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EDITOR’S NOTE

We present you with a number of thought-provoking items in this issue on a variety of topics touching those working in and around the judiciary. This issue brings our annual review of recent criminal decisions of the United States Supreme Court and the debut of our new reporter, Michigan Law Prof. Eve Brensike Primus. Prof. Primus teaches criminal law and is a coauthor of one of the leading criminal procedure casebooks. On behalf of all the readers of Court Review across the continent, welcome, Prof. Primus. Her coauthor for this issue is Kristin Froehle of Williams & Connolly LLP.

Our regular columnist from Canada, Judge Wayne Gorman, has provided us with highlights of notable decisions from the Supreme Court of Canada. I suspect two cases will be of particular interest to all our readers even if you do not work in Canada. The Le case regarding the role of minority status and the “detention analysis” raises intriguing points that are factually applicable in any U.S. criminal court. Whether the points in the opinion should be incorporated in U.S. legal analysis will spark many animated discussions in the “robing room.” The Barton case similarly raises points of thoughtfulness and respect for the human beings at the core of our cases that should be on the minds of every judicial officer regardless of your view of the specific legal analysis in the case.

Judge Tim Schutz reviews the book Unexampled Courage by Judge Richard Gergel. Unexampled Courage is an inspiring as well as controversial story of the role our courts and judges played in the civil rights movement. As Judge Schutz explains, the book and its story provide ample material for lively discussions about our history and the proper role of courts in a society founded on rule of law.

Speaking of the role of courts in society, Prof. Gary Marchant provides us with a breathtaking tour of new technology issues arising in our courtrooms. If they haven’t bedeviled you yet, they soon will. Prof. Marchant gives you a head start on planning how you will cope with them.

Finally, Judge Eric Smith of Alaska provides us with a thoughtful exploration of using engagement techniques for handling our judicial duties. You will find the wisdom of experience in his observations. You may also find a path to smoother, more efficient, and more just proceedings.

As always, we hope you enjoy the issue. If you have comments or suggestions, please write to editors@courtreview.org.—David Prince

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

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

The cover photo is the Second Pinal County in Florence, Arizona. The Second Pinal County Courthouse, built in 1891, is an historic three-story redbrick courthouse designed by architect James M. Creighton in the Late Victorian Revival style. It was replaced by another courthouse in 1961, fell into despair, and was closed in 2005. In January 2011, the county approved a plan to restore the building to its former glory and for use by the county. It was listed on the National Register of Historic Places in 1978. Photo by Mary Watkins.
President’s Column

Welcome AJA members and colleagues to the latest issue of Court Review.

Treatment courts have become an important part of our judicial system.

I have presided over a DUI court in Reno, Nevada for the past two years. In the beginning of November, I had the good fortune with my team to attend the National Center for DWI Courts training in El Paso, Texas.

We had excellent presentations on the 10 guiding principles of DWI courts. Julie Seitz and Shane Wolf were the project directors from the National Center for DWI courts. Other presenters included Judge Diane Bull, Mary Jane Knisely, Maggie Morales-Aina, and Mark Pickle.

The 10 principles are: 1. Determine the population; 2. Perform a clinical assessment of the impaired driver; 3. Develop the treatment plan; 4. Supervise the offender; 5. Forge agency, organization, and community partnerships; 6. Take a judicial leadership role; 7. Develop case management strategies; 8. Address transportation issues; 9. Evaluate the program; 10. Ensure a sustainable program.

El Paso Judge Robert Anchondo demonstrated the importance of the judge as a vital member of the DWI court team. As team leader, he was committed and willing to recognize and understand the complex and often troubled lives of those who stood before the bench. He involved his families and expressed a sincere commitment and strong personal belief that only by addressing the underlying problems of substance abuse, through intense treatment and accountability, can a participant acquire the ability to stop driving while impaired. The success or failure of a DWI court in large part depends on the strength shown by the judge as leader of the program.

If you are considering starting a DWI Court or already have one I would strongly recommend that you attend this program.

As president of the American Judges Association, I had the honor to attend the William H. Rehnquist Award for Judicial Excellence at the United States Supreme Court. Past recipients include American Judges Association members, Judge Elizabeth Hines, Judge Steve Leben, and Judge Kevin Burke. This year’s recipient is Tennessee Circuit Court Judge Duane Stone. He co-founded the Fourth Judicial District Drug Recovery Court in 2009 and co-founded a Veteran’s Treatment Court in 2015. He implemented a neonatal abstinence syndrome prevention initiative that focuses on empowering people in jails and on probation with information about the dangers of in utero drug exposure.

In 2011 Judge Sloan and his wife adopted an infant son who was born suffering from withdrawals as a result of his birth mother’s opioid use. Judge Sloan gained a different perspective about addiction once his son came into his life. He sought information from medical professionals who explained substance use disorder as a chronic brain disorder. This knowledge helped him treat the participants in his program.

He started by identifying three simple steps all courts should implement regardless of charges people face:

Universal testing of everyone processed into jail for opioid use;
If tests are positive, conduct a clinical assessment and provide treatment; and
Supervise individuals in treatment and recovery for as long as it takes.

His court serves as a model for treatment courts throughout the country. We congratulate Judge Sloan on his award.

The Honorable Mark S. Cady, Chief Justice of the Supreme Court of Iowa and President of the Conference of Chief Justices, was on the program to make the opening remarks at the Rehnquist Award dinner. Unfortunately, we learned of his untimely death. We express our condolences to his family. He will be missed by his colleagues throughout the nation. He was married to Rebecca Cady and had two children. He died on November 15, 2019 after suffering a heart attack while walking his dog. He was 66 years old.

As a justice, he wrote the opinion in Varnum v. Brien, a unanimous decision in 2009 that made Iowa the third state to permit same-sex marriage. Justice Cady demonstrated the courage of his convictions and the importance of an independent judiciary. In 2010, Iowa voters defeated the retention of three of the judges responsible for the decision.

We will honor Judicial Independence at our Annual Meeting in Philadelphia from September 13-17, 2020.

Don’t forget that our 2020 Midyear Meeting will be at the Napa Marriott from April 23-25, 2020, in Napa, California. The focus will be Pretrial Proceedings and Reform.

There will be presentations on the various pretrial programs currently implemented across the United States addressing challenges, barriers, best practices, and recommendations for improvements.

The presentations will share research regarding risk factors and impaired driving, the reliability and validity of various risk assessment tools, important limitations, as well as implementation issues. There will also be presentations on Juvenile Pretrial Reform and Strategies for Countering the Paper Terrorism of Sovereign Citizens. I encourage your participation. Napa will be informative and fun.
Highlights from the Decisions of the Supreme Court of Canada in Criminal Matters in 2019

Wayne K. Gorman

In 2019, the Supreme Court of Canada rendered a number of decisions involving criminal law issues. In this edition’s column, I intend to highlight a number of the most significant decisions rendered by the Court in 2019 (up to October 31). These decisions involved the following issues:

• the authority of Canadian police to detain and arrest;
• the questioning of sexual offence complainants on their prior sexual activity; and
• the importance of respecting victims in the trial process by refraining from pejorative and demeaning language.

Let us start with the Supreme Court’s decisions on the admissibility of prior sexual activity of complainants in sexual offence trials.

THE ADMISSIBILITY OF A COMPLAINANT’S PRIOR SEXUAL ACTIVITY

To question a complainant in a sexual assault trial in Canada, the proposed questioning must comply with section 276 of the Criminal Code of Canada, R.S.C. 1985 (section 276 contains a list of offences to which it applies). Section 276(1) indicates that evidence that a complainant “engaged in sexual activity” is “not admissible to support an inference that the complainant “(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief.”

Section 276(2) of the Criminal Code indicates that in order to be admissible, the proposed evidence must relate to “specific instances of sexual activity.”


R. v. R.V.

In R.V., the accused was charged with the offence of sexual assault. It was alleged that the offence took place on July 1, 2013. At the trial, the complainant testified that she was a virgin at the time of the assault. The Crown introduced evidence of her subsequent pregnancy and the approximate date of conception to support the complainant’s testimony that she was sexually assaulted by the accused on the date alleged.

In a pretrial application, the accused sought to question the complainant as to whether anyone else could have caused the pregnancy. In particular, he wanted to question the complainant “about her prior sexual activity, with the [accused], or any other individual, that may have occurred between June 1st and July 1st, 2013.”

The application judge ruled that the accused was not permitted to ask whether the complainant had engaged in any other sexual activity because the accused had not presented evidence of “specific instances of sexual activity,” as required by § 276(2) of the Criminal Code. However, the accused was permitted to cross-examine the complainant about her claim that she was a virgin at the time of the assault.

The accused was convicted. The conviction was overturned by the Ontario Court of Appeal. The Crown appealed to the Supreme Court of Canada. The Supreme Court described the issue raised by the appeal as follows:

The question in this case is how § 276 operates when the accused seeks to cross-examine the complainant to challenge sexual history evidence led by the Crown. Section 276 requires that the accused’s right to make full answer and defence be balanced with the dangers that cross-examination may pose to the complainant’s privacy and dignity and to the integrity of the trial process. This analysis applies with equal force regardless of whether the accused seeks to introduce evidence to establish a defence or to challenge inferences urged by the Crown.

The appeal was allowed and the conviction restored, though the Supreme Court concluded that the application judge had erred in refusing to allow the cross-examination.

THE SECTION 276 APPLICATION

The Supreme Court noted that “[b]road exploratory questioning is never permitted under § 276. Open-ended cross-examination concerning a complainant’s sexual history clearly raises the spectre of the impermissible uses of evidence that the provision was intended to eliminate. Section 276(2)(a) requires the accused to identify ‘specific instances of sexual activity’ to avoid unnecessary incursions into the sexual life of the complainant” (at paragraph 47). The Court held, however, that “the clearly identified time period, along with the specific nature of the activ-
ity — activity capable of causing pregnancy — was sufficiently specific to satisfy § 276(2) (a)" (at paragraph 55).

The Supreme Court concluded that because the "Crown-led evidence implicated a specific sexual act, namely activity capable of causing pregnancy within a particular timeframe," the accused’s "request satisfied the 'specific instances' requirement of § 276(2) because it was sufficiently detailed to permit the judge to apply the regime" (at paragraph 6).

The Supreme Court pointed out that the "Crown clearly intended to rely on evidence of the pregnancy to establish the actus reus. The presumption of innocence requires the accused to be permitted to test such critical, corroborating physical evidence before it can be relied on to support a finding of guilt. Given the accused's denial of any sexual contact with the complainant, and the lack of other evidence of paternity, the ability to cross-examine the complainant was fundamental to his right to make full answer and defence" (at paragraph 7).

CONCLUSION (R. v. R.V.)

However, despite the error, the Supreme Court concluded that "no miscarriage of justice occurred in this case. The cross-examination that was permitted and actually occurred allowed the defence to test the evidence with sufficient rigour" (at paragraph 9).

R. v. GOLDFINCH

In Goldfinch, the accused was also charged with the offence of sexual assault. In this case, the complainant was a woman the accused had previously lived with. Their relationship at the time of the alleged offence was described as being one of "friends with benefits" (at paragraph 3).

At his trial, the accused applied, pursuant to § 276 of the Criminal Code, to have evidence admitted that he and the complainant were in a sexual relationship at the time of the alleged assault.

The trial judge admitted the evidence. A jury found the accused not guilty. A majority of the Alberta Court of Appeal allowed the Crown's appeal and ordered a new trial, finding that the trial judge had erred in admitting the evidence.

THE APPEAL

The accused appealed to the Supreme Court of Canada. The Court indicated that "'[t]his case asks whether evidence of a relationship with an implicit sexual component engages § 276 of the Criminal Code and, if so, when such evidence may be admitted.'"

THE SUPREME COURT’S DECISION

The appeal was dismissed. The Supreme Court of Canada held that "'[t]he introducing evidence of the sexual nature of the relationship served no purpose other than to support the inference that because the complainant had consented in the past, she was more likely to have consented on the night in question. It was therefore barred by § 276(1).'" The Court also held that the evidence "was not ‘relevant to an issue at trial’… Bare assertions that such evidence will be relevant to context, narrative or credibility cannot satisfy § 276. The evidence in this case should not have been admitted and a new trial is required" (at paragraphs 4 and 5).

COMMENTARY

In this series of decisions, the Supreme Court of Canada has emphasized the important "gatekeeper" role trial judges play in sexual assault trials. In particular, the Court has emphasized the importance of remaining alive to the objectives of § 276 as the trial unfolds by actively supervising cross-examination and adapting § 276 rulings as necessary when new evidence comes to light" (see R.V, at paragraph 71. Also see Barton, at paragraphs 68 and 197, and Goldfinch, at paragraph 75).

In Barton, the Court extended the application of § 276 by holding that it applied to any charge "in which an offence listed in § 276(1) has some connection to the offence charged, even if no listed offence was particularized in the charging document" (at paragraph 76). In R.V, the Court narrowed the applicability of § 276 in those cases in which the evidence of sexual activity was led by the Crown to incriminate the accused. Finally, in Goldfinch, the Supreme Court stressed the importance of trial judges ensuring, before evidence of prior sexual activity is admitted, that there be a clearly identified basis as to why the proposed evidence is relevant and why it does not involve myth reasoning concerning victims of sexual assault. As noted by the dissenters in R.V, "[s]exual offence trials are unique among criminal trials in Canada… Evidence of a complainant’s sexual history is inadmissible where it is tendered by the accused, unless and until the accused meets the admissibility criteria set out in § 276(2)" (at paragraph 101).

CONSTITUTIONAL DETENTION IN CANADA

Another area in which the Supreme Court has rendered decisions this year involves the authority of Canadian police to detain and arrest. The Court considered this issue from a constitutional perspective (arbitrary detentions) and a common-law perspective (the power to arrest to maintain the peace). It also considered, at length, the impact that membership in a visual minority has on constitutional detention. The Court looked at past decisions and the impact they may have on future cases.

Section 9 of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, states: Everyone has the right not to be arbitrarily detained or imprisoned.

This section of the Charter has received a significant amount of attention by the Supreme Court of Canada. The Court’s seminal decision remains R. v. Grant, 2009] 2 S.C.R. 353. In Grant, the Court held that from a constitutional perspective a person could be physically or "psychologically detained." In the latter

“[A]n ‘important consideration when assessing when a detention occurred is that Mr. Le is a member of a racialized community’”

instance, the Court held in Grant that detention could arise in two ways: (1) the accused complies with a police demand because she or he is “legally required to comply with a direction or demand,” or (2) the accused is not under a legal obligation to comply with a direction or demand made by the police, “but a reasonable person in the subject’s position would feel so obligated” and would “conclude that he or she was not free to go” (at paragraphs 30 and 31). Note the objective nature of the test.

The Court’s most recent consideration of § 9 of the Charter occurred in R. v. Le, 2019 SCC 34. In Le, the accused was standing in a backyard talking to “four Black men” (see paragraph 1). The accused was described as being of “Asian descent” (see paragraph 69). The police approached them and asked for identification. The accused fled. He was caught and arrested. He was found to be illegally in possession of a handgun. At trial, he was convicted of firearm-related offences. The Ontario Court of Appeal upheld the convictions. An appeal was taken to the Supreme Court of Canada.

The Supreme Court indicated that the appeal presented the issue of “whether this encounter between the police and Mr. Le infringed his right to be free from arbitrary detention.” The Court’s decision in Le considers this issue, but as will be seen, the decision also considers the more complex issue of police interaction with visible minorities. Let us commence by looking at the Court’s consideration of § 9 of the Charter.

SECTION 9 OF THE CHARTER-ARBITRARY DETENTION:

The Supreme Court indicated, at paragraph 25, that § 9’s prohibition of arbitrary detention “is meant to protect individual liberty against unjustified state interference.” The Court concluded that the accused “was detained when the police entered the backyard and made contact” because “no statutory or common law power authorized his detention at that point, it was an arbitrary detention” (at paragraph 30). Thus, the accused was detained before he fled.

The Court concluded that “Mr. Le’s detention was arbitrary because, at the time of detention (when the police entered the backyard), the police had no reasonable suspicion of recent or ongoing criminal activity. Investigative objectives that are not grounded in reasonable suspicion do not support the lawfulness of a detention, and cannot therefore be viewed as legitimate in the context of a § 9 claim. This detention, therefore, infringed Mr. Le’s § 9 Charter right” (at paragraph 133).

RACE AND MINORITY STATUS AS A CONSIDERATION IN THE DETENTION ANALYSIS:

In addition, the Court made the following comments concerning how the accused person’s “racial background” affects the issue of detention (at paragraph 75):

At the detention stage of the analysis, the question is how a reasonable person of a similar racial background would perceive the interaction with the police. The focus is on how the combination of a racialized context and minority status would affect the perception of a reasonable person in the shoes of the accused as to whether they were free to leave or compelled to remain. The § 9 detention analysis is thus contextual in nature and involves a wide ranging inquiry. It takes into consideration the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society. The reasonable person in Mr. Le’s shoes is presumed to be aware of this broader racial context.

The Court indicated that an “important consideration when assessing when a detention occurred is that Mr. Le is a member of a racialized community in Canada. Binnie J. in Grant found that ‘visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive’” (at paragraph 72).

The Court accepted, as accurate, a number of extrinsic reports presented at the appeal by interveners concerning police contact with racial minorities. The acceptance of these reports led the Court to conclude that “[m]embers of racial minorities have disproportionate levels of contact with the police and the criminal justice system in Canada” (at paragraph 90). The Court then indicated that “it is in this larger social context that the police entry into the backyard and questioning of Mr. Le and his friends must be approached. It was another example of a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions.” The Court suggested that the “documented history of the relations between police and racialized communities would have had an impact on the perceptions of a reasonable person in the shoes of the accused. When three officers entered a small, private backyard, without warrant, consent, or warning, late at night, to ask questions of five racialized young men in a Toronto housing cooperative, these young men would have felt compelled to remain, answer and comply” (at paragraph 97).

THE ACCUSED’S PHYSICAL STATURE:

Interestingly, the Supreme Court also concluded that Mr. Le’s “small stature” was a factor establishing that he was arbitrarily detained (at paragraph 123):

As to stature, the trial judge found that Mr. Le had a small physical stature and said he took this consideration into account when concluding that his detention only began when he was questioned about the contents of his bag. While it is not clear how this consideration was taken into account, we are of the view that a reasonable person with the same physical stature would likely be profoundly intimidated when three police officers entered the backyard in the manner in which these officers did. In such a circumstance, a person of small stature may be more likely to feel overpowered and conclude that it is not possible to leave the backyard. Such a person may think it more necessary to comply with the police commands and directions. This element, then, supports a conclusion that a detention arose at the moment the police entered the backyard.
The Court's decision in Le deals with a pressing societal issue: contact between the police and racial minorities. However, it is difficult to know what to say about the Court's physical stature comments. Mr. Le was not a child or a young offender. Is the Supreme Court of Canada really saying that short or slightly built Canadians are more susceptible to constitutional detention than tall or heavily built ones?

**COMMENTARY:**

The Supreme Court has encouraged Canadian judges in Le to be cognizant of the realities of the nature of the type and extent of the contact that occurs between the police and racial minorities in assessing whether a specific individual, who belongs to a racial minority, has been detained.

The Court appears to be suggesting that the reports it considered can form the basis for a contextual approach: "[O]n a go-forward basis, these reports will clearly form part of the social context when determining whether there has been an arbitrary detention contrary to the Charter" (at paragraph 96). The Court also appears to be suggesting that even in the absence of evidence that the specific accused felt compelled to comply with a police officer's direction, an arbitrary detention could be found in the accused's membership in a racial minority (at paragraph 160):

The need to consider the race relations context arises even in cases where there is no testimony from the accused or any witness about their personal experience with police. Even without direct evidence, the race of the accused remains a relevant consideration under Grant.

It is difficult to determine how these comments will subsequently be interpreted in future arbitrary detention cases. It has recently been suggested, for instance, that Le affirms "the importance of understanding the social context of interactions between police and racialized groups when adjudicating the circumstances of a specific encounter,... It affirmed that social context evidence can, and should, be "used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case" (see Campbell v. Vancouver Police Board, 2019 BCHRT 128, at paragraph 22). In another recent decision, Le was seen as a basis upon which to impose a lesser sentence in a weapon offence (see R. v. Virgo, 2019 ONCJ 575). In doing so, the sentencing judge indicated that "the perception of racialized groups, and Mr. Virgo is a young black man, that they are not treated equally by criminal justice institutions has been recognized by the Supreme Court of Canada. And one report prepared for and accepted by the Superior Court in a sentencing case has recognized the link between black youth not trusting the police to protect them and resorting to self-help" (at paragraph 23).

In 2019, the Supreme Court of Canada also considered the power of the police to arrest through common-law authority.

**THE ANCILLARY COMMON-LAW POLICE AUTHORITY:**

In Fleming v. Ontario, 2019 SCC 45, the plaintiff was arrested while walking to a protest, though he had not committed any offence. He sued the police successfully, but the trial judge's decision was overturned by the Ontario Court of Appeal on the basis that the arrest was lawful at common law to prevent an apprehended "breach of the peace."

On appeal to the Supreme Court of Canada, the trial judge's decision was affirmed. The Supreme Court indicated that the issue was whether the police have the power to "arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace?"

The Supreme Court held that "no such power exists at common law. The ancillary powers doctrine does not give the police a power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace." The Court indicated that a "drastic power such as this that involves substantial interference with the liberty of law-abiding individuals would not be reasonably necessary for the fulfillment of the police duties of preserving the peace, preventing crime, and protecting life and property. This is particularly so given that less intrusive powers are already available to the police to prevent breaches of the peace from occurring" (at paragraph 7).

The Court also indicated that at "common law, a breach of the peace has always involved 'danger to the person'... an act can be considered a breach of the peace only if it involves some level of violence and a risk of harm. It is only in the face of such a serious danger that the state's ability to lawfully interfere with individual liberty comes into play. Behaviour that is merely disruptive, annoying or unruly is not a breach of the peace." (at paragraphs 58 and 59). The Court stated that it "seriously questioned whether a common law power [to arrest a person for the purpose of preventing that person from breaching the peace] would still be necessary in Canada today" (at paragraph 60).

The Court concluded that the police did not have lawful authority to arrest the plaintiff "[b]ecause there is no common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace" (at paragraph 102).

**COMMENTARY:**

This decision is much less controversial than Le, though possibly as far reaching. Mr. Fleming was walking toward a protest. He had not committed any crime nor were there any grounds to believe that he might do so. The arrest was unnecessary, and as we have seen, unlawful. Interestingly, despite this, it was deemed lawful by the Ontario Court of Appeal.

It could be argued that the Supreme Court's decision effectively eliminates the vague arrest power asserted through the doctrine of preventing a breach of the peace. The decision might cause Canadian police officers to refrain from ever again arresting someone on such a dubious basis.

**INDIGENOUS VICTIMS-BIAS AND PREJUDICE:**

Finally, in mid-2019, the Supreme Court of Canada rendered a decision that should cause all judges to reassess their approach to those who appear before us or who are the subjects of homicides.

In Barton, the accused was charged with murder. The victim (Ms. Gladue) was an Indigenous woman who was a sex-worker. The offence took place in the accused's hotel room. The victim...
died as a result of loss of blood caused by a cut to her vaginal wall.

As we saw earlier, the Supreme Court considered a number of issues in this decision. One that has not been referred to yet, involves the Court’s insistence that trial judges recognize that we “play an important role in keeping biases, prejudices, and stereotypes out of the courtroom” (at paragraph 197).

The Court stated that “our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons — and in particular Indigenous women and sex workers — head-on.” The Court indicated that “[t]urning a blind eye to these biases, prejudices, and stereotypes is not an answer. Accordingly, as an additional safeguard going forward, in sexual assault cases where the complainant is an Indigenous woman or girl, trial judges would be well advised to provide an express instruction aimed at countering prejudice against Indigenous women and girls. This instruction would go beyond a more generic instruction to reason impartially and without sympathy or prejudice’ (at paragraph 200).

The Supreme Court held that in “a case like the present, the trial judge might consider explaining to the jury that Indigenous people in Canada — and in particular Indigenous women and girls — have been subjected to a long history of colonization and systemic racism, the effects of which continue to be felt. The trial judge might also dispel a number of troubling stereotypical assumptions about Indigenous women who perform sex work, including that such persons” (at paragraph 201):

- are not entitled to the same protections the criminal justice system promises other Canadians;
- are not deserving of respect, humanity, and dignity;
- are sexual objects for male gratification;
- need not give consent to sexual activity and are “available for the taking”;
- assume the risk of any harm that befalls them because they engage in a dangerous form of work; and
- are less credible than other people.

**LANGUAGE USED TO ADDRESS MS. GLADUE AT TRIAL:**

The Supreme Court noted that at the trial, “[w]itnesses, Crown counsel, and defence counsel all repeatedly referred to Ms. Gladue as a ‘Native girl’ or ‘Native woman.’” The Court held that “it is almost always preferable to call someone by his or her name. There may be situations where it would be appropriate for the trial judge to intervene to ensure this principle is respected” (at paragraph 207):

Being respectful and remaining cognizant of the language used to refer to a person is particularly important in a case like this, where there was no suggestion that Ms. Gladue’s status as an Indigenous woman was somehow relevant to the issues at trial. While there is nothing to suggest that it was anyone’s deliberate intention in this case to invoke the kind of biases and prejudices against Indigenous women discussed above, the language used at trial was nevertheless problematic. At the end of the day, her name was “Ms. Gladue”, not “Native woman”, and there was no reason why the former could not have been used consistently as a simple matter of respect.

**COMMENTARY:**

The Supreme Court’s comments in Barton might seem self-evident, but they were not to the judge and counsel who participated in the trial. Barton serves, at least, as a reminder to all of us of the necessity of treating those who appear before us, or those who cannot, with respect and dignity. From a larger perspective, Barton calls upon us to intervene to ensure that all participants treat those involved in the judicial process with respect.

**CONCLUSION:**

As we have seen, the Supreme Court of Canada considered a number of diverse and important criminal-law issues in 2019. The Court has shown a willingness to make broad pronouncements concerning public policy issues when they arise in constitutional and non-constitutional cases. The Court’s decision in Le is, in my view, going to be a challenging one for trial judges to apply. The type of studies and reports considered by the Supreme Court are not routinely filed before Canadian trial judges. We are going to be asked to take judicial notice of the conclusions reached in the reports and studies filed in Le. It will be interesting to see how this unfolds.

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 webpage of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges’ Journal. Judge Gorman’s work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgmorman@provincial.court.nl.ca.
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Unexampled Courage
The Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waites Waring

Timothy Schutz

The Honorable Richard Gergel currently presides in the United States District Court for the Eastern District of South Carolina. In his recent book, Unexampled Courage, Judge Gergel pays tribute to the essential and sometimes controversial role that one of his predecessor jurists, the Honorable J. Waites Garing, played in ending the legal segregation of America’s schools. In doing so, Gergel reminds us of our recent history and challenges us to think critically about our proper role as judicial officers.

Gergel’s telling begins with the tragic events of February 12, 1946, when Sgt. Isaac Woodard, a returning World War II Veteran wearing his army uniform, was travelling from Augusta, Georgia on his way across South Carolina to his family home in Winnsboro. Some witnesses alleged Woodard had been drinking and made numerous requests for the bus driver to stop for a restroom break. Whatever the cause, there was tension between Woodward and the driver. Woodard, like many of the nearly one million Black Americans who served in World War II, felt his service had earned him a measure of respect. In the Jim Crow South, that view was not shared by the powers that be. When Woodard demanded the White bus driver speak to him with decency, the table of conflict was set.

The police were called at the next stop in Batesburg, South Carolina. Woodard was removed from the bus and arrested by Constable Lynwood Shull. The beating was so severe, Woodard was blinded in both eyes. Woodard’s plight was even more tragic in that he had served his country as a returning war veteran. Constable Shull was acquitted.

President Truman eventually heard Woodard’s story. Shocked by the brutality of the incident, Truman pressured the Justice Department to pursue a civil-rights action against Constable Shull. After the initially assigned judge recused, the case was transferred to the book’s subject, Judge J. Waites Waring. Judge Waring had been appointed to the United States District Court for the Eastern District of South Carolina in 1941. Although the Shull case was eventually tried in Columbia, Waring presided principally in Charleston. His family was long established in Charleston and politically connected. As a federal judge with a lifetime appointment, Waring was an accepted member of the highest ranks of Charlestonian society. He had lived a privileged life. Waring shocked his wife of thirty years, and Charleston high society, when in 1945 he filed for a divorce and went on to marry Elizabeth Hoffman, who herself had enjoyed a privileged life in Michigan and Connecticut. There divorces and subsequent marriage created a foundation that would have far-reaching impacts on the norms of Charlestonian culture.

The case of People v. Shull proceeded to trial in 1946 before an all-White male jury. Gergel provides the reader with the social setting and trial details in a vivid account that brings the historic case to life. The effort made by the prosecution in pursuing the case against Constable Shull can charitably be characterized as lackluster. In closing arguments, prosecutor Claude Sapp informed the jury that “whatever verdict you gentleman bring in, the government will be satisfied with.” Defense counsel urged Southern independence, arguing that “if a decision against the government means seceding, then let South Carolina secede again.” That championed independence was grounded in unabashed bigotry, with defense counsel arguing that Woodward’s admission that he spoke back to the white bus driver demonstrated he was intoxicated because “that’s not the talk of a sober nigga in South Carolina.” Constable Shull was acquitted.

Judge Waring was deeply troubled by the verdict in favor of Shull. Although his legal career before the Shull trial did not involve civil-rights claims, Gergel explains that Waring had demonstrated a sensitivity to racial issues in managing his courtroom. He did away with segregated seating and hired a Black bailiff. Thus, it seems he understood at a personal level the inherent costs of segregation and discrimination. But we learn that the Shull decision marked a turning point in Waring’s judicial career. There is little doubt this turn was facilitated by his new wife, Elizabeth, who had also attended the trial. Elizabeth was shocked by the rigidity and bluntness of the enforced racial order. After attending the trial and hearing the verdict, she told her husband she had never seen such a terrible thing. When she shared her concerns with a Charleston friend, he reported “that sort of thing happens all the time. It’s dreadful but what are we going to do about it.”

Gergel explains that the Warings decided there was something
they could do. The couple began by immersing themselves in the sociological research regarding racial relations in the United States. They were significantly influenced by W.J. Cash’s *Mind of the South*. Cash opined that the “common [W]hite” possessed admirable traits of pride, bravery, personal generosity, and courtoeousness, but also tended toward darker traits of intolerance, fear, hate, exaggerated individualism, and a tendency toward unreality that left them susceptible to racial demagogues. The Warings were also influenced by Gunnar Mydals opus, *An American Dilemma: The Negro Problem and Modern Democracy*. Mydal had conducted a study in which Whites and Blacks ranked the importance of various racial barriers. Whites identified the most important of these barriers to be interracial sex and marriage, followed by concerns regarding direct social contact with Blacks, such as sharing the same eating places and restrooms. Less important to Whites were issues surrounding political disenfranchisement and discrimination in employment, lending, and public assistance. In contrast, Blacks ranked fair access to employment, credit, and public relief as their top concerns, followed by the right to vote. Blacks placed little importance on issues related to interracial marriage and sex.

From the perspective of White society, perpetuation of the existing economic and social order—and the corresponding subjugation of Blacks—mandated legal segregation of the races. The obsession with social order and maintenance of the status quo created an environment where isolation, brutality, and dehumanization were an accepted norm. Thousands of Black Americans were lynched in the period between 1857 and 1945. These killings were intended to terrorize Blacks and instill in them a fear of resistance and dissipating hope. Remarkably, numerous anti-lynching bills were introduced in Congress over the years, and yet even measures to end such barbarism went down to political defeat. The social order was also enforced with a myriad of other techniques, from disenfranchisement, to discriminatory lending practices, and segregation of public facilities. Although there were many working to change this system, the status quo continued for decades. Was it the rabid resistance of a minority of legislators or the apathy of the citizenry that stood in the way of reform? It seems both were necessary components in the perpetuation of these practices.

Gergel gently reminds us that the judicial system was also complicit in maintaining the status quo. Indeed, the racial segregation of our schools was enabled by the Supreme Court’s 1896 decision in *Plessy v. Ferguson*, which upheld the concept of “separate but equal” public accommodations for the races as consistent with the Fourteenth Amendment of the United States Constitution. In practice, of course, the separate accommodations had never been equal. Whether a product of intentional subjugation or the human inclination to favor one’s own tribe, the dominant White society had never provided public services and assets for Black Americans on a par with those that were provided to Whites.

By the middle of the twentieth century, however, a substantial number of intellectual, spiritual, and political leaders began to speak out against the inherent indecency of the separate-but-equal myth. But the call for change was vigorously contested because the preservation of school segregation was essential to the perpetuation of the racial hierarchy. Its import became even more pronounced in the face of the integration of the armed forces. The presence of nearly one million Black soldiers during the World War II effort demonstrated that the races could work, to a degree, side by side without chaos ensuing. The White establishment could tolerate such a result in the isolated and distant setting of military service. But if school desegregation came to neighborhoods and towns across the county, it would dispel the argument that our domestic peace could not be secured unless the races were socially separated. Thus, school desegregation was viewed as the bulkhead for preserving the racial status quo.

With the injustice of the *Shall* trial as an impetus, and informed by the analytical framework he and Elizabeth chose to digest, Gergel tells us, Judge Waring made a very conscious choice that he would use his position as a federal district court judge to do something about segregation. In 1944, the Supreme Court decided *Smith v. Allbright*, which struck down Texas statutes that prohibited Blacks from participating in the Texas Democratic Primary. Many southern states had similar statutes but began moving toward voluntary compliance with *Smith*. South Carolina chose a different course. Governor Olin Johnston called a special session of the General Assembly, with a proclamation announcing “White Supremacy will be maintained in our primaries.” The General Assembly thereafter repealed all statutory references to the primary, effectively delegating operation of the primary process to the Democratic Party, thereby hoping to avoid the State action which triggered the *Smith* ruling. The NAACP then challenged the legislative repeal. The case landed before Judge Waring, who ultimately ruled in favor of the Black plaintiff who had challenged the process. In reaching his conclusion, Waring stated he could either “be entirely governed by the plaintiff who had challenged the process. In reaching his conclusion, Waring stated he could either “be entirely governed by the doctrine of [W]hite supremacy” or be “a federal judge and decide the law.” Waring was heavily criticized for the opinion. But he proclaimed it “time that we South Carolinians who have been fortunate enough to get our heads a little above the fog do what we can to bring our people out of it.”

Gergel provides insight into the price paid for Judge Waring’s progressive jurisprudence. The Warings were bombarded with public criticism, letters, and threatening calls after the *Smith* decision was announced. Elizabeth was confronted in public. They were ostracized by White society and lost nearly all their friends. But Judge Waring did receive the support of several intellectuals, including Clifford Durr, former president of the National Lawyers Guild. Praising Waring’s ruling, Durr wrote:

> A courage of a greater and rarer kind is required to face the disapproval of society in defense of a basic democratic principle. It hurts to be shut off from one’s own people. It hurts even more when they are good people—friendly, basically decent and kindly, and the only barrier is an idea. Loneliness can be more painful than wounds of battle, and few are willing to risk it. It takes real courage for a judge, in opposition to the deep seated folk-ways of those with whom he lives and will continue to live to say, “This is the law. It is my duty to enforce it and I will do my duty.”

Although South Carolina continued to lag behind, Waring could sense the country was turning a corner. In its 1950 term, the Supreme Court decided a trio of cases that challenged the disparate treatment of Whites and Blacks as it related to public education and travel. Waring saw these cases as a signal that the
Supreme Court was moving towards a reconsideration of the
Plessy doctrine. The Court ultimately decided these cases in
favor of the Plaintiffs but did not expressly overrule Plessy.
Instead, the Court focused on the factual reality that the separate
accommodations were simply nowhere near equal, with the
White-only facilities being far better funded and supported than
the Black facilities. Thus, the Court ruled in the Plaintiff’s favor
because the compared facilities were not equal, but the Court did
not disavow the separate but equal doctrine.

Waring was nonetheless persuaded the Court was trending
toward the abolition of separate but equal. Sensing the changing
political and legal climate, Waring embarked upon a campaign
that would be viewed as ethically suspect in today’s judicial cul-
ture. First, he began to encourage those in his supportive intel-
lectual circles to file a case to address head-on the constitu-
tionality of Plessy v. Ferguson. But no case had been filed which
directly challenged the continuing propriety of the separate-but-
equal doctrine. Waring learned, however, of a pending case cap-
tioned Biggs v. Elliott, which was filed as a typical challenge to
the unequal distribution of assets between White and Black
schools. The Plaintiffs were represented by Thurgood Marshall of
the NAACP. When Marshall arrived at the courthouse for a pre-
trial hearing, Waring requested to see him in chambers. In this ex
parte discussion, Waring informed Marshall he had no desire to
hear another case focused on the issue of whether the separate
facilities were in fact equal. Instead, he directed Marshall to pur-
sue a frontal challenge against the constitutionality of the sepa-

Because the case now involved a challenge to the constitution-
ality of statutes mandating segregated facilities, the applicable
court rules required the case be heard by a panel of three federal
court judges. Since the case had originally been assigned to him,
Waring was confident he would be one of the three judges on the
panel. He was also confident the other two judges would rule to
uphold the constitutionality of segregated schools. But Waring
recognized he would be provided the opportunity to write a diss-
ent that would provide an intellectual foundation for the con-
clusion that separate-but-equal facilities was in theory and in
practice a perpetuation of state-sanctioned inequality, which
could not be reconciled with the Fourteenth Amendment’s guar-
antee of equal protection to all citizens.

Understanding the societal and legal trends, and the resulting
threat the Biggs case posed to segregation, the State of South Car-
olina embarked upon an interesting defense strategy. The State
concluded it was inevitable that a court would find the Black and
White schools at issue were dramatically unequal. Thus, the State
committed to fund seventy-five million dollars to improve the
condition of the Black schools. With this funding secured, the
State would endeavor to focus the case on the question of
whether the separate schools could be made equal, rather than
whether the concept of separate but equal was inherently dis-
-criminatory. To make this strategy even more alluring, the State
decided to confess that the existing Black schools were far infe-
rior to the counterpart White schools. The State held this strategy
close to the vest, ultimately springing it on the Plaintiffs on the
morning of trial. As a consequence, the Plaintiffs were cut short
in their effort to present the compelling inequities and injustices
in the respective schools, which had been allowed to exist under
the separate-but-equal doctrine.

Whether due to the financial commitment made by the State,
or the established reluctance of a South Carolinian jurist to strike
down segregation laws, the State was able to persuade two of the
three judges to uphold the constitutionality of segregated
schools. But they could not persuade Judge Waring. The majority
decision and Judge Waring’s dissent were announced on June 23,
1951.

Waring recognized and expressly articulated that the time had
come for the federal government to squarely address whether
segregation in our school’s systems could withstand constitution
scrutiny. He began his assessment by praising the “Unexampled
Courage” of the Black citizens who brought the suit, with many
of them suffering persecution and financial retribution. This is
the origin of the phrase that Judge Gergel uses in the title of this
book to refer to both the Plaintiffs and Judge Waring. Waring
proceeded to address the inherent flaws of the separate but equal
document. Waring emphasized the damage that the separation
of races does to children’s view of themselves. He also pointed to
the overwhelming evidence that the doctrine had consistently
resulted in the construction and support of White facilities, that
were far superior to the facilities for Black citizens. This evidence,
Waring argued, illustrated the fundamental flaw with the sepa-
rate-but-equal doctrine.

From their testimony, it was clearly apparent, as it
should be to any thoughtful person, irrespective of having
such expert testimony, that segregation in education can
never produce equality, and that it is an evil that must be
eradicated. This case presents the matter clearly for adjud-
cation and I am of the opinion that all of the legal guide-
posts, expert testimony, common sense and reason point
unerringly to the conclusion that the system of segregation
in education adopted by the State of South Carolina must
go and must go now.

In words that would provide the intellectual foundation for
abolishing the separate but equal doctrine, Waring declared “Seg-
regation is per se inequality.”

When the convulsions of history and the appellate process
finally played their hand, it was Brown v. Topeka Board of Educa-
tion rather than Biggs v. Elliott which provided the case by which
the United States Supreme Court struck down segregation in
America’s schools. But Waring’s dissent in Biggs was clearly a pre-
cursor to the Supreme Court’s 1953 Brown decision.

Gergel has done his predecessor, the profession, and the
country a great service by highlighting the intellectual courage of
Judge Waring, and the perseverance, pride, and sacrifice of the
Black Americans who had the courage to stand for what was right
in the face of institutional persecution. Waring’s judicial role in
this story is not without controversy. As Gergel points out, the
open solicitation of cases and the ex parte strategizing with lead
counsel for one of the parties would not be tolerated under
today’s ethical precepts. And one can argue that the long-term
acceptance of desegregation by White citizens may have been
better facilitated had it come through legislative action rather
than the courts. On the other hand, history has shown the leg-
islative branch has too often been willing to sacrifice the rights
of minorities at the altar of reelection.

Wattie Waring made a conscious choice to end a practice that
was unjust and unconstitutional. The words of the Fourteenth Amendment had not changed in the half century since Plessy was decided. Yet Waring educated himself—culturally, sociologically, legally, and morally—to recognize and declare the inherent falsehood of separate but equal. He had the courage to make a decision that ran counter to the tidal pull of his social circle. And he seems to have made this conscious choice relatively late in his legal career. Certainly, he was shaped by the savage beating of Woodward and the acquittal of Shull. Perhaps it awakened him to the omnipresent oppression that had always surrounded him but which he had never truly seen. Perhaps he was inspired by the different vision and intellectual support of a new spouse. Perhaps he had simply evolved as a jurist. Whatever the cause, Waring made a conscious choice to advocate for the abolition of an unjust system.

In a recent article in The Bencher, the national publication of the American Inns of Court, Judge William C. Koch, Jr. wrote:

All of us have and will encounter what Pogo the Possum, the title character of Walt Kelly's now out-of-print comic strip once called "insurmountable opportunities."

These are the defining moments of our lives and careers. Our challenge is to remain alert for these moments, particularly the non-traditional ones. When they arrive, we must trust our heart and common sense to make the right decision. Until they arrive, our task is to prepare for them by mastering our craft and by adhering to the highest standards of professionalism, civility and excellence.

Judge Gergel has blessed us with the story of Judge Waring’s embrace of his insurmountable opportunities. What are yours?

Timothy J. Schutz is a trial judge in Colorado and has been recognized for excellence by the Colorado Judicial Institute. He was a commercial and intellectual property litigator before taking the bench. Judge Schutz considers service on the bench an honor and makes his goal to bring equal measures of humanity, diligence, and scholarship to his judicial calling.
Select Criminal Law and Procedure Cases from the U.S. Supreme Court’s 2018-2019 Term

Eve Brensike Primus & Kristin Froehle

Although the 2018-19 Term at the Supreme Court did not include any blockbuster rulings like Carpenter v. United States, the Court issued a number of significant criminal law and procedure rulings. It addressed warrantless blood-alcohol testing, the dual-sovereignty doctrine, the right to trial by jury, ineffective assistance of trial counsel, questions of incorporation, prisoners’ competence to be executed, permissible methods of execution, and some important statutory interpretation questions.

Looking back on the Term, Justice Gorsuch clearly solidified his position as the libertarian “swing” vote in criminal procedure cases. He joined the liberals to uphold a defendant’s right to trial by jury, strike down a federal statute as unconstitutionally vague, and incorporate the Eighth Amendment’s prohibition against excessive fines against the states. At the same time, he took a very pro-death penalty stance in the Eighth Amendment cases and joined Justice Thomas in a dissent that questioned the validity of Gideon v. Wainwright’s holding that indigent criminal defendants are constitutionally entitled to appointed counsel. With Justice Kavanaugh consistently voting with the conservatives, Justice Gorsuch will likely continue to play a large role in shaping the Court’s criminal law and procedure jurisprudence.

FOURTH AMENDMENT

In its only Fourth Amendment case this Term, the Supreme Court held in Mitchell v. Wisconsin that police may almost always order a warrantless blood test to measure a driver’s blood-alcohol content (BAC) without offending the Fourth Amendment provided that (a) they have probable cause to believe that the driver has committed a drunk-driving offense, and (b) the driver’s unconsciousness or stupor requires him to be taken to the hospital or other facility before the police can administer a standard evidentiary breath test. Police arrested Gerald Mitchell for operating a vehicle while intoxicated after Mitchell failed a preliminary breath test. The arresting officer drove Mitchell to the police station to conduct a standard evidentiary breath test, but Mitchell was too lethargic even for a breath test. Police then drove him to the hospital for blood testing, but Mitchell was unconscious by the time they arrived. The officer asked hospital staff to test Mitchell’s blood, revealing a 0.22 BAC. The Wisconsin courts denied Mitchell’s suppression arguments, and he was convicted of drunk driving.

Justice Alito, writing for a plurality of the Court that included Chief Justice Roberts and Justices Breyer and Kavanaugh, adopted a rebuttable presumption that police can seek warrantless blood tests on unconscious suspected drunk drivers without running afoul of the Fourth Amendment. After explaining that “under the exception for exigent circumstances, a warrantless search is allowed when ‘there is compelling need for official action and no time to secure a warrant,’” Justice Alito laid out the case for a compelling need here. He noted that highway safety is a compelling interest, enforcement of strict BAC limits lead to highway safety, and enforcement can only occur with accurate and prompt testing. The plurality relied on the fact that every state has implied-consent laws that promote prompt BAC testing by breath test or—if breath testing is unavailable—by blood test to support its view that there is a compelling state need; the state only need prove that it had no time to secure a warrant.

Citing the Court’s decision in Missouri v. McNeely, the plurality acknowledged that “the fleeting quality of BAC evidence alone is not enough” to satisfy the exigent circumstances exception. The addition of “some other factor creat[ing] pressing health, safety, or law enforcement needs that would take priority over a warrant application” may be enough to trigger an exigency exception. For example, the plurality described Schmerber v. California as a case permitting a warrantless blood test on a drunk driver who had gotten into a car accident because the accident itself created an emergency requiring the officer to attend to other pressing needs—i.e., helping the injured, administering first aid, preserving evidence at the scene, and redirecting traffic. As a result, the further delay associated with seeking a warrant would risk destruction of evidence. Similarly, according to the plurality, unconscious-driver cases are emergencies that require the police to attend to individuals’ medical well-being and might further delay warrant application. The plurality therefore reasoned that the exigency exception will almost always apply to warrantless blood draws for unconscious drunk drivers like Mitchell.

The plurality “d[id] not rule out the possibility that in an unusual case the defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged

Footnotes

2. 139 S. Ct. 2525 (2019).
3. Id. at 2532.

5. 569 U.S. 141.
6. 139 S. Ct. at 2533.
7. Id. at 2537.
that a warrant application would interfere with other pressing needs or duties.” The case was remanded to provide Mitchell the opportunity to make this showing.

Justice Thomas provided the fifth vote, concurring in the judgment but advocating for the broader rule that he wanted (and did not get) in McNeely: that the imminent destruction of evidence is a risk in every drunk-driving arrest and should trigger application of the exigent circumstances exception whenever the police have probable cause to believe a driver is drunk whether the driver is conscious or unconscious.

Justices Sotomayor, Ginsburg, Kagan, and Gorsuch dissented in two separate opinions. All of the dissenters felt the exigency exception was not properly before the Court. The Court had granted certiorari to address the contours of the implied-consent exception; instead, the plurality reached out to decide the case on exigency grounds even though Wisconsin admitted that there was no exigency and had never relied on that exception to justify its actions.

Justice Sotomayor, joined by Justices Ginsburg and Kagan, also addressed the application of the exigency exception on the merits. They felt that the same reasons for rejecting a categorical exigency exception in McNeely apply to cases where the driver is unconscious: there is already an inherent delay in taking a suspect to a hospital to get blood drawn; many jurisdictions have streamlined processes for obtaining warrants quickly; and alcohol dissipates from the blood at predictable rates that can be used to figure out what the BAC had been at an earlier point. For all of these reasons, Justice Sotomayor would require the police to get a warrant or show individualized reasons why they could not in a given case instead of adopting a categorical presumption.

FIFTH AMENDMENT

In Gamble v. United States, the Court granted certiorari to reconsider the separate-sovereigns (or dual-sovereignty) doctrine of the Double Jeopardy Clause. Though the Fifth Amendment Double Jeopardy Clause protects citizens from “be[ing] twice put in jeopardy” for the same offense, the separate-sovereigns doctrine limits the Double Jeopardy Clause to prosecutions brought by one sovereign. As a result, a state may prosecute a defendant under state law even if the federal government has already prosecuted him for the same offense under a federal statute and vice versa. In a much-awaited decision, the Court upheld the dual-sovereignty doctrine.

After Terrance Gamble was convicted and sent to prison for being a felon in possession of a firearm, he argued that the federal government could not also charge him with being a felon in possession of a firearm because it would violate the Double Jeopardy Clause. Justice Alito, writing for the majority and joined by all but Justices Ginsburg and Gorsuch, upheld Gamble’s convictions and the dual-sovereignty doctrine. Justice Alito criticized Gamble’s characterization of the doctrine as an exception to the Double Jeopardy Clause. Focusing on the text, Justice Alito noted that the Double Jeopardy Clause has always been about protecting individuals from prosecution for “the same offence,” not for the same conduct or actions.”

Id. was not persuaded by Gamble’s evidence supporting this claim, nor was the Court convinced that incorporation of the Double Jeopardy Clause against the states had substantively changed the right. Instead, the Court noted that the dual-sovereignty doctrine is deeply rooted and “honors the substantive differences between the interests that two sovereigns can have in punishing the same act.”

Justice Thomas joined the majority but filed a separate concurrence on the role of stare decisis. Though the majority emphasized its reluctance to overrule precedent, Justice Thomas noted that stare decisis can result in overreliance on erroneous prior decisions. He urged the Court to reconsider its stare decisis standard arguing that no special justification should be required for the Court to reverse flawed precedent. Having said that, he concurred in the decision, noting that the dual-sovereignty doctrine was not a flawed precedent and should be upheld.

Justice Ginsburg and Justice Gorsuch filed separate dissents. Justice Ginsburg advocated for overturning the dual-sovereignty doctrine, arguing that state governments and the federal government were “parts of one whole.” It is not the governments that have sovereignty; “ultimate sovereignty resides in the governed.” Using a historical analysis, Justice Ginsburg argued that the dual-sovereignty doctrine was originally intended to protect individual liberties, but the majority’s Gamble decision only restricts individual liberties. She thought the Court should have overruled the dual-sovereignty doctrine, noting that it “has been subject to relentless criticism by members of the bench, bar, and academy.”

Justice Gorsuch also dissented. His reading of the text, structure, and historical sources gave him a different understanding of the word “offence” than the majority. An offense, Justice Gorsuch maintained, was not historically sovereign-specific, and the great weight of common-law authority deemed successive prosecutions by separate sovereigns out of bounds. Applying the Court’s stare decisis factors, Justice Gorsuch would have abrogated the dual-sovereignty doctrine.

9. 139 S. Ct. at 2539.
12. Id. at 1965.
13. Id. at 1966.
14. Id. at 1990 (Ginsburg, J., dissenting) (quoting The Federalist No. 82, p. 493 (C. Rossiter ed. 1961) (A. Hamilton)).
15. Id. (internal quotations omitted) (emphasis in original).
16. Id. at 1995.
"The [Haymond] decision clearly puts other sections of the federal revocation statute that affect a large number of cases at risk..."

SIXTH AMENDMENT

This Term’s Sixth Amendment cases included one potentially important ruling in a right-to-trial-by-jury case (United States v. Haymond) and two smaller rulings—one addressing an ineffective-assistance-of-counsel issue (Garza v. Idaho), and the other addressing a Batson challenge (Flowers v. Mississippi).

THE RIGHT TO TRIAL BY JURY

United States v. Haymond

André Haymond was convicted of possessing child pornography and sentenced to a prison term followed by 10 years of supervised release pursuant to 18 U.S.C. § 3583. When it was later alleged that he violated the terms of his supervised release by possessing more child pornography, a federal district judge acting without a jury and under a preponderance-of-the-evidence standard found that he knowingly possessed some of the images. Under a special provision in the federal supervised-release statutory regime (§ 3583(k)), a judge who finds by a preponderance that a defendant on supervised release committed certain enumerated offenses—including possession of child pornography—must impose an additional prison term of at least five years and up to life. Without that special provision, Mr. Haymond would have been eligible to receive a sentence of between zero and ten years in prison. The trial judge reluctantly sentenced Mr. Haymond to five years, and, on appeal, the Tenth Circuit Court of Appeals concluded that the five-year sentence required by § 3583(k) violated Mr. Haymond’s Fifth and Sixth Amendment rights to trial by jury. The Supreme Court agreed.

Justice Gorsuch, joined by Justices Ginsburg, Sotomayor, and Kagan, wrote a plurality opinion that began by emphasizing that, under Apprendi, Blakely, and Alleyene, a jury must find beyond a reasonable doubt every fact that the law makes essential to a punishment that a judge might later seek to impose. It rejected the government’s argument that the Sixth Amendment’s jury promise does not apply to supervised-release revocation hearings, noting that its prior precedents had “rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a ‘sentence administration proceeding.’” The same is true of efforts to recast punishment: it only applies to a discrete set of federal offenses; it takes away the judge’s discretion regarding whether and how much prison is appropriate; and it imposes a mandatory minimum of five years in prison. He wrote separately to make it clear that, as a general matter, he viewed the judge’s role in supervised-release proceedings as consistent with traditional parole and he “would not transplant the Apprendi line of cases to the supervised-release context.”

But, having brought the Apprendi line into the supervised-release context, it may be difficult for the Court to limit its impact. The decision clearly puts other sections of the federal revocation statute that affect a large number of cases at risk, as well as various state provisions on the revocation of probation, parole, and supervised release.

Justice Alito, writing in dissent for himself, the Chief Justice, and Justices Thomas and Kavanaugh, warned that the plurality opinion “sports rhetoric with potentially revolutionary implications” and is crafted so as to “lay[ ] the groundwork for later decisions of much broader scope.” The dissent then recounts how much of the plurality opinion’s language suggests that the Sixth Amendment jury trial right applies to “any supervised-release revocation proceeding.”

Although the plurality states in a footnote that it is “not pass[ing] judgment one way or the other on the question of remedy and decide whether § 3583(k) is unenforceable or permits the judge to empanel a jury to find the necessary facts to trigger the mandatory minimum.”

Having concluded that § 3583(k)’s addition of a mandatory minimum violated Mr. Haymond’s right to a trial by jury, the plurality would remand the case for the lower court to address the question of remedy and decide whether § 3583(k) is unenforceable or permits the judge to empanel a jury to find the necessary facts to trigger the mandatory minimum.

24. Id. at 2386 (Breyer, J., concurring in the judgment).
25. Id. at 2385.
26. Id. at 2386 (Alito, J., dissenting).
27. Id. at 2387 (emphasis in original).
28. Id. at 2388.
other on § 3583(e)’s consistency with Apprendi,” under the plurality’s logic, “a term of supervised release could never be ordered [by a judge acting without a jury] for a defendant who is sentenced to the statutory maximum term of imprisonment, and only a short period” could be imposed for one sentenced to something close to the maximum. 30

On the merits, the dissents disagreed with the plurality’s belief that supervised release falls within the meaning of “criminal prosecutions” for which the Sixth Amendment provides a right to jury trial. Relying on the original meaning of “accused” and “criminal prosecution,” the dissent concluded that “[a] supervised-release revocation proceeding is not part of the criminal proceeding that landed a defendant in prison in the first place because ‘[a] “criminal prosecution” . . . ends when sentence has been pronounced on the convicted or a verdict of “Not guilty” has cleared the defendant of the charge.” 31 Instead, the dissents believe that supervised release should be treated like parole and probation hearings, which the court had previously held were not considered part of the criminal prosecution for purposes of the Sixth Amendment.

Going forward, in addition to determining which other parole, probation, or supervised-release statutes are affected by Haymond’s holding, lower courts addressing the remedial question will have to grapple with the implications of the Haymond decision: If the right to a jury trial applies at § 3583(k) revocation hearings, what other rights should be afforded to defendants at these hearings? Is there a Sixth Amendment right to counsel? 32 A Fifth Amendment right to testify or not to take the stand? 33 A right to confront witnesses? 34 This will hardly be the Court’s last word on the scope of the Haymond decision. We’ll have to see how limited Justice Breyer’s view will be down the line.

INEFFECTIVE ASSISTANCE OF COUNSEL

In Garza v. Idaho, 35 the Supreme Court extended Roe v. Flores-Ortega 36 and held that (a) a lawyer provides constitutionally deficient performance when she fails to file a notice of appeal after the client requests an appeal—even when the underlying plea included a waiver of appeal—and (b) prejudice will be presumed in such cases. Gilberto Garza, Jr. entered an Alford plea to aggravated assault and possession of a controlled substance with intent to deliver, signing an appeal waiver as part of the plea agreement. Following sentencing, Garza informed his trial counsel of his desire to appeal, but counsel did not file the appeal. After the period for filing a notice of appeal passed, Garza sought post-conviction relief in state court, claiming his trial counsel was ineffective for failing to file a notice of appeal despite Garza’s instructions to do so. The Idaho state courts denied relief, holding that Garza failed to show both deficient performance and resulting prejudice to his appeal and thus did not merit relief under the Strickland v. Washington 37 standard for assessing ineffective-assistance-of-counsel claims.

In a 6–3 opinion authored by Justice Sotomayor, the Court reversed. In Flores-Ortega, the Court had already explained that a lawyer who disregards specific instructions from her client to file a notice of appeal renders deficient performance under Strickland. The Garza majority held that this remains true even when the client signed an appeal waiver because no appeal waiver serves to bar all appellate claims and filing an appeal is a purely ministerial act that counsel performs to effectuate a decision that the defendant alone is entitled to make.

With regard to prejudice, Flores-Ortega had held that, “when an attorney’s deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed ‘with no further showing from the defendant of the merits of his underlying claims.’” 38 According to the Garza majority, trial counsel’s failure to file an appeal after Garza requested one triggered the Flores-Ortega presumption of prejudice. As was true in Flores-Ortega, “the loss of the entire [appellate] proceeding itself, which a defendant wanted at the time and to which he had a right, . . . demands a presumption of prejudice.” 39

Justice Thomas, joined by Justices Gorsuch and Alito, dissented, arguing both that trial counsel’s performance was not deficient and that Flores-Ortega’s presumption of prejudice should not apply when the defendant has executed an appeal waiver. Justice Thomas argued that “a defendant who has executed an appeal waiver cannot show prejudice arising from his counsel’s decision not to appeal unless he (1) identifies claims he would have pursued that were outside the appeal waiver; (2) shows that the plea was involuntary or unknowing; or (3) establishes that the government breached the plea agreement.” 40 Justice Thomas contended that Garza waived his right to appeal with his plea agreement, and therefore Garza, not his trial counsel, forfeited his appeal. Justice Thomas likened this issue to other waived issues, noting that counsel should not be deemed ineffective for failing to challenge a waived issue. Thus, Justice Thomas concluded, Garza’s trial counsel pursued “the only professionally reasonable course of action for counsel under the circumstances” by failing to file a notice to appeal. 41

Joined now only by Justice Gorsuch, Justice Thomas concluded by lamenting the Court’s further break from the original meaning of the Sixth Amendment. Noting that the Sixth Amendment originally provided defendants with a right only to employ counsel or use volunteered services, Justice Thomas argued that

29. Id.
30. Id. at 2390.
31. Id. at 2393 (quoting F. Heller,第六条修正案的宪法意义 (1951)).
35. 139 S. Ct. 738 (2019).
38. Garza, 139 S. Ct. at 742 (quoting Flores-Ortega, 528 U.S. at 484).
39. Id. at 748 (quoting Flores-Ortega, 528 U.S. at 483).
40. Id. at 752 (Thomas, J., dissenting).
41. Id. at 753.
A BATSON CHALLENGE

The Court reviewed a Batson challenge in Flowers v. Mississippi and deemed a trial court’s finding of no discriminatory intent in the State’s use of its preemptory strikes clear error. At Curtis Flowers’s murder trial, the prosecution used its preemptory strikes to remove five of the six African-American prospective jurors. After he was convicted and sentenced to death, Flowers appealed on the grounds that the State violated his Sixth and Fourteenth Amendment rights in issuing racially discriminatory preemptory strikes. The Mississippi Supreme Court upheld the conviction, but the U.S. Supreme Court remanded the case in light of Foster v. Chatman. On remand, the Mississippi Court again upheld Flowers’s conviction, and he appealed.

In a 7–2 decision authored by Justice Kavanaugh, the Court overturned the conviction. The Court found significant evidence of discriminatory intent. First, there was the history in the case. In Flowers’s previous five trials, three had been reversed by the state courts due to prosecutorial misconduct, including two prior Batson violations by the same prosecutor who tried the instant case. In all six of Flowers’s trial combined, the State had used peremptory challenges to strike 41 of 42 black prospective jurors. There was “dramatically disparate questioning of black and white prospective jurors,” and the prosecutor struck all but one prospective black juror in the instant case. Finally, the prosecutor had given paltry explanations for striking one black juror who was similarly situated to unchallenged white jurors. Justice Kavanaugh noted that while the Court “need not and do[es] not decide that any one of those [ ] facts alone . . . require[s] reversal,” the cumulative evidence proved that the preemptory strikes were motivated by discriminatory intent.

Justice Thomas, joined in part by Justice Gorsuch, dissented. Justice Thomas argued that the case did not present a true question of law and believed that the Court “disregarded [its] traditional criteria to take this case.” Justice Thomas also disagreed with the majority’s understanding of the facts. He believed there were race-neutral reasons for each preemptory strike. He concluded by suggesting that the majority opinion “distorts our legal standards, ignores the record, and reflects utter disrespect for the careful analysis of the Mississippi courts.”

Writing for himself alone, Justice Thomas went on to question the legitimacy of the Batson decision itself, noting that it has “led the Court to disregard Article III’s limitations on standing by giving a windfall to a convicted criminal who . . . suffered no injury,” “forced equal protection principles onto a procedure designed to give parties absolute discretion in making individual strikes,” and “blinded the Court to the reality that racial prejudice exists and can affect the fairness of trials.”

In the end, Flowers adds very little to the Batson line of cases. The majority itself recognized that the decision “break[s] no new legal ground.” Justice Alito concurred specifically to note that the case involved a “unique combination[ ] of circumstances.”

EIGHTH AMENDMENT

This Term’s Eighth Amendment cases ran the gamut from a case about the incorporation of the Excessive Fines Clause (Timbs v. Indiana) to cases addressing methods of execution (Bucklew v. Precythe) and inmates’ competence to be executed (Madison v. Alabama and Moore v. Texas).

INCORPORATING THE EXCESSIVE FINES CLAUSE

In the first incorporation case since 2010, the Court held in Timbs v. Indiana that the Fourteenth Amendment Due Process Clause incorporates the Eighth Amendment Excessive Fines Clause against the states. After Tyson Timbs pleaded guilty and was sentenced for dealing in a controlled substance and conspiracy to commit theft, the state sought civil forfeiture of Timbs’s Land Rover SUV, which the state suspected was used to transport heroin. During the forfeiture hearing, the Indiana trial court found that, although the vehicle had been used to facilitate the commission of a crime, forfeiture of the vehicle would be unconstitutional under the Eighth Amendment Excessive Fines Clause, because the vehicle was worth $42,000—more than four times the maximum $10,000 monetary fine assessable against Timbs for his drug conviction. The Indiana Supreme Court reversed, holding that the constitutional prohibition on excessive fines constrained only federal action and was inapplicable in state cases. The Supreme Court unanimously disagreed.

Writing for the majority, Justice Ginsburg—joined by all but Justice Thomas, who concurred in the judgment—found that the protection against excessive fines was “fundamental to our scheme of ordered liberty,” with ‘deep[ ] root[s] in [our] history
and tradition.” Noting that all fifty states have a constitutional provision prohibiting the imposition of excessive fines and that the protection against excessive fines “has been a constant shield throughout Anglo-American history,” the majority found the historical and logical case for incorporating the Excessive Fines Clause “overwhelming.”

Justice Gorsuch concurred, noting that a better vehicle for incorporation may be the Fourteenth Amendment Privileges and Immunities Clause. However, Justice Gorsuch did not believe the case turned on that decision. Justice Thomas disagreed, concurring only in the judgment. Justice Thomas argued that the right to be free from excessive fines, a “substantive right that has nothing to do with ‘process’” should not be incorporated through the Due Process Clause, but rather be characterized as “one of the ‘privileges or immunities of citizens of the United States’ protected by the Fourteenth Amendment.”

**EXECUTION METHODS**

In *Bucklew v. Precythe*, the Court addressed the legal test for as-applied challenges to state execution methods. In 2013 Missouri revised its lethal injection protocol to require the use of pentobarbital to execute prisoners in capital cases. Twelve days before his scheduled execution using this protocol, Russell Bucklew raised an as-applied challenge to the use of pentobarbital in his case, arguing that, as a result of vascular tumors that he had in his head, neck, and throat due to a medical condition called cavernous hemangioma, the use of the pentobarbital would cause him severe pain in violation of the Eighth Amendment. In *Baze v. Rees* and *Glossip v. Gross*, the Court had required an inmate filing a facial challenge to a method of execution under the Eighth Amendment to show that there is “a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain” that the State has refused to adopt without a legitimate penological reason. Bucklew argued that the *Baze-Glossip* test only applied to facial challenges to execution methods and not as-applied claims like his. When pressed by the lower courts for an alternative method, Bucklew suggested the use of nitrogen gas and was given an opportunity to present evidence about the use of that method. Ultimately, the district court rejected his arguments, applying the *Baze-Glossip* test to his claim and granting the State’s motion for summary judgment after finding that Bucklew presented no evidence that the use of nitrogen gas would substantially reduce the risk of severe pain. The Eighth Circuit Court of Appeals affirmed, and so did the Supreme Court in a 5-4 decision written by Justice Gorsuch.

First, the majority examined the original and historical understanding of the death penalty, noting that capital punishment is permitted by the Constitution and has often involved methods that can and did result in significant pain, such as hanging. According to the majority, the Eighth Amendment does not guarantee a painless death; it merely prohibits the state from seeking to “add terror, pain, or disgrace” to executions. The analysis is “necessarily comparative” and requires the Court to examine the State’s proposed execution method and compare it to another viable alternative. The *Baze-Glossip* comparative test, the Court held, applies whether the challenge is facial or as applied.

Next, the majority held that Bucklew failed to satisfy his obligations under the *Baze-Glossip* test because (1) he failed to show that his proposed alternative was more than theoretically available, having provided no evidence about how nitrogen gas would be administered, in what concentration, and what protocols would ensure the safety of the execution team; (2) the State had a legitimate reason for declining to adopt an “untried and untested” nitrogen gas protocol that no state had ever used before, because “choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it;” and (3) Bucklew failed to show that the use of nitrogen gas would significantly reduce a substantial risk of severe pain; instead, the majority felt that all of his contentions rested on speculation or were contradicted by record evidence.

Justice Thomas concurred, noting that he continues to believe that the Eighth Amendment only prohibits methods “deliberately designed to inflict pain.” Much of the history that Justice Gorsuch unearthed in the majority opinion supported this contention, but the majority ultimately felt that it was not necessary to “revisit[] that debate,” because the State “was entitled to summary judgment . . . under the more forgiving *Baze-Glossip* test.”

Justice Kavanaugh wrote a separate concurrence to emphasize that all nine justices agreed that the *Baze-Glossip* test does not require the alternative method of execution identified by the inmate to be authorized under current state law. Given this, Justice Kavanaugh argued that an inmate facing a serious risk of pain will typically be able to identify an available alternative.

Justice Breyer, writing for himself and Justices Ginsburg, Sotomayor, and Kagan, dissented. The dissenting justices felt that it was improper to apply the *Baze-Glossip* test to as-applied challenges, noting that Missouri’s execution protocol could cause Bucklew “excruciating” pain and was tantamount to torture. And even if Bucklew did have the burden of suggesting a less painful alternative, the dissenters believed that he met that burden. Noting that Missouri law permits the use of nitrogen gas,
COMPETENCE TO BE EXECUTED

In Madison v. Alabama, the Court built on its prior decisions in Ford v. Wainwright and Panetti v. Quarterman and issued two holdings: First, the Court clarified that the Eighth Amendment permits the execution of those who do not remember their criminal acts as long as they are able to rationally understand why they are going to be executed. Second, it held that the Eighth Amendment prohibits the execution of any prisoner whose mental illness renders him unable to rationally understand why the State seeks capital punishment regardless of the type of mental illness at issue.

Vernon Madison was convicted of capital murder in 1985. He sat on death row for the next thirty years, his mental condition deteriorating. After suffering a series of strokes, he was diagnosed with vascular dementia, which included cognitive impairment and memory loss. He asked for a stay of execution on grounds of mental incompetence, noting that he could no longer remember the details of his crime or understand why he was being executed. After the Alabama state courts rejected his request, Madison sought federal habeas corpus relief. The federal district court rejected his petition, but the Eleventh Circuit found that Madison met the Antiterrorism and Effective Death Penalty Act’s (AEDPA) high burden of establishing that the state-court ruling “involved an unreasonable application of clearly established federal law” and also found that it rested on an “unreasonable determination of the facts.” In 2017 the Court—relying on the high burden required under AEDPA—reversed the Eleventh Circuit.

Facing execution in 2018, Madison returned to state court and presented new evidence of further cognitive decline, but the Alabama state court found Madison mentally competent, noting he had not met the threshold showing for proving insanity. The Supreme Court vacated the Alabama state court judgment in a 5–3 opinion authored by Justice Kagan and joined by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor. First, it held that the Eighth Amendment does not prohibit Madison’s execution just because his mental disorder left him without any memory of committing his crime. A prisoner is only incompetent to be executed under Panetti when mental illness renders him incapable of “reach[ing] a rational understanding of the reasons for [his] execution.” Individuals who do not remember their crimes can still grasp the reasons for the sentence, and therefore prisoners without a memory of their crimes are still competent under Panetti.

At the same time, the Court emphasized that memory loss, combined with “other mental shortfalls” can interact to “deprive a person of the capacity to comprehend why the State is exacting death as a punishment.” According to the Court, if the prisoner cannot understand the State’s rationale for seeking capital punishment, the execution cannot serve its retributive purpose.

The cause of the mental illness is not the relevant criterion. Instead, the Court focuses on the effect of the mental disorder. Regardless of the kind of mental disorder—the Court mentioned psychosis, dementia, delusions, and other cognitive decline—Panetti asks only whether the prisoner is able to rationally understand why the State seeks to execute him. Noting that it was unclear whether the lower court applied this standard properly, the Court remanded the case for further consideration, commanding the Alabama state court and other lower courts to supplement the existing record if necessary and “look beyond any given diagnosis to a downstream consequence” when conducting the Eighth Amendment analysis.

Justice Alito, joined by Justices Thomas and Gorsuch, dissented. The dissenters agreed that the Eighth Amendment permits the execution of a person who does not remember his crime, but they felt that the Court should not have gone beyond addressing that limited question, noting that it was the only question briefed in the petition for a writ of certiorari. Justice Alito accused Madison’s counsel of “flagrantly flout[ing]” the Court’s rules by asking the Court to focus on the second, winning issue after certiorari was granted. On the merits, the dissenters found that the Alabama state court understood the full extent of Madison’s dementia and appropriately considered it, so they felt there was no need to vacate the state court ruling.

In Moore v. Texas, the Court reversed (for a second time)

70. Id. at 1134 (majority opinion).
71. Id. at 1146 (Sotomayor, J., dissenting).
72. 139 S. Ct. 718 (2019).
73. 477 U.S. 399 (1986).
77. Justice Kavanaugh did not take part in the decision.
78. Madison v. Alabama, 139 S. Ct. 718, 723 (2019) (quoting Panetti, 551 U.S. at 958 (second alteration in original)).
79. Id. at 727–28.
80. See id. at 728.
81. Id.
82. Id. at 729.
83. Id. at 732 (Alito, J., dissenting); see also Sup. Ct. R. 14.1(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”).
84. 139 S. Ct. 666 (2019) (per curiam).
Texas’s determination that Mr. Moore was not sufficiently intellectually disabled to prevent his execution under *Atkins v. Virginia*. The first *Moore* case reached the Supreme Court in 2016. In a majority opinion written by Justice Ginsburg, the Court held in *Moore I* that the state court had made a number of critical errors when analyzing Moore’s intellectual disability, including (1) deviating from prevailing clinical standards by overemphasizing Moore’s perceived adaptive strengths rather than focusing on his adaptive deficits; (2) relying too heavily on adaptive improvements made in prison; and (3) relying on factors that had no grounding in prevailing medical practice and instead called for lay perceptions of and stereotypes about intellectual disability. On remand, the Texas court once again found that Moore lacked an intellectual disability. Moore, now with the support of the local district attorney, petitioned the Court asking for reversal.

In a per curiam opinion decided without oral argument, the Court reversed Texas’s decision a second time, emphasizing that the Texas court’s remand decision repeated the same analysis that it had found wanting in its 2017 decision. The per curiam opinion “agree[d] with Moore and the prosecutor that, on the basis of the trial court record, Moore has shown he is a person with intellectually disability,” and remanded the case again.

Chief Justice Roberts, a dissenter in *Moore I*, concurred. Although he still believes, as he wrote in 2017, that the Court has failed to provide clarity for enforcing the requirements of *Atkins*, he agreed that the Texas court had repeated the same errors that the Court had previously condemned. Noting the same lack of clarity to lower courts, Justice Alito dissented, joined by Justices Thomas and Gorsuch. Justice Alito wrote that “[t]he error in this litigation was not the state court’s decision on remand but our own failure to provide a coherent rule of decision” in the first *Moore* case. He therefore argued that the majority used this lack of clarity to serve as factfinders rather than a court of last review.

In the end, *Moore II* probably does not have a lot of precedential value as it essentially repeats what the Court previously said in *Moore I*. Instead, it is an example of the Court intervening to stop a lower court from disregarding its prior instructions and to prevent a perceived injustice in a capital punishment case.

**Habeas Corpus**

*Moore I* was also the subject of the only habeas case on the Court’s docket this Term. In *Shoop v. Hill*, the Court issued a unanimous per curiam opinion to remind lower courts that Supreme Court decisions that post-date a state court’s determination cannot be considered “clearly established law” for purposes of determining whether a state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” under 28 U.S.C. § 2254(d)(1). Danny Hill had filed a federal habeas petition arguing that the Ohio state court had unreasonably erred when it concluded that he was not sufficiently intellectually disabled to prohibit his execution under *Atkins*. The Sixth Circuit Court of Appeals agreed, relying on the factors and language in *Moore I* to grant Hill’s *Atkins* claim. The Supreme Court reversed, noting that *Moore I* was decided nine years after the Ohio state court decision under review and, as a result, could not be considered “clearly-established federal law” for habeas review purposes in this case. The Court remanded for the Sixth Circuit to re-examine Hill’s claims based strictly on the legal rules that were clearly established at the relevant time. *Shoop v. Hill* is yet another example of how restrictive federal habeas corpus review of state court prisoners’ claims is under the Anti-Terrorism and Effective Death Penalty Act.

**Statutory Interpretation in Criminal Law**

Many of the Court’s criminal cases this Term focused on issues of statutory interpretation, addressing questions about whether to apply a knowing *mens rea* requirement to the status-element of a federal crime prohibiting possession of firearms by illegal aliens (Rehaif v. United States), how to interpret the enhanced penalty clauses in the Armed Career Criminal Act (United States v. Stitt, Quarles v. United States, Stokeling v. United States), whether the statute authorizing enhanced penalties for firearm use during the commission of violent felonies is unconstitutional vagueness (United States v. Davis) and whether statutory tolling of a supervised release period is appropriate during periods of pretrial incarceration for unrelated offenses (United States v. Mont).

**Mens Rea Requirements**

In *Rehaif v. United States*, the Court addressed the relationship between 18 U.S.C. §§ 922(g) & 924(a)(2). Section 922(g) makes it unlawful for nine different categories of individuals to possess firearms, including aliens who are “illegally or unlawfully” in the country. Section 924(a)(2) adds that a person who “knowingly violates” § 922(g) shall be imprisoned for up to ten years. In *Rehaif*, the Court held that the knowing scienter requirement in § 924(a)(2) applies to both the conduct element of § 922(g)—possession of a firearm—and its status element—that the defendant is an alien who is illegally or unlawfully in the country. As a result, to be guilty under § 924(a)(2), a defendant must know both that he possessed a firearm and that he was an alien who was illegally or unlawfully in the country.

In a 7–2 opinion delivered by Justice Breyer, the Court noted its longstanding presumption when interpreting federal criminal statutes that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct. It then emphasized

87. Moore II, 139 S. Ct. at 672.
89. Moore II, 139 S. Ct. at 674 (Alito, J., dissenting).
90. 139 S. Ct. 504 (2019).
91. See Greene v. Fisher, 565 U.S. 34 (2011) (noting that the clearly-established federal law is the law that existed at the time of the relevant state court decision).
92. 139 S. Ct. 2191 (2019).
that this presumption “applies with equal or greater force when Congress includes a general scienter provision in the statute itself” as it did in § 924(a)(2). Finding that neither the text nor the legislative history provide a reason to depart from that presumption, the Court held that “knowingly” modifies both elements of the violation—illegal status and firearm possession. The majority felt that applying the scienter requirement to the status element was necessary to separate wrongful from innocent acts; after all, possession of a gun can be entirely innocent. Without knowledge of his status, a defendant “may well lack the intent needed to make his behavior wrongful.”

Justice Alito, joined by Justice Thomas, dissented, noting that “every single Court of Appeals to address the question” had read no scienter requirement into the illegal status element of the statute. Noting that the text itself does not answer the question, Justice Alito emphasized that the Court had never before imposed a mens rea requirement on a status element in an offense and that applying a knowledge requirement to the status element in § 922(g) would be factually problematic, would frustrate Congress’s public safety objective, and would lead to perverse results. Justice Alito also warned that the majority’s decision in Rehaif will have “far reaching” practical effects. First, tens of thousands of prisoners currently serving sentences under § 922(g) will seek relief from their convictions. Second, federal courts will have to grapple with how to apply a knowledge requirement to other status elements in § 922(g), which will raise a host of questions. For example, under § 922(g)(4), a person who has been “adjudicated as a mental defective” may not knowingly possess a firearm. Does that person also have to know that he has been adjudicated as a mental defective? Do felons have to know their status as felons? Finally, the Court’s reasoning may also reach beyond § 922(g). Other federal statutes and a host of state statutes codify status-based offenses. Should courts presume that those elements have mens rea requirements as well? Only time will tell how far Rehaif’s logic extends.

THE ARMED CAREER CRIMINAL ACT (ACCA)

The ACCA requires judges to impose a fifteen-year sentence enhancement when a felon who has three prior convictions for certain violent or drug-related crimes is convicted of unlawfully possessing a firearm. In three cases this Term, the Court addressed statutory interpretation questions about the predicate offenses that prosecutors relied on to seek ACCA enhancements. United States v. Stitt and Quarles v. United States both address the ACCA’s definition of burglary. Although burglary is specifically enumerated as an offense that can trigger ACCA enhancement, the ACCA does not define it. In Taylor v. United States, the Court interpreted “burglary” under the ACCA to include the generic, contemporary meaning of burglary—an unlawful or unprivileged entry into, or remaining in, a building or other structure, with the intent to commit a crime.

In United States v. Stitt, a unanimous Court concluded that the ACCA’s generic definition of “burglary” includes state burglary statutes that criminalize the breaking and entering of vehicles designed for overnight accommodation of persons. Justice Breyer, writing for the Court, noted that “Congress intended the definition of ‘burglary’ to reflect ‘the generic sense in which the term [was] used in the criminal codes of most States’ at the time the Act was passed.” According to the Court, a majority of state burglary statutes covered vehicles adapted or customarily used for lodging when the ACCA was passed. Part of what makes burglary an inherently dangerous crime, the Court explained, is that it creates the possibility of a violent encounter between offender and occupant. Someone who breaks into an RV, mobile home, or other vehicle that is adapted or used for lodging runs the risk of such a violent encounter.

In Quarles, the Court addressed whether Michigan’s third-degree home invasion offense—which criminalizes forming the intent to commit a crime at any time after a person unlawfully remains in a building or structure—is a form of generic burglary under the ACCA. Justice Kavanaugh, in another unanimous opinion, wrote for the Court that generic remaining-in burglary under the ACCA does not require a person to have the intent to commit a crime at the moment she first unlawfully remains in a building or structure. Under the ACCA’s burglary definition, such intent can be formed at any time while unlawfully remaining in the building or structure.

According to the Court, Congress intended to include both types of burglary—when there is intent upon first unlawful entry and when intent develops during an unlawful remaining in a building or structure—in the ACCA’s generic definition of burglary. Both types were criminalized in the states when the ACCA was enacted and both types are equally serious and “create[] the possibility of a violent confrontation,” which is precisely what the ACCA intends to punish through enhanced sentencing.

Finally, in Stokeling v. United States, the Court addressed robbery rather than burglary, holding that robbery could serve as a predicate violent felony under the ACCA even in states like Florida where robbery requires only slight force. Although robbery is not an enumerated predicate like burglary, the ACCA also defines a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” that “has as an element the use, attempted use, or threatened use of physical force against the person of another.”

93. Id. at 2195.
94. Id. at 2197.
95. Id. at 2201 (Alito, J., dissenting).
96. Id. at 2212.
98. 139 S. Ct. 399 (2019).
100. 495 U.S. 575 (1990).
102. Stitt, 139 S. Ct. at 406 (quoting Taylor, 495 U.S. at 598).
104. 139 S. Ct. 544 (2019).
Denard Stokeling’s sentence for possessing a firearm was enhanced under the ACCA based, in part, on a Florida robbery conviction that requires “resistance by the victim that is overcome by the physical force of the offender.” Stokeling contended Florida robbery required a significantly smaller showing than the violence required by the ACCA and argued that only physical force “reasonably expected to cause pain or injury” should trigger application of an ACCA enhancement.

Justice Thomas, joined by Justices Breyer, Alito, Gorsuch, and Kavanaugh, disagreed and found that robbery may serve as a predicate offense for ACCA enhancement purposes even in states that define robbery as merely overcoming a victim’s resistance. The majority noted that robbery requiring “the use of ‘force or violence’” was included as an enumerated offense when the ACCA was first enacted. At the time, the common-law definition of robbery, violence existed when force was needed to overcome the victim's resistance, however slight. The majority emphasized that, when Congress revised the statute in 1986, it was intending to expand the ACCA's coverage and used the same word—"force"—when defining crimes of violence, thus suggesting that it intended the term to retain the same common-law meaning and include common-law robbery predicated on the use of force to overcome a victim's resistance.

Justice Sotomayor, writing for the dissent, disagreed. Citing the Court's prior decision in Johnson v. United States, which held that Florida's felony battery offense is not a predicate violent offense under the ACCA, she argued that the Court had found the ACCA's physical force requirement to require "violent," "substantial," and "strong" force. For the dissent, a victim's resistance, which "can mean essentially no force at all," did not satisfy the Johnson standard. Many individuals labeled as "robbers" in Florida were not the sort that should merit sentence enhancement under the ACCA.

Justice Sotomayor continued by referencing legislative history, noting that "robbery" was taken out of the ACCA's list of offenses. Congress did not intend to include all forms of robbery, precisely because in places like Florida, "the label 'robbery' [applies] to crimes that are, at most, a half-notch above garden-variety pickpocketing or shoplifting.”

VAGUENESS DOCTRINE

In United States v. Davis, the Court continued down the path it started in Johnson v. United States and Sessions v. Dimaya and deemed 18 U.S.C. § 924(c)'s residual clause unconstitutionally vague. Section 924(c)'s residual clause authorized enhanced penalties for defendants who used a firearm in connection with a felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of the committing the offense." Justice Gorsuch, writing for a 5-4 majority, noted that § 924(c)'s residual clause was almost identical to the clause the Court struck down in Dimaya and emphasized that "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" The majority then rejected the government's attempt to save the statute by arguing for a conduct-specific, case-by-case approach to application of the clause, noting that it was inconsistent with the text, history, and structure of the federal criminal code.

Justice Kavanaugh, joined by the Chief Justice and Justices Thomas and Alito, dissented, noting that § 924(c), unlike the residual clauses addressed in other cases, punishes current conduct. It does not enhance a penalty for prior offenses. The dissenters believe that § 924(c)'s focus and present on conduct, coupled with the Court's general practice of saving ambiguous statutes from unconstitutionality when fairly possible, meant that it should have been interpreted to consider current conduct instead of taking a constitutionally problematic categorical approach.

STATUTORY TOLLING

In Mont v. United States, the Court held that pretrial detention lasting longer than 30 days and later credited as time served for a new conviction statutorily tolls an individual's period of supervised release for prior offenses under 18 U.S.C. § 3624(e). When Jason Mont was arrested in Ohio and held pretrial on drug-trafficking charges, he was four years and three months into a five-year period of federal supervised release for federal drug crimes. At a later federal hearing to determine whether he had violated the conditions of his supervised release, Mont challenged the jurisdiction of the federal district court, noting that his term of supervised release had ended two weeks prior. The Supreme Court held that Mont's supervised-release period was tolled while he was held in pretrial detention in state custody under § 3624(e), because it was later credited toward his state sentence.

Justice Thomas wrote for the Court, joined by Chief Justice Roberts and Justices Ginsburg, Alito, and Kavanaugh. Section 3624(e) provides that “[a] term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime . . . .” Relying on dictionary definitions and canons of interpretation, Justice Thomas interpreted “imprisoned in connection with a conviction” to include periods of pretrial detention for which a defendant receives credit against a later sentence. According to the
“After the charges were dropped, he sued the arresting officers under 42 U.S.C. § 1983...”

Mont argued that the present-tense construction of the statute—the use of “is imprisoned”—prohibited courts from looking backwards and tolling a pre-arrest time period. Writing in dissent, Justice Sotomayor, joined by Justices Breyer, Kagan, and Gorsuch agreed. “[N]o one would say that a person ‘is imprisoned in connection with a conviction’ before any conviction has occurred.” Had Congress wanted to toll periods of pretrial confinement, it could have used words like “confined” or “detained” instead of “imprisoned” or it could have used the past tense. The majority approach is problematic, the dissent explains, because an offender’s supervised-release status will remain uncertain until the underlying charges are resolved.

FIRST AMENDMENT

In Nieves v. Bartlett, the Court considered the legal standard for addressing a plaintiff’s claim that he was arrested in retaliation for his speech in violation of the First Amendment. Bartlett was arrested at a public winter sports festival in Alaska for disorderly conduct and resisting arrest. After the charges were dropped, he sued the arresting officers under 42 U.S.C. § 1983, alleging that the officers violated his First Amendment rights by arresting him in retaliation for his speech. (Bartlett had refused to speak with one officer and had intervened later to advise an underage partygoer not to speak to the other officer.) The officers responded that they arrested Bartlett because he interfered with an investigation and initiated a physical confrontation with the police. The Supreme Court affirmed the lower court’s decision to grant summary judgment to the officers and held that the existence of probable cause should generally defeat a retaliatory arrest claim.

Chief Justice Roberts, writing for himself and Justices Breyer, Alito, Kagan, and Kavanaugh, emphasized that, to prevail on a claim that government officials improperly retaliated against an individual for engaging in protected speech, the plaintiff must show that the government official acted with a retaliatory motive and that the retaliatory motive caused the adverse action against the plaintiff that resulted in an injury. The majority felt that establishing such “but for” causation is particularly challenging in the arrest context because “protected speech is often a wholly legitimate consideration for officers when deciding whether to make an arrest.” Officers often have to make “split-second judgments,” and the existence of probable cause suggests that the arrest may have happened regardless of the officers’ motives. To ensure that officers are not unnecessarily chilled from being able to do their jobs, the majority would ask if the officers’ actions were objectively reasonable—namely, if they had probable cause to support the arrest. If so, then the retaliatory arrest claim would typically fail. But if the plaintiff establishes the absence of probable cause, then the majority would turn to the test enunciated in Mt. Healthy City Board of Education v. Doyle. Under that test, “[t]he plaintiff must show that the retaliation was a substantial or motivating factor behind the arrest, and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation.”

The Court did note that a “narrow qualification” to its holding is appropriate “for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” In those cases, “an unyielding requirement to show the absence of probable cause could pose ‘a risk that some police officers may exploit the arrest power as a means of suppressing speech.’” Thus, the majority noted that “the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.”

Justice Thomas concurred. Although he agreed with the majority’s general rule, he would not adopt its qualification for cases where arrests are atypical noting that the qualification “has no basis in either the common law or our First Amendment precedents.”

Justice Gorsuch concurred in part and dissented in part. He believes that “a First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim” and, as a result, there is “no legitimate basis for engrafting a no-probable-cause requirement onto a First Amendment retaliatory arrest claim.” But that doesn’t mean that the existence of probable cause would not inform issues like causation. Justice Gorsuch agreed with the majority that the absence of probable cause is not an absolute requirement for a retaliatory arrest claim and the presence of probable cause is not an absolute defense, but he would reserve decision on the role that probable cause should play for future cases.

120. Mont, 139 S. Ct. at 1832.
121. Id. at 1837 (Sotomayor, J., dissenting).
122. 139 S. Ct. 1715 (2019).
123. Id. at 1724 (quoting Reichele v. Howards, 566 U.S. 658, 668 (2012)).
124. Id. (quoting Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018)).
126. Nieves, 139 S. Ct. at 1725.
127. Id. at 1727.
128. Id. (quoting Lozman, 138 S. Ct. at 1953–54).
129. Id.
130. Id. at 1728 (Thomas, J., concurring in part and concurring in the judgment).
131. Id. at 1732 (Gorsuch, J., concurring in part and dissenting in part).

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Justice Ginsburg, concurring in part and dissenting in part, believed that *Mt. Healthy City Board of Education v. Doyle* adopted the right test. Justice Sotomayor dissented separately to note that she agreed with Justice Gorsuch that the existence of probable cause “has undeniable evidentiary significance to the underlying question of what motivated an arrest,” but she also agreed with Justice Ginsburg that courts should evaluate retaliatory arrest claims under the *Mt. Healthy* standard that is used in other First Amendment retaliation claims. She objected to the majority casting aside that standard in favor of a requirement that the plaintiff produce “comparison-based evidence,” which she thinks will not sufficiently protect the First Amendment interests at stake.

**A LOOK AHEAD**

In the 2019–20 Term, the Court will address some important criminal law and procedure issues. The Justices will return to the issue of incorporation in *Ramos v. Louisiana* to determine whether the Sixth Amendment’s guarantee of a unanimous verdict applies to the states. In *Kahler v. Kansas*, the Court will decide whether the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense. And in Fourth Amendment jurisprudence, the Court will consider whether it is reasonable for officers making investigative stops to assume, absent any indications to the contrary, that the driver of a car is the registered owner. It should be an exciting docket.

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132. Id. at 1736 (Sotomayor, J., dissenting).
133. Id. at 1737.
135. No. 18-6135.

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Emerging Technologies and the Courts

Gary E. Marchant

The world is changing at a faster pace today than ever before, in large part fueled by an unprecedented rate of technology advances. This pace of technological change will only accelerate going forward. We all must take this reality of unprecedented change into account as we plan our futures, perform our professional duties, and in the case of judges, write judicial opinions. As Chief Justice of the U.S. Supreme Court John Roberts stated in an interview at the time of his appointment, “politicians – and judges for that matter – should be wary of the assumption that the future will be little more than an extension of things as they are.” It is human nature to perceive the world today the same as it was yesterday, and the same as it will be tomorrow. This static view of the world is an illusion, however, and masks the unprecedented disruptive change going on in the world around us.

Technology is the key driver of much of the rapid change we are experiencing today. An unprecedented number of emerging technologies are moving simultaneously from the laboratory or even science fiction into real-life applications. Examples include artificial intelligence, robotics, synthetic biology, 3D printing, nanotechnology, brain-computer interfaces, genetic sequencing, human gene editing, Internet of Things, RFID chips, mobile health, drones, virtual reality, and blockchain. Each of these technologies has already spawned real companies, real products, and real lawsuits, with much more to come over the next couple of decades. Every one of these technologies will have enormous impacts on our individual lives, as well as creating widespread beneficial and disruptive effects for our social, economic, and legal systems.

One thing these new emerging technologies don’t have is effective regulatory systems. These technologies have emerged so fast that our legislative and regulatory branches of government have been caught flat-footed and have not been able to put in place comprehensive government oversight. This inaction might be a blessing in disguise, since any regulatory enactment would likely be obsolete by the time the ink dried, given that these technologies are developing and evolving so rapidly.

The result is that courts are often on the front line in addressing the inevitable conflicts and potential harms that may be side effects of emerging technologies. In theory, courts may not be the optimal branch of government to address the societal impacts of emerging technologies. Courts lack the technological staff and resources available to the other branches of government, and must address problems in the context of the facts in individual cases rather than taking a broader, more comprehensive approach. Most judges lack technological expertise, and are limited in what information they are permitted to consult. Moreover, judges are more comfortable enforcing statutes and rules adopted by other branches of government, rather than having to forge for themselves the new rules of the road for emerging technologies.

But courts do not have the luxury that the other branches of government usually have of postponing decisions when issues relating to new technologies appear on their docket. Courts are already being, and will even more in the near future be, called upon to adjudicate complex and unprecedented issues raised by emerging technologies. So like it or not, judges will have to get used to being on the front line of new technologies, and to have a basic understanding of both the technical and legal dimensions of these technologies. In this article, I preview some of these issues, organized into categories of new substantive claims and defenses, evidentiary aspects, and impacts on the judicial process and court operations.

NEW SUBSTANTIVE CLAIMS AND DEFENSES

The many emerging technologies disrupting commerce and society are not surprisingly presenting courts with novel claims and defenses. No technology is more disruptive than artificial intelligence (AI), and it is already presenting the legal system with new challenges about responsibility and culpability. In the past era of rule-based AI, a human programmer pre-programmed every decision an AI would make in response to certain inputs or events, and thus the human programmer could explain and be held responsible for the actions of the AI system. Modern AI is mostly based on machine learning, a form of data-based AI, in which the AI system learns itself by trial and error from data, with no human programming the AI what to do. This creates new issues for courts. No human can explain why the machine learning AI did what it did, it is a black box. So when such an AI system causes harm, who is responsible?

This dilemma was illustrated by a recent case in Switzerland where art gallery owners created a machine-learning bot and released it on the web with some bitcoins and the instruction to go purchase interesting items for the art gallery. All was going fine until one day the police knocked on the art gallery door, and said they had intercepted parcels that contained a pound of the drug Ecstasy and a stolen passport, both of which were criminal acts to purchase. After discussing the matter with the art gallery owners who claimed that they neither intended nor anticipated the purchase of the illegal goods, the police eventually confiscated the computer that controlled the naughty bot. Sometime later the police sheepishly returned the computer and did not file any charges. This example portends a bigger issue as AI bots

Footnotes
3. Id.
assume a larger and larger role in society, and will inevitably commit some crimes and torts, but who (or what) will meet the traditional legal requirements of mens rea, negligence, and foreseeability when it is the machine rather than a human programmer making the decisions? 8

**Genetic evidence** has been introduced in some cases to show a genetic predisposition to criminality. A common mutation in the MAOA-A gene, which codes for an enzyme that breaks down brain hormones such as serotonin, may significantly increase the probability of criminality, especially if it is combined with an abusive early background. 5 A number of criminal defendants have attempted to introduce evidence of such a genetic influence as mitigating evidence in capital murder cases. 6 Judges have differed on whether such evidence is admissible, and juries have varied in how much weight, if any, they give to such evidence as a mitigating factor in sentencing. 7 The new type of genetic defense raises profound issues about guilt, culpability, and punishment, for which there are no simple right answers. 8

Privacy cases present many new technology questions for judges. For example, does a property owner have a privacy claim against a neighbor who flies a drone above his swimming pool taking video footage of a private pool party? Numerous claims have been presented to courts about this and many other alleged privacy intrusions involving **drones**. 9 There have even been cases where the landowner shoots down the neighbor’s drone – is the privacy invasion a legitimate defense for such self-help measures? 10 Courts have also been asked to decide issues of the legal restrictions, if any, on the use of GPS location tracking on a phone or car for employers to track their workers, parents to track their kids, spouses to track their partners, and stalkers to track their victims. 11 Although the FCC has been requested for many years to issue rules on the use of location data generated by smart phones, the absence of such rules leaves judges on their own to craft appropriate rules to balance the conflicting interests at issue in such cases. 12

A final example is a whole spectrum of cases involving **reproductive technologies**. Courts have been confronted with cases involving the disposition of embryos when the couple who created the embryos divorce or are killed, or what custody rights do a genetic versus a non-genetic parent have when a family breaks up. 13 Other cases have required courts to decide what happens if embryos are accidentally destroyed, 14 what limitations (if any) can state legislatures put on parents’ rights to genetically test (and abort) an embryo or fetus, 15 and what rights do a child produced by in vitro fertilization where anonymous donors provided half or all of the genetic input have to recover in the estate or insurance policy of their social parent? 16

The Massachusetts Supreme Judicial Court complained that courts are being stuck with tough technology issues that should be decided in the first instance by publicly accountable legislatures:

> For the second time this term, we have been confronted with novel questions involving the rights of children born from assistive reproductive technologies…. As these technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people. 17

**NEW TYPES OF EVIDENCE**

Judges are already confronting new types of evidence enabled by technology coming into their courtrooms, whether it be social media evidence, images from surveillance cameras, facial recognition evidence, or forensic DNA in criminal cases. This is just the beginning, however, of a coming tsunami of novel technological evidence. Emerging technologies are providing many new types of evidence that are challenging judges and juries.

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7. Id.
For example, neuroimaging is increasingly being used in court cases for a variety of potential uses. In several hundred cases, brain-imaging evidence was produced to show that a criminal defendant allegedly lacked the cognitive capability to have the requisite mens rea, or more commonly to show some type of alleged brain damage that might mitigate the defendant’s criminal culpability. Courts and juries are all over the map in receiving such evidence—some judges allow it to be introduced while others do not, some juries find the evidence to be persuasive mitigating evidence, others do not. Other attempted or potential uses of neuroimaging in court cases include brain scans for lie detection, pain, post-traumatic stress disorder, recidivism, and subclinical traumatic brain injury. Given the complicated technical issues of how such brain-scanning evidence is conducted and represented, along with the uncertain ethical and legal significance of brain lesions or aberrations, judges without advanced neuroscience training will be hard-pressed to decide such cases in a scientifically credible and consistent manner.

Genetics is another source of scientific evidence that is having enormous legal implications. Most judges are already familiar with the use of forensic DNA for identification in criminal law, but that is just the first of many diverse applications of genetic evidence in court cases. DNA is already having dramatic impacts on paternity cases, immigration cases, and food-poisoning cases, in which DNA provides a highly accurate and legally salient map for quantifying both human and microbial relationships. Genetic mutations are also being used to identify exposures in toxic tort cases, and differences in genetic susceptibilities to chemical and pharmaceutical exposures are increasingly being used by defendants in some cases and plaintiffs in others to argue for or against causation in personal injury cases. Judges are now being called upon to determine whether a defendant can undertake intrusive genetic testing of a plaintiff to discover genetic traits relevant to causation, taking into account the same type of information may be used by the plaintiff when helpful to their case. In at least one case, the genetic testing of the plaintiff revealed genetic risk information that was crucial to the health of the plaintiff and his family, but because the testing was done by a testing lab contracted by the defendant, no one associated with the case had a physician-patient relationship with the plaintiff. In that case, the judge felt compelled to take on the task of trying to genetically counsel the plaintiff, a skill that is not taught in judges’ school.

Location-tracking technology raises many evidentiary issues for courts. A person’s location is often tracked and recorded by the GPS chip in their cell phone and by cell tower triangulation. The U.S. Supreme Court in its 2018 Carpenter decision held that police needed a warrant to access continuous location data over many days using cell tower records. The Court left undecided whether less prolonged continuous location monitoring also required a warrant. In most states, there are no laws about private use of cell phone location data, so courts are called upon to decide whether GPS evidence can be used in a variety of contexts, such as divorce cases. In several cases with contradictory outcomes a defendant has attempted to use GPS cell records to contest a speeding ticket based on police radar—judges are required to decide in such cases whether GPS phone records or police radar is more accurate, not an easy technical issue to resolve, especially considering there is usually no expert testimony in these cases in which only a couple of hundred dollars are at stake.
Justice Alito, in another location-tracking case, pointed out that legislatures not courts should be deciding these issues in the first place:

In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative… A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way. To date, however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes.

Unfortunately, such judicial pleas for legislative guidance have fallen on deaf ears, and federal and state legislators have failed to provide courts with clear rules to decide these location privacy issues.

The Internet of Things (IOT) is another technology that will increasingly generate new types of evidence that will be used in court cases. The IOT consists of networks of sensors connected to the Internet. For example, the “smart” devices responsible for smart homes and smart cities are examples of IOT sensors. There are now over 6 billion such smart devices connected to the Internet, with more than 5 million new devices being connected every day. In the home alone, these smart devices include home security systems, home speakers, garage doors, heating and air-conditioning systems, refrigerators, ovens, ranges, washers and dryers, televisions, home entertainment, lighting, outlets, and switches. Each of these smart devices collects and stores data that is communicated over the Internet.

Already, we have started to see cases of evidence from such devices being sought to help prove events or communications. For example, the Amazon Echo device, often known as Alexa, has already been subpoenaed in a couple of murder cases based on the possibility that the Alexa device may have heard and recorded events in the home where the murder took place. In one of these Alexa cases, data from a smart water meter may have provided even more relevant evidence to help solve the murder.

IOT devices in the home have also been used to provide evidence of a software or sensor malfunction that results in a fire and other types of property damage.

As with so many of the technologies now entering society, there are not yet any rules or laws governing access to IOT devices. The bipartisan Electronic Privacy Information Center sent a widely cited letter to the U.S. government in July 2015 calling for the establishment of some rules of the road for the smart IOT devices being installed in our homes – “Americans do not expect that the devices in their homes will persistently record everything they say. It is unreasonable to expect consumers to monitor their every word in front of their home electronics. It is also genuinely creepy.”

A special type of IOT device increasingly used to provide evidence in courts are wearables such as Fitbits and smart watches. These devices collect and store data on the activity and location of its owner, which turn out to be relevant in a variety of court cases. The first such case was a workers’ compensation case where the injured worker used her fitbit data to prove how her lifestyle changed dramatically after a workplace injury. Fitbit data has also been used in a number of motor vehicle and accident cases to show the relative positions and the speeds of the parties involved in the collision. Perhaps most significantly, such wearable data has been used to solve several murder and rape cases. This has led to what is probably my favorite title of all time for a student law review note: “Wearable Devices as Admissible Evidence: Technology Is Killing Our Opportunities to Lie.”

3D printing is yet another emerging technology that is already starting to be used in court evidence. 3D printing has advanced rapidly in recent years – from printing relatively simple three-dimensional plastic objects such as an animal figurine, to now printing more complex objects using metals, composites, and even living cells. The era of 3D printing is already presenting many legal issues, such as the potential to print contraband items such as guns or recreational drugs in one’s own home, to intel-

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36. Id.
39. O’Brien, supra n. 35.
44. Nicole Chauriye, Wearable Devices as Admissible Evidence: Technology Is Killing Our Opportunities to Lie, 4 CATH. U. J. L. & TECH. 495 (2015-2016)
features of the blockchain make them very attractive for a growing number of legal and illegal applications.”

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Blockchain will be yet another evidentiary challenge for courts. Blockchain is the technology underlying cryptocurrencies such as Bitcoin, but it also has dozens of other applications such as smart contracts, financial services, supply chains, health, energy, real estate, and even government services such as elections. The blockchain is a distributed ledger, which means there are many computers (or “nodes”), each of which has a complete copy of the ledger, providing both greater security and participation compared to a centralized database with a single entity and a single point or attack. The other key feature of the blockchain is that the entries on the ledger are cryptographically “hashed” into blocks of encrypted records that are both anonymous and immutable. While each transaction on the blockchain can be tracked by any authorized user, the identity of the parties involved in each transaction is kept private using a private “key.”

These features of the blockchain make them very attractive for a growing number of legal and illegal applications, including many applications by courts themselves in court recordkeeping and managing court judgments, warrants, and criminal histories. However, blockchain evidence is already presenting unique challenges for parties and courts in criminal investigations and civil discovery given the quasi-anonymity of the owners of the encrypted data and assets. The admissibility of blockchain evidence may also be an issue because of hearsay problems. Already, judges are being called upon to address such blockchain discovery and admissibility disputes, and these issues will rapidly proliferate going forward as every major company in the country is already implementing blockchain projects. Resolving such issues requires judges to have a basic familiarity with blockchain technology, which most judges currently lack.

Artificial intelligence algorithms will also increasingly be used as evidence in courts. An algorithm is essentially a formula for predicting a result from a set of data—most algorithms today are implemented by AI machine learning. Many AI algorithms are developed by private entities and require significant investment to collect a robust and representative data set and then develop an algorithm that optimizes its output. Not surprisingly, the developers of such algorithms seek to keep the data and underlying software program for the algorithm proprietary. This can present a problem if the algorithm is then used in court as evidence.

Many states use algorithms in criminal cases to determine the need for pretrial detainment or to estimate the risk of recidivism during sentencing or probation determinations. The Wisconsin Supreme Court held that a court could rely on a proprietary sentencing algorithm, without disclosing the underlying data and formula to the defendant and his counsel, provided that the court used the algorithm as just one input and did not rely on the algorithm exclusively. The defendant had argued that it was a due process violation to deny him access to the algorithm so he could have his counsel or an expert test the algorithm for validity or bias. Other courts have held that it would be a due process violation for government entities to rely on proprietary algorithms in a variety of other contexts, such as determining Medicaid benefits or teacher ratings. The European Union has published an 80-page manual for European courts on how to handle AI evidence, but no such guidance exists at this time for U.S. judges, who are thus required to decide these issues on their own on a case-by-case basis.

Perhaps the greatest evidentiary threat to the courts is the rise of AI evidence in the form of algorithms. These algorithms are often proprietary and complex, making it difficult for the average lawyer to understand how they work. As the use of AI in the courtroom increases, judges and other legal professionals will need to have a basic understanding of how these algorithms work and how to properly account for them in court proceedings.

46. Id.
53. K.W. v. Armstrong, 789 F.3d 962 (9th Cir. 2015).
of “deep fakes.”56 Deep fakes are photographs or videos manipulated using AI to make it appear that someone is saying or doing something that they did not say or do. This deep fake technology has quickly gotten very good, and it often takes an expert considerable time to determine that a video or photo is fake. Some experts believe that within a year or less it will become impossible to determine whether a picture or video is fake. This technology presents a grave threat to our political and national security systems, as a fake and sensational fabrication of a politician or soldier could be highly disruptive.57 As courts increasingly utilize as evidence videos from smart phones, CCTV surveillance cameras, and police body cams, this threat to the trustworthiness of photographs and videos will present a major challenge to courts.58 If we can no longer believe what we see, the privileged position that photographs and videos have had in our litigation system will disappear. Not only will we not know that a fake video or photo has been fabricated, but it will be easy to claim that a real video or photo is fake. Judges, juries, and litigators will all be tested as we enter the “post-truth” society, and new rules and strategies for authenticating visual evidence will be needed.

IMPACTS ON COURT OPERATIONS AND JUDICIAL PROCESS

Over the past decade or so, technology has significantly changed courtrooms and the judicial process. Online filing, digital evidence, e-discovery, courtroom presentation technologies, as well as remote communication and even testimony have evolved the courtroom and the profession of being a judge in ways that were not anticipated when most current occupants of the bench were in law school. However, the technological change experienced so far will pale compared to the coming impact of emerging technologies on courtrooms and emerging technologies, which will be more revolutionary than evolutionary.

For example, some future cases may be litigated using virtual reality. As one analysis recently concluded, “both VR [virtual reality] and AR [augmented reality] will become part of the litigation process. The only question is when.”59 Such evidence could provide a much more realistic and impactful view of a crime or accident. As one scientist working in this field projected, “Imagine you could transport the entire jury, the judge, the litigators — everybody — back to the crime scene during the crime. That would be the best thing possible for any trial.”60 A prominent plaintiffs’ lawyer predicts that “in 10 years, most trial lawyers will be using VR just like they’re using laptops today. VR will be the norm, not the exception.”61 VR has already been used in courtrooms in China,62 and several U.S. companies claim to be developing a VR tool for use in courtrooms in this country.63

Use of VR in the courtroom would raise several procedural issues for judges and courts. First, given the persuasive power of being immersed in a VR experience, how can courts ensure that VR presentations accurately represent the facts of a given case? Simulations are sometimes used in courts today, but are subject to rigorous evidentiary scrutiny. The same would be required for VR, especially when one party has the technological sophistication to produce and assess such representations, where the other party may not. Also, some people who encounter VR experience dizziness and motion sickness — how should a court deal with a situation where a minority of jurors are not able to continue with a VR presentation that their fellow jurors experience in full? Finally, immersing jurors in realistic VR re-enactments of violent crimes or grisly accidents may be traumatic for some jurors. Would jurors need to be psychologically screened and counseled before being selected for juries that will be exposed to such VR evidence?

Legal analytics are also increasingly used in the litigation process. This technology uses the vast quantities of data now available online (“big data”) to predict results or recommend strategy in the litigation process. Many vendors are now marketing such legal analytical tools to law firms. Of greatest relevance to judges, some commercially available tools attempt to predict or influence the decisions of individual judges. The tool collects all available data on that judge’s previous decisions and opinions, supplemented with any secondary information about that specific judge available from media stories, social media, and other sources, and then applying AI to process the data, it predicts not only the likely outcome and timing of the judge’s opinion, but also provides customized advice on specific arguments, precedents, and even phrases to use or not use based on the particular

63. Homampour, supra n. 59, at L12.  
64. Id.
LSU football team lost a game. These types of correlations affect the judgment of individual judges or judges as a group revealed by big data and AI have the potential to reveal patterns that may discredit or embarrass the judiciary. France has responded to this new reality by criminally banning the use of judicial analytics software – punished by up to five years in prison. Such a solution is unlikely to be adapted in the United States under our First Amendment, so judges should be prepared for a future where their decisions, both individually and collectively, are sliced and diced by new data analytic tools to provide new insights and surprises.

Various big data tools are also being applied to jurors. Courts can take advantage of the more accurate and up-to-date online information now available to achieve more accurate and efficient summoning of jurors. At the same time, parties can use those same databases and more to better characterize prospective and selected jurors with respect to their opinions, biases, and values. Vendors are now offering digital tools that allow lawyers to profile an individual juror prospect in real time, using predictive analytics to integrate and evaluate all the data available on a juror derived from demographic data, vital statistics, juror questionnaires, and social media postings. These services even integrate data on the juror’s purchase decisions and other behaviors that are obtained by data brokers. Such intrusive searches into the personal data and history of prospective jurors may create a backlash against jury service by many citizens. These juror “big data” tools are not only being used for jury selection, but can also guide attorneys on what arguments will be most effective with jurors, and have even been used to obtain litigation funding based on a favorable jury profile.

As decisions are increasingly made by AI algorithms that are not programmed by humans but rather make their own “decisions” based on their machine learning, how will such algorithms be interrogated in trials? Scholars are beginning to take seriously and start thinking through the implications of having machines serve as witnesses in trials. One insightful exploration of this issue concluded that “certain machine evidence implicates the readability of a machine source, that the black box dangers potentially plaguing machine sources trigger the need for credibility testing beyond what is contemplated by existing law, and that accusatory machine conveyances can be ‘witnesses against’ a defendant under the Confrontation Clause.” The concept of a machine testifying in a court trial is truly a revolutionary change to our legal system.

Brain-machine interfaces (BMI) will profoundly affect future society, including the judicial system. BMI involves linking computers directly to our brains – to either collect information from our mental process, and perhaps someday to insert ideas and instructions directly into the brain. Major companies and research institutes in the United States, China, and Japan, including Facebook and Elon Musk’s Neuralink, have been reporting significant advances in BMI, particularly in deciphering what a brain is thinking. This has produced claims that BMI technology powered by artificial intelligence will soon be able to “read” our thoughts.

The ultimate disruption of the judicial process would be the rise of robo-judges. We are already seeing some early examples of AI systems participating in the judicial process. In Argentina, a software program named Prometea is used to generate draft judicial opinions on various types of routine cases such as public-housing or taxi license disputes – the overseeing judge has approved 100 percent of these draft decisions as written to date. China is now using AI judges to handle routine and small cases, “featuring an artificially intelligent female judge, with a body, facial expressions, voice, and actions all modeled off a living, breathing human (one of the court’s actual female judges, to be exact).” An Ohio judge is using the Watson artificial intelligence system to help him read through and process the large paper records in many juvenile cases.

U.S. Supreme Court Justice John Roberts was recently asked, “Can you foresee a day when smart machines, driven with artificial intelligences, will assist with courtroom fact-finding or, more controversially even, judicial decision-making?”

67. Id. at 17-18.
68. Id. at 17. This data can include gun ownership, the profession of the juror’s relatives, magazine prescriptions, TV shows viewed, and political affiliation. Id.
71. Id. at 2051.
77. Adam Liptak, Sent to Prison by a Software Program’s Secret Algorithms, N.Y. TIMES, May 1, 2017.
Roberts replied: “It’s a day that’s here, and it’s putting a significant strain on how the judiciary goes about doing things.” While some scholars are already exploring the implications of AI, judges, AI will not replace all judges anytime soon. Like every other sector in the economy, AI will increasingly play a role in almost everything we do, and those who reject or ignore the technology will soon be displaced by those who utilize and try to harness the incredible power of new disruptive technologies such as artificial intelligence.

CONCLUSION

As this extremely brief incursion into a large number of complex and disruptive technologies has hopefully demonstrated, these emerging technologies will dramatically change all aspects of our lives and society, including the practice and profession of judging. Because these technologies are advancing too fast for legislatures and regulatory agencies to effectively regulate the technology, courts by default will be on the front line in resolving the conflicts, risks, rights, and responsibilities that these technologies present, often writing on a blank slate of relevant rules and precedent. As such, judges will have no choice but to become knowledgeable about the new technologies underlying novel legal claims and defenses, new types of technology evidence, and the systemic changes to the courtroom and judicial process driven by new technologies. This will not be an easy task given the lack of technical training for most judges, the lack of trained scientific and engineering staff assistants, and the limitations placed on judicial decisions by the specific parties and record in front of the judge. Yet, just as lawyers are now required to demonstrate a minimum level of technological competency by the ABA (and most state bar associations) in its Model Rules of Professional Responsibility, so too judges will need to have a basic level of scientific and technological knowledge and understanding to perform their jobs competently in the new era of emerging technologies.

It will be tempting for judges to try to avoid these tough technological and scientific issues by deciding cases on legal technicalities or other grounds that judges are more familiar with. But as federal judge Jed Rakoff, who has long been actively involved in court-science issues, has pleaded, society urgently needs judges to step up the plate and provide some clarity and certainty about the legal aspects of emerging technologies:

“If I had a magic wand, I would say to my fellow judges, ‘I know that when you have a case that involves a scientific issue and a technical legal issue, your natural instinct may be to see if you can resolve the case on the technical legal issue, but you’re not really advancing the law as well as could be done if you would take the time to address the scientific issue. The technical legal issue may never come up again, and even if it does, it doesn’t really get to the merits. The scientific issue is much closer to the merits of the case. If you can advance how judges think about science on any particular issue, you will be doing well, and it’s a great service.”

On the other hand, judges don’t want to get too far out in front of technology, given how fast technology changes often in unpredictable ways. Justice Kennedy warned about this danger in his decision in the City of Ontario v. Quon case, which dealt with a public employee’s privacy rights in communication technologies. He warned that “the judiciary risks error by elaborating too fully” on the legal aspects of a rapidly evolving technology, and that “prudence counsels caution before the facts in the instant case are used to establish far-reaching premises” that “might have implications for future cases that cannot be predicted.”

So judges must walk a fine line betweenducking the scientific issues altogether versus overreaching beyond their current knowledge to the murky unpredictable waters of future technologies. There is no question that judges will be challenged by the many new emerging technologies now starting to pervade their courtrooms and dockets. But on the positive side, these technologies are immensely important and fascinating to our own individual lives, those of our children and grandchildren, and the substance and process of judging.

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78. Id.
80. ABA, Model Rule of Professional Responsibility 1.1, comment 8 (2012).
81. Frederic I. Lederer, Judging in the Age of Technology, JUDGES’ J., Fall 2014, at 6, (“technological competence is or soon will be a requirement for judges”).
82. Ashish Joshi, Interview with Judge Jed Rakoff, Litig. (ABA), Fall 2019, at 15, 21.
83. 560 U.S. 746 (2010).
84. Id. at 759-60.
Some Thoughts on Engaged Judging

Eric Smith

“The Passive Judge[s] … do their job, answer questions, … and give warnings when necessary. But most of the times [sic] that is as far as they go.”

“The Active Judge … is the person you see walking around, … and fixing problems as they happen, cleaning up the mess players left behind.”

Chief Justice John Roberts famously described the role of a judge as that of a baseball umpire, passively calling balls and strikes. This model has been substantially and accurately criticized, especially in the context of state court adjudications, where the litigants often do not have legal representation. That criticism, however, has focused primarily on procedural remedies, tied to the notion of an “active” or “engaged” judge as a means of improving the ability of the adversary system to deliver justice. In this article, I suggest that while this notion is important, it is incomplete, for a judge (in state court at least) is faced with a complex web of problems to solve, problems that in appropriate cases require not just a facilitator but a willingness to step outside the adversarial mode and to move the parties toward resolving issues in the context of the non-jury hearings the judge conducts.

I will start with some vignettes from my own experience that illustrate how a rigid deference to the adversary system is not always necessary or effective.

A TRIAL-SETTING CONFERENCE IN A DOMESTIC RELATIONS CASE

Trial-setting conferences are a fixture of the court system. They provide an easy way by which the judge and the parties can address any preliminary issues relating to discovery and the like and to identify the issues to be addressed at the trial, the length of the trial, and the date of the trial. In the context of “engaged” judging, where the judge will assist unrepresented parties to understand the underlying legal context and provide a map of how the case will proceed, the trial-setting conference is a valuable tool to ensure that each side can well and fairly present their case.

But a trial-setting conference can also be a vehicle actually to resolve, or at least partially resolve, a case, particularly in the context of a domestic relations case where the parties do not have lawyers. For example, one of my cases only involved property—when I asked the plaintiff at the trial-setting conference what he saw as the key issues, he told me he wanted his stereo back; the defendant responded that that was fine, if he repaid his half of the deposit on the apartment, and when he agreed, I put the parties under oath and finalized the divorce. I had similar experiences in custody cases, where the parties came to an agreement on custody and visitation when a discussion of what the issues may be turned into one about the details of visitation.

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Footnotes

4. Richard Zorza suggested persuasively to me in a conversation that it is more appropriate to use the term “engaged” rather than “active.” I accordingly will use this term in this article.
5. See sources cited in note 3, supra
6. I have excluded jury trials because they present a number of unique considerations, primarily relating to how a judge’s conduct affects the jurors’ deliberations. I will, however, provide some thoughts infra regarding how jury trials implicate some of the same concerns and approaches a trial judge needs to consider.
7. Court systems throughout the country offer a wide variety of services designed both to resolve cases short of trial and to facilitate the ability of unrepresented litigants to navigate their way through a court case. As discussed in greater detail infra, I do not mean to suggest that the approach I outline in this article should substitute for those services—rather, I see it as an important additional tool that judges can use, especially in cases in which the parties have not been able to resolve their differences before trial.
8. I am describing here my own practice as a judge. I agree, however, that it can be productive to hold an initial status conference to get an understanding of the basic issues of this case in a more neutral setting, without setting a trial date, reserving the “trial-setting conference” for a time when an adversarial trial is unavoidable. See IAALS, Working Smarter Not Harder, How Excellent Judges Manage Cases, January 2014.
These kinds of results arose because I often used the following procedure in my trial-setting conferences. I would begin by explaining that to set a trial date, I needed to know how long the trial would take, and that in turn meant that I needed to know what the issues were. I would then ask the plaintiff what he or she wanted to do, after which I would ask the defendant what they thought about that. I would then follow up with the plaintiff, asking them their reaction. A discussion often would ensue that led to an agreement between the parties—the trial-setting conference in essence became a settlement conference. Or put differently, the parties and I abandoned the adversarial system in the midst of a proceeding designed to lead to an adversarial trial.9

**AN EVICTION HEARING**

A landlord had sought to evict a tenant for non-payment of rent—neither had attorneys. The judge hearing the case at the time suggested (appropriately) they talk in the hallway, and they came back with an agreement. Two months later, the landlord once again filed for an eviction. I told the parties that it would be helpful for me to learn about the issues before we began the actual hearing. The landlord explained that the tenant had not paid her rent or utilities and had to go. When I asked the tenant her position, she said that she was planning to leave the town for good in 10 days and was willing to let the landlord keep the deposit. I asked the landlord what she thought; she said the deposit would not cover the utilities. The tenant responded that she would pay what she owed on the utilities before she left. I pointed out to the landlord that this was only the eviction hearing—any monetary issues would have to be addressed at a later hearing—and that we were looking at a 5-day difference between the statutory eviction date and when the tenant planned to leave; and I asked her what she wanted to do. The landlord then agreed to the tenant’s proposal, a result that freed the landlord of the tenant and got her what she was owed, and that avoided the tenant being tarred with a record of having been evicted.

This was all done in the context of what was scheduled to be an evidentiary, adversarial hearing, one that, had it proceeded, would have damaged the defendant over the long term, as she did not deny she had not paid her rent and so was subject to eviction. But I was able to resolve it in the context of asking the parties what they wanted, and then seeing where the discussion led. Again, the manner in which the hearing was conducted led to a resolution, a procedure that might be termed a settlement conference in the guise of a trial—and, more important, a proceeding that led to a result that met both parties’ needs for equity and justice.

**PROBATION REVOCATION**

Alaska has implemented the PACE program,10 which is designed to improve the ability of medium-risk probationers to succeed on probation. It is not a therapeutic program, but it does have a therapeutic flavor. Basically, probationers are told that the purpose of the program is to help them succeed, but they are also told that they will be arrested if they do not appear for their appointment, if they refuse to take a drug test, or if they test positive for drugs—there are no second chances. But if the person admits the violation right away, then the sanction is quite lenient, usually 3 days in jail, if they do not, the consequences are more severe: 15 days if they lie, 30 days if they do not show up. My experience over a period of many years is that this approach was quite effective in reducing recidivism compared to other probationers, with the exception of opiate addicts.

The important feature of this program was the manner in which the hearing was held. The usual procedure in a probation revocation proceeding is that the court is asked first to determine if a violation has occurred, perhaps through an evidentiary hearing, if a violation is admitted or found, then the court sets the consequences after a formalized process by which the district attorney is the first to talk, perhaps with testimony from the probation officer, after which the defense attorney will speak, followed by the probationer if they want to say something. The PACE hearing, by contrast, started with an admission by the probationer. The proceeding after that was less formalized: usually, the probation officer would present his or her sense of the probationer’s situation, the DA and defense attorney would add their perspective, and a conversation generally would then ensue, one that included the defendant and me, in an interactive, problem-solving discussion that sometimes would lead to a collaborative decision, and always included an effort by all involved to point toward the future rather than to resolve some factual or legal dispute. Of significance here is that the process was rarely adversarial, and there was no effort to determine a prevailing party.

**PROPERTY DISPUTE**

A central, and often boring, feature of divorce trials is the procedure by which the court is asked to value the personal property of the parties, a key part of the allocation of the marital estate. It is far from unusual for a judge to have to determine the value of some two or three hundred items, including the sofa, the pots and pans, the tools, the clothing, and even the blue plastic pitcher.11 The values on these items often do not vary very much ($1 versus $2 on the pitcher), but the judge still has to make a call.

I initially handled this process through a standard adversarial proceeding, with the plaintiff testifying about each item as part of their case in chief, the defendant providing their response as part of their case in chief, and then hearing any rebuttal testimony. It could be very difficult keeping track of it all, especially if each item came with a picture or some other demonstrative exhibit. I decided that it would be easier for me to make a ruling if we went

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9 A similar conversation could be held at an initial status conference, since the purpose of the conference is to identify key issues, and the process of identifying those issues could, in appropriate cases, lead to a discussion of how to resolve them.
10 PACE is an acronym for Probation Accountability and Certain Enforcement, and is based on Hawaii’s Opportunity Probation with Enforcement, or HOPE. See http://www.correct.state.ak.us/blog/alaskapace/2010/08/04/what-is-pace/.
"Truth in baseball is clear-cut: a ball is fair or foul, the runner is safe or out, the pitch is a ball or a strike ...." item by item—for example, I would have the plaintiff value the bed or the picture and then get the defendant’s testimony. But a very interesting pattern emerged: the parties initially would each tell me why the couch was worth $40 as opposed to $50, but over time, as we worked through the list, they would stop fighting about the values, and a consensus would emerge as to most of the minor property at least. The proceeding thereby led to a settlement of sorts, which in turn tended to reduce the overall heat of the hearing. It was noteworthy in this respect that I did nothing to encourage the settlement—the agreement arose purely by virtue of the structure of the proceeding.

II.

The underlying feature of the adversary system is that it is meant “to get to truth and justice through a competition between two versions of fact and law before a neutral decision-maker.” The courtroom is viewed in this context as “at least to the first order, a zero-sum environment [in which] one [side] loses and one wins.” The judge’s role in this context has traditionally been that of a neutral and largely passive umpire, with the parties having the sole responsibility “to control investigation, define the issues at stake in the case, and present evidence and argument to the court.” Judges in this construct “play no independent role in shaping the content or outcome of cases.” Rather, their “primary function is to ensure a level playing field upon which the skilled advocates battle.” Or as Chief Justice Roberts described it:

Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.

[I]t’s my job to call balls and strikes and not to pitch or bat.

The judge-as-umpire model does have some validity. Many of the calls a judge must make are relatively straightforward, akin to a pitch that clearly is in or out of the strike zone—“Billy said it is raining” obviously is hearsay if offered to prove that it is raining, and obviously is not hearsay if offered to prove Billy is delusional. The calls also tend generally to be black or white—a particular piece of evidence either is or is not admissible, the elements of the crime have or have not been proven. In addition, like judges, umpires have to manage the game, making sure that the rules are followed, controlling the behavior of the players, and at times dealing with the crowd to ensure that the game can proceed appropriately. And as every person who follows baseball knows, each umpire has his or her own strike zone, just as different judges can and do issue very different rulings based on the same facts and law.

This last point is significant, however, for it undercuts a key element of the umpire model even as it supports that model. The notion of calling a pitch a ball or strike carries with it the belief that there is only one concrete, objective answer—the pitch can only be either a ball or a strike. But even in baseball, this is not true—a ball to one umpire might be a strike to another, and umpires do, after all, call a pitch a strike even though the box on the television screen (which is supposed to be objective) indicates that it is a ball. This in turn entails that the judge-as-umpire model is misleading, because it implies that judges, like umpires, are identifying an objective truth, when in fact they are exercising their own discretion and understanding in applying what is supposed to be a clear rule. Or put differently, the judge’s ruling, just like the umpire’s call, does not necessarily constitute some objective “truth.”

This leads to a more fundamental difficulty with viewing the role of a judge as akin to that of an umpire. “Truth” in baseball is clear-cut: a ball is fair or foul, the runner is safe or out, the pitch is a ball or a strike (even if reasonable minds might differ on specific pitches). More important, the manner in which this “truth” is determined is equally straightforward and unaffected by process—the umpire looks at where the ball goes or whether the ball arrives at the base before the runner. But neither of these factors applies in the context of a trial, for “the law may have both a different concept of truth and a different way of finding truth than do other systems of thought.”

As noted above, the adversary system is designed to be a mechanism for finding out what actually happened, for eliciting the “truth.” That process requires adjudicating a variety of facts. But as Goodpaster points out:

the law manufactures facts from the raw data of reality so that it can perform its operations on them. Facts do not announce themselves as facts. The data from which factual conclusions are drawn is ambiguous and subject to varying interpretations. Furthermore, the same data can constitute a different fact under a different theory of what the data means.

Thus, unlike baseball, facts attain their meaning in a court of law only in the context of the particular theory or issue in which they are presented. Snapping a bicycle lock with a bolt cutter can constitute theft if done by a stranger, or recovery of one’s bike if done by an owner who lost the key.

12 Zorza, supra note 3, at 429, n.15.
13 Id. at 440, n.51.
14 Steinberg, supra note 4, at 901.
15 Id.
16 Carpenter, supra note 4, at 659.
18. A long-time baseball umpire pointed out in this context that “there are many intangibles when it comes to calling balls and strikes.” Evans, Sorry, Judges, We Umpires Do More Than Call Balls and Strikes, WASH. POST, September 7, 2018.
20. Id. at 131.
The difficulty of ascertaining the “truth” in the adversary system—a task akin to encountering an iceberg, 90% of which is underwater—is further confounded by three other factors. First, most factual findings in trials rely heavily on the testimony of witnesses, which notoriously often can be quite unreliable. Faulkner summarized this dilemma well:

“I want the truth,” the Justice said. “If I can’t find that, I got to have sworn evidence of what I will have to accept as truth.”

This potential unreliability is compounded by the fact that judges generally must make a determination of what has already occurred; yet

it is not always possible to be sure of the past. Witnesses may differ in what they think they saw, or there may be no witnesses on a significant issue so that the past must be reconstructed from circumstantial evidence; or, in some cases, witnesses may deliberately lie. Once the evidence is presented, it must be interpreted, leaving room for further indeterminacy.

Second, the legal system imposes different burdens of proof, which means that something may be “true” in the sense of having been proved in one context, but not in another, and it utilizes evidentiary rules that block access to the truth. And third, trials in many ways consist of two lawyers talking to the judge; yet as Judge Marvin Frankel noted, “the truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time.”

In short, as Goodpaster so eloquently framed it:

the issue in a trial is the truth of the accusation, and the accusation is true if it is proven to be true within the rules of proof and persuasion. In this manner, a trial produces truth, rather than finds it. This truth is a “legal” truth and is that which the system recognizes as true.

And this epistemological difference in the nature of “truth” in a trial as opposed to a baseball game leads to the other, fundamental limitation with using the judge-as-umpire metaphor: the very structure of the adversary trial is dramatically different from that of a game.

Baseball, like trials, has two elements from the umpire’s point of view: the acts which make up the game—balls and strikes, hits and outs—and the outcome—one team wins and the other loses. Umpires operate passively under clearly defined rules which they cannot change with respect to the first element, and they have no role whatsoever in deciding who wins or who loses. But the judge’s role in both elements is very different and vastly more complex in at least three respects. First, as noted above, umpires merely apply the rules—they cannot redefine the strike zone. By contrast, judges can and do change the rules—they can decide to exclude evidence in a criminal case based on a new interpretation of the Constitution, or, at the appellate level, overturn long-existing precedent regarding the limits of governmental action, as the recent case of Janus v. AFSCME demonstrates. A judge, in short, can decide that what previously was a ball is now a strike—they have a lot more control over just what the rules might be.

Second, as many commentators have pointed out, judges, in state court at least, participate in a very different “game” than does an umpire. Baseball umpires deal with two sides who are, formally at least, equally matched—both teams are composed of trained ballplayers who have been selected to play at the highest level. The umpire analogy as it applies to court proceedings assumes that both parties have lawyers, but this assumption simply is not true in many civil state court cases, the majority of which involve persons who represent themselves. And this fact requires a very different kind of judge than a passive observer rendering rulings.

Lawyers are trained to gather and to present evidence and to identify the key issues in a case. The legal system is designed with that training and ability in mind. But most people who represent themselves in court have no real idea of what they are doing, much less how to deal with the many evidentiary rules. The result is that they often do not know the specific legal requirements they need to meet (such as the elements of a prescriptive easement), the facts that are necessary to prove those requirements, or the manner in which they can or should present that information. A judge who fails to understand this reality, forcing self-represented parties to follow the rules without providing any guidance, may...
well be “neutral” in a formal sense, but will not be providing justice in any meaningful sense at all.31

A judge, in short, can no longer be passive, relying on the parties to supply the information. Rather, as many commentators have persuasively argued, they need to be “active” or “engaged” participants in the hearing in order to assure that the necessary information is elicited to make an appropriate ruling. This often will require the judge to adjust procedures (such as relaxing many of the rules of evidence32 or requiring less formality in pleadings), to explain the relevant law and process to the parties both at the outset of the trial, and to take an active role in eliciting information.33 In effect, the judge does at times pitch or bat, and people most definitely come to the “ball game” to see them.

The adjustments identified above are procedural in nature—they are designed, as Richard Zorza put it, “to make sure that the adversary system does what it is supposed to do at its best—to get to truth and justice through a competition between two versions of fact and law before a neutral decision-maker.”34 This leads to the third key reason why judges are not simply umpires: unlike umpires, they decide the outcome of the “game”; and that outcome, unlike baseball (which is effectively a zero-sum game with one clear winner and one clear loser) often is not based purely on “truth” and may well not involve an actual winner or loser.

Justice plays no role in baseball. But the provision of justice is a central element of our judicial system, and as Faulkner so beautifully illustrated:

“T’ain’t truth and justice the same thing?” the sheriff said.

“So am I,” Uncle Gavin said. “It’s so rare. But I am more interested in justice and human beings.”

“Isn’t truth and justice the same thing?” the sheriff said.

“Since when?” Uncle Gavin said. “In my time, I have seen truth that was anything under the sun but just . . . .”35

As noted above, the adversarial system uses many tools, most notably many of the rules of evidence and the concept of the burden of proof, essentially to block the search for truth to meet the requirements of justice. In this way, in rendering a ruling, a judge’s determination of the outcome may well depart from the “truth” to deliver justice. Thus, a person might “win” in criminal court, but lose in civil court.

The “winner” of a trial, unlike a baseball game, therefore can be quite contextual. But there are many hearings that a judge may hold which are not zero-sum games in which one side wins and the other loses. For example, the task of a “problem-solving” court is not to determine a winner or loser, but to enable a defendant to sober up or a family to keep their apartment or a parent to keep their job. And no one actually “wins” a custody battle: the judge’s job is to evaluate what custodial arrangement best benefits the children, an outcome that cannot properly be evaluated in terms of whether one parent “won” the case.

Both of these examples illustrate the final, and in some ways most fundamental, way in which the outcome of a case can and will be very different from that of baseball. Baseball is purely competitive. But contrary to Zorza’s comment quoted above, there are many kinds of court proceedings that need not and should not be competitive; and the competitive underpinnings of the adversary system can often be at odds with the delivery of justice. A judge conducting these kinds of proceedings is in fact very much a pitcher or batter, not a passive observer calling balls and strikes.

Problem-solving courts, for example, are an important response to the recognition that the competition inherent in the adversary system simply does not work in key areas, most notably where the parties (civil or criminal) suffer from substance abuse. Again, there is no actual “winner” or “loser” in these kinds of cases—there is a problem to be solved: how to enable the party to get clean and, in many cases, to get their kids back home. In those courts, “the problem-solving judge, instead of being a remote adjudicator, asks what needs to be done to get the parent off drugs, and takes a leadership role in seeing that everyone works together.”36

The central recognition underlying these kinds of proceedings is that the competitive approach of the adversary system simply does not work in many cases. This, of course, is one reason why there is such a focus on settlement in civil cases, especially those where the parties (e.g., parents, neighbors, or siblings) will have an ongoing relationship once the case is concluded. But where outside settlement efforts have failed, a judge may well have to tailor the hearing and the ruling in a way that enables the parties to continue to coexist, a far cry from simply deciding if the evidence is admissible.

In short, the adversary system requires a very different sort of “umpire” than baseball. In baseball, the “truth” is readily ascertained (if occasionally the subject of memorable disputes). But a judge operates in a much more complex arena, where truth is contextual and elusive, and “in the last analysis, . . . not the only goal.”37

III.

A recent review of the literature regarding “active judging” identified four categories of behavior judges engage in that depart

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31. See generally, Zorza, supra note 3, Engler, supra note 3.
32. This can be a particularly useful step, for as Frankel points out, the rules of evidence were written to protect jurors from hearing unduly prejudicial evidence, Frankel, supra note 24, at 1042–43, a concern simply not present in a bench trial. A judge, after all, knows the rules of evidence and can determine the appropriate weight and credibility, if any, to give to a particular piece of evidence, particularly since most of the evidence addressed in the evidentiary rules is competent evidence unless an objection is made. In addition to giving the judge the fullest possible record on which to ask questions and render a ruling, allowing the litigants to provide any evidence they find relevant would also benefit self-represented litigants, since, in my experience at least, they tended to censor themselves for fear of violating an evidentiary rule.
33. These arguments are well and forcefully set out in the articles cited in note 3 supra.
34. Zorza, supra note 3, at 429, n.15.
37. Frankel, supra note 24, at 1037.
from the traditional norms of passive judging and party control: (1) adjusting procedures; (2) explaining law and process; (3) eliciting information; and (4) raising new legal issues not previously raised by parties, as well as additional potential categories of judicial activity, including (5) referring parties to court-based and nonprofit service providers; and (6) facilitating negotiation between parties. 38

The first four categories, while important, are entirely procedural in nature, designed to improve the manner in which an adversarial trial is conducted. Of course, in recognition of the limitations of the adversarial system, many judges actively and appropriately encourage the parties to take advantage of the many opportunities that every court system has provided to resolve cases short of trial—the last category—but that focus needs to go well beyond simply encouraging the parties to talk or referring them to mediation. Rather, a key element of “engaged” judging includes, where appropriate, structuring the hearing process itself to facilitate a resolution.

It is important at the outset to define what the term “resolution” means in this context. The most obvious meaning is that the parties actually settle the case—they agree on an outcome that lays out precisely what their obligations will be, such as the payment terms of a contract, the specifics of an easement, or the details of the custodial arrangement for the children. But “resolution” can and must be given a broader meaning, for a case can be “resolved” in key ways even if it does not settle. This is due to two central elements that underlie many civil trials, in state court at least. First, as noted above, many such trials are not zero-sum games, where one party wins and the other loses. Second, a lot of trials involve parties who know each other—they are married, neighbors, siblings, or friends. Adversarial trials bring out the worst in people,39 for they have to fight hard and look for the strongest evidence to present against the other party, which necessarily tends to lead them to view the other in a highly negative way.40 Thus, a fight over a lot line may lead to long-term enmity, as can a battle over sibling debt. A short-term “victory” in these cases may well lead to a long-term loss for all concerned.

This dynamic not only will require a judge to find ways to ameliorate the tensions that arise during the trial, but also offer the judge an opportunity to structure both the hearing and the manner in which he or she rules on a case in a way that enables the judge to structure the entire hearing and result in a manner that promotes, where appropriate, an ongoing positive relationship between the parties. There are a variety of ways in which this can be done. First, the judge can ask the parties at the beginning of a bench trial in civil cases whether they want to take an hour and see if they can settle some or all of the case. I routinely employed this practice, regardless of whether the parties had tried mediation in the past—the parties, represented or not, usually would agree to try, and we often would be successful. But even if we were not, the discussion often had a somewhat positive impact on the trial, for the parties generally found some areas in which they agreed, and they discovered that they could work together at least in some fashion, both of which tended to reduce the tension and anger during the trial.

Second, it can be possible to conduct the trial in a way that leads the parties to resolve some or all of the issues. As noted in section 1, a judge can use the initial case conference or trial-setting conference in this manner, asking the parties what the issues are and then framing the ensuring conversation to see if they can come to an agreement. A judge can also start the trial itself by asking the parties what outcome they are seeking or what their basic position may be, and then using that as a framework within which to ask relevant questions, which again may lead the parties to come to an agreement. And as arose in the context of the property valuations discussed in section I above, there are ways to receive the evidence that leads the parties to stop disagreeing, at least as to some issues.

I generally would put the parties under oath in the second context described above, so that their comments could form the basis for either the settlement or my ultimate ruling if they did not resolve the case. This leads to a third way that the conduct of a trial can lead to “resolution” in the broader sense: a judge can take an active role not only to ensure that he or she receives the necessary relevant evidence, but also in how the evidence is received, so as to try to reduce the animosity in the room. This can include such techniques as reminding the parties at the outset of the trial that they are going to still have to deal with each other long after the trial is over, encouraging the parties to focus the evidence in a positive way (e.g., the strengths they bring to raising the children...

38 Carpenter et al., supra note 3, at 279-280.
39 As one critic characterized it, “the formal nature of the courts pits the parties against one another like two scorpions in a bottle, at a time when they are most angry and hostile toward one another.” Wensman, And Never the Twain Shall Meet Again: The Best Interests of Children and the Adversary System, 52 U. MIAMI L. REV. 79, 132-33 (1997).
40 This is particularly true in family law cases:

[1]In family cases a rational fact-finding process promoting a “final” resolution is difficult to attain... More than in any other type of case, the “truth” in family cases is defined less by rational and empirical fact-finding and more by perception, emotion, conflict, anger and anxiety. As courts and litigants repeatedly experience, few family cases—particularly those involving children—are resolved with “finality” the first or even second time around. In addition, as the percentage of pro se litigants involved in family cases grows, approaches traditionally used by courts to promote rational fact-finding become even more difficult to apply. Thus, in far too many cases “finality” is eventually reached through the operation of law (emancipation of a minor) or the exhaustion of personal funds, not by a court aiding the parties in reaching a just resolution. Conference of State Court Administrators, Position Paper on Effective Management of Family Law Cases (2002), at 3.
rather than the manifold reasons why the other is an awful parent), and using the judge's inherent authority to ask questions to assure that the parties remain focused on the key elements of the case.

This kind of approach can and does apply in a variety of contexts, not just the standard bench trial in a civil matter. Probation revocation hearings can be conducted as more of a discussion with the parties, with direct communication with the defendant, a method employed by the wellness courts that does not need to be restricted to that format. Child protection hearings can be held in a manner that leads the parties to look to reunification, rather than focusing on what the parents have done wrong or the failings of the social worker. The problem-solving courts have taken this approach in a variety of contexts; there is no reason why similar approaches cannot be used in every case.

It should be noted that, perhaps paradoxically, some of these approaches may well work best when neither party is represented. It is much more difficult to have a direct conversation with a party when they have a lawyer, since that party generally will only speak through the attorney, either by having the attorney talk for them or by participating only in the context of answering questions. In addition, lawyers tend, understandably, to be focused on what they perceive is best for their client, and this may lead them to block their clients from the kind of discussion that can lead to a resolution.

Finally, the manner in which a judge issues their ruling can help “resolve” a case. The content of the order can be very important. For example, accentuating the positive aspects of both parties can be a valuable way to assist in preserving their relationship. Saying that a party was “not credible” as to a particular factual issue often is a far better choice than concluding they “lied.” A judge can also choose not to resolve a factual issue that was hotly litigated but not necessary to the ultimate result, where a ruling on that issue might appear to validate a party's negative feelings in a way that will not be helpful in the long term.

A judge's choice as to how to announce the ruling can also be significant. In many cases, a written order may well suffice. But there also are times where it is important for the judge to put a ruling on the record in the presence of the parties. This enables the judge to look at the parties in the eye; and perhaps of equal or greater importance, the parties have to respond to the judge's non-verbal cues. There also may be people involved in the case who are not parties, such as grandparents or siblings, and they may well need to hear the ruling as well. It was not unusual for me to talk to the parties in custody cases about the fact they were going to have to work together to raise their children long after the case was over, a discussion that cannot really be very effective in writing. And sometimes I would talk directly to the others in the room, encouraging the grandparents to focus on the joy of having grandchildren rather than facilitating the fight between their children.

Nor is the value of an oral ruling confined to a standard civil case. The way in which a judge explains a sentence or probation revocation in a criminal case can go a long way towards facilitating rehabilitation and enabling victims to achieve some closure—and even, where appropriate, some form of reconciliation between the offender and the victim or at least between their families. Child protection cases can involve many of the same dynamics as custody cases—accentuating the parents' positive elements and encouraging them to keep up their good work in an oral ruling explaining why the state will retain custody can facilitate reunification. In both of these situations (and in many other contexts as well), looking the party in the eye as one points out what more needs to be done is an important part of “resolving” the case.

One final note: a judge necessarily must take a different approach in cases tried to a jury than in a bench trial, since the judge must be extremely careful not to intimate his or her opinions on the case to the jurors. This can impede most importantly the judge's ability to ask questions to witnesses, since the questions may well require expressing some concern about the witness's testimony, which in turn could prejudice the jury. But this does not mean that a judge cannot take the kind of active role discussed above in jury cases, especially where the parties may have a relationship that extends beyond the case. For example, judges can work to reduce hostility and facilitate resolution during the discovery phase. There often are pretrial motions to address, where the judge can be active in the same manner as in a bench trial. And judges can tailor the way in which he or she delivers a ruling to accomplish the same kinds of goals as in a bench trial.

IV.

It is more than likely that almost every judge is actively involved in some fashion in how a case proceeds — the differences among judges in all probability revolve around how engaged they believe they ought to be. The appropriate level of such “activism,” as it were, also necessarily is constrained by the basic ethical duty to act impartially and to appear impartial, a duty that is of particular importance whenever a judge chooses to try to help the parties achieve a resolution of the case. After all, the words and actions of the judge matter as the judge works with the parties, a dynamic that is of particular concern whenever a judge seeks to settle a case in which the judge may later participate.41

It also is important to note that the context in which a judge hears a case is a critical component of “engaged” judging.42 There

41. While there is no ethical bar to a judge settling a civil case in which they sit, provided that the parties do not object (see, e.g., Alaska Commission on Judicial Conduct Advisory Opinion #2006-01 (October 30, 2006)); many judges prefer not to do it; and as I understand it, some jurisdictions flatly prohibit judges from doing so. Needless to say, if one does facilitate a settlement in one's own case, it is important both to make a record that any settlement into which the parties enter is not unduly influenced by the judge and to be prepared to recuse oneself if the settlement fails and either the parties request recusal or one recognizes that one has formed a bias due to the parties' behavior or positions in the settlement discussions.

42. See generally Engler, And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks, 67 Fordham L. Rev. 1987 (1999), which contains a detailed discussion of the issues raised in this paragraph.
are many actors involved in a court case beyond the parties, any attorneys, and the judge, all of whom can, do, and, indeed, must play an important role in ensuring that cases move smoothly and fairly and whenever possible can be resolved short of an actual trial. The kinds of actions described in this article were used by me, and are meant to be used, as an element of, not a substitution for, those very important services. In addition, there often can be a significant imbalance of power between the parties (as in landlord/tenant cases or where domestic violence is present), a key complicating factor of which a judge must be aware and that might interfere with a fair discussion and resolution of the issues. And there may be cases where the judge is not aware of key background facts (such as the actual availability of affordable housing for a tenant who is willing to move out to resolve a landlord/tenant dispute) that could mean that what appears to be a sensible and fair resolution in fact is not one at all.

All of these concerns warrant attention in any given case, and each could stand alone as a topic for a scholarly article. But none of them mean that a judge must act in a manner consistent with the classic model of the umpire judge.43 Indeed, much of the research cited in this article basically seems intended both to document and to encourage the ways in which judges do and should go beyond that classic model. The central point of this article is simply to underscore the reason why this literature both has it right yet is unduly limited in its call for action. An “engaged” judge is an effective judge because they do not simply react to what they hear—they are actively involved in both how the case proceeds, both substantively and procedurally, and how it can be “resolved” in the broad sense discussed above. In doing so, the judge is constantly problem-solving, shifting rules and procedures and rulings to accommodate what needs to be done, consistent of course with the relevant legal rules and the overriding requirement both to be impartial and to appear to be impartial. This is a far more complex—and fulfilling—task than simply calling balls and strikes.

43. See Engler, supra note 3, at 386: “As long as the judge is prepared to help all sides, as needed, the problem is not one of impartiality, but the appearance of impartiality. The solution is to provide clear guidelines and explanations, not to require judges to sit back passively regardless of the unfairness that follows in terms of process or outcome.” Cf. Carpenter, supra note 3, at 701-02, 708 (noting complexities inherent in a judge’s efforts to be fair, to elicit facts, and to apply the burden of proof where the parties are self-represented).
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Across
1  "___ Christianity" (1942 C.S. Lewis book)
5  Coverage provider for bank accts.
9  High winds?
14  Impersonating Baldwin?
15  Move, in real estate jargon
16  "... thereto I plight thee my ___"
17  2012-2018 TV series about country music performers
19  Aware of, in '50s slang
20  "My folks are gonna ground me, like, forever!"
21  Don some formal threads
23  SEC overseer
25  Verb that aptly rhymes with "jerk"
26  Goofy guy
30  Cyberspace gatekeepers (abbr.)
32  "The good, the ___, and ..."
35  Sunny lobbies
36  Not otherwise occupied
37  How many sing at 38-Across
38  Noted singer-songwriter venue often featured on 17-Across
41  A looooong time
42  Public sch. auxiliaries
43  Camel's stopping place
44  Capetown's land (abbr.)
45  Anfered deer
46  Something brewing
47  Hamper
48  Wearing sneakers, say
54  "City of New ___" (1979 Bee Gees hit)
55  Boot-shaped country
60  "The Volunteer State"

Down
1  ___-pedi (salon service)
2  Actor Jack of old westerns
3  Word with home and room
4  Empty hallway sound
5  "Headed for the ___ Bay" (Otis Redding lyric)
6  River mouth deposit
7  Running a temperature, e.g.
8  For students of both genders
9  Significant ___
10  Fast
11  Clumsy's exclamation
12  Julius Caesar phrase
13  Home ec alternative
14  Destructive sort
15  Less green, as fruit
22  Safety items that deploy in a collision
24  Well-taken beverage?
26  Cultural traits
28  Cookbook author Chalmers
29  Baby back___
31  Six, in Sieville
32  Talk oneself up
33  1967 Dionne Warwick hit
34  ___ number on
36  Greek-salad topper
37  Ella Fitzgerald's forte
39  Ahead by a pair
40  Scribble idly
45  Agree
46  Stinging insect
47  Wiggly dessert
49  Show respect for
50  Assibilate
51  "Beatle Bailey" pooch
52  Home of a famous Colorado ski resort
53  Home of Brigham Young
55  Home of Monday Night Football
56  Home of Kazakhstan
57  Must-have item
58  Transfusion liquids
61  He's comin' in a '69 Three Dog Night hit

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Answers are found on page 145.
COURT REVIEW ITEMS
Judge Smith’s article, Some Thoughts on Engaged Judging, provides excellent insights into the development of skills for judges. For additional exploration of related concepts, review the special issue of Court Review on procedural fairness presented by Steve Leben in Volume 44, Issue 1/2 along with the groundbreaking white paper on procedural fairness authored by Judges Kevin Burke and Steve Leben, which can be found at https://bit.ly/2RvzNMh. You also may find of value a discussion of applying social science research to improve judicial case management in A New Model for Civil Case Management from Volume 50, Issue 4.

NEW PUBLICATIONS

The National Institute of Standards and Technology produced an excellent report this year on the state of DNA science related to mixtures. Their report, DNA Mixtures: A Forensic Science Explainer. What are DNA Mixtures? And why are they sometimes so difficult to interpret?, is one of those rare publications that truly lives up to its title. Rich Press, the report’s author, provides a superb and understandable explanation of the often-murky waters of the DNA mixtures we so commonly see in courtrooms. He describes the different types of DNA evidence, the developments in DNA technology in recent years, and the “double-edged sword” of recent advancements. Mr. Press explains in easy to follow language the difficulties that can cause problems in interpreting DNA mixtures and what they really mean. As helpful as his analogy is, I must admit the richness of his illustrative photos made me hungry for that childhood staple of vegetable soup. This report is a must-read for any judge handling criminal cases.


As we all know, the trial judge is cast in the role of gatekeeper for scientific evidence in our court system. The National Judicial College (NJC) has long been a reliable source of useful and informative materials for judges and they don’t disappoint in this new bench book. With financial support from the State Judicial Institute, NJC partnered with the Justice Speakers Institute, LLC, to assemble an excellent bench book to help us in tackling the myriad of issues presented by new science. The panel of authors represents extensive courtroom experience on both sides of the bench. The authors provide a digestible overview of the nature of scientific knowledge, the scientific method, and the language of scientific research. They also survey a broad range of topics that arise regularly in courtrooms across our country. Topics range from shaken baby to statistics. Common misunderstandings of scientific research, both accidental and intentional, are described. The authors also walk the reader through the common situations that arise in civil, criminal, and juvenile proceedings addressing how to handle the issues pretrial, during trial, and in post-trial proceedings. The focused sections on evidence-based sentencing and post-sentence supervision would be worth presenting as a standalone publication. They are sure to provide you with welcome new insights on how to be a more effective criminal judge. And the best news is that the bench book is available as a free download.

WEBSITES
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While many search resources are available online, the sheer number of potential search topics can be overwhelming. We often forget how much can be available to us on any given topic and sometimes old fashioned “shelf browsing” is the best way to be surprised by an unexpected gem. One example is PlayerFM’s page for Supreme Court Podcasts, which presents a surprisingly broad array of potentially interesting and useful podcasts for anyone interested in the judiciary, or who may be seeking ideas for that upcoming community presentation. Podcasts listed range from addressing the history of the court to telling the human stories behind landmark cases, key civil rights cases, comedic takes on legal questions, and upcoming cases as well as issues.