AJA WHITE PAPERS


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


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


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


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

ALTERNATIVE DISPUTE RESOLUTION


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


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


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

BOOK REVIEWS


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


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


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


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


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

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

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

**DOMESTIC VIOLENCE AND FAMILY LAW**

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

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

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

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


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


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


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

**FOR THE NEW JUDGE**


Psychologist Isaiah Zimmerman talked about how the cutting of ties with many others that typically occurs when a person becomes a judge may affect judges of varying personality traits. Though “[i]solation is not going to be removed from the judicial career,” he suggested several steps judges can take to maintain a healthy life and judicial career:
“By understanding and actively employing the measures recommended, a judge can transmute isolation into a rewarding resource.”

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

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

JUDICIAL ETHICS


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


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


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

That debate led to another essay by Professor Monroe Freedman, another legal-ethics expert. Freedman sided generally with Judge Posner on First Amendment grounds, though he suggested an amendment to judicial-ethics rules. Professor Lubet again responded.

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

JUDICIAL INDEPENDENCE


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

JURY TRIALS


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


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


After cochairing the District of Columbia’s jury-reform project, Judge Gregory Mize began his own experiment, conducting individual voir dire in a small room with each potential juror. He found that potential jurors who had been silent in open court often told much more in this setting—with example after example of key information that would not
have been discovered under normal procedures. His conclusion: “I am convinced that even if individual questioning took up significant amounts of time (which it has not for me), it would be well worth expending the effort in order to avoid juror UFO’s and the consequent danger of mistrials caused by impanelling biased or disabled citizens.”


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

LEGAL WRITING


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


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


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


See the description under “Book Reviews.”

MAKING BETTER JUDGES®


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


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


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


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


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


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

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

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


See description under “For the New Judge.”


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


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


See the description under “AJA White Papers.”


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


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

Special Issue on Indian Law and Tribal Courts, 45 Ct. Rev. 1 (2009).

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

Special Issue on Law and Neuroscience, 50 Ct. Rev. 44 (2014).

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


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


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


This article presented ten tips for dealing with the media.
based on the recommendations of journalists and experience handling two high-profile murder trials.


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

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

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


Based on a survey of drug-court and family-court judges, Deborah Chase and Judge Peggy Fulton Hora found that “[p]erception of litigant gratitude was the most important overall predictor of feeling positively about the judicial assignment.” Family-court judges scored low in perceptions of litigant gratitude; drug-court judges scored high. The authors speculated that “the therapeutic effects of these new types of courts,” such as drug courts, “which employ the social sciences and are based on the recommendations of journalists and experience handling two high-profile murder trials.


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

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

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


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

PROCEDURAL FAIRNESS/PROCEDURAL JUSTICE


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

These two articles presented the results of two pilot projects that achieved some success in reducing no-show rates for criminal defendants—saving time and money while also having fewer warrants and pretrial incarcerations. The articles report for each test what worked, what didn’t, and what merits further consideration. Researchers indicated both that reducing failures-to-appear should result in improved perceptions of court fairness by defendants and that incorporating procedural-fairness principles into reminder notices seemed to help reduce no-shows.


See the description under “Making Better Judges®.”


Researchers Diane Sivasubramaniam and Larry Heuer discuss important differences in the importance that decision recipients and decision makers place on fair procedures: decision makers are more concerned with outcome, while decision recipients are more concerned with process. This has important implications for judges, who are the decision makers.
Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes, by Brian H. Bornstein and Hannah Dietrich, 44 Ct. Rev. 72 (2008).

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


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


See description under “AJA White Papers.”


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


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


Utah has a governmentally established commission that evaluates judicial performance and provides public reports before each judge’s retention election. The commission adopted procedural-justice principles to govern its review process and sends citizens to observe judges’ adherence to those principles in the courtroom. Researcher Nicholas Woolf and then commission vice chair Jennifer Yim described the process, including a list of 20 evaluative criteria that could be used by courtroom observers anywhere.


See description under “AJA White Papers.”

PSYCHOLOGY AND THE LAW


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


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


Three academic researchers reviewed both the leading research on what leads to eyewitness-identification errors and the United States Supreme Court cases on the subject, noting a disconnect between them. They also reviewed the “common knowledge” of jurors in the area and safeguards that could be taken to protect against reliance on unreliable testimony.


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

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


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


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


Shortly after publication of their award-winning book, Jeopardy in the Courtroom: A Scientific Analysis of Children’s Testimony, professors Stephen Ceci and Maggie Bruck explained how interviews with children differ from ones with adults in ways that can lead to error when the children’s statements are merely recounted by others. They concluded: “If courts are interested in historical accuracy, there is simply no substitute for a tape that can be played to verify . . . the details of the discussion that took place . . . .”

PUBLIC OPINION OF THE COURTS


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


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

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

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

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

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

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