempted to develop its own specialized jury instruction on

implicit bias. (Personal communication with S. Cox and S. Redfield (June 3, 2013)).

21. E.g., Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835 (2002); E. Ashby Plant & Patricia G. Devine, *Responses to Other-Imposed Pro-Black Pressure: Acceptance or Backlash?*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 486 (2001).
22. Lisa Legault et al., *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (But Also Increase) Prejudice*, 22 PSYCHOL. SCI. 1472 (2011).
23. See Nancy K. Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469 (2006).
24. Young et al., *supra* note 17.
25. See pages 113-114 for the specialized jury instruction used in this experiment. We have annotated the experimental instruction we tested, citing the existing scientific research evidence that formed the theoretical basis for each of the components of the instruction.
26. Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Court-*

Our Experimental Implicit-Bias Jury Instruction, Annotated¹

Our system of justice depends on the willingness and ability of judges like me and jurors like you to make careful and fair decisions.² What we are asked to do is difficult because of a universal challenge: We all have biases. We each make assumptions and have our own stereotypes, prejudices, and fears.³ These biases can influence how we categorize the information we take in.⁴ They can influence the evidence we see and hear, and how we perceive a person or a situation. They can affect the evidence we remember and how we remember it. And they can influence the “gut feelings” and conclusions we form about people and events.⁵ When we are aware of these biases, we can at least try to fight them.⁶ But we are often not aware that they exist.

We can only correct for hidden biases when we recognize them and how they affect us. For this reason, you are encouraged to thoroughly and carefully examine your decision-making process to ensure that the conclusions you draw are a fair reflection of the law and the evidence.⁷ Please examine your reasoning for possible bias by reconsidering your first impressions of the people and evidence in this case. Is it easier to believe statements or evidence when presented by people who are more like you?⁸ If you or the people involved in this case were from different backgrounds—richer or poorer, more or less educated, older or younger, or of a different gender, race, religion, or sexual orientation—would you still view them, and the evidence, the same way?⁹

Please also listen to the other jurors during deliberations, who may be from different backgrounds and who will be viewing this case in light of their own insights, assumptions, and even biases.¹⁰ Listening to different perspectives may help you to better identify the possible effects these hidden biases may have on decision-making.¹¹

Our system of justice relies on each of us to contribute toward a fair and informed verdict in this case. Working together, we can reach a fair result.¹²

Footnotes

1. We reprint here the specialized jury instruction used in the present experiment, along with citations to the existing scientific research evidence that formed the theoretical basis for each of the instruction's components. However, we are not suggesting nor do we recommend that any court proceed to adopt this instruction without further empirical testing to determine the efficacy of this or any other instruction designed to address implicit and explicit forms of bias in juror decision making.
2. When leadership sets an egalitarian example, others may also pursue this goal (see Henk Aarts et al., *Goal Contagion: Perceiving Is for Pursuing*, 87 J. PERSONALITY & SOC. PSYCHOL. 23 (2004)).
3. To avoid potential backfire effects, instructional language should reduce external pressure to comply (by avoiding authoritarian language) and promote intrinsic motivation to counteract biases (E. Ashby Plant & Patricia G. Devine, *Responses to Other-Imposed Pro-Black Pressure: Acceptance or Backlash?*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 486 (2001); Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417 (2004); Lisa Legault et al., *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (But Also Increase) Prejudice*, 22 PSYCHOL. SCI. 1472 (2011)).
4. See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Legault et al., *supra* note 3.
5. See Justin D. Levinson et al., *Guilty by Implicit Bias: The Guilty-Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010); E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811 (1998); Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEG. STUDIES 886 (2010). On the effects of bias on perception and judgment, and regarding how awareness of potential bias may help trigger self-correction efforts, see Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007).
6. People often are not aware of their own biases. For people to attempt to correct for bias, they must know that it is a problem and also believe the problem to be self-relevant (see Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994); see also Duane T. Wegener et al., *Flexible Corrections of Juror Judgments: Implications for Jury Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 629 (2000); Duane T. Wegener & Richard E. Petty, *Flexible Correction Processes in Social Judgment: The Role of Naive Theories in Corrections for Perceived Bias*, 68 J. PERSONALITY & SOC. PSYCHOL. 36 (1995); Duane T. Wegener & Richard E. Petty, *The Flexible Connection Model: The Role of Naive Theories in Bias Correction*, in 29 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 141 (Mark P. Zanna ed., 1997)).
7. A more deliberative mode of thinking may help to reduce expressions of bias (see Ellen Langer et al., *Decreasing Prejudice by Increasing Discrimination*, 49 J. PERSONALITY & SOC. PSYCHOL. 113 (1985); Maja Djikic et al., *Reducing Stereotyping Through Mindfulness: Effects on Automatic Stereotype-Activated Behaviors*, 15 J. ADULT DEV. 106 (2008); see also Guthrie et al., *supra* note 4; Jeffrey E. Pfeifer & James R. P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCHOL. 1713 (1991)).
8. For a discussion on processing fluency and perceptions of trust, see Rolf Reber & Norbert Schwarz, *Effects of Perceptual Fluency on Judgments of Truth*, 8 CONSCIOUSNESS & COGNITION 338 (1999); Adam L. Alter & Daniel M. Oppenheimer, *Uniting the Tribes of Fluency to Form a Metacognitive Nation*, 13 PERSONALITY & SOC. PSYCHOL. REV. (2009). See also Russell D. Clark & Anne Maass, *Social Categorization in Minority Influence: The Case of Homosexuality*, 18 EUR. J. SOC. PSYCHOL. 347 (1988), Masaki

Yuki et al., *Cross-Cultural Differences in Relationship- and Group-Based Trust*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 48 (2005).

9. Perspective-taking may help to reduce the accessibility and expression of stereotypes (see Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility & In-Group Favoritism*, 78 J. PERSONALITY & SOC. PSYCHOL. 708 (2000)).
10. Instructions that encourage people to attend to and appreciate one another's differences (i.e., a multiculturalism philosophy) are more effective at reducing expressions of bias than instructions to ignore individual differences (i.e., a colorblindness philosophy); the latter may induce a backfire effect, thereby increasing expressions of prejudice (e.g., Evan P. Apfelbaum et al., *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918 (2008)). Note that the mere presence of a racial minority on a panel of mostly white jurors may reduce the likelihood of a biased verdict (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)).

11. See Wegener et al., *supra* note 6. When individuals are held accountable for the decision-making process itself, they tend to think more deliberatively; however, when they are only held accountable for the outcome, they may be more likely to attempt to justify unjust decisions retrospectively (see Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999)). These instructions are designed to focus the juror on the process. In addition, if people are made aware of their biases, those who endorse egalitarianism but remain implicitly biased may actively correct for bias in their decision making (see Leanne S. Son Hing et al., *Inducing Hypocrisy to Reduce Prejudicial Responses Among Aversive Racists*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 71 (2002)). In the presence of a relatively egalitarian-minded group, an individual's judgments may become less stereotypic (see Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Inter-group Behavior and Stereotype Accessibility*, 80 J. PERSONALITY & SOC. PSYCHOL. 645 (2001)).
12. Emphasizes goal-setting and leadership involvement; see footnote 2.

than white defendants.²⁶ Authors of those studies concluded that the race of the victim may not be a critical factor in the expression of this “white juror bias,” but other research suggests otherwise.²⁷ To account for this possibility, NCSC varied the race of both the victim and the defendant across experimental conditions of the trial scenario. NCSC also created a video of a trial judge giving instructions on the applicable law, which included either the specialized implicit-bias jury instruction or an alternative instruction of approximately equal length (creating matched control groups for comparison purposes).

NCSC hired a market-research firm to recruit a sample of jury-eligible mock jurors to participate in the study. Recruited participants who met eligibility requirements received a brief description of the study in which they were asked to assume the role of a juror in a trial case. Participants were randomly assigned to one of eight possible conditions in the experiment: They watched one of the two videotaped sets of jury instructions (with either the specialized implicit-bias instruction or the control instruction imbedded) and then read one of four possible versions of the mock-trial scenario describing the evidence in the case against the defendant (varying the race of the defendant and the victim). After the presentation of evidence, mock jurors indicated whether they thought the defendant was guilty and, if so, recommended a sentence. The mock jurors also took the Race Implicit Association Test (IAT), a popular online test developed by researchers to identify, measure, and study implicit bias. A total of 901 jury-eligible adults participated in the study, which was conducted in May and June 2013. On the whole, the composition of the participant group

reflected the demographic and attitudinal characteristics of the broader national population. A large majority of participants demonstrated a preference for whites on the Race IAT, which is also consistent with other national studies.

Overall, white participants across all conditions in the present study convicted white defendants at a slightly higher rate (65%) than black defendants (59%), although this difference was not statistically significant. The specialized instruction did not appear to significantly influence mock-juror verdict preference, confidence in verdict, or sentence severity. The authors were unable to replicate with this sample the traditional baseline pattern of “white juror bias” (i.e., the higher rate of guilty verdicts and harsher sentences for black defendants in control conditions) observed in prior similar studies, which precluded a complete test of the value of the specialized instruction.²⁸

Because prior studies demonstrated or replicated the juror-bias effect successfully in a number of different settings, with a number of different types of trial scenarios, and with designs that varied in ecological validity (i.e., degree of resemblance to natural court settings), it is not likely that the findings of the present study are attributable to the web-based nature of the study design. It is possible that the specific legal instructions provided in the present study differed in a meaningful way from past studies and that those differences were ultimately responsible for eliminating the juror-bias effect. However, it is unlikely that these differences are the primary reason why the juror-bias effect was not observed, as in the months following this study, we learned that other contemporaneous studies in which similar legal instructions were *not* provided also failed to replicate

room: *Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000).

27. 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, 215 (2001); *but see* Mitchell et al., *supra* note 16.

28. Mock jurors who received the control instruction evaluated the strength of the defense's case in subtly different ways from participants who received the specialized instruction. Specifically, no differences were observed between conditions when the trial scenario described the victim as white. Similarly, for participants who received the specialized instruction, no differences were observed

the original juror-bias effect. One intriguing potential explanation for the failure to replicate the juror-bias effect in the present study and in contemporaneous studies is that over time and with increased media scrutiny to racial inequality, Americans may have become increasingly aware of implicit forms of bias. They may be particularly sensitive in research and other settings in which they know or suspect that their individual responses are monitored for analysis, and this sensitivity may have been heightened at the time the study was conducted (*i.e.*, during the Florida trial of George Zimmerman). This heightened level of awareness and sensitivity may have prompted many participants to spontaneously self-correct for possible expressions of racial bias, regardless of whether or not they received the specialized jury instruction. Future research should explore this possibility and its implications for contemporary jurors.

Despite the absence of a baseline race-bias effect for jurors, the study provided some preliminary evidence to suggest that a specialized instruction could alter expressions of bias in juror judgments. White jurors who received these specialized instructions produced a different pattern of judgments of the strength of the defendant's case compared with participants who received a control instruction. Specifically, in control conditions, white jurors perceived the defendant's case as significantly stronger when the alleged crime occurred between a black defendant and a black victim, compared with the scenario that involved a white defendant and a black victim. This difference was eliminated in the specialized-instruction conditions. Further research is needed to fully examine the impact of such an instruction under a variety of conditions. Additional research could also explore why, absent any bias-reduction intervention, the black-on-black crime in the present study produced the highest strength-of-case ratings for the defense. A complementary effect was not observed in favor of white defendants when the victim was described as white, discounting a same-race explanation for the effect. Finally, we also did not observe any clear evidence of "backlash effects" (in which mock jurors might seem to treat black defendants more harshly) after hearing an implicit-bias instruction, but small sample sizes limited these analyses. Future studies that continue to explore the potential utility of this type of instructional intervention should also be designed to answer this question.

THE VIEW FROM HERE

In this article, we have stressed the importance of empirically testing any new bias-reduction intervention for efficacy before full-scale adoption and implementation. While we have provided the specialized jury instruction used in this experiment, along with citations to the existing scientific research evidence that formed the theoretical basis for each of the

instruction's components, we are not suggesting that any court proceed at this point simply to adopt this instruction and move on: We do not have sufficient data at this time to support a recommendation to use this or any other specialized jury instruction to mitigate juror implicit bias. Based on the results of one study, the specialized jury instruction designed to address implicit and explicit forms of bias in juror decision making does not appear to be the panacea some hoped for. However, the research evidence continues to expand on a variety of strategies for reducing bias in decision making. Social scientists continue in earnest to search for and test innovative bias-reduction interventions. New evidence now exists to demonstrate the utility of some bias-reduction interventions that, at the time this study was conducted, were considered only theoretically promising.²⁹ Many more strategies continue to show promise but have not yet received empirical scrutiny. As basic research evidence builds on more innovative approaches to addressing bias in decision making, the court community will benefit in time.



Jennifer K. Elek, Ph.D., is a court research associate with the National Center for State Courts. In Dr. Elek's recent work at NCSC, she has focused on promoting gender and racial fairness in the courts; on improving survey-based judicial-performance-evaluation programs; on educating the court community about offender risk and needs assessment and its role in evidence-based sentencing; and on identifying and evaluating the efficacy of problem-solving-court programs. She holds a Ph.D. in social psychology from Ohio University, an M.A. from the College of William and Mary, and a B.A. from Vassar College.



Paula Hannaford-Agor is the director of the NCSC Center for Jury Studies. She joined the NCSC Research Division in May 1993 and routinely conducts research and provides courts and court personnel with technical assistance and education on the topics of jury-system management, jury-trial procedure, and juror decision making. She has authored or contributed to numerous books and articles on the American jury, including *Jury Trial Innovations* (2d ed. 2006), *The Promise and Challenges of Jury System Technology* (NCSC 2003), and *Managing Notorious Trials* (1998). She is faculty for the ICM courses *Jury System Management* and *Promise and Challenges of Jury System Technology*. As adjunct faculty at William & Mary Law School, she teaches a seminar on the American jury. She holds a J.D. and a Master's in Public Policy from the College of William and Mary.

between the conditions. However, when the victim was described as black, mock jurors who received the control instruction judged the defense's case to be stronger when the defendant was also described as black than when the defendant was described as white. This pattern of findings in the control conditions, however, does not replicate the traditional juror-bias effect. Additional research is needed to fully understand the observed effect.

29. E.g., Yoona Kang et al., *The Nondiscriminating Heart: Lovingkindness Meditation Training Decreases Implicit Intergroup Bias*, 143 J.

EXPERIMENTAL PSYCHOL.: GEN. 1306 (2014), available at <http://dx.doi.org/10.1037/a0034150>; Adam Lueke & Bryan Gibson, *Mindfulness Meditation Reduces Implicit Age and Race Bias*, 6 SOC. PSYCHOL. & PERSONALITY SCI. 284 (2015), available at <http://spp.sagepub.com/content/6/3/284>; Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXPERIMENTAL PSYCHOL.: GEN. 1306 (2014), available at <http://dx.doi.org/10.1037/a0036260>.

PROMISE? by Victor Fleming

Across

- 1 Ready, willing partner
 5 Half-___ (flag position)
 9 Omar of "Scream 2"
 13 Harriet Beecher Stowe novel
 14 Wrinkly Jamaican fruit
 15 Half-moon tide
 16 Rock's Jon Bon ___
 17 Campus guy with a list
 18 New Delhi dress
 19 Start of a quip
 22 Soda cooler
 23 Picnic ruiner
 24 Peewee or Della
 25 Attendance-taker's count
 27 C'est la ___
 29 Lard, essentially
 30 Reach, as success
 33 San ___ Obispo
 34 Part 2 of the quip
 37 "Compos mentis"
 38 Asserts
 39 Nev. clock setting
 40 Four-stringed instrument, briefly
 41 Ill-tempered
 45 Cool cat's words of understanding
 47 ___ Paulo, Brazil
 49 Excessively
 50 End of the quip
 54 "Make ___!"
 (Star Trek command)
 55 Ground
 56 Legal memo phrase
 57 Be out of

58 Jai ___

(game resembling handball)

59 NASA's Armstrong

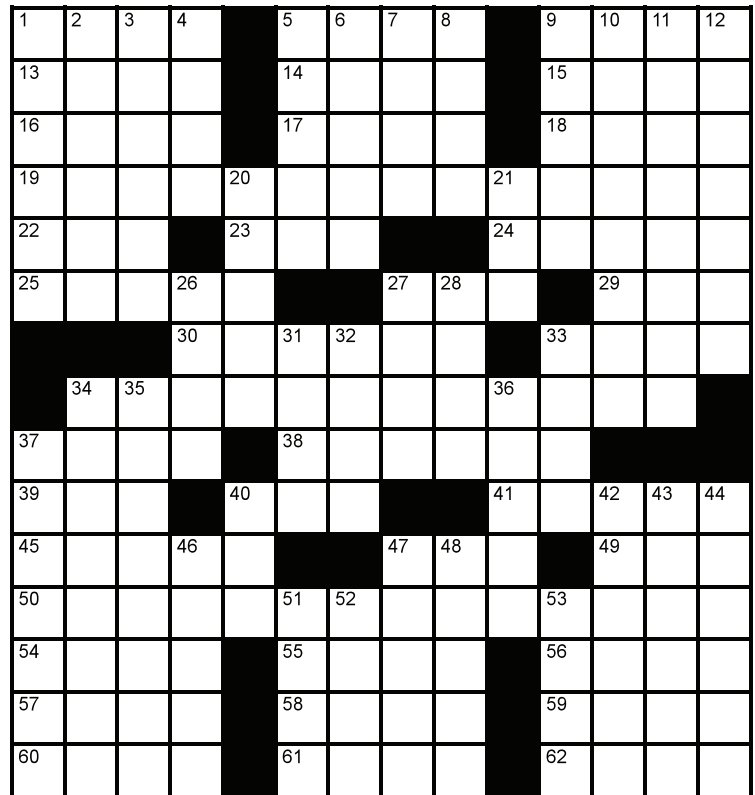
60 Mardi ___

61 Comic actor Lahr

62 Better figures?

Down

- 1 Abut on
 2 Mile High athlete
 3 River walls
 4 Polish, as a manuscript
 5 "Here's ___ your eye!"
 6 Performer's promoter
 7 Smeltery residue
 8 Lilliputian
 9 Follow in sequence
 10 Like a lover, not a fighter
 11 Fly behind a boat
 12 Small upright pianos
 20 "___ makes waste"
 21 Mine output
 26 Gutter's spot
 27 "Livin' la ___ Loca"
 28 Part of MIT (abbr.)
 31 Kind of master
 32 Price of a hand
 33 Sax-playing Simpson
 34 Monthly reading for a utility worker
 35 Where there are "too many fish"
 36 Male operatic voice
 37 Throwing down hard, as a football
 40 Newswire org.



- 42 "___ Soul Picnic"
 (1968 Laura Nyro song)
 43 Much more than warm
 44 Alpine refrains
 46 Portable music players
 47 Submarine system
 48 Check out, as books
 51 Meatloaf serving, say
 52 Rival of Harvard
 53 Brown-bagger?

Vic Fleming is a district judge in Little Rock, Arkansas. Answers are found on page 127.

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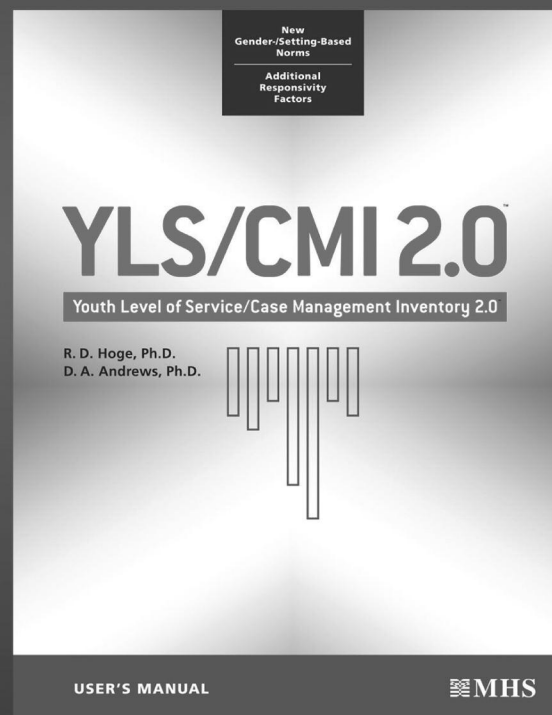
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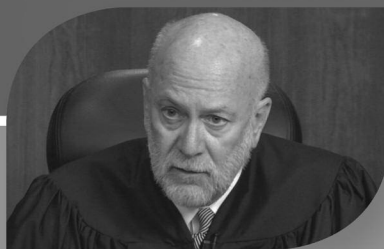
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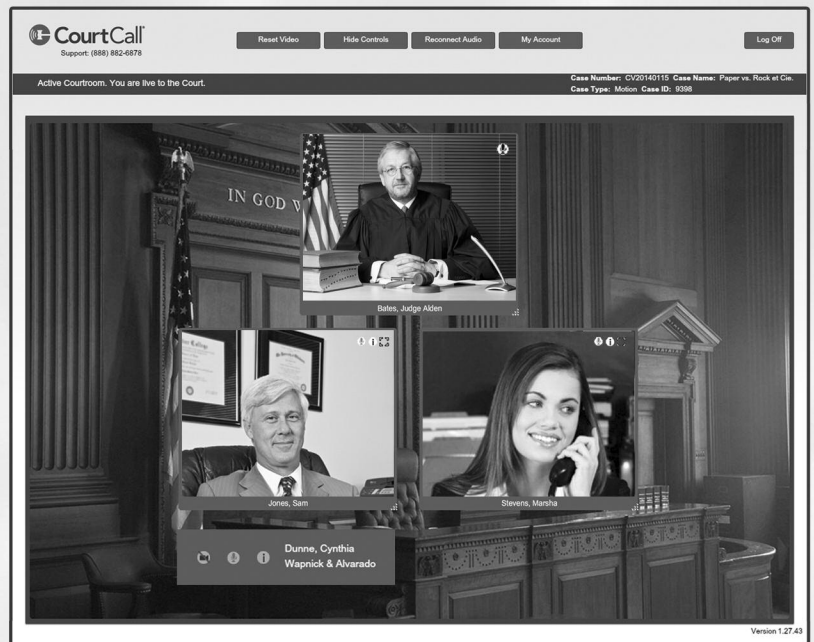
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NOTICE OF PROPOSED BYLAWS REVISIONS

President Brian MacKenzie appointed a new Bylaws Committee charged with the responsibility for reviewing and modernizing the language of the bylaws to reflect current trends and law regarding section 501(c)(6) nonprofit organizations. Immediate Past President Elliott Zide was appointed chair, and the following members now actively serve on this committee: Judges Susan Burke (MN), Elizabeth Hines (MI), Richard Kayne (WA), Russell Otter (Ontario), John B. Williams (MO), and Sheila Woods-Skipper (PA).

The committee has had the benefit of researching bylaws, policies, and procedures of other nonprofit organizations. The process to present the revisions below has been inclusive and participatory. An interim report of the committee was made to the Executive Committee at its January meeting, and a more detailed report was made to the Board of Governors at the April midyear meeting in Fort Myers. The committee reports are available to the membership and can be found in the minutes of the Fort Myers Executive Committee and Board of Governors meetings. The committee has benefited from open discussions at these meetings, as is reflected in what follows.

In accordance with current Article 18 of the bylaws, you are notified that the committee will be offering a motion at the General Assembly Meeting in Seattle in October 2015 seeking the adoption by a single vote of amended and restated bylaws. A summary of the proposed changes is printed here. The full proposal was sent to all AJA members for whom we have email addresses on August 19, 2015; it is also posted on the AJA website (amjudges.org).

You are invited to make comments or suggestions. Please forward your comments to Shelley Rockwell at srockwell@ncsc.org. Between now and the meeting, the committee will consider each comment or suggestion.

Judge Elliott Zide
AJA Immediate Past President and
Bylaws Committee Chair

SUMMARY OF BYLAW REVISIONS

Article I: Name and Office

- Unchanged

Article II: Purpose

- Sec. 1: Now sets forth the general purpose, objective, and goal of the American Judges Association using the language and tone as set forth in the current AJA website.
- Sec. 2: Sets forth the language for the general powers of the Association.
- Sec. 3: Adds specific language in the powers of the Association stating AJA's commitment to diversity.
 - AJA will actively recruit membership that reflects the diversity of the judiciary.
 - AJA will support, promote, and encourage present

and prospective members to be knowledgeable about diversity issues.

- AJA will engage in membership and leadership recruitment and retention strategies to achieve its commitment to a diverse membership and to active participation in all of the affairs of the organization.
- Sec. 4: Now reads as follows: AJA shall operate not-for-profit and exclusively for education and charitable purposes within the meaning of section 501(c)(6) of the Internal Revenue Code of 1975 or the corresponding sections for past or future tax codes.

Article III: Membership

- Sec. 1: Voting Members
 - The definition of "Eligible Courts" has been combined with the definition of "Voting Members" to clearly describe the AJA's existence as a member-driven organization of diverse judicial officers and arbitrators from eligible courts.
- Sec. 2: Associate Members (a membership-drive opportunity)
 - Specifically allows for affiliated and honorary membership for those who support the objectives and purposes of AJA but who are not judicial officers or arbitrators in eligible courts.
- Sec. 3: Honorary membership for the highest judicial officer in states, provinces, etc.
- Sec. 5: Termination of Membership
 - Shifts initial suspension authority from the Board of Governors to the Executive Committee, with final suspension approval remaining with the Board of Governors.
 - Shifts appeal and reinstatement authority from the General Assembly to the Board of Governors.
- Sec. 6: Affiliated or Association Memberships (cosmetic changes only)

Article IV: Dues

- Rewritten to clarify the authority and role of the Board of Governors in establishing the schedule of dues for all groups and types of members.

HIGHLIGHTING REMAINING REVISIONS RELATING TO HOW THE AJA CONDUCTS ITS BUSINESS

Article VII: Board of Governors

- District Representatives will be eliminated from the organization.
- The general powers to conduct the affairs and business of the Association remain in a restructured Board of Governors.
- The number of districts will be reduced from 14 to 7:

- District 1: **Canada**
- District 2: **Northeast:** Connecticut, Massachusetts, Maine, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont
- District 3: **Southeast:** Delaware, District of Columbia, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, Puerto Rico, and the US Virgin Islands
- District 4: **South/Southwest:** Alabama, Mississippi, Louisiana, Arkansas, Oklahoma, Texas, New Mexico, Arizona, Mexico, and Central American countries
- District 5: **Western:** Alaska, Washington, Oregon, California, Idaho, Nevada, Montana, Wyoming, Utah, Hawaii, American Samoa, Marshall Islands, Commonwealth of Northern Mariana Islands, and military overseas
- District 6: **West Central:** Colorado, North Dakota, South Dakota, Nebraska, Kansas, Missouri, Wisconsin, Minnesota, and Michigan
- District 7: **Central:** Illinois, Ohio, Iowa, Indiana, Kentucky, West Virginia, and Tennessee
- The Board of Governors now will be composed of:
 - Up to six members representing each of the seven districts (for a maximum of 42) who will be elected for two-year terms; term limits are eliminated.
 - The duly elected and qualified officers of the Association.
 - The three presidential appointments to the Executive Committee **IF** they are not otherwise Governors.
 - AJA past presidents following the completion of their term of office shall serve as at-large voting members of the Board as long as they remain dues-paying members of the Association.
- The role of the Executive Committee remains the same. However, the three presidential appointments to the Executive Committee do not have to come from the Board of Governors, nor do they require Board of Governors approval.
- The language about standing and ad hoc committees has been modernized.

Article V: Conferences and Meetings: The language in this section about conferences has been modernized.

Article VI: General Assembly: The language remains the same.

Article VII: The Board of Governors section has been revised as stated above, with other portions remaining the same.

Article VIII: Except as follows, this article about officers remains the same: However, the appointment of the Treasurer and confirmation by the Board of Governors has now been more carefully articulated. The revised bylaws provide as follows: “the Treasurer shall be nominated by the executive committee at its meeting prior to the annual meeting and elected by the members of the board of governors at a board meeting immediately following each annual conference General Assembly.”

Article IX: Court of Appeals remains in place.

Old Article X about the district representatives has been eliminated.

Old Article XI about sections of the Association has now been eliminated.

Old Article XII, captioned “Education conferences” (referring to education conferences in districts), has been eliminated.

The new Article X, formerly Article XIII: Committees, has been revised as follows: The names and numbers of the standing committees have been reduced and changed so that the standing committees in alphabetical order are now awards, budget, bylaws, conference, conference site, domestic violence, education, executive, membership, nominations, public information and relations, publications, and resolutions. There is language that allows for creation of other standing committees by the Board of Governors. Section 2 is now called “Other Committees” and states as follows: “Other committees or task forces of an immediate or non-recurring character may be created by the president or by resolution of the Board of Governors to investigate, study and implement matters relating to specific purposes, business and objects of the Association. The term of such committee shall end at the next annual conference of the Association following its creation unless continued by the executive committee.”

The new Article XI is now captioned “Board of Governors and Committees, Manner of Acting” and reads as follows:

- Sec. 1: Participation by Governors
 - Allows for the Board of Governors to conduct meetings electronically.
- Sec. 2: Committee Meetings
 - Allows for committees to conduct meetings electronically.

Article XII: Fiscal Matters was Article XIV, and the language remains the same.

Article XIII: Dissolution used to be Article XV, and language remains the same.

Article XIV: Rules of Procedure used to be Article XVI, and language remains the same.

Article XV: Definitions used to be Article XVII, and language remains the same.

Article XVI: Amendments to the Bylaws used to be Article XVIII, and language remains the same.

Answers to Crossword
from page 122

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



The Resource Page



WEBSITES OF INTEREST

Quarterly Summaries of Procedural-Fairness Research
ProceduralFairness.org



Since January 2014, the website ProceduralFairness.org has been posting quarterly summaries of new research. The website was created in 2012 to provide background information about how to improve procedural fairness in courts and policing. The quarterly research reports make it easy for those who want to follow developments in this area to find descriptions of all the latest research in one place. In many cases, the report even links to the full-text articles.

These quarterly summaries are prepared by Justine Greve, M.A., a staff member with the Kansas Court of Appeals, and Shelley Spacek Miller, J.D., a staff member with the National Center for State Courts. They search the Internet and other sources to locate the most notable procedural-fairness scholarship released over the past three months. Their lists include everything from academic books and articles to presentations, reports, podcasts, and web resources. Magazine articles and news stories on procedural fairness are listed as well.

The reports focus primarily on the justice system—courts and judging, prisons and policing. But they touch on a wide range of topics, including a number of studies on business and management. Judges may find those of interest too; after all, we manage employees and collectively run a very large enterprise.



RECENT ARTICLES WORTH NOTING

Tina Rosenberg, *The Simple Idea That Could Transform US Criminal Justice*, THE GUARDIAN, June 23, 2015.
<http://goo.gl/y66fB3>

This article goes in-depth to describe how Judge Victoria Pratt has transformed her courtroom in the Newark (NJ) Municipal Court into a model court for procedural fairness.

Guardian reporter Tina Rosenberg spent time observing the court and talking to Judge Pratt. She also interviewed Yale Law School professor Tom Tyler, who has written about procedural justice for more than two decades, and Minneapolis judge and former American Judges Association President Kevin Burke, who has practiced and preached procedural fairness in courts for almost as long.

Judge Pratt began to learn about procedural fairness after a city official gave her a report about the Community Justice Center in Red Hook, a neighborhood in Brooklyn. She went to observe the Red Hook court, talked to its judge, Alex Calabrese, and saw how the principles of procedural fairness could be used. She concluded, as she told Rosenberg, “Newark really needs this.” And she has made these principles the basis for her approach to the defendants who come through her court.

Rosenberg’s article combines information from Pratt, Tyler, and Burke, stories about several specific defendants and their treatment in Pratt’s courtroom, and reflections from the court’s longtime public defender. Rosenberg’s lengthy article is perhaps the best treatment of procedural fairness in courts ever to appear in the mainstream press. Judges would find it informative; court staff and the public would find it a great introduction to how these concepts may infuse effective courtroom practices.

Elizabeth Ingriselli, *Mitigating Jurors’ Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690 (2015).
<http://goo.gl/HWpIRW>

This law-review note presents an interesting experiment about how the timing and content of jury instructions may be used to reduce racial bias by jurors. This empirical research from Elizabeth Ingriselli may be particularly interesting after you read the article in this issue by National Center for State Courts researchers Jennifer Elek and Paula Hannaford-Agor about their own attempt to reduce juror bias through an experimental jury instruction.

Ingriselli reviews in some detail the social-science research related to racial bias, including research about what leads to the implicit bias often found in studies of whites who unknowingly exhibit bias against blacks. She concludes that these studies “suggest that when race is not explicit, white jurors are not aware of their biases and hence do not try to suppress them, which results in biased decision making.” On the other hand, “[w]hen race is salient, whether explicitly or implicitly, whites attempt to compensate for their implicit negative feelings toward blacks by suppressing their biases.” Thus, her expectation was that when race was not salient and evidence was ambiguous, white jurors’ implicit biases would emerge.

Her experiment used 412 people who completed an implicit-association test to measure implicit racial bias and then read and completed a survey about a crime scenario. They were told that the research was intended to examine how jurors evaluate evidence and determine guilt. Jury instructions were also given—sometimes before participants read the evidence, sometimes afterwards. Ingriselli found that the data provided some support for the proposition that bias was reduced when a “debiasing” instruction was given before the evidence was presented. She also offered suggestions for future research.