

VOLUME 102 NUMBER 2

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# JUDICATURE

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## *Rights* that made the world right

How freed slaves extended  
the reach of federal courts  
and expanded our understanding  
of the 14th Amendment

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**FROM THE PUBLISHER**

**WE RECEIVED NEWS OF ASSOCIATE JUSTICE ANTHONY M. KENNEDY'S RETIREMENT**

as we prepared this edition of *Judicature* for printing. We look forward to paying tribute to him in a later edition of this journal.

Justice Kennedy came to Duke Law School in 2008 to dedicate our remodeled law library and our beautiful atrium, the Star Commons. He offered his reflections about the symbolism of the moment. These buildings, he said, were edifices for “the exploration and evolution of the rule of law” — a crucial part of the maintenance of justice around the world. “We still must make the case for the rule of law, and we still must remember that our freedom and our security consist of the world of ideas.”

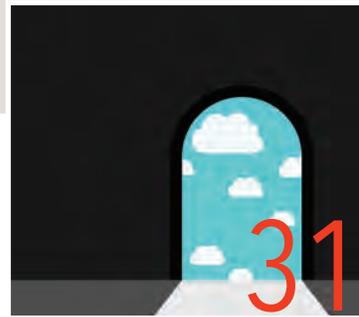
He elaborated on this theme of ideas, developed through study, and then action or *inter-action*, developed through discussion: “[Students] go to the library and they begin to study, and we hope they encounter what Holmes called ‘the secret joy of isolated thought,’” he said. “In the commons, the students discuss the ideas of the law, the concept of justice, the meaning of freedom, with students from other disciplines, other backgrounds, from other countries. And, so it goes — from library to commons.”

Our new Bolch Judicial Institute seeks to do much of what Justice Kennedy so eloquently discussed. We aim to “make the case for the rule of law.” Our Institute is dedicated to preserving and advancing the rule of law, here in the United States and around the world. We will do this through research and scholarship — ideas — and through discussion, debate, and on-the-ground projects — action and interaction. We are working now to translate our vision into concrete plans and goals. I welcome your thoughts as we begin this important work.

A handwritten signature in dark ink that reads "David F. Levi". The signature is written in a cursive style.

David F. Levi  
Director, Bolch Judicial Institute  
Levi Family Professor of Law and Judicial Studies  
Duke Law School

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## *Toward a More Perfect Union*

In 2018, as the nation commemorates the 150th Anniversary of the 14th Amendment, stakeholders in the justice system should reflect on our successes and failures along the continuum for equal justice, equal access, equal opportunity, and full inclusion. The 14th Amendment was ratified against the backdrop of slavery, exclusion of women and people of color, disenfranchisement, and white supremacy. It granted citizenship to all persons born or naturalized in the United States and declared that no state could deprive any person of life, liberty, or property “without due process of law.” As author Eric Foner writes in his essay *The Checkered History of the Great 14th*



FROM THE  
EDITOR IN CHIEF

*Amendment*, it is “one of the most important constitutional Amendments in American history.” In the short run, Foner notes, the equal protection clause had little practical effect, as Southern white resistance and northern complacency resulted in a “new system of racial subordination” that sought to eliminate black voting, institutionalize racial segregation, and limit black economic progress. Foner provides important insight on the court’s evolving role in interpreting the 14th Amendment to develop the rights, powers, and relations for individuals and corporations that are protected today.

Now we must ask ourselves whether the courts face a crisis of confidence in our ability to make real the 14th Amendment’s promise of equal protection and equal opportunity.

More than 50 years ago, the National Conference of Christians and Jews surveyed public confidence in the fair-

ness of court outcomes and found that minorities expressed significantly less confidence than whites in the fairness of court outcomes. The National Center for State Courts’ annual *Public Trust and Confidence in the Courts* surveys show similar trends continue today.

Notwithstanding civil rights statutes, aggressive enforcement, diversity training, and increased pluralization, people of color remain skeptical that they can receive fair and impartial justice in America’s courts. Implicit bias research provides a sound basis for much of that skepticism. Implicit bias is the process by which the brain uses “mental associations that are so well established as to operate without awareness, intention, or control.” (*Mental Health Project Implicit FAQ*, implicit.harvard.edu.) Because the bias is unconscious, a judge’s, jury’s, prosecutor’s, or attorney’s decisions and actions may rely on stereotypes that can negatively or positively influence actions, resulting in disparities that undermine the justice process and fuel a lack of confidence.

Research shows that “(1) the magnitude of implicit bias toward members of minority and disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior, (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias, and (4) self, situational, or broader cultural interventions can correct systematic and consensually shared implicit biases.” (Kang & Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1064 (2006).)

I had the honor of chairing the American Bar Association project to develop a resource guide on implicit bias, *Enhancing Justice Reducing Bias*, for judges and lawyers. The work reaffirms for me that as judges, we must not only do justice, but we must also be *seen* as “doing justice.” Courts must embrace a larger role of working to improve the “fair administration of justice” and the perceptions of justice. Justice will be enhanced by strong reentry courts and other therapeutic courts, civic education, judicial outreach, diversity, implicit bias training, and other innovative programs that foster confidence and improve the fair administration of justice.

As we commemorate the sesquicentennial of the 14th Amendment, every stakeholder must recommit to working fervently to reach the promise of equal justice for every citizen!

BERNICE B. DONALD, Judge, U.S. Court of Appeals for the Sixth Circuit

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# BRIEFS

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FROM YOU!

## ARTICLE SUBMISSIONS

*Judicature* explores all aspects of the administration of justice and its improvement. We publish articles based on empirical research as well as articles based on fact and opinion from members of the bench, the bar, and the academy. Complete submission guidelines may be found on our website: [judicialstudies.duke.edu/judicature](http://judicialstudies.duke.edu/judicature).

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Email your letter, including your full name and title, with *Attn: Editor* in the subject line, to [judicature@law.duke.edu](mailto:judicature@law.duke.edu).

## JUDICIAL HONORS

We print select judicial honors, space permitting, and lists of active judges celebrating milestone anniversaries of the date of their commission. Send submissions to [judicature@law.duke.edu](mailto:judicature@law.duke.edu); high-resolution (300 dpi) photos are welcome.

## THE STORIED THIRD BRANCH

The Storied Third Branch invites judges to write a tribute to another judge who has, through example or mentorship, served as an inspiration to colleagues on and off the bench. See details at [judicialstudies.duke.edu/judicature](http://judicialstudies.duke.edu/judicature).

from THE NATIONAL CENTER FOR STATE COURTS



## The back-and-forth history of rulemaking authority

**THIS NOVEMBER, ARKANSAS VOTERS WILL DECIDE ISSUE 1**, a constitutional amendment that would, among other things, allow the state's legislature to create rules of pleading, practice, and procedure for the state's courts and amend, annul, and repeal any rules adopted by the Arkansas Supreme Court.

For many states, including Arkansas, having an explicit provision that places rulemaking authority in the hands of the state's court of last resort is a relatively new phenomenon. Since the early days of our nation, states have experimented with different ways of handling rules of practice and procedure. At first, most states continued the British practice of allowing local courts to operate autonomously. Early efforts to shift rulemaking authority to the state's court of last resort proved challenging and often temporary.

Ohio offers an example of the changing trends over time. In 1803, just after Ohio won statehood, the legislature granted the state's supreme court power to create "general rules of practice for the courts of common pleas." But, likely because lower court judges were concerned about the intrusion on their autonomy, the statute was repealed a year later. In

1810, the legislature specified by law that the supreme court could create a suggested set of rules for the Courts of Common Pleas. By 1845, the legislature had granted the supreme court power over lower "state" courts and made those rules "binding and obligatory." But eight years later, the legislature created its own Code of Civil Procedure, and by 1885 the supreme court was again stripped of its rulemaking power over lower courts.

For the next 50 years, rulemaking authority lay with Ohio's legislature. Then, a 1935 statute gave the supreme court the right to approve or amend "state" court rules of practice and procedure. Finally, the 1968 Modern Courts Amendment created the three-step process used today: the Ohio Supreme Court prescribes rules governing practice and procedure in all courts, but the proposed rules are to be laid before the legislature, which has the power to amend them. Once the rules go into effect, all laws in conflict with rules are of no force or effect. Lower courts retain the right to create their own rules as long as they are "not inconsistent" with the Supreme Court's rules.

The Ohio example of on-again-off-again rulemaking authority occurred at the same

time state legislatures sought to simplify practice and procedure themselves. For example, the Field Code, the 1848 New York Code of Civil Procedure named for its lead author and proponent David Dudley Field, reformed and codified the common law practices of New York courts (many of which were retained from the time of the Revolution) and merged law and equity. But the reform turned sour as the legislature became arguably too involved. The Field Code adopted in 1848 consisted of approximately 390 sections; by 1909, it had 3,000-plus sections and was decried as an example of legislative revision “gone mad.”

In the 1900s, groups such as the American Bar Association and the American Judicature Society began to believe that the authority to create rules of practice and procedure should rest within the judiciary itself, but they were divided on how the power should be administered. A 1909 ABA committee suggested the courts of last resort should “so far as possible” have the power, but only as that was consistent with home rule and local independence. Some critics argued that handing the power to the court of last resort would stymie reform because justices of the high court, who tended to be older, had “reached an age in life when all change seems abhorrent.”

The American Judicature Society was largely responsible for the solution proposed in Bulletin VII-A (1917), which outlined a system of constitutional language for a “unified” court system. It used much of the language of Great Britain’s Judicature Acts of 1873 and 1875, written in constitutional provisions that could avoid the tug of war states faced with legislatures. Rather than give the power to the court of last resort, however, AJS proposed giving rulemaking authority to a Judicial Council chaired by the chief justice of the state and made up of the top judges in the

## THE AMERICAN JUDICATURE SOCIETY PROPOSED GIVING RULEMAKING AUTHORITY TO A JUDICIAL COUNCIL CHAIRED BY THE CHIEF JUSTICE OF THE STATE AND MADE UP OF THE TOP JUDGES IN THE STATE.

state, similar to a proposal of the 1873 Judicature Act but granting a Judicial Conference (made up of all judges in the state) the power to change Judicial Council rules by majority vote (copying the 1875 Judicature Act language). The legislature could adopt a “short practice act,” but when a statute and court rule conflicted, the rule would trump the law.

Since then, three broad trends have emerged. First, the federal Rules Enabling Act was enacted in 1934, granting the federal Judicial Conference power to create Rules of Civil Procedure (and, later, rules for criminal procedure, etc.). This did not completely resolve tension between the branches, however: Congress refused to allow the Federal Rules of Evidence to go into effect in the 1970s, instead enacting their own version. States looked to the language of the Enabling Act for adopting their constitutional provisions, while state high courts looked at adopting, either partially or wholesale, the federally developed civil procedure and similar rules.

Second, debate continued over whether a judicial council or the court of last resort would have power to promulgate rules. For example, Georgia’s 1986 constitution provides its supreme court with the power

to adopt uniform court rules. However, each “class” of court has a separate Judicial Council made up of the judges from that court, such as the Council of Superior Court Judges. The state’s supreme court may only adopt a rule “with the advice and consent of the council of the affected class or classes of trial courts.”

Third, legislatures have made change challenging. Most constitutional amendments to deprive the legislature of power over rules of practice or procedure had to come from the legislature itself, through constitutional conventions or by initiative in states where such efforts are permitted. For this reason, states that have achieved some level of explicit constitutional rulemaking authority in their state constitution have done so either through a constitutional convention or, if through the legislature, via an omnibus rewrite of their judiciary article. Examples of the latter include Alabama (Amendment 328, adopted by voters in 1973) and more recently Arkansas (Amendment 80, adopted by voters in 2000).

Today, the states can be divided into three broad types with respect to the explicit, exclusive placement of constitutional rulemaking authority within the judiciary (and more specifically the court of last resort).

Type I states, of which there are 13, have explicit and exclusive constitutional language granting the judiciary, a judicial council, or the supreme court rulemaking power. Michigan is an example here; its constitution provides: “The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.”

Type II states have explicit language in their constitution granting rulemaking authority to the courts but allowing the legislature to intervene. These 22 states generally fall into two subtypes:

# JUDICIAL HONORS

**J.H. CORPENING II**, the chief district court judge for the 5th Judicial District of North Carolina, received the David W.



Soukup Judge of the Year Award at the National Court Appointed Special Advocates Conference in March. The award honored Corpening's efforts to establish an innovative program that assists drug-addicted mothers with recovery and helps them keep and care for their babies during recovery.

The city of Ocala, Florida, renamed a portion of one of its streets to honor retired Judge



**SANDRA E. CHAMP**, recognizing her trailblazing role as both the first elected female judge and the first African American judge in the Fifth Judicial Circuit of Florida. Champ served from 2000 until she retired in 2003.

**JAMES B. PASLAY**, the longest-serving magistrate

judge of Spartanburg County, South Carolina, received the state's highest honor, the Order of the Palmetto, in May. He was appointed a judge of the civil and criminal court of Spartanburg in 1973. The court became the City of Spartanburg Magistrate Court in 1979, and Paslay has served there ever since. "I'd do this another 45 years if I could," he said.

**PETER T. FAY** received the 2018 American Inns of Court Professionalism Award for the United States Court of Appeals for the Eleventh Circuit. A

senior judge on the circuit since 1994, Fay was recognized as a "legal legend" by the Eleventh Judicial Circuit Historical Society in 2008.

Judge **JENNIFER WALKER ELROD** of the U.S.



Court of Appeals for the Fifth Circuit was named Appellate Judge of the Year by the Texas Association of Civil Trial and Appellate Specialists.

Type II-a gives the legislature the power to alter, add, or veto any rules. The Ohio Modern Courts Amendment discussed above is an example of this. Similarly, California's constitution provides that state's Judicial Council the authority to adopt rules for court administration, practice, and procedure, but requires that any such rule shall not be inconsistent with statute. The legislature's ability to alter rules may require a simple majority or supermajority to act.

Type II-b grants the judiciary explicit and exclusive authority for rulemaking but leaves certain areas or rules open to legislative activity. Colorado, for example, grants the supreme court broad powers but reserves for the legislature the power to adopt simplified procedures in county courts for misdemeanor trials. North Carolina's constitution divides the judiciary itself, giving explicit and exclusive authority for the appellate division (supreme court and court of appeals) to the supreme court. In 1967, the North Carolina General Assembly

TYPE I STATES	TYPE II STATES	TYPE III STATES
Arizona	Alabama	Connecticut
Arkansas	Alaska	Idaho
Delaware	California	Indiana
Hawaii	Colorado	Iowa
Illinois	Florida	Kansas
Kentucky	Georgia	Maine
Michigan	Louisiana	Massachusetts
New Hampshire	Maryland	Minnesota
North Dakota	Missouri	Mississippi
Oklahoma	Montana	Nevada
Pennsylvania	Nebraska	New Mexico
West Virginia	New Jersey	Oregon
Wisconsin	New York	Rhode Island
	North Carolina	Tennessee
	Ohio	Washington
	South Carolina	
	South Dakota	
	Texas	
	Utah	
	Vermont	
	Virginia	
	Wyoming	

delegated supplemental rulemaking authority for the lower courts to the supreme court but retained the ability to alter, amend, or repeal rules — a power it has exercised several times since.

Type III states have no explicit language in their constitutions that mention practice or procedure. Many of these 15 states, however, do have language in their constitutions granting their supreme court "administrative authority" or stating that the courts are under the supervision or supervisory control of the supreme court.

How does this play out in Arkansas? Prior to Amendment 80, Arkansas was a Type III state, with no explicit constitutional language for rulemaking by the supreme court. After Amendment 80, the state became Type I: The state's supreme court "shall prescribe the rules of pleading, practice and procedure for all courts . . ." If Issue 1 is adopted, Arkansas will become a Type II, with the legislature able to create rules or amend or repeal any existing rule adopted by the supreme court with a three-fifths' vote.

– **WILLIAM RAFTERY** blogs about state legislation affecting the courts at [gaveltogavel.us](http://gaveltogavel.us).

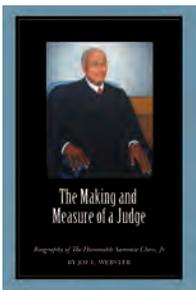
**SAMMIE CHESS, JR.**  
SUPERIOR COURT JUDGE, NORTH CAROLINA



SAMMIE CHESS JR. VIEWS HIS PORTRAIT, WHICH IS ON DISPLAY IN THE NORTH CAROLINA SUPERIOR COURT, HIGH POINT, N.C., AND IN THE COUNTY COURTHOUSE IN ALLENDALE, S.C. PHOTO BY LAURA GREENE, *HIGH POINT ENTERPRISE*, 2015.

# *A giant among judges and men*

by Joe L. Webster



THIS TRIBUTE IS BASED ON JUDGE WEBSTER'S BOOK, *THE MAKING AND MEASURE OF A JUDGE: BIOGRAPHY OF THE HONORABLE SAMMIE CHESS, JR.* (CHAPEL HILL PRESS, 2017.) ALL PAGE NUMBERS REFERENCE THE PRINTED BOOK, AND ITALICIZED SECTIONS ARE EXCERPTED FROM THE BOOK.

*[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.”*

— The Federalist No. 78, Alexander Hamilton

**ON A DIRT FLOOR OF A TENANT HOUSE LOCATED AT THE EDGE OF A COTTON FIELD IN THE RURAL BULL POND COMMUNITY OUTSIDE ALLENDALE, S.C., A GIANT WAS BORN IN THE MIDST OF AMERICA’S GREATEST DEPRESSION.** Named after his father, Sammie Chess the junior was refined by a close-knit family, faith, and the deeply segregated south. The Hon. Sammie Chess, Jr. (“Chess”) rose to become the first African American superior court judge in North Carolina and one of the first in the United States south of Washington, D.C. Gov. Robert “Bob” Scott had the courage to appoint Chess as a special superior court judge in November 1971, at a time when previous governors had not had the courage or desire to do so.

After graduating from North Carolina Central Law School, passing the North Carolina bar exam in 1958, and serving his country in the army from 1958 to 1960, Chess, like other African American pioneer lawyers of his generation, hung his shingle. He practiced law in High Point, N.C., and, like many of his race, accepted his calling as a “social engineer” (p. 28) to take on a deeply fractured society, full of racial prejudice and invidious discrimination, which badly needed to be challenged and corrected. It was as a civil rights lawyer that Chess first made his mark on society. Chess was serious about the oath

he took to defend and protect the constitution and viewed himself as a soldier of that constitution (p. 67). His imprint was felt in numerous legal cases affecting the lives of thousands of people in High Point and beyond. As one of the cooperating attorneys of the NAACP Legal Defense Fund, Chess was an attorney of record in *North Carolina Teachers Association v. the Asheboro City Board of Education*, *Robinson v. Lorillard Co.*, and *Addison v. High Point Memorial Hospital*. He also was an attorney for the plaintiffs and the public face of the lawsuit initiated against the High Point Board of Education to desegregate the public schools. During the pretrial and trial stages, Chess, along with the lead attorney (renowned civil rights attorney and friend, Julius Chambers) and others, represented the plaintiff in an employment racial discrimination case, *Griggs v. Duke Power Co.* On March 8, 1971, the U.S. Supreme Court decided for the plaintiff and held that employment tests must be job related. *Griggs* was the first racial discrimination case brought under Title VII of the Civil Rights Act of 1964 to come before the U.S. Supreme Court on its merits and quickly became a landmark decision. *Griggs’s* author, the late Supreme Court Justice Warren Burger, identified *Griggs* as the most important case handed down by the Court in his first two full terms (p. 69).

What distinguishes Judge Chess from so many other lawyers and judges who have served our state and nation

well? He is a man of unsurpassed courage, grace, determination, and strength of character that allowed him to overcome obstacles not experienced by most other lawyers and judges of his generation. Chess is guided by a moral compass. He said,

*. . . {Y}ou must have a bearing and abiding faith in your moral direction; that you can’t be a lawyer if you don’t stand up straight. There will be blows against you, but you will be a man if you take the blows. A man can do remarkable things if you inspire others. You can even disarm your opponent if you stand up straight and practice these principles. You can’t think about consequences, but you have to think about what the constitution requires. (pp. 66-67)*

In the early 1960s, Chess traveled to Gastonia, N.C., to his opposing attorney’s home turf to present a civil case, the only case his father ever witnessed. The jury ruled in his client’s favor. After rendering their verdict, many of the jurors, who were highly impressed by the manner in which Chess had argued his client’s case, came down out of the jury box asking for Chess’s business card, desiring him to be their family attorney. However, whatever joy of victory Chess experienced was tempered by what he and his father experienced when they were leaving the courtroom. As Chess and his father walked some distance behind his opposing attorney out of the courtroom into the hallway lead- ▶

ing toward the exit, a man came toward the opposing counsel. The man spoke to opposing counsel and asked him,

*“What in the world happened to you? You look like you have been in a fight with a bobcat.” The opposing counsel responded, “A nigger lawyer just beat the shit out of me.” Without saying a word, Chess and his father continued to walk toward the exit. (pp. 87-88)*

Later as a trial judge, in many of the courts where Chess presided, the various court officials such as clerks, bailiffs, and other law enforcement had never seen a black lawyer, let alone a black judge. During one assignment, Chess traveled to a distant court and

*{Chess} remembers pulling into a parking space which was marked with a sign indicating that the space was for judges only. “This deputy came rushing up to me saying, ‘Are you crazy, what do you think you’re doing?’ I didn’t say anything. He said, ‘Can’t you read?’ I said, ‘Deputy, I am the judge.’ All of a sudden, it came to him that he heard there was a black judge. I told the deputy, ‘It’s OK. This is something you have not been accustomed to.’” (p. 106)*

These are but a couple of examples that prove Chess was the right person to become the first African American superior court judge in North Carolina. While many others would have been offended and ready to take measures in their own hand, Chess was not willing to bring himself to the level of a Klansman. He was well grounded and rooted in love and forgiveness, which was embedded in him by his parents and extended family. His grandmother gave him advice that served him well. She said, “You are better than nobody, but nobody is better than you.” Chess also said, “My way isn’t to get angry. If you disagree with me, I’m not going to stop talking to you.

**Chess distinguished himself by carrying himself in a professional, nonconfrontational manner that undoubtedly did much to combat ignorance and prejudice. Perhaps unbeknownst to him, Chess’s manner garnered respect and promoted reconciliation among persons of different racial backgrounds and from all walks of life.**

I’m going to keep talking and try to persuade you, and eventually you may come to see things the way I do.”

Chess distinguished himself by carrying himself in a professional, nonconfrontational manner that undoubtedly did much to combat ignorance and prejudice. Perhaps unbeknownst to him, Chess’s manner garnered respect and promoted reconciliation among persons of different racial backgrounds and from all walks of life. To use the words contained within President Abraham Lincoln’s second inaugural address, Chess’s life’s work and the manner in which he carried it out did much to help “bind up our nation’s wounds.”

Notwithstanding Chess’s manner of dealing with racial prejudice, he learned early in his career that not everyone would understand his work as a civil rights lawyer. He learned that some would despise him. During this period a white man near Chess’s office approached Chess to tell him that he saw him as being the “devil incarnate.” Later on, however, after getting to know Chess, he learned that Chess was a good man. Several years later Chess was asked to do the man’s eulogy. (p. 153)

Lest anyone conclude that Chess was a “yes man” or somehow too weak to stand up to the arduous work involved in representing clients as a civil rights lawyer during the height of the civil rights struggle, his strength of character was unquestionable. No one ever accused Chess of being weak. Strength of character includes the ability to walk away from a fight if necessary. However, Chess proved he was only human on one occasion as exemplified by the following incident that occurred at the High Point, N.C., courthouse in the early 1960s, a rare occasion in Chess’s professional life where his always calm-and-collected demeanor was challenged. Chess described the incident:

*A number of attorneys, including myself, had “shucks” (court files) in our hands waiting in line to discuss dispositions with the prosecutor. All of a sudden the prosecutor reached up from his seat and snatched the shuck from my hand. I immediately reached over and pulled him up from his seat, cocked my fist and looked him in the eye and told him, “If you ever snatch anything from me again, I’ll crack your jaw.” (p. 61)*

#### JUDICIAL WISDOM

*Chess says, “my agenda is to be open and do justice in every case that comes before me as God and conscience show me what justice is in that matter. That’s all I*

*take with me on every case.” As a private lawyer and then judge, he advocated for “justice for all people, regardless of race, societal background, or education. I think of myself as just a man and now a judge. I’m going to try to do justice in every case that comes before me.” Chess saw the absolute need to treat all who came before him with respect. He said, “The court must always stand high in the opinion of the populace. The governmental system must show respect for every citizen. If it can do that, it can survive.” (pp. 105, 115)*

Judge Chess understood the great responsibility of being a trial judge; that the role of judge is, in some respects, like that of being an umpire. However, Chess’s judicial philosophy was much more than one that called upon him to call balls and strikes. He said,

*Judges have a greater responsibility than to just sit there and rule; judges have a responsibility to make sure that defendants make an informed decision; to make sure that it is not the time constraints of counsel that are the basis of the defendant’s decision. Defendants are at a disadvantage of expressing themselves. They have had conferences with their counsel; they don’t want to anger their counsel. The defendants know they are at the hands of their counsel and that after the judge is gone they are in the hands of their counsel. As judge, I had a responsibility to take that weight off of the defendant. (The judge) says, “I’m not there to protect lawyers. I have a duty to see to it that the atmosphere is proper, that the conditions are appropriate for a defendant getting a fair and impartial trial; if the judge fails in this regard then he or she has engaged in a major failing.” My concern was to pierce the veil and see that the conditions exist to best insure those concerns. (p. 111)*

In December 1971, shortly after taking the oath of office, Judge Chess was

interviewed by a newspaper reporter. In response to the reporter’s questions, Chess acknowledged that many across our nation were questioning the legitimacy and fairness of our justice system, and whether it could be saved. His solution, that of placing competent people in all levels of our courts who have the requisite integrity and knowledge, no doubt would go a long way toward mending our justice system today.

*“There is nothing wrong with the system.” . . . What the courts need, says Judge Chess, is a better implementation, more dedicated people who will inspire confidence and “devotion to try to effect a good system.” Judge Chess said, “It seems we are not meeting the great needs of the people.” He points to what he describes as “dissatisfaction among various age and racial groups.” Young people are asking questions like, “Can it endure?” “Does it meet the needs?” The judge says young people are accusing the establishment of hypocrisy and notes that “we do not live up to the principles of our government.” “They’re asking questions about whether or not government is meeting its responsibilities” . . . “My feeling is that we have got to have people in the system who can inspire confidence in the system from the magistrate’s level to the Supreme Court.” (p. 104)*

Chess has commented on another huge problem facing the courts today: the very large number of pro se litigants who seek redress in the state and federal courts.

*The United States system of justice, whether involving criminal or civil cases, is an adversary system. There is no exception to this rule. Therefore, many cases are won or lost because of the skill or lack of skill of the lawyer representing the parties. Even worse are situations where one side is represented by one or more skilled lawyers, and the other side has to rely solely upon laymen’s knowledge in repre-*

*senting themselves in the pursuit of justice. Chess saw many such cases as a Superior Court judge and as an Administrative Law judge. (p. 123)*

Related to the pro se litigant problem facing our courts, Chess also pondered a question that has vexed many judges that care about fairness throughout time. To what extent should a judge seek to level the playing field, and thereby promote justice, which is the ultimate end of all civil disputes or criminal prosecutions? Chess resolved the issue by stepping into the fray when necessary to promote justice.

*“How does the judge try to see that a fair and just trial takes place without tipping the scale to one side or the other?” Chess believes strongly that indeed it is the job of the trial judge to see that the game is played fairly without having the tremendous power of “undue influence” affect the outcome of the case. While a judge is an independent arbiter, Chess also believes strongly that the judge’s role includes a duty of making sure that there is not a miscarriage of justice. The judge plays a unique role. He or she is in a tenuous position. There is no need for a judge to enter the fray when the adversaries are equal. Equal adversaries can take care of themselves. If the judge sees that an injustice is taking place, then the judge should step in and make sure that injustice doesn’t continue. As soon as the problem is corrected, then the judge should step back and allow the litigants to continue. (pp. 123-24)*

Judge Chess was not the kind of judge that would never admit error. Neither was he ever offended or opposed if the losing party gave notice of appeal in open court as some other judges seemed to disdain.

*He agrees that he and all judges have failures and, like the most respected judges in American history, commit error from* ▶

time to time. Judge Chess, like most judges who have tried many cases over their career, has had the court of higher authority reverse his decision. However, Chess is confident that, with regards to all the failures or mistakes he made as judge, he tried to admit them and go about correcting any error in judgment immediately. Chess says, I tried to proceed honestly and honorably in all of my doings. Whatever I've done did not vary far from who I am. My idea was that I wanted to be accurate and if I was in error in some way, I wanted to be corrected. I welcomed being corrected because in my error I might do injustice in some way. I believe that is why the system is tiered so you will have many eyes. I never made a lawyer think I would be offended by any appeal. Any injustice done would not be intended. I tried to get for an individual the fairest trial possible. I wanted any error in the facts or law to be brought up and corrected so that the individual would get the fair trial to which he is entitled. I have no ego that transcends that responsibility. My responsibility is to ensure an individual a fair and impartial trial. I have no personal interest in the case. I'd rejoice if someone points out something that was contrary to a fair and impartial trial. To do otherwise would be subverting rather than upholding those principles. (pp. 111-12)

Chess also has offered advice to the highest courts in the land. He spoke to the division and lack of comradery that affects not only our society in general, but our court system as well. The division and lack of respect for those even on the same court is evident in the dissenting opinions of various courts.

*There is a great need for the court's decisions to become final, not in the sense that a ruling has been handed down by the court, but that it has been handed down in a manner that most observers believe*

**There is a great need for the court's decisions to become final, not in the sense that a ruling has been handed down by the court, but that it has been handed down in a manner that most observers believe that the court's decision is a fair and just result.**

*that the court's decision is a fair and just result. If there is no finality, then friction continues. This continued friction will be like a scab on the skin of our system of justice. It will continue to fester. (p. 122)*

In our still deeply divided America and world today, we can learn so much from Judge Chess. In a time of many voices who are the purveyors of hate and further division in our society, we need to hear more from voices of reason and moderation. For over a half-century, Chess was and remains such a voice. Lawyers and others can learn from his example that you can be an advocate and agent for change designed to make this world a better place. Chess proved, like others among his contemporaries, that you can be an agitator and go against the system in an attempt to seek fairness and justice, and still gain the respect of others, including your adversaries. A man of integrity, Chess has carried himself in a dignified man-

ner in and out of the courtroom, which allowed him to stand out among lawyers and judges of not only his time, but also the generations before him and after his retirement. His rise to prominence gives hope to those among us who have lost hope and been denied respect because of poverty, race, or other circumstances beyond our control.

Chess is a shining example to others of how, with hard work and perseverance, one can rise above his or her circumstances in life. Indeed Chess is "among those few men in society" who possessed an abundance of the "requisite skill in the law, integrity and knowledge" that Alexander Hamilton wrote about centuries ago as being integral to qualifying for the station of a judge. Because of this, Chess commanded the respect of all who appeared before or got to know him. Perhaps retired Judge W. Douglas Albright of North Carolina's 18th Judicial District Superior Court said it best: "We are all better off as a result of Sammie Chess, Jr., being among us. . . . When his time comes, he will have left this world a better place." (p. 158)



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from THE U.S. DISTRICT COURT for the WESTERN DISTRICT OF TENNESSEE



(LEFT TO RIGHT)  
REV. JAMES  
LAWSON, ANDREW  
YOUNG, LUCIUS  
BURCH, CHARLES  
NEWMAN AND W.J.  
MICHAEL CODY  
ENTER THE FEDERAL  
COURTHOUSE IN  
MEMPHIS, APRIL  
4, 1968. PHOTO  
COURTESY W.J.  
MICHAEL CODY.

## Remembering Dr. King's last legal battle

BY SARAH SMITH

DURING THE FIRST WEEK OF APRIL OF THIS YEAR, THE CITY OF MEMPHIS, TENN., COMMEMORATED THE LIFE AND LEGACY OF DR. MARTIN LUTHER KING, JR., ON THE 50TH ANNIVERSARY OF THE SANITATION WORKERS' STRIKE AND KING'S ASSASSINATION. As part of the commemoration, the judiciary of the U.S. District Court for the Western District of Tennessee remembered a parallel court battle — a fight for the right to march downtown in the face of a federal injunction.<sup>1</sup>

This article recalls the court hearing from two perspectives, based on a 2018 interview with attorney W.J. Michael Cody, conducted by the author of this article, and a preserved oral history from Judge Bailey Brown of the U.S. District Court for the Western District of Tennessee and U.S. Sixth Circuit Court

of Appeals, conducted by Judge Gilbert Merritt in 1994 and Rita F. Wallace in 1997 and made available by the Sixth Circuit Court of Appeals Library.<sup>2</sup> The story is further evidence of the critical role the federal courts played in negotiating the legal challenges of the Civil Rights Era.

### THE RIGHT TO MARCH

King came to Memphis in spring 1968 to support and help lead a large march through downtown Memphis to promote living pay and safer working conditions for city sanitation workers. Just a few months prior, on Feb. 1, 1968, two sanitation workers — Echol Cole and Robert Walker — were brutally killed on the job when a garbage truck malfunctioned and crushed them. No compensation or benefits were available to their families. A labor dispute erupted ten days later, when 1,300 black men from the city's

Public Works Department walked off the job and began to strike for better treatment.<sup>3</sup> Every day for weeks, workers continued to strike, carrying signs with a powerful message: "I Am a Man."

A large march in support of the striking workers was held on March 28, 1968, organized by local leader Rev. James Lawson. The march turned violent after a small number of (mostly young) people stripped the sticks from the signs they were carrying and began to smash storefronts. Property damage and violence ensued. King and Lawson fled the march to safety.<sup>4</sup> Mayor Henry Loeb declared martial law and called in 4,000 National Guard troops.

King was determined to see the workers' cause through, and he sought to return to Memphis to lead a second march to promote economic equality and social justice — in line with the goals of his Poor People's Campaign.<sup>5</sup> ▶

At the time, Cody was a young associate at the law firm of Burch Porter & Johnson, president of the West Tennessee Chapter of the American Civil Liberties Union, and a member of the ACLU's national board. Judge Brown, a former named partner at the same firm where Cody worked, was the chief judge of the U.S. District Court for the Western District of Tennessee.

The city of Memphis sued to enjoin King and his colleagues at the Southern Christian Leadership Conference from leading the second march through downtown Memphis. Cody, working under trial lawyer Lucius Burch, participated in that injunction hearing and ruling — King's last court battle. Because the judge assigned to the case was out of town, Judge Brown handled and issued the temporary restraining order on the morning of April 3, 1968.

That same day, Dr. King delivered his powerful "I've Been to the Mountaintop" speech, reflecting on his own mortality:

Like anybody, I would like to live a long life — longevity has its place. But I'm not concerned about that now. I just want to do God's will. And He's allowed me to go up to the mountain. And I've looked over, and I've seen the Promised Land. I may not get there with you. But I want you to know tonight that we, as a people, will get to the Promised Land. And so I'm happy tonight; I'm not worried about anything; I'm not fearing any man. Mine eyes have seen the glory of the coming of the Lord.<sup>6</sup>

A hearing to dissolve the restraining order was held on April 4, 1968. Dr. King was assassinated that evening on his hotel balcony in Memphis.

## TO THE FEDERAL COURTS

On the morning of April 3, 1968, Mike



PHOTO COURTESY W.J. MICHAEL CODY

*If the march continued in direct violation of a federal injunction, civil rights protections enforced by the federal courts might be diluted.*

Cody received a telephone call from a colleague at the ACLU in New York City. The ACLU sought to have Cody represent King to have the temporary restraining order lifted, despite King's "threatening in the media that he was going to conduct the march anyway."

"The federal injunction was the only reason we were intervening. The city wanted it to be in federal court," said Cody. "They didn't name Jim Lawson or anyone local [in order] to guarantee that it would stay in federal court."

Cody went upstairs to Burch, a seasoned and revered litigator, to see how to proceed:

At that point, Burch wanted me to get a telegram or something to get us formally engaged and not be volunteering to do this. The telegram ended up coming about the time we ended up going to court the next morning.

The other thing was that Burch wanted to meet with Dr. King. We went over to the Lorraine Motel.

Burch went to the Lorraine motel with Cody and fellow young attorneys David Caywood and Charles Newman. Memphis attorneys Louis Lucas and Walter Bailey were also involved in the matter from the Ratner, Sugarmon firm.

Burch and Cody knew why the city wanted to pursue the injunction in federal court. If the march continued in direct violation of a federal injunction, civil rights protections enforced by the federal courts might be diluted. Their strategy was clear: Burch and his associates would seek to have the injunction lifted and, in exchange, they would agree to restrictions on the march. They also needed to respond to another of the city's concerns — "that, among other [safety concerns], they had threats against King's life and couldn't even guarantee his safety."

Two themes emerged in the hearing: (1) The city would be safer having nonviolent leaders leading and supervising the march; and (2) city leaders were amenable to certain restrictions to guarantee safety. There was plenty of familiarity among the lawyers, Cody recalls. Judge Bailey was the Brown of Burch, Porter, Johnson, and Brown, prior to taking the bench. The attorney for the city, James Manire, had also worked as an attorney at Burch, Porter, and Johnson. The collegial nature of

their relationships helped to make the later compromise possible.

Burch called three witnesses to discuss how the march could be conducted safely, relying on King's leadership and nonviolent principles: Andrew Young (later Ambassador to the United Nations), Lawson, and John Spence of the U.S. Commission on Civil Rights. Burch was able to get city witnesses to admit that, if the march were going to happen, they would "rather have the march occur when it is under the leadership of people who have an established conviction for nonviolence and a strong self-interest in maintaining nonviolence."<sup>7</sup>

Lawson testified: "[I]t is Dr. King's desire, as it is mine, that Memphis and people everywhere learn to put into application the high ideals that most of us confess concerning neighborliness, love, justice, understanding, and not just, you know, on Monday, but every day of the week."<sup>8</sup>

A compromise was reached to allow the march to proceed with safety conditions; the order lifting the injunction would be entered the following day.

When asked about the most memorable moment of his career, Judge Brown later said it was "the Martin Luther King case — it was really fortuitous, because it should have been [Judge] McRae's case, but he was away. I went to all of that trouble, and I tried to settle the case. But by the end of the day after I started home, I'd heard that he'd been shot and killed."<sup>9</sup>

When a former law clerk of Judge Brown's later reflected on his career, he commented about the hearing: "As frequently occurred in his court, the two sides seemed to be hopelessly at odds at the beginning of the day but had, under Judge Brown's firm but fair guidance, reached agreement by the end of the day."<sup>10</sup> Judge Brown guided the tes-

timony and the lawyers, and he helped them reach a resolution.

So after I got that kind of understanding out in the courtroom, I called them back into my chambers, and I said, "Do I interpret the situation right? The King people are willing to submit to these kind of restrictions, and the city is of the feeling that while they won't agree to it, they will not really oppose my withdrawing the restraining order provided there's limitations set on it?" And they said yes. I said, "Okay. You all go and draw an order and bring it back, have it in here bright and early in the morning, and you can go on with the parade under these conditions."

Judge Brown recalled that evening: Of course, when I was driving home that night, I heard on the radio that King had been killed, been shot and killed. So I mean I had deputy marshals around my house for the next three weeks or a month. I never could figure out who was supposed to be mad at me, who I was supposed to

have made mad by what I had done. But the deputy marshals spent their time watching my little boy out in the sandbox, and that's what it all amounted to.

The march went forward several days later, without King. It was peaceful, and the sanitation workers ultimately reached an understanding with the city of Memphis. Lawson's testimony proved true: "[T]he best defense against urban explosion in the midst of urban injustice is to have creative, vital, nonviolent movements, which include marches, because, then, this helps the angers and the frustrations and the fears of people to find legitimate expression and a means of changing their wrongs."<sup>11</sup>

— SARAH SMITH is a law clerk to Judge Bernice B. Donald, United States Court of Appeals for the Sixth Circuit. She will join the law firm of Burch Porter & Johnson PLLC this year as an associate. She thanks Mike Cody (Partner, Burch, Porter & Johnson, PLLC) and Nick Farris (Satellite Sixth Circuit librarian) for their assistance with this article.

<sup>1</sup> See *Court Recalls MLK's Last Legal Battle* (Apr. 6, 2018), <http://www.uscourts.gov/news/2018/04/06/court-recalls-mlks-last-legal-battle>.

<sup>2</sup> Interview with W.J. Michael Cody (June 2, 2018); Oral History Interview by Judge Gilbert S. Merritt and James A. Higgins, with Senior Circuit Judge Bailey Brown (June 6, 1994) (on file with the Library of the United States Court of Appeals for the Sixth Circuit); Second Oral History Interview by Rita F. Wallace, Court Historian, with Senior Circuit Judge Bailey Brown (Oct. 16, 1997) (on file with the Library of the United States Court of Appeals for the Sixth Circuit).

<sup>3</sup> See *Memphis Sanitation Workers' Strike*, THE MARTIN LUTHER KING, JR. RESEARCH & EDUCATION INSTITUTE, <https://kinginstitute.stanford.edu/encyclopedia/memphis-sanitation-workers-strike>.

<sup>4</sup> See W.J. Michael Cody, *King at the Mountain Top: The Representation of Dr. Martin Luther King, Jr.*,

*Memphis*, April 3-4 1968, 41 U. MEM. L. REV. 699, 700 (2011).

<sup>5</sup> *Memphis Sanitation Workers' Strike*, *supra* note 3.

<sup>6</sup> Dr. Martin Luther King, Jr., "I've Been to the Mountaintop," Address at Bishop Charles Mason Temple (Apr. 3, 1968), <https://kinginstitute.stanford.edu/king-papers/documents/ive-been-mountaintop-address-delivered-bishop-charles-mason-temple>.

<sup>7</sup> *City of Memphis v. Martin Luther King, et al.*, No. C-68-80, 81 (W.D. Tenn. Apr. 3, 1968), <https://www.tnwd.uscourts.gov/pdf/content/CityOfMemphisVKingTranscript.pdf>.

<sup>8</sup> *Id.* at 135 (testimony of Reverend James Lawson).

<sup>9</sup> Oral History Interview, Oct. 16, 1997, *supra* note 2 at 187.

<sup>10</sup> Presentation of the Portrait of the Honorable Bailey Brown, Aug. 5, 1987. On file with the Library of the United States Court of Appeals for the Sixth Circuit.

<sup>11</sup> *City of Memphis*, No. C-68-80, at 146.



# Rights that made the world right

*How freed slaves extended the reach of federal courts and expanded our understanding of the Fourteenth Amendment*

by LAURA F. EDWARDS

*In 1870, Maria Mitchell, an African American woman in Edgecombe County, North Carolina, did something that she could not have done when she was enslaved: She “talked for her rights.” Mitchell had a problem with B.D. Armstrong, a white landowner who was likely her employer. According to the testimony in the trial that followed, she expressed her anger in a form common to the 19th-century South, a highly stylized, verbal barrage designed to draw attention to the situation and to shame the intended target. Or, as her son put it, “his Mama was talking loud.” Armstrong demanded that she stop. Mitchell responded that “she was talking for her rights and would as much as she pleased and as loud as she pleased.” So Armstrong issued a threat: “if she did not hush he would make her hush.” When Mitchell continued to denounce him, he struck her in the face and broke out a piece of her tooth — or so she alleged when she turned her words into action and used her rights to file charges against him.<sup>1</sup>*

The case provides a particularly compelling example of how the constitutional changes of the Reconstruction era extended rights to African Americans and, as a result, opened up the legal system to them. The Reconstruction Amendments profoundly altered the legal status of Maria Mitchell and other African Americans: the Thirteenth Amendment abolished slavery; the Fourteenth Amendment established birthright citizenship and provided federal protection of civil rights, which prohibited states from discriminating on the basis of race; and the Fifteenth Amendment provided federal oversight of voting rights. Mitchell's words, that "she was talking for her rights and would as much as she pleased and as loud as she pleased," underscored the importance of those changes in a way that was hard to miss.

Her case also shows how those constitutional changes dramatically affected legal matters that most people would consider unremarkable, not constitutional. While Maria Mitchell's case was adjudicated in the South, the legal framework that shaped her case was not exclusively Southern. It characterized the operation of law in local courts throughout the United States, and it was the one with which most Americans had familiarity in the early 19th century. This part of the legal system, focused at the local level, was charged with maintaining the public order or, in the terminology of the time, keeping the peace — a body of issues that included all but the most serious criminal cases as well as a broad range of issues involving the public health and welfare. The expectation was that officials would adjudicate conflicts in the community, doing what was right, although, obviously, not everyone agreed on what was right and not everyone's opinion carried equal weight, given the rigid inequal-



*More often than not, the application of rights tended to preserve existing inequalities, because lawmakers concerned themselves with the rights that governed property ownership and economic exchange, a body of law concerned with the interests of those who owned property, not those without.*

ities of the early 19th century. Once local cases were concluded, the documents were folded in thirds, tied with a ribbon, filed away, and forgotten. So, too, was the legal context that produced these documents.<sup>2</sup>

These local courts seem far removed from the Fourteenth Amendment and the rights it protected. But they were not. This article explores how the Fourteenth Amendment brought together two legal frameworks — one focused on the rights of legally recognized individuals, which was the purview of state and federal jurisdictions, and the other focused on maintaining the public order and, essentially, doing what was right, which was associated with local jurisdictions — and encouraged Americans to see federal authority, in particular, as the protector of both rights and what was right. The result was a rights revolution, initiated by ordinary Americans, that transformed not just the meaning of rights, but also the reach of federal authority, stretching both to cover a much wider array of issues than had been

the case before passage of the Fourteenth Amendment. The implications have been both profound and enduring, supporting expansive expectations of what rights can do and what federal authority can accomplish.<sup>3</sup>

### *Legal Frameworks*

Maria Mitchell was "talking for her rights." Reading only her words, it seems like a straightforward claim: Mitchell was demanding rights that other American citizens had but that had been denied to her by state law until the federal government interceded with the Reconstruction Amendments, particularly the Fourteenth Amendment. When placed within the broader context of the legal system in the 19th century, however, that interpretation provides only a partial explanation of the import of Maria Mitchell's words.

Current scholarship tends to focus on law and legal institutions at the state and federal levels. But those jurisdictions did not have a monopoly on legal authority or the governing practices that

initiated new laws and enforced existing ones in the first half of the century. Instead, legal authority was widely dispersed and resided in institutions that were relatively private, such as households, churches, and communities, as well as those that were relatively public, such as local, state, and federal governments in their judicial, legislative, and administrative forms — although the lines between the categories of private and public forms of governance often blurred. Together, these various jurisdictions constituted a governing system that captured and contained the contradictory impulses of American life: They maintained existing inequalities while also adjudicating conflicts generated by those inequalities.<sup>4</sup>

Americans had more experience with some legal jurisdictions than with others. The federal government figured prominently in the territories, which lacked the institutional apparatus of state government. But it was a distant entity for most Americans, who encountered it in only a few ways: through the military, the campaigns of aspirants to federal office, the postal service, and in the context of federal cases, of which there were few, particularly in the first few decades of the 19th century.<sup>5</sup> People were more likely to encounter the legal authority of states, which had jurisdiction over most of the work of governance, through their responsibilities to protect the rights of individuals and to maintain the public order. But states then delegated significant power to counties and municipalities in matters involving the public order, making local areas, not the states, the jurisdictions most closely associated with those duties. That situation dates from the Revolution, when lawmakers turned their colonies into states and then decentralized the most important functions of state government, all in the name of bringing law

closer to the people. Much of the daily business of governance was done in local legal venues such as the circuit courts and even more localized proceedings, such as magistrates' hearings and trials. These locations made the law part of the fabric of people's lives. They convened wherever there was sufficient space — in a house, a barn, a mill, or a yard. That was true even for circuit courts in the first decades of the 19th century, when many counties lacked the formal courthouses that would later house circuit courts. Local courts were the legal jurisdictions that would have been the most familiar to most Americans, given the wide range of issues handled in these venues and the wide variety of people who were involved in the process of adjudicating them.<sup>6</sup>

State and federal jurisdictions dealt with the protection of individual rights, although states handled a much wider variety of such cases. In the 19th century, the term "individual rights" — or "rights" for short — referred to those rights that were thought to be conferred by government, namely civil rights and, increasingly, political rights, which were available to those people recognized as legal individuals (namely free white men, particularly those with property). Secondarily, the term referred to natural rights, which belonged to everyone and could not be abridged by government, at least in theory. In practice, what constituted a natural right was contested and ultimately dependent on government recognition and enforcement. Natural rights — even life and liberty — were also connected to civil and political rights, in the sense that those who could claim civil and political rights (free white men) had stronger claims to natural rights than those who did not (such as married women, the enslaved, and even the working poor). Property ownership was inseparable

from individual rights; property requirements for suffrage had only recently been eliminated for white men by the time of the Civil War. Even then, suffrage for white men was not quite universal: Elections for some offices in some states were still restricted on the basis of property. And most civil rights involved the ownership, accumulation, and exchange of property or access to those jurisdictions with authority over that body of law.<sup>7</sup>

Even though 19th-century political leaders invoked rights in expansive terms, often in connection to liberty, freedom, and equality, with the implication that they could accomplish those ends, rights had different implications within the legal system. To be sure, rights were necessary for individuals to function independently in American society. Without them, it was impossible to claim legal ownership of property, enter into contracts, or defend one's interests in state or federal courts. But, in the legal system, rights did not do the kind of work that the political rhetoric of the time implied. They resolved competing claims among individuals by identifying winners and losers, a situation that undercut the connection between rights and equality posited in political rhetoric. State courts, moreover, were committed to the preservation of rights as such, not to the concerns of the individuals who brought their problems for adjudication.

As a result, the legal framework of rights produced outcomes of questionable justice, according to the standards of many Americans: a conviction overturned because of an improperly framed indictment, for instance, or the seizure of property because of a faulty bill of sale. More often than not, the application of rights tended to preserve existing inequalities, because lawmakers concerned themselves with the ▶

rights that governed property ownership and economic exchange, a body of law concerned with the interests of those who owned property, not those without. That situation explains the popular stereotype of lawyers as parasites who exploited arcane rules to profit from the misfortune of others.<sup>8</sup>

### *Upholding the Social Order*

The fact that states also had broad powers to regulate in the name of the public health and welfare also limited people's rights. State constitutions did have bills of rights, but the rights they enumerated were not absolute. In fact, state and local governments exercised wide latitude in limiting or suspending the rights of individuals in the name of the public good. That legal logic sanctioned not just slavery, but also the range of restrictions placed on free blacks, all women, and many white men without property. A right was a right only as long as the state decided not to take it away.<sup>9</sup> States delegated considerable authority over matters regarding the public welfare to local courts. In adjudicating most of these issues, local courts aimed to keep the peace — to do what was right, not to uphold the rights of individuals.

"The peace" was a well-established concept in Anglo-American law that expressed the ideal order of the metaphorical public body, subordinating everyone (in varying ways) within a hierarchical system. The peace was inclusive, but only in the sense that it forced everyone into its patriarchal embrace, raising its collective interests over those of any given individual. Keeping the peace meant keeping everyone — from the lowest to the highest — in their appropriate places, as defined by rigid inequalities of the early 19th century. Maintaining the peace was never a peaceful proposition; it was about coercion.<sup>10</sup>

While this localized system did not recognize the rights of free women, children, enslaved people, or free blacks, it still incorporated them into its basic workings, because they were part of the social order that the legal process was charged with overseeing. The system maintained their subordination and regulated their behavior. But it also relied on information they supplied about community disorder. Take, for example, two cases in North Carolina initiated by slaves: one slave complained to a magistrate that a free black man had been playing cards with other slaves on a Sunday; another complained that the same free black man assaulted one of those slaves after the card game. (One suspects that another complaint could have been filed about the consumption of "spirituous liquors," a common morals charge.) Technically, these slaves gave "information," because laws prohibited all slaves from filing a complaint; the magistrate then proceeded with the case based on that information.<sup>11</sup>

These two enslaved men had their own reasons for what they did, reasons distinct from the magistrate's likely concerns about disorder among slaves and free blacks. As such, the cases illustrate central elements of this part of the legal system. Different people pursued different ends within it, sometimes at the same time. Masters filed charges against slaves they could not control. Families regularly brought their feuds to court for resolution, with wives, husbands, parents, children, siblings, aunts, uncles, and cousins all lining up to air their dirty laundry. Even enslaved people tried to mobilize local courts to address their concerns. That was possible, because the system depended on the participation of everyone in the local community.<sup>12</sup>

The "law" in this part of the system was capacious and uncontrolled by legal professionals. In most legal mat-

ters, the interested parties collected evidence, gathered witnesses, and represented themselves. Local courts did follow state laws regarding rights in procedural respects, particularly in determining who could prosecute cases in their own names. But determinations about the merits of the claims — righting the wrongs in question — relied on common law in its traditional sense as a flexible collection of principles rooted in local custom, but that also included an array of texts and principles, in addition to statutes and state appellate law, as potential sources for authoritative legal principles. The information provided by those with an interest in the case also mattered, because the expectation was that outcomes should preserve the social order, as it existed in particular localities. Preservation of the social order was also why court officials took evidence and even prosecuted cases on behalf of individuals without the legal right to testify or prosecute — enslaved people, married women, and minors. This area of law existed in the lived context of people's lives and existing social relationships — what the scholarship tends to identify as elements of social history, distinct from the law.<sup>13</sup>

This legal framework allowed for the handling of situations that might not have had legal standing in either state or federal jurisdictions. Magistrates regularly prosecuted husbands, fathers, and even masters for violence against their wives, children, and slaves, because the authority granted heads of household was not absolute but was contingent on the maintenance of the social order. The court was concerned with keeping flagrant abuses of power in check so that households did not fall apart, not attending to the individual rights of either household heads or dependents. Magistrates also recognized that wives and slaves controlled property,



*Local courts meted out justice on a case-by-case basis to right wrongs, not to maintain individual rights or even to produce precedents that others could claim. One person's experience did not transfer to another person of similar status or predict any other case's outcome.*

even though they could not own it in other areas of law. The point was to keep the property where it belonged, not to uphold property rights.<sup>14</sup>

#### *Particular, Not Universal*

The effects of legal decisions then remained with the particular people involved, because the system was so personalized. Local courts meted out justice on a case-by-case basis to right wrongs, not to maintain individual rights or even to produce precedents that others could claim. One person's experience did not transfer to another person of similar status or predict any other case's outcome. Each jurisdiction thus produced inconsistent rulings, aimed at resolving particular matters, rather than producing a uniform, comprehensive body of law. Many saw that situation as natural and just: It made no sense to impose arbitrary rules developed elsewhere rather than to pay attention to the particular dynamics of local communities.<sup>15</sup>

Of course, people in local communities regularly disagreed on what was right. The legal process at the local level

acknowledged that situation and provided a means for arriving at an outcome that would allow people to put conflicts behind them and move on. Consensus, however, was more apparent than real. In the slave South, it rested on a social order that subordinated the vast majority of the population — all African Americans, free white women, and property-less white men. All these groups experienced different levels of subordination, with enslaved African Americans enduring the most extreme forms. But none of these people could redefine the structural dynamics of the social order, even though they participated in the system and occasionally bent it to their interests. To the extent they had credibility, it was because of the social ties that also defined their subordination. They were insiders, not outsiders: enslaved people who had the support of their masters and other whites; married women who were known as good wives and neighbors; poor white men known for their work ethic and amiability. Positive outcomes of cases involving those insiders did not result in favorable treatment for anyone

else. To the contrary, local communities in the slave South inflicted horrific punishments on those, particularly enslaved African Americans, who did not fulfill their subordinate roles. Those outcomes seemed just plain wrong to those who did not have the status to receive favorable treatment.<sup>16</sup>

Still, the legal culture of local courts was deeply engrained within American society and carried considerable power at the time of the Civil War. It framed expectations about what the law was supposed to be and do, even for those on the margins of the local legal system: The law should actively uphold what was right.<sup>17</sup>

#### *African Americans' Rights During Reconstruction*

African Americans, like Maria Mitchell, brought those expectations to the courts during Reconstruction. When Mitchell filed assault charges against B.D. Armstrong in 1870, she was using her new civil rights, which allowed her to access the legal system. But those rights were not the ones she had been talking about; those rights — the ones that were unspecified, but loudly asserted — were about what was right. The charges underscore the point: She charged B.D. Armstrong with assault, which was an offense against the peace of the community, a disruption of the public order, not a violation of Maria Mitchell's rights. People pursued such cases because they wanted public condemnation of behavior at odds with their view of the public order. In the first half of the 19th century, such claims about what was right stayed at the local level. But the Reconstruction Amendments, particularly the Fourteenth Amendment, changed all that. Those amendments did not just affirm the rights of African Americans. They also made it possible for claims about what was right to travel ►

elsewhere in the system, altering the meaning of rights and changing people's relationship to the federal government. What was right acquired a closer relationship to rights.

Claims about what was right first traveled into federal jurisdictions through the claims of enslaved African Americans during the Civil War. Maria Mitchell's efforts to use the legal system are characteristic of the actions of many formerly enslaved people. Although contemporary observers and later historians have taken such actions for granted, it is remarkable that people who had been enslaved would look for redress in the very legal system that had maintained their enslavement. But they did. Historians usually attribute such faith in the law to the promise of rights. But formerly enslaved African Americans also were acting on other, deeply rooted expectations about the law — that it should do what was right and maintain a just public order. The promise of the moment gave them hope that they could access legal authority to elaborate their vision of what was right — of what constituted a just society.<sup>18</sup>

Those expectations explain why enslaved African Americans began bringing their complaints to legal venues during the Civil War, when their claims to freedom, let alone to rights, were still tenuous. Once behind federal lines, African Americans sought out military officials and military courts to adjudicate their conflicts. They continued to do so after Confederate surrender but before passage of the Fourteenth Amendment — a time when the states of the former Confederacy limited the rights of all African Americans through the notorious Black Codes. African Americans came to these venues with rights claims. But they also expected federal officials to address the kinds of issues that would have fallen to local

courts and that had been handled within the framework of doing what was right: interpersonal conflicts, often involving violence and including domestic issues, as well as matters involving broader questions of social justice, such as the treatment of refugees, payment of wages, and reunification of families. In those cases, they expected federal venues to do what was right, not just to uphold rights. The various courts under federal jurisdiction, which lacked an established body of law to handle this diverse array of claims, struggled to keep up. Most of the issues were not of the kind that had previously fallen within federal purview. But African Americans persisted, pushing past jurisdictional boundaries in the pursuit of justice.<sup>19</sup>

The exercise of federal authority in cases of this kind might have been temporary if not for the passage of the Reconstruction Amendments, particularly the Fourteenth Amendment, which gave the federal government authority over the states' handling of rights — something that the federal government did not have before. To be sure, those powers were limited and largely negative. The Fourteenth Amendment placed restrictions on states, prohibiting them from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States" or depriving any person "of life, liberty, or property, without due process of law." It also prohibited the denial "to any person within its jurisdiction the equal protection of the laws." The federal government could regulate the administration of rights, as defined by the states, but it could not create or distribute rights. Later Civil Rights Acts extended federal authority in ways that brought it into state law more actively. But, given political opposition and the limited resources of federal enforcement

agencies, that authority was never fully utilized in the late 19th century.<sup>20</sup>

That negative power was nonetheless profound, particularly in the states of the former Confederacy. The Fourteenth Amendment forced states to extend rights to African Americans, which made it possible for Maria Mitchell to turn B. D. Armstrong's assault into a legal matter. If she had still been enslaved, Maria Mitchell could not have prosecuted a case of assault; like the two slaves mentioned earlier, she could only have given information. Mitchell and other African Americans could file charges because of their civil rights, which were enabled by the Fourteenth Amendment, enshrined in state constitutions, and protected by the threat of federal intervention.<sup>21</sup>

What happened in those local courts then altered federal authority. The Fourteenth Amendment opened up paths for ordinary Americans' conceptions about "what was right" to migrate out of local venues through the framework of "rights." (The Fifteenth Amendment did the same for voting rights.) Before those constitutional changes, Americans' claims about what was right remained in the local courts. Once a wrong was righted, order was restored. There were no further consequences for the law. Such cases would never have made it to a federal jurisdiction.<sup>22</sup>

### *Beyond Local Jurisdiction*

The framework of rights allowed one person's claims about what was right to acquire the power of a universal claim, enforceable by federal authority. They could even acquire the status of constitutionally protected rights. One of the most dramatic examples is access to public venues and services, such as streetcars, railroads, restaurants, hotels, and even government jobs and education. In the early 19th century, claims to



*During and after the Civil War, African Americans framed claims to new spaces in terms of rights that the state should extend to them and that the federal government should protect. Who, they asked, had a right to access public space and public accommodations if not the public? Was it not the government's duty to ensure access?*

access involved the maintenance of the public order, not the rights of individuals. To the extent that questions of access involved rights, they were part of the nebulous category of social rights (privileges that were established in context and thus varied from one community to another and that were not protected by state or federal law). Vendors of such services were required to serve the public and were subject to state and local regulation as a result. But such expectations never guaranteed equal access. To the contrary, access to public areas and public services had always been restricted, particularly for African Americans but also for all women. The result was a patchwork of local ordinances and longstanding customary practices, which constrained where African Americans could go and how they could act. During and after the Civil War, African Americans framed claims to new spaces in terms of rights that the state should extend to them and that the federal government should protect. Who, they asked, had a right to

access public space and public accommodations if not the public? Was it not the government's duty to ensure access?<sup>23</sup>

Such claims were not that far removed from those of Maria Mitchell, who was claiming the right to use space in ways that her employer clearly rejected: She could speak her mind where she wanted to and how she wanted to. To be sure, such views also had the support of key Congressional leaders. But it was ordinary people who pushed popular conceptions of access to public spaces as a "right" into legal arenas. The Civil Rights Act of 1875 explicitly acknowledged such claims as rights. Those provisions were subsequently declared unconstitutional, but cases involving access to public space continued to cast the issues in terms of civil rights, a characterization that was ultimately accepted and institutionalized.<sup>24</sup>

### *Violence*

African Americans' claims to those rights already recognized in state and federal law

were always difficult to separate from their conceptions of what was right, because of the structural racism in 19th-century society. Structural racism often took form in violence. White supremacists used violence widely and indiscriminately to keep African Americans from using their civil and political rights — to keep them from going to court or voting. But white supremacists also used violence widely and indiscriminately to keep African Americans from pursuing their vision of what was right — to keep them from using public space, advancing economically, gathering together, and even going to school.<sup>25</sup> Local courts routinely adjudicated cases involving violence that did not involve violations of civil or political rights — like that of Maria Mitchell. Many more acts of violence never reached the courts for adjudication at all. What distinguished the conflicts that remained at the local level from the ones that migrated to federal jurisdictions was the link to civil and political rights: If the violence in question resulted in a rights violation, then it could move up and out of the local courts. But the emphasis on those cases involving rights obscures underlying commonalities in all cases of violence: When African Americans challenged violence in court, they were challenging a social order marred by structural racism. They were substituting their own vision of what was right, by using their rights.

*United States v. Cruikshank*, one of the most famous cases of the period to reach the U.S. Supreme Court, provides a particularly dramatic example. The case resulted from the federal government's involvement in sorting out voting rights violations in Louisiana's 1872 election. A year later, there was no clear outcome and some local areas were still in a state of upheaval. In the town of Colfax, uncertainty exploded into violence, when a white mob, aligned with the ▶

Democratic Party, attacked local African Americans, aligned with the Republican Party. There is still no clear reckoning of the death toll, but it is estimated that the white mob killed between 60 and 150 African Americans. Federal prosecutors did what they could to identify, charge, and convict the members of the white mob. The defendants then promptly turned around and appealed, claiming that the federal government had overstepped its authority. As in so many other cases from this period, it was difficult to distill questions about rights from broader questions about what was right: There were the voting rights of African Americans and the rights claimed by the white mob's concerns over the public order. Ultimately, the justices who decided the case did so through the framework operative in that jurisdiction — which clearly frustrated some of the justices, who could find no good way uphold rights and to achieve justice. The decision affirmed the claims of the aggrieved members of the white mob, limiting federal authority and, with it, the federal government's ability to intervene on behalf of African Americans who claimed rights violations.<sup>26</sup>

### *Myra Bradwell and Women's Rights*

The implications of the era's constitutional changes did not end with African Americans. The Reconstruction Amendments, particularly the Fourteenth Amendment, altered the relationship of all Americans to rights and the federal government: They positioned the federal government as an arbiter between all Americans and their states, while also elevating the importance of rights as the means by which Americans could access federal power. It did not take them long to do so, as evidenced in *Bradwell v. United States* and *The Slaughter-House Cases*, both of which were heard by the

Supreme Court in 1873, the very year of Colfax massacre.

Myra Bradwell — the Bradwell in *Bradwell v. United States* — played an influential role in Illinois legal circles as editor of the *Chicago Legal News*, the publication on which many lawyers in the state depended to keep current on the law. It was, then, deeply ironic when the Illinois state legislature — filled with lawyers who read her publication — refused to consider her application to the bar. Bradwell challenged the decision, making creative use of the Fourteenth Amendment. She admitted that the opportunity to apply to the bar was not, in itself, a right. Even so, it was centrally connected to her right to pursue her livelihood and her property interests — issues of central importance to women, who lost such rights under coverture. When the legislature refused to consider her application, they had denied rights to her that were granted as a matter of course to other (male) citizens. The Supreme Court rejected the first part of the argument, which focused on what qualified as a protected right in the Fourteenth Amendment, thereby evading the second part, which dealt with the amendment's application to women. Still, her use of the Fourteenth Amendment illustrates the broader transformation underway.<sup>27</sup>

The New Orleans butchers in *The Slaughter-House Cases* were challenging an ordinance that regulated the slaughtering of meat and, among other things, required licensing and designated a central location for slaughterhouses downstream from the city. State and local governments had traditionally regulated the slaughterhouses where butchers worked because of the public health risks. But the butchers in New Orleans had a particular beef (so to speak) with their government: They were white men, mostly supporters of

the Democratic Party, who saw the regulation as overreach on the part of the Republican Party, which was then in control of the city. With the backing of their party's leadership, they reached for the laws of their political opponents and used the Fourteenth Amendment to protect what they saw as their right to pursue a livelihood as others could. Like Bradwell, the butchers framed access to economic opportunities as a right protected by the Fourteenth Amendment. The court rejected the butchers' claims, upholding the states' rights to regulate for the public good, and tried to limit the meaning of rights in the Fourteenth Amendment, insisting that it was designed to protect the civil and political rights of African Americans — that is, their claims to those rights already recognized in state law. In both the *Slaughter-House* and *Bradwell* cases, the judges sought to contain the multiplication of rights.<sup>28</sup>

In which direction do these cases move? It is possible to read them as an affirmation of the Fourteenth Amendment's protection of African Americans' civil and political rights, because they limited other rights claims. It is also possible to read them as a harbinger of arguments that connected the Fourteenth Amendment to economic claims and, ultimately, a broader array of rights, often at the expense of protecting the civil and political equality of African Americans. Scholars have made both arguments, and the scholarship has stalled out there, unable to resolve the conflict. Yet the conflict was — and is — the point. These cases are examples of the efforts of Americans — all kinds of Americans — to make their view of what was right into a right.

### *Conclusion*

The cases of formerly enslaved people like Maria Mitchell and the African

Americans who lived in Colfax, La., had a lot in common with those of Myra Bradwell and the New Orleans butchers. They all made rights claims, appealing to federal authority either indirectly or directly. And they were not alone. The key cases of the late 19<sup>th</sup> century feature a diverse array of characters — a grain elevator operator in Illinois, German brewers in Kansas, bakers in New York, to name a few — all with expansive views of federal power and what it could accomplish. Those views were firmly embedded in the constitutional changes of the Reconstruction era that dealt with rights but did so in a way that tied rights to expectations that legal venues would right wrongs — that rights made the world right. If anything, the connection between rights and what was right was even stronger in popular conceptions of the legal order, which increasingly identified rights as a means — even the primary means — to achieve justice.

That link carried its own problems —

and still does. As the frustration of justices in *Cruikshank* suggests, individual rights, even in their most expansive form, had definite limits when it came to achieving social justice. Nor was the preservation of an individual's rights always synonymous with the public good. Still, the policy changes of the Reconstruction era allowed the aspirations of diverse groups of Americans to move into the realm of federal law and, once there, to acquire the status of universal legal principles. The results remade the relationship between Americans and the nation state, raising expectations about the federal government's role in maintaining a just social order. Those expectations could only result in conflict, as there was no consensus among the American people about what was right — about what constituted a just society. At the same time, though, the conflicts were and are necessary: They are about our aspirations for what the nation can be and our faith in the law to realize those aspirations.



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<sup>1</sup> *State v. Armstrong* (1870), Criminal Action Papers, Edgecombe County, State Archives of North Carolina, Raleigh, North Carolina. This case is from the County Court, and is in its original, manuscript form with the other cases from this court in the State Archives.

<sup>2</sup> LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009). The discussion of local courts draws extensively on the analysis in this book, which was based on local court records in North Carolina and South Carolina. The local courts in parts of the country worked similarly, as my own research and that of others suggests. See, e.g., Laura F. Edwards, *Textiles: Popular Culture and the Law*, BUFF. L. REV. 64, 193–214 (2016); see also MARTHA JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018); KELLY KENNINGTON, *IN THE SHADOW OF DRED SCOTT: ST. LOUIS FREEDOM SUITS AND THE LEGAL CULTURE OF SLAVERY IN ANTEBELLUM AMERICA* (2017); Felicity Turner, *Rights and the*

*Ambiguities of Law: Infanticide in the Nineteenth-Century U.S. South*, 4 J. CIV. WAR ERA 350 (2014); Kimberly Welch, *Black Litigiousness and White Accountability: Free Blacks and the Rhetoric of Reputation in the Antebellum Natchez District*, 5 J. CIV. WAR ERA 372 (2015).

<sup>3</sup> In addition to *The People and Their Peace*, this Article draws on three other publications by Edwards: LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* (2015) [hereinafter *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION*]; Laura F. Edwards, *Reconstruction and the History of Governance*, in *THE WORLD THE CIVIL WAR MADE* 30 (Gregory P. Downs & Kate Masur eds. 2015) [hereinafter *RECONSTRUCTION AND THE HISTORY OF GOVERNANCE*]; Laura F. Edwards, *Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South*, 112 AM. HIST. REV. 365 (2007) [hereinafter *Status Without Rights*].

<sup>4</sup> *RECONSTRUCTION AND THE HISTORY OF GOVERNANCE*, *supra* note 3. Such a perspec-

tive is common in scholarship that focuses on the colonial period. See LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900* (2011); PHILIP J. STERN, *THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATION OF THE BRITISH EMPIRE IN INDIA* (2011); *THE MANY LEGALITIES OF EARLY AMERICA* (Christopher L. Tomlins & Bruce H. Mann eds. 2001). But the idea of “many legalities” and overlapping legal arenas tends to drop out of the scholarship focused on the 19th century, where the presumption is that the new nation secured a monopoly on legal authority with its founding. Recent work, however, suggests otherwise. See, e.g., William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, in *THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY* 85 (Meg Jacobs, William J. Novak & Julian Zelizer eds. 2003); *THE LONG NINETEENTH CENTURY (1789-1920)* (Christopher Tomlins & Michael Grossberg eds. 2008); BARBARA YOUNG WELKE, *LAW AND* ▶

THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES (2010); William J. Novak, *The American Law of Association: The Legal-Political Construction of Civil Society*, 15 *STUD. AM. POL. DEV.* 163 (2001).

- <sup>5</sup> See, e.g., RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SERVICE FROM FRANKLIN TO MORSE* (1995). Some Americans were more likely to be involved in federal courts than others. As the work of Martha S. Jones shows, free blacks actively defended their rights in local, state, and federal jurisdictions precisely because their legal status — and their ability to live within the United States — was so tenuous. See, e.g., Jones, *supra* note 2.
- <sup>6</sup> EDWARDS, *supra* note 2, at 26–53, 256–85.
- <sup>7</sup> A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION, *supra* note 3, at 90–119.
- <sup>8</sup> EDWARDS, *supra* note 2, at 205–98. For a particularly compelling account of the limits of rights in the early 19th century, see CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993).
- <sup>9</sup> The best statement on states' regulatory power is WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).
- <sup>10</sup> EDWARDS, *supra* note 2, at 64–99.
- <sup>11</sup> *State v. Chavis*, 1851, Criminal Actions Concerning Slaves and Free Persons of Color, Granville County, State Archives of North Carolina, Raleigh, North Carolina. EDWARDS, *supra* note 2, at 64–132.
- <sup>12</sup> EDWARDS, *supra* note 2, at 64–132.
- <sup>13</sup> *Id.* at 64–132.
- <sup>14</sup> *Id.* at 100–201.
- <sup>15</sup> *Id.* at 64–99.
- <sup>16</sup> *Id.* at 169–201.
- <sup>17</sup> *Status Without Rights*, *supra* note 3.
- <sup>18</sup> *Id.*
- <sup>19</sup> *Id.* GREGORY P. DOWNS, *AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR* (2015) emphasizes the pervasiveness and importance of federal legal venues, which often took over for local courts in the years following Confederate surrender. Recent scholarship on African Americans' experiences during the Civil War and Reconstruction often uses government documents, particularly legal records, and underscores the fact that African Americans made every effort to use various levels of the legal system. Generally, however,

such works do not link those sources or the resulting cases to broader changes in law and legal institutions. The work associated with the Freedmen and Southern Society Project, which pioneered the use of federal records that had been largely overlooked, provided the framework for subsequent scholarship. See, e.g., *THE BLACK MILITARY EXPERIENCE* (Ira Berlin et al. eds. 1982); *THE DESTRUCTION OF SLAVERY* (Ira Berlin et al. eds. 1985); Ira Berlin et al., *Afro-American Families in the Transition from Slavery to Freedom*, 42 *RADICAL HIST. REV.* 89 (1988). For other work on the period that makes extensive use of legal sources, see LAURA F. EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* (1997); MARY FARMER-KAISER, *FREEDWOMEN AND THE FREEDMEN'S BUREAU: RACE, GENDER, AND PUBLIC POLICY IN THE AGE OF EMANCIPATION* (2010); Crystal N. Feimster, "What If I Am a Woman": *Black Women's Campaigns for Sexual Justice and Citizenship*, in *THE WORLD THE CIVIL WAR MADE*, *supra* note 3; BARBARA J. FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY* (1985); KATE MASUR, *AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C.* (2010); SUSAN E. O'DONOVAN, *BECOMING FREE IN THE COTTON SOUTH* (2007); JOHN C. RODRIGUE, *RECONSTRUCTION IN THE CANE FIELDS: FROM SLAVERY TO FREE LABOR IN LOUISIANA'S SUGAR PARISHES, 1862–1880* (2001); JULIE SAVILLE, *THE WORK OF RECONSTRUCTION: FROM SLAVE TO WAGE LABORER IN SOUTH CAROLINA, 1860–1870* (1994); LESLIE SCHWALM, *A HARD FIGHT FOR WE: WOMEN'S TRANSITION FROM SLAVERY TO FREEDOM IN SOUTH CAROLINA* (1997).

- <sup>20</sup> A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION, *supra* note 3, at 90–119.

<sup>21</sup> *Id.*

- <sup>22</sup> RECONSTRUCTION AND THE HISTORY OF GOVERNANCE, *supra* note 3.

<sup>23</sup> For a particularly compelling account of African Americans' efforts to access public spaces, see MASUR, *supra* note 19. For a fascinating discussion of the regulation of public carriers and people's access to them, see BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920* (2001). Education is also an example of African Americans' efforts to access public ser-

vices. The Reconstruction era constitutions of many states in the former Confederacy included access to public education as something akin to a right. See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 67–105 (2014). As Zackin argues, states recognized an array of positive rights in the late 19th century, often at the behest of citizens who actively sought out government protection. The claims of African Americans to schooling are well documented. See MASUR, *supra* note 19; see also HUGH DAVIS, "WE WILL BE SATISFIED WITH NOTHING LESS": THE AFRICAN AMERICAN STRUGGLE FOR EQUAL RIGHTS IN THE NORTH DURING RECONSTRUCTION (2011); DAVISON M. DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954* (2005); HEATHER WILLIAMS, *SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM* (2005).

- <sup>24</sup> Civil Rights Act of 1875, 18 Stat. 335; Civil Rights Cases, 109 U.S. 3 (1883); A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION, *supra* note 3, at 163–64; see also MASUR, *supra* note 19; Amy Dru Stanley, *Slave Emancipation and the Revolutionizing of Human Rights*, in *THE WORLD THE CIVIL WAR MADE*, *supra* note 3.

<sup>25</sup> The extent of violence is strikingly evident in most of the literature on Reconstruction, and has become the focus of recent work. See DOWNS, *supra* note 19; HANNAH D. ROSEN, *TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF CITIZENSHIP IN THE POSTEMANCIPATION SOUTH* (2009); KIDADA E. WILLIAMS, *THEY LEFT GREAT MARKS ON ME: AFRICAN AMERICAN TESTIMONIES OF RACIAL VIOLENCE FROM EMANCIPATION TO WORLD WAR I* (2012). Examples of violence pervade the literature, and some of the most horrific examples were documented in federal hearings. See, e.g., [reverse chronological order] 39th Cong. 1st sess., House Report 101, Select Committee on the Memphis Riots; 40th Cong., 3rd sess., House Miscellaneous Document 52, Condition of the Affairs in Georgia; 42nd Cong., 2nd sess., House Report 22, Testimony Taken by the Joint Committee to Enquire into the Condition of Affairs in the Late Insurrectionary States (Ku Klux Klan Hearings); 43rd Cong., 2nd sess., House Report 261, Condition of Affairs in the South

(Louisiana); 43rd Cong., 2nd sess., House Report 262, Affairs in Alabama; 43rd Cong., 2nd sess., House Report 265, Vicksburg Troubles; 44th Cong., 1st sess., Senate Report 527, Mississippi in 1875 44th Con., 2nd sess., House Miscellaneous Document 31, Recent Election in South Carolina; 44th Cong., 2nd sess., Senate Miscellaneous Document 45, Mississippi; 44th Cong., 2nd sess., Senate Miscellaneous Document 48, South Carolina in 1876. The literature on voting rights cases suggests how violence made its way into federal courts through these kinds of cases. See, in particular, the work cited in note 6 above.

<sup>26</sup> *United States v. Cruikshank*, 92 U.S. 542 (1876); see also *United States v. Reese*, 92 U.S. 214 (1876); A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION, *supra* note 3, at 146–72. For information on the Colfax massacre, see LEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008); CHARLES LANE,

THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008). Conventional historiographical wisdom has laid much of the blame for Reconstruction's failure at the feet of the U.S. Supreme Court, arguing that the Court's decisions represented nothing less than the conscious abandonment of African Americans to conservative whites intent on stripping them of their newly acquired civil and political rights. Recent scholarship, however, has moderated those conclusions, arguing that the Court was not as hostile to African Americans' rights as previous scholarship suggests, particularly in the area of voting rights, where it left significant protections in place. See PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011); G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RES. L. REV. 755 (2014). Throughout the late 19th century, however, the Court upheld a narrow, individualized view of civil rights,

one at odds with the aspirations of many Americans. While it upheld federal enforcement, the Court's decisions did nothing to make an already difficult job any easier.

<sup>27</sup> *Bradwell v. Illinois*, 83 U.S. 130 (1873); A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION, *supra* note 3, at 146–72; JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 151–91 (1991). Myra Bradwell's case, however, also suggests countervailing political currents, giving women the same rights as men without acknowledging the particularities of structural inequalities that they faced as women; Illinois allowed women admission to the bar within a year of the U.S. Supreme Court's decision.

<sup>28</sup> *Slaughter-House Cases*, 83 U.S. 36 (1873); A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION, *supra* note 3, at 146–72; see also Michael A. Ross, *Justice Miller's Reconstruction: The Slaughter House Cases, Health Codes, and Civil Rights in New Orleans, 1861–1873*, 64 J. SOUTHERN HIST. 649 (1998).

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**WHEN MOST PEOPLE – AND EVEN MOST LAWYERS – THINK ABOUT “CONSTITUTIONAL LAW,” THEY THINK ONLY OF THE UNITED STATES CONSTITUTION.**

That is not entirely surprising, given that the federal constitution is usually the focus of civics lessons and law school courses alike. But any study of American constitutional law that ignores state constitutions – many of which initially predated ratification of the U.S. Constitution – casts aside a critical aspect of our country’s dual-sovereign system and fails to recognize that “virtually all of the foundational liberties that protect Americans originated in the state constitutions and to this day remain independently protected by them.”

The shortcomings of this approach to constitutional law are the subject of Judge Jeffrey Sutton’s new book, *51 Imperfect Solutions: States and the Making of American Constitutional Law*. Although Judge Sutton currently serves on the U.S. Court of Appeals for the Sixth Circuit, he is uniquely situated to opine on state law because of his prior service as Ohio State Solicitor – a state-level position modeled closely after that of the U.S. Solicitor General – when he represented Ohio in cases involving claims under both the U.S. and Ohio constitutions. It was this set of experiences, which included representing his state before the Ohio Supreme Court and the U.S. Supreme Court, that “recalibrated” his “views about the role of the States in our federalist system of government.”

Judge Sutton persuasively argues that state constitutions are underappreciated and, in many cases, unexplored. Practically speaking, this phenomenon – which persists more than two decades after he began observing this trend during his service as Ohio Solicitor – may be attributable to many causes, including litigants and jurists who reflexively treat state and federal constitutional provisions as coextensive when a state constitution is similar to the federal one. His broader point is that state constitutions, and the potential differences between rights provided by state constitutions and the federal constitution, are not always top-of-mind for many of the people who play an integral role in the legal system: academics, advocates, and even jurists.

The “central conviction” of *51 Imperfect Solutions* is grounded in the notion that states can set “positive examples that hold the potential to be . . . influential in the development of American constitutional law,” and that the “underappreciation of state constitutional law has hurt state and federal law and has undermined the appropriate balance between state and federal courts in protecting individual liberty.” This is especially true when, for example, a “National Court declines to enforce a right, [and] the state courts become the *only* forum . . . for enforcing the right under their own constitutions, making it imperative to see whether and, if so, how the States fill gaps left by the U.S. Supreme Court.”

Judge Sutton’s examination of these issues is particularly relevant in light of his suggestion that we look to state constitutions to help “handle our country’s difference of opinion.” Federalism, he argues, “could be a solution, or at least a partial answer, to some of the deep divides that persist in today’s chapter of American history” and “a useful process for ameliorating and eventually resolving them.” And although “state courts at times have played a critical role in advancing *some* constitutional rights,” the current question – at least according to Judge Sutton – “is whether there is room for them to play a greater role in the future.”

If lawyers, academics, and jurists heed Judge Sutton’s call to take our “state constitutions more seriously,” we may soon have an answer to that question.

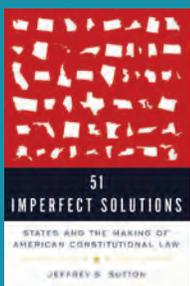
– SARAH HAWKINS WARREN is Solicitor General of Georgia. She previously clerked for Judge J.L. Edmondson, U.S. Court of Appeals for the Eleventh Circuit, and Judge Richard J. Leon, U.S. District Court for the District of Columbia, and was a litigation partner at Kirkland & Ellis LLP.

# change agents

## Looking to state constitutions for rights innovations

BY JEFFREY S. SUTTON

The following is an excerpt from *51 Imperfect Solutions: States and the Making of American Constitutional Law* (© 2018 by Jeffrey Sutton, published by Oxford University Press. All rights reserved.) The book is available for purchase from all major booksellers.



### EXCERPT FROM CHAPTER 2: AMERICAN CONSTITUTIONALISM: A SECOND SOURCE OF POWER COMES WITH DUAL CONSTRAINTS ON THAT POWER

The point of this chapter is twofold: (1) to explain how we got here — how the bench and bar became so one-sided in their understanding of American constitutional law and diminished the States' constitutions in the process, and (2) to consider reasons for changing course — why American lawyers and judges (and citizens) would benefit from taking our state constitutions more seriously than they currently do.

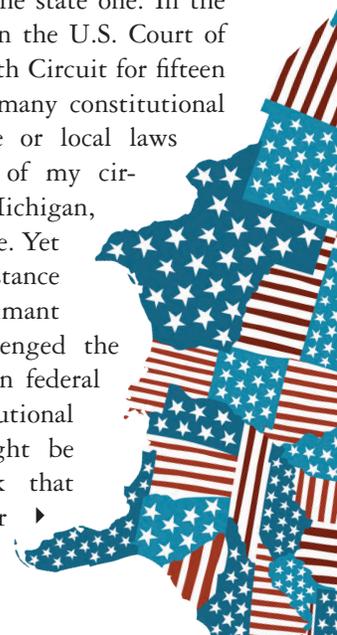
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A few features of American constitutional law confirm the similarities between the two situations. In this country, state and local laws face two sets of constitutional constraints: those under the U.S. Constitution and those under the relevant state constitution. The Framers of the U.S. Constitution modeled all individual rights guarantees after guarantees that originated in a state constitution — usually one of the state constitutions ratified between 1776 (after, in most cases, the colonies declared independence from England) and 1789 (when the people ratified the U.S. Constitution). Take some of our most celebrated rights: free speech; free exercise of religion; separation of church and state; jury trial; right to bear arms; prohibitions on unreasonable searches and seizures; due process; prohibition on governmental taking of property; no cruel and unusual punishment; equal protection. *All* of them, and all of the other individual rights guarantees as well, originated in the state constitutions and were authored by a set of not inconsequential political leaders in the States, such as John Adams, Benjamin

Franklin, Robert Livingston, James Madison, and George Mason.

The upshot is that American constitutional law creates two potential opportunities, not one, to invalidate a state or local law. Individuals who wish to challenge the validity of a state or local law thus usually have two opportunities to strike the law — one premised on the first-in-time state constitutional guarantee and one premised on a counterpart found in the U.S. Constitution.

Yet most lawyers take one shot rather than two, and usually raise the federal claim rather than the state one. In the course of serving on the U.S. Court of Appeals for the Sixth Circuit for fifteen years, I have seen many constitutional challenges to state or local laws within the States of my circuit: Kentucky, Michigan, Ohio, and Tennessee. Yet I recall just one instance in which the claimant meaningfully challenged the validity of a law on federal *and* state constitutional grounds. One might be tempted to think that federal judges hear



lawsuits only under federal law. Don't be. We hear many state common law and state statutory claims. That's because our power to hear federal statutory and constitutional claims comes with authority to hear related claims that arise under state law. And our power to hear disputes between citizens of one State against citizens of another permits claims under state or federal law — or both.

.....

What we have today is not an inevitable feature of the Framers' vision. It is in reality quite remote from anything the Framers could have imagined. The original constitutional plan created largely exclusive federal and state spheres of power as opposed to largely overlapping spheres of power. Which makes sense: Why would a libertarian group of Framers, skeptical of governmental power and intent on dividing it in all manner of ways, have *doubled* the governmental bodies that could regulate the lives of Americans? And tripled and quadrupled them if one accounts for cities and counties? A system of largely separate dual sovereignty (federal *or* state power in most areas) has become a system of largely overlapping dual sovereignty (federal *and* state power in most areas). Good or bad, textually justified or not, this feature of American government is not going away. American constitutional law today thus permits at least two sets of regulations in every corner of the country and what comes with it: the potential for dual challenges to the validity of most state or local laws. That has been true since the end of the Warren Court for most liberty guarantees, and it is difficult to envision a scenario in which that reality disappears.

This history, much abridged for sure, suggests two explanations for the seeming reluctance of lawyers and courts to take one part of American constitutional

law seriously. The first is a function of time. Because it took until the 1960s for the U.S. Supreme Court to complete the individual rights revolution by incorporating most of the Bill of Rights into the Fourteenth Amendment, it was not until then that American lawyers, law schools, and state courts had any reason to think about using state and federal court systems, and state and federal constitutions, to vindicate civil rights. We thus are not talking about a set of litigation opportunities, a litigation strategy, that existed for most of American history. It's been roughly fifty years since the U.S. Supreme Court completed much of this transformation. That's not a long time, less than a fourth of American legal history. And that's even less time if we consider the most recently incorporated right: the Second Amendment in 2010.

The second reason emerges from a central explanation for the success of the federal rights revolution: the States' relative underprotection of individual rights. Who could blame lawyers and their clients for being reluctant to develop a strategy built in part on state constitutional rights? The U.S. Supreme Court recognized many of the rights it did between the 1940s and the 1960s *because* many state courts (and state legislatures and state governors) resisted protecting individual rights, most notably in the South but hardly there alone. One can forgive lawyers from this era for hesitating to add state constitutional claims to their newly minted federal claims. Why seek relief from institutions that created the individual rights vacuum in the first place?

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#### EXCERPT FROM CHAPTER 9: EPILOGUE

**W**hen told in full, [the stories told in the book] provide a healthy

counterweight to received wisdom. They show the risk of relying too heavily on the U.S. Supreme Court as the sole guardian of our liberties as well as the farsighted role the state courts have played before in dealing with threats to liberty. Even the most acclaimed individual rights decision in American history, *Brown v. Board of Education*, is more complicated than it might at first appear when it comes to the role of the States and national government in rights protection. It's worth remembering the other half of that story. The companion case to *Brown* was *Bolling v. Sharpe*, in which the Court demanded the end of segregation in the public schools of the District of Columbia, an enclave controlled by the federal government, not a State. Those who place complete faith in just *one* branch of American government to protect their rights will eventually be disappointed.

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All of this prompts an essential question, one of the most crucial underlying this book. What is it about the issues in *San Antonio Independent School District v. Rodriguez*, *Mapp v. Ohio*, *United States v. Leon*, *Buck v. Bell*, or *Minersville School District v. Gobitis* (or for that matter, *Kelo v. City of New London* or *Employment Division v. Smith* or *Baker v. Nelson*) that prevented Supreme Court defeats from becoming the death knell of the claimants' objectives and instead spurred equally promising, if not more promising, state and local initiatives? Why in these areas? Why not others?

A common thread in many of these examples — and others in which the States have been leaders rather than followers — is the complexity of the problem at hand. While national interest groups will invariably favor winner-take-all approaches, complexity often stands in the way. The more difficult it is to find a single answer to a problem, the more likely state-by-state

variation is an appropriate way to handle the issue and the more likely a state court will pay attention to an advocate's argument that a single State ought to try a different approach from the one adopted by the National Court. Just as the intricacy of a problem might prompt different, even competing, answers, it might prompt state courts (and legislatures) to pace change at different speeds. In many areas of law affected by changing social norms, the most important question is not whether but when, not whether but by whom.

A second consideration prompted by these stories is accountability. When the U.S. Supreme Court shifts the spotlight from the national to the local stage, it clarifies the lines of authority.

A third consideration relates to the selection method for most state court judges: elections. Dissonant though it may sound, judicial elections sometimes are the friend of innovative individual rights litigation, not its enemy. Some supposedly countermajoritarian constitutional issues are not countermajoritarian at all when presented effectively to elected state court judges. Just as there may be politically functional and politically dysfunctional issues in legislation, the same may be true in litigation. And the two do not always overlap. That reality may explain why these education, criminal procedure, property-rights, free exercise, and eventually marriage issues resonated with some state-elected judges but not life tenured federal judges. In the Ohio school-funding litigation, in which I represented the State, I thought it helped the plaintiffs — the advocates of change — that the justices of the Ohio Supreme Court were elected. I say this not to plug one method of appointment over another but to show that traditional assumptions about judicial



elections and constitutional guarantees may not always hold true.

Even the crudest electoral practicalities do not invariably warrant distrust in the capacity of state court judges to construe their constitutions independently. Truth be told, there are many settings in which judicial elections should lead to *more* state court independence from the U.S. Supreme Court, not less. Aren't there many federal constitutional rulings that *increase* the scope of a protected right and with which elected judges in some States disagree? And with which a majority of the electorate in those States disagree? Aren't there many federal constitutional rulings that *decrease* the scope of a protected right and with which elected judges in some States disagree? And with which a majority of the electorate in those States disagree? The answer of course will depend on the issue and the State. Think about it another way. Surely there are originalist justices on the state courts who disagree with living constitutionalist U.S. Supreme Court decisions. And surely the oppo-

site is true. Electoral practicalities often should liberate, not confine, state court judges in following their own interpretive approaches.

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An objective of this book is to urge a few modest steps toward closing the gap between *one* feature of the original design of American government and current practice by returning the States to the front lines of rights protection and rights innovation. As written, the U.S. Constitution was *not* designed to facilitate rights innovation, whether through Congress or the courts. The document contains one blocking mechanism after another, all quite appropriate given the potential breadth of power exercised by the federal branches. As written, the state constitutions were change incubators, governing smaller, often more congenial populations with shared world views. And the state constitutions were, and remain, easy to amend. Unlike the Federal Constitution, the state constitutions are readily amenable to adaptation, as most of them can be amended through popular majoritarian votes, and all of them can be amended more easily than the federal charter. The design of each charter signals that the States were meant to be the breakwater in rights protection and the national government the shoreline defense.

Increasing the salience of the state courts and state constitutional law honors some worthy traits of the original federal constitutional framework, most notably its conspicuous horizontal *and* vertical separations of powers. If there's one feature of American government worth preserving over every other, it's that differentiated lines of constitutional structure — honored and undiluted — preserve liberty. Only by retaining a balance of authority among the branches do we keep the most malignant risks to liberty at bay.

.....

A revival of independent state constitutionalism not only might return us to something approximating the original design, but it also might ease the pressure on the U.S. Supreme Court to be the key rights innovator in modern America. Why not put the state constitutions, state courts, and state legislatures on the front lines (or more precisely return them to the front lines) when it comes to rights innovation? Even if one accepts that many of the Warren Court decisions were for the good as a matter of policy, and even if one assumes that the States brought this diminishment of authority upon themselves, that does not tell us what to do next. All essential constitutional questions ultimately come down to structure. And structure concerns who, not what — who should be the leading change agents in society going forward, not looking backward. One point of telling these stories is to make the case that it's time to shift the balance back to the state courts.

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While nearly all interest groups and most Americans seem to remain comfortable with using the U.S. Supreme Court (as opposed to the state courts) as their preferred change agent, it's easy to wonder how long this can last and to worry how it will end. So long as we insist on casting the Court in this role, two things are inevitable: The people will care deeply about who is on the Court, and the people will criticize the Court, as opposed to the elected branches, when five justices do not do their bidding. The confirmation process — picking justices to resolve structural and individual rights debates known and unknown for the next twenty-five to thirty years — is not well-equipped to handle the first development, and the Court as an institution is not well-equipped to respond to the second.

.....

Whatever the prospects for change through state constitutions and state courts may have been in the 1950s and 1960s, I have a hard time understanding why they remain inappropriate vehicles for rights innovation in the twenty-first century — and why they should not be the lead change agents going forward. When Justice Brandeis launched the laboratory metaphor for policy innovation, he used the plural, not the singular, signaling an interest in hearing how the States in the first instance would respond to new challenges. A single laboratory of experimentation for fifty-one jurisdictions and 320 million people poses serious risks. A ground-up approach to developing constitutional doctrine allows the Court to learn from the States — useful to pragmatic justices interested in how ideas work on the ground, useful to originalist justices interested in what words first found in state constitutions mean. It gives both sides to a debate time to make their case. And it places less pressure on the U.S. Supreme Court. The Court may wait for, and nationalize, a dominant majority position, lowering the stakes of its decision in the process. Or it may treat occasionally indeterminate language in the way it should be treated, as allowing for fifty-one imperfect solutions rather than one imperfect solution.



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The following two articles focus on reentry courts — a type of problem-solving court that addresses the challenges former offenders face when reintegrating into the community after a period of incarceration. Each article in its own way attempts to grasp the slippery subject of how to measure success regarding such programs, and whether they are worth their costs in time, money, and resources. Marvin L. Astrada analytically reviews reentry courts and lays out competing metrics for measuring success, discussing their relative pros and cons. Conversely, Judge Jeffrey Alker Meyer and Carly Levenson take a different tack, describing the reentry court in the U.S. District Court for the District of Connecticut from a front-lines perspective, allowing for measurement of its effectiveness by its impact on the lives of participants.

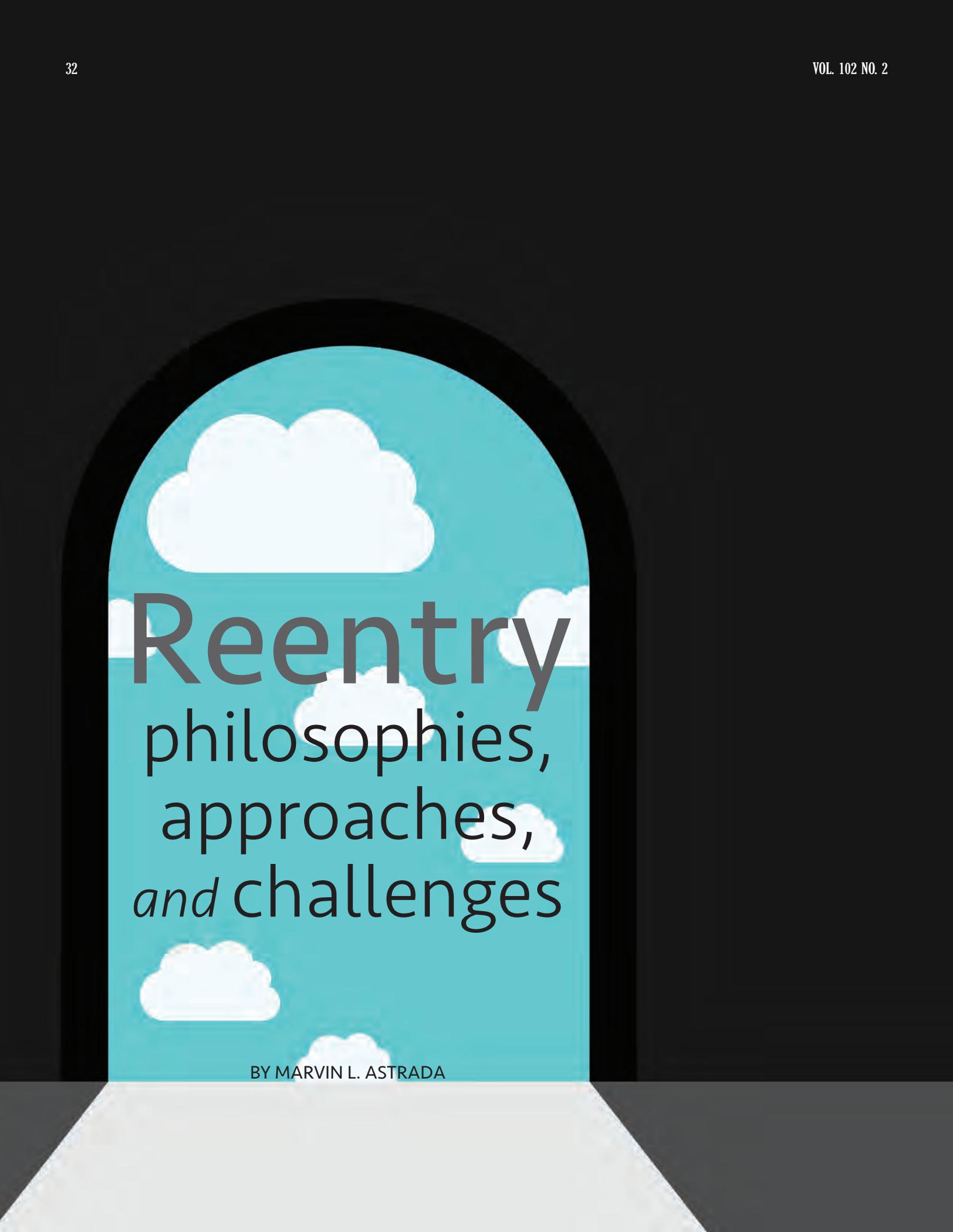
The debate about whether problem-solving courts work and are cost-effective is a lively one. Perhaps more so in the federal system, doubts have recently been cast on whether such special court dockets are worth the considerable time, money, and resources they require to operate. Cold calculations regarding impact on recidivism — the quantitative approach to evaluating success — render a mixed bag of results, with a recent federal study sponsored by the Federal Judicial Center finding little positive impact on recidivism. The two articles in this issue of *Judicature* suggest that perhaps a qualitative approach has a place in the evaluative process — an approach that takes into account the impact of such programs on the lives of participants, and looks to other metrics such as employment, sobriety, stable housing, improved mental health, and more positive perceptions of the legal system as measures of success. To that I say Amen, and read on.

# Reentry courts

## *Are they worth the cost?*

— Judge Timothy D. DeGiusti of the United States District Court for the Western District of Oklahoma is a 2018 graduate of the Duke Master of Judicial Studies program. He studied reentry programs for his master's thesis, "Innovative Justice: Federal Reentry Drug Courts – How Should We Measure Success?"





# Reentry

philosophies,  
approaches,  
*and* challenges

BY MARVIN L. ASTRADA

**Competing notions of crime and punishment have shaped the administration of criminal justice in the United States ever since the Quakers established the Walnut Street Prison in 1773 in Philadelphia, creating the first penitentiary in the country. Since then, the form and substance of criminal punishment have evolved from penitence, to rehabilitation, to retribution. From the mid-1970s onward, public policy has emphasized punishment and retribution. The result today is a burgeoning prison population, massive state and federal expenditures on the prison system, and a growing realization that releasing offenders without support mechanisms creates a revolving-prison-door phenomenon.**

In recent years, reentry programs have emerged as a way to address the challenges of reintegrating ex-offenders into society and, increasingly, as a tool for combatting mass incarceration and reducing persistent recidivism rates. Reentry programs are managed by the court and designed to provide broad, comprehensive support to ex-offenders in building a productive life outside prison. This article provides an overview of reentry philosophy and approaches, and discusses some of the challenges of measuring the success of reentry programs.

### THE PROBLEM

Statistics from the Bureau of Justice (BJS) indicate that, in 2012, the overall prison population in the U.S. was approximately 1,570,400.<sup>1</sup> Although the overall nationwide prison population rate has declined and the rate of release continues to increase, data from 2005 to 2010 show that recidivism is a tremendous challenge.<sup>2</sup> In 2005, 67.8 percent of 404,638 state prisoners released in 30 states were arrested within three years of release, and 76.6 percent were arrested within five years.<sup>3</sup> In the 23 of those 30 states with available data on inmates who returned to prison, 49.7 percent of inmates had either a parole or probation violation or an arrest for a new offense within three years, and 55.1 percent had a parole or probation violation or an arrest within five years.<sup>4</sup>

The BJS has estimated that *nearly three-quarters of all released prisoners will be rearrested within five years of their release* — and about six in ten will be re-convicted.<sup>5</sup> Furthermore, people of color are overwhelmingly encumbered with the profoundly negative consequences of having been incarcerated, because they disproportionately constitute the majority of the incarcerated population.<sup>6</sup>

In 2014, “1,561,500 people were under the control of state or federal correctional authorities. . . . This represents almost a one percent decline from the previous year, yet it still remains [the case] that almost one in every 100 Americans remains in prison. The Equal Employment Opportunity Commission . . . suggests that if the current trends

continue, ‘approximately 6.6 percent of all persons born in the United States in 2001 [could] serve time in state or federal prison during their lifetimes.’”<sup>7</sup> The growing rate of offenders transitioning into the community; high prospects of re-arrest, re-conviction, and re-incarceration; offenders’ limited or ill preparedness to reenter the community; and communities’ inability or lack of capacity to provide support during the transition exacerbate the profound challenges communities face in attempting to curb recidivism.

The recidivism rate has remained virtually unchanged for the last decade or more.<sup>8</sup> Of the two-thirds of former inmates who are re-arrested within three years of release, more than half will eventually be re-incarcerated. Additionally, more parolees are returning to prison than ever before: about one-third of all prison admissions nationwide are parole violators returned to prison for new crimes or technical violations.<sup>9</sup> By some estimates, ex-offenders account for about 15 to 20 percent of all arrests among adults, although this varies considerably by state and type of criminal behavior.<sup>10</sup>

The costs to communities are high. The sheer volume of offenders being released and unsuccessfully reintegrated into the community negatively affects the structural integrity and stability of host communities, straining public health, public housing, homelessness, mental health services, community and family relationships, and civic participation. Furthermore, the costs associated with incarcerating and re-incarcerating ▶

offenders are putting immense pressure on already overextended state budgets.<sup>11</sup>

The struggle to successfully transition from prison to society is not a novel problem. The increasing scale of the problem, however, has presented new and serious challenges.<sup>12</sup> Over the last two decades the U.S. “has commenced the largest multi-year discharge of prisoners from state and federal custody in history.”<sup>13</sup> This exploding population of ex-offenders makes reducing rates of re-offending and recidivism more difficult.<sup>14</sup> Lack of oversight, poor transitional preparation, and a lack of access to substantive social, financial, and educational resources and opportunities such as affordable housing, gainful employment, physical and mental health care, and treatment programs for substance abuse are serious problems that ex-offenders face.<sup>15</sup> Over “650,000 people are released from prison each year,” and often they return to the “high-crime, poverty-stricken communities from which they came, still battling . . . intractable poverty, educational and job training deficits, [and] drug addictions or mental illnesses that contributed to their criminality in the first instance.”<sup>16</sup>

There is growing realization that releasing offenders without providing support mechanisms creates a revolving-prison-door phenomenon. Academics and professionals have begun to explore alternatives to focusing strictly on retribution, with a particular focus on offenders’ release and subsequent (failure of) reintegration into the community. Although the goal of the modern criminal justice system, broadly speaking, has been “to control crime with justice,” some argue that “prosecutors must look beyond simple ‘control’ to recognize that public safety may be achieved with tools other than imprisonment.”<sup>17</sup> Looking beyond “control” led to a focus on post-incarceration. Employing recidivism rates

as a quantifiable measure of correctional programs’ success and effectiveness, many analysts found that a large percentage of offenders were returning to prison. This phenomenon prompted, in part, further research into post-incarceration and the effects of a purely retributive ethos. Some advocates claim that reentry programs offer a much-needed alternative tool “other than imprisonment” to address these challenges and more effectively administer justice.<sup>18</sup>

The logic of a reentry program is relatively straightforward: Keeping ex-offenders out of prison helps stem the growth of the prison population. In the reentry context, the court is part of a team-based approach to offender processing, release, and reintegration.

#### REENTRY, THE COURTS, AND THE ADMINISTRATION OF JUSTICE

Since the early 2000s, the courts have begun to reevaluate the role of the judge and other major criminal justice players, including prosecutors and defenders, in the administration of justice. In light of the crucial role that successful offender release and integration into the community assumes in

reducing the prison population — and with the realization that recidivism rates have not been optimally reduced — courts began to consider and implement reentry programs as a way to help reduce recidivism and stem the tide of mass incarceration.<sup>19</sup>

The concept of reentry encompasses all activities and programming geared toward better preparing ex-offenders to permanently return to the community.<sup>20</sup> Reentry programs “may be broadly defined as the processes and experiences associated with offenders’ incarceration and release from prison, jail, or some form of secure confinement.”<sup>21</sup> The logic of a reentry program is relatively straightforward: Keeping ex-offenders out of prison helps stem the growth of the prison population.<sup>22</sup>

In the reentry context, the court is part of a team-based approach to offender processing, release, and reintegration.<sup>23</sup> Judges, defense lawyers, prosecutors, and probation officers work together, bringing their diverse professional expertise collectively to bear on solving the problems on which the program is focused. As a team, the stakeholders have better access to institutional resources and information and consequently can better shepherd participants through the bureaucratic obstacles [that] often stymie successful reintegration. Joint problem solving and resource sharing among stakeholders in the criminal justice system is a marked departure from the courts’ normal way of doing business.<sup>24</sup>

Reentry programs thus reflect local conditions and the local criminal justice ethos, and are thoroughly affected by local circumstances. Reentry programs may be adapted, refined, reconfigured, and repurposed by various courts to reflect unique local circumstances.

Although local circumstances, such as legal culture and philosophy, play a substantial role in how reentry is conceptualized and implemented by the courts, reentry programs are rooted in a common philosophical-legal approach that informs how success is perceived and measured. Generally speaking, reentry is premised on the notion that a formal and comprehensive transition process after release from prison is necessary to address an ex-offender's basic survival needs, such as safe housing, gainful employment, and healthcare, as well as skills-based need such as treatment, literacy, and job training, to prevent a revolving-prison-door syndrome.<sup>25</sup> Reentry is a "therapeutically oriented judicial approach to providing court supervision and appropriate treatment to offenders"<sup>26</sup> to effectuate this transition process.

Some criminal justice scholars view reentry programs as reconfiguring the notion of rehabilitation. That is, rehabilitation, according to some commentators, "with an eye to reentry, has been repackaged, not as a way to improve the individual offender for his or her own sake, but rather as a way to improve public safety for all of society."<sup>27</sup> This aspect of reentry programs, some advocates contend, begins to address some of the failures of a purely retributive paradigm, which focuses mainly on punishment of the individual offender. While punishment plays a fundamental role in the administration of justice, reentry programs focus on the challenges ex-offenders face during post-incarceration, taking into account the well-being of the offender and of the community that he or she will return to. Reentry programs thus attempt to provide therapeutic rehabilitative programs to enhance an ex-offender's prospects of permanent reintegration into the community after punishment, to concomitantly help the ex-offender build a sustainable, produc-

tive life, and to improve the well-being of the overall community. The community benefits when ex-offenders become contributing members of society who do not commit new crimes. For this reason, some advocates contend that reentry programs are an important tool for courts and communities to employ when addressing the pressing challenges posed by the mass release of ex-offenders into the community.<sup>28</sup>

The recent shift from decades of retributive criminal justice to more "non-brick-and-mortar social control options"<sup>29</sup> means that some courts are more willing to view reentry as a viable means to address the collateral consequences of being an ex-offender. Collateral consequences entail legal "sanctions and restrictions that limit or prohibit people with criminal records from accessing employment, occupational licensing, housing, voting, education, and other opportunities."<sup>30</sup> Recently highlighted by the U.S. Supreme Court in *Padilla v. Kentucky* — "holding that defendants have a Sixth Amendment right to be informed of a collateral consequence (in *Padilla*, deportation) attaching to a guilty plea"<sup>31</sup> — these collateral consequences make it very difficult for ex-offenders to productively move on with their lives post-incarceration.

The criminal justice system devotes considerable resources to investigating and punishing crime.<sup>32</sup> Reentry programs seek to prevent ex-offenders from reoffending and returning to prison. Sustaining the present trajectory of the exponentially growing prison population — a revolving-prison-door phenomenon wherein offenders are serving longer sentences and often returning to prison, and governments are devoting substantial economic resources to manage revolving-door-prison populations — is not an economically viable nor desirable option. Reducing recidivism and focus-

ing on the endpoint of the correctional process, reentry advocates contend, constructively addresses the problem of mass incarceration by shrinking the number of ex-offenders who return to the courts and the prison system.<sup>33</sup> Given the present rates of incarceration, release, and recidivism, it seems to be in the best interests of the judiciary and the broader community to create and support effective and efficient reentry processes.

#### HOW A REENTRY PROGRAM WORKS — ISSUES & CHALLENGES

The state and the federal courts have implemented reentry programs that reflect local contexts and community issues and are specifically designed to comprehensively address the challenges ex-offenders face during post-conviction.<sup>34</sup> Attempts to clearly define, operationalize, and measure the efficacy of a reentry program highlight its complex nature and the important role that the courts assume in the process. If reentry is more than simply programmatic in nature, and encompasses a comprehensive process, does it possess an empirically sound basis for establishing programs geared toward reintegration? Are reentry programs overly broad to the point where such programs are not monetarily feasible?

Some courts view reentry holistically rather than as a single ad-hoc program.<sup>35</sup> In a holistic approach, the courts and criminal justice professionals actively participate in reentry efforts, which may better serve the goal of "the effective integration of former federal [and state] prisoners into our communities and the reduction of recidivism."<sup>36</sup> Here, reentry is not based solely or mainly on objective quantitative measures and methodology. Indeed, some commentators qualitatively characterize reentry as a movement, an approach, or a continuing process that begins at the point ▶

of release and continues afterwards. Assessing the strength or weakness of reentry programs, and whether they “work,” will depend in part on whether one views reentry programs from a qualitative or quantitative perspective.

The reentry paradigm “builds on the notion that the transition from prison to the community does not happen automatically and without preparation. Reentry strategies encourage the establishment of broad linkages that support offender transitions and community partnerships and penetrate through and beyond prison walls.”<sup>37</sup> Reentry thus focuses on the socioeconomic environment that offenders will be released into, and what the courts can do to help offenders successfully reintegrate.<sup>38</sup>

Reentry programs generally take a holistic rehabilitative approach that recognizes and addresses the complex factors that directly impact successful reintegration — such as socioeconomic status, education, age, mental health, substance abuse, and sustained employment — with the expectation that programs designed to address these challenges will improve the ex-offender’s chances for successful reintegration. Reentry programs take into account the fact that ex-offenders likely “are less educated, less likely to be gainfully employed, and more likely to have a history of mental illness or substance abuse — all of which have been shown to be risk factors for recidivism.”<sup>39</sup>

Some scholars contend that reentry programs help reduce recidivism because the courts assume such a proactive role in the post-conviction period.<sup>40</sup> Traditionally, “the role of the judge in a criminal case is to oversee courtroom proceedings relating to a defendant’s guilt or innocence and the appropriate disposition of the case.”<sup>41</sup> In problem-solving and reentry courts, the judge is an active participant, allowing the courts to

assume a different role in the administration of justice. Under a reentry approach, judges can set and monitor an offender’s post-conviction agenda and can impose explicit conditions on an offender’s behavior with directives such as “do not use drugs,” “get regular drug testing,” or “go to treatment.”<sup>42</sup>

In this way, the court employs a mix of graduated sanctions and incentives to influence and redirect offenders’ behavior and to reinforce success if such

When evaluating reentry programs, it is important to note that how recidivism is conceptualized and defined will directly affect evaluation results. [And] there are . . . competing views about what recidivism means or should mean.

changes are effectuated.<sup>43</sup> Sanctions may include community service, increased supervision levels, ordering drug testing or treatment, or short periods of re-incarceration. Incentives may include various rewards, such as a reduction of length of stay in prison in return for satisfactory progress in various educational, vocational, and drug treatment programs and work assignments, and for good behavior.<sup>44</sup> These incentives and sanctions may help ex-offenders better navigate the complex challenges associated with release and reintegration. The

court thus assumes an active and comprehensive role rather than a passive presence in an ex-offender’s attempt to reintegrate into the community.

Like other problem-solving courts, reentry courts include problem-solving and therapeutic components in supporting an ex-offender’s planned transition into the community. The court tailors a reentry plan to fit an offender’s unique risks and needs and attempts to address the specific issues and challenges an offender will face upon release from prison, such as employment and substance abuse treatment, to maximize successful reintegration.<sup>45</sup> To help accomplish this, the court must be able to draw upon a range of supportive and supervision resources to implement the plan and must exercise the authority and discretion needed to efficiently and effectively impose sanctions and incentives.<sup>46</sup>

#### DOES REENTRY WORK?

Defining and measuring success are major points of contention in the reentry debate among advocates and critics — on and off the bench. Some reentry program advocates subscribe to or emphasize a qualitative approach, stressing the value of intangible and humanistic benefits that accrue from reentry; a qualitative argument is based on the idea that success cannot be measured solely or mainly in quantitative terms. Some critics, on the other hand, approach reentry from a quantitative perspective; successful outcomes are objectively measured via empirically data-driven, cost-benefit analysis, and evidence-based practices rooted in statistical analysis.

The literature on reentry programs is scattered in criminological, sociological, and psychological publications, although much of it can be found in state and federal agency and government reports.<sup>47</sup> Generally speaking, the literature has a pronounced sociological, rather than a

psychological, bent. Methodologically, this has resulted in focusing less on the individual offender, treatment provider, and program characteristics when measuring outcomes and instead assessing programs using recidivism outcome studies. A program is generally classified as one that *works, does not work, or is promising*; the “what works” literature tends to be program-based, as opposed to principles-based.<sup>48</sup> The largest and most influential “what works” study in the U.S., *Crime Prevention: What Works, What Doesn't, and What's Promising*, was conducted by the University of Maryland and funded by the U.S. Justice Department in 1997.<sup>49</sup> The report attempted to identify effective reentry programs by creating scientific scoring systems to evaluate programs based on whether they can be proven to have an empirical impact in reducing recidivism.<sup>50</sup>

When evaluating reentry programs, it is important to note that how recidivism is conceptualized and defined will directly affect evaluation results. Recidivism is “often defined as the re-arrest, reconviction, or re-incarceration of an ex-offender within a given time frame.”<sup>51</sup> Recidivism, when viewed critically, provokes debates about the overarching social, economic, and political conditions associated with crime.

There are two general competing views about what recidivism means or should mean: 1) recidivism is viewed broadly as constituting *any* new contact with the criminal justice system, and 2) recidivism is more narrowly construed as commission of a particular type of new crime, such as a felony, resulting in a new sentence.<sup>52</sup> What one includes in the definition of recidivism has a substantial impact on the rate of recidivism.<sup>53</sup> Recidivism also can be viewed in terms of the individual criminal; for instance, one could conclude that a particular offender is resistant to crime-preventing mecha-

nisms. Another view is that recidivism is the direct result of debilitating structural socioeconomic conditions conducive to criminal conduct.<sup>54</sup> Some commentators contend that these different definitions of recidivism and the resulting variation in rates make recidivism an insufficient measure of the effectiveness of reentry, since reentry programs aim for permanent reintegration, which is more than merely remaining arrest-free for a specified time period.

Another problem with using recidivism rates as a measure for reentry is that of sample size: Programs are localized, and therefore often quite small. They do not provide sufficient sample sizes to generate generalizable conclusions. Some studies have focused on assessing the effectiveness of a stand-alone program, while others have taken a comprehensive approach by evaluating the effectiveness of a program statewide or nationwide. Some studies have demonstrated successful outcomes, others have found no discernible effects, and others have found a mix of positive and negative findings.<sup>55</sup>

Some advocates of reentry programs contend that to accurately measure successful reintegration, researchers need to build into their evaluations “measures of attachment to a variety of social institutions. Research shows that these factors are related to long-term criminal desistance,” such as whether or not programs address underlying issues of substance abuse, sobriety, and attendance at treatment program.<sup>56</sup> To better gauge the effectiveness and success of reentry, it has also been suggested that researchers keep track of whether or not programs help offenders become involved in community activities, in a church, or in offender support groups or victim sensitivity sessions.<sup>57</sup> There are many outcomes that reentry programs strive to improve upon, and these are

usually not operationalized and measured in traditional recidivism-only outcome evaluations.<sup>58</sup>

To empirically measure reentry programs' relative success or failure, some reentry advocates suggest narrowing the scope and focus of such programs by defining them as programs that either specifically focus on the transition from prison to community or initiate treatment in a prison setting and link up with a community program to provide continuity of care.<sup>59</sup> Within this broad definition, only programs that have an outcome evaluation are included. A narrow definition, however, discounts programs that have not been formally evaluated, do not specifically focus on the transition process, or do not begin in the community.<sup>60</sup>

As noted earlier, reentry programs are inherently local. There is no universal reentry approach or singular program model; the structure of a program varies depending on local needs, resources, and statutory frameworks. Programs vary significantly by type, number of phases, treatment modality employed, duration of treatment, location of treatment, presence of aftercare, risk level of offender, and type of treatment provider.<sup>61</sup> This makes quantitative assessment of reentry very difficult. Furthermore, because the authority for post-prison supervision is often not vested within the judicial branch, reentry courts operate based on a variety of approaches, each consistent with local statutory frameworks. For instance, in New York City, an administrative law judge — with authority from the parole board — has managed reentry participants within a community court setting. In Fort Wayne, Ind., the Indiana Parole Commission has authorized judges to supervise returning prisoners on the commission's behalf.<sup>62</sup> In each model, the court and the offender work coop- ▶

eratively to address the risks associated with release from prison and to improve successful reintegration.

The debate over the effectiveness of rehabilitation efforts reaches back for decades. After Robert Martinson published his influential article in 1974 asserting that rehabilitative programs were not producing results,<sup>63</sup> some critics attempted to refute the allegation and demonstrate that treatment efforts could be effective. A key element of such attempts was the notion that empirical data should guide the correctional enterprise, as opposed to common sense or politics.<sup>64</sup> The focus on scientific data to inform risk assessment ushered in the present practice of evaluating rehabilitative programs using an *Evidence-Based Practice* approach (EBP). Although recently embraced by the criminal justice system, EBP has its origins in 19th-century medical practice. More than a century later, the medical definition of EBP — “the conscientious, explicit, and judicious use of current best evidence in making decisions . . . integrating individual clinical expertise with the best available external clinical evidence from systematic research”<sup>65</sup> — is very much in line with the therapeutic, problem-solving, and comprehensive reentry approach. EBP “has shifted the focus of supervision and services to the factors that are most likely to impact . . . involvement in criminal behavior . . . targeting antisocial thought patterns, peer associations, and other dynamic risk factors using approaches research has shown generally reduce the likelihood of future criminal behavior.”<sup>66</sup>

Many states, relying upon EBP, have initiated program reforms aimed at reducing recidivism.<sup>67</sup> At the center of EBP is a commitment to understanding the individual and using a strategy that provides the best option for achieving the desired result.<sup>68</sup> EBP, however,

also has its critics. For example, some commentators contend that EBP has been simplified to a “this worked for most, so it should work for you” model that erroneously expects all offenders to respond to the same mode of service delivery.<sup>69</sup> This approach ignores an offender’s unique characteristics, circumstances, and priorities for successful reintegration. While it is the case that many offenders have similar risk factors — such as drug addiction — it is also

Whether the benefit of having a single program participant successfully avoid re-incarceration merits the financial costs of a reentry program is likely to remain a serious point of contention and debate.

the case that each offender’s specific circumstances require different treatment responses based on unique characteristics, including race, ethnicity, age, sex, gender, and mental health.<sup>70</sup>

The debate over the success of reentry programs probably will not cease even when more and better empirical data becomes available. Instead, the discussion is likely to focus on the extent and cost of success. A reentry program’s success, for example, from a qualitative perspective, could be defined as *any* observable reduction in recidivism. An observable reduction can constitute a

single program participant who does not reoffend after completing a reentry program. Whether the benefit of having a single program participant successfully avoid re-incarceration merits the financial costs of a reentry program is likely to remain a serious point of contention and debate. Recidivism is thus a “complicated criminological and social concept . . . measuring the recidivism-reducing effect of any program is challenged by the complexity of interdependent variables that affect the measure.”<sup>71</sup>

## CONCLUSION

Whether viewed expansively or narrowly, reentry programs reflect a significant departure from how the courts have traditionally administered justice.<sup>72</sup> Within the realm of criminal law, the courts have traditionally limited involvement to fact finding and application of the law from a detached, procedural standpoint. Reentry courts are essentially problem-solving courts that require court involvement throughout the offender’s experience with the criminal justice system. Such courts attempt to actively, effectively, and efficiently use limited resources to address particular problems that offenders face when attempting to reintegrate into the community. The development of reentry courts builds upon the claimed success of problem-solving courts in reducing the recidivism rates for the various at-risk clients they target: drug addicts, the mentally ill, the homeless, and juveniles, among others.<sup>73</sup>

At a time when most communities are hard-pressed to fund equally important societal needs, such as education, infrastructure, and health care, the allocation of funds for reentry programs will most likely be subject to contentious debate concerning cost-benefit analyses, as well as differing views as to how ex-offenders should be supported during

post-conviction. But the costs to society of mass incarceration and recidivism are also very real and escalating. More empirical study must be conducted to provide better guidance to local communities struggling with these challenges, with the caveat that there be a degree of flexibility in determining how to evaluate successful reentry programs.

For now, judges, working in tandem with support staff and key actors in the criminal justice system, especially prosecutors and defenders, may have a unique opportunity to enhance an ex-offender's prospects of permanent reintegration into the community by actively participating in programs that "go beyond" punishment. Reentry programs of all types can thus be viewed as experimental legal laboratories attempting to mollify the pernicious effects of mass incarceration and

recidivism. Regardless of the controversy surrounding reentry programs, as presently conceptualized and applied, they may provide judges and other key criminal justice actors with additional tools to play a more proactive, positive, and expansive role.



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<sup>1</sup> E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES 1991–2012, at 1–3 (2013).

<sup>2</sup> Leslie Helmus et al., *Absolute Recidivism Rates Predicted by Static-99R and Static-2002R Sex Offender Risk Assessment Tools Vary across Samples: A Meta-Analysis*, 39 CRIM. JUST. & BEHAVIOR 1148 (2012); see also U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 5 (2016) (finding that federal offenders recidivate at an alarming pace: 49.3 percent were rearrested within eight years of their release from prison).

<sup>3</sup> MATTHEW R. DUROSE, ALEXIA D. COOPER, & HOWARD N. SNYDER, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (2014), p. 1. See also Joel M. Caplan, *Parole System Anomie: Conflicting Models of Casework and Surveillance*, 70 FED. PROBATION 32 (Dec. 2006); Matthew G. Rowland, *Assessing the Case for Formal Recognition and Expansion of Federal Problem-Solving Courts*, 80 FED. PROB. 3, 12 (2016) (finding recidivism in the state system has been reported to be as much as 68 percent within three years of release from prison).

<sup>4</sup> *Id.*

<sup>5</sup> See NATHAN JAMES, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 1–4 (2015), available at <https://fas.org/sgp/crs/misc/RL34287.pdf>.

<sup>6</sup> William Hubbard, *Remarks on Collateral Consequences of Mass Incarceration*, 2 CRIM. L. PRAC. 10 (2014).

<sup>7</sup> Lisa A. Rich, *A Federal Certificate of Rehabilitation Program: Providing Federal Ex-Offenders More Opportunity for Successful Reentry*, 7 ALA. C.R. & C.L.L. REV. 249, 251 (2016).

<sup>8</sup> Durose et al., *supra* note 3; see also John Larivee, *Prisoner Reentry: A Public Safety Opportunity*, 37 PROSECUTOR 43 (2003); Jason Clark, *Incarceration, Recidivism, and Rehabilitation: Reducing Risk and Recidivism*, 75 TEX. BAR. J. 612 (2012).

<sup>9</sup> THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 685 (Joan Petersilia & Kevin R. Reitz eds., 2015).

<sup>10</sup> DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf>.

<sup>11</sup> CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, THE PRICE OF PRISONS:

EXAMINING STATE SPENDING TRENDS, 2010–2015 (2017), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-2015-state-spending-trends/legacy\\_downloads/the-price-of-prisons-2015-state-spending-trends.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-2015-state-spending-trends/legacy_downloads/the-price-of-prisons-2015-state-spending-trends.pdf); see also U.S. DEP'T OF EDUC., STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION (2016), <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf>.

<sup>12</sup> See generally Doulas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, 3 HARV. L. & POL'Y REV. ONLINE (2008).

<sup>13</sup> Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C.L. REV. 255, 256 (2004).

<sup>14</sup> *Id.* at 257.

<sup>15</sup> See MARTA NELSON ET AL., VERA INST. OF JUSTICE, THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY (1999); see Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use & Re-Incarceration Following Prison Release: Assessing the Risk*, 3 CRIMINOLOGY & PUB. POL'Y 139 (2004).

<sup>16</sup> Jessica S. Henry, *The Second Chance Act of 2007*, 45 CRIM. L. BULL. art. 3, at 4 (2009), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2344739](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344739).

<sup>17</sup> Charles J. Hynes, *Prosecution Backs Alternative to Prison for Drug Addicts*, 19 CRIM. JUST. 28 (2004).

<sup>18</sup> See Reginald A. Wilkinson, et al., *Prison Reform Through Offender Reentry: A Partnership Between Courts and Corrections*, 24 PACE L. REV. 609, 612 (2004).

<sup>19</sup> See, e.g., KEITH O'BRIEN & SARAH LAWRENCE, IMPLEMENTING A REENTRY PROGRAM ACCORDING TO BEST PRACTICES, MASS. EXEC. OFFICE OF PUB. SAFETY (2007), available at <http://www.mass.gov/eopss/docs/eopss/publications/implementing-a-reentry-program-according-to-best-practices-march-2007.pdf>; TIMOTHY HUGHES & DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES (2002), available at <http://www.bjs.gov/content/pub/pdf/reentry.pdf>; Stephen E. Vance, *Federal Reentry Court Programs: A Summary of Recent Evaluations*, 75 FED. PROB. 64, 65, 72 (2011).

<sup>20</sup> See Rich, *supra* note 7, at 249.

<sup>21</sup> Edward E. Rhine & Anthony C. Thompson, *The Reentry Movement in Corrections: Resiliency, Fragility and Prospects*, 47 CRIM. L. BULL. art. 1, 2 (2011).

- <sup>22</sup> See Melissa A. Knopp, *Breaking the Cycle: Ohio Reentry Courts*, 41 OHIO N.U. L. REV. 747 (2015) (“With the latest criminal justice reform efforts focused on reducing ballooning state corrections budgets and the number of inmates in state prisons, policy makers have been more willing to reassess the past punitive approaches that heavily relied on imprisonment as the principal crime control strategy.”).
- <sup>23</sup> See, e.g., Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003).
- <sup>24</sup> Gottschall & Armour, *infra* note 32, at 38–40; see Seiter & Kadela, *infra* note 50, at 368; see also Hamilton, *infra* note 55, and D.J. FAROLE, THE HARLEM PAROLE REENTRY COURT EVALUATION: IMPLEMENTATION AND PRELIMINARY IMPACTS (2003). Note that BJS data from 2000–2013 indicate that the majority of offenders on community supervision are on probation (on average 84 percent between 2000–2013).
- <sup>25</sup> See Faye S. Taxman, *The Offender & Reentry: Supporting Active Participation in Reintegration*, 68 FED. PROB. 31 (2004).
- <sup>26</sup> Knopp, *supra* note 22.
- <sup>27</sup> See Henry, *supra* note 16, at 2; see also James M. Byrne & Don Hummer, *Prisoner Reentry — Examining the Role of the Police in Reentry Partnership Initiatives*, 68 FED. PROB. 62 (2004).
- <sup>28</sup> See, e.g., Berman, *supra* note 12; Vivian Nixon et al., *Life Capacity Beyond Reentry: A Critical Examination of Racism and Prisoner Reentry Reform in the U.S.*, 2 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 21 (2008), available at <https://muse.jhu.edu/article/252430/pdf>; Thompson, *supra* note 13, at 256–57.
- <sup>29</sup> Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013).
- <sup>30</sup> The Council of State Governments Justice Center, National Inventory of Collateral Consequences of Conviction (2012, 2017), available at <https://niccc.csgjusticecenter.org/>
- <sup>31</sup> Logan, *supra* note 29, at 1103–05.
- <sup>32</sup> Joan Gottschall & Molly Armour, *Second Chance: Establishing a Reentry Program in the Northern District of Illinois*, 5 DEPAUL J. FOR SOC. JUST. 31, 67 (2011). Examples include: funding “police and other investigative agencies; public prosecutors; taxpayer-funded defender services (which represent the vast majority of defendants accused of crime); the judicial system, including judges and their staffs, court clerks, stenographers and marshals and other court security personnel; pretrial and probation officers; addiction counselors; and the enormous state and federal prison system.” *Id.*; see also Laura Knollenberg & Valerie A. Martin, *Community Reentry Following Prison: A Process Evaluation of the Accelerated Community Entry Program*, 72 FED. PROB. 54 (2008).
- <sup>33</sup> See JEREMY TRAVIS AND CHRISTY VISHER, EDS., PRISONER REENTRY AND CRIME IN AMERICA (2005).
- <sup>34</sup> For examples of federal courts that have implemented reentry programs, such as the District of Oregon, the District of Massachusetts, the Western District of Michigan, the Southern District of Ohio, the Middle District of Florida, and the Eastern District of Pennsylvania, see Hon. Michael J. Newman & Matthew C. Moschella, *The Benefits and Operations of Federal Reentry Courts*, FED. LAW. 26, 26–35 (2017), available at <http://www.fedbar.org/Resources/1/Federal-Lawyer-Magazine/2017/December/The-Benefits-and-Operations-of-Federal-Reentry-Courts.aspx>; Stephen E. Vance, *Federal Reentry Court Programs: A Summary of Recent Evaluations*, 75 FED. PROB. 64 (2011), available at [http://www.uscourts.gov/sites/default/files/75\\_2\\_11\\_0.pdf](http://www.uscourts.gov/sites/default/files/75_2_11_0.pdf). For a listing of various state reentry court programs, see *State by State Listing of Re-Entry Programs for Prisoners*, Lionheart Found., <http://lionheart.org/prison/state-by-state-listing-of-re-entry-programs-for-prisoners/> (last visited June 14, 2018).
- <sup>35</sup> See, e.g., *Re-Entry Court*, U.S. PROB. OFF.: EASTERN DISTRICT OF PA., available at <http://www.paep.uscourts.gov/re-entry-court> (listing the description and materials pertaining to the Supervision to Aid Reentry (STAR) Program in Philadelphia, PA, overseen by the Third Circuit Court of Appeals).
- <sup>36</sup> See Gottschall & Armour, *supra* note 32.
- <sup>37</sup> Rhine & Thompson, *supra* note 21, at 18. See also Patrick J. Carr, *The New Parochialism: The Implications of the Beltway Case for Arguments Concerning Informal Social Control*, 108 AM. J. SOC. 1249 (2003); April Pattavina, et al., *An Examination of Citizen Involvement in Crime Prevention in High-Risk Versus Low to Moderate Risk Neighborhoods*, 52 CRIME & DELINQ. 203 (2006); and Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCH. Q. 319 (2004).
- <sup>38</sup> Rhine & Thompson, *supra* note 21, at 8. See also Joan Petersilia, *Prisoner Reentry — What Works in Prisoner Reentry? Reviewing and Questioning the Evidence*, 68 FED. PROB. 4 (2004); Gordon Bazemore & Jeanne Stinchcomb, *Prisoner Reentry — A Civic Engagement Model of Reentry: Involving Community Through Service and Restorative Justice*, 68 FED. PROB. 14 (2004).
- <sup>39</sup> See James, *supra* note 5.
- <sup>40</sup> See Shadd Maruna & Thomas P. LeBel, *Welcome Home? Examining the Reentry Court Concept from a Strengths-Based Perspective*, 4 W. CRIMINOLOGY REV. 91 (2003).
- <sup>41</sup> A.B.A., *Reentry Courts*, 17 CRIM. JUST. 15 (2002).
- <sup>42</sup> See Martha Neil, *2 Federal Judges Work with Ex-Cons in Chicago Re-Entry Program*, A.B.A. J. (Aug. 16, 2012), [http://www.abajournal.com/news/article/federal\\_judges\\_work\\_with\\_ex-cons\\_in\\_chicago\\_re-entry\\_program/news/article/judges\\_and\\_the\\_administrative\\_state/?icn=sidebar&ici=bottom](http://www.abajournal.com/news/article/federal_judges_work_with_ex-cons_in_chicago_re-entry_program/news/article/judges_and_the_administrative_state/?icn=sidebar&ici=bottom).
- <sup>43</sup> A.B.A., *supra* note 41.
- <sup>44</sup> GA. DEP’T OF CORR., PERFORMANCE INCENTIVE CREDIT (2017), available at [http://dcor.state.ga.us/sites/all/themes/gdc/pdf/PIC\\_v032017.pdf](http://dcor.state.ga.us/sites/all/themes/gdc/pdf/PIC_v032017.pdf)
- <sup>45</sup> See ALASKA PRISONER REENTRY TASK FORCE, FIVE-YEAR PRISONER REENTRY STRATEGIC PLAN, 2011–2016, available at <http://www.correct.state.ak.us/TskForce/documents/five-year-prisoner-reentry-plan.pdf>.
- <sup>46</sup> KEITH O’BRIEN & SARAH LAWRENCE, *IMPLEMENTING A REENTRY PROGRAM ACCORDING TO BEST PRACTICES* (2007), available at <http://www.mass.gov/eopss/docs/eops/publications/implementing-a-reentry-program-according-to-best-practices-march-2007.pdf>.
- <sup>47</sup> Two distinct literatures that have emerged using distinct disciplinary traditions and methodologies for assessing reentry and “what works.” These differences have evolved over the last two to three decades due to disciplinary training (mainly psychology versus criminology) and the methods each discipline has adopted. Each literature, while finding some support for the efficacy of a reentry approach to criminal justice, nonetheless have produced different conclusions based on different foci of analysis. Petersilia, *supra* note 38, at 4–5.
- <sup>48</sup> *Id.* at 6.
- <sup>49</sup> LAWRENCE W. SHERMAN, ET AL., PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING 6–12 (1997), available at <https://www.ncjrs.gov/works/>
- <sup>50</sup> See Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 CRIME & DELINQ.,

360, 370–72 (2003). The researchers developed the following criteria to determine whether a crime prevention program was effective or ineffective:

*What Works*: “For a program to be considered ‘working,’ there must be at least two Level 3 evaluations with significance tests indicating that the intervention was effective, and the preponderance of the remaining evidence must support that conclusion.” *Id.* at 372.

*What Does Not Work*: “For a program to be coded as ‘not working,’ there must be at least two Level 3 evaluations with statistical significance indicating the ineffectiveness of the program, and the preponderance of the remaining evidence must support the same conclusion.” *Id.* at 372.

*Promising*: “These are programs for which the level of certainty from available evidence is too low to support generalizable conclusions. However, there is some empirical basis for predicting that further research could support such conclusions, such as programs are found effective in at least one Level 3 evaluation, and the preponderance of the remaining evidence supports that conclusion.” *Id.* at 372–73.

*Unknown*: “Any program not classified in one of the three previous categories is defined as having unknown effects.” *Id.* at 373.

<sup>51</sup> James, *supra* note 5, at 5; see also Robert Weisberg, Meanings & Measures of Recidivism, 87 S. CAL. L. REV. 785, 786–87 (2014). As noted by Weisberg, stepping outside the parameters of recidivism so defined, one can, for example, limit the definition of a recidivist act to a new criminal act, a new prison-eligible felony, or to a technical violation of parole. *Id.* at 786. One can also lengthen or shorten a given time frame; thus, the definition of recidivism is “a matter of [being a] legal concept and [having] criminological significance.” *Id.* One can also question a case wherein “a technical violation was charged to see if the act was actually a new crime that the prosecutor just chose to treat as an administrative violation, for ease of proof and procedure. That approach would have raised difficult fact-finding issues, so the definition of recidivism remains[s] contingent on empirical uncertainty.” *Id.* at 786–87.

<sup>52</sup> See James, *supra* note 5, at 5–6.

<sup>53</sup> *Id.*

<sup>54</sup> See Stephanie Slifer, *Once a Criminal, Always a Criminal?*, CBS NEWS (Apr. 23, 2014, 7:35 AM), <https://www.cbsnews.com/news/once-a-criminal-always-a-criminal/>.

<sup>55</sup> For examples of varying studies and results, see Z. K. Hamilton, *Adapting to Bad News: Lessons from the Harlem Parole Reentry Court*, 50 J. OF OFFENDER REHABILITATION, 385–410 (2011); J. A. Wilson & R. Davis, *Good Intentions Meet Hard Realities: An Evaluation of the Project Greenlight Reentry Program*, 5 CRIMINOLOGY & PUB. POL’Y, 303–38 (2006); J.A. Bouffard & L.E. Bergeron, *Reentry Works*, 44 J. OF OFFENDER REHABILITATION 1–29 (2006); P.K. Lattimore, D.M. Steffey & C.A. Visher, *Prisoner Reentry in the First Decade of the Twenty-First Century*, 5 VICTIMS & OFFENDERS 253–67 (2010); J.A. Inciardi, et al., *An Effective Model of Prison-Based Treatment for Drug-Involved Offenders*, 27 J. OF DRUG ISSUES, 261 (1997).

<sup>56</sup> Petersilia, *supra* note 38, at 7.

<sup>57</sup> See JAMIE YOON & JESSICA NICKEL, REENTRY PARTNERSHIPS: A GUIDE FOR STATES & FAITH-BASED & COMMUNITY ORGANIZATIONS, COUNCIL OF STATE GOV’TS JUSTICE CTR., N.Y., N.Y. (2008), [https://www.bja.gov/Publications/CSG\\_Reentry\\_Partnership.pdf](https://www.bja.gov/Publications/CSG_Reentry_Partnership.pdf).

<sup>58</sup> Petersilia, *supra* note 38, at 7; see also Henry, *supra* note 16, at 8; Arthur J. Lurigio et al., *The Effects of Serious Mental Illness on Offender Reentry*, 68 FED. PROB. 45 (2004); James E. Robertson, *Civil Disabilities and Citizenship: The New Color Line*, 21 CORRECTIONAL L. REP., 57, 63 (2010); Wendy S. Still, *San Francisco Realignment: Raising The Bar for Criminal Justice in California*, 25 FED. SENT’G REP. (2013).

<sup>59</sup> ANNA CRAYTON ET AL., URBAN INST., PARTNERING WITH JAILS TO IMPROVE REENTRY: A GUIDEBOOK FOR COMMUNITY-BASED ORGANIZATIONS (2010), available at <https://www.urban.org/sites/default/files/publication/29146/412211-Partnering-with-Jails-to-Improve-Reentry-A-Guidebook-for-Community-Based-Organizations.PDF>.

<sup>60</sup> Petersilia, *supra* note 38, at 4–5 (citing Seiter & Kadela, *supra* note 50, at 368; see also Chuck Colson, *Thirty-Sixth Annual Review of Criminal Procedure — Justice That Restores: A Paradigm-Shift in Criminal Justice Practices*, 36 GEO. L.J. ANN. REV. CRIM. PROC., at iii (2007).

<sup>61</sup> Mirlinda Ndrecka, *The Impact of Reentry Programs on Recidivism: A Meta-Analysis* (2014), (unpublished Ph.D. dissertation, University of Cincinnati) at iii.

<sup>62</sup> A.B.A., *supra* note 41, at 15.

<sup>63</sup> Robert Martinson, *What Works Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

<sup>64</sup> Christopher T. Lowenkamp et al., *When A*

*Person Isn’t A Data Point: Making Evidence-Based Practice Work*, 6 FED. PROB. 11, 12–15 (Dec. 2012).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See, e.g., OR. REV. STAT. § 182.525, 2003; ARK. CODE § 16-93-104; S. C. CODE ANN. § 24-21-10; KY. REV. STAT. ANN. § 532.007; 730 ILL. COMP. STAT. ANN. § 190/10; AND TEX. BUS. & COM. CODE ANN. § 501.092.

<sup>68</sup> See Lowenkamp, et al., *supra* note 64, at 12–15.

<sup>69</sup> For an in-depth discussion of the merits and pitfalls of EBP, see Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295 (2009); Douglas B. Marlowe, *Evidence-Based Policies and Practices for Drug-Involved Offenders*, 91 PRISON J. 27S (2011); Gerald P. Lopez, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1 (2014).

<sup>70</sup> See Gottschall & Armour, *supra* note 32, at 53–55; see also Douglas B. Marlowe, et al., *Matching Judicial Supervision to Clients’ Risk Status in Drug Court*, 52 CRIME & DELINQ. 52, 54 (2006).

<sup>71</sup> Weisberg, *supra* note 51 at 799–800.

<sup>72</sup> Kristin Brown Parker, *The Missing Pieces In Federal Reentry Courts: A Model For Success*, 8 DREXEL L. REV. 397 (2016). Available at <http://drexel.edu/law/lawreview/issues/Archives/v8-2/brown1/>.

<sup>73</sup> Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT’G REP., 127, 127 (2007).

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# Reflections *on a* Reentry Court

By JEFFREY ALKER MEYER  
and CARLY LEVENSON

Kevin hesitates in the doorway before entering Courtroom 3. When Kevin was 26, he was tried and sentenced in this courtroom. The judge who presided over his trial and sentencing has since retired, but a massive portrait of her hangs high on the back wall, as if she is watching all below.

Being in this room, with the portrait looming, “brings back memories of something I don’t really want to remember,” Kevin said.

In 1991, a jury convicted Kevin of conspiring with several co-defendants to distribute narcotics. He was sentenced to serve more than 24 years, in part because his prior felony convictions rendered him a “career offender” under the Sentencing Guidelines. With a state sentence he received around the same time, Kevin was facing a total 26 years in prison. His impending term of incarceration, he noted, was the same length as his entire life up to that point.

Kevin survived more than a quarter-century of incarceration in nine different federal prisons by “staying focused” and “reading a lot of books.” Last year, he emerged at age 52 and returned home to New Haven, Conn. He was welcomed by five generations of his family, from his 95-year-old grandmother all the way down to his grandchildren, who were born while he was locked up. Returning to a city felt strange after being incarcerated in rural areas for so many years. “When you’re in the mountains you don’t see people, you don’t see cars driving by . . . you just see a lot of snow.” Even more jarring were the enormous

leaps in technology since 1991. One year after his release, he is still learning how to use the features on his cell phone.

When he came home, Kevin noticed that, despite the many changes in his community and in the world, “some people were still in the streets doing the same thing they were doing when I left.” He was determined to begin a

“I knew I didn’t want to be a part of that no more. I’m not the type of person where I’m just going to be stuck in one spot for the rest of my life.”

new chapter. “I knew I didn’t want to be a part of that no more,” he said. “I’m not the type of person where I’m just going to be stuck in one spot for the rest of my life.” When his probation officer suggested that he visit the Reentry Court, Kevin agreed, despite some initial skepticism.

Now a regular and outspoken member of the program, Kevin considers Reentry Court a “blessing” — though he still sometimes wishes it took place in a different courtroom.

In this essay, we reflect on our experience with Kevin and other members

of a federal Reentry Court program that began in the District of Connecticut in August 2016. One of us is the judge who presides over this Reentry Court, and the other is a law clerk who spent a year closely working with the Reentry Court and now works as a public defender. We don’t write this as an academic analysis of prisoner reentry, nor as an empirical evaluation of reentry courts in general or our program in particular. Our goals are more modest: to explain how our Reentry Court works; to share the stories and perspectives of some of our members (based on their consent to be interviewed); and to reflect on some of the values of a reentry court program that may not be readily susceptible to mathematical tracking or measurement.

#### THE MEMBERS OF OUR REENTRY COURT

are men who have very recently completed lengthy sentences in federal prison and are serving terms of supervised release in the District of Connecticut. Anyone on supervised release must communicate regularly with a probation officer, submit to drug tests and home visits, and comply with a litany of other conditions. Those who voluntarily choose to participate in Reentry Court agree to take on additional obligations and more intensive supervision for the one-year period of the program. Most importantly, they agree to report to court every other Wednesday to participate in Reentry Court sessions, which last about an hour and a half. In addition, they attend a cognitive-thinking group known as Moral Reconation ▶

Therapy (MRT), which is led by probation officers, meets weekly, and usually takes a few months to complete.

A Reentry Court session bears little resemblance to a typical court proceeding. Before the session begins, all the chairs in the courtroom are plucked from their usual places and arranged in a community circle around the two wooden counsel tables. The ten or so members arrive at 4:30 p.m. The first 15 minutes of the session are unstructured to encourage social conversation among the members and with the various members of the Reentry Court “team.” The team includes the judge, several probation officers, and representatives from both the U.S. Attorney’s Office and the Office of the Federal Public Defender.

As the judge who presides over the Reentry Court, I do not wear a robe, bang a gavel, or “take the bench” for any part of the Reentry Court sessions. A critical part of the Reentry Court is its informality, which allows all of us to step outside of our traditional roles and interact more naturally with one another. My own goals for each session are to be waiting by the courtroom door to greet every member as he arrives and to establish a person-to-person connection from the beginning.

After about 15 minutes of informal conversations, we all take seats around the circle. I go one-by-one to talk with each member about how things have gone for him since the last court session. Members share with all of us their successes — a job offer, praise from an employer, the birth of a grandchild — as well as their setbacks and disappointments — a failed driver’s license test, a break-up with a significant other, an eviction notice. If there is a success to report, I congratulate them and ensure that they are publicly recognized, as they should be for their effort. If there has been a setback, I ask them how

they plan to respond, and I invite all the others gathered around to weigh in about how to troubleshoot the problem. Oftentimes, the best idea or inspiration comes from another member who has faced a similar challenge.

Even if one of our members has a serious setback, such as a positive drug test, we try to engage with him to reflect about what led to the choice he made and what consequences it can have. Naming and shaming don’t have seats at our table. The common goal throughout is to affirm, encourage, and inspire. We believe that building self-confidence and preserving dignity and self-esteem are vital to the success of every member, as they are for each of us in our personal lives and careers.

We challenge each of the members to articulate their short- and long-term goals, and the whole team works to identify concrete steps to be taken before the next court session. Between court sessions, the probation officers and the U.S. Attorney’s Office reentry coordinator frequently talk or meet with each member to help with following through on goals (reaching out to employers, signing up for testing programs, etc.). Almost every dialogue with each member ends with, “What else can we do to help you?” and then, “Does anyone else have other thoughts for Kevin?”

These individual dialogues last for about 45 minutes. The balance of each session is devoted to a different guest speaker each week. We have hosted a wide variety of speakers over the life of our Reentry Court, from prospective employers to a bank representative to a nutritionist. Frequently, our guest speakers are people who have served time themselves and can offer firsthand wisdom about the challenges they have overcome.

Reentry Court consists of four phases, with the entire program designed to

take about a year. Every member must reach specific milestones in each phase before progressing to the next. If someone slips up — for example, if he fails a drug test, or misses a session without giving notice — he loses time credit, which means it will take him longer to progress to the next phase. In the end, those who graduate are celebrated with a joyous graduation ceremony and then have their term of supervised release shortened by one year. This reduction in supervised release is no doubt a “carrot” that prompts many of the members to join in the first place. But the benefits that members receive in the form of support and resources while in Reentry Court likely offer an even bigger return.

**LEROY HAS BEEN IN AND OUT OF PRISON SINCE** he was a teenager. After serving an almost five-year federal sentence for illegal gun possession, he was released to a halfway house; within weeks, he was rearrested for violating his probation and sentenced to serve two and a half more years.

When he was released again in December 2016, he joined Reentry Court and quickly found work as a driver for a service that transports people to dental and medical appointments.

Leroy believes that “it’s a misconception that you can’t get a job” with a criminal record. “Does the record have an effect on it? A little bit. But there are a lot of places that will give you an opportunity — you just have to sell yourself.” During his first weeks in Reentry Court, Leroy brought in flyers with his employer’s contact information, encouraging jobless members to apply.

Despite his optimism, Leroy acknowledges that the process of applying for jobs can be intimidating. “I get nervous at interviews, because I’m not used to being questioned like that. My experience with interviews has mostly

been getting interviewed by the police.” In job interviews, “I don’t want to say something wrong, or look stupid, or be judged. I already feel like I have an intimidating look because of my size, and then they see all these tattoos,” he says, motioning to his face and neck. “And then they see I got a record and it’s like, ‘Aw, man, I’m not going to get it.’ But you keep trying. You know, you’ve got to keep going. There is a place that will hire you.”

Leroy’s hours as a driver with the transport service have fluctuated. At times, work has “slowed down to the point where I almost didn’t have a job,” he says. It’s gotten slow again recently, so he has been looking for a second job; nothing has panned out yet. His long-term goal is to start his own business, but he knows there are a lot of smaller goals he has to achieve first. For example, he needs to build up his credit, which was non-existent after a lifetime spent either in prison or using only cash.

“I’d been trying to stop carrying cash all the time and start using a card, to build a little credit. I had a card for a while, but I never used it, because I didn’t know how. I was too embarrassed to say that I didn’t know how to use it, and I didn’t want to look stupid trying to use it, so I never used it. I just didn’t want to get up there and look like I didn’t know what I was doing,” he laughs. When he eventually relented and asked someone, he was surprised to learn how simple it was.

For Leroy, one of the hardest things about reentry has been having to ask for help. “I’m the kind of person where I like to take care of my own everything. So having to rely on people for a ride, or a place to stay . . . it’s tough.” But Reentry Court has given him a forum for seeking and accepting help. When his son’s mother refused to let Leroy spend time with his son,

Leroy brought the situation to Reentry Court. The team connected him with a volunteer lawyer who handled his visitation case in family court pro bono, and Leroy was ultimately able to secure visitation rights. Though he considers himself a private person, Leroy became more comfortable talking about the

Even if one of our members has a serious setback, such as a positive drug test, we try to engage with him to reflect about what led to the choice he made and what consequences it can have. Naming and shaming don’t have seats at our table.

issue with his son in Reentry Court after hearing other members talk about navigating similar situations with their own kids. “Going to Reentry Court,” he says, “I’ve seen that almost all of us had these issues.”

**LIKE LEROY, STEVE HAS BEEN IN AND OUT OF PRISON** for most of his life. He came home two years ago at age 45, after serving 12 and a half years. In reflecting on his two-year “anniversary,” he mentions that, before now, he hadn’t been out in the world for more than two years at a time since he was 14.

Steve is soft-spoken and quick to smile. He jumped at the opportunity to join Reentry Court after his release. “For me, accepting help was a no-brainer,” he says, particularly because he had no legitimate work history. “Reentry” is in some contexts a misnomer, since a lot of people coming out of prison are making their first entry into the legal workforce. Holly, the U.S. Attorney’s Office reentry coordinator, helped Steve put together a resume and apply to jobs. He was hired as a “Downtown Ambassador” in New Haven, a role that is a combination of street cleaner, tour guide, and patrolman. His employer was so pleased with Steve’s work performance that he asked Holly for referrals for other potential employees.

At the team’s pre-meetings, the probation officers always update the team on what is happening with each member. Patrick, Steve’s probation officer, almost always began Steve’s update the same way: “Steady as he goes.”

Steve deflects praise for his achievements, attributing credit to the people he refers to as his “supporting cast” — that is, his adult daughter and three young grandchildren, with whom he lives. “A lot of people aren’t fortunate enough to have a supporting cast. My daughter opened her home to me, supported me, was basically taking care of me before I got a job.” And his grandchildren? “They think they’re my parents. They love to boss me.”

Although his relationships with family have remained strong, navigating relationships with friends has been one of his biggest challenges since coming home. Many of his friends “are not on the page that I’m on,” and although Steve feels strongly that it is “their prerogative to live life the way they choose,” he also believes he needs to keep his distance in order to avoid falling back into old habits. Distancing himself from these lifelong friends — relationships ▶

“built from the sandbox” — has been emotionally taxing and sad.

Last fall, Steve became the first graduate of Reentry Court. His daughter and grandkids attended the ceremony and gave speeches, as did his employer and even the judge who had sentenced Steve so many years ago.

#### **THOUGH MEMBERS ARE SOMETIMES ISOLATED FROM THEIR FRIENDSHIPS**

for the reasons Steve describes, they provide moral support and inspiration to one another through Reentry Court and the Moral Reconciliation Therapy groups. In particular, older members like Kevin, Leroy, and Steve serve as role models for younger ones. Anthony, one of the youngest participants at 24, observes, “Kevin, that guy that did a lot of years? He wants it, and you can see that. And that’s how I want to be, too. If I hear [of an opportunity] that’s going to be beneficial to me, I want to jump on it.”

Anthony came home about a year ago, after serving two and a half years for his role in a string of armed robberies when he was 20. He was sentenced to time served in federal court and expected to be transferred to state custody because of an outstanding bond in state court. To his surprise, he was released that day. “It was an insane feeling. I almost passed out when I heard I was going home.”

Once he got over the initial shock, his transition home was not as much of a jolt to Anthony’s system compared to some of the other men who served longer sentences. “I got on my feet very quick,” he remembers, and “my fingers were on fire” typing up job applications. He first got a job delivering pizzas, and later, with a small moving company, where he now works full time.

He originally signed up for Reentry Court because he wanted to get the year off his supervised release. “For the first

three months in Reentry Court, [getting the year off my supervised release] was all I cared about.” But after a few months in the program, it wasn’t just about getting the year off anymore. He says he changed his thinking, which he attributes to discussions at Reentry Court sessions and especially to the

The members are not the only ones whose relationships and views of “the system” are changed by this experience. Reentry Court gives judges, prosecutors, defense attorneys, and probation officers the opportunity to step outside of our usual roles.

Moral Reconciliation Therapy program. “In MRT, you learn to really put everything behind you, but to also accept what happened to you. I wouldn’t be here if I didn’t commit a crime. And I also wouldn’t have learned half the things I learned.”

Anthony recalls one of the Reentry Court’s recent guest speakers, who is the senior vice president of human resources at Yale-New Haven Hospital — one of the largest employers in Connecticut. In New Haven and the surrounding area, jobs at Yale University and the

Yale-New Haven Hospital are highly coveted. This speaker talked about the hospital’s commitment to hiring people with criminal records and offered advice to those interested in applying. During his presentation, he told a story about himself as a teenager, when a football teammate placed a gun in his hand during an emotionally charged moment. Though his reflex at the time was to hand the gun back, the speaker admitted he could have just as easily made a “bad decision” in that moment that would have prevented him from getting to where he is today. The story stuck with Anthony, who decided it needed tweaking. “He said if he’d made that bad decision, he wouldn’t be here today. But I think he could have made that bad decision and still been here. I took what he said and turned it, because I feel like, maybe he still could have,” Anthony insists, pointing to the success of his fellow Reentry Court participants, as well as the stories of many of our past guest speakers, who rebuilt their lives and went on to successful careers after committing crimes at a young age.

#### **STEVE SAYS THAT REENTRY COURT HAS HAD A “HUMONGOUS IMPACT”**

on the way he thinks about courts and the criminal justice system, and other participants have echoed this sentiment. As Steve explains it, “you get to see a different side of people in Reentry Court. I was able to converse with prosecutors. You don’t get to know someone until you converse with them, see where their head is at. These are regular people. A lot of times we lose focus of the fact that [prosecutors and judges] are doing a job. I got to meet a good group of people from many walks of the judicial system. It showed me that they’re human beings; they have a heart.”

Leroy had a similar experience. The prosecutor who filed Leroy’s case is one of

the team members who regularly attends Reentry Court. “During my time going back and forth to court, I hated the guy,” Leroy recalls. “I used to sit there in court and wonder, ‘Why does this prosecutor, who doesn’t even know me, want so badly to take me away from my family?’” When their paths crossed again in Reentry Court years later, Leroy’s feelings about the prosecutor had shifted. “When I saw him in there, I didn’t have no animosity — and that has a lot to do with the program and my growth.” The two shook hands, and even talked a little about Leroy’s case. Though Leroy still harbors some frustration about the way his case played out, he no longer holds on to any anger towards the prosecutor. “Whether I agree with everything he did or not, he was doing his job. He said it was nothing personal, it’s just that he has things to uphold. And I respected that, and that was it.”

The members are not the only ones whose relationships and views of “the system” are changed by this experience. Reentry Court gives judges, prosecutors, defense attorneys, and probation officers the opportunity to step outside of our usual roles, to work collaboratively toward a shared goal, and to relate differently to each other and our members in a way that is not possible in our day-to-day work.

Of course, Reentry Court is far from a magical cure-all. Many of the participants remain deeply frustrated about aspects of their own cases and about structural injustice as well. Kevin, for

example, makes a passionate case against lengthy sentences for selling drugs and believes the criminal justice system is infected with racial bias. At the same time, he believes that Reentry Court “shows another side” of the system, and shows that “people [in the system] do have a heart; people do care.”

**MUCH OF THE EXISTING LITERATURE ABOUT REENTRY COURTS** attempts to evaluate whether such programs reduce recidivism, often by measuring new arrests or convictions. Whether our Reentry Court ultimately reduces recidivism is not a question we can answer at this point. We have had too few participants to yield meaningful statistical results; moreover, our participants are not randomly selected because our program is voluntary. These features, combined with the fact that the program is still in its infancy, prevent us from reaching any empirical conclusions.

Anecdotally, we can say that the large majority of our 21 members to date have been successful. Most have found and retained jobs and housing, reunited with family, and avoided new criminal charges. A few of our members have occasionally failed drugs tests or been arrested on new, relatively minor charges. Four of our members have dropped out of the program, two by their own choice and two at our suggestion when it became apparent that they were not able to commit to membership in the program. A single one of the members had to leave because of his

arrest for a serious violent crime. One of our members tragically passed away from an overdose, despite having had no prior positive drug test results during his participation in the program.

We think the results of our program are encouraging, and we are encouraged as well by the unanticipated benefits. By changing the somewhat calcified way that members and their families view and relate to judges, lawyers, and probation officers, the Reentry Court increases public confidence and trust in the judicial system. And by changing the way judges, lawyers, and probation officers view and relate to people who have been convicted of crimes, Reentry Court challenges us to rethink how we do our jobs and how we understand and relate to the people who are most impacted by our criminal justice system.



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# A matter *of* style

**Perceptions of  
chief justice leadership  
on state supreme courts  
*with an eye toward*  
gendered differences**

BY MIKEL NORRIS  
& CHARLIE HOLLIS WHITTINGTON

**ALTHOUGH MOST RESEARCH ON COURT LEADERSHIP STILL FOCUSES ON THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT, RESEARCHERS ARE INCREASINGLY INTERESTED IN STATE SUPREME COURTS, AND WITH GOOD REASON.**

State supreme courts provide a more diverse institutional setting for understanding court leadership than the U.S. Supreme Court.<sup>1</sup> Different states have different norms and rules. Some state court systems are consolidated while others are not. Some states give opinion-assignment power to their chief justices. Some do not. States differ in how they choose their chief justices and the length of terms they serve. Finally, different states choose their panels of justices in different ways. Some state courts hear every case en banc, whereas others assign cases to smaller panels of justices. These differences and more make understanding how the justices on these courts — and chief justices in particular — believe their courts should be managed interesting and relevant, both for scholars and judicial leaders.<sup>2</sup>

The purpose of this analysis is to examine and analyze leadership styles, skills, and attributes on state supreme courts. This area of research is growing in academic study, as more scholars — particularly in political science and public administration — are examining how our political institutions are

run, rather than focusing only on the politics that take place in those institutions.<sup>3</sup> We are particularly interested here in discerning if there are differences in leadership style preferences between men and women on state high courts. Many bemoan the dearth of women in leadership in American politics; however, women have been incredibly successful in obtaining the position of state chief justice. Over half of the state chief justiceships were held by women as recently as 2014. This fact alone should interest scholars and pundits who study gender and leadership. In this article, we attempt to shed light on two specific questions pertaining to court leadership. First, what types of leadership styles do state supreme court justices *themselves* think are responsible for effective or ineffective court leadership? Second, are there any differences between male and female state supreme court justices regarding what they think constitutes effective or ineffective court leadership by their chief justices?

Courts — and state courts in particular — provide an excellent forum for examining these questions. Research on gender and leadership has long recognized differences in the leadership styles of men and women across an array of academic disciplines. A traditionally feminine leadership style is generally characterized by interaction.<sup>4</sup> It is more democratic and emphasizes collabo-

ration, participation, consensus, and empowerment. A traditionally masculine leadership style, on the other hand, is characterized by autocracy, and the seeking out of opportunities to exert authority over others.<sup>5</sup> Past studies have shown that this form of leadership is prevalent in hierarchical organizations that have performance-based cultures, whereas feminine leadership styles are generally perceived to be more effective in flatter organizational structures that emphasize transformation and empowerment.<sup>6</sup>

Based on our understanding of masculine and feminine leadership styles, it would be sound to assess how justices themselves regard gender differences in leadership on state high courts. State supreme courts are “flat” organizations with every justice exercising equal authority. While state chief justices govern their courts, they are considered leaders among peers rather than leaders of subordinates.<sup>7</sup> State supreme court judges also have stated in surveys presented in previous research that a primary task of chief justices is to build consensus in making their rulings.<sup>8</sup> The ability to build consensus is commonly referred to as a feminine leadership trait.<sup>9</sup> Without adequate consensus, courts can fail to maintain themselves as institutions, which could result in conflict with, and retaliation from, the other branches of government or the ▶

**Over *half* of the state chief justiceships were held by women *as recently as 2014*.**

public.<sup>10</sup> Too much dissensus among justices can sow discord, weaken precedent, confuse the interpretation of the law, and lead to more appeals.<sup>11</sup> Since justices already know this, it is interesting to consider whether male and female justices on state high courts seek to adopt feminine leadership styles in their chief justices more generally, and consensus-building skills in particular. To be sure, no uniform method of leadership ensures the interests of a state supreme court or a state court system are protected. However, fostering inter- and intra-court cooperation and consensus appears to be key to effectively promoting and protecting the interests of the courts in state politics. Consensus helps courts achieve their interests.<sup>12</sup>

This study aims to broaden our understanding of whether state supreme courts are more amenable to a masculine or feminine leadership style by examining what the justices themselves perceive the leadership qualities of their chief justices to be. Next, we attempt to answer whether masculine or feminine leadership styles in state chief justices are desirable by examining what the justices themselves think are the most important duties and responsibilities of their chief justices and what these justices think are the most important skills necessary for a chief justice to possess in order to achieve these goals.

### THE STUDY

In order to study state supreme court justices' perceptions of the types of organization their chief justices lead, whether leadership styles conventionally attributed to women or men may be more successful on state supreme courts, whether state supreme court justices themselves value the leadership qualities that the literature attributes to them, and whether there are differences in preferences depending on the

## What types of leadership styles do state supreme court justices think are responsible for effective or ineffective court leadership? Are there any differences between male and female state supreme court justices regarding what they think constitutes effective or ineffective court leadership by their chief justices?

justice's gender, we constructed a survey questionnaire that was mailed to a total of 587 current and former state supreme court justices in all 50 states. We followed up with telephone calls to each court approximately two weeks after the surveys were received. Justices were assured complete confidentiality and anonymity in their responses and were instructed to not answer any question they thought would breach confidentiality. Those justices who were interviewed via telephone were asked questions from the survey instrument and given the opportunity to answer follow-up, open-ended questions related to the questions in the survey. Phone conversations averaged between 35 minutes to an hour in length. Conversations were transcribed after each interview. Fifty-eight responses were gathered from the sur-

vey, a 9.7 percent response rate. Justices from 31 different states responded to the survey. A list of states from which the surveys were returned, as well as other descriptive information about the survey respondents, are presented in Table 1. Forty of the respondents were male, and 18 of the respondents were female. Twenty-three of the justices were either currently serving or previously served as chief justice of their court, for a total of 117 years of service as chief justice among the respondents.

Although the survey asked questions on a variety of subjects, the questions specifically addressed in the analysis are the following:

*A: In your opinion, what are the three most important duties/responsibilities of being your court's chief justice?*

*B: In your opinion, what are the three most important skills necessary to be an effective leader as a chief justice?*

*C: In your opinion, what leadership characteristics have you observed that have led to your chief justice being an ineffective leader?*

*D: In your opinion, are chief justices*

Table 1: STATES PARTICIPATING IN THE SURVEY

Arizona	New Hampshire
Arkansas	New York
California	North Dakota
Florida	Ohio
Georgia	Oregon
Hawaii	Pennsylvania
Idaho	Rhode Island
Indiana	South Carolina
Iowa	Tennessee
Kentucky	Texas
Maine	Utah
Maryland	Vermont
Michigan	Washington
Minnesota	West Virginia
Mississippi	Wyoming
Missouri	

Note: Number of participants from each state and judicial status not reported to maintain confidentiality

*in a better position than other justices to foster consensus on their court?*

Because we know so little about leadership styles and their effectiveness on state supreme courts — let alone whether gendered leadership styles are more or less effective on state supreme courts — this study is mostly exploratory. Although literature on gendered leadership posits that different genders exhibit different leadership styles, we are content to simply explore what the justices themselves have to say about how their courts are led. While it may be possible to statistically model the effects of masculine and feminine leadership styles on state supreme courts, this type of analysis would not tell us whether the justices think — either explicitly or implicitly — that certain leadership qualities are more or less desirable in their chief justices. We believe that the best way to discern what the justices themselves think of leadership on state supreme courts is to ask them.<sup>13</sup>

Since the duties and responsibilities of state chief justices vary widely from state to state, we have decided to perform our analyses by accounting for whether a

chief justice presides over a unified or non-unified court system. Chief justices in unified court systems are responsible for the central administration of their state’s entire court system, whereas chief justices in non-unified systems do not have to handle the central administration of state courts. This distinction is important because unified court systems are hierarchical in form. State supreme courts in non-unified courts are not.<sup>14</sup> Chief justices who sit atop a judicial hierarchy in unified court systems should, according to the extant literature, be more amenable to a masculine leadership style. Other important powers — such as the ability to assign opinions, for example — could possibly affect what leadership skills different justices think a chief justice should have.<sup>15</sup> We choose to look at differences between unified and non-unified courts specifically because one is hierarchical and one is not, and therefore each could be assumed to align with a different leadership style.<sup>16</sup> Thirty-six of our respondents work or have worked on unified courts. Twenty-two of our respondents work or have worked on non-unified courts.

**THE DUTIES OF THE CHIEF JUSTICE**

Figure 1 provides a graphical interpretation of what the justices in the survey volunteered as the most important duties and responsibilities of state supreme court chief justices. The justices in this survey overwhelmingly agreed that the most important duty of their chief justices was to administer the business of their courts. Nearly one third — 31.5 percent — of the answers to the question about the most important duties and responsibilities of the chief justice pertain to effective court administration. This holds true regardless of whether the chief justice is responsible for administering just the state supreme court or the entire state court system. In describing the duty of the chief jus- ▶

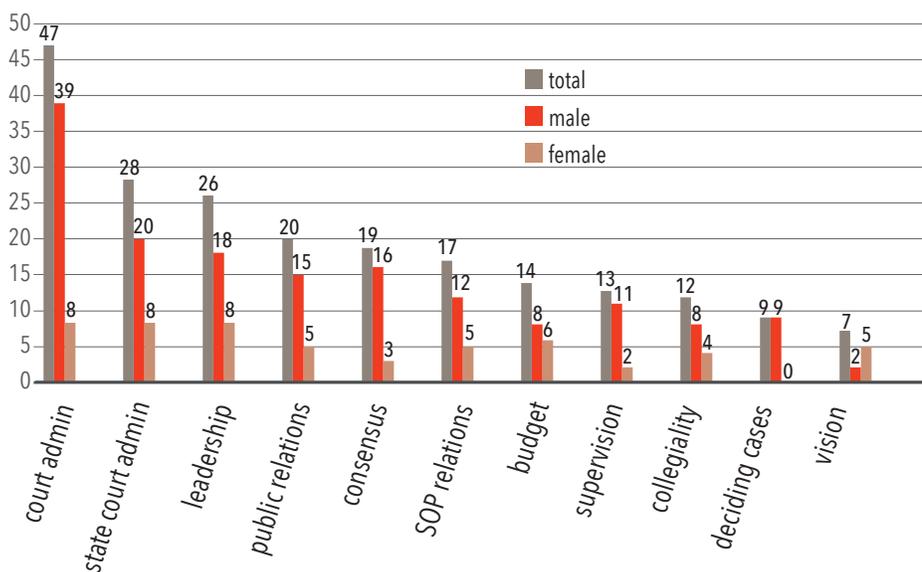
Table 2. **DIFFERENCE BETWEEN MALE & FEMALE STATE SUPREME COURT JUSTICES: DUTIES OF THE STATE CHIEF JUSTICE**

	Proportion Male	Proportion Female
<b>ALL JUSTICES</b>		
Vision	.014	.116
Consensus	.112	.021
Promptly Deciding Cases	.063	0
Budget	.056	.128
<b>UNIFIED COURTS ONLY</b>		
Consensus	.158	.023
Vision	.026	.116
Budget	.039	.140
Promptly Deciding Cases	.066	0
<b>NON-UNIFIED COURTS ONLY</b>		
Collegiality	.045	.25

Notes: 1. Values represent the number of responses per gender category divided by total responses. For example, 16 of 143 responses by male justices indicated consensus building as an important duty (16/143 = .112). 2. Variables listed in order of greatest to least statistical difference between genders using difference of proportions tests. 3. Only variables with statistically significant differences are shown.

Source: Authors’ Data

FIGURE 1: **MOST IMPORTANT CHIEF JUSTICE DUTIES AS IDENTIFIED BY CURRENT AND FORMER STATE SUPREME COURT JUSTICES** SOURCE: AUTHORS’ DATA



tice to manage either the supreme court or the state court system, respondents commonly used words such as “set the tone” and “preside.” Several justices said a chief justice should preside over several aspects of the judicial process, including deliberation, oral argument, and judicial conferences; opinion assignment and writing; and interacting with the public and other branches of government. Chief justices were also expected to effectively administer the operations of the lower states courts. Related responsibilities included staffing, budgets and finance, organization, and public relations with other branches of government, the state bar association, and the public. These responses provide strong evidence to support the contention that being an effective state chief justice — just like being an effective Chief Justice of the United States Supreme Court — requires effective task management and social leadership.

Next, we examined whether male and female respondents had different

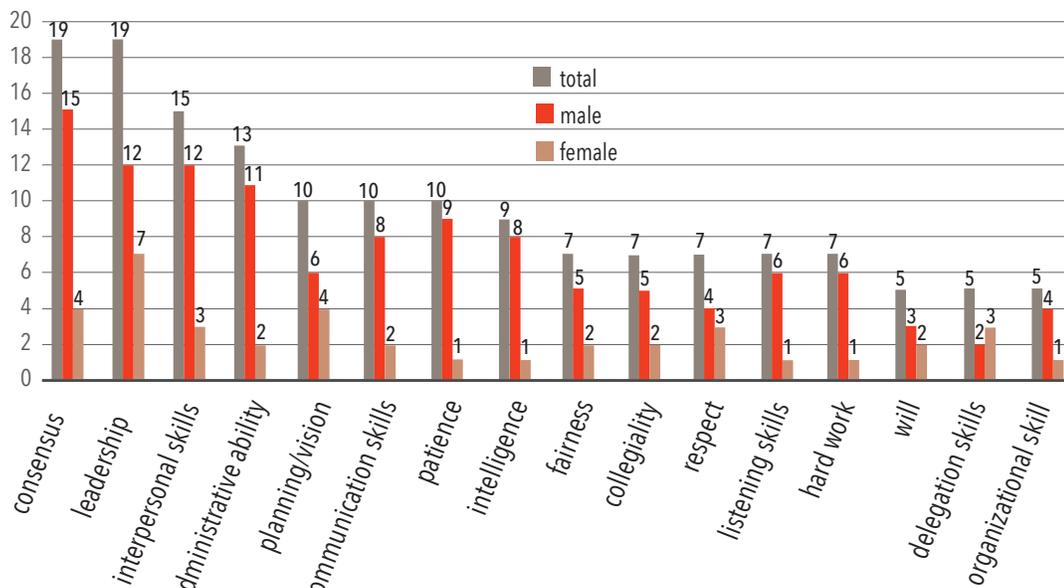
opinions about which types of duties and responsibilities are most important for a chief justice to accomplish. Table 2 lists the duties specified by the justices in the survey, in order of the greatest differences between male and female respondents. When the justices’ answers are pooled, the duty of “providing the court with a vision” exhibits the greatest difference between male and female justices ( $z = -2.97, p \leq .01$ ), with female justices ranking vision as a more important leadership quality than male justices did. The next two important differences concern creating consensus ( $z = 1.89, p \leq .05$ ) and efficiently deciding cases ( $z = 1.77, p \leq .05$ ), respectively. More male justices than female justices ranked consensus-building as an important responsibility of chief justices. Based on literature about gendered leadership, we might have expected consensus-building to be considered more important by female justices.<sup>17</sup> Along with forming a vision for their courts, female justices ranked managing the budgetary pro-

cess as being a more important duty of chief justices than did their male counterparts ( $z = -1.64, p \leq .05$ ).

The duties and responsibilities to which male and female justices assign similar levels of importance tended to be those that were inherent to the job of chief justice and aligned well with the literature on task management and social leadership: public relations, court administration, system administration, and fostering collegiality. An interesting change occurred, however, when we divided the survey responses based on whether or not the respondent operated in a unified court system. Whereas male justices on unified courts viewed collegiality to be more important (though not statistically more so), female justices on non-unified courts viewed the need for chief justices to foster collegiality on their courts to be much more important than did their male counterparts.

A final comparison of the perceived importance of a chief justice’s duties was made by consolidating the several duties and responsibilities mentioned by the justices into two categories. One category represents duties involving the internal operation of the courts, and the second variable represents duties chief justices perform outside the court. Comparing the differences between male and female respondents’ answers on these two variables produced interesting and consistent results. Male justices were much more likely to prioritize the importance of internal court operations than were their female counterparts, regardless of whether

Figure 2: MOST IMPORTANT SKILLS OF CHIEF JUSTICE AS IDENTIFIED BY CURRENT AND FORMER STATE SUPREME COURT JUSTICES SOURCE: AUTHORS’ DATA



they were in a unified or non-unified court system ( $z = 1.94, p \leq .05$ ). Female justices, on the other hand, particularly those in unified court systems, consistently emphasized the importance of a chief justice’s duties and responsibilities outside the court ( $z = -2.03, p \leq .05$ ). This means that, while male and female justices may similarly prioritize some of the chief justice’s duties, female justices appear to place much more importance on what a chief justice does outside the court — particularly in regard to relationships the chief justice develops with external political or legal actors.

Several conclusions can be reached based on this analysis. First, it is apparent that both male and female justices agreed on the importance of several of the chief justice’s leadership tasks. Among them were court administration, public relations, and fostering collegiality. Administering courts — whether unified or non-unified — was the most cited duty of the chief justice, and there were no substantial differences of opinion between the male and female justices on the importance of this duty. Public relations also fit into this category of responsibilities. Both male and female respondents recognized it as an important component of a chief justice’s job.

Second, male and female justices diverged on the importance of some duties and tasks. For example, male justices thought chief justices should build consensus and “properly” decide cases.<sup>18</sup> Female justices thought providing a vision for the court and concentrating on the court’s budget were more important duties. These findings are unique. While deciding cases could be linked to a masculine leadership style, and providing a vision to a feminine leadership style, it is interesting that consensus-building was preferred by male justices. This difference warrants further consideration.

Finally, when the duties and responsibilities were categorized as either internal or external duties and responsibilities, other obvious differences arose. Male justices quite clearly believed that focusing on the internal operations of the court was a more important responsibility, while female justices clearly believed that the most important work for state chief justices was to focus on maintaining relations with external actors.

**THE SKILLS OF THE CHIEF JUSTICE**

Figure 2 provides a graphical interpretation of what the justices in the survey thought were the most important skills a state chief justice needed in order to be a successful leader. The skills specified by the justices are more numerous than the duties identified as important for the chief justice to perform. Still, there are some notable patterns in the skills male and female justices thought were important for a state chief justice to have.

Despite the diversity of opinions expressed in the survey, leadership capability, consensus-building, interpersonal skills, and administrative ability were perceived as being the most important skills of an effective chief justice, with 11.6 percent of the respondents recognizing “leadership ability” as the most important skill to have. The responses showed many ways to interpret leadership as a requisite skill. Although the term “leadership ability” was mentioned by some justices, other descriptions of leadership ability included: “leading by inspiring others”; “leadership is knowing when to fight, when not to fight, and not being afraid to fight. Upholding the dignity of the office by not backing away from confrontation”; “political skills to deal with the other branches, and with administration”; and “leading by not using a heavy hand.” Interestingly, consensus-building was considered by many

to be an important leadership skill and not just a duty the chief justice needs to perform. Consensus-building was not only considered an end for chief justices, but also a means to an end.

Table 3 lists the skills justices thought a chief justice should have, in order of the greatest differences between male and female respondents. Again, we have pooled all answers and separated them based on whether the respondent served in a unified or non-unified court system. Per the pooled responses in Table 3, organizational skills, the ability to make good decisions, decisiveness, and consistency were the leadership skills with the greatest variation among male and female justices’ responses. Female justices thought leadership was a more important skill than did their

Table 3. DIFFERENCES BETWEEN MALE & FEMALE STATE SUPREME COURT JUSTICES: NECESSARY SKILLS TO BE EFFECTIVE CHIEF JUSTICE

	Proportion Male	Proportion Female
<b>ALL JUSTICES</b>		
Organizational Skills	.014	.06
Hard Work	.049	0
Collegiality	.049	0
Leadership	.077	.14
Interpersonal Skills	.063	.12
<b>UNIFIED COURTS ONLY</b>		
Leadership	.05	.154
Hard Work	.063	0
Preparation & Planning	.038	.103
Respect	.025	.077
<b>NON-UNIFIED COURTS ONLY</b>		
Organizational Skills	0	.182

1. Values represent the number of responses per gender category divided by total responses. For example, 7 of 143 responses by male justices indicated hard work as an important skill ( $7/143 = .049$ ). 2. Variables listed in order of greatest to least statistical difference between genders using difference of proportions tests. 3. Only variables with statistically significant differences are shown.

Source: Authors’ Data

male counterparts ( $z = -1.77, p \leq .05$ ), while male justices thought collegiality, hard work, patience, and the ability to delegate were more important ( $z = 1.60, p \leq .10$  for both collegiality and hard work). These skills are an interesting mix and do not fit neatly with expectations of masculine and feminine leadership styles. It could be that justices are suggesting that these skills are necessary for chief justices because they do not have them themselves; however, there is no evidence of this in this survey, and that theory would need to be explored in future research.

It is interesting to note the skills where there was little difference between male and female respondents in the pooled analysis. For example, there was little disagreement about the importance of the ability to plan, the need for intelligence, willpower, communication skills, and the value of humility in order for a chief justice to be a successful leader. But skills such as communica-

tion, empathy, humility, ethics, time management, respect, and interpersonal skills were more favored by female justices than male justices. These skills are very commonly associated with a feminine leadership style. Skills such as intelligence, will, and energy are regularly attributed to masculine leadership styles, but were not among the most noted skills by the justices — male or female — in the survey. It could be that the results of this survey would be more robust and significant if the sample size were larger.

Differences between male and female justices changed when examining only justices in unified court systems. In this analysis, leadership traits associated with a masculine leadership style — notably hard work and delegation — rose in importance for male justices. Female leadership traits, too, became important to female justices in unified court systems. Some notable skills important to female justices in unified court systems

were ethics, preparation, and respect. It is notable that these skills reflect personal character traits. It could be that although these chief justices are charged with administering these court systems, they are also symbolic representatives of these courts. Therefore, the justices hoped that their chief justices embody the best personal traits that judges and staff themselves aspire to have.

An examination of responses from justices in non-unified courts shows that more female than male justices valued organizational and time-management skills, decisiveness, and humility in a chief justice. No skills stood out among the male justices' responses as being more or less important when compared to female justices' responses.

**WHAT MAKES FOR AN INEFFECTUAL CHIEF JUSTICE?**

Figure 3 provides a graphical interpretation of the justices' perceptions of the personal characteristics that

Figure 3: PERSONAL CHARACTERISTICS DETRIMENTAL TO PERFORMANCE AS CHIEF JUSTICE AS IDENTIFIED BY CURRENT AND FORMER STATE SUPREME COURT CHIEF JUSTICES

SOURCE: AUTHORS' DATA

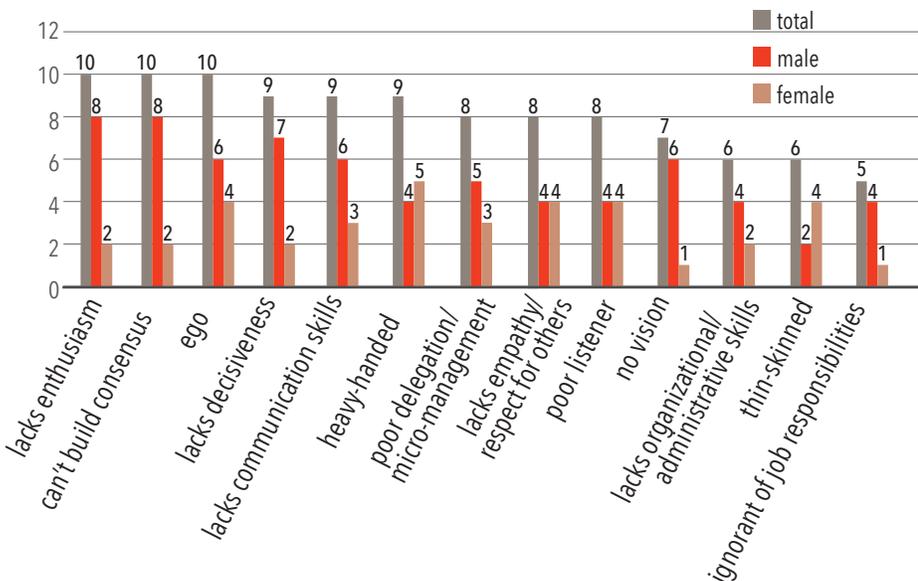


Table 4: DIFFERENCES BETWEEN MALE AND FEMALE STATE SUPREME COURT JUSTICES: DETRIMENTAL LEADERSHIP CHARACTERISTICS

	Proportion Male	Proportion Female
<b>ALL JUSTICES</b>		
Thin Skin	.030	.111
No Enthusiasm	.119	.028
Heavy Handed	.060	.139
<b>UNIFIED COURTS ONLY</b>		
Can't Build		
Consensus	.108	.032
No Vision	.108	.032

1. Values represent the number of responses per gender category divided by total responses. For example, 2 of 67 responses by male justices indicated thin skin as detrimental to leadership (2/67 = .030). 2. Variables listed in order of greatest to least statistical difference between genders using difference of proportions tests. 3. Only variables with statistically significant differences are shown. Source: Authors' Data

make chief justices ineffectual leaders. The characteristics that stood out were typically associated with ineffectual leadership in other organizational contexts: no enthusiasm, poor delegation skills, micromanagement, lack of respect for his or her colleagues, a big ego, heavy-handedness, and a lack of communication skills. A lack of enthusiasm was the most-cited characteristic of an ineffectual chief justice (12 percent of responses).

A comparison of male and female justices' responses about ineffectual leadership reveals similar views toward these characteristics. T-tests of all types of ineffectual leadership show that there is very little difference between male and female justices' conclusions that poor delegation skills and micromanagement, ego, lack of organizational or administrative ability, and lack of communication skills result in ineffectual leadership among chief justices.

Table 4 lists the characteristics of ineffectual leadership in order of the greatest differences between male and female respondents. These characteristics are also broken down for unified and non-unified court systems. Having a thin skin, lack of enthusiasm, heavy-handedness, an inability to generate consensus, and a lack of vision were considered ineffectual leadership characteristics. Female justices were more likely than male justices to think that heavy-handedness and a thin skin were detrimental to effective leadership. Heavy-handedness in leadership clearly conflicts with a female leadership style. At first glance, it is interesting that there would be a difference between the views of male and female justices with regard to how much having a thin skin affects a chief justice's ability to lead. However, many female justices made statements throughout their surveys indicating that chief justices needed to

“fight” for their own courts in order to be effective leaders, and that they had to be able to remain strong in the face of harsh opinions and criticisms. It is possible that justices believed that if a chief justice had a “thin skin,” he or she would not be willing or able to successfully fight for the courts they represent in a political arena:

Justice 23: *{The chief justice} needs to have competent political skills — almost adversarial.*

Justice 34: *{The chief justice} must be courageous.*

Justice 36: *They have to be an effective advocate for the state court system — particularly in budget negotiations.*

Justice 55: *Courage is necessary. Ego, political favoritism and fear, poor insight and self-promotion, arrogance and an inability to entertain others' points of view. {These} characteristics lead to failure.*

The characteristics and skills that the male justices identified as contributing to ineffective leadership are also interesting. First, consensus-building emerged again as a skill that male justices thought was essential to effective chief justice leadership. The results are telling. These justices also thought it was detrimental to leadership if consensus cannot be achieved. This contrasts with responses about vision. Female justices said vision was a very important leadership trait for chief justices; male justices said it is detrimental to court leadership if chief justices *do not* have vision.

Again, several characteristics emerge when we look only at unified courts. Male justices still considered the inability to foster consensus and formulate a vision to be detrimental. Female justices still thought heavy-handedness and having a thin skin were detrimental. However, two new factors emerged. First, male

There was little disagreement about the importance of the ability to plan, the need for intelligence, willpower, communication skills, and the value of humility in order for a chief justice to be a successful leader.

and female justices agreed that a lack of enthusiasm was detrimental to chief justice leadership. Second, female justices noted that a lack of respect for others, from others, and for the court system as a whole was detrimental to leadership of the state court system. In the words of one female justice, “[N]ot exhibiting a greater level of self-sacrifice is detrimental [to leadership]. Respect and belief in the institution are key.” In the words of another justice:

“Having served under three chiefs, the commonalities and differences are striking. When faced with important issues (e.g., legislative relations), two would come to the court and say “We have a problem and I’d like to hear your ideas about how to address it.” The other would say “We have a problem and I’m going to tell you what to do about it.” The dictator took all the credit for everything that went well and blamed others if things didn’t go well. The other two were good listeners, thoughtful and diplomatic, gaining our respect no matter how the situation turned out.” ▶

Differences among male and female justices' responses about enthusiasm also emerge in non-unified courts. Female justices also saw the lack of communication and listening skills as more detrimental to the success of a chief justice than did their male colleagues. These skills closely align with a female leadership style. Female justices also thought that having a big ego was more detrimental to chief justice leadership than did the male respondents. Often, these leadership weaknesses were thought to be interconnected. For example, when talking about detrimental leadership qualities, one female justice on a non-unified court stated, "[T]he weaker ones tend to be overbearing, overconfident, and poor listeners."

### CONCLUSION AND DISCUSSION

What duties and responsibilities do state supreme court justices think are necessary for a state chief justice to accomplish in order to be an effective leader? What leadership skills should a chief justice exhibit or not exhibit in order to be an effective leader of his or her court? Do male and female justices differ in what they think are the necessary responsibilities and skills of successful state supreme court leaders? This paper provides insight into these questions by examining the answers to an original survey given by state supreme court justices themselves.

Based on the answers to the survey, it is reasonable to conclude that many duties and tasks are thought to be inherent in the position of chief justice. For example, all justices surveyed believed proper court administration to be among a chief justice's foremost responsibilities. However, differences among male and female respondents emerged with regard to how that administration should take place. Male justices emphasized the need to foster consensus and

Whereas male justices believed that chief justices were ineffective when they could not generate consensus and provide a vision for their courts, female justices believed that heavy-handedness and a lack of respect for others on the court led to ineffective leadership.

deal with a court's internal operations, while female justices emphasized vision and a belief that a chief justice should focus on relationships with external actors who may influence a court's environment. This last difference is intriguing and warrants further research. Another interesting result is the degree to which male justices emphasized consensus and collegiality when compared to female justices. More research should be devoted to understanding whether or not male chief justices actually foster greater consensus than their female counterparts.

There are similarities between male and female justices regarding their perceptions of the skills necessary to effectively lead as a chief justice — especially when the results were pooled. However, interesting differences emerged when the answers were broken down based on whether the justices operated within unified or non-unified

court systems. Here, the results align more closely with expectations in the literature pertaining to how different leadership styles fit within certain types of organizations. Although leadership and organizational abilities were viewed by most justices as essential skills, female justices highlighted emotional skills such as empathy, humility, and respect, while male justices focused on more concrete leadership skills such as hard work and decisiveness. Future research on court leadership needs to pay close attention to differences in leading unified versus non-unified court systems. Dividing courts in this way is not a paramount consideration for this paper; however, the differences in results that occurred because of this consideration should be explored more thoroughly.

Finally, both male and female justices agreed about the attributes of ineffective chief justices. Both male and female justices agreed that a lack of enthusiasm, poor organizational and leadership skills, and a lack of delegation skills and communication skills were detrimental to leadership. Still, there were differences between the genders here, too. Whereas male justices believed that chief justices were ineffective when they could not generate consensus and provide a vision for their courts, female justices believed that heavy-handedness and a lack of respect for others on the court led to ineffective leadership.

These results reveal both similarities and differences of opinion as to what makes chief justices effective leaders of their courts. While a main goal of this paper is to analyze gendered differences in leadership style preferences, we hope that this analysis provides insight for all as to what constitutes effective leadership on state supreme courts.

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<sup>1</sup> See Peverill Squire, *Measuring the Professionalization of U.S. State Courts of Last Resort*, 8 ST. POL. & POL'Y Q. 223, 223 – 38 (2008); David Hughes, Teena Wilhelm & Richard Vining, Jr., *Deliberation Rules and Opinion Assignment Procedures in State Supreme Courts: A Replication*, 36 J. Sys. J. 395, 395 – 410 (2015).

<sup>2</sup> See Mikel A. Norris & Holley J. Tankersley, *Women Rule: Gendered Leadership and State Supreme Court Chief Justice Selection*, 39 J. WOMEN, POL. & POL'Y. 104, 104 – 25 (2018).

<sup>3</sup> See Joseph Daniel Ura & Carla M. Flink, *Managing the Supreme Court: The Chief Justice, Management, and Consensus*, 26 J. PUB. ADMIN



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RES. & THEORY 185, 185 – 96 (2016).

<sup>4</sup> We recognize that these are general classifications, and that male leaders can and do exhibit female leadership styles, and vice versa. However, the literature on gender and leadership style shows that these types of leadership characteristics are typical of leadership style differences between the genders.

<sup>5</sup> See Alice H. Eagly & Blair T. Johnson, *Gender and Leadership Style: A Meta-Analysis*, 108 PSYCH. BULL. 233, 233 – 56 (1990); Alice H. Eagly, Mona G. Makhijani & Bruce Klonsky, *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCH. BULL. 3, 3 – 22 (1992); Sarah Burke & Karen M. Collins, *Gender Differences in Leadership Styles and Management Skills*, 16 WOMEN MGMT. REV. 244, 244 – 56 (2001); Christina L. Boyd, *She'll Settle It?*, 1 J. L. & CTS. 193, 193 – 219 (2013).

<sup>6</sup> See Paul C. Nutt, *Strategic Decisions Made by Top Executives and Middle Managers with Data and Process Dominant Styles*, 27 J. MGMT. STUD. 173, 173 – 94 (1990); Janice Yoder, *Making Leadership Work More Effectively for Women*, 57 J. SOC. ISSUES 815, 815 – 28 (2001).

<sup>7</sup> See Christina L. Boyd, *She'll Settle It?*, 1 J. L. & CTS. 193, 193 – 219 (2013).

<sup>8</sup> See Rick A. Swanson, *Judicial Perceptions of Consensual Norms on State Supreme Courts*, 91 JUDICATURE 186, 186 – 96 (2008). Several reviewers noted that the term “consensus” can have different meanings in different judicial contexts. It was also noted that consensus conceptualized as unanimous decision making can have adverse consequences (for example, when a court unanimously makes a decision that is out of step with the law). In these instances, dissent can be meritorious and valuable. The authors readily agree with this sentiment. However, it needs to be noted that we asked the justices in this survey to conceptualize consensus as unanimous decision making. Although some justices noted that unanimous decision making is not always desirable, and that their courts do not discourage dissenting opinions. Almost all respondents stated that judicial consensus is still believed by the members of their court to be an aspirational goal.

<sup>9</sup> See Alice H. Eagly, Mary C. Johannesen-Schmidt & Marloes L. van Engen, *Transformational, Transactional, and Laissez-Faire Leadership Styles: A Meta-Analysis Comparing Women and Men*, 129 PSYCH. BULL. 569, 569 – 91 (2003); Lori D. Paris, Jon P. Howell, Peter W. Dorfman & Paul J. Hanges, *Preferred Leadership Prototypes of*

*Male and Female Leaders in 27 Countries*, 40 J. INT. BUS. STUD. 1396, 1396 – 1405 (2009).

<sup>10</sup> See Brett E. Boyea & Victoria Farrar-Myers, *Leadership and Election Litigation in State Supreme Courts*, 43 ST. & LOC. GOV. REV. 17, 17 – 31 (2011); Amanda Ross Edwards & Elisha Carol Savchak, *Why are State Judges Among Us? Public Service and Self-Presentation*, 100 JUDICATURE 21, 21 – 29 (2016).

<sup>11</sup> See Charles H. Sheldon, *The Incidence and Structure of Dissensus on State Supreme Courts*, in SUPREME COURT DECISION MAKING: NEW INSTITUTIONALIST APPROACHES 115, 115–34 (Cornell Clayton & Howard Gilman, eds., 1999).

<sup>12</sup> See Boyea & Farrar-Myers, *supra* note 10; Laura Langer, Jody McMullen, Nicholas Ray & Daniel Stratton, *Recruitment of Chief Justices on States Supreme Courts: A Choice between Institutional and Personal Goals*, 65 J. POL. 656, 656 – 75 (2003); Laura Langer & Teena Wilhelm, *The Ideology of State Supreme Court Chief Justices*, 89 JUDICATURE 78, 78 – 86 (2005).

<sup>13</sup> See Swanson, *supra* note 8.

<sup>14</sup> See Sally Holewa, *Court Reform: The North Dakota Experience*, 30 J. Sys J. 91, 91 – 110 (2009); William Raftery, *Unification and “Bragency:” A Century of Court Organization and Reorganization*, 96 JUDICATURE 6, 6 – 12 (2013).

<sup>15</sup> See Hughes, Wilhelm & Vining, *supra* note 1 (2015).

<sup>16</sup> See Victor E. Flango, *Court Unification and the Quality of State Supreme Courts*, 16 J. Sys. J. 33, 33 – 55 (1994); Victor E. Flango & David B. Rottman, *Measuring Trial Court Consolidation*, 14 J. Sys. J. 65, 65 – 74 (1992).

<sup>17</sup> See Eagly, Johannesen-Schmidt & van Engen, *supra* note 9 (2003); Paris, Howell, Dorfman & Hanges, *supra* note 9 (2009).

<sup>18</sup> “Properly” deciding cases was not a pre-defined selection for the justices in the survey. Those who stated cases should be decided properly were typically referring to the chief justice making sure that the court was not decided cases on improper grounds, or answering questions that were not asked of the court. Many also stated that proper decision making included making sure all internal court procedures for case decision making were followed.

from THE BOLCH JUDICIAL INSTITUTE of DUKE LAW

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# New Guidance for MDLs

**The Judicial Panel on Multidistrict Litigation issued an order** on Dec. 12, 2017, centralizing 46 pending actions alleging improper marketing of and inappropriate distribution of various prescription opiate medications into cities, states, and towns across the country in *Nat'l Prescription Opiate Litig.* (MDL No. 2804). As of May 1, 2018, the number of cases ballooned to 600. It will most assuredly rise in the future. Litigation of this type is increasingly commenced and can explode quickly, witness the 2,800 actions initially centralized in *Xarelto Prod. Liab. Litig.* (MDL No. 2592) in December 2015 rising to 21,709 individual actions in 2018. For comparison purposes, as late as 2004, the number of pending non-asbestos cases centralized in all MDLs hovered consistently at 10,000 actions.

In May, the Bolch Judicial Institute published for public comment proposed updates and revisions adding new sections to the *2014 Duke Law Standards and Best Practices for Large and Mass-Tort MDLs*. The original and revised documents, as well as information about the public comment period, are available on the Bolch Judicial Institute website (*see* <http://bit.ly/Bolch-MDLcomment>).

The proposals add: (1) new sections to Chapter 1 on the information individual plaintiffs should submit when filing a claim; (2) a new Chapter 3 on lead counsel duties, including guidance on the extent of fiduciary duties owed by the plaintiff steering committee and lead counsel to all plaintiffs; (3) a new Chapter 4 on the role of nonleadership counsel; and (4) a new Chapter 6 on settlement review and claims-processing administration.

Judges and practitioners are encouraged to review and submit comments, adverse or positive, on the proposals. Following is a streamlined version of the document, containing only the black-letter standards and best practices.

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The 2018 revisions to the *2014 MDL Standards and Best Practices* were prepared by four teams consisting of 30 volunteer practitioners, equally balanced between plaintiff and defense lawyers, and seven judges. The proposals arise from a series of bench-bar MDL conferences held by the former Duke Law Judicial Studies Center (now Bolch Judicial Institute) in 2013, 2014, 2015, and 2016. The conferences documented the marked increase in the number of cases centralized in a few mass-tort MDLs. These mass-tort MDLs

present enormous challenges to transferee judges assigned to manage them. There is little official guidance, and no rules explicitly govern the management of mass-tort MDLs, often requiring the transferee judge to develop procedures out of whole cloth.

The revised document is available for public comment from May 14 to July 2, 2018. Then, the drafting teams will make appropriate revisions, incorporating additions and revisions into the *2014 Standards and Best Practices for Large and Mass-Tort MDLs*. A final, consolidated document will be posted on the Bolch Institute's website, made available to the bench and bar, and forwarded to every transferee judge of a large or mass-tort MDL.

The team leaders responsible for drafting the document were **James Bilsborrow** (Weitz & Luxenberg); **Mark Chalos** (Lief Cabraser Heimann & Bernstein); **Brenda Fulmer** (Searcy Denney Scarola Barnhart & Shipley); **Michelle Mangrum** (Shook Hardy & Bacon); **Steven Marshall** (Venable); **Ellen Relkin** (Weitz & Luxenberg); **Kaspar Stoffelmayer** (Bartlett Beck Herman Palenchar & Scott); and **Sean Wajert** (Shook Hardy & Bacon).

# PROPOSED STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS

Bolch Judicial Institute – May 2018

(Updating and Revising  
2014 MDL Standards and Best Practices)

## CHAPTER 1: MANAGEMENT OF TRANSFERRED CASES

*....(Material omitted from 2014 MDL Standards and Best Practices.)*

**MDL STANDARD 1:** The transferee court, in consultation with the parties, should articulate clear objectives for the MDL proceeding and a plan for pursuing them. The objectives of an MDL proceeding should usually include: (1) eliminating duplicative discovery; (2) avoiding conflicting rulings and schedules among courts; (3) reducing litigation costs; (4) saving the time and effort of the parties, attorneys, witnesses, and courts; (5) streamlining key issues; and (6) moving cases toward resolution (by trial, motion practice, or settlement).

*....(Material omitted from 2014 MDL Standards and Best Practices.)*

**Best Practice 1C:** At an early juncture, the parties and the transferee judge should collaboratively develop a discovery plan.

*....(Material omitted from 2014 MDL Standards and Best Practices.)*

**Best Practice 1C(iv):** At an early juncture, individual claimants should be required to produce information about their claims.

**Best Practice 1C(v):** In large mass-tort MDLs, a court should, on the parties' request, consider issuing a case management order approving plaintiff and defendant fact sheets, which can provide information useful for case management, relevant to selecting bellwether trials, and valuable for conducting settlement negotiations. Fact sheets also help to uncover cases that should not have been centralized in the first instance.

**Best Practice 1C(vi):** When plaintiff fact sheets are used, defendant fact sheets may serve a similarly important purpose.

**Best Practice 1C(vii):** In large mass-tort MDLs, particularly those involving competing brands or versions of a similar pharmaceutical drug, the court should consider issuing a case management order requiring a product identification disclosure sheet that quickly identifies cases that should not have been centralized in the first instance.

**Best Practice 1C(viii):** Standardized interrogatories may serve as an alternative to fact sheets.

**Best Practice 1C(ix):** The court should enforce reasonable deadlines for submitting fact sheets, excusing late submissions only on an appropriate showing. ▶

**Best Practice 1C(x):** The transferee judge should consider, in addition to deadlines for the completion of fact sheets, a case management order detailing the process for handling late or incomplete fact sheets.

**Best Practice 1C(xi):** Once it is demonstrated that individual fact sheets have been filed with material, inaccurate information, the court should consider requiring that answers be supported with some minimal amount of additional evidence supporting the claim or defense at issue.

**Best Practice 1D:** Class actions may require a different approach to discovery because of the need to resolve class-certification issues as early as practicable.

*...{Material omitted from 2014 MDL Standards and Best Practices.}*

**Best Practice 1E:** The transferee judge should confer with the parties to determine whether holding bellwether trials would advance the litigation.

**Best Practice 1E(i):** The transferee court should adopt a strategy for facilitating the availability of the broadest possible pool of candidates from which to select bellwether cases.

**Best Practice 1E(ii):** One strategy for facilitating the broadest pool of candidates from which to select bellwether cases is to consider remanding select cases back to the transferor districts for trial.

**Best Practice 1E(iii):** The transferee judge and the parties should establish a process that requires collaborative selection of bellwether trial cases.

**Best Practice 1E(iv):** The transferee judge should adopt rules that will minimize the risk that parties will attempt to “game” the bellwether trial-selection process to result in test trials of cases that are not representative of the entire case pool.

**Best Practice 1E(v):** The transferee judge should consider using bellwether alternatives, including mini-trials and mediation.

*...{Material omitted from 2014 MDL Standards and Best Practices.}*

### CHAPTER 3: LEAD COUNSEL DUTIES

**MDL STANDARD 5:** Plaintiffs’ lead counsel in an MDL does not have a fiduciary relationship with all plaintiffs in the case, notwithstanding a perception sometimes expressed to the contrary.

**MDL STANDARD 6:** Lead counsel owes an obligation to the court to comply with all directions set out in the court’s appointment order and must resolve any conflicts with obligations owed to counsel’s retained clients that might otherwise interfere with lead counsel’s ability to carry out the court’s directions.

**Best Practice 6A:** The court should delineate in its appointment order the responsibilities of lead counsel in sufficient detail for counsel to advise individually-retained clients of the duty owed to the court, which is superior to any duty owed to the individually-retained client.

**Best Practice 6B:** Lead counsel has a duty to perform functions affecting all plaintiffs in an MDL in a fair, honest, competent, reasonable, and responsible way.

**MDL STANDARD 7:** Lead counsel should not disclose information provided under a condition of confidentiality, including settlement discussions subject to confidentiality conditions, to plaintiffs or their retained counsel.

**MDL STANDARD 8:** Absent a compelling reason, lead counsel should not disclose confidential information, including confidential settlement discussions, to their own individually-retained clients.

**MDL STANDARD 9:** Lead counsel must disclose to individually-retained clients their role as lead counsel.

**Best Practice 9A:** As soon as possible after appointment, lead counsel should advise individually-retained clients how the appointment may implicate the clients' interests, including participation in decision-making dealing with selection of bellwether trials, allocation of common-benefit funds, litigation management strategy, and settlement negotiations.

**Best Practice 9B:** When considering an inventory or global settlement, lead counsel should fully inform individually-retained clients of the implications of the lead counsel appointment.

**Best Practice 9C:** Lead counsel must remain faithful to their obligations to the court as delineated in the appointment order when engaging in confidential settlement discussions for individually-retained clients.

**Best Practice 9D:** Should the court ever have a concern that a settlement negotiated on behalf of lead counsel's individually-retained clients might violate the terms of the court's order appointing lead counsel, the court should order lead counsel to disclose the settlement terms in camera to a Special Master appointed for this purpose or, if desired, to the court itself.

**Best Practice 9E:** Lead counsel should maximize the common and collective interests of all plaintiffs in negotiating a global settlement consistent with appointment.

**Best Practice 9F:** Consistent with existing attorney-client relationships, the court should consider entering an order authorizing confidential settlement negotiations.

#### **CHAPTER 4: ROLE OF NON-LEADERSHIP COUNSEL**

**MDL STANDARD 10:** Lead counsel should establish processes that build consensus among non-leadership counsel as to key decisions that lead to settlement.

**Best Practice 10A:** Lead counsel should provide equal opportunity to all willing and able counsel to participate in discovery and other MDL tasks.

**Best Practice 10B:** Where the court is advised of issues that create potential conflicts among counsel, it should institute measures that permit non-leadership counsel to provide input.

**MDL STANDARD 11:** The court and lead counsel should develop practices to identify potential conflicts and disagreements early on between non-leadership counsel and lead counsel.

**Best Practice 11A:** The court should issue case-management order delineating the roles and obligations of lead counsel, any liaison counsel, and plaintiffs' counsel in individual cases.

**Best Practice 11B:** A transferee judge should be alert throughout the MDL proceedings for potential and emerging disagreements and conflicts between lead and non-lead counsel.

**Best Practice 11C:** The court should consider a reappointment process for lead counsel as a means of discovering serious conflicts, if any, between lead and non-leadership counsel.

**Best Practice 11D:** As part of the reappointment process, the court should require lead counsel to report on their exercise of MDL obligations, including communication with non-leadership lawyers.

#### **CHAPTER 5: ESTABLISHMENT AND USE OF COMMON FUNDS**

*...{Material omitted from 2014 MDL Standards and Best Practices.}*

#### **CHAPTER 6: SETTLEMENT REVIEW AND CLAIMS-PROCESSING ADMINISTRATION**

**MDL STANDARD 13:** If the parties indicate a willingness to negotiate settlement, the MDL judge should facilitate negotiations, but judges should not impose settlement negotiations on unwilling parties.

**Best Practice 13A:** If the parties have indicated a willingness to begin settlement ▶

negotiations, a settlement master can play a valuable role at the appropriate stage.

**Best Practice 13B:** The parties should consider appointment of a settlement master as soon as they are willing to begin settlement negotiations.

**MDL STANDARD 14:** The parties must advise the MDL court upon reaching a settlement agreement and must provide the court with information concerning the settlement, which information will differ based on whether the settlement is a global or inventory settlement.

**MDL STANDARD 15:** For global settlements, which will resolve an entire MDL, the court should ensure the integrity and transparency of the process that led to the settlement agreement, including the claims process.

**Best Practice 15A:** Upon reaching a global settlement, the parties should provide the transferee judge with information concerning the allocation model specified by the settlement (including eligibility criteria), distribution system, minimum participation rate, and provisions accounting for any distributions for extraordinary circumstances.

**Best Practice 15B:** The parties should advise the transferee judge of any minimum percentage or number of cases disposed of by a global settlement.

**Best Practice 15C:** The parties should advise the transferee judge of any reserve allocated in the settlement to pay for extraordinary injuries.

**MDL STANDARD 16:** The transferee judge should review the claims process to help facilitate claims processing and settlement distribution.

**Best Practice 16A:** In a large MDL involving many claimants, a Qualified Settlement Fund (“QSF”) provides significant administrative convenience for the court and parties and offers favorable tax advantages to the parties.

**Best Practice 16B:** The parties should file a joint or unopposed motion or stipulation asking the court to establish a QSF and appoint a QSF Administrator to manage funds, handle ongoing claims resolution, and work with the plaintiffs and their counsel to determine the QSF’s payout structure.

**MDL STANDARD 17:** The transferee judge and parties should collaborate in addressing lien resolution (including Medicare and Medicaid) and instituting methods to minimize delays caused by such resolution, especially health care liens.

**Best Practice 17A:** The transferee judge overseeing a global settlement should designate representatives from both sides to create a healthcare lien resolution process. The responsibilities and respective duties of these representatives (and subcommittees, as needed) should be specified at the outset and assigned at the earliest possible time.

**Best Practice 17B:** The transferee judge should assist the parties in the healthcare lien process by issuing orders, as needed, requiring periodic reporting.

*...{Material omitted from 2014 MDL Standards and Best Practices.}*

## **CHAPTER 7: FEDERAL/STATE COORDINATION**

*...{Material omitted from 2014 MDL Standards and Best Practices.}*

Download the revised  
Standards and Best Practices at  
 <http://bit.ly/Bolch-MDLcomment>

Download the original  
Standards and Best Practices at  
 <http://bit.ly/Bolch-MDL2014>

from EDRM at DUKE LAW

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# Unlocking the e-discovery TAR blackbox

**EDRM at Duke Law has published a proposed set of e-discovery guidelines** that explain technology assisted review (TAR), also known as predictive coding and computer assisted review, and is now seeking public comments on the guidelines from judges and practitioners. An editable version of the guidelines is available for download on the EDRM website (*see* [EDRM.net](http://EDRM.net) or <http://bit.ly/EDRM-TARcomment>).

More than 50 volunteer judges, practitioners, and e-discovery experts have been working on the project since December 2016. A companion set of “best practices” is being developed by 20 other judges and practitioners to provide protocols on whether and under what conditions TAR should be used. Together, the guidelines and best practices will provide a record and roadmap for the bench and bar, which legitimize and support the use of TAR in appropriate cases.

TAR is a machine-learning process and an early iteration of artificial intelligence (AI) for the legal profession. AI is quickly revolutionizing the practice of law and will continue to generate a steady stream of new tools designed to

increase the efficiency and effectiveness of the practice of law. To date, the legal profession has been a reluctant suitor of technological assistance in e-discovery.

Machine-learning processes like TAR have been used to automate decision-making in industries since at least the 1960s, leading to efficiencies and cost savings in healthcare, finance, marketing, and other industries. But it is only now that segments of the legal community have begun to accept machine learning, via TAR, to automate the classification of large volumes of documents in discovery. These guidelines provide guidance on the key principles of the TAR process. Although the guidelines focus specifically on TAR, they are written with the intent that, as technology continues to change, the general principles will also apply to future iterations of AI beyond the TAR process.

TAR is similar conceptually to a fully human-based document review — but the computer replaces the human reviewer in conducting the document review. As a practical matter, the computer is faster, more consistent, and more cost effective than human review teams. Moreover, a TAR review can

generally perform as well as a human review, provided that there is a reasonable and defensible workflow. Similar to a fully human-managed review where subject-matter attorneys train a human review team to make relevancy decisions, the TAR process involves human reviewers training a computer so that the computer’s decisions are just as accurate and reliable as those of the trainers.

The potential for significant savings in time and cost — without sacrificing quality — is what makes TAR most useful. According to a 2012 Rand Corp. report, 73 percent of the cost associated with discovery is spent on review. Document-review teams can work more efficiently because TAR can identify relevant documents faster than human review and can reduce or eliminate time wasted reviewing nonrelevant documents. TAR promotes Rule 1 of the Federal Rules of Civil Procedure, which calls on courts and litigants “to secure the just, speedy, and inexpensive determination of every action and proceeding.”

Traditional linear or manual review, in which teams of lawyers — billing clients — review boxes of paper or count- ▶

less online documents, is an imperfect method. Problems with fatigue, human error, disparate attorney views regarding document substance, and even gamesmanship are all associated with manual document review. Multiple studies have shown significant discrepancy rates in the determinations of reviewers charged with identifying relevant documents by linear review — as much as 50 percent or more. TAR is similarly imperfect, but studies show that TAR is at least equally accurate, if not more accurate, than humans performing document-by-document review. Such review meets the overarching legal standard in discovery, which requires reasonableness, not perfection.

Importantly, no reported court decision has found the use of TAR invalid. Scores of decisions have permitted TAR, and a handful have even encouraged its use. The most prominent law firms in the world, on both the plaintiff and the defense sides of the bar, are using TAR. Several large government agencies, including the DOJ, SEC, and IRS, have recognized the utility and value of TAR when dealing with large document collections.

In order for TAR to be more widely used in discovery, however, the bench and bar must become more familiar with it. These guidelines and the soon-to-be-issued best practices demystify the process and, more importantly, establish

a logical framework for the bench and bar to accept future technological breakthroughs without interminable delay.

The leaders of the teams that drafted the guidelines are **Matt Poplawski** (Winston & Strawn); **Mike Quartararo** (eDPM Advisory Services); and **Adam Strayer** (Paul, Weiss, Rifkind, Wharton & Garrison) with **Tim Opsitnick** (TCDi). **James Francis**, retired United States magistrate judge, provided general editorial assistance. Following is the first chapter of the proposed 40-page TAR guidelines, which provides a good executive summary.

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# Proposed Technology Assisted Review Guidelines

EDRM at Duke Law – May 2018

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## CHAPTER ONE: *Defining Technology Assisted Review*

### A. INTRODUCTION

Technology assisted review (referred to as “TAR,” and also called predictive coding, computer assisted review, or machine learning) is a review process in which humans work with software (“computer”) to teach it to identify relevant documents.<sup>1</sup> The process consists of several steps, including collection and analysis of documents, training the computer using software, quality control and testing, and validation. It is an alternative to the manual review of all documents in a collection.

Although there are different TAR software, all allow for iterative and interactive review. A human reviewer<sup>2</sup> reviews and codes (or tags) documents as “relevant” or “nonrelevant” and feeds this information to the software, which takes that human input and uses it to draw inferences about unreviewed documents. The software categorizes each document in the collection as relevant or nonrelevant, or ranks them in order of likely relevance. In either case, the number of documents reviewed manually by humans can be substantially limited to those likely to be relevant, depending on the circumstances.

## B. THE TAR PROCESS

The phrase “technology assisted review” can imply a broader meaning that theoretically could encompass a variety of nonpredictive coding techniques and methods, including clustering and other “unsupervised”<sup>3</sup> machine learning techniques. And, in fact, this broader use of the TAR term has been made in industry literature, which has added confusion about the function of TAR, defined as a process. In addition, the variety of software, each with unique terminology and techniques, has added to the confusion by the bench and bar in how each of these software works. Parties, the court, and the vendor community have been talking past each other on this topic because there has been no common starting point to have the discussion.

These guidelines are that starting point. As these guidelines make clear, all TAR software share the same essential workflow components; it is just that there are variations in the software processes that need to be understood. What follows is a general description of the fundamental steps involved in TAR.<sup>4</sup>

### 1. ASSEMBLING THE TAR TEAM

A team should be selected to finalize and engage in TAR. Members of this team may include: service provider; software vendor; workflow expert; case manager; lead attorney; and human reviewer. Chapter Two contains details on the roles and responsibilities of these members.

### 2. COLLECTION AND ANALYSIS

TAR starts with the team identifying the universe of electronic documents to be reviewed. The case manager inputs the documents into the software to build an analytical index. During the indexing process, the software’s algorithms<sup>5</sup> analyze each document’s text. Although various algorithms work slightly differently, most analyze the relationship between words, phrases, and characters, the frequency and pattern of terms, or other features and characteristics in a document. The software uses this features-and-characteristics

analysis to form a conceptual representation of the content of each document, which allows the software to compare documents to one another.

### 3. “TRAINING” THE COMPUTER USING SOFTWARE TO PREDICT RELEVANCY

The next step is for human reviewers with knowledge of the issues, facts, and circumstances of the case to code or tag documents as relevant or nonrelevant. The first documents to be coded may be selected from the overall collection of documents through searches, thorough client interviews, by creating one or more “synthetic documents” based on language contained, for example, in document requests or the pleadings, or the documents might be randomly selected from the overall collection. In addition, after the initial-training-documents are analyzed, the TAR software itself may begin selecting documents that it identifies as most helpful to refine its classifications based on the human reviewer’s feedback.

From the human reviewer’s relevancy choices, the computer learns the reviewer’s preferences. Specifically, the software learns which terms or other features tend to occur in relevant documents and which tend to occur in nonrelevant documents. The software develops a model that it uses to predict and apply relevance determinations to unreviewed documents in the overall collection.

### 4. QUALITY CONTROL AND TESTING

Quality control and testing are essential parts of TAR, which ensure accuracy of decisions made by a human reviewer and by the software. TAR teams have relied on different methods to provide quality control and testing. The most popular method is to identify a significant number of relevant documents from the outset and then test the results of the software against those documents. Other software test the effectiveness of the computer’s categorization and ranking by measuring how many individual documents have had their computer-coded categories “overturned” by ▶

a human reviewer, by how many documents have moved up and down in their rankings, or by measuring and tracking the known relevant documents until the algorithm suggests that few if any relevant documents remain in the collection. Yet other methods involve labeling random samples from the set of unreviewed documents to determine how many relevant documents remain. Methods for quality control and testing continue to emerge and are discussed more fully in Chapter Two.

##### 5. TRAINING COMPLETION AND VALIDATION

No matter what software is used, the goal of TAR is to effectively categorize or rank documents both quickly and efficiently, i.e., to find the maximum number of relevant documents possible while keeping the number of nonrelevant documents to be reviewed by a human as low as possible. The heart of any TAR process is to categorize or rank documents from most to least likely to be relevant. Training completion is the point at which the team has maximized its ability to find a reasonable amount of relevant documents proportional to the needs of the case.

How the team determines that training is complete varies depending upon the software. Under the training process in software commonly marketed as TAR 1.0,<sup>6</sup> the software is trained based upon a review and coding of a subset of the document collection that is reflective of the entire collection (representative of both the relevant and nonrelevant documents in the population), with a resulting predictive model that is applied to all nonreviewed documents. The predictive model is updated after each round of training until the model is reasonably accurate in identifying relevant and nonrelevant documents, i.e., reached a stabilization point, to be applied to the unreviewed population. This stability point is often measured through the use of a control set, which is a random sample taken from the

entire TAR set, typically at the beginning of training, and can be seen as representative of the entire review set. The control set is reviewed for relevancy by a human reviewer and, as training progresses, the computer's classifications of relevance of the control set documents are compared against the human reviewer's classifications. When training no longer substantially improves the computer's classifications, this is seen as a point of reaching training stability. At that point, the predictive model's relevancy decisions are applied to the unreviewed documents.

Under software commonly marketed as TAR 2.0, the human review and software training process is melded together. The software from the outset continuously searches the entire document collection and identifies the most likely relevant documents for review by a human. After each training document's human coding is submitted to software, the software re-categorizes the entire set of unreviewed documents, and then presents back to the human only those documents that it predicts as relevant. This process continues until the number of relevant documents identified by the software after human feedback becomes small. At this point, the TAR team determines whether stabilization has been reached or whether additional re-categorization (i.e., more training) is reasonable or proportional to the needs of the case.

Before the advent of TAR, parties did not provide statistical evidence evaluating the results of their discovery. Only on a showing that the discovery response was inadequate did the receiving party have an opportunity to question whether the producing party fulfilled its discovery obligations to conduct a reasonable inquiry.

But when TAR was first introduced to the legal community, parties provided statistical evidence supporting the TAR results, primarily to give the bench and bar comfort that the use of the new technology was reasonable as compared to human-based reviews. As the bench and bar have become more familiar with TAR and the science behind it, the need

to substantiate TAR's legitimacy in every case has diminished.<sup>7</sup>

Nonetheless, because the current state of TAR protocols and the case law on the topic is limited, statistical estimates to validate review continue to be discussed. Accordingly, it is important to understand the commonly cited statistical metrics and related terminology. At a high level, statistical estimates are generated to help the bench and bar answer the following questions:

- How many documents are in the TAR set?
- What percentage of documents in the TAR set are estimated to be relevant, and how many are estimated to be nonrelevant, and how confident is the TAR team in those estimates?
- As a result of the workflow, how many estimated relevant documents did the team identify, and how confident is the team in that estimate?
- How did the team know the computer's training was complete?

TAR typically ends with validation to determine its effectiveness. Ultimately, the validation of TAR is based on reasonableness and on proportionality considerations: How much could the result be improved by further review? To that end, what is the value

of the relevant information that may be found by further review versus the additional review effort required to find that information?

There is no standard definition of what level of accuracy is sufficient to validate the results of TAR (or any other review process). One common measure is "recall," which measures the proportion of truly relevant documents that have been identified by TAR. However, while recall is a typical validation measure, it is not without limitations and depends on several factors, including consistency in coding and the prevalence of relevant documents. "Precision" measures the percentage of actual relevant documents contained in the set of documents identified by the computer as relevant.

The training completeness and validation topic will be covered in more detail later in these guidelines.

## ABOUT EDRM

EDRM is a Duke Law-based community of e-discovery and legal professionals who create practical resources to improve e-discovery and information governance. As technology radically transforms litigation and the legal profession, EDRM members collaboratively develop frameworks, standards, educational tools, and other resources to guide the adoption and use of e-discovery technologies. Learn more or get involved at [EDRM.net](http://EDRM.net).

<sup>1</sup> In fact, the computer classification can be broader than "relevancy," and can include discovery responsiveness, privilege, and other designated issues. For convenience purposes, "relevant" as used in this paper refers to documents that are of interest and pertinent to an information or search need.

<sup>2</sup> A human reviewer is part of a TAR Team. A human reviewer can be an attorney or a non-attorney working at the direction of attorneys. They review documents that are used to teach the software. We use the term to help keep distinct the review humans conduct versus that of the TAR software.

<sup>3</sup> Unsupervised means that the computer does not use human coding or instructions to categorize the documents as relevant or nonrelevant.

<sup>4</sup> Chapter Two describes each step in greater detail.

<sup>5</sup> All TAR software has algorithms. These algorithms

are created by the software makers. TAR teams generally cannot and do not modify the feature extraction algorithms.

<sup>6</sup> It is important to note that the terms TAR 1.0 and 2.0 can be seen as a marketing terms with various meanings. They may not truly reflect the particular processes used by the software, and many software use different processes. Rather than relying on the term to understand a particular TAR process, it is more useful and efficient to understand the underlying processes, and in particular, how training documents are selected, and how training completion is determined. There are a limited number of ways to select training documents, and a limited number of ways to determine training completion.

<sup>7</sup> The Federal Rules of Civil Procedure do not specifically require parties to use statistical estimates to satisfy any discovery obligations.

# Not So Fast: A RESPONSE TO THE GARNER RESPONSE TO MY ARTICLE ON LOCKHART

BY JOSEPH KIMBLE

IN THE SPRING 2018 EDITION OF *JUDICATURE*, BRYAN GARNER, an old friend, responded to my article in the previous issue,<sup>1</sup> an article that took the form of a mock opinion by Kimble, J., in *Lockhart v. United States*.<sup>2</sup> He wrote his own mock opinion, with an introduction criticizing mine.<sup>3</sup>

Simply put, Garner and I disagree on whether canons can dispose of cases such as *Lockhart* with clarity and concision. In my view, they cannot — as the conflicting opinions in *Lockhart* demonstrated. The case rested on a syntactic ambiguity caused by a modifier following a three-part series. In his own opinion, Garner relies on the series-qualifier canon — which favors *Lockhart* — as “more directly applicable” than the last-antecedent canon because the ambiguous language involves a “straightforward, parallel construction that involves all nouns . . . in a series.”<sup>4</sup> But he begs the question when he calls the construction “straightforward” and “parallel.” (I realize that a judge writing an opinion can state conclusions as declarations.)

In fact, much of the debate between the majority and dissenting opinions in *Lockhart* was, in a sense, over how straightforward and parallel the items in the series are. The series, without the trailing modifier: *aggravated sexual abuse, sexual abuse, or abusive sexual conduct*. Yes, you have three nouns, but the first and third have two modifiers in front, and the second has one. And the justices disagreed on whether the trailing modifier — *involving a minor or ward* — applied to all three items or only the last one.

Justice Sotomayor, for the majority, invoked the rule of the last antecedent. She said that “it takes more than a little mental energy to process the individual entries in the list, making it a heavy

lift to carry the modifier across them all.”<sup>5</sup> She followed with a hypothetical example from baseball: “imagine you are the general manager of the Yankees and . . . tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year’s World Champion Kansas City Royals.”<sup>6</sup> The natural reading, she said, would limit the trailing modifier’s reach to the final item, *pitcher*.

Justice Kagan, dissenting along with Justice Breyer, countered with these two examples: *an actor, director, or producer involved with the new Star Wars movie* and *a house, condo, or apartment in New York*.<sup>7</sup> Here, she insisted, the modifiers apply to all the previous items as a matter of ordinary English, which the series-qualifier canon reflects. But in contrast to Justice Sotomayor’s example, none of the nouns in Justice Kagan’s series had modifiers in addition to the ambiguous trailing one.

Justice Kagan discounted the baseball example above as “not parallel” because *pitcher* does not have a modifier of its own, as the other two items do.<sup>8</sup> In response, Justice Sotomayor offered the example of a friend’s asking you to get *tart lemons, sour lemons, or sour fruit from Mexico*, and said you “would be forgiven” for thinking you could bring back lemons from California.<sup>9</sup> Justice Kagan, disagreeing, said there would be “no doubt” that “[y]our friend wants some produce from Mexico.”<sup>10</sup> Thus, the justices were of different minds on a parallel series with a single preceding modifier.

Now, perhaps, you’ll see why in my opinion I provided several baseball examples, taking off from Justice Sotomayor’s baseball example, to show how intuition, common knowledge, and slight variations can affect the possible meaning. Figuring out when to apply the series-qualifier canon is not always as simple as you might think. My sense

(without any empirical evidence) is that trailing modifiers can be somewhat dicier than leading modifiers to begin with. A series with internal modifiers can be dicier still: consider *adults and young children who are healthy* or *versatile infielders and durable catchers who can hit*.

At any rate, the majority in *Lockhart* rejected the series-qualifier canon in favor of the last-antecedent canon, which Garner asserts is less applicable because the construction at issue “doesn’t involve a ‘pronoun, relative pronoun, or demonstrative adjective’ — in short, no word has a grammatical antecedent.”<sup>11</sup> He knows, though, that “last antecedent” has become the catchall name that courts use and apply even when the trailing modifier doesn’t technically involve an antecedent. And because I think the canon still gets more credence than it deserves in resolving ambiguity, I revisited the Court’s previous use of it, after having said in my introduction that “readers will notice [in my opinion] an uncommon candor and willingness to consider scholarly opinion . . . .”<sup>12</sup>

Neither syntactic canon was the clear winner in *Lockhart*. If you were merely choosing between them, you might well side with Justice Kagan (and Garner). But either way, you ought to acknowledge and address plausible contrary arguments. What’s more, you ought to recognize that picking between those canons was not all there was to the disposition. That was the target of my mock opinion: decision by canon alone.

To repeat: Garner (or anybody else) can write a short opinion declaring that the canons, as he and Justice Scalia describe them in their book *Reading Law*, resolve the case. But his opinion exudes a confidence and certainty that is unjustified. The same goes for textualism in general.<sup>13</sup>

## DECISION-MAKING GENERALLY DEMANDS MORE THAN AN EXERCISE IN PARSING.

As for the rule of lenity in criminal cases, he is of course right that it's one of the canons included in *Reading Law*. When I said in my subtitle that “Canons Are Not the Key,” I meant the syntactic canons at the heart of the case. Commentators had, after all, billed *Lockhart* as a contest between dueling canons.<sup>14</sup>

Beyond that, *Reading Law*'s criterion for invoking lenity is this: “whether, after all the legitimate tools of interpretation have been applied, a reasonable doubt persists.”<sup>15</sup> I consider legislative history a legitimate tool of interpretation,<sup>16</sup> and so did the justices in *Lockhart*.<sup>17</sup> I consider a statute's framework — its place in the scheme of related statutes — a legitimate tool of interpretation, and so did the justices in *Lockhart*. Garner's opinion ignores all this. It says: “If an ambiguity in a criminal statute is genuinely debatable, the defendant wins.” But his opinion (favoring *Lockhart*) does not go to the trouble of exploring the ambiguity.

Except for dismissing the last-antecedent canon in one sentence, the opinion does not touch on any of the arguments that actually led to the government's winning, including intuitive arguments.<sup>18</sup>

A last point about the case, for anyone who still thinks that *Lockhart* should have won easily on linguistic grounds alone. Of the five circuits that had explicitly addressed the issue, none applied the trailing modifier to the entire series; they came to the same conclusion — for a similar mix of reasons — as the Supreme Court majority.<sup>19</sup>

Garner criticizes my opinion as “dictum-filled” and “bloated with hand-wringing dicta that only obscure the law.”<sup>20</sup> He points out that his is “some 88 percent shorter.” Shorter, yes, mainly because it pronounces one canon as controlling and (as I just mentioned) says nothing at all about contrary arguments. Decision by fiat, you might say.<sup>21</sup>

Underlying my opinion were obvious

rhetorical and jurisprudential purposes: to register the importance of considerations that are not strictly textual; to call attention to the inherent dangers of modifiers with a series; to cast doubt on the strength of the last-antecedent and surplusage canons; to trace the history and highlight the subtleties of the series-qualifier canon; and to address courts' differing definitions of ambiguity, as well as the Supreme Court's own less-than-consistent standards for invoking lenity. I wasn't just deciding; I was trying to face these issues head-on, even while expressing points of view.

In the introduction to my opinion, I called it “a flight of fancy.”<sup>22</sup> However unlikely its style or even its content may have been, I believe this: decision-making generally demands more than an exercise in parsing.

— JOSEPH KIMBLE writes *Judicature*'s “Redlines” column; see it and more about him on page 80.

<sup>1</sup> Joseph Kimble, *How Lockhart Should Have Been Decided (Canons Are Not the Key)*, 101 JUDICATURE 40 (Winter 2017).

<sup>2</sup> 136 S. Ct. 958 (2016).

<sup>3</sup> Bryan A. Garner, *How Lockhart Really Should Have Been Decided: Canons of Construction Are Key*, 102 JUDICATURE 56 (Spring 2018).

<sup>4</sup> *Id.* at 57 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 147 (2012)).

<sup>5</sup> *Lockhart*, 136 S. Ct. at 963.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 969; see also *id.* at 972 n.2, setting out five more examples, from cases, of similarly uncomplicated series.

<sup>8</sup> *Id.* at 970 n.1.

<sup>9</sup> *Id.* at 966.

<sup>10</sup> *Id.* at 972.

<sup>11</sup> Garner, 102 JUDICATURE at 57 (quoting *READING LAW* at 144).

<sup>12</sup> Kimble, 101 JUDICATURE at 41.

<sup>13</sup> See Joseph Kimble, *What the Michigan Supreme Court Wrought in the Name of Textualism and Plain Meaning: A Study of Cases Overruled, 2000–2015*, 62 WAYNE L. REV. 347, 376 (2017) (“Textualists exaggerate the number of

appellate cases in which the text alone yields a singular or self-evident meaning. They figure that if they study hard enough all the various and often conflicting textual clues, they will discover the intended meaning. And they largely discount the value of intuition, common sense, legislative history, real-world consequences, and sensible policy in deciding cases.” (citation omitted)).

<sup>14</sup> See, e.g., Neal Goldfarb, *Coming to SCOTUS: Battle of the Dueling Interpretive Canons*, LAWnLinguistics.com (Oct. 27, 2015) (URL omitted).

<sup>15</sup> *READING LAW* at 299 (citation omitted).

<sup>16</sup> See Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in Barnhart, Why Both Are Weak, and How Textualism Postures*, 16 SCRIBES J. LEGAL WRITING 5, 37–41 (2014–2015) (listing 12 arguments for considering legislative history).

<sup>17</sup> *But see Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., with Alito & Gorsuch, JJ., concurring in part and concurring in the judgment) (rejecting the majority's use of legislative history).

<sup>18</sup> See, e.g., *Lockhart*, 136 S. Ct. at 964 (“We there-

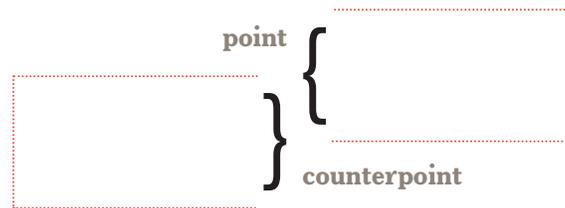
fore see no reason to interpret § 2252(b)(2) so that ‘[s]exual abuse’ that occurs in the Second Circuit courthouse triggers the sentence enhancement but ‘sexual abuse’ that occurs next door in the Manhattan municipal building does not.”).

<sup>19</sup> *United States v. Mateen*, 764 F.3d 627, 631–32 (6th Cir. 2014); *United States v. Lockhart*, 749 F.3d 148, 151–56 (2d Cir. 2014); *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011); *United States v. Hubbard*, 480 F.3d 341, 350 (5th Cir. 2007); *United States v. Rezin*, 322 F.3d 443, 447–48 (7th Cir. 2003); cf. *United States v. Hunter*, 505 F.3d 829, 831 (8th Cir. 2007) (assuming the contrary without discussion); *United States v. McCutchen*, 419 F.3d 1122, 1125 (10th Cir. 2005) (same).

<sup>20</sup> Garner, 102 JUDICATURE at 57.

<sup>21</sup> See Bryan A. Garner, *Interview with Justice Elena Kagan* (Part 4) (video) (URL omitted) (so describing an opinion that, among other things, does not “respond[] to the arguments that you think are losers” and thus disregards the Court's responsibility to “tak[e] all the parties seriously,” as well as “to show the American public . . . how we reason about cases”).

<sup>22</sup> Kimble, 101 JUDICATURE at 41.



## A(nother) new plan for clerkship hiring

**O**n February 28, 2018, an unofficial ad-hoc committee of federal judges announced a new version of a law clerk hiring plan, a revision of an earlier system that was tried but discontinued in 2014. Under the new plan, students who entered law school in 2017 or later will not begin the application and hiring process for federal clerkships until after the completion of their second year of law school. In its announcement of the plan, the ad-hoc committee calls it “a two-year pilot plan that participating judges will reconsider after June 2020.”

To support the plan, the OSCAR Working Group – a group of judges and law school administrators – voted to adjust the date on which clerkship applications are made available to judges. (OSCAR is the Online System for Clerkship Application and Review operated by the Administrative Office of the Courts to facilitate the hiring process for federal clerkships and staff attorney positions.) According to the OSCAR website, “Judges will not seek or accept formal or informal clerkship applications, seek or accept formal or informal recommendations, conduct formal or informal interviews, or make formal or informal offers before June 17, 2019” – the date that the OSCAR system will make clerkship applications available to

judges. The application date for the entering class of 2018 is June 15, 2020.

The plan responds in part to a September 2017 letter signed by 111 law school deans who said they “strongly support a proposal under which judges would not accept clerkship applications until after the completion of students’ second year.” The letter noted that waiting until the second year will provide judges with more information about students and give students more time to focus on their studies before turning to the often-stressful clerkship hiring process.

Similar federal clerkship hiring plans have been adopted in the past. All eventually fell apart. To provide perspective on the new plan and its chances for success, we posed questions to the **HONORABLE DIANE WOOD**, chief judge of the U.S. Court of Appeals for the Seventh Circuit, a senior lecturer at the University of Chicago, and a member of the ad-hoc committee that developed the plan; and to **PROFESSOR AARON NIELSON**, who teaches administrative law at Brigham Young University, has written about clerkship hiring, and is a former clerk to Supreme Court Justice Samuel A. Alito, Jr., Judge Janice Rogers Brown of the U.S. Court of Appeals for the D.C. Circuit, and Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit.

## Do federal courts need a coordinated hiring plan for clerks? Why, or why not?

**WOOD:** The federal courts have a great deal of experience, both with coordinated hiring plans and without such plans. During the periods when the plans have been in effect and have been followed by a substantial majority of the judges, the hiring process has operated better both for clerkship applicants and for judges. Particularly for applicants who are still in law school and who hope to obtain a clerkship immediately upon graduation, the plans have assured that the student is able to develop a full academic record, get to know professors and other recommenders well enough for a personal and helpful letter of recommendation, and come to an informed opinion about whether a clerkship fits into the student's career plans. Hiring law students who have barely completed their first year is unambiguously bad for all concerned. In contrast, if a judge has two full years of grades, she gets a much better picture of the student's ability. Suppose, for example, that the first-semester grades are average, but the second half of the first year and the full second year are excellent. The judge would make a mistake in overlooking that candidate, if she or he were limited to first-year grades only; that mistake would be avoided under the plan. The opposite could also happen: A student might start out with a fine performance but slack off as time goes on and the competition becomes more intense. Letters of recommendation are also much more helpful when the writer actually knows the person and can speak specifically to the judge's hiring criteria.

Experience shows that during the periods when no plan has been effect, competition among the judges has pushed the dates of interviews back into the end of the first year of law school.

This means that both the judge and the student are making plans for two years or more into the future. That, too, can be risky, even though it normally works out. Worse, the student is relegated to discussing a semester (or quarter) or so in law school, undergraduate experience, and any relevant work experience. Neither party is well served with such limitations. That timetable creates terrible pressure for the first-year students who are just feeling their way. It has a particularly deleterious effect on students who do not come from a background where graduate work, or law school, was the norm, including minority students and those from disadvantaged backgrounds.

**NIELSON:** This may sound pedantic, but no, federal courts don't *need* a hiring plan. The courts didn't fall apart between 2013 and 2017 when there was no plan. The better question is whether federal courts should want a hiring plan. But to answer that question, we need to answer two other questions. What is the benefit of a hiring plan? And how much does it cost?

A hiring plan could provide real benefits — if it worked. Judges could hire with more information (a good thing); students could get a better feel for the law before applying (also a good thing); and hiring might be more orderly (arguably a good thing).

Unfortunately, a plan that works would be very costly. Coordination is difficult when breaking from the group provides a benefit, there are many players, there isn't much transparency, and there is no meaningful enforcement mechanism — all of which describes clerkship hiring pretty well. To create a working plan, the federal courts would need a powerful enforcement mechanism to prevent "early" hiring. But would that be cost-justified? Almost certainly not.

We could, for instance, imprison law students who apply early; in the cartel context, the prospect of prison presumably discourages some coordination. But jail obviously would be disproportionate in the clerkship context. The courts could also try to set up a "medical match" system that controls all hiring. But that is expensive and, alas, isn't foolproof either. Or Congress could pass a law ordering judges not to hire early. But that could not possibly be the best use of Congress's time. Stigma also may sometimes serve as an informal enforcement mechanism. Yet as far as I can tell, there is no stigma. In fact, some judges who think it is virtuous to hire outside the plan say they do so because they believe the plan is unfair to students.

And so we come to the crux of the dispute: What is better — a plan that doesn't work or no plan at all? My sense is the latter. I applied for clerkships while the old plan was collapsing. It was unfair. Some students at schools with less robust clerkship cultures presumably trusted the plan because it looked authoritative; they missed out. Many better-informed students knew that some judges hired early but did not know who those judges were, and students in the know weren't always keen on sharing that information. That also wasn't fair. Likewise, some but not all professors were willing to send letters before the deadline, which in effect treated similarly-situated students dissimilarly. And some judges may have penalized students for applying early by discounting their applications, even though students were simply trying to navigate a difficult situation with imperfect information. Finally, when a plan is formally in place but is widely ignored, folks learn that only gullible people trust rules. That's a very bad lesson to teach law students. ▶

Will a coordinated plan affect all judges equally? For example, will it advantage or disadvantage judges on certain courts or in certain geographic areas? Should Supreme Court justices adhere to the plan?

**WOOD:** The new plan is as evenhanded among judges as it is possible to be: It uses only one date (in the first year, June 17, 2019) for the time when applications can be transmitted to judges, whether electronically using the OSCAR system or in any other way accepted by the judge in question. From that point, it is up to the judge to decide how to proceed. In order to address geographic issues and to be sensitive to student budgets, some judges have started to use video interviews; other judges prefer in-person interviews.

Several justices on the Supreme Court have publicly expressed their support for the plan, including Justice Elena Kagan and Justice Ruth Bader Ginsburg. Justice Kagan indicated that she would take compliance with the plan into account when she conducts her own hiring. But the Supreme Court justices do not hire people directly out of law school, so certain features of the plan do not apply to them.

**NIELSON:** Many students are on the East Coast, and it is easier and cheaper for those students to interview with judges who are near them than to fly to, say, San Antonio, St. Paul, or Salt Lake City. Proximity isn't as significant in a world without a plan because hiring isn't as compressed; there is more time for students to travel and tickets can be purchased more cheaply. In a world with a plan, however, students,

at least at the margins, rationally prefer to interview where lots of judges are reachable quickly and cheaply. The same math presumably applies for students in California, to the Ninth Circuit's benefit.

This isn't just my opinion. I reached out to a number of circuit judges. This is what one of them said: "The plan hurts judges in 'fly-over country.' The top students will be tempted to go only to New

**HIRING LAW STUDENTS WHO HAVE BARELY COMPLETED THEIR FIRST YEAR IS UNAMBIGUOUSLY BAD FOR ALL CONCERNED.**

York and D.C. to interview because they can do those cities quickly and compactly and they are the places with more potential feeder judges." Another made the same point: "Any plan hugely advantages judges in the I-95 corridor from Boston to Richmond."

At the same time, the plan creates incentives for "exploding" offers, which are disgraceful. When hiring is compressed, the opportunity cost of delay increases. The current iteration of the plan purports to prohibit exploding offers by giving students 48 hours to travel. But will that solve the problem? Again, quoting a circuit judge: "The 48-hour period for exploding offers is a joke. It's not realistic that an applicant can schedule numerous interviews, receive offer(s), consult with advisors and family, and come to a reasonable conclusion in that short period."

I agree with Chief Judge Wood that Supreme Court involvement is interest-

ing. In theory, the justices could act as enforcement mechanisms — if a circuit judge hires early, her clerks won't be considered for a Supreme Court clerkship. And because students know this, they know not to apply early. In practice, however, I'm not so sure. First, non-"feeder" judges hire early, too. That presumably will not change much no matter what the Supreme Court does. Second, although a number of the justices have suggested that they will take into account the plan, others haven't even gone that far, and, I believe, no justice has said that he or she will categorically reject applicants on this ground. This matters because, objectively, no one has a good shot at clerking at the Supreme Court; there is a lot of luck involved. So if a student's odds of being hired at First Street drop from, say,

2 percent to 1 percent, is that really enough to dissuade an early application to a circuit judge? And third, how will the justices police such a rule? A circuit judge may say something like, "Obviously, I can't hire now, but I sure hope you are available when I can; I'll keep my eyes out for your application." The effect can be essentially the same as an offer.

How does the requirement that students have grades for two years of law school before applying benefit or adversely impact individual law students, including post-graduates and current students?

**WOOD:** The requirement benefits current students and is irrelevant to anyone who has already completed more than two years of law school at the time of his or her application. Nothing in this plan

addresses applications from post-graduates. For judges who prefer hiring lawyers with some experience, the plan does not require any change in their practice. For other judges who prefer hiring directly from law school, however, the plan will allow the student to put his or her best foot forward in the ways described above. It is our experience, and our expectation, that the professed fear that graduates will crowd out current law students is not realistic. Judges who prefer hiring directly from law school will simply do so with a better information base.

**NIELSON:** My position is the middle one — I would be sympathetic to a plan if I thought it would work at a reasonable cost and without unintended consequences. Students at schools like BYU, where I teach, presumably do worse in a world without a working plan; the same is true for students at all schools who, for whatever reason, need a bit more time to adjust to law school. When judges make decisions with less information, they have to rely more heavily on proxies for legal ability. For instance, a circuit judge told me that all else being equal, if all the information that he has is the law school, hiring a clerk from Stanford is generally safer than hiring a clerk from BYU because students who attend Stanford, on average, have higher entering credentials. But after students have had time to demonstrate their ability, Stanford’s initial advantage often disappears. Thus, at least at the margins, if there is a working plan, we should expect students at schools like BYU to do better than they would in a world without a plan, while students at the most selective schools should do worse.

And we should also expect students who need more time to adjust to law school to do better. As someone who teaches at BYU, that doesn’t bother me!

Unfortunately, I don’t think the plan will work. In a world with a broken plan, students at the most selective schools who did best as 1Ls should be expected to do better because they have greater access to secret information. Today, no one knows the full universe of judges who aren’t following the plan. Yet by next year, the students on the *Yale Law Journal* will have a pretty good idea, even though almost all other students still won’t.

Similarly, we should expect post-graduate applicants to do better in a world with a plan because they aren’t regulated. Hiring during a compressed period can be stressful. Some judges pre-

**TODAY, NO ONE KNOWS THE FULL UNIVERSE OF JUDGES WHO AREN'T FOLLOWING THE PLAN. YET BY NEXT YEAR, THE STUDENTS ON THE YALE LAW JOURNAL WILL HAVE A PRETTY GOOD IDEA . . .**

fer to hire a clerk or two outside of that process just to deescalate things. Hiring post-graduates is not always a problem; some judges like having real-world experience in chambers. But it is a problem if a judge feels compelled to hire a post-graduate, not because he or she is the best candidate, but because of the plan’s incentives. Likewise, as one of my colleagues stresses, to the extent that the plan encourages hiring post-graduates, it makes it more difficult for less “traditional” students to clerk, especially students who are married or who have young children. After all, they have to

find a job, then leave that job and move someplace else for a clerkship, and then probably move again. Such upheaval often isn’t realistic.

**Should the judiciary as an institution have any concerns about potential administrative challenges law schools may face in implementing any hiring plan?**

**WOOD:** The law schools have overwhelmingly supported the Federal Law Clerk Hiring Plan of March 2018. They have not communicated any concerns about administrative challenges that cannot be addressed. The small number of schools on the quarter system wanted to ensure that the starting date was late enough to accommodate their calendars, which is why the plan uses June 17, 2019, and June 15, 2020, for the next year. In addition, even if a quarter-system student were missing one or two grades by June 17 of the 2L year, that student would still have one more set of grades than any semester-system student. Importantly, the plan is flexible: In the event that there are unexpected administrative

challenges for law schools, students, or judges, it will be revised to accommodate those challenges. That flexibility is reflected in the fact that this is a two-year pilot plan, not something that has been etched in stone.

**NIELSON:** If by “administrative challenges” we mean, “preventing faculty members from sending recommendation letters too soon,” then yes, the judiciary should be concerned. Otherwise, I agree with Chief Judge Wood that the administrative challenges should not be significant. ▶

At bottom, law schools are not designed to prevent judges from hiring their students. No doubt many law schools see the advantage of a plan and want it to succeed. But what happens when a specific judge wants letters of recommendation sent early? A law school may decide that it will not send letters before the deadline, no matter what. But that school has to worry that other schools will not be so unyielding. This is not an imaginary concern. In 2012, Georgetown Law circulated a memo to its students, letting them know that “some of our peer schools are submitting students’ applications for judicial clerkships in advance of deadlines established by the federal law clerk hiring plan.” Predictably, Georgetown also started sending letters.

All the while, a similar dynamic is playing out with faculty members. We know that some judges hire before the deadline and that some professors send letters to those judges. So what should a professor do when a talented student asks for a recommendation? Some may stand firm and say, “No way, no how.” But is that fair to the student? Around the same time as the Georgetown memo, Harvard similarly announced that “[f]aculty approached by students who are applying on their own to non-complying judges may exercise discretion in deciding how to support such students.” That is a sensible compromise — but it also largely gives up the game. Recommendation letters will be sent.

Previous plans did not last because many judges did not abide by the guidelines, for a variety of reasons. Do you believe this plan is more likely to succeed? Why?

**WOOD:** No plan lasts forever, as all of the judges who worked to develop this plan know well. But this plan has a better chance than many, because it has been built on the experience we have gained over the years. Critically, it is a very simple plan centered on one pivotal date. No one needs to monitor the date when an application was sent, the date when it was received, the date of first interview, the date of offer, and the date of acceptance. There is no “starting gun” for interviews that applicants must observe. The plan leaves as much as possible to individual circumstances, including, importantly, the fact that interviews can take place over the summer before the third year, when the applicant may well be working in a city near the judge to whom he or she has applied. This timing means that interviews need not come at the cost of missing class.

**THIS PLAN HAS A  
BETTER CHANCE THAN MANY,  
BECAUSE IT HAS BEEN BUILT  
ON THE EXPERIENCE WE HAVE  
GAINED OVER THE YEARS.**

**NIELSON:** Answering this question is difficult because there is a “Heisenberg problem” — if those of us who worry about the plan state publicly that it probably won’t work because judges aren’t following it, it may lead to even more judges not following it. Even so, the truth is that some judges are not following the plan. And students deserve that information.

For instance, Judge Jerry Smith (for whom I clerked a decade ago) sent a letter to law schools to say he will not

follow the plan. Another circuit judge reports that on a recent trip to Boston, she told students that the plan is a mistake and that “they should apply early to judges in [her] circuit.” A third judge told me in no uncertain terms that he is not going to follow the plan. In fact, I’ve heard whispers that perhaps the majority of judges in at least one circuit will not do so. Even the Ninth Circuit, which issued a statement in favor of the plan, admits that not all of its judges are on board. The same is true for the First Circuit which acknowledges that only a “majority” of its judges are on board; the Third Circuit’s announcement is ambiguous.

Put all of this together and it is pretty obvious that a lot of clerkship hiring is going to happen outside of the plan. So what are other judges going to do in response? Perhaps a critical mass will decide to abide by the plan, even if

it means missing out on many good clerks. But is that critical mass likely to hold together over the long run? I fear we will be in for a repeat of the demise the old plan. At first a handful of judges will refuse to comply, some openly and some not. And then a few more. And then a lot more. And then the plan will collapse. That said, I agree with Chief Judge Wood

that this plan is better than the old plan; it is simpler and the summer is a better time for hiring.

### Concluding thoughts?

**WOOD:** Through the adoption of this plan, participating judges around the country will improve the clerkship hiring experience both for their applicants and for themselves. While it is not essential that every judge in the country follow the plan, for the plan to succeed,

we are hopeful that most judges will find it in everyone’s best interest to adopt it. Suggestions for improvement are also welcome. They may be addressed to any member of the Ad Hoc Committee that formulated the plan: Chief Judge Merrick Garland (D.C. Circuit); Chief Judge Robert Katzmann (2d Circuit); Chief Judge Sidney Thomas (9th Circuit); or Chief Judge Diane Wood (7th Circuit).

**NIELSON:** I understand why a plan is attractive and I appreciate the efforts of Chief Judge Wood and the Ad Hoc Committee to try to build a system that works best for everyone. Our disagree-



**THE TRUTH IS THAT SOME JUDGES ARE NOT FOLLOWING THE PLAN. AND STUDENTS DESERVE THAT INFORMATION.**

ment is about means, not ends. If there was a cost-effective way to push hiring back that would work, not encourage exploding offers, not make the process more expensive for students, and not benefit some judges more than others, I’d support it.

But I just don’t see it. The new plan is already leaky — and it would be very

difficult to plug those leaks. At the same time, a plan creates problems of its own. And if a plan doesn’t work (which is likely), the process becomes really unfair. Likewise, the ills of a world without a plan should not be overstated; it may not be ideal to hire clerks with just one year of grades, but some judges are good at it, and if they aren’t,

then there is an opportunity for other judges to wait for passed-over superstars.

So if a plan isn’t realistic, what’s the best option? *Transparency*. Everyone should know and play by the same rules. No one should have to care about rumors. And no one should be an “insider.” Unfortunately, although it’s imperfect, I fear that means no plan.



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# Six books *for* understanding *the* Fourteenth Amendment

BY ROBERT N. HUNTER, JR.

**D**uring the 150th anniversary of the ratification of the Fourteenth Amendment, the judicial scholar with an inquiring mind will find much to read, and much historical and constitutional wisdom to be gained, in new and not-so-new books about the Civil War and Reconstruction.

The story of the Fourteenth Amendment is inseparable from the times in which it was created. The Civil War Amendments, part of the “Second Constitutional Convention,” occurred when “radical” Republicans controlled Congress between 1865 and 1870.

All the Civil War Amendments were enacted to overturn *Barron v. Baltimore*, 32 U.S. 243 (1833), and the legal results of the worst judicial opinion in Supreme Court history, the *Dred Scott* decision.

There is prologue to examine, including: the passage of the Thirteenth Amendment outlawing slavery; the debate over readmission of the rebelling states back into the federal government;

the military rule of Southern states during Reconstruction; and the continuing struggle of the defeated South to deny newly freed slaves the privileges and immunities of citizenship through the passage of “black codes” and suppression of political freedom for white and black Republicans. Racial and political violence throughout the South and a deadly riot in Memphis sparked the Joint Congressional Committee on Reconstruction into action.

What follows, in no particular order, are books I have read that may pique your curiosity in considering how the founding fathers of the Second Constitutional Convention created and used the Fourteenth Amendment to balance the equities, address the challenges of their times, and create a coherent democracy. They also shed light on issues that remain relevant and volatile today.

Michael Kent Curtis’s excellent *No State Shall Abridge, The Fourteenth Amendment and the Bill of Rights*

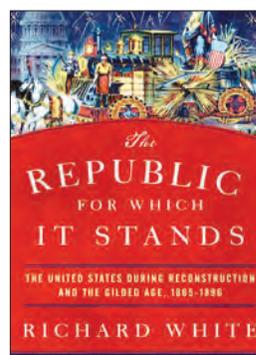
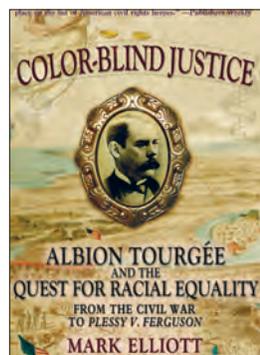
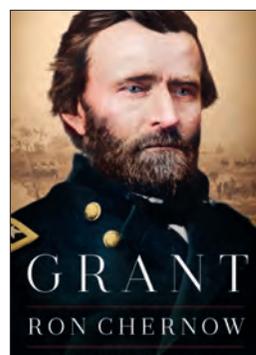
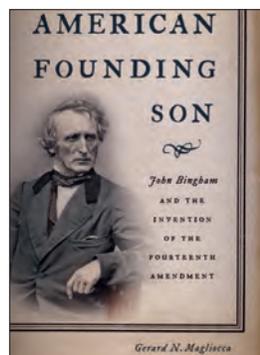
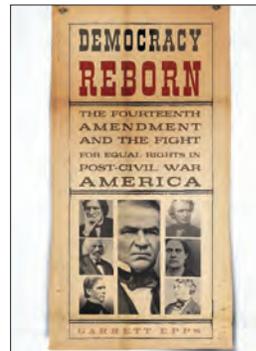
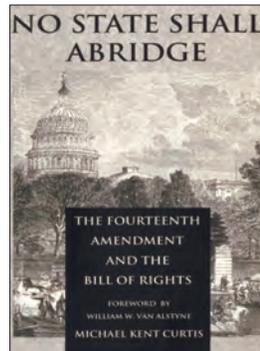
(Duke University Press, 1986) sets the standard. Writing in part to rebut then-Attorney General Edward Meese’s contention that the incorporation doctrine applying the Bill of Rights to criminal defendants was not historically based, Curtis methodically builds his case. Starting with the antebellum state law controversies regarding free speech and slavery, the text describes the legal and political context in which the Fourteenth Amendment was proposed and ratified. Curtis’s thesis focuses on the views of John Bingham, the Ohio congressman who drafted the language of Section 1 of the Amendment. Bingham, a skilled lawyer, sought to overturn any lingering effects of the *Dred Scott* and *Barron* decisions and give constitutional authority to legislative efforts to prevent Southern violence against newly freed blacks and Republicans in the South.

Many Republicans of the 1866 Congress believed the passage of the Thirteenth Amendment granted former slaves citizenship, and, therefore,

the protections of the Due Process Clause of the Fifth Amendment and the Privileges and Immunities Clause of Article IV, which protected all citizens' fundamental liberties against federal or state action, applied equally to freed slaves. But John Bingham saw that more was needed. President Andrew Johnson's veto of the Civil Rights Act of 1866 disabused the Republicans of their belief that statutes alone could protect newly freed slaves and unionists in the post-war South. As chief drafter of the amendment, Bingham's job was to "constitutionalize" the protections of the federal Bill of Rights in order to quell state efforts to abridge those rights.

While Bingham's language seems clear now, in a series of cases beginning with the *Slaughter-House Cases*, 83 U.S. 36 (1873), the Supreme Court interpreted the amendment as applying to a small set of rights of citizenship (e.g., the right to use navigable rivers). Bingham's broader view would not become law until the Warren Court of the 1960s. Curtis's book gives an interpretative history of the Fourteenth Amendment in court from its inception, to its demise, and finally to its resurrection in the Warren Court.

Another entertaining volume of history of the Fourteenth Amendment is *Democracy Reborn, The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America* by Garrett Epps (Henry Holt & Company, 2006). This volume contains a digestible chronology of events and their significance in the passage of the Civil War Amendments. Epps examines in detail the politics of Reconstruction from Abraham Lincoln's death in 1865 to Republican Senator Charles Sumner's death in 1874, particularly with regard



to the partisan battles between Congress and President Johnson. This is less a book about legal theory than an Allen Drury thriller concerning the ability of Congress to pass legislation over the objections of a recalcitrant president and minority Democratic Party. Epps offers a thorough overview of the period's historical context leading up to the passage of the Fourteenth Amendment and until its ratification.

Epps's volume sets the historical stage for three biographies of recent vintage, which provide in-depth examinations of the

effect of the Fourteenth Amendment through the lives of three key figures in American history. The first is *American Founding Son, John Bingham and the Invention of the Fourteenth Amendment*, by Gerard N. Magliocca (New York University Press, 2013). John Bingham, an Ohio lawyer, served in the House of Representatives from 1855 until 1873, with the exception of two years from 1864 until 1865. He was an abolitionist who fought against admitting Kansas and Oregon to the Union unless they assured the equal rights of all citizens, regardless of race. During the Civil War, Lincoln appointed Bingham to serve as Judge Advocate with the rank of Major in the Union Army. Following Lincoln's death, Bingham served as a military prosecutor in the trials of Dr. Samuel Mudd and John and Mary Sarratt, who were accused of conspiring with John Wilkes Booth to assassinate President Lincoln. Bingham also later served as one of the House prosecutors in the impeachment trial of President Johnson. Bingham's final service to the United States was as Ambassador to Japan under four presidents.

The book examines in depth Bingham's efforts to secure explicit Constitutional authorization for federally protected privileges and immunities, and equal protection for all U.S. citizens. As battles with President Johnson over Reconstruction made clear, any Congressional legislation extending federal rights to the states would be left to the impermanence of future Congressional action or judicial interpretation. Knowing the Southern states would eventually be reconstructed and readmitted to the Union, Bingham and other anti-slavery Republicans seized the opportunity to enact additional amendments. Bingham's pivotal role in ►

these efforts, particularly in the creation of the Fourteenth Amendment, is worth this deeper look.

The second biography is *Grant* by Ron Chernow (Penguin Press, 2017). In his latest best-seller, the Pulitzer Prize-winning author of *Hamilton* and *Washington* seeks to rehabilitate the reputation of the eighteenth president of the United States. Thanks to his wartime experience and his close confidential relationship with President Lincoln, Grant well understood the racial problems that arose after emancipation.

Beginning with the amnesty proclaimed in Lee's surrender at Appomattox and during his post-war service as Commander of the Armies of Occupation under President Johnson, Grant sought to assure that newly freed slaves were treated as citizens. He was the first president to employ the Fourteenth Amendment and its enforcement legislation to protect black people from the white supremacists in the South following the War. At best, the results were mixed. Still, his biography offers a fascinating study of the life and times of the United States from the Mexican War through the end of Reconstruction. Grant, a West Point graduate, served as a young officer in the Mexican War. From a blue-collar family of hide tanners in the Midwest to marriage into a slave-owning plantation family in Missouri, Grant's personal history illustrates the Civil War's dramatic impact on American families. The book also chronicles the development of Grant's friendship with Lincoln, ratified by a string of battle successes in the War along the Mississippi and culminating in Vicksburg, and his final victory at Petersburg and Appomattox. Following surrender, Grant's generous terms to Southern veterans sought to prevent recriminations that could have

turned a victory into a long-simmering guerilla war.

Grant's efforts to use military troops to enforce the federal Civil War amendments were problematic. As victors have learned in occupying defeated countries, it is difficult to militarily occupy rebel territory and attempt reconciliation at the same time. Republican governors in the South pled with Grant to support their battles against the Klan and other Southern resistance. For a time he did just that. Grant was also the first president to confront a Congress with Southern delegates at full strength. Although Grant's presidency was troubled by corruption and graft, his efforts to secure equality for all citizens remained constant. This biography is a fascinating narrative of an imperfect man who served honorably as president.

The final biography essential to understanding the story of the Fourteenth Amendment is *Color Blind Justice, Albion Tourgee and the Fight for Racial Equality from the Civil War to Plessy v. Ferguson*, by Mark Elliot (Oxford University Press, 2006). Albion Tourgee, a native of the Western Reserve of Ohio, was a Union officer who settled in North Carolina following the Civil War. Active in local politics, he was elected as a circuit court judge and served from 1869 to 1873, was a leading delegate to the 1868 Constitutional Convention, and served as a Code Commissioner in the writing of North Carolina's civil code. Following the end of his elected career, he became a best-selling author of fiction, recounting stories gleaned from his years on the bench in Reconstruction-era North Carolina.

Two of Tourgee's books, *A Fool's Errand* and *The Invisible Empire*, describe the challenges trial court judges faced as they enforced the newly won rights of African Americans to serve as jurors,

give testimony, and bring civil actions against their former masters. Imagine serving as a trial judge, riding your circuit with a horse and buggy, carrying a sidearm to prevent your own assassination, and having to dismiss cases because all witnesses had been killed or were too frightened to testify. Tourgee's fiction is a thinly disguised *roman à clef* for his life.

Tourgee went on to be a newspaper writer who never lost the radical Republican views he held in his youth. His penultimate act was to plot with citizens in New Orleans to bring a challenge to railroad segregation in the South in *Plessy vs. Ferguson*. 163 U.S. 537 (1896). His arguments were grounded in the Fourteenth Amendment, and in his brief to the Supreme Court he coined the phrase "color-blind justice." His story further emphasizes the difficulties faced by the victors in trying to "reconstruct" a hostile, defeated people to accept new ideas. Cases like *Plessy* and *United States v. Cruikshank*, 92 U.S. 542 (1876), largely ended practical enforcement of the Fourteenth and Fifteenth Amendments for six decades thereafter.

The final volume I recommend is *The Republic for which it Stands: The United States During Reconstruction and the Gilded Age, 1865-1896*, by Richard White (Oxford University Press, 2018), the latest volume in the multi-volume set, *The Oxford History of the United States*. For those who have read the other Pulitzer Prize-winning volumes in this series, its tradition of excellence in historical storytelling continues here. While *The Republic for which it Stands* adequately recounts the events of the time, the author does more than simply tell the story of the United States during this time period. He gives fresh meaning to these events through the broad lens of

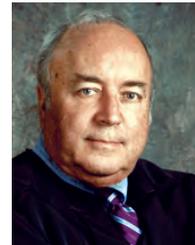
the governing philosophy of the time. For example, he points out that at the end of the Civil War, the United States was three different countries: the victorious and controlling North, the stillborn South, and the Wild West. He points out that during this period the North's dominating ethic permeated public policy. Its tenets favored a free-labor and contract-rights economy tempered by the growth of private organizations, such as fraternal orders and protestant Christianity. This dominating ethic dictated the philosophy that not only formed the Southern Reconstruction but also the development of the West, which, he contends, was the subject of a Greater Reconstruction. A useful insight.

The shifting political coalitions that helped achieve victory in the Civil War had very different ideas about reconciliation with the South and settlement of the West. For example, "liberal republicans" who believed in laissez-faire economics and a weak central government formed

a coalition with the Democrats to support Horace Greely for president against Grant in the election of 1872, presaging the abandonment of the blacks in the South in the compromise of 1877. Despite their best efforts, Radical Republicans, ascendant until 1872, failed to effectuate the legal revolution their efforts envisioned. Nevertheless, the ideals that dominated this period helped shape the American dream of home, public concepts of morality, and the role of government in homogenizing the country. This is a good read, as are the other books in this series, and a must-read for students of American history.

History and law are studies of energy. At various times in the history of our country, concern for the poor is paramount, then populism is ascendant, and, at other times, business oligarchies rule. Nevertheless, the energies that take political hold and become law remain with us for generations, only to reappear as new

legal arguments. The energy that underpinned the Fourteenth Amendment may have failed to hold in its time, but after lying dormant for years it was resurrected by the Warren Court in the 1950s and 1960s. And it still occupies our attention today, in new form. The past is prologue; study the past.



**ROBERT N. "BOB" HUNTER, JR.**, is a judge on the North Carolina Court of Appeals. He previously practiced law for 35 years with the firm of Hunter, Higgins, Miles, Elam and Benjamin, PLLC, as managing partner. He is past president of BarCares, Inc., which delivers programs and counseling services to meet the psychological health needs of the bench and bar, and he is a 2014 graduate of the Duke Law Master of Judicial Studies program.

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# Zap multiword prepositions, please

Probably the worst small-scale fault in legal writing is unnecessary prepositional phrases, a fault that this column will keep going after. A noxious variant is the multiword preposition — a phrase that can routinely be reduced to a single, simple preposition. Examples: with regard to (= on, about); for the purpose of (= to, for); during the course of (= during); prior to (= before); subsequent to (= after). Take aim at these gremlins.

## Original

## Better

On September 14, 2012, the Plaintiff filed her First Amended Complaint. It contained no reference to the Probation Memo. On that same date, Winston’s counsel, Judd Burstein, Esq., was contacted by Friedman, who informed him that Sorkin had contacted her with regard to the Probation Memo. Burstein then filed a letter, also on September 14, 2012, in order to notify the Court that he believed that Sorkin used privileged material. He requested a conference with respect to this issue. Thereafter, Burstein and Sorkin exchanged a series of emails concerning whether the Probation Memo was a privileged document and how Sorkin came to obtain it. On October 3, 2012, the Court granted Winston’s request for a conference scheduled for October 5, 2012.

*{By this time in the opinion, the names are familiar: Winston is a defendant, Sorkin is a former counsel of his who now represents the plaintiff, and Friedman is also a former counsel for Winston. Complicated, but it doesn’t matter for this exercise.}*

On September 14, 2012, three events occurred. (1) Plaintiff filed her first amended complaint. It didn’t mention the probation memo. (2) Winston’s counsel, Judd Burstein, was contacted by Friedman, who told him that Sorkin had contacted her about the memo. (3) Burstein then filed a letter to notify the Court that he believed that Sorkin had used privileged material. He requested a conference on this issue.

After these events, Burstein and Sorkin exchanged a series of emails about whether the memo was privileged and how Sorkin came to obtain it. Then in October, the Court granted Winston’s request for a conference.

## Redlined

On September 14, 2012, the Plaintiff filed her First Amended Complaint. It contained no reference to the Probation Memo. On that same date, Winston’s counsel, Judd Burstein, Esq., was contacted by Friedman, who informed him that Sorkin had contacted her with regard to the Probation Memo. Burstein then filed a letter, also on September 14, 2012, in order to notify the Court that he believed that Sorkin used privileged material. He requested a conference with respect to this issue. Thereafter, Burstein and Sorkin exchanged a series of emails concerning whether the Probation Memo was a privileged document and how Sorkin came to obtain it. On October 3, 2012, the Court granted Winston’s request for a conference scheduled for October 5, 2012.

1. Why not an occasional contraction for a relaxed, conversational style?
2. Are we going to start referring to every lawyer as Esq.?
3. Multiword preposition.
4. Multiword preposition.
5. Multiword preposition.
6. Almost always, *about* beats *concerning*. Listen to how you talk.
7. This date might not be necessary, but the shortened form helps to make a transition.
8. Surely this date is unnecessary.



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