Bold and persistent reform

Why pilot projects may be the surest – if not the fastest – way to ensure the success of civil rules amendments

BY JEFFREY SUTTON & DEREK WEBB
THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE ABROGATED. I speak not of the criticisms of the rules as a failure to ensure the just, speedy, and inexpensive determination of litigation — though many distinguished lawyers and jurists have sadly moved in that direction. No, I direct my lament at those entrusted with the responsibility to ensure the vitality of the rules.

Providing uniform procedures that are consistently followed throughout the country is the raison d’être of the federal civil rules. An individual in Texas should not be treated procedurally differently than an individual in California with the same lawsuit. Over time, the rules have grudgingly accepted limited exceptions to address unique circumstances. But what was once a small pool of exceptions has now grown to a yawning chasm that is swallowing up the whole.

More than 110,000 cases are pending in 20 mass-tort MDLs. That number represents 33 percent of the entire pending federal civil caseload. These cases implicate enormous financial stakes that affect the U.S. economy. Yet no civil rule provides uniform procedures that can be applied consistently to MDL litigation throughout the country. Instead, MDL transferee judges wield virtually total discretion under the guise of pretrial management.

Left largely to their own devices, transferee judges have been compelled to develop procedures out of whole cloth to manage complex problems that regularly arise. A hodgepodge set of practices has evolved that may have worked for some judges in certain cases but now are indiscriminately adopted by newly designated transferee judges, who most often are handling their first MDL. Without rules or official guidance, these judges terminate nearly 90 percent of the centralized cases, all done under a statute that was intended to centralize cases for pretrial purposes only, primarily discovery. The legal authority for much of their actions is not self-evident.

Laissez-faire advocates dismiss any need for new rules, contending that Rule 16(c)(2)(L) is all that is needed to establish legitimacy. That rule authorizes a judge to adopt “special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.”

Based on this slender reed, they defend the status quo and MDL practices that: (1) establish multi-million-dollar common-benefit funds, assessing hundreds of unwilling parties proportionate costs, including parties in state-related litigation; (2) impose responsibilities on lead counsel that may conflict with fiduciary duties owed their clients; (3) recognize some judicial responsibility to review the fairness of global settlements albeit without explicit authority to do so, unlike Rule 23 class action settlements; (4) create and amply compensate steering committees consisting of 10-20 lawyers who peremptorily manage the litigation on behalf of hundreds of other lawyers; (5) develop screening methods that filter out meritless complaints filed as tag-alongs; and (6) hold bellwether trials whose rulings pressure parties to settle with little fear of appellate review. All under the Rule 16 rubric. By this argument, we might as well dispense with the body of rules and have only a single rule that authorizes a judge to develop procedures that are “just.”

It is no surprise that experienced judges view the possibility of rules governing MDLs as obstacles, because they narrow that judge’s discretionary authority. Plaintiff lawyers are equally satisfied with the existing MDL practices — though they, on occasion, are experiencing what defense lawyers have begun to experience, that is, a transferee judge bent on forcing an unwanted settlement. These judges and lawyers join institutional forces, including the opposition of JPML members, which pose a formidable defensive array.

Rather than cede the civil rules to certain irrelevance as the exceptions consume the whole, better to end the downward spiral and start afresh.

John K. Rabiej, Director, Duke Law Center for Judicial Studies
Features

12
BOLD AND PERSISTENT REFORM
THE 2015 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE 2017 PILOT PROJECTS
Jeffrey S. Sutton & Derek A. Webb

22
A CLASH OF CONSTITUTIONAL VALUES
WHEN SHOULD TRIAL JUDGES CONSIDER CONSTRAINING A DEFENDANT’S RIGHT TO SELF-REPRESENTATION?
Stephen C. Leckar

32
NICE TRY
WHEN CONTRACTS SEEK TO PREEMPT JUDICIAL DISCRETION
J. Travis Laster & Kenneth A. Adams

40
WHETHER, WHEN, AND WHAT TO WRITE
FEDERAL JUDGES AND OPINION WRITING (AN IMAGINED CONVERSATION)
D. Brock Hornby

52
ROUNDTABLE: THE STATE OF THE JUDICIARY
David F. Levi with Carolyn B. Kuhl, Margaret H. Lemos, H. Jefferson Powell, Don R. Willett & Ernest A. Young

64
CRUSHED
SOCIAL SECURITY LITIGATION IN THE FEDERAL COURTS
Jonah B. Gelbach & David Marcus

Departments

2
EDITOR’S NOTE, BRIEFS, HONORS

6
ON E-DISCOVERY
WHAT WILL AI MEAN FOR YOU?
George Socha

9
THE STORIED THIRD BRANCH
GENTLEMAN JUDGE AND MAGNIFICENT MAN
Gene E.K. Pratter

75
REDLINES
BULLET POINTS, YES. UNNECESSARY DATES, NO.
Joseph Kimble

76
BOOK REVIEW
OUT-OF-CONTROL POLICING – ARE JUDGES TO BLAME?
Lee H. Rosenthal

80
LASTLY
KEEPING THE BALANCE THROUGH CHANGING TIDES
Stewart Walz
“Everybody wants to rule the world.” — TEARS FOR FEARS SONG LYRIC (1985)

“Why is judicial restraint so important? … (T)he simplest response is by all odds the best. Our system of governance gives judges both life tenure and virtually the last word on a document that is at once supremely important and maddeningly inexact. Because the normal constraints on the exercise of power are lacking, America places a big bet that judges will restrain themselves. But this bet goes against eons of human experience…” — J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY (2012), PAGE 7

IN A RECENT ARTICLE CONCERNING THE SUPREME COURT CONFIRMATION PROCESS, Justice Ruth Bader Ginsberg — my former law school professor — was recently quoted as saying she hoped that in her lifetime “we would get back to the way it was.” The context was the observation that we had gone from the Senate having confirmed the superbly qualified (though polar opposites) Justice Ginsberg nearly unanimously and Justice Antonin Scalia unanimously, to an essentially party line 54-45 vote to confirm the superbly qualified Justice Neil Gorsuch. As this trend has emerged, the commentariat regularly gnashes its collective teeth and rends its garments over the partisan nature of confirmation and resulting “ politicization” of the Supreme Court (and other courts).

What is often left undiscussed is the degree to which this is a self-created problem for the judiciary as a governmental institution. Many (and perhaps most) of the cases that reach the Supreme Court require the justices to decide, at some level, whether to honor the decisions of the elected branches of government or instead to find some basis in the Constitution not to. This brings to mind a remark from another of my law school professors, Louis Lusky, who — despite being a law clerk to Justice Harlan Fisk Stone, a dedicated New Dealer, and a civil rights litigator — complained in his class that “the Warren Court seemed to think it should be running the whole country.” Current complaints of supposed Supreme Court overreach come from both the left and the right (as in Citizens United and U.S. v. Windsor).

On a moment’s reflection, it seems not only likely but inevitable that other governmental branches will push back against appellate courts that increasingly intervene against legislative and executive action — that is, against the decisions of those branches that at least have the legitimacy of voter empowerment. The Supreme Court’s only democratic legitimacy comes from the elected branches’ appointment and confirmation of Court members — which, at the moment, is precisely the commentariat’s complaint. Judge Wilkinson notes that no matter what judicial methodology is currently in vogue on the left or right — living constitutionalism, originalism/textualism, political process theory, etc. — its judicial exponents tend to suffer from a lack of humility and an apparent willingness to clothe in (or, perhaps, disguise with) Constitutional garb their favored policy decisions. And the more judges of all ideologies feel unconstrained about running the country (as Prof. Lusky might say), the more the political branches notice and understandably strive to prevent judges on the “other team” from getting on courts.

Thus, one key to fulfilling Justice Ginsberg’s hope for a return to more consensus in the confirmation process would be more humility and a becoming institutional modesty on the part of the Supreme Court. This would instantiate what Judge Wilkinson tellingly calls “the republican virtue” of judicial restraint. This is not to say that the Supreme Court’s motto should be, “Don’t just do something; stand there!” Obviously, from time to time America needs principled brakes on the elected branches. But America also benefits from a Supreme Court that does not end up partisan, in appearance or reality. And jurisprudentially, there is no dishonor in a certain deference to the decisions of other branches and levels of government that have the imprimatur of democratic enactment, especially if that restraint has the additional benefit of lessening the incentives for others to turn Supreme Court appointments into partisan brawls.
Often thought of as a local issue to be handled exclusively by sheriffs and law enforcement, court security is becoming more commonly viewed as a situation that requires input and participation from local judicial leaders and state-level, statewide plans and actions. Much of this change in attitude can be traced back to the 2005 shooting incident in the Fulton County Courthouse in Atlanta, Georgia. Most recently this manifested in two separate efforts in Arizona and Texas, both of which are examples of how states are moving to address these issues.

Arizona: Statewide standards, but a question of funding

Created by an administrative order issued by Arizona Chief Justice Scott Bales in 2015, the Court Security Standards Committee was asked to survey existing court security measures in the state and to recommend statewide standards for courthouse security, courtroom security, and security officer training. Those recommendations included the development of statewide policies on a host of issues ranging from entry screening practices and equipment to requiring the establishment of court security committees and a process by which all courts would have security assessments conducted on a regular basis. Recognizing that court security was no longer simply a local issue, the committee recommended that a state court security fund be created to assist local courts in purchasing security equipment and improving existing systems.

The committee’s recommendations were adopted by the state’s Judicial Council, and an attempt was made to create a statewide court security fund in Arizona’s 2017 legislative session. The fund was to have been financed via a 2 percent increase on all court fees. Ultimately, however, the fund was not adopted; it was replaced with one-time appropriation in the state’s budget for the year.

States appear to be divided on the issue of how to pay for security at the state level. In some instances, the debate is over whether a fund is needed at all or if one-time appropriations from the state legislature would be sufficient. In other states the question has come down to control: Indiana’s legislature in 2014 and 2015, for example, debated the creation of court security fund(s) using...
proceeds from fees on civil and criminal cases. The House’s version would have placed money into a state-wide court security fund controlled by the Indiana Supreme Court; the Senate wanted county-based funds controlled by county officials.

The funding source has been an issue elsewhere, too; when the Maine Courthouse Security Fund was introduced in 2005, it was to have been funded via a 7 percent tax on the sale of firearms and ammunition. That plan was scrapped in favor of appropriations from the legislature. Other states have opted for fee-based funding systems, such as $5 fees imposed on civil and criminal cases, sometimes coupled with state appropriations.

Texas: Judge Julie Kocurek Judicial and Courthouse Security Act
In 2015, Texas District Court Judge Julie Kocurek was the victim of an attempted assassination in her home driveway. In October 2016, the state’s Judicial Council released a review of court security in the state, 10 years after an initial report recommended statutory changes to improve the situation. In 2017, the Texas legislature enacted the Judge Julie Kocurek Judicial and Courthouse Security Act, including several provisions that have already appeared in other states.

Certified Court Security Officers Requirement: Anyone assigned to duties as a court security officer must take specialized training developed by the Office of Court Administration (OCA) and the Texas Commission on Law Enforcement (TCOLE). The commission must then certify that a person has completed the course. The law is similar to one enacted in Arkansas in 2007, which gave the state’s Commission on Law Enforcement Standards and Training and Administrative Office of the Courts responsibility for the court security curriculum. Kentucky’s 2008 law goes further, specifying that the state’s Certified Court Security Officers Training Academy must include a minimum of 29 specific areas of training, ranging from courtroom protocol and disturbances to protecting juries.

Court Security Committees:
Requires each trial court to create a court security committee made up of, at a minimum, the presiding judge or local administrative district judge, local law enforcement, and someone from the county commission or municipal government. For county-level courts and committees, seats are designated for additional judges as well as prosecutors. The committees are to adopt court security policies and procedures and make recommendations to local government for needed court security expenditures and resources. Several states have adopted similar requirements either by statute or rules issued by the state’s court of last resort. The powers of these committees vary, with some serving only in an advisory capacity while others are able to set courthouse practices and procedures.

Court Incident Reporting: A Texas law passed in 2007 required that local administrative judges provide written reports on courthouse security incidents to the Office of Court Administration. The 2017 law shifts this responsibility to the sheriff, constable, or other law enforcement agency providing security for the court. It also requires that the presiding judge of the court in which the incident occurred receive a copy of the report.

Tracking the number of security incidents in courthouses has been a challenge for years; in many states, data is either not collected on the number of incidents or, if it is collected, it remains at the local level and is not reported to a state entity. At present, there remains no national reporting or data collection system. Debate over who should be responsible for reporting and collecting such data is also common, as seen in the Texas case where the responsibility shifted from a judge to law enforcement. Other states put the onus on court staff/employees to report incidents directly to their state court administrator through the use of judicial-branch reporting systems.

Creation of a State-Level Judicial Security Division: Tasked with providing guidance to state court personnel on improving security for each court, the Division is to be part of the Office of Court Administration. Now, most states have a similar state-level office attached to either the administrative office of the courts or the supreme court/court of last resort itself.

Public Release/Availability of Personal Information: Texas law had already removed some of a judge’s personal information (including home address, family information, etc.) from public records. The new law removes personal information from an expanded list of agencies that are covered to include entities such as local voting registrars. It also specifies that “judge” includes local, limited jurisdiction judicial officers such as justices of the peace and municipal court judges as well as retired judges and quasi-judicial officers such as court-appointed magistrates.

This question of who is and is not a “judge” for purposes of laws that seek to protect this personal information was also being debated in Illinois. For example, in 2012 Illinois enacted a Judicial Privacy Act that addressed the issue of protecting the information of “judicial officers.” In 2017, the legislature amended the definition of that phrase to specifically include former and deceased judges.

— WILLIAM E. RAFTERY blogs about state legislation affecting the courts at gaveltogavel.us.
ANTHONY J. SCIRICA was awarded the American Inns of Court Professionalism Award for the Third Circuit. He served as chief judge of the U.S. Court of Appeals for the Third Circuit from 2003 to 2010 and took senior status in 2013.

Associate Justice JOSEPH MALTESE of New York’s Appellate Division, Second Judicial Department, received the Rapallo-Scalia Award for outstanding achievements by Italian-American lawyers and jurists.

The Mississippi Bar Foundation awarded the Law-Related Public Education Award to Forrest County Court and Youth Court Judge MICHAEL W. MCPHAIL. McPhail has served as a youth court judge for 33 years.

ANDRE M. DAVIS, former Fourth U.S. Circuit Court of Appeals judge, received the John Marshall Award from the American Bar Association Judicial Division and the Standing Committee on the American Judicial System. Davis retired in August to become Baltimore’s city solicitor.

14th Judicial Circuit Judge CHRISTOPHER N. PATTERSON was honored by the Florida Bar as its Justice-Teaching Judge of the Year. The award recognizes dedication in teaching Florida students about the government and judicial system.

The American Bar Association awarded California’s Chief Administrative Law Judge KAREN V. CLOPTON the Robert B. Yegge Award in recognition of her outstanding contributions to the field of judicial administration.

The Association of Black Judges of Michigan awarded Michigan Supreme Court Justice KURTIS T. WILDER the Honorable Harold Hood Award, which is granted to a judge who “exemplifies integrity and dedication to equal justice.”

U.S. District Court Magistrate Judge NANCY JOSEPH (Eastern District of Wisconsin) was named one of the Milwaukee Business Journal’s “Women of Influence.” The award recognizes the city’s women who are making a positive difference. Joseph helps to expose middle and high school students to legal and judicial careers.

West Virginia Second Judicial Circuit Judge DAVID HUMMEL was honored as the Judge of the Year by the West Virginia Association for Justice. Hummel has served as a circuit judge since his 2008 election.

Indiana Supreme Court Justice ROBERT RUCKER received the Sagamore of the Wabash, one of Indiana’s highest civilian honors. He retired after 18 years on the court.

The Hofstra Maurice A. Deane School of Law honored Nassau County New York Supreme Court Judge DENISE SHER, Suffolk County Supreme Court Judge DENISE F. MOLIA, and U.S. District Court Judge JOANNA SEYBERT (Eastern District of New York) as Outstanding Women in Law.

Congratulations to these judges (active status) who are celebrating milestone anniversaries of their commission dates.

- E. GRADY JOLLY U.S. Court of Appeals for the Fifth Circuit
- MICHAEL STEPHEN KANNE U.S. Court of Appeals for the Seventh Circuit
- JERRY EDWIN SMITH U.S. Court of Appeals for the Fifth Circuit
- JOSEPH PETER STADTMUELLER U.S. District Court for the Eastern District of Wisconsin
- PAUL J. BARBADORO U.S. District Court for the District of New Hampshire
- EDWARD EARL CARNES U.S. Court of Appeals for the Eleventh Circuit
- NATHANIEL M. GORTON U.S. District Court for the District of Massachusetts
- CAROL E. JACKSON U.S. District Court for the Eastern District of Missouri
- DENNIS G. JACOBS U.S. Court of Appeals for the Second Circuit
- IRENE PATRICIA MURPHY KEELEY U.S. District Court for the Northern District of West Virginia
- PAUL JOSEPH KELLY, JR. U.S. Court of Appeals for the Tenth Circuit
- LEE HYMAN ROSENTHAL U.S. District Court for the Southern District of Texas
- URSULA UNGARO U.S. District Court for the Southern District of Florida
“ARTIFICIAL INTELLIGENCE IN THE LAW” should be the tagline for what’s next in legal technology, if coverage in the legal press is any guide. Lawyers and vendors alike are extolling AI’s virtues and touting how the use of AI will revolutionize the practice of law — or they are warning that AI is going to usher in the end of lawyers, the practice of law, and even the judiciary as we know them.

All too often, missing from these proclamations and ruminations is any meaningful description of what AI is, where it came from, and what it is likely to mean for bench and bar at a practical level in the short to medium term.

The concept of artificial intelligence was introduced in 1955. The basic idea is that computers might be able to learn, and that they might be able to do things, make decisions, and exercise judgment based on what they learn. That concept has morphed over time, jogged down some dead-end alleys along the way, and led to more consternation — as well as more optimistic anticipation — than is presently warranted by the reality of AI.

Examples of various nonlegal implementations of artificial intelligence can be found all around us. Well-known applications include Pandora’s suggestions for songs you might want to hear, where “every Pandora station evolves with your tastes”; the Nest Learning Thermostat, which “automatically adapts as your life and the seasons change”; and Tesla cars, which, with the Model 3, now “have the hardware needed for full self-driving capability at a safety level substantially greater than that of a human driver.”

Artificial intelligence is beginning to penetrate the legal world, but it still is at the “innovator” and “early adopter” stages, having not yet crossed the chasm into “early majority.” An early entrant is Canadian startup Ross Intelligence, which offers a legal research tool built on top of IBM’s Watson and is being used by at least 14 law firms. AI also is being used to identify relevant authorities in briefs, create nondisclosure agreements, automate the review and approval of contracts, and facilitate real estate due diligence.

Artificial intelligence (depending on one’s definition of AI) also is used for discovery, most notably as the technology behind “predictive coding” and “technology assisted review.” AI helps to find the story in the data and to evaluate ESI to suggest key issues, confidentiality, and overall case relevance.

A Brief History of Artificial Intelligence
The first electronic computer was introduced in 1940, followed the next year by the first programmable computer and then in 1944 by the first programmable American computer. The first commercial computer, UNIVAC, appeared on the market in 1950.

In 1955, John McCarthy, an assistant professor of mathematics at Dartmouth College, and three other scientists proposed a summer research project on a novel topic that they called “artificial intelligence”: "The study is to proceed on the basis of the conjecture that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it. An attempt will be made to find how to make machines use language, form abstractions and concepts, solve kinds of problems now reserved for humans, and improve themselves.”

In early 1956, two Carnegie Mellon University researchers constructed a working artificial-intelligence machine, which one of them described as “a thinking machine.”

That summer the Dartmouth Artificial Intelligence Conference was held, launching the field of artificial intelligence. At the same time, McCarthy began developing LISP, the first artificial intelligence programming language, and from 1958 to 1962 he implemented the language and began applying it to problems of artificial intelligence.

In 1963, artificial intelligence research got a financial boost as the Advanced Research Program Association (ARPA, now known as DARPA) began to fund a range of AI and computer science efforts. The first recipients of this funding included MIT, Stanford, and Carnegie Mellon.

Advances ensued, accompanied, of course, by failures and setbacks. Here are just a few of the advances:

• 1961: Checkers program, capable of learning its own evaluation function, beats Connecticut state checkers champion.
• 1965: Development began on DENDRAL, one of the first applications of artificial intelligence to problems of scientific learning, specifically helping organic chemists identify unknown organic molecules.
• 1966-1972: Mobile robot Shakey, using limited ability to perceive and model its environment, performed tasks such as planning, finding routes, and rearranging objects.
• 1979: The Stanford Cart — a cart with four small bicycle wheels, electronic motors, and a television camera — successfully crossed a chair-filled room without human intervention.
• 1997: IBM’s Deep Blue beat world chess champion Garry Kasparov.
• 2016: Google’s AlphaGo beat top professional Go player.
TABLE 1: Survey of AI knowledge

<table>
<thead>
<tr>
<th>AI CAPABILITY</th>
<th>RESPONDENTS SAYING AI DOES THIS TODAY</th>
<th>ACTUAL STATUS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ability to learn</td>
<td>57%</td>
<td><strong>AI capability today</strong></td>
</tr>
<tr>
<td>Solve problems</td>
<td>50%</td>
<td></td>
</tr>
<tr>
<td>Interpret speech</td>
<td>37%</td>
<td></td>
</tr>
<tr>
<td>Ability to replicate human interaction</td>
<td>35%</td>
<td></td>
</tr>
<tr>
<td>Think logically</td>
<td>51%</td>
<td></td>
</tr>
<tr>
<td>Play games</td>
<td>19%</td>
<td></td>
</tr>
<tr>
<td>Run surveillance on people</td>
<td>18%</td>
<td></td>
</tr>
<tr>
<td>Replace human jobs</td>
<td>31%</td>
<td></td>
</tr>
<tr>
<td>Feel emotion</td>
<td>14%</td>
<td></td>
</tr>
<tr>
<td>Control your mind</td>
<td>8%</td>
<td></td>
</tr>
<tr>
<td>Take over the world</td>
<td>10%</td>
<td></td>
</tr>
</tbody>
</table>

TABLE 2: Survey of AI technology usage

<table>
<thead>
<tr>
<th>AI DEVICE/SERVICE</th>
<th>RESPONDENTS WHO ENCOUNTERED TECHNOLOGY IN THE LAST YEAR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Email spam filters</td>
<td>51%</td>
</tr>
<tr>
<td>Predictive search terms</td>
<td>46%</td>
</tr>
<tr>
<td>Siri virtual assistant</td>
<td>36%</td>
</tr>
<tr>
<td>Online virtual assistant</td>
<td>31%</td>
</tr>
<tr>
<td>Facebook-recommended news</td>
<td>28%</td>
</tr>
<tr>
<td>Online shopping recommendations</td>
<td>28%</td>
</tr>
<tr>
<td>Home virtual assistant</td>
<td>11%</td>
</tr>
<tr>
<td>Reverse image searching</td>
<td>9%</td>
</tr>
<tr>
<td>None of the above</td>
<td>16%</td>
</tr>
</tbody>
</table>

What is Artificial Intelligence?

For an initial definition of artificial intelligence, let’s return to the researcher who coined the phrase, John McCarthy: According to his 2007 definition, artificial intelligence is:

> the science and engineering of making intelligent machines, especially intelligent computer programs. It is related to the similar task of using computers to understand human intelligence, but AI does not have to confine itself to methods that are biologically observable.8

Examples of artificial intelligence in action include, said McCarthy, playing games, recognizing speech, understanding natural language, powering expert systems, and organizing information into categories based on inputs provided to the artificial intelligence program.6

According to his 2007 definition, artificial intelligence is: According to his 2007 definition, artificial intelligence is: According to his 2007 definition, artificial intelligence is: According to his 2007 definition, artificial intelligence is: According to his 2007 definition, artificial intelligence is: According to his 2007 definition, artificial intelligence is: According to his 2007 definition, artificial intelligence is:

General definitions of artificial intelligence are easy to find, such as this one from Technopedia: “an area of computer science that emphasizes the creation of intelligent machines that work and react like humans . . . .”10

What actually constitutes artificial intelligence turns out to be surprisingly difficult to define, however. In a 2016 New York Times Magazine article, Gideon Lewis-Krause pointed out one of the challenges: “Artificial intelligence, we believe, must be something that distinguishes HAL from whatever it is a loom or wheelbarrow can do. The minute we can automate a task, we downgrade the relevant skill involved to one of mere mechanism . . . . The goal posts for ‘artificial intelligence’ are thus constantly receding.”11

The results of a recent survey conducted by Pegasystems highlight the confusion over what artificial intelligence encompasses.12 Of 6,000 survey respondents, 72 percent said they understood what AI is, 17 percent said they did not, and 11 percent were unsure. When asked to choose from a list of possible AI capabilities, however, the respondents greatly underestimated which ones are available today or are becoming increasingly available (see Table 1 above).

Respondents also underestimated the extent to which they already use some form of AI devices and services. Thirty-four percent of respondents said they have never interacted with AI technology, yet when asked about particular AI devices and services, 84 percent said they used one or more of the technologies listed (see Table 2 at left).

AI Today

Clearly, AI’s tendrils reach far today. Additional examples of self-proclaimed artificial intelligence offerings include the following (and this list is just a small sampling):

- **Entertainment recommendations**: Pandora; Netflix; Spotify.
- **Smart home devices**: Nest thermostats; Lifx color-changing light bulbs; August’s Smart Lock.
- **Recommendations from retailers**: Amazon; Target; Watson used by Macy’s; Under Armour; 1-800-Flowers.com; The North Face; Sears.
- **Automobiles**: Tesla, with self-driving hardware on all cars; Google’s Waymo self-driving car project; Toyota’s Yui concept car.
- **Customer service**: Cogito for customer service, sales centers, and managerial support; DigitalGenius to propose answers to KLM agents; the WeChat Messenger bot deployed by China Merchant Bank.
- **AI-driven concierge services**: John Paul’s Digitally-Enhanced Concierge; Pega Self-Service Advisor; Mezi’s human-assisted travel agent bot.

AI for Lawyers

There is no small amount of tooth-gnashing over the idea that AI will eliminate or at least reduce the need for lawyers (and judges). More measured articles are appearing in well-regarded publications such as The Atlantic ("Rise of the Robolawyers – How legal representation could come to resemble TurboTax"), The New York Times ("A.I. Is Doing Legal Work. But It Won’t Replace Lawyers, Yet.") , and the ABA Journal ("How artifi-
cial intelligence is transforming the legal profession”). More dire predictions are easy to find as well: “Lawyers could be the next profession to be replaced by computers” at CNBC; “Artificial intelligence closes in on the work of junior lawyers” in The Financial Times; and “Why Artificial Intelligence Might Replace Your Lawyer” at OZY.

While it is unlikely that AI will replace lawyers any time soon, artificial intelligence is being deployed to help lawyers become more effective. Some examples follow (although some may use a rather flexible definition of AI).

Canadian startup ROSS Intelligence (www.rossintelligence.com), founded in 2014, touts itself as “the world’s first digital attorney.” ROSS is a legal research tool built on top of IBM’s Watson. According to the company, “ROSS understands natural language legal questions and provides expert answers instantly . . . .” Law firms using ROSS include BakerHostetler; Bryan Cave; Dentons; Dickinson Wright; Fennermore Craig; K&L Gates; Kobre & Kim; Latham & Watkins; Salazar Law; Sedgwick; Simpson Thacher; Van Horn Law Group; von Briesen & Roper; and Womble Carlyle.

Casetext (casetext.com/) has an AI-driven offering called CARA (Case Analysis Research Suite), which evaluates submitted briefs to identify relevant authorities. CARA is used at over 100 law firms.

Artificial intelligence from Neota Logic (www.neotalogic.com) powers Perfect NDA, a tool for creating nondisclosure agreements. The company’s tools power Foley & Lardner’s Global Risk Solutions (www.foley.com/grs/), a Foreign Corrupt Practices Act compliance app, as well as Compliance HR’s Navigator Suite, a human resources app developed in conjunction with Littler Mendelson.

Law Geex (www.lawgeex.com) has an “artificial intelligence solution [that] helps legal teams automate the review and approval of contracts.”

Reed Smith uses an AI platform from RAVN System (www.ravn.co.uk/) for real estate due diligence.

AI as Discovery Tool

Artificial intelligence has entered the discovery arena as well. Many claim that “predictive coding” and “technology assisted review” are forms of artificial intelligence. There is a credible argument for the proposition that both supervised machine learning and unsupervised machine learning (one, the other, or both of which form TAR, depending on whom you side with) are forms of AI. For now, however, we will set those technologies aside and look briefly at two other AI implementations specifically for e-discovery.

First is NexLP (www.nexlp.com/), which says it “uses artificial intelligence and machine learning to derive actionable insight from unstructured and structured data.” The company’s Story Engine can “[s]earch, analyze, and investigate complex datasets to tell a story” as well as “[a]ctively monitor communications to turn disparate data into decisive decision.”

NexLP integrates with kCura’s Relativity (www.kcura.com/relativity/) for, among other things, evaluating electronically stored information.

And then in June, DISCO (www.csdisco.com) announced the general availability of DISCO AI. According to the company’s press release, DISCO AI presents lawyers “with predictions for suggested document classifications (or tags) relevant to particular aspects of a case, such as key issues, importance, confidential information, and overall case relevance.”

There also are, of course, myriad examples of e-discovery providers who claim their systems are powered by artificial intelligence but who don’t seem to publish detailed explanations of what they mean by that.

These are only the early fits and starts. In the months and years to come, we are likely to see the ever-morphing field of artificial intelligence alter how the bench and bar get their work done, not so much displacing attorneys and judges as delivering to them greater capabilities for handling ever-growing troves of data.

– GEORGE SOCHA is the co-founder of EDRM, the e-discovery standards organization housed at Duke Law School, and director of BDO Consulting’s forensic technology services. Learn more at edrm.net.

1 For more on the technology adoption life cycle, from which these terms come, see GEOFFREY MOORE, CROSSING THE CHASM: MARKETING AND SELLING HIGH-TECH PRODUCTS TO MAINSTREAM CUSTOMERS (1991; 2d ed. 1999 & 3d ed. 2014).
4 Knight, supra note 2.
7 See Knight, supra note 2.
he Eastern District of Pennsylvania is a large, collegial trial court where quick humor and timely touches of humanity are as highly valued as intelligence and integrity. Even though this court is one where these characteristics abound, most of our 32 currently serving district judges would name J. William Ditter, Jr., as first among equals with the qualities that practitioners and the public place high on the list for exemplary judges and human beings.

But there is another reason to shine a light on Bill Ditter. Too often we extol people only after they cannot readily receive our words of appreciation. With the fortuitous opportunity to showcase a deserving judge, I have selected someone who, albeit like so many others, ought to know in real time the very high regard his friends and acolytes have for him and some of the reasons why I, among many, wish I could claim to be his relative as well as friend and colleague.

The basics are impressive. Public service is in Bill’s bones. Bill Ditter is the son of a “country lawyer”-turned-Congressman who served for a decade until his death in 1943, the year Bill graduated from Ursinus College. Having become a member of the U.S. Naval Reserve in 1942, Bill entered active duty during World War II. He served again in Korea. In between, he earned his law degree from the University of Pennsylvania in 1948. Thereafter, he clerked for the common pleas judges of Pennsylvania’s
From Bill Ditter I have learned that a judge should work calmly, with integrity, treating every human being in the courtroom — parties, lawyers, victims, offenders — with dignity. Perhaps next to fairness, the most important thing Bill has brought to the job is the respectful and dignified treatment of each person before him.

Montgomery County, where he later became an assistant district attorney and then first assistant D.A. while maintaining a busy private law practice with his lawyer sister through the late 1950s and early 1960s. He served six years as a state court trial judge until his confirmation in October 1970 as a federal judge. He assumed senior status in 1986, and his 42 years of federal bench service continues unabated. Thank goodness it does.

Reminding us by example that service takes many forms, in 1984 Judge Ditter helped incorporate the Historical Society of our Court. From the Society’s inception, Judge Ditter served on its board of directors and as chairman of its important calendar committee, where he has taken special care to call to our collective attention the many interesting communities beyond our district’s population centers. Judge Ditter served for many years on the Villanova School of Law Board of Consultants. Year in and year out, he has delivered guest lectures, received honorary degrees, and been selected for well-deserved public accolades from bar associations, educational institutions, and civic organizations.

Always a devout and humble participant in the work of his church, he has taught Sunday School and been chosen often as a lay homilist for the congregation. He charms as he teaches. Bill has advised: “Three things of certainty I learned from my late father: First, you cannot climb a wall that’s leaning toward you. Second, you cannot kiss a girl who’s leaning away from you. And third, you cannot, with full grace due, accept the praise and honors that are bestowed upon you in life.”

With his beloved wife of more than 60 years, the late Verna B. Ditter, Bill parented four sons who, in turn, have provided Bill with eight grandchildren and several great-grandchildren. They could not ask for a more devoted and lively paterfamilias. His various hobbies have included photography, writing poetry, gardening, genealogy, softball, downhill skiing, and beekeeping. More on that last one a bit later.

Professionally, Bill Ditter loves the trial court — interacting with lawyers and litigants, settling cases, presiding over trials, writing opinions. Those privileged to watch Bill in action see clearly that he believes trial judges have the best job in the world. Certainly, no one does it better, and those of us who try to emulate Bill Ditter are better for it. He is revered by his many law clerks for whom their service with him is a prized badge of singular honor.

In Bill Ditter we have an enormously productive trial judge. Many of his cases were tremendously significant, but Bill always acknowledges that every case is significant to the parties involved. He never describes the cases on his docket so that the listener will be impressed by the judge. Yet his work has been impressive.

Early in his federal career, Judge Ditter masterfully engineered the Reading Railroad bankruptcy. When he sentenced a prominent politician convicted of public corruption, he minced no words: “Lying, cheating, and scheming were a way of life for him. . . . When he was out of office he gave bribes, when he was in office he took bribes . . . .” On the state court, Judge Ditter was similarly to-the-point in denying custody to a mother who had treated her children as inconvenient commodities. And he takes to task lawyers who habitually display insufficient care in their professional work product.

Of course, Judge Ditter has presided over hundreds of other cases, mammoth or minor, all of which have received the talents of a judge who is an exemplar of ability, probity, temperament, and honor. From Bill Ditter I have learned that a judge should work calmly, with integrity, treating every human being in the courtroom — parties, lawyers, victims, offenders — with dignity. Perhaps next to fairness, the most important thing Bill has brought to the job is the respectful and dignified treatment of each person before him.

He is a judge of uncommon courtesy and chivalry off the bench as well. Bill never raises his voice or interrupts; he holds the door for others; always stands and offers to pull out and hold the chair for any woman who chooses the seat next to him (and who wouldn’t so choose?) in the judges’ lunchroom. Bill’s humor is dry, witty, and very funny in a self-deprecating, never hurtful way. Bill’s manner is as far from hubris as can be. The peerless “file clerk” in his memory pulls out a charming joke on any topic and on demand. His Christmas letters are legendary as diaries of family and country life, recounting an endless series of mild misadventures marked by the foibles of human nature, all told with disarming detail.
For most of us, however, the most memorable Ditter letters respond to judicial bureaucratic inquiries. In one, Judge Ditter was reporting as the District’s Liaison Judge to the General Services Administration for 1977, a year in the still-early life of our “new” courthouse. Judge Ditter described it as a year of significant achievement with regard to the struggles attendant to painting the judges’ elevators doors, installing an “art-sy” plaza water fountain as a way of handling subterranean water that was causing building subsidence, balancing the building HVAC by averaging (note the distinction from “balancing”) the temperatures in various unrelated parts of the courthouse, and supporting the structure from the top down in deference to the location of Court of Appeals on floors above the District Court chambers. Periodically this letter is reissued on its publication anniversary as a reminder of the timelessness of many joys lurking in judges’ work environments.

The other classic for which Judge Ditter is honored by his appreciative colleagues is his priceless response to a follow-up inquiry from the Chairman of the Committee on Financial Disclosure seeking further explanation of $171.50 in “Farm Income” reported by the Judge on his annual financial report. Specifically, Judge Ditter was required to explain whether one-half hog, a few dozen eggs, and some honey were “grown, manufactured, etc.” at his place of residence. Judge Ditter adroitly disposed of the ham and eggs and then, zeroing in on the bees, responded:

“The remaining part of the farm income came from the sale of honey. Once again, the bees (like the hog and the chickens) that produced the honey did not live in our actual place of residence. They had their own quarters which we call beehives and while one or two from time to time may have gotten into the house (a problem we did not have with either the hog or the chickens) we did not make them feel welcome and tried to make reasonable efforts to exclude them. Honey comes from nectar. I think that much of the nectar gathered by our bees was found on other persons’ properties although I must admit I have made no real effort to trace it. In my judgment honey does not grow at all nor is it manufactured. Therefore, it must come under the heading ‘etc.’”

The Chairman of the Committee sought no further explanation.¹ What better example of a judge’s craft could there be?

Though he rarely speaks of them, some of his colleagues know how deeply felt and indelible certain painful personal experiences have been for Bill. In each instance he has borne, and still bears, them resolutely and without complaint. His sacrifices are not worn as badges. He would shun martyrdom or anything that might call attention to himself or impede his service on the bench or at home. Rather, Bill’s life as a devoted husband, father, judge, friend, and community member serves as daily encouragement to the rest of us to strive to be better as we are glad to greet each day.

Though I was not in attendance, I understood from our late colleague Judge Norma Shapiro (who never got these things wrong) that at the dinner to mark his assumption of senior status, Judge Ditter reported that, on the day of his induction as a Common Pleas Court judge, he and his wife Verna went to a country chapel to conclude the day with a prayer. The judge prayed that God would help make him a good judge and keep him humble. Apparently, Verna quickly assured God it was only necessary to make sure Bill was a good judge, because she’d make sure he stayed humble. That indomitable pairing has had splendid success. Bill Ditter is a man who quietly and effectively demonstrates every day that he understands and obeys the Biblical admonition to do justice, love mercy, and walk humbly with God. I, among many, thank all the powers-that-be for the privilege of learning from our friend, Judge J. William Ditter, Jr.

¹ The full letter is well worth reading and may be read in toto in MORTALS WITH TREMENDOUS RESPONSIBILITIES (St. Joseph University Press), recently published under the authorship of another of our Court’s superb jurists, our former Chief Judge Harvey Bartle III. Alternatively, upon request, the author of this article will provide a copy of this correspondence gem.
BOLD AND PERSISTENT REFORM


BY JEFFREY S. SUTTON & DEREK A. WEBB
AT 6 P.M. ON NEW YEAR’S EVE, 2016, AS MOST AMERICANS WERE SETTLING IN TO WATCH COLLEGE FOOTBALL GAMES OR PREPARING TO GO TO A NEW YEAR’S EVE PARTY, CHIEF JUSTICE JOHN ROBERTS RELEASED HIS YEAR-END REPORT ON THE FEDERAL JUDICIARY.1 THE THEME OF THE 2016 REPORT WAS THE DISTRICT COURT JUDGE.

The Chief Justice highlighted the distinct challenges district court judges face. Working mostly outside the public eye, they “stand alone and unassisted,” carrying out their “crucial role” as the principal trial judges, perhaps indeed the principal judges, of the federal court system. Tasked with an enormous range of responsibilities, an effective district court judge must be a “jack of all trades.” Inside the courtroom, they serve as a “calm central presence,” making evidentiary rulings and resolving motions “without the luxury of calm consideration and research in the quiet of chambers.” Outside the courtroom, district judges confront a “daunting workload” of some 500 cases waiting in the wings and must therefore be able administrators and astute and creative problem solvers as well. On or off the bench, the job “requires long hours, exacting skill, and intense devotion — while promising high stress, solitary confinement, and guaranteed criticism.”2

The job also is not static. New types of cases, new ways of gathering and preserving evidence, and an ever-burgeoning caseload constantly add unanticipated stresses to the system. To keep up, district courts must be vigilant in updating the way they handle their case load. Just as a “lumberjack saves time when he takes the time to sharpen his ax,”3 district courts must continually refine their approaches to stay on top of a daunting docket.

The Chief Justice mentioned two ax-sharpening devices in his report: the 2015 amendments to the Federal Rules of Civil Procedure and the 2017 pilot projects authorized by the Judicial Conference of the United States to test other initiatives designed to improve the efficiency and fairness of civil litigation.4

The 2015 amendments include several reforms intended to streamline discovery and case resolution. They place a proportionality limit on discovery. They encourage district judges to meet promptly with the lawyers once the complaint is filed to confer about the needs of the case and to put together a case management plan. They suggest ways to expedite the resolution of pretrial discovery disputes. And they clarify the important issues relating to the preservation and loss of electronically stored information.5

The two pilot projects — an Expedited Procedures Pilot and a Mandatory Initial Discovery Pilot — propose additional reforms designed to promote the goals of Civil Rule 1: “the just, speedy, and inexpensive determination of every action and proceeding.” And both confront the risk that, when courts fail to resolve cases in a speedy and inexpensive way, it’s fair to question whether any such resolution can be just.

The two pilots take different paths. The Expedited Procedures Project requires litigants and judges to handle the discovery phase of each case more promptly through firm deadlines: a cap on the amount of time for discovery, a requirement that judges promptly resolve dispositive motions, and time limits for the final dispositions of cases. The Mandatory Initial Discovery Project requires initial disclosure of information helpful and harmful to the parties at the outset of the case and without prompting by formal discovery requests.

Each pilot project has historical roots worth recalling. Complaints about discovery are not new. And efforts to address those complaints have come in many forms. The failures of two earlier reform efforts, in 1980 and 1993, offer helpful lessons for today’s initiatives. Of special note are the dissenting statements of Justices Lewis Powell and Antonin Scalia in response to those efforts.
Before describing the dissents and their relation to the 2015 Rules Amendments and the 2017 Pilot Projects, a word (or two) is in order about the Rules Enabling Act of 1934. The Act empowers the Supreme Court to “prescribe” rules of practice and procedure for the federal courts. It delegates responsibility for working out the details of those rules to the Judicial Conference of the United States, which in turn delegates that responsibility to a standing committee and various advisory committees composed of experienced judges, lawyers, and law professors. After the rules committees complete their work, typically in two to three years’ time, the Supreme Court must approve the rules. After that, the Court transmits the proposals to Congress. And if Congress does not reject or alter them within the seven months provided under the Act, they become law.6

In addition to approving or rejecting rules proposals as a group, individual justices from time to time have issued dissents. But it does not happen often, making the Powell and Scalia dissents noteworthy and worth revisiting.

BEYOND TINKERING: JUSTICE POWELL AND THE VIRTUES OF THINKING BIG

In the three decades after the Federal Rules of Civil Procedure were created in 1938, judges, practitioners, and scholars largely supported the expansive opportunities for discovery made possible by the new federal rules. The Supreme Court told lower courts and practitioners that the discovery rules should be accorded “a broad and liberal treatment.”7 “No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.”8 Broad discovery makes a trial “less a game of blind man’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”9 If a trial is a search for the truth, broad discovery was perceived as its indispensable handmaiden.

But the thinking of the bench and bar began to shift by the 1970s. Many came to view the pretrial discovery phase as rife with abuse, whether through unreasonable discovery demands or opposition to reasonable discovery demands. An exponential growth in discoverable information did not help. As the price of broad discovery grew in terms of time and money, it became easy to question the cost-benefit tradeoff. Rather than providing a preliminary X-ray of the merits of the parties’ claims, as originally intended, discovery had become a “self-contained universe with a life of its own.”10 If broad discovery had been the “Cinderella of changes” in the Rules of Civil Procedure of 1938, warned Professor Arthur Miller, the “carriage had turned into a pumpkin” by the 1970s, requiring “major changes” if the rules were ever “to be a carriage again.”11

To address these concerns, Chief Justice Warren Burger convened the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in April of 1976.12 The three-day conference commemorated the 70th anniversary of Roscoe Pound’s 1906 address entitled “Popular Dissatisfaction with the Administration of Justice,” which had kick-started efforts to create the new federal rules of procedure, and met in the same room in the Minnesota State Capitol in which Pound had delivered the speech.13 Burger lamented the “sporting theory of justice,” first criticized by Pound, in which lawyers prioritized private advantage over justice in the pretrial writ system.14 Even though the Federal Rules of Civil Procedure had eliminated many forms of pleading-stage thrusts and parries, it had shifted “exaggerated contentiousness” to discovery.15 “[W]idespread complaints” had emerged among lawyers about discovery procedures that were “being misused and overused.”16 The problem fell hardest on “small litigants” who could not afford to wait out parties with “long purses” that protracted the early stages of litigation.17 Burger called for a reexamination of the discovery rules, urging the Judicial Conference and the Standing and Advisory Committees to reconsider them “boldly, not timidly.”18

At the turn of the last century, Burger observed, many lawyers would have taken a trolley car or horse and buggy to the Minnesota State Capitol to hear Pound’s speech. But by 1976, the trolley car was gone and parking meters had replaced hitching posts. “Perhaps what we need now,” Burger added, “are some imaginative Wright brothers of the law to invent and Henry Fords of the law to perfect new machinery for resolving disputes.”19 Pound had worried that we have been tinkering where comprehensive reform is needed.20 Burger called upon the legal community to seek “fundamental changes” and “major overhaul” rather than to settle for mere “tinkering.”21

Burger’s call for an overhaul set several wheels in motion. After the meeting, the ABA Board of Governors made three suggestions: (1) narrow the scope of discovery from material “relevant to the subject matter involved in the pending action” to material “relevant to the issues raised by the claims or defenses of any party”; (2) provide for a prompt discovery conference if requested by any party; and (3) limit interrogatories to 30.22 President Jimmy Carter’s Attorney General, Griffin Bell, approved all three suggestions,23 and Chief Justice Burger urged the Rules Committee to hold hearings on “any proposals the legal profession considers appropriate.”24

The Advisory Committee on Civil Rules moved to implement the suggestions and published the three amendments for comment. They received considerable feedback — and criticism.25 Those criticizing the change in the scope of discovery from “subject matter” to “issues” or “claims and defenses” pointed out that the Advisory Committee had no evidence that the phrase “subject matter” caused courts to permit overly broad discovery.26

In response to the negative comments from nearly 40 individuals and five bar groups, the Advisory Committee withdrew two of the proposals (narrowing discovery to issues and limiting interrogatories to 30) and left in place the third (holding a discovery conference).27 The Committee Note mentioned the “widespread criticism of abuse of discovery” and said that the Committee had considered limiting the scope of discovery and
limiting the number of interrogatories.\textsuperscript{28} But “abuse of discovery,” the Committee believed, “is not so general as to require such basic changes in the rules that govern discovery in all cases. . . . In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.”\textsuperscript{29} With that, the Rules Committees and the Judicial Conference transmitted the revised package to the Court for its review.

The Supreme Court approved the package in 1980. Justice Powell, joined by Justices Potter Stewart and William Rehnquist, dissented, marking the first time that three justices had dissented from a rule proposal.\textsuperscript{30} The issues were not new to Justice Powell. In delivering the inaugural Orison S. Marden Memorial Lecture before the New York City Bar Association in 1978, he had warned that “we have no more pressing duty than to fashion effective remedies for the twin evils of civil litigation — delay and expense. Abuse of discovery is a prime culprit.”\textsuperscript{31} In Court opinions, he had made similar points. In one, he targeted “the widespread abuse of discovery that is a prime cause of delay and expense in civil litigation” and highlighted the work of the Pound Conference and what he saw as promising rule changes proposed by the ABA.\textsuperscript{32} “As the years have passed,” he added in another, “discovery techniques and tactics have become a highly developed litigation art — one not infrequently exploited to the disadvantage of justice.”\textsuperscript{33} “The glacial pace of much litigation,” he added in a third, “breeds frustration with the federal courts and, ultimately, disrespect for the law.”\textsuperscript{34}

Justice Powell’s dissent from the 1980 rule proposal gave him an opportunity to express these concerns in the context of the concrete as opposed to the abstract, in the context of specific rules reforms rather than general pleas for adaptation. “[T]he changes embodied in the amendments,” as he saw it, “fall short of those needed to accomplish reforms in civil litigation that are long overdue.”\textsuperscript{35} Powell dissented not from what the new rules included but from what they left out. He discussed the steps by which the Committee had taken up the suggestions of the ABA and rejected two of them after the public comment period. At the same time that he acknowledged the Committee’s difficult task in trying to develop a consensus

AT THE TURN OF THE LAST CENTURY, BURGER OBSERVED, MANY LAWYERS WOULD HAVE TAKEN A TROLLEY CAR OR HORSE AND BUGGY TO THE MINNESOTA STATE CAPITOL TO HEAR POUND’S SPEECH. BUT BY 1976, THE TROLLEY CAR WAS GONE AND PARKING METERS HAD REPLACED HITCHING POSTS. “PERHAPS WHAT WE NEED NOW,” BURGER ADDED, “ARE SOME IMAGINATIVE WRIGHT BROTHERS OF THE LAW TO INVENT AND HENRY FORDS OF THE LAW TO PERFECT NEW MACHINERY FOR RESOLVING DISPUTES.”

for all of the changes, he could not refrain from critiquing its final work product: “[W]hatever considerations may have prompted the Committee’s final decision, I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery.”\textsuperscript{36}

Although some discovery was essential to litigation, he added, the scope and duration of discovery had spread beyond reasonable bounds. “Delay and excessive expense now characterize a large percent-age of all civil litigation.”\textsuperscript{37} And “as every judge and litigator knows,” the culprit was discovery procedures.\textsuperscript{38} “Lawyers devote an enormous number of ‘chargeable hours’ to the practice of discovery.”\textsuperscript{39} In simple cases, discovery could take weeks. In complex cases, it could take years. And the length and cost discovery now regularly added to litigation stacked the deck in favor of wealthy litigants at the expense of the “average citizen” for whom access into federal court was becoming cost prohibitive:

[...] too often discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.\textsuperscript{40}

Modest and halting reforms, in his view, stood little chance of removing this shadow. Worse than that, they might delay effective reform for another decade. Because any single reform of a rule takes a minimum of three to four years to pass and confronts many blocking possibilities along the way, the approval of minor changes diminishes the resolve needed to make major changes down the road. In Powell’s words: “The process of change, as experience teaches, is tortuous and contentious. Favorable congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.”\textsuperscript{41}

Echoing Pound and Burger, Justice Powell warned that the 1980 reforms amounted to “tinkering changes” when
true reform demanded a “thorough re-examination of discovery rules.” He did not stand alone. Others shared Powell’s disappointment with the Rules Committees’ tiny steps. The ABA Section of Litigation called the amendments “an insufficient response to a serious problem.” Scholarly articles faulting the Advisory Committee for not going further. Others wrote pieces exploring how district court judges could pick up the pieces and control discovery abuse on their own. Five years out from the modest reforms of 1980, one scholar remarked that “Justice Powell proved prophetic. The 1980 amendments did little to stem the rising tide of discovery abuse because they did not address the underlying causes.”

LOOKING BEFORE LEAPING:
JUSTICE SCALIA AND THE VIRTUES OF EXPERIMENTATION

If the 1980 reforms suffered from a failure of resolve, the 1993 amendments suffered from an excess of ambition. Up to then, parties typically initiated discovery through formal requests. In an effort to “accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information,” the Advisory Committee proposed altering Rule 26 to require parties to turn over certain core pieces of information “relevant to disputed facts alleged with particularity in the pleadings.” As proposed, the amendment required litigants to disclose the information regardless of whether it helped or hurt their side.

Since the late 1970s, judges and scholars had been considering the merits of mandatory initial disclosure, hoping it might prompt a cultural shift among lawyers. The “sporting theory of justice,” thought Pound and Burger, had permitted, perhaps facilitated, a legal culture that shortchanged the prompt and fair resolution of disputes. The result was an approach to discovery that often imposed additional costs without benefit and undue process without gain.

Mandatory initial disclosure, it was hoped, might address these problems. It would help lawyers see themselves not only as partisan advocates of their clients but also as officers of the courts. And it would help them appreciate that they not only had obligations to the discovery of truth but also to the integrity of the judicial system — cousins to, if not siblings of, government lawyers in criminal cases under Brady.

Proponents of the plan thought that laying obviously relevant cards on the table up front would have other downstream benefits as well. It would permit parties to evaluate their cases more promptly, leading to early settlements in some cases and earlier trials in others. It would streamline and expedite any additional discovery, decreasing depositions and interrogatories in the process. It would save costs and weed out cases that should never have been filed in the first place. And it would increase access to justice by reducing financial barriers to court.

In 1991, the Advisory Committee on Civil Rules sought public comment on a proposal that required plaintiffs and defendants to disclose information that was “likely to bear significantly on any claim or defense.” Comments on the proposal were not favorable. Of the 264 written comments submitted to the Rules Committee, 251 opposed it. Seventy people appeared at two public hearings to testify against the amendment on behalf of businesses, bar associations, and public-interest groups. The American Bar Association, the American Corporate Counsel Association, Public Citizen Litigation Group, the American Civil Liberties Union, the American Institute of Certified Public Accountants, American Trial Attorneys, the NAACP Legal Defense Fund, the Defense Research Institute, and the Product Liability Advisory Council all opposed the amendment.

At the close of the public comment period, the Advisory Committee reconsidered the proposal and opted to remove the initial disclosure provision. The proposed Committee Note said that further local experimentation was needed before proceeding further: “It is appropriate that any national standard prescribing the type, form and timing of required disclosures not be adopted until some experience has been gained under these various local plans.”

Six weeks later, however, the Advisory Committee reversed course again and voted to proceed with the reform without waiting for local experimentation. As one judge put it, experimentation would push “the whole of the national amendment process back to 1996.” At the same time that the Advisory Committee moved forward with an initial discovery requirement, it narrowed the scope of it. The revised amendment did not require disclosure of anything that bears on a claim but only information “relevant to disputed facts alleged with particularity in the pleadings.”

The Court approved the reform on April 22, 1993, but with several asterisks. Chief Justice Rehnquist, in his transmittal letter to Congress, noted that the Court approved only the procedures by which the reform had been promulgated, not the substance of the reform itself. Justice White penned a concurring statement, the first concurrence in the history of the federal rules, echoing Rehnquist’s agnosticism and questioning the Rules Enabling Act’s requirement that the Supreme Court approve the handiwork of the Advisory Committee and the Judicial Conference.

Justice Scalia, joined by Justices Clarence Thomas and David Souter, dissented. Scalia worried that requiring lawyers to turn over information potentially harmful to their clients’ interests was at odds with the adversarial culture of the American legal system. And he noted that the reform had met with near “universal criticism” “from every conceivable sector of our judicial system,” a set of criticisms that initially prompted the Advisory Committee to pull the reform back “in favor of limited pilot experiments” before they decided, six weeks later and without further public comment, to recommend a revised rule.

Justice Scalia focused his criticisms on timing and experience. He maintained that such a “novel” revision of the discovery rules should not be under-
Courts exercised this right of first refusal. In contending that the amendments were “premature,” he used the reformers’ words against them. “It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, been subjected to any significant testing on a local level.” Instead of waiting for the results of a three-year pilot project, the Advisory Committee preferred “to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.”

Justice Scalia was not the only one to criticize the rulemakers’ refusal to rely on pilot projects. Professor Linda Mullenix observed that the Advisory Committee had little empirical data to draw upon in formulating its rule. And Professor Stephen Burbank criticized the rulemakers for showing a “studied indifference to empirical questions.”

While Congress allowed the amendment to go into effect on Dec. 1, 1993, just barely, the reform had a brief life. It remained unpopular. Anticipating that some district courts might not appreciate the reform, the Advisory Committee included an opt-out provision. Within four years, 45 out of the country’s 94 district courts exercised this right of first refusal.

Of the remaining districts, many of them made the disclosures voluntary. In view of the house-divided nature of the new discovery regime and a growing preference for a uniform set of rules on such an important feature of federal trial practice, the Advisory Committee amended the rule again in 2000. The new rule retained a framework for mandatory initial disclosure, but limited it, critically, to information that the party might “use to support its claims or defenses.” That was a distant call from the 1993 requirement that parties turn over all information at the outset of the case “relevant to disputed facts alleged with particularity in the pleadings.”

With that, the 1993 reforms came to an end. By pushing for bold reform against widespread opposition, armed with anecdotes and testimonials but without empirical data based on local testing, the Advisory Committee accomplished little. Justice Scalia had no problem with the idea that “[c]onstant reform of the federal rules to correct emerging problems is essential.” But in carrying out that mission, Scalia emphasized the importance of looking before leaping—that the Rules Committees and Judicial Conference should experiment with ambitious rules before adopting them nationwide. Under the Rules Enabling Act, the rulemakers have a duty to carry on “a continuous study of the operation and effect of the general rules of practice and procedure.”

But the duty of careful study, Scalia claimed, preceded the duty of recommendation, and sometimes that study required local experiments first. Had the Advisory Committee taken this route, had it tested the new regime of mandatory initial disclosure locally for three years from 1993 to 1996, a more enduring reform, one way or another, might have been in place by 1998 — a timeline that may have looked slow in 1993 but looks positively swift today.

**THE 2015 CIVIL RULES AMENDMENTS AND THE 2017 PILOT PROJECTS**

At first glance, the themes of Justice Powell’s 1980 dissent and Justice Scalia’s 1993 dissent point in opposite directions. A recommendation that the Rules Committees act boldly and promptly to rectify problems with civil discovery is difficult to square with a recommendation that the Committees conduct local trials of significant reforms before adopting them. The former gets things done; the latter is a recipe for delay and runs the risk of waiting too long to implement any reform at all.

But the 2015 Civil Rules Amendments and the 2017 Pilot Projects, when examined together, embrace essential kernels of wisdom reflected in both perspectives. Before describing these reforms in more detail, it’s worth remembering why discovery reform remains as essential today as it was in 1980 and 1993 — perhaps more essential today than it ever has been.

Consider these observations and questions about American civil litigation circa 2017:

- Broad civil discovery may well have made sense in 1938, permitting each side to engage in a no-stone-unturned search for the truth, all paid for by the other side. But those rules were designed for what was then a discrete world of “paper” and “thing” discovery. With the creation of copying machines, the amount of paper discovery increased significantly. And with the development of the internet, the amount of discoverable information increased exponentially. There are a lot more stones than there used to be.
- In the face of this transformation of information creation and preservation, does our discovery system still honor the imperatives of Civil Rule 1: “the
just, speedy, and inexpensive determination of every action? In many cases, it’s doubtful that we can respect a liberal model of fence-and-be-fenced discovery without slighting the goals of “speedy” and “inexpensive” litigation. In a world of electronic discovery, the kind of prolonged and costly search for the truth associated with a “just” resolution of each action at some point ends up at cross-purposes with that same goal.

- The American judicial system is the envy of the world. But what country has adopted our system of civil discovery? Not one to our knowledge. Other countries seem to be doing everything they can to avoid importing American discovery practices into their legal systems. Let’s hope that this is not what people mean when they refer to American exceptionalism.

- The ever-increasing globalization of business will lead to a growth in international disputes. As matters now stand, isn’t it likely that international businesses will be wary about litigation in American courts? If a company is based in a country that does not use our system of broad civil discovery — which is to say, all of them — it’s easy to wonder whether such companies will prefer dispute resolution in American courts.

- It’s not just that there is a striking contrast between discovery in this country and the rest of the world. There is also a remarkable contrast in this country between the discovery practices used in civil cases and in another set of cases devoted to a search for the truth: criminal cases. Try looking for an analogue to Civil Rules 26 through 37 in the Federal Rules of Criminal Procedure. You will not find one. Why? Do our courts resolve criminal cases less fairly, less justly, than civil cases? Or do we just insist on more process for disputes about money rather than liberty? These questions deserve consideration and answers.

- One long-cherished value when it comes to American dispute resolution has been the right to a jury trial, reflected in the Sixth and Seventh Amendments to the United States Constitution. But as many point out, the number of civil jury trials is decreasing, if not disappearing in many courts. For example, the number of civil trials in all federal district courts dropped from 12,018 in 1984 to 3,355 in 2006. In 1962, juries resolved 5.5 percent of federal civil cases; since 2005, the rate has been below 1 percent. And in the 30-year period from 1970 to 1999, while the total number of civil filings in federal courts rose by 152 percent, the number of cases that were tried by federal judges dropped by 20 percent. At the same time, there is a growing shortage of lawyers with the skill and experience to try civil cases, a development that should surprise no one. The skill set of most civil litigators now turns on managing discovery before motions for summary judgment rather than managing evidence before jury trials. Our colleges and high schools have many mock trial programs but no mock discovery programs with mock depositions and mock interrogatories. And yet the latter would be far more useful (if a lot less interesting) to students than the former if they ever become lawyers, at least as things now stand.

- Just as the forces of creative destruction play out every day in American capitalism, with some businesses thriving and others exiting the stage, so the same may happen one day with American dispute resolution. If the federal bench and bar do not reform civil litigation, American businesses and individuals eventually will do it for them. The free market of dispute resolution will eventually punish lawyers and judges who fail to pay attention to what is happening and adjust to it.

- One option will be the state courts, where plenty of innovation is already taking place. Two surveys show that civil litigators in Arizona prefer the state courts to the federal courts. Arizona, by the way, has a 25-year-old system of mandatory voluntary disclosure much like the coming federal pilot.

- Another option is mediation and arbitration, which minimizes (and sometimes eliminates) discovery. Statistics show that this is a growth industry, here and abroad. That’s fine if it happens to be a better form of dispute resolution for a given conflict and a given set of parties. But that development is troubling if it merely reflects a frustration with the costs, delays, and uncertainties of federal civil litigation.

- Increased arbitration and mediation is not cost free. The American legal system is still a precedent-driven one. Arbitration and mediation generally do not create precedents, and certainly not binding ones. If court resolution ever becomes the “alternative” in alternative dispute resolution, one can fairly
worry about the necessary creation of precedents needed to guide lawyers and parties. It’s not even clear that arbitration and mediation will work without a wellspring of judicial precedents.

As the above suggests, the concerns that animated the 1980 and 1993 Civil Rules amendments remain with us and, if anything, are more salient today. All of which explains the impetus behind the 2015 Civil Rules amendments and the 2017 pilot projects. And all of which takes us back to Justices Powell and Scalia.

Today’s reforms fuse both pieces of advice — by thinking and acting boldly through the 2015 amendments and by testing other reforms at the local level through pilot projects before deciding to nationalize them. Taken together, the reforms seek to steer a prudent course between tinkering changes and sweeping overhaul.

The 2015 amendments were not timid. For starters, the amendments fully adopt one of the original 1980 proposals and improve on it. As amended, Civil Rule 26 refers to discovery not of “any matter relevant to the subject matter” of the action but only to information relevant to the parties’ “claims or defenses.”

It also eliminates language that referred to the discovery of any information “reasonably calculated to lead to the discovery of admissible evidence.” Perhaps most critically, discoverable information not only must be relevant to the parties’ claims or defenses, but it also must be “proportional to the needs of the case.”

That’s not all. For the first time since 1938, Civil Rule 1 places a responsibility upon the parties as well as the court to ensure the “just, speedy, and inexpensive determination of every proceeding.”

And the amendments shorten several crucial early deadlines. Plaintiffs must serve their complaint within 90 days (down from 120) after filing it. And courts must issue their scheduling orders within 90 days (down from 120) after any defendant has been served, or 60 days (down from 90) after any defendant has appeared. To encourage active, in-person scheduling conferences between the court and counsel, the Rules Committee deleted language that previously allowed the conference to occur “by telephone, mail, or other means.”

On top of all that, the amendments clarified the parties’ preservation responsibilities when it comes to electronically stored information, limiting sanctions “to instances of intentional loss or destruction.”

The pilot projects offer the prospect of still more far-reaching reforms. The Expedit ed Procedures Pilot draws upon practices already employed by some judges and turns on the intuition that the less time courts give litigants to conduct discovery, the more they will focus on the reasonable discovery needs of each case.

The pilot has five features: (1) a scheduling conference as soon as possible but no later than 90 days after any defendant is served or 60 days after any defendant appears; (2) a time limit on discovery of no more than 180 days, with the possibility of one extension for good cause; (3) the prompt resolution of discovery disputes through conferences and short submissions rather than formal briefing; (4) the resolution of dispositive motions within 60 days of the filing of the reply brief; and (5) a firm trial date so that the trial starts within 14 months of service (for 90 percent of the cases) and within 18 months of service (for the remaining 10 percent of the cases).

By setting these time limits, the pilot aims to “concentrate the mind” of lawyers and judges alike to resolve disputes in as expeditious a manner as possible. It may be difficult to draft rules that require reasonable behavior when it comes to discovery and other pretrial procedures. But it may be possible to mandate reasonable behavior by setting fixed time periods to undertake these activities — requiring lawyers and their clients to use weeks and months rather than years to focus on the essentials of a case.

The Mandatory Initial Discovery Pilot takes a different tack and is a refined outgrowth of the 1993 discovery proposal. Drawing upon court rules already used in several states and the Employment Law Protocols, the pilot tests whether mandatory and immediate court-ordered discovery prior to traditional party-initiated discovery will decrease expenses and delay. The pilot increases the amount of information parties must disclose at the outset of the case. Under the pilot, both parties must disclose information helpful and harmful to their position. In the language of the pilot’s standing order, the parties would turn over information “relevant to any party’s claims or defenses” as opposed to the current requirement under Rule 26 that they turn over information that the responding party “may use to support its claims.”

Each pilot is slated to last three years. With the help of the data-collection capabilities of the Federal Judicial Center, the pilots will gauge whether the reforms increase the efficiency and fairness of the trial process and perhaps even gain popularity among lawyers and judges in the trial-run districts. In this way, the pilot projects may realize the vision of Justice Powell and Justice Scalia by adopting reforms that are bold yet empirical, far-reaching yet experimental.

This will take time, no doubt. And it is perhaps ironic that pilot projects designed to improve the speed and efficiency of federal litigation may delay reform. But that is the fair price of combining the virtues of thinking big and slow, of boldly attempting to transform judicial and legal culture surrounding the self-contained world of pretrial discovery based squarely upon empirical data mined from local experimentation. And it’s a fair price for addressing the risk aversion and change aversion of lawyers. As Justice Powell pointed out in his 1980 dissent, “it often is said that the bar has a vested interest in maintaining the status quo.” In order to increase the speed of litigation — one of the chief goals of Rule 1 — and a problem lamented in the ages of Shakespeare and Dickens, a problem indeed dating back to Magna Carta — one must first be prepared to go slowly and sometimes experimentally in the domain of rule reform and judicial administration.

These promising reforms call to mind another Year-End Report that Chief Justice Roberts penned, in 2014.
posts sturdy bronze tortoises, symbolizing the judiciary’s commitment to constant but deliberate progress in the cause of justice.”

The slow plodding tortoise did win in Aesop’s Fable. But the speedy and impatient hare has his role to play as well. In the context of the 2017 pilot projects, designed to improve the speed, efficiency, cost-effectiveness, and overall responsiveness of the federal courts, it may yet be possible to put the slow and deliberate pace of the tortoise in the service of the fleet-footed hare.

2 Id. at 3–8.
3 Id. at 7.
4 Id. at 6–7.
5 Id. at 6; see id’n Ted Hirt, Important Amendments to the Federal Rules of Civil Procedure, Wash. Lawyer, Oct. 2015.
8 Id.
13 For background on the influence of Roscoe Pound’s speech on the creation of the Federal Rules of Civil Procedure, see for example, Austin Scott, Pound’s Influence on Civil Procedure, 78 Harv. L. Rev. 1568 (1965); Jay Tidmarsh, Pound’s Century, And Ours, 81 Notre Dame L. Rev. 513 (2006); Barry Friedman, Popular Dissatisfaction with the Administration of Justice: A Retrospective (and a Look Ahead), 82 Indiana L. J. 1193 (2007).
15 Id. at 31.
16 Id. at 33.
17 Id. at 32.
18 Id. at 28.
19 Id.
20 Id.
21 Id. at 32.
23 Id. at 755.

[84x250]supra [84x583]Brazil, supra note 47, at 507 (Scalia, J., dissenting) [hereinafter Scalia dissent].

[86x469]New Discoveries

[100x260]Marc Galanter,

[230x220]Ann Pelham,

[250x260]Linda Mullenix,

[230x280]Donna Stienstra,

[230x227]D. Susman,

[230x240]Empirical Legal Stud. 459 (Nov. 2004); Stephen

[230x270], 50

[230x270]G. Young,

[230x260]Federal Lawyer 30 (July 2003); Marc Galanter,

[230x310]The Vanishing Trial: A Problem in Need of Solution? See

[230x345], 46

[230x355]Professor Edward Cooper and the Rules Enabling Act

[230x365]into its “continuous study” of the rules, see Mark

[230x375]the committee to incorporate empirical analysis

[230x385]Committee since 1992, has played in encouraging

[230x395]the committee to reform the rules administration.


[410x133]Revisiting the 1938 Rules Experiment

[483x655]ADR and the

[525x671]Possible Responses to the ACTL/IAALS Report: The

[565x671]Arizona Experience


[601x178]and inexpensive determination of every action and

[621x200]Civil Jury Project at NYU School of Law, available at


[661x227]97

[681x227]98

[701x227]99

[721x227]100

[741x227]101

[761x227]102

[781x227]103

[801x227]104

[821x227]105

[841x227]106

[861x227]107

[881x227]108

[901x227]109

[921x227]110

[941x227]111

[961x227]112

[981x227]113
The defendant is accused of serious felony offenses but insists on exercising the right of self-representation. The defendant seems oriented as to time and place. Yet the charged offenses' nature and the defendant's in-court speech and conduct and written submissions suggest an ideation far removed from the mainstream. Nor will the defendant cooperate with court-appointed counsel, an experienced and skilled practitioner. For aught that appears, the proposed defense theory and strategy seem outlandish.

Many contemporary readers may be thinking of Dylann Roof, accused of murdering nine Charleston, S.C., church members, who insisted on defending himself and was convicted of 33 federal crimes. Following an unorthodox defense before a jury, in which he neither testified nor presented evidence, Mr. Roof was condemned to death by a jury. While his fate and the issue of whether he was competent to represent himself may yet be adjudicated on appeal or in post-conviction proceedings, the scenario presented here is hardly unusual. Although it is impossible to quantify the number of defendants whose competency to self-represent is determined, the empirical data suggests that number is not modest.

The federal courts track the number of mental competency hearings conducted annually by magistrate judges. To be sure, being competent to stand trial is a legal step removed from being competent to represent oneself — the latter being this article’s focus. Even so, the numbers are illuminating. The most recent reports show that magistrate judges conducted 510 mental competency hearings nationally in the 12 months that ended on Sept. 30, 2016, a number higher than in the prior year, when they presided over 439 such hearings.

Forty years ago, the Supreme Court in Faretta v. California declared that the Sixth Amendment allows defendants to knowingly and intelligently waive their right to be represented by counsel and to instead defend themselves in criminal cases. Faretta derived this right from history, the Sixth Amendment’s text, and “[the] respect for the individual which is the lifeblood of the law.”

The Faretta majority concluded that forcing a defendant to accept counsel “can only lead him to believe that the law contrives against him.” Speaking for the Court majority, Justice Potter Stewart...
wrote that while "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts[,] where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer’s training and experience can be realized, if at all, only imperfectly. . . ." Moreover, Justice Stewart stated, "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages."10

In 2008, the Supreme Court in Indiana v. Edwards11 modified Faretta’s expansive right to self-representation. In an opinion authored by Justice Stephen Breyer, the Court held that if there is “reasonable cause” to believe that a defendant who seeks to represent himself suffers from a severe mental illness and cannot conduct the trial proceedings rationally, a trial judge may conduct a hearing to make an informed judgment over whether to permit or deny self-representation.12

How should a trial judge respond when a defendant whose speech, deportment, or writings suggest seriously disturbed ideation requests to proceed pro se? To date, the Supreme Court has not “prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel.”13

Federal trial courts frequently use the Benchbook for U.S. District Judges to caution defendants about the pitfalls of self-representation.14 Indeed, the Benchbook’s warnings somewhat mirror the course followed in the Roof prosecution.15 However, the Benchbook lacks any protocols to help assess the competency of an apparently severely troubled individual who demands to self-represent.

A similar lack of clarity also is reflected in the state courts. One commentator’s exhaustive recent analysis of post-Edwards state decisions concluded that “vague” and “constitutionally suspect” standards were being used to assess whether to permit gray-area defendants to represent themselves.16

This article first addresses the intersection between the constitutional principles governing competency in general: the right of the defendant to self-represent and the countervailing right of the state to limit that freedom in those circumstances where a defendant’s competency to self-represent is dubious. Afterwards, it suggests guidelines that can be used by trial courts adjudicating these delicate situations and by appellate courts reviewing trial judges’ decisions.

PRECLUDING DEFENDANTS FROM SELF-REPRESENTATION

Mental health issues present an inherent conflict between the Fifth and Sixth Amendments. The Fifth Amendment may give rise to a procedural due process claim (where a court failed to hold a competency hearing despite a “bona fide doubt” about the defendant’s competence) and a substantive due process claim (where an “actually” incompetent defendant was convicted or sentenced).17 At the same time, Faretta endorses the right to self-represent following a “knowing, voluntary, and intelligent” waiver of the right to counsel.18 Absent a serious mental condition, defendants possess the “right to represent themselves and go down in flames if they wish[,] a right the district court [is] required to respect.”19 The difficulty comes in identifying when the self-representation right may be constrained.

Background

In Edwards, the Supreme Court recognized that two of its cases had set forth a mental competency standard. The first case, Dusky v. United States,20 defines the competency standard as including “(1) whether the defendant has a rational as well as factual understanding of the proceedings against him and (2) whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.”21 The second case, Drope v. Missouri,22 “repeats that standard,” for “it has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”23

Ultimately Edwards disavowed “the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself.”24 In light of Edwards, judges may “require a higher level of competence for self-representation” than would be the case if the issue solely focused on the defendant’s competency to stand trial.25

Upon a proper showing, the Constitution permits trial judges to limit the right of severely mentally ill defendants from representing themselves. Edwards recognized that “[m]ental illness itself is not a unitary concept . . . . In certain instances an individual . . . will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.”26 The Court referenced this dichotomy as the defendant’s “ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.”27

IN LIGHT OF EDWARDS, JUDGES MAY “REQUIRE A HIGHER LEVEL OF COMPETENCE FOR SELF-REPRESENTATION” THAN WOULD BE THE CASE IF THE ISSUE SOLELY FOCUSED ON THE DEFENDANT’S COMPETENCY TO STAND TRIAL.
In characterizing the former benchmark as being “the higher standard at issue here,” Edwards described Respondent Ahmad Edwards, a schizophrenic, as a “gray-area defendant.” This term, Justice Stephen Breyer wrote, meant an individual more or less mentally competent to stand trial, but seemingly lacking the mental competence to self-represent.28

Edwards explained that society’s interest in a fair trial is two-fold: making sure that the trial is fair in fact, but also making sure that the public will perceive that the trial is fair. The Court pointed out that “insofar as a defendant’s lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution’s criminal law objectives, providing a fair trial.”29 Thus “the Constitution permits [courts] to insist upon representation by counsel for those [defendants] competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”30

Continuing, the Court observed that while the Dusky standard for competence to stand trial could help in making this determination, “given the different capacities needed to proceed to trial without counsel, there is little reason to believe that Dusky alone is sufficient.”31 In explaining the need for imposing “a mental-illness-related limitation on the scope of the self-representation right,” the Court majority reasoned:

The Constitution permits judges to take realistic account of the particular defendant’s mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under Dusky, but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.33

Thus understood, “Edwards does not compel a trial court to deny a defendant the exercise of his or her right to self-representation; it simply permits a trial court to require representation for a defendant who lacks mental competency to conduct trial proceedings.”34

In its ruling, the Edwards Court declined to adopt a “specific standard” for determining representational incompetence.35 It left that to the discretion of the “trial judge . . . who . . . will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant.”36 Predictably the “states have generated a patchwork of competency standards for self-representation,” yielding “an odd and uncomfortable arrangement because state thresholds for the exercise of federal constitutional rights typically should not vary.”37

FEW GUIDELINES AVAILABLE TO HELP TRIAL JUDGES

The federal courts regularly confront seemingly irrational defendants who wish to represent themselves.38 As would be expected, the same problem appears in the state courts.39

Nor are the severe mental illnesses foreseen by Edwards limited to those exhibiting palpable indicia of impaired thought — say, paranoid delusional expressions. A wide array of mental diseases can affect the ability to self-represent. Schizophrenia and related disorders, depressive disorders, anxiety disorders — even delirium and dementia, extreme phobia or panic, obsessive-compulsive disorders, or Asperger’s Syndrome may well affect a defendant’s cognitive ability to self-represent.40

Since Edwards the law has developed on a case-by-case basis.41 Because the concerns identified by Edwards likely will continue to require large expenditures of judicial resources, this article draws from the cases and suggests protocols to assist trial judges in exercising the discretion granted by Edwards as well as appellate courts in reviewing those decisions.

Trial judges have a continuing duty to monitor gray-area defendants who defend themselves.

When a “gray-area” defendant’s competence to self-represent is not evaluated, or is done so in at best a perfunctory way, a potential issue will lurk of whether that defendant was constructively denied the assistance of counsel. An invalid waiver of counsel is tantamount to the denial of counsel, which is a structural error, i.e., an error that is presumptively prejudicial.42 Accordingly, trial judges must carefully assess requests to self-represent at the outset and should continue monitoring such situations through sentencing.43

A Ninth Circuit decision, United States v. Ferguson,44 is a representative Edwards issue that permeated a case. In addressing an Edwards claim raised on direct appeal, the Ferguson court “note[d] that [d]efendant’s behavior was decidedly bizarre;” he had repeatedly made irresponsible demands of his counsel, including an “attempt[ ] to file a motion of ‘dishonor’ against his lawyers,” and advanced highly unorthodox legal theories — such as requesting the judge to recognize a “‘public policy’ exception in the UCC and dismiss the case ‘for value.’” Moreover, “once the jury convicted [Ferguson], there was far less reason for continuing his odd behavior at sentencing. Yet Defendant continued his bizarre and wholly ineffective behavior.”45 Even then, faced with the strong possibility of a statutory maximum sentence, and with “almost nothing to gain and everything to lose” by aberrant behavior, Ferguson’s bizarre actions continued.46

The confluence of three circumstances led the Ferguson panel to remand the case to the district court. First, “Defendant’s actions suggest that he might have been ‘unable to carry out the basic tasks needed to present his own defense without the help of counsel.’”47 Second, “Defendant’s complete failure to defend himself seriously jeopardized the fairness of the trial and sentencing hearing and, at the very least, seriously jeopardized the appearance of fairness.”48 Third, “[p]erhaps most importantly, the record suggests that the district court might have forced counsel
upon Defendant, had the court had the benefit of reading Edwards.”

Appointing standby counsel invites other concerns, for the law has not clearly defined the duties of standby counsel. For example, standby counsel’s duty to question the defendant’s competence to self-represent is murky.

A line of appellate cases that have considered the issue of competency adapted the “meaningful adversarial testing” standard of United States v. Cronic, a seminal decision on evaluating ineffective assistance of counsel claims, to require a similar obligation of standby counsel in the context of a competency hearing.

Even then, “[i]t is not clear that standby counsel has an obligation to address limitations that may impair the defendant’s ability to represent herself.”

Seeking an alternative remedy, some courts have appointed “hybrid” counsel to “essentially function as ‘co-counsel.’” However, there is no constitutional right to hybrid representation. Also, it is only permissible with the defendant’s consent, whereas standby counsel may be provided over the defendant’s objection. Nor is hybrid representation available in all jurisdictions; some disfavor such arrangements.

**Defining meaningful guidelines to assess the gray-area defendant’s demand to self-represent.**

In the post-Edwards landscape, after setting aside cases where the defendant’s seemingly nonsensical effort to self-represent was rejected after being found a contrivance intended to delay the trial, one can readily find decisions on both sides of the self-representation spectrum. For instance, a court may justifiably deny self-representation to a defendant whose personal history, mental evaluation, communications with the court, or demeanor reflects delusional or irrational thoughts that appear likely to impair the defendant’s cognitive functioning.

That occurred in United States v. Lewis, which affirmed a trial judge’s insistence on the defendant being represented by counsel, where the defendant’s “disordered thinking prevented him from personally managing the large amount of documentary evidence in this case.”

Likewise the Court of Appeals for the Fourth Circuit upheld an unsuccessful request to self-represent where the defendant, who was diagnosed as suffering from delusional disorder and personality disorders, maintained that his cross-examination skills were superior to his counsel’s, leaving the trial judge “unconvinced” that Barefoot could “understand[fully his role and duties at trial were he to represent himself.”

Other courts have recognized the right to self-represent where the defendant possessed a basic understanding of the necessary steps. In United States v. Stafford, the district judge explored the defendant’s apparent understanding of jury selection and trial procedures and considered psychological experts’ testimony.

In the absence of nationally-promulgated standards to assess requests to self-represent where Edwards concerns may be present, unless a self-representation competence standard is agreed on through the appellate process, both psychiatrists and trial courts likely will use differing formulations. Trial judges’ decisions may in the mine-run of cases yield satisfactory results, although there is reason to suspect otherwise. As appeals follow, the legal questions raised may ultimately be answered, but only after some, perhaps many, unnecessary reversals.

In some jurisdictions, the courts of appeals could use their “supervisory power” to issue baseline procedures, as has been done in other situations. There is precedent under Edwards for following this step where the state’s highest court has that authority.

An analysis of Edwards, post-Edwards cases, and related commentary gives insight into what constitutionally acceptable standards might entail. Edwards itself characterized representational competence as a function of one’s ability to demonstrate “powers of understanding, reasoning, and appreciation.” It looked to the joint amicus brief filed by the American Psychiatric Association (APA) and the American Academy of Psychiatry and the Law, which examined the “decision-making and cognitive/
communication capabilities” needed by a defendant representing himself.77

The APA amicus urged that a pro se defendant must understand, among other issues, “the exact elements of the crimes charged,” how the prosecution’s evidence relates to these elements, and “what is important to highlight, throughout trial and in closing.”78 Further, the APA urged that the defendant must be able, in both oral and written communications, to articulate essential points of his defense, stay focused on relevant matters, and to communicate with multiple audiences (the judge, witnesses, jurors, and the prosecutor), adding that “if a defendant lacks these decisional capacities — and, by implication, only such capacities — he will be ‘unable to carry out the basic tasks needed to present his own defense without the help of counsel.’”79 Using these as an influential starting point, we can derive from the cases a series of checkpoints.

The Trial Judge should hold an on-the-record hearing. Above all else, an on-the-record hearing should be held to assess whether the defendant possesses “basic rationality,” which will require that the court “inquire into whether the defendant has non-delusional reasons’ to self-represent.”80 The views of the defendant and all counsel should be solicited.81

(A) A rational defense strategy. The presiding judge should ensure that the defendant understands his Faretta rights and is seeking to knowingly and intelligently waive them. The court should caution the defendant of the pitfalls and potential adverse implications of defending a case by oneself, the need to understand basic principles of courtroom procedure and the rules of evidence, and to recognize the trial judge cannot assist the defendant in trying the case.82

In addition the judge should determine whether the defendant can articulate “a rational defense strategy,” and confirm that the defendant understands “at least on a basic level, the legal elements of the charged offenses, means of defense if they exist, and the probative value of the prosecution evidence and whatever evidence may be available in defense, as well as have a sufficient understanding of court procedures to make at least rudimentary use of this understanding.”83 An appreciation of the potential penalties upon a conviction also should be ascertained.84

And while the defendant’s literacy is not, strictly speaking, an issue addressed in Edwards, it is at least a factor worth considering in deciding whether to allow self-representation: A judge fairly could ask whether a mentally impaired person with a limited education would encounter undue difficulty presenting a defense.85

(B) The defendant’s deportment. The defendant’s speech and affect are important and in order to make an informed decision, the trial judge should be particularly alert to and address whether the defendant’s speech was disordered. “Given the established relationship between disorganized speech and thought disorders, disorganized speech may be a strong indicator of cognitive impairment and, possibly, an impaired means of recognizing and advancing one’s best interests.”86

At the same time, courts must be alert to the possibility that some speech defects may be simple speech impediments, tics, or attributable to noncognitive causes such as Parkinson’s disease.87 It is also important to assess the clarity and firmness of the defendant’s demand to self-represent, for a court may be justified in overruling a request to self-represent where the defendant is vacillating.88

The Trial Judge should appoint a forensic examiner. While a defendant’s bizarre or seemingly irrational verbal communications or written submissions may not render the defendant incompetent to self-represent, such signals should cause a trial court to appoint a qualified forensic examiner to conduct a thorough competency assessment of the defendant.89 Put simply “[a] determination that the defendant is stricken with delusional or irrational thoughts . . . should lead the court to some level of suspicion as to the defendant’s competency to represent himself.”90

If the court opts to appoint a forensic examiner, it should explain why. The resulting process should include recognized testing, interviews of counsel and those who evaluated the defendant previously, and a review of the defendant’s pro se filings, if any.91 An examination report should include the examiner’s assessment of the foregoing information, with opinions as to diagnosis and prognosis, and if the defendant suffers from a severe mental illness, an opinion as to whether he or she can conduct trial proceedings rationally.92

It also is important to obtain the examiner’s views as to whether the defendant is malingering or seeking to manipulate the criminal justice system.93

The Trial Judge should appoint counsel for the defendant and define the lawyer’s role. A court also should appoint counsel for purposes of an Edwards proceeding and delineate the role to be played by counsel: full representation, standby or hybrid. Militating in favor of appointing full-time counsel for this purpose is the unassailable logic that if competency is at issue, then it stands to reason “that the court cannot predetermine that the same person is capable of representing himself in his own competency hearing. If the person truly lacks competency, who would be there to voice the concern?”94

At the least, not merely for the defendant’s protection but to guard against
ambiguity and subsequent appeals in an area already complicated by uncertainties, a trial judge who chooses to appoint a standby counsel should provide standards to define counsel’s participation in the case. These instructions should include actively seeking and providing medical information to medical examiners, coupled with counsel’s independent, candid and objective observations, arranging meetings with knowledgeable witnesses, analyzing the forensic report, deciding whether good faith reasons exist to contest it, and, if appropriate, challenging the findings — in short, duties that oblige standby counsel to play a meaningful role in helping the court make the right call.95

In all events a written decision should explain the trial judge’s reasoning.

Suggesting a standard of review

There remains the issue of ensuring an effective review process. Some courts of appeals have applied a deferential standard of review to matters of competency to counsel.100 There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.101

CONCLUSION

In Wade v. Mayo,96 a case decided 15 years before the Supreme Court recognized a right to counsel in criminal cases100 and 40 years before Edwards, the Court recognized that mental condition can affect a defendant’s capability of self-representation. Wade involved an 18-year-old burglary defendant who was forced to represent himself when his motion for counsel was denied. The Court found that impermissible and held that:

[T]hough not wholly a stranger to the Court Room, having been convicted of prior offenses, [the defendant] was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. . . .

There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.101

Edwards flowed logically from Wade. Notwithstanding Faretta’s holding, there are some individuals who by reason of a lack of mental capacity are incapable of defending themselves in any case, simple or complex. The task of the courts is to recognize when to say “no” to those persons while recognizing that there are others who must be accorded their requests to exercise that right. This article has sought to identify ways to bring structure to that process.

4 Id.
6 Id. at 819–20 (giving the Sixth Amendment’s literal terms “the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails”).
8 Id. at 834. Three dissenting justices found no independent constitutional basis for the right to self-representation in a criminal trial. Id. at 836–46 (Burger, C.J., joined by Blackmun and Rehnquist, JJ., dissenting). 846–52 (Blackmun, J. joined by Burger, C.J., and Rehnquist, J., dissenting).
9 Faretta, 422 U.S. at 834.
10 Id. See also McKaskle, 465 U.S. at 176–77 (explaining that Faretta right “exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused’s best possible defense”).
12 Id. at 173–78. See, e.g., Panetti v. Stephens, 727 F.3d 398, 414 (5th Cir. 2013); United States v. Ferguson, 560 F.3d 1060, 1070 n.6 (9th Cir. 2009); United States v. Berry, 565 F.3d 385, 391 (7th Cir. 2009); United States v. DeShazer, 554 F.3d 1281, 1290 (10th Cir. 2009).
16 E. Lea Johnston, Communication and Competence for Self-Representation, 84 FORDHAM L. REV. 2121, 2122 (2016) (contending that “existing state competency standards are constitutionally suspect”) [hereinafter “Johnston”]. See also id. at 2124 (characterizing Edwards’ language as “vague”).
17 Pate v. Robinson, 383 U.S. 375, 385 (1966) (finding error in failing to order competency hearing despite petitioner’s self-inflicted wounds, medicated
Amendment is to ensure a fair trial, it ‘does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.’ Id. at 184–85 (Scalia, J., joined by Thomas, J., dissenting) (emphasis in original).

34 United States v. Ferguson, 560 F.3d 1060, 1070 n.6 (9th Cir. 2009) (quoting United States v. DeShauter, 554 F.3d 1281, 1290 (10th Cir. 2009) (emphasis in original)).

35 Edwards, 554 U.S. at 178.

36 Id. at 177.

37 Johnston, supra note 16, at 2127.

38 See, e.g., United States v. Duncan, 643 F.3d 1242, 148–49 (9th Cir. 2011) (competency to waive capital appeal); United States v. Arenburg, 605 F.3d 164, 168–69 (2d Cir. 2010) (defendant repeatedly referred to “a conspiracy involving MGM Studios and the government with the object of publicly broadcasting his thoughts”); United States v. Ruston, 565 F.3d 892, 901–03 (5th Cir. 2009) (defendant asserted that “law enforcement organizations and others,” including Katie Couric, were attempting to murder him); United States v. Ghane, 490 F.3d 1036, 1040–41 (2d Cir. 2007) (defendant’s under-standing "was not rational because it was premised on his delusion of a government conspiracy working against him"); United States v. Jones, 336 F.3d 245, 255–60 (7th Cir. 2003) (sentencing); United States v. Bojerguin, 155 F.3d 1181, 1189–90 (10th Cir. 1998) (defendant ‘believ[ed] that his lawyer was participating in a conspiracy, along with the pros ecutor and the judge’); Nichols v. United States, 955 F.2d 161, 166–69 (2d Cir. 1992) (granting coram nobis); United States v. Auen, 846 F.2d 872, 874–78 (2d Cir. 1988) (severe paranoid delusional ideation).

39 See generally Johnston, supra note 16, at 2128–2139 & nn. 44–125 (citing cases).

40 Johnston at 2136 & nn. 91–99, 2140 & nn. 128–32 (citations omitted); Ellesha Lecluyse, Note, The Spectrum of Competency: Determining a Standard of Competency for Pro Se Representation, 65 Case W. Res. L. Rev. 1239, 1253–54 (2015) [hereafter “Lecluyse”]. Professor Johnston suggests that the impact of certain mental illnesses, “particularly those that do not carry symptoms of psychosis, is uncertain” and argues that “it is unclear whether personality disorders can ever qualify as severe mental illnesses.” Johnston, supra note 16, at 2160.

41 See generally Johnston, supra note 16.


44 560 F.3d 1060 (9th Cir. 2009).

45 Id. at 1068–69.

46 Id.

47 Id. at 1069 (quoting Edwards, 554 U.S. at 175–76).

48 Id. (citing Edwards, 554 U.S. at 177) (emphasis in original).

49 Id.

50 Id.

51 Dropsky, 420 U.S. at 178 n.13. See also United States v. Stafford, 782 F.3d 786, 790, 791 (9th Cir. 2015); United States v. VanHoesen, 450 Fed. Appx 57, 62 (2d Cir. 2011) (counsel’s failure to alert the court to concerns regarding VanHoesen’s competence to self-represent “provides substantial evidence of defendant’s competence”); United States v. Savage, 505 F.3d 754, 760 (7th Cir. 2007) (“Significant weight given to counsel’s representations and failure to raise the competency issue”); Boyd v. Brown, 404 F.3d 1159, 1167 (9th Cir. 2005); Klar, 213 F.3d at 703; Lay v. Trammell, 2015 U.S. Dist. LEXIS 136793, *55 & n.7 (N.D. Ohio Oct. 15, 2015) (capital case), aff’d, 622 Fed. Appx. 772 (6th Cir. 2015). Courts should also be alert to the prosecution signaling concerns with the defendant’s mental health, E.g., Ross, 703 F.3d at 867–68.

52 Bundy v. Dugger, 816 F.2d 564, 566 n.2 (11th Cir. 1987) (quoting Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986) (counsel cannot “blindly follow” defendant’s instructions “particularly if counsel has reason to believe defendant’s judgment impaired by “mental difficulties””).


55 Odle v. Woodford, 238 F.3d 1084, 1088–89 (9th Cir. 2001) (reversing denial of habeas writ). See also United States v. Jones, 336 F.3d 245, 259 (3d Cir. 2003) (“[W]e cannot afford appreciable weight to defense counsel’s silence … [absent] any evidence in the record that might explain why he chose not to raise the issue.”).


57 United States v. Schmidt, 105 F.3d 82, 90 (2d Cir. 1997).

58 See McKauley, 465 U.S. at 176–79; Faretta, 422 U.S. at 834 n.46; United States v. Anzaldi, 800 F.3d 872, 876 (7th Cir. 2015).
59. See generally Johnston, supra note 16, at 2127 & n.29 (citing Edwards, 554 U.S. at 176) (internal citations omitted).


61. APA Amicus, supra note 77 at 24.


65. Marks, supra note 75, at 846. See also Lechayse, supra note 40, at 1251-67 (Defendant [must] show the logic behind [the] decision-making process in order to assess the defendant’s ‘reasoning capacity or ability to employ logical thought processes to compare the risks and benefits of [the] different option’); Ashley Beck, Indiana v. Edwards: The Prospect of a Heightened Competency Standard for Pro Se Defendants, 84 U. Colo. L. Rev. 434, 458 (2013) (defendants "who . . . suffer[] from delusions and exhibit[] extreme and bizarre behavior . . . would likely be incapable of adequately and competently executing their own defenses without the assistance of counsel").
party proceeding pro se is for the district court to conduct a hearing to determine whether or not the party is competent, so that a representative may be appointed if needed.

This is possible because nothing in that Rule “prevents a district court from exercising its discretion to consider sua sponte the appropriateness of appointing a guardian ad litem for a litigant whose behavior raises a significant question regarding his or her mental competency.” Ferrelli v. River Manor Health Care Ctr., 323 F.3d 196, 203 (2d Cir. 2003).


See, e.g., Kowalczyk, 805 F.3d at 852–56 (discussing extended proceedings); Williams, 137 A.3d at 161 & n.8 (no evidence of malingering).

Smit, supra note 60, at 174 (footnotes and internal citations omitted). As pointed out in Ros, it is “contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel. Such a defendant may not proceed pro se until the question of her competence to stand trial has been resolved.” Ros, 706 F.3d at 870 (citation omitted). See also United States v. Purnett, 910 F.2d 51, 55 (2d Cir. 1990) (“[T]he trial court cannot simultaneously question a defendant’s mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel.”).


See, e.g., United States v. Smith, 830 F.3d 803, 809 (8th Cir. 2016) (applying de novo standard); United States v. Gerritzen, 571 F.3d 1001, 1006 (9th Cir. 2009); United States v. Guerin, 471 F.3d 197, 199 (D.C. Cir. 2006); State v. Bird, 858 N.W.2d at 646; State v. Jackson, 63 Wis. 2d at 497–98, 867 N.W.2d at 821.
NICE
Contracts can lead to litigation. It’s standard for drafters to anticipate litigation by including in a contract rules for interpreting it. That’s why contracts usually specify a governing law. And a contract might replace default rules governing a claim for breach, for example, by reducing the period for bringing claims.

But drafters also use the following four techniques to try to control how a court interprets a contract:

- stating that a judicial rule of interpretation doesn’t apply
- stating an internal rule of interpretation
- stating how a court is to act in a given context
- stating that a particular standard applies

Each of these techniques seeks to preempt judicial discretion. The first three operate by steering a court to a desired conclusion. Imagine a rule of judicial interpretation that “up means down.” A contract could employ the first technique by saying “The up-means-down rule does not apply.” It could use the second technique by saying “Up means only up.” Or it could use the third technique to say “Up is to be interpreted to mean only up.” By contrast, the fourth technique characterizes a situation as the parties see fit, whether or not that’s justified by the facts.

Commentators have paid little attention to these techniques. This article considers each technique and how courts have reacted or might react.

This article uses examples from contracts filed by public companies on the U.S. Securities and Exchange Commission’s EDGAR system. In this article, those examples are highlighted in sans serif text and set off by horizontal lines. We didn’t select examples for the quality of the drafting, and we certainly don’t propose them as models. They simply illustrate points we address.

STATING THAT A JUDICIAL RULE OF INTERPRETATION DOESN’T APPLY

In contract disputes, courts invoke rules of interpretation to attribute meaning to confusing or disputed contract language. Judicial rules of interpretation are generalized notions, pieced together by courts and commentators over time, about the most likely meaning that writers express, and readers derive, in a given context. Courts use rules of interpretation as an alternative to the messy and often impossible task of determining what meaning the parties to a contract had actually intended. In this sense, rules of interpretation are arbitrary. That perhaps explains why they are also called, more grandly, “canons of construction.”

Canon means a rule that has been accepted as fundamental so presumably those who wield the term “canons of construction” think it connotes that sort of solidity and not the expediency that actually underlies use of judicial rules of interpretation.

Judicial rules of interpretation have their supporters, notably Antonin Scalia and Bryan Garner, coauthors of Reading Law: The Interpretation of Legal Texts. But judicial rules of interpretation also have their critics. For example, consider the shortcomings of one rule of interpretation, the rule of the last antecedent.

 TRY.
Scalia and Garner identify 37 “canons” that they say apply to all texts, including contracts. Contract drafters appear wary of two in particular, as suggested by contracts on EDGAR stating that one or the other, or both, don’t apply.

Stating That Ambiguities Are Not to Be Construed Against the Drafter
The first of the disfavored rules is known by the Latin name contra proferentem, meaning “against the offeror.” According to this rule, if a contract provision is ambiguous, the preferred meaning should be the one that works against the interests of the party that provided the wording.

Here’s how the Restatement (Second) of Contracts states it:
In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

But if two businesses, each represented by counsel, enter into a contract, then arguably both sides should be considered responsible for how it’s worded. That’s not surprising, in that the Delaware Court of Chancery has also held that contra proferentem is best applied to standardized contracts and when the drafting party has the stronger bargaining position. It follows that courts shouldn’t object if contract parties who negotiate a transaction from a position of comparative equality elect to make it explicit that contra proferentem doesn’t apply.

Stating That Ejusdem Generis Doesn’t Apply
The second disfavored rule of interpretation is known by the Latin name ejusdem generis. Here’s how Scalia and Garner express it:
Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class.

In other words, in a reference to dogs, cats, horses, cattle, and other animals, this rule of interpretation “implies the addition of similar after the word other,” so other animals doesn’t mean any animal, it means other similar animals.

Applying ejusdem generis is fraught with uncertainty, so some drafters seek to neutralize it. Here’s an example of how one contract attempts to accomplish that:

The rule of ejusdem generis shall not be applicable to limit a general statement, followed by or referable to an enumeration of specific matters, to matters similar to those specifically mentioned . . . .

In contrast to provisions neutralizing the rule of contra proferentem, which operate indirectly by establishing a general rule based on the sophisticated nature of the parties, this provision seeks to influence directly how part of a contract is interpreted.

We haven’t found caselaw on whether provisions that purport to neutralize ejusdem generis are enforceable, but we suspect that some courts would be skeptical. For one thing, courts are partial to invoking ejusdem generis. For another, a court might be confused about how far to go when applying such a provision: does it preclude ever limiting a general statement, or does it just preclude rote application of ejusdem generis? If the latter, a court could still limit a general statement if the context suggests that’s what the parties intended.

So as not to give a court an excuse to apply ejusdem generis, and to avoid any risk involved in attempting to neutralize ejusdem generis, specify an appropriate general class and rely on it — don’t also list members of the general class.

Other “Internal” Rules of Interpretation
In addition to or instead of seeking to exclude judicial rules of interpretation, drafters also include in contracts their own rules of interpretation — what we call “internal” rules of interpretation. You find them stated in separate sections or gathered together in one section, often under the heading Interpretation. Some internal rules of interpretation track judicial rules of interpretation, for example ejusdem generis and contra proferentem, whereas others seek to negate judicial rules of interpretation.

Stating That Headings Don’t Affect Meaning
An example of an internal rule of interpretation that seeks to negate a judicial rule of interpretation is the headings-for-convenience provision. Here’s an example:
The headings in this Agreement are included for convenience and will not affect the meaning or interpretation of this Agreement.

The utility of this statement, however, drafter word it, has been explained as follows, using the word captions instead of headings:

The content of the captions all too often diverges from the substance of the contract. In part, this is because captions are an extremely truncated description of complex text. However, divergences also may arise because captions are not drafted or reviewed with the same care and scrutiny as the text, or because time pressures do not afford the opportunity to conform captions to last-minute changes to the text. 17

Incorporating a headings-for-convenience provision counters what Scalia and Garner call the “title-and-headings canon,” which holds that “[t]he title and headings are permissive indicators of meaning.” 18

A 2016 Second Circuit opinion addressed a headings-for-convenience provision. 19 The parties to a reinsurance contract disagreed over which arbitration provision governed their dispute, one in the reinsurance certification or another in an endorsement. First Mutual sought to compel its reinsurer, Infrassure, to submit to arbitration governed by the endorsement, but that arbitration provision contained the heading “LONDON ARBITRATION AND GOVERNING LAW (UK AND BERMUDA INSURERS ONLY).” Because Infrassure, a Swiss company, wasn’t a United Kingdom or Bermuda insurer, it argued that the endorsement provision didn’t apply. In response, First Mutual pointed to the following headings-for-convenience provision in the endorsement, which the court referred to as the “Titles Clause”: “The several titles of the various paragraphs of this Certificate (and endorsements . . . attached hereto) are inserted solely for convenience of reference and will not be deemed in any way to limit or affect the provisions to which they relate.” 20

First Mutual argued that the parenthetical “(UK AND BERMUDA INSURERS ONLY)” was part of the endorsement’s title, and by operation of the headings-for-convenience provision, the title did not limit the endorsement to insurers of those countries. The court disagreed, calling it a “thin argument” and saying, “The purpose of the Titles Clause is not to strip away an express indication as to the context in which a particular provision is operative, but to ensure that the text of a provision is not discounted or altered by the words of its heading.” 21

If it’s clear that because of careless drafting a heading doesn’t match what’s in the related provision, a headings-for-convenience provision would accomplish only what a court would likely do anyway. If it’s arguable that a unique component of a heading reflects the intended scope of the related provision, then a court might ignore a headings-for-convenience provision, just as the Second Circuit did. That makes headings-for-convenience provisions of questionable use to drafter.

**Stating That Examples Introduced by Including Don’t Limit the General Class**

Consider the following example of an internal rule:

As used in this Loan Agreement, the term “including” means “including, but not limited to” or “including, without limitation,” and is for example only and not a limitation.

Adding this rule, however, it’s expressed, is a more concise alternative to always using including but not limited to, including without limitation, or including without limiting the generality of the foregoing instead of just including.

On Twitter and on his blog, Bryan Garner has recommended that to ensure that including isn’t interpreted as introducing an exhaustive list, including should be defined to mean including but not limited to. In other words, the definition would preclude the phrase fruit, including oranges, lemons, and grapefruit from being interpreted so that fruit means only oranges, lemons, and grapefruit. As such, this internal rule reinforces the judicial rule of interpretation Scalia and Garner call the “presumption of nonexclusive ‘including’” — “The verb to include introduces examples, not an exhaustive list.” 24 Using the internal rule also allows you to “rigorously avoid the cumbersome phrasing each time you want to introduce examples.” 25

But elsewhere, Garner says that the phrases including but not limited to, including without limitation, and including without limiting the generality of the foregoing serve a different function: they’re “intended to defeat three canons of construction: expres-sio unius est exclusion alterius (to express one thing is to exclude the other), nosci tur a sociis (it is known by its associates), and eiusdem generis (of the same class or nature).” 26

Without considering whether, and how, each of those three judicial rules of interpretation relates to this issue, it’s clear that Garner has in mind avoiding, for example, having the phrase fruit, including oranges, lemons, and grapefruit interpreted so that fruit means only fruit similar to those listed, namely citrus fruit.

It’s easy to reconcile Garner’s conflicting rationales: the internal rule of interpretation could logically be intended to preclude attributing any limiting effect to items following including, whether that limiting effect consists of interpreting those items to be an exhaustive list or requiring the class in question to consist only of items similar to the listed items.

Regarding whether courts would respect his proposed internal rule, Garner says, “Will judges take such a definition seriously? Generally, yes. I defy anyone to produce a case in which this definition hasn’t worked, so that including defined in this way has nevertheless been held to introduce an exhaustive listing.” 27

We won’t take Garner up on his challenge, as it seems unlikely that a court would deem a list exhaustive even if it’s introduced as not being limited. More relevant are those cases in which courts endorse the notion that a group followed by a list of items introduced by including but not limited to is limited to items similar to the listed items. 28 That interpretation is less limiting.
than holding that a list is exhaustive, but it’s nevertheless limiting, and in a way that drafters might not expect. So because it ignores the real threat, Garner’s challenge is too narrow to be meaningful.

That some courts disregard but not limited to shouldn’t come as a surprise. A court handling a contract dispute will want to determine the meaning intended by the drafter. In the process, it might elect to disregard any language unrelated to that. Given that it’s routine for drafters to add without limitation or but not limited to to each instance of including (and without limitation or but is not limited to each instance of includes), a court could conclude that such phrases are essentially meaningless. It could equally conclude that an internal rule of interpretation that has the same effect is irrelevant too.

After all, drafters sometimes misuse including to mean “namely,” which would make the list of examples exhaustive.30 Or drafters might use an overbroad noun before includes or including, so that the narrow list that follows including better expresses the intended meaning (as in, conceivably, fruit, including oranges, lemons, and grapefruit). If a court believes that either of those circumstances applies to the contract language at issue in a dispute, the court might be disinclined to reach a different interpretation based on an across-the-board gloss on including that drafters apply by rote.

Another problem with relying on an internal rule of interpretation that including means including but not limited to is that it’s an awkward fix for the potential confusion that results from following a general word with a list of obvious examples. By saying fruit, including oranges, lemons, and grapefruit, you invite a court to conclude that fruit consists of only citrus fruit, and not apples or bananas. Eliminating such lists shouldn’t pose a problem — everyone knows that oranges, lemons, and grapefruit are fruit. (This recommendation is consistent with our advice for not falling afoul of ejusdem generis.)30

Instead, drafters should use includes or including only to make it clear that the general class in fact includes something that otherwise might not fall within its scope — fruit, including tomatoes. (Are tomatoes a fruit or a vegetable? Your answer might depend on whether you’re a botanist or a cook.) Doing so leaves little possibility for mischief. Because tomatoes lurks at the margins of fruit, a court couldn’t reasonably conclude that fruit in fact means only tomatoes or tomato-like produce.

If a client’s needs in a transaction leave you no choice but to include a list of obvious members of a class, put the general class after the list and modify the general class to block any implication that the items in the list limit the general class — oranges, lemons, grapefruit, and other fruit, whether or not citrus. As a way to make it clear that the examples cited aren’t the whole story, that’s more effective than using including but not limited to and its variants.

STATING HOW A COURT IS TO CONDUCT ITSELF

Drafters also seek to preempt judicial discretion by specifying in a contract what a court may do, is not authorized to do, or must do.

Various verb structures are used to ostensibly grant a court discretion. Here’s an incomplete list, with interpret used as a placeholder for different verbs, interpret and construe being the most common:

- the court may interpret
- the court will/shall have the right to interpret
- the court will/shall be entitled to interpret
- the court will/shall be allowed to interpret
- the court will/shall have the power to interpret

That drafters have so many different ways of saying the same thing is due to the chaotic state of verb structures in traditional contract drafting.31

Here’s an example that uses one of these structures:

The courts shall be entitled to modify the duration and scope of any restriction contained herein to the extent such restriction would otherwise be unenforceable, and such restriction as modified shall be enforceable.

To show that the above list is incomplete, here’s an example that uses a different verb structure to say that a court has the authority to rule on the law and facts of a lawsuit:

Each party hereby agrees that any such court shall have in personam jurisdiction over it and consents to service of process in any manner authorized by Nevada law.

Similarly, various verb structures aim to prohibit a court from doing something:

- the court shall/may not construe
- no court shall/may construe
- X shall/may not be construed as
- neither X nor Y is to be construed as
- X is not to be construed as
- nothing in this agreement is to be construed as

And there are other ways to say that a court is prohibited from doing something. Here are two examples, with the latter having the same effect as an internal rule of interpretation meant to neutralize ejusdem generis:32

- No prior drafts of this Agreement or any negotiations regarding the terms contained in those drafts shall be admissible in any court to vary or interpret the terms of this Agreement.

- The principle of ejusdem generis shall not be used to limit the scope of the category of things illustrated by the items mentioned in a clause introduced by the word “including.”

A range of verb structures aim to say that a court must do something:

- the court shall construe
- the court will be required to construe
- X is to be construed
- X shall be construed

That list, too, is incomplete. Here’s an example of a different structure used to say that a court must act a certain way:

The Service Provider agrees that in the event of such violation Kelso will, in addition to any other rights and remedies, be entitled to equi-
Upon encountering this sort of provision, a judge is likely to think, “Says who!” Contract parties have no basis for telling a court how to act, and a court might well ignore or explicitly reject anything that suggests as much. A 2016 case before the Delaware Court of Chancery provides an example of a court doing just that. A party to a contract sought a preliminary injunction, basing its claim in part on the following provision:

The parties hereto agree that any party by whom this Agreement is enforceable shall be entitled to specific performance in addition to any other appropriate relief or remedy. Such party may . . . apply to a court of competent jurisdiction for . . . injunctive or such other relief as such court may deem just and proper in order to enforce this Agreement or prevent any violation hereof and, to the extent permitted by applicable law, each party waives any objection to the imposition of such relief.

This in effect requires that a court grant specific performance. The Delaware Court of Chancery denied the motion for summary judgment, offering the following explanation:

Parties, however, cannot in advance agree to assure themselves (and thereby impair the Court’s exercise of its well-established discretionary role in the context of assessing the reasonableness of interim injunctive relief) the benefit of expedited judicial review through the use of a simple contractual stipulation that a breach of that contract would constitute irreparable harm.

Drafters can aim for the same result without appearing to boss the court around. For example, instead of saying in a severability provision that a court must interpret the contract in a certain way if it holds that part of the contract is unenforceable, you could introduce the severability provision as follows:

The parties acknowledge that in a dispute between the parties arising out of this agreement or the subject matter of this agreement, they would want the court to interpret this agreement as follows:

This approach has the benefit of putting the focus on the parties, not on the court.

**STATING THAT A GIVEN STANDARD APPLIES**

A contract might state that a particular legal standard applies. We consider three examples.

**Stating That a Consultant Is an Independent Contractor**

Consulting agreements typically state that the consultant is an independent contractor. But saying that doesn’t make it so. If a consultant’s status as an independent contractor were challenged by, for example, a government agency that thinks it’s owed payroll taxes, a court might well ignore what the contract says and determine whether the consultant was an independent contractor based on the nature of the relationship after the contract was signed.

A contract would reflect more accurately the relationship between a company and a consultant if it were to say that the parties intend that the consultant will be an independent contractor. And such a statement would serve a purpose — in a close case, a court might find relevant what the parties had intended at the outset of the relationship, particularly in a dispute between the sophisticated parties.

One could argue that if a company isn’t penalized for inaccurately characterizing in a contract its relationship with a contractor, then the company might as well retain the inaccurate statement, particularly if it leaves the consultant thinking that the consultant is unquestionably an independent contractor. But as a general matter, it’s best for contracts to reflect reality, so the parties understand what they’re getting into. In particular, companies so routinely mischaracterize employees that there’s a benefit to using contract language to signal to all concerned that simply declaring that a consultant is an independent contractor doesn’t make it so.

This approach could conceivably be applied in other contexts. For example, a court might decide that the choice of governing law in a contract is unenforceable. Drafters could acknowledge as much by having governing-law provisions state that the parties intend that the agreement is governed by the law in question. But it would seem pedantic to insist on that — it’s not often that courts decline to enforce the governing-law provision in a contract. But if the alternative outcomes are more subtle than whether a provision is enforceable or unenforceable, or if the risk of an alternative outcome is significant, it makes more sense to acknowledge the role of courts.

**Stating That a Power of Attorney Is Coupled with an Interest**

A power of attorney — which is a kind of contract — might use the phrase coupled with an interest to describe the nature of the power. It’s likely that many drafters who use this phrase don’t know what it means, having copied it unthinkingly from a form or precedent.
The phrase *coupled with an interest* means that the power of attorney is not revocable by act or death of the principal before the interest expires. But for a power to be irrevocable because it’s coupled with an interest, the interest must be in the subject matter of the power and not in proceeds arising from exercise of the power. In many powers of attorney, the drafter might well have given no thought as to whether the agent had an interest in the subject matter. In other words, use of the phrase might be inconsistent with the facts.

Recognizing this, courts don’t take the phrase *coupled with an interest* at face value. Instead, they determine whether a power is irrevocable by looking at the parties’ entire agreement and the circumstances of their relationship.

The best way to ensure that the phrase is used in a way that makes sense would be to explain in the contract what the phrase means and what the parties hope to achieve. Here’s how we would accomplish that:

[The principal] acknowledges that this power of attorney is coupled with an interest, because [the agent] has an interest in [refer to the subject of the power]. It follows that in addition to any other consequences under law, this power is irrevocable and will survive [the principal’s] death or incompetence.

This formulation violates a basic rule of contract drafting, in that it says the same thing twice—first using a term of art, then more simply. But it’s the least bad alternative. Because the term of art *coupled with an interest* is so entrenched, many would likely find disconcerting use of just the simpler version.

**Stating That Text Is Conspicuous**

Some statutes say that certain statements must be “conspicuous.” Foreexample, section 2-316(2) of the Uniform Commercial Code (UCC) states that a disclaimer of the implied warranty of merchantability must be “conspicuous.” Section 1-201(10) of the UCC says that “conspicuous” means “so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it,” and it includes examples of the attributes of conspicuous terms. Because this is a vague standard, fights over what constitutes conspicuous text have given rise to caselaw on the subject.

The lack of specific guidelines has resulted in drafters trying to establish by contract that certain text is in fact conspicuous:

**OPCO AND FINANCECO ACKNOWLEDGE THAT THIS STATEMENT CONSTITUTES CONSPICUOUS NOTICE.**

Such statements might appear unobjectionable — if a party subject to a contract provision acknowledges that it’s conspicuous, that might reassure a court that the party had in fact noticed that provision. But invariably such acknowledgments are found in the provision at issue. If that provision is in fact inconspicuous, the acknowledgement would be inconspicuous too. So as a matter of logic, the acknowledgement would be of value only if the provision is conspicuous. That defeats the purpose of the acknowledgment.

**CONCLUSION**

This brief exploration of how contracts seek to preempt judicial discretion suggests the following general observations:

- A court might be less likely to accept a statement that a judicial rule of interpretation doesn’t apply if that statement could be seen as interfering with the natural reading of a contract.
- Like judicial rules of interpretation, internal rules of interpretation are arbitrary, so a court is likely to ignore an internal rule of interpretation if the context suggests a meaning different from one arrived by applying the internal rule.
- Telling a court how to act doesn’t make sense, because contract parties have no power to determine how a court handles a particular issue. Instead, drafters should have the parties acknowledge that a particular outcome is appropriate or that they would want the court to interpret the contract in a specified way.
- If a contract provision stating that a given legal standard applies doesn’t match the facts, a court might well hold that the provision is unenforceable.

But relying on these general observations is less helpful than being alert to the ways that drafters seek to preempt court discretion and considering in a particular context the best way to achieve the desired goal. ♦

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1. See Negotiating and Drafting Contract Boilerplate § 6.02 (Tina L. Stark ed. 2003) [herein after Stark].
2. See B.H. Glenn, Annotation, Validity of Contractual Time Period, Shorter than Statute of Limitations, for Bringing Action, 6 A.L.R. 3d 1197 (originally published in 1966) (noting “the general rule that in the absence of a controlling statute a contract provision limiting the time for bringing an action thereon is valid if the stipulated period of time is reasonable”).
3. See BLACK’s LAW DICTIONARY (10th ed. 2014) (defining canon of construction as “A rule used in construing legal instruments, esp. contracts and statutes; a rule that guides the interpreter of a text”).
4. Id.
in American International Group, Inc. v. Bank of America Corp., 16 Scribes J. Legal Writing 45 (2015) (discussing the judicial rule of interpretation — a variant of the rule of the last antecedent — that whether a closing modifier is preceded by a comma determines what that modifier applies to).

7. See Scalia & Garner, supra note 5, at xi–xvi.

10. See Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC, No. CIV.A. 4586-CS, 2013 WL 1955012, at *26 (Del. Ch. May 13, 2013) (“The doctrine of the construction of a contract against the drafter would typically preclude the interpretation that CalPERS now adopts. . . . But, CalPERS’ form drafters were canny, and the LLC Agreement contains a provision waiving ‘any rule of law . . . that would require interpretation of any ambiguities in this Agreement against the party that has drafted it.’”)

11. See, e.g., Zimmerman v. Crothall, 62 A.3d 676, 698 (Del. Ch. 2013) (stating that contra proferentem “is less likely to be appropriate where knowledgeable and experienced parties to a contract engaged in a series of negotiations”).

12. Scalia & Garner, supra note 5, at 199.

13. Id.

15. See id. at 50.
16. See id. at 55.
17. Stark, supra note 1, at 599.
18. Scalia & Garner, supra note 5, at 221.
20. Id. at 176.
21. Id.


25. Id.

30. See supra text accompanying note 16.
32. See supra text accompany note 14.

34. Id.
35. Stark, supra note 1, at 114–16.
37. See id. ¶ 1.62.

38. See, e.g., American General Finance, Inc. v. Bassett (In re Bassett), 285 F.3d 882, 887 (9th Cir. 2002) (using the Uniform Commercial Code’s definition of “conspicuous” to construe a Bankruptcy Code requirement that a contract contain a “clear and conspicuous” statement).
This is the third in a series of imagined conversations about federal courts among friends who once were law school classmates and now are well along in their legal careers.

[ the cast ]

Federal courts law professor LANG FELL
Federal circuit judge COAR DAPPEL
Federal district judge NIELSEN PRIUS
Federal bankruptcy judge CHIP TERLEVEN
Federal magistrate judge MADGE STRAIT
Federal trial lawyer TALAGUD STOREY
Federal practitioner LINDA GATE
Transactional lawyer WARD SMITH
Smith’s law firm’s new associate BELLA BILOWR
General counsel MANNY G. RISK

[ the scene ]

This third conversation occurs at lunchtime in the chambers of United States Circuit Judge Coar Dappel. All but Dappel are seated around a conference table. Judge Dappel, having just heard oral argument, enters chambers from the corridor, doffs her black robe, and hangs it in a closet.
COAR DAPPEL: Welcome. Our first two conversations didn’t solve anything, but I certainly learned a lot about the dynamics of federal trials, dispute resolution, and judges going public. I hope today’s conversation about opinion writing will be equally engaging. Just like our first two conversations, we’ll discuss the federal trial courts and circuit courts, not the Supreme Court. As the only appellate judge among us, I know I will be challenged!

LANG FELL: Alright then, Coar, here’s the most basic question of all. Why do circuit judges write opinions? It wasn’t the custom in England when our federal circuit judges write opinions? It wasn’t the most basic question of all. Why do circuit judges write opinions? It wasn’t the custom in England when our federal judicial system got underway.

DAPPEL: Written opinions aren’t required by the Constitution, statute, or rules, but they have become a well-entrenched tradition. A single opinion for a panel of circuit judges helps build the stature of the court as an institution. To be sure that everyone on the panel agrees with what’s said, that opinion pretty much has to be in writing. Three other reasons conventionally are given: to impose an intellectual discipline on the judges in reaching their decisions; to tell the parties and their lawyers in that particular dispute the outcome and the reasoning (although that could be done orally in the courtroom); and to announce the law to other judges, the bar, law professors, and the interested citizenry.

WARD SMITH: Well, if the written decision-making process is so important, that suggests judges should have the primary role in drafting. Bella, you clerked for a circuit judge before you joined our law firm. Did your circuit judge write all her own opinions?

BELLA BILOWR: I don’t want to reveal confidential workings of chambers practices, so I’ll speak in generalities based on the writings of circuit judges like Beverly Martin, Richard Posner, Patricia Wald, and the late Frank Coffin. In many chambers, once the tentative decision has been reached at the judges’ conference after oral argument, law clerks do the initial drafting and the judges exercise more of an editorial function.

MANNY G. RISK: Look, if it’s the writing that disciplines the decision-maker, then judges should be writing their own decisions. We all know that editing doesn’t impose the same discipline on analysis as writing does. That leads me to a more general complaint about all opinions, trial and appellate. They often demonstrate a limited appreciation of how the real world works, and little understanding of the practical effects of the rules or precepts they lay down. They appear to be written by people without practical experience. And they belabor the obvious. I think judges rely too heavily on law clerks for opinion drafting.

*AUTHOR’S NOTE: Since federal judges sometimes don’t read law reviews or academic literature, I have chosen this casual, footnote-free, format — the third in a series — to canvass a variety of views on a topic that pertains to us all. I hope busy judges can browse through the piece without excessive effort and be provoked to think more consciously about their opinion-writing habits. The words are mine, but the ideas are not. They come from a broad literature on appellate opinions (there is much less on trial court opinions) and conversations with colleagues and lawyers over the years. On bankruptcy opinions, I have benefited from the particular insights of United States Bankruptcy Judges James Haines (ret.) and Jeffery Hopkins.

DAPPEL: Manny, you’re not alone in your criticism. Judge Posner has lodged the same complaint. He distinguishes the “writer” model of appellate judging, which he endorses, from the “manager” model. Some believe it was the great case explosion during the 1980s that led to appellate judges becoming managers and editors. Circuit judges didn’t even have law clerks until 1930. Now, circuit judges can hire five staff people, and a number of us fill most or all of the positions with law clerks. Let’s face it: Case volumes have become so high and federal case complexity so intense that unless we are polymaths like Judge Posner, we have to rely on law clerks for much of the writing.

FELL: And Manny, the assertion that writing disciplines how outcomes are reached is hardly free from controversy. Llewellyn was skeptical over 50 years ago. Cognitive research and empirical data cast serious doubt on whether the reasons a person gives for a decision are what really generated the outcome or that we can even know. What judges or academics call reasoning that explains a decision, psychologists call “motivated reasoning.” Instead, in my view, it is the need to explain the law and justify the outcome that demands written opinions. Professor Schauer has said that the written opinion has the “task of guiding — the setting forth of standards to help those who are expected to follow the law.” The late Justice Antonin Scalia told his co-author Bryan Garner, “[I]f you haven’t made clear what your holding is, instead of reducing litigation, instead of making life simpler for courts and lawyers below you, you’ve complicated it.”

SMITH: I agree wholeheartedly with those statements. As a transactional lawyer, I often don’t care how appellate judges determine which side should win. I understand the Legal Realists’ angst and cognitive studies’ interest in this topic, and appellate lawyers who want to win their case may care, but it’s frequently not relevant to me. What matters to me is the justification for the decision. Most disputes don’t go to court; we lawyers use the opinion’s explanations and justifications to deduce the rules that govern us and avoid court. Clarity of the rules is where circuit judges should focus their energies, and I agree with Manny that, although it may be unrealistic, we’d all be better off if judges did more of that writing rather than law clerks.
Books and manuals have been written on that topic, Lang. First, the contents depend upon the type of decision. Generally there are three types: summary orders; memorandum opinions; and full-dress opinions. In the days of print, only full-dress opinions were published in the West Reports, and there was academic and judicial debate about what opinions should be published. Circuits typically had local rules severely limiting the weight of an “unpublished” opinion or even prohibiting its citation. For a time, judges — famously the late Judge Richard Arnold and Judge Alex Kozinski — debated the legitimacy of limiting the precedential impact of a case. Now all decisions are available digitally, and the Appellate Rules allow all decisions to be cited. The nomenclature of “published” and “unpublished” remains, but the controversy seems to have diminished.

But back to the three types of opinions. Little need be said about summary orders. They summarily grant or deny procedural motions or dismiss an appeal for failure to do something. Memorandum opinions should explain succinctly to the parties and their lawyers, already knowledgeable about the case, why the court reached the decision it did. For full-dress opinions, the manuals recommend a brief introduction describing the holding; a statement of facts and procedural history; and then analysis of the legal issues. The FJC’s Judicial Writing Manual says that “the writing should reflect only the final decision and the reasons for it. If the decision is a close one, the opinion should say so, but it should not record every step and misstep the writer took along the way.” Circuit judges differ on this point, however. I recall one judge who described the difficulty of the decision so graphically that you could not tell until the last line how she would come out. That type of opinion has limited utility as a guide to trial lawyers or transactional lawyers for future cases. And as Lang mentioned, the cognitive studies people would be skeptical that it even charts accurately how that judge reached her decision. There’s a literature that discusses and distinguishes the “search and discovery” portion of the process — where a judge looks for input and decides what the outcome should be — from the “rationalization” portion of the process where she justifies the decision. And even that distinction’s controversial, subject to ongoing learning in cognitive studies.

Written opinions aren’t required by the Constitution, statute, or rules, but they have become a well-entrenched tradition. A single opinion for a panel of circuit judges helps build the stature of the court as an institution. To be sure that everyone on the panel agrees with what’s said, that opinion pretty much has to be in writing.”

LINDA GATE: And save us from the multipart tests. Those tests cost time and money because in future cases the lawyers and trial judges must address each factor, yet they seldom contribute to a predictable outcome.

STOREY: Why are so many circuit opinions long and verbose?

DAPPEL: Lawyers have been complaining about opinion length for well over 100 years, Talagud. The truth is, we federal judges deal with very complex statutes and regulations. Sometimes length is unavoidable.

FELL: Sometimes, Coar. But as a regular reader of circuit opinions, I think length also comes from unnecessary boilerplate about standards of review, standards for summary judgment, treatment of a jury verdict — things you repeat in every case. Plus circuit judges could greatly abbreviate some of their analysis; it looks like the efforts of a young law clerk for whom every issue, no matter how straightforward, is a “federal case.” If you were writing the opinions yourselves, I’ll bet you wouldn’t even address some of those issues. You need to do more ruthless editing of what your law clerks draft. Judge Posner said recently: “The cost of lawyer time caused by the excessive length and unnecessary complexity of judicial opinions is a social waste.”

DAPPEL: By the way, Chip, it occurs to me that as a bankruptcy judge you sit on a bankruptcy appellate panel from time to time. Please speak up when you disagree with my appellate perspective.

CHIP TERLEVEN: Well, the bankruptcy appellate panels are somewhat different. As Bankruptcy Judge Jeffery Hopkins has reminded me, BAP judges are in a sense volunteers — they have full caseloads as trial judges and do their appellate work in addition. And the vast majority of the BAP cases arise under Chapters 7, 13, and occasionally Chapter 12, involving consumers, family farms,
and fishermen. As he says, “[e]conomy of words and speedy resolutions of those appeals are the hallmark.” But sometimes BAP judges do confront issues of first impression or of significant precedential value, and then they write for the circuit, the Supreme Court, or scholars in a fashion similar to the circuit courts.

**GATE:** Do you judges worry about style as you write?

**DAPPEL:** Many do. Some urge appellate judges to write opinions of greater literary quality, treating Oliver Wendell Holmes, Learned Hand, and Robert Jackson as examples. Some judges now cultivate a very colloquial style. Others like arcane language. On the other hand, Professors Paul Carrington, Daniel Meador, and Maurice Rosenberg have pointed out that some judges “polish and refine the literary style at considerable cost in time and with insignificant gain for the judicial function.”

**GATE:** Don’t forget the judges who use opinions for their own brand of humor, or to apply an extended metaphor or pun, or to chastise lawyers and parties. I think those types of appellate opinions are self-indulgent, not good tools for trial judges, trial lawyers, or technical writers, like those who write instructions on how to assemble a piece of equipment.

**DAPPEL:** Perhaps. But writing opinions day after day can become tedious, Linda. We’re human and sometimes need a little levity. In some instances our frustration with lawyer behavior boils over. But I agree we should try to avoid that style.

**FELL:** Some modern handbooks and advocates of opinion writing urge judges to increase audience interest by following popular marketing or media techniques such as “teaser openers,” “trailer openers,” or “zingers.” Zingers make me think of presidential tweets! But a couple of decades ago Professor Frederick Schauer pointed out that we’re not surprised when statutes or regulations are uninteresting, complex, or inaccessible to nonspecialists, and we shouldn’t hold judicial opinions to literary standards. He said that “ordinary people simply do not read judicial opinions.” And that’s okay. Maybe the actual text of some Supreme Court opinions will reach a lay audience — Chief Justice Warren hoped that Brown v. Board of Education would — but seldom will that happen for a circuit opinion. Instead, the audience is the parties, judges, lawyers, and law professors.

**RISK:** Lang, you’re overlooking judges who want their opinions to be noticed. Both Judges Benjamin Cardozo and Posner have recognized that the majority of cases on appeal have only one possible outcome. They aren’t particularly interested in those, but instead in what Posner calls “the most important and most interesting” cases, those that Cardozo said “will count for the future,” where “the creative element in the judicial process finds its opportunity and power.” For judges with that agenda, using lessons learned from literature can make their opinions more readable and attract the attention those judges want in those cases. And speaking of what “counts,” some academics measure judges’ quality by how often their opinions are cited. Judge Posner does very well on that metric.

**STOREY:** I think treating the opinion as a literary product is a conceit that drives appellate judges astray. I don’t go home in the evening saying, “I’ll read a few judicial opinions tonight instead of a good book, and I hope their opening lines or zingers will draw me in.” As far as I’m concerned, judicial opinions are merely tools for understanding what the legal rules are and predicting how they’ll be applied in another situation. Appellate judges would be better seeing themselves as technical writers, like those who write instructions on how to assemble a piece of equipment. They should write simple explanations that are accurate and convey the information effectively to the intended audience. Forget the teasers, trailers, and zingers.

**DAPPEL:** I was silent earlier when Ward said clarity of the rules for future cases should be our only focus, but I have to disagree with that assertion. In fact, it’s critical for appellate opinions to focus first on persuasion. I have to persuade the other two members of the three-judge panel that my opinion draft has reached the proper conclusion; I need to persuade the entire circuit court if the case goes en banc; I need to persuade the Supreme Court if it agrees to hear an appeal. When the issue is the constitutionality of a municipal ordinance that regulates demonstrations next to an abortion clinic, or the legality of a school policy concerning access to bathrooms for transgender students, the opinion must try to persuade the law professors and media who comment. A technical writer’s approach just won’t do the job of persuasion. If lessons from literature or opinion-writing gurus will help me be more persuasive in such cases, I’m all for them.

**FELL:** Maybe there should be different approaches for different types of opinions. For civil rights opinions, a judge should be aware that her language may be quoted in the media. But for business or patent-type decisions, clear rules may be the most important focus.

**DAPPEL:** Good point. I’ll alert my law clerks.

**RISK AND SMITH:** [groaning in unison] Not your law clerks, Coar, you!

**RISK:** I endorse attorney Jonathan Mermin’s arguments in favor of streamlining opinions. He disagrees with Judge Posner’s request to get rid of headings and subheadings, pointing out that lawyers generally don’t read judicial opinions in their entirety, but instead look for relevant segments with the help of headings and subheadings. Mermin says, “A judicial opinion without headings is like a newspaper without headlines: You can still find what you’re looking for, but you spend more time searching for it.”

**GATE:** Mermin also argued that the “context-free recitation of facts” at the outset of an opinion is less than helpful,
and that most lawyers jump over that section and proceed straight to the analysis section where generally the material facts are repeated anyway. I confess that’s what I do. Moreover, as Judge Kozinski said, “including inconsequential facts can provide a spurious basis for distinguishing the case in the future.”

**NIELSEN PRIUS:** Linda, that may be a good point for appellate opinions, but in the trial court we **have** to find the facts first, from “the raw source material” as Professor Jeffrey Van Detta has said, before we can go on to assess and apply the law. It’s important that we give a full presentation of the facts, because the circuit court may disagree with what we think’s important or unimportant.

**STOREY:** I agree with Mermin’s other criticism that repeating the parties’ arguments in an opinion — a style that goes back at least a couple hundred years to when written briefs were the exception, regular reporting of opinions was in its infancy, and the advocates’ view of the law was almost as important as the judges’ — is a waste. Now that I can find the briefs and sometimes oral arguments online, I don’t need the lawyers’ arguments repeated in the court’s opinion. What I want is the court’s reasoning that justifies its decision and articulates how it will affect future cases.

**RISK:** Nielsen, I notice that district judges have been writing far more opinions in recent years than when you first took the bench. Why is that?

**PRIUS:** Probably several reasons, Manny. I’m aware of only one explicit requirement for writing — a departure provision of the Sentencing Guidelines — although on occasion a local rule will add a writing requirement, as the Northern District of California has done for habeas corpus cases. Actually, the Rules of Civil and Criminal Procedure go out of their way to permit oral rulings from the bench. A 1983 amendment to Rule 52 on bench trials explicitly permits findings of fact and conclusions of law to be “stated on the record after the close of the evidence,” and the Advisory Committee Note said that it “should reduce the number of published district court opinions that embrace written findings.” Would that it were so! But the academics, rules drafters, and circuit courts demand explicit reasoning from us trial judges in complicated matters such as class certification, patent construction, and summary judgment issues like qualified immunity and employment discrimination, which many of us finding safer to do in writing. This trend has changed the dynamic of being a trial judge. We used to spend most of our time in trials and sentencings, our writings were short and less frequent, and our rulings were delivered primarily to the parties and their lawyers, usually orally in open court, structured in the same way the lawyers structured their arguments.

**FELL:** Interesting, Nielsen. Along those lines, linguistic anthropologist Susan Philips studied the actual speech of state trial judges in taking guilty pleas, looking at variations in their spoken courtroom language, and discovered what she thinks were ideological differences. She thought it was more important to focus on what trial judges actually **said** in open court than what she called the “written residues of actual behavior.” And Circuit Judge Beverly Martin, formerly a district judge, has written about the impact of the federal trial judge speaking “in the courtroom as a representative of the courts and our government.”

**GATE:** Judge Wald has applauded the practice of some trial judges saying “I” rather than “the court” when giving their opinions. She thinks it humanizes the process. I do find there’s something archaic and mystifying to the parties in the courtroom when the individual trial judge says “the court has decided,” almost as if someone other than the speaking judge decided.

**PRIUS:** I disagree. I want to emphasize the institution, not the person under the robes, and so I say “the court.” But I do agree that for trial judges, what we say in open court is crucial. It’s still the case that most of the decisions we trial judges make in the course of a day in court are oral and not in writing unless someone orders a transcript — for example, accepting a guilty plea; sentencing; ruling on juror challenges at voir dire; admitting or excluding evidence; appointing a lawyer. But as the number of trials has declined and the number of complex motions has grown, there’s both more demand for and more time for trial judges to write opinions that would’ve been bench rulings 20 years ago. We’ve also been criticized for not writing enough opinions — notably by former District Judge Nancy Gertner.
— for not writing enough sentencing opinions to develop the law of sentencing, and for not writing enough opinions when we deny summary judgment. She says that skews the development of the law in areas like employment discrimination because we give all the reasons why summary judgment should be granted, but do not elaborate on the reasons why summary judgment should be denied.

STRAIT: I don’t buy the argument that there aren’t enough written decisions explaining the denial of summary judgment. As a magistrate judge, I write a lot of opinions explaining why summary judgment should be denied in employment discrimination cases because my opinions are recommended decisions and I need to explain the reasons to the reviewing Article III judge. In fact, we magistrate judges may be one of the reasons for the growth of written opinions at the trial court level. The increase in the number of magistrate judges has far outpaced that of district judges, and district judges delegate a lot of work to us. Whenever a district judge refers a dispositive motion to us, we have to write. After conducting a suppression hearing in a criminal case, we write; after hearing a motion to certify a class, we write; after hearing a motion to dismiss an indictment or to dismiss a civil case for lack of personal or subject matter jurisdiction, we write. If the district judge had the time to hear the motion to suppress, he or she could rule from the bench, and on a summary judgment motion the district judge could deny it virtually without opinion. We’re also writing more opinions in general because the complexity of e-discovery and the new rules require explanation that the lawyers can understand and apply, and discovery disputes seldom reach an appellate court for a ruling. And a statute requires us to issue a written explanatory order whenever we release or detain a defendant pretrial.

DAPPEL: Nevertheless, I think the argument for written opinions is stronger in the case of circuit judges than trial judges because, in the federal system, the circuit courts have the final say on the law except for those few cases — now fewer than 100 per year — that the Supreme Court takes. There’s a need to ensure uniformity of the law, assess the larger consequences of the decision as precedent, and demonstrate legitimacy. As I said earlier, written opinions lend legitimacy to circuit courts; circuit judges are virtually invisible except for their writings. But the legitimacy factor doesn’t apply to all courts — for example, small claims courts certainly don’t need written opinions to support their legitimacy, and perhaps even federal trial courts don’t either. Trial courts derive their legitimacy from trials, sentencings, and other events in open court.

But Nielsen, Madge, and Chip, I find that when you trial judges do provide a written decision, it gives me important information as to why you reached that decision and helps us circuit judges decide whether your decision should be affirmed.

FELL: Coar, you might want to think twice before you reflexively urge trial judges to provide more written explanations. There’s some suggestion in cognitive research that written explanations can distort decisions that should be discretionary or should depend on evaluating a number of factors, the kinds of things that trial judges often do. According to Professor Chad Oldfather, the process of writing can over-emphasize those factors that are easier to verbalize — what psychologists call “verbal overshadowing” — at the expense of inarticulate, context-based judgments.

PRIUS: I experience that tension when I go through the list of section 3553(a) statutory sentencing factors in trying to explain, even orally, the sentence I impose, or in going through the list of factors the Civil Rules Committee and the circuit say I should consider in deciding whether to approve a class action settlement. I say or write the words, but frankly they don’t produce the result I reach. It’s much more an intuitive judgment.

FELL: Professor Oldfather suggests that in such contexts, appellate judges like Coar are actually looking to review the process of decision-making more than the substance.

DAPPEL: Well, it does give us comfort that the trial judge’s decision was not capricious. I hadn’t considered that it might be false comfort or might over-emphasize some factors. It also gives us something to review; we appellate judges are not accustomed to deciding issues in the first instance.

FELL: Talagud, how do you as a trial lawyer feel about the growing volume of trial court opinions?

STOREY: I’m torn, Lang. On the one hand, I’m overwhelmed by the torrent of words pouring out of our courts on every imaginable issue, opinions usually verbose and redundant of what’s already been said. Even Sir Francis Bacon and Lord Edward Coke warned against reporting too many decisions. On the other hand, I and my associates love to find a decision on point for whatever proposition we’re advancing, and if there’s no appellate decision, we’re happy to cite a trial court decision. Plus, if I’m the lawyer in the case, I like to be able to show my client a written opinion; it helps justify my fees.

FELL: What about you, Ward, as a transactional lawyer?
**SMITH:** I share Talagud’s diffidence for slightly different reasons. I like circuit court and state supreme court opinions — if they’re not too long — because they’re generally authoritative. It may be risky to advise my clients to base their conduct on trial court opinions, on the other hand, because they can be so easily overturned. Traditionally the trial court was concerned primarily with fact-finding, not developing the law and creating precedent. I guess I don’t see the reason for all the written opinions at the federal trial court level. I don’t see Nielsen’s state trial judge colleagues writing as many opinions as federal district judges do.

**FELL:** Nielsen, what about that?

**PRIUS:** As far back as 1964, the Judicial Conference recognized that the number of published opinions at both district and circuit levels was “rapidly growing,” and adopted a policy that both district and circuit judges should publish “only those opinions which are of general precedent value and that opinions authorized to be published be succinct.” Part of the concern then was physical library resources, no longer an issue in this digital age. But later, a 1977 FJC district court case management study developed data showing that in highly productive or speedy district courts, “[r]elatively few written opinions are prepared for publication.” Recent data also show that busier courts generate fewer written opinions than low case-volume districts.

So when I went to “baby judge school,” we were encouraged to avoid writing too many opinions and to rule from the bench while the case or issue was fresh in our minds, because a trial or a multitude of sentencings would prevent us from getting back to a dispute where we’d promised a written opinion. The parties wanted a prompt decision so they could move on. The late Judge Henry Friendly said in 1972: “The district courts know what their business is — disposing of cases by trial or settlement with fairness and with the optimum blend of prompt decision and rightness of result.” He added: “I do not believe the greatest district judges to be those who stew for months and then write a long opinion on a novel point of law concerning which they are almost certain not to have the last word.” I learned it was for circuit judges to make the law, and for us district judges to apply it. I think that now more attention is given to teaching trial judges how to write. Computers have made it easier than when judges dictated or wrote longhand. There are some occasions where complexity compels us to write, but I think we’re writing too often. And the less a judge rules from the bench, the more insecure she becomes in doing so. However, some, like District Judge Mark Bennett, believe that a written opinion shows the losing party that the judge considered seriously every argument the party made and therefore provides legitimacy. Chief Justice John Marshall said in 1835: “Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged.” But, he quickly added: “Even this is not always attainable.”

**BILOWR:** Perhaps some of the apparent increase in trial court opinions is an artifact of the digital revolution. I can now find on Bloomberg, Westlaw, Lexis, Pacer, the district courts’ websites, or the Government Publications Office’s FDsys virtually every writing a district, magistrate, or bankruptcy judge has issued in a case, regardless of whether she thought it was an important ruling to publish. Maybe trial judge writings have simply become more widely available.

**PRIUS:** That’s an excellent point, Bella. Back in the day, we district judges told West Publishing Company what we thought qualified for publication in Federal Supplement or Federal Rules Decisions. I was very stingy in what I submitted because I didn’t want to cut down trees to say something already said elsewhere. Now, everything I write is out there, and the whole notion of what is a “published” opinion in the trial court has changed. That’s another reason why we trial judges should go back to more bench rulings when there is no novel legal question, and save the lawyers and our peers from all the published verbiage.

**STRAIT:** But often there’s no clear law on an issue, and even a trial court opinion can be useful then, Nielsen.

**DAPPEL:** Do you trial judges use law clerks in writing your opinions the same way we circuit judges do?

**PRIUS:** There are a lot of similarities. We can hire three staff people, and some judges no longer engage a judicial assistant, making all three law-trained. My own personal goal is to do a rough first draft for every opinion because I can then structure the opinion, focusing on only the important issues. Many of my colleagues let their law clerks write the first draft. With the decline of trials, law clerks have more time available outside the courtroom, and it’s tempting to keep them busy by having them write first drafts on difficult motions. Sometimes my docket is such that I have to let a law clerk do it. I confess that when I’m then in the role of editor, I don’t do as good a job.

**TERLEVEN:** We bankruptcy judges can hire two staff people. I’m like Nielsen: I try to do my own first drafts and often even final drafts that I issue orally from the bench. My law clerks are well educated but they don’t have the business acumen a bankruptcy opinion often needs, and they generally lack litigation or transactional experience. Bankruptcy is highly specialized, and a basic bankruptcy course at law school cannot really address the more nuanced aspects.

**STRAIT:** As a magistrate judge, I have two staff people; some of my colleagues use both positions for law clerks. Plus some magistrate judges with a steady diet of pro se prisoner cases have access to a staff law clerk. My law clerks do first drafts of
As everything we write gets published digitally, we’ve begun to write for a wider audience, realizing we may have influence on how the law develops if our opinions are picked up by legal bloggers, the media, or our trial court colleagues.

more on that challenge now. Cognitive studies have reduced our confidence in the ability of judges and jurors to even evaluate witnesses’ testimony. The evidence for implicit or unconscious biases in humans seems irrefutable. Biases are not just racial, ethnic, or gender, but also consist of confirmation bias, hindsight bias, omission bias, coherence-based reasoning, anchoring, framing, prior beliefs — the list goes on. Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich have done important research and writing on these issues. We trial judges have to learn about these hazards and try to overcome them to the extent possible.

PRIUS: That’s true, and judicial education and academic literature are focusing even use numbered findings to that end. We should leave law development to the circuit courts. But recalling one of Bella’s earlier observations, I fear the digital revolution has changed the audience as some trial judges now perceive it, and that has changed the nature of our opinions.

GATE: How so?

PRIUS: The perceived audience for trial judges used to be just the parties and the lawyers in the case, and we seldom spoke to or wrote for a larger audience. We simply told the lawyers in open court how we ruled on the issues they’d raised. But as everything we write gets published digitally, we’ve begun to write for a wider audience, realizing we may have influence on how the law develops if our opinions are picked up by legal bloggers, the media, or our trial court colleagues. I suppose in that context we face the same concerns a circuit judge has for the content and style of an opinion.

FELL: Chip, what about you bankruptcy judges?

TERLEVEN: Lang, I think the trial court issues on the table affect us as well, with some adjustments. First, fact-finding is critical in many bankruptcy decisions, both contested matters — for example, estimating and valuing claims, ruling on claims objections, preferences, and plan confirmation — and adversary proceedings — for example, determining nondischargeability and fraudulent transfers. Because district and circuit judges generally aren’t bankruptcy specialists, we also need to explain fully what we’re doing, and to persuade, in the event of an appeal. It can also be important to write when there’s a need to educate the local bankruptcy bar on best procedural practices or common pitfalls. But because time is money, and that’s what the bankruptcy process is all about, we try to use oral rulings from the bench to avoid the delay that writing an opinion causes. There’s also little need to write opinions, let alone lengthy ones, when the ruling is
important only to the parties, as so many of our rulings are. I think we should leave longer opinions to Bankruptcy Appellate Panels and the circuit courts. Former Bankruptcy Judge James Haines used to teach new bankruptcy judges saying: “I write as little as I can. And when I do, I write as little as I can.” A bankruptcy court decision is not the time to show how erudite we are.

**SMITH:** I want to shift our attention. It was fascinating, Coar, to watch the argument before your appellate panel a few minutes ago before we assembled here in your conference room. As a transactional lawyer, I almost never go to court. I thought the appellant’s lawyer presented the merits of his case persuasively, but the panel seemed to give him a pretty hard time on what you call the standards of review, something Lang Fell mentioned earlier. I assume that will play a role in the eventual opinion. Why are the standards of review important? Why not just focus on whether Nielsen’s trial judge colleague got it right or wrong? That’s what I wanted to know, and I expect that’s what the parties and the lawyers care about most.

**PRIUS:** Great question, Ward. As a district judge, I try to read every opinion the circuit writes, and I confess I get pretty tired of reading about the standard of review — or more likely, several different standards of review — at the beginning of every opinion. It seems like so much law clerk boilerplate.

**FELL:** Looking at courts systemically as a law professor, I always thought appellate courts had two main functions: first, to correct error; second, to clarify the law. It seems to me, Coar, that standards of review don’t contribute much to either of those objectives.

**DAPPEL:** Well for starters, certain statutes, Rules of Procedure, and Supreme Court cases actually require us to use particular standards of review, so the issue’s not solely one of our creation. Moreover, the standard of review we apply really is important. Retired Circuit Judge Deanell Tacha once said that “to the normal reader [standard of review] is legalese. To the judge, it is everything.” For one reason, it distinguishes our role as appellate judges from the role of trial judges like Nielsen. The Supreme Court occasionally reprimands us for not giving enough deference to trial courts, so we’re careful to describe what we’re doing. As Nielsen pointed out, trial judges and juries decide the facts; we appellate judges do not, and so we don’t reject their factual determinations unless they’re clearly erroneous. We actually use that term as a standard of review.

**STOREY:** Then why not just say you accept the facts as the trial court found them? Why do you need the double negative, that they were “not clearly erroneous?”

**DAPPEL:** Custom, I suppose. And sometimes the term comes from a Rule or statute. And maybe in some cases to signal that we don’t really like the trial court’s findings, but we’re bound by them.

On the other hand, we circuit judges make the final decisions about what the law is, except for the few cases the Supreme Court hears. Since that’s our responsibility and binding on all the federal trial judges and lawyers in the circuit, we give no deference to what trial judges colleague got it right or wrong? That’s what I wanted to know, and I expect that’s what the parties and the lawyers care about most.

**PRIUS:** Gee, I wish there were only three standards, Coar. They’re designed for the appellate guild, the secret handshake. As a trial judge, I find it unhelpful to read an opinion that says merely that something is not plain error. That doesn’t tell me whether it’s right or wrong. I want to know, so as to get it right next time. Same thing for harmless error. Of course I’m grateful not to have to do the case over, but if you say “any error was harmless” without deciding whether it was error in the first place, the trial lawyers and I don’t know how to govern our behavior next time around.

**FELL:** What about that, Coar? Shouldn’t you circuit judges always decide first whether there was any error at all, before you get to whether it was plain, clear, harmless, or whatever?
DAPPEL: In a perfect world, probably we should. But circuit judges are very busy, and sometimes it’s quicker and easier to get agreement that something was harmless or not plain error, without getting into the more difficult and significant analysis of whether it actually was error at all.

STOREY: Well, I’m just a trial lawyer, but I know what I look for from the circuit is clear guidance. I want to know what’s permitted and what’s not, and be able to predict what the court will say the next time. No offense, but I don’t think you should avoid the question for efficiency’s sake. Getting an authoritative ruling is one of the reasons we have appellate courts.

STRAIT: I agree with Talagud. The lawyers spent their time and their clients’ money arguing the error issue to you, and the trial judges and lawyers in future cases would have better guidance if you determined something was either error or correct.

DAPPEL: There’s an ancient and venerable tradition among American judges not to decide something unless it’s necessary in order to resolve the dispute.

FELL: But circuit judges are not the Supreme Court, which may have institutional reasons for pursuing what Alex Bickel called the passive virtues, so as to avoid prematurely deciding at that level difficult issues that involve relations with the democratically elected branches.

DAPPEL: There are other reasons for our reticence to decide. Even below the Supreme Court level, judicial decisions are not democratic, and there’s good reason therefore to restrict judges’ influence. Decisions take emotional and cognitive capital. I notice trial judges often avoid making decisions they don’t have to. Nielsen, I’ll bet you’ve avoided your share of difficult decisions as a district judge. In fact, my colleagues and I are often frustrated when we read a trial record to see objections the trial judge never has ruled on.

PRIUS: [silence]

FELL: Pardon me for saying so, but many of the instances where circuit judges avoid deciding whether something is actually error have nothing to do with inter-branch relations or democratic values. I don’t see that these standard-of-review rules are really guided by what’s useful for the parties to a dispute, the trial judges who will judge future disputes, or the lawyers who must conduct themselves in court based upon these opinions.

GATE: In fairness to Coar, I have to say it’s not just circuit judges who use standards of review. I’ve read a lot of social security disability decisions by you, Nielsen, or by Madge Strait, that say you’re reviewing the Social Security Commissioner’s decision denying disability benefits to see if the decision is supported by substantial evidence on the administrative record. You even use harmless error analysis. Those are standards of review.

STRAIT: Linda, you’re correct that district courts do use standards of review on account of statutes and Supreme Court and circuit rulings. And we haven’t even mentioned Chevron deference to agency decisions or the arbitrary and capricious standard. When Nielsen reviews my magistrate judge decisions, he applies a standard of review — clearly erroneous or contrary to law for some, and for others, he gives them de novo review. Those standards of review are required by the governing statute concerning magistrate judges’ decisions and the Federal Rules of Civil and Criminal Procedure.

TERLEVEN: Two standards govern review of bankruptcy court decisions by district or circuit courts as well — de novo review for facts and law in non-core proceedings; for core proceedings, clearly erroneous review of the facts and de novo review of the law. These are quite similar to the standards for district court review of magistrate judge decisions.

FELL: Can’t we boil the standards down to just those two? Judge Wald says appellate judges have a “tendency to transmogrify the rhetoric of review standards,” and that the choice of standard “basically does the court’s work for it” without a genuine analysis of the underlying issue. In the administrative law context in the 1970s, Professors Ernest Gellhorn and Glen O. Robinson denigrated the standards as basically “liturgical” with “no more substance at the core than a seedless grape.” Around the same time Professor Rosenberg said the abuse-of-discretion standard “has no meaning or idea content that I have ever been able to discern.” Judge Posner recently said we should “simplify — indeed largely . . . discard — the standards of appellate review” and argued really there are only two, plenary and deferential, because all but plenary are practically synonymous. If there are minor differences among the others, are the differences worth preserving? Or are we talking about how many angels can dance on the head of a pin? The two-level standard for review of magistrate and bankruptcy judges seems to work pretty well. I’m not aware of any empirical evidence that the multitude of standards serves a useful purpose.

GATE: I like Lang Fell’s suggestion for simplification. But Coar, even if we can’t persuade you to consolidate and reduce the number of standard-of-review formulations, I suggest you put them in a local rule or standing order. Then you won’t have to recount them in every opinion. Better yet, the Advisory Committee on the Rules of Appellate Procedure could do that for the entire country. You don’t have to tell us each time that you’re using the correct standard. If a dissenter concludes the panel majority has applied the wrong standard, only then would you need to repeat the verbage.

FELL: Classmates, we’re at the end of our allotted time, so let me try to sum up this conversation. So much has changed in the practice of law, the nature of lawsuits, and technology, that we should not expect
the judicial opinion to be exempt. Maybe after a couple of hundred years it’s time to reexamine its role and its most appropriate components and structure at all levels of the federal judiciary. At the trial level, federal judges may be writing more often and at greater length than necessary. At all levels we could decrease the repetition of well-established law. Judges should approach opinion-writing with a conscious awareness of current practices, such as how lawyers and other judges actually read and use opinions; the effects of digitization; the fact that every written decision is available whether or not labeled as “unpublished” and regardless of whether it’s from a circuit, district, bankruptcy, or magistrate judge; and the fact that lawyers’ arguments in the cases are independently available online. We should recognize that some current practices seem to have developed almost unconsciously and may no longer be appropriate.

**DAPPEL:** Maybe. Or maybe there will always be a certain amount of unavoidable grumbling among lawyers, judges, and law professors. Maybe things are moving as well as can be expected, given the work load and complexity of the issues we all confront. I think federal trial and circuit courts are still well regarded here and abroad. The kinds of opinions we write now come from a long tradition of academic-style opinion writing. It will not easily be displaced.

**PRIUS:** I don’t think you’ll get my district judge colleagues to reduce the amount of their writing; many of them have come to enjoy it. And, in some cases, district judges have a unique perspective that deserves to be published.

**TERLEVEN:** Ditto for bankruptcy judges.

**STRAIT:** We magistrate judges can’t reduce our writings; we have to explain what we do for the Article III judges who review us.

**GATE:** And I like getting all the trial court opinions, so that I have a case to cite as authority.

**FELL:** Well, I tried! And we didn’t even get to the role of concurrences and dissents, or whether judges should do their own internet research in writing an opinion. Perhaps that’s for another conversation.

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**D. BROCK HORNBY** has been a federal trial judge in Maine since 1990 and has presided at trials in other districts within the First Circuit. He has also been a federal magistrate judge, law professor, state supreme court justice, and private practitioner in general practice.

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THESE ARE INTERESTING TIMES FOR THE JUDICIARY. TACKLING QUESTIONS OF JUDICIAL INDEPENDENCE, THE BALANCE OF POWERS, JUDICIAL SELECTION METHODS AND MORE, A PANEL OF DUKE LAW FACULTY AND ALUMNI JUDGES JOINED DEAN DAVID F. LEVI AT DUKE LAW SCHOOL RECENTLY TO DISCUSS THE STATE OF THE JUDICIARY. HERE’S WHAT THEY HAD TO SAY.

O ur topic is “the state of the judiciary,” which could encompass a huge amount of territory. The topic is not self-defining. We can look at the judiciary from many points of view — its independence, selection process, efficacy, quality, institutional support, reputation, and so forth. There are also many jurisdictions, federal and state, and also local and administrative judges who are sometimes members of the executive branch of government.

How should we think about the topic, and in what respects should we be concerned about the health of our judiciary, so critical to what we conceive of as the rule of law? Here we have a terrific panel of Duke faculty and alumni who are thinking about these issues every day. Each of their short discussions briefly and cogently expresses deep thoughtfulness, the result of years of study and practice. Professor Maggie Lemos discusses judicial independence and introduces us to the concepts of decisional independence and institutional independence. She then asks the provocative questions: How can we measure judicial independence, and how would we know when it is threatened?
Professor H. Jefferson Powell looks at the state of the judiciary from the point of view of an executive branch lawyer. This perspective yields rich insights into the functioning of the courts, particularly the United States Courts of Appeals.

Judge Carolyn Kuhl offers reflections from the point of view of a distinguished trial judge in California, much admired for her handling of complex civil cases. Judge Kuhl notes that judges are accustomed to criticism and do not cower before it. However, in a moving plea, she discusses the institutional threat posed when law enforcement officials conduct arrests and dragnet-type operations within state courthouses.

Justice Don Willett of the Texas Supreme Court gives us a lively review of the state election and selection processes for judges, noting that the perfect system has not yet been implemented, let alone conceived. He also reviews the wide variation in resources among the state courts. Our different systems are so varied that it is hard to generalize about our judiciaries.

Finally, Professor Ernest Young takes us right into the heart of current controversies involving the federal courts and the sometimes harsh criticism of the courts and individual judges from the two political branches. He discusses three questions: Whether this level of criticism of the federal courts is unusual, historically speaking? Is it a bad thing to have criticism of the federal courts? And what is the role of judges themselves, and of the academy, in creating the climate in which criticism is flourishing?

There is a story about an English judge who is said to have expressed frustration at the close of an oral argument: “Counsel, you have been going on at some great length, and I am no wiser now than when you began.” And in that great English tradition of wit and defiance, counsel replied: “No wiser, my lord, but better informed, perhaps.” And so while our discussants agree it is not possible to sum up the “state of the judiciary” in a single grade or measurement, our thinking is much enriched. We are both wiser and better informed.

— DAVID F. LEVI, Dean and Professor of Law, Duke Law School
he legal literature on judicial independence tends to draw a distinction between two kinds of judicial independence. One is decisional independence, and the other is institutional. Another way of describing this distinction is to think about the difference between the independence of an individual judge and the independence of the judiciary as a whole. When most people talk about judicial independence they mean the first kind — the decisional independence kind. And they mean something like the idea that judges should be able to decide cases impartially, "without fear or favor" based on the particular facts presented in the case and the judge’s own best understanding of the law.

Justice Sandra Day O’Connor had this to say about judicial independence recently, referring to decisional independence: "Judicial independence is the vital mechanism that empowers judges to make decisions that may be unpopular but not less correct. In so doing, the judiciary vindicates the principle that no person or group, however powerful, is above the law, and it gives life to the promise that the rule of law safeguards the minority from the tyranny of the majority." For most observers, this kind of independence is indispensable in a constitutional democracy. At the federal level, of course, it’s secured by constitutional provisions that give Article III judges life tenure during good behavior, and a guaranteed salary.

But even if we keep our focus on the federal government, where judicial independence seems so strong, if we look at institutional independence we will find quite quickly that the judiciary as a whole is hugely dependent on the political branches. The Constitution gives Congress the power to create lower federal courts or to decline to create them, to fund those courts, to regulate their jurisdiction, to make and adjust rules of procedure that govern what happens in those courts, to create alternate court systems under Articles I and IV, to impeach judges, to override nonconstitutional decisions. The President, for his part, has the power to appoint judges, and to enforce — or maybe not fully enforce — judicial orders. And political actors also can play an important role in shaping public opinion about the courts in terms of mobilizing support from the courts or mobilizing opposition to the courts.

One question that we might ask about judicial independence is which kind is more important — decisional or institutional? Or, which is the bigger threat — attacks on individual judges or more general efforts to weaken the power of the judiciary as a whole?

The former tends to get more attention; attacks on individual judges get a lot of press, and they certainly are cause for concern. But it may be the case that the larger threat to judicial independence is the slow chipping away of judicial power and institutional capacity: things like shunting cases out of the courts and into administrative tribunals, facilitating or encouraging private arbitration as an alternative to litigation in court, changing court procedures so that it’s difficult for certain types of claimants to make use of the courts, failing to nominate judges so that the courts don’t have the people they need to do their jobs, being stingy with budgets, or half-hearted enforcement of judicial orders. Those kinds of measures tend to fly below the radar, and any one on its own might not seem like a critical threat to the independence of the judiciary. It’s only by looking at the combined effect that one might start to get worried.

But that then brings me to the last question that I want to flag, which is probably the hardest one: How would we know if we should be worried? How can we measure judicial independence (of either variety), or identify actions that could be real threats?

There are a number of different approaches to this last question in the literature on judicial independence, none entirely satisfactory. One approach, which is common in comparative assessments of judicial independence across nations, is just to focus on formal structural rules that govern the interaction between the judiciary and the political branches. If we took that approach within the United States, we’d look at constitutional provisions and probably would conclude that federal judges are quite independent, at least in the sense of decisional independence, given the protections that I mentioned earlier. We might worry a lot about state judges, most of whom are elected and, maybe more importantly, almost all of whom face some sort of retention moment, whether it’s reconfirmation by the governor or legislature, or reelection or retention election. If we were just looking at formal provisions, we might conclude that that federal judges are terribly independent and state judges not at all.

But that’s not very satisfying. We know that state judges can in fact be quite independent, and that we might have reason to worry about the independence of federal judges, notwithstanding these formal provisions. So a second approach is to look at what the political branches are doing vis-à-vis the courts, to try to identify actions that appear to be threats. In one sense that’s pretty easy to do, because the acts or omissions that we’re interested in are things we can observe. We can read the President’s tweets; we can see what sort of legislation is being proposed or passed in Congress. What we can’t know, though, is how that’s affecting the judiciary, or affecting individual judges — and at the end of the day that might be what we really want to know.

Part of the challenge here is that, particularly if we’re talking about institutional independence, we run quickly into a really difficult baseline question. Institutional dependence of the courts is not necessarily a four-letter word. It is just a fact in our system that the courts need the political branches in order to do their jobs effectively. In order to assess whether, for example, particular regulations coming from Congress constitute a permissible or impermissible effort to regulate the courts, we would have to get some sense of magnitude, a sense of how much is too much. Or, maybe we would need to get a sense of motivation; we might want to distinguish between actions that are
motivated by some sort of good-governance norm as opposed to actions that are motivated by a desire to change how judges are deciding individual cases. None of those questions is going to be easy to answer.

A final approach to measuring judicial independence is to look at what judges themselves are doing and to try to identify indicia of independent decision-making or its absence. But that, too, is no easy task. Suppose we look at the Supreme Court over five years, and we find that the Court has ruled against the government in some significant proportion of cases in which the government was a party. Could we conclude that judicial independence is thriving and that the Court is in no way cowed by threats from the political branches? No, of course not. The Court may be ruling against the government only in cases that it knows aren’t very important. Or the Court may simply be declining to take cases that would prove to be controversial. At the extreme, in a system with a really weak judiciary, litigants may not even bother bringing cases that would involve a clash between the judiciary and the government.

On the other side, suppose we see what appears to be a clear threat to an individual judge and then we see that judge back down. What can we deduce from that? One semi-recent example involves Judge Harold Baer of the Southern District of New York, who in 1996 decided a case called United States v. Bayless, which proved to be very controversial. It was a criminal case involving the apparent trafficking of a great deal of heroin. Judge Baer ruled against the government on a suppression motion, excluding almost all of the drug evidence on the ground that the police hadn’t had reasonable suspicion to make the stop that led to the arrest and the search that revealed the drugs. In the course of his opinion he also included some pointed language about possible corruption by the NYPD and the public’s perception of the police. He then faced a firestorm of criticism in the press and from political actors. Republican members of Congress wrote President-elect Clinton a letter calling for Judge Baer to be impeached or to step down. It was an election year, and both President Clinton and Senator Bob Dole, who was his opponent, made statements in the press implying that maybe Judge Baer should change his mind or resign, or that maybe impeachment should be on the table. When Clinton’s press secretary was asked whether the President would ask for Judge Baer’s resignation, he told reporters that the White House was “interested in seeing how [Baer] rules” on reconsideration. Maybe not surprisingly, that was interpreted in the media as a thinly veiled threat to Judge Baer. And, indeed, Judge Baer granted the government’s motion for reconsideration, heard new evidence on the suppression motion, and ended up reversing himself. The defendant eventually was convicted and went to jail for a long time.

So, is that evidence of a judge caving in the face of political pressure? Or did Judge Baer sincerely change his mind in the face of new evidence? It’s almost impossible to answer that question from the outside. It might even be impossible for Judge Baer to answer that question if we could ask him.

What this suggests, other than pessimism about our ability to measure independence and threats to independence, is that we probably need to put together all of these different kinds of measures and look at formal provisions alongside actions by political officials and institutions, as well as what we see happening with judges. We’d probably also want to include some sense of public opinion or public support for the courts, because political reprisals are not going to carry nearly as much heft if they’re not backed by the public.

If we look at public opinion, we find ourselves in a good news/bad news situation: Efforts to measure the public’s confidence in the courts, or the Supreme Court specifically, suggest that the public has a fairly high level of confidence in the Court as compared to Congress. The number of respondents reporting a high level of confidence in the Supreme Court has hovered around 30 percent since the 1970s. That number has sunk in the last decade, going down from 35 percent to a low of 23 percent in 2014, although it’s now coming back up. Even with the decline, though, it’s still a lot higher than confidence levels in Congress and the President, which are about six and ten percent now, respectively. So that might feel like good news for the courts.

There is still a reason to worry, though, that our rather toxic political environment might spill over to how the public feels about the courts. Studies of state court systems, which have different methods of selecting judges, suggest that the more political the judicial-selection system, the lower the public’s sense of the legitimacy of the courts. Public confidence in the courts tends to be lower in states with partisan judicial elections than in other kinds of selection systems. When the public hears about judges accepting campaign contributions or being subjected to or using attack ads, public support for and confidence in the courts diminishes. That gives us some reason to worry, I think, that what’s going on elsewhere in our political system may have negative consequences for how the public thinks about other government officials and institutions, including judges and courts.

— MARGARET H. LEMOS, Robert G. Seaks LL.B. ’34
Professor of Law, Duke University
I want to talk about the state of the judiciary, and specifically the state of the federal courts, from a different perspective: the perspective of an executive branch legal advisor, a role I’ve had the privilege of serving in for two administrations. But I first need to say a word about what that role is.

When I was working on my first book on the matter, I gave part of it to a friend to read and when he came back to me he said, “Well, it’s sort of interesting, but none of this is law,” by which he meant — being a little bit too polite to say it bluntly — “What legal ‘advisors’ really do is write the rough draft of the propaganda that is going to be put out in defense of whatever the administration’s policymakers decide, isn’t it?”

Although of course sometimes people don’t do their jobs properly, the answer is no. The answer is also no to an equal and opposite mistake, which is the picture of the executive branch legal advisor as the little naysaying judge inside the executive. The policymaker wants to do something, and the executive branch lawyer’s job is to say “no you can’t.”

Neither one of these describes, in principle or in practice, the role of the executive branch legal advisor. There is an internal executive branch legal process, but it is not the same as the judicial process. To oversimplify, when the courts decide cases, they are doing things within the central responsibility of the judiciary. That’s what courts do; they sit to “do law.” And when a court has done so, it has discharged its central function. The executive’s central function is not to “do law.” It is to execute the acts of Congress and to carry out the president’s independent constitutional responsibilities within the bounds of law. And what that means is that when the executive branch legal advisor gives her advice, that’s not the end of the story. That’s not the point at which the executive has done its job. That’s just one of the factors that goes into the ultimate decision.

So I want to put on my executive branch lawyer hat and look at the functioning of the federal judiciary as I see it at the moment. I have three observations. First, on the substance of the law, I think the federal courts, other than the Supreme Court, are doing, generally speaking, an extremely good job in ways that merit public trust, because their decisions and their opinions explaining their decisions generally display clarity in judgment and professional rigor in their reasoning, and on important and contested issues, the judges are displaying that kind of commitment to independent judgment that is a crucial component of judicial independence.

Here are a couple of examples. Just this past Tuesday [April 4, 2017], the Seventh Circuit, sitting en banc, decided a case titled Hively v. Ivy Tech Community College, on the application of Title VII to a claim of sexual orientation discrimination. The Seventh Circuit was badly divided; in fact there was not just a dissent, but four opinions. Each of these opinions was a model of independent, rigorous, and admirable judicial thinking. The basic underlying issue, even broader than the important one that was officially before the court, is: What are sound methods of statutory construction? Each of the four opinions gave a clear and principled statement of the judge’s views on that important issue, and then did an admirable job of applying that particular judge’s views to the question before the court. Hively is a wonderful example of a court handling a very difficult question that has a big meta-question underneath it, and doing both in ways that I admire.

A second example, more briefly: Chevron deference, for decades a central feature of judicial review of administrative interpretation of statutes, is a matter about which I think it’s fair to say the federal judges have begun a lively debate. That seems to me to be a great example of an important issue on which people disagree, and it’s a debate in which the federal courts of appeals and district judges are playing a valuable role.

The reason this positive observation about the state of the judiciary leaps out to me, wearing my executive branch lawyer hat, is that in the role of a legal advisor to executive branch policymakers, what I want most of all from the courts is not that they agree with my personal views, or even that they take the position that is most favorable to the executive’s own institutional interests, but that the judiciary give statements of the law that are clear, carefully reasoned, and free of inappropriate political or ideological coloration.

Why do I need that in particular as an executive branch lawyer? Because in that role of giving advice to policymakers, I am giving advice that should be principled, in a context that by definition is political and ideological. The executive is a political branch, that’s what it’s supposed to be. But the more that the judges do their job in ways that are independent of politics and ideology, the more able I am to do my different lawyer’s job in a political and ideological context.

My second observation, wearing my executive branch lawyer hat, is that I think the federal courts make far too much use of their tools for avoiding decisions on the merits. Standing is probably the most common means, but there are others I have in mind as well. When the courts avoid reaching the merits and making a substantive decision on an issue that affects the executive branch, the immediate effects for policymakers are almost always good. The long-term effects on the executive branch’s decision-making process, which includes law, are almost always bad. That is in part because policymakers, like nonlawyers, often find it very hard to distinguish a decision like “Well, the plaintiff didn’t have standing,” from a decision like “There’s just no law there; the law is irrelevant.” That’s quite different from where the court reaches the merits and gives a decision, even if the court defers very substantially to the executive’s decision and rules for the executive.

In that second context, it’s clear there is law, and when I as an executive branch legal advisor am trying to provide sound legal
advice to my clients, to the policymakers that I’m advising — when the courts have reached the merits and said something, I have something to work with from the judiciary. When the judiciary avoids decisions, I am left with what may well seem to my policymaking superiors to be just my view.

My third observation, wearing my executive branch legal advisor hat, is that in a number of recent decisions, federal courts of appeals judges are showing that they are being influenced, understandably but unfortunately, by the bad example of the Supreme Court with respect to writing opinions. The Supreme Court’s members have, for many decades, been under the unfortunate, mistaken impression that a judicial opinion should be a personal opinion: “It’s what I think. And since I think what I think, I’m going to go ahead and tell you.” That’s not the proper role of a judicial opinion. It is — or should be — an institutional statement, even if it is a separate opinion.

The result of thinking “well, an opinion is just my opinion and therefore I will tell you” is a proliferation of unnecessary and unhelpful separate opinions. I’m not saying that dissents and concurrences are illegitimate. When they advance the institution’s and the entire profession’s understanding of the legal issue, they are profoundly beneficial. All four of the opinions in this recent Seventh Circuit case do that. They are useful; I admire the judges not just for the craftsmanship, but for the decision to write and file the opinions. But when a separate opinion primarily serves the writer’s personal interest in telling us what he or she thinks, I think the judge should think twice before filing it. At the moment, I think the Supreme Court is a lost cause, but if Court of Appeals judges model good opinion writing behavior, perhaps even the justices could be brought around in time.

Why does this particularly strike me? The judiciary is a lost cause, but if Court of Appeals judges model good opinion writing behavior, perhaps even the justices could be brought around in time. Why does this particularly strike me from the standpoint of an executive branch lawyer? It’s because executive lawyers never have the luxury of just expressing their opinion when they’re doing their job right. They don’t always do that, of course; there are unfortunate and well-known examples of them failing to do so. But when executive branch legal advisors, in formal advice-giving capacities, render advice, they are always giving advice as an expression of institutional rather than personal opinion. And when the judges suggest that, well, our opinions are just opinions, this in fact models bad behavior for executive branch lawyers, suggesting to an executive branch lawyer with a particular bee in the bonnet that “just like the judges I can use this opportunity to advance my particular personal views, too.” There are some unfortunate examples of this happening in recent years.

So from the particular perspective I’ve taken, I think that there are good things to be said about how the federal courts are doing and some unfortunate things as well.

— H. JEFFERSON POWELL, Professor of Law, Duke University

California’s Chief Justice Tani Cantil-Sakauye, in her State of the Judiciary speech to the California Legislature, spoke about what she called unprecedented polarization in our national dialogue about politics and about the courts. She was referring, in part, to decisional independence, as described by Professor Lemos.

I would like to suggest we should be slow to conclude that criticism of the judiciary and criticism of judicial decisionmaking is a significant threat to the Third Branch. Judges for the most part understand that enduring criticism is part of their job. Trial judges often say that whenever we decide a case we make 50 percent of the people before us unhappy because, after all, someone loses in just about every case we decide. Trial judges are especially aware of the reactions of a losing party or attorney. We often see them again in our court for a subsequent proceeding or in a subsequent case, and often it’s not hard to detect their attitudes.

You may not have noticed this — I don’t think the event received much press outside California — but one of the most remarkable political challenges to a judicial decision occurred in the last election. I’m not referring to anything that happened in the presidential race. Last November, California voters were asked to vote on the propriety of a United States Supreme Court constitutional decision. (We always have such interesting ideas in California. I think the rest of the country is better for it because the other states can watch what we do and decide whether it was a good or a bad experiment.) The California Legislature voted to put on the ballot a referendum on a United States Supreme Court decision.

The first thing that happened, of course, was a challenge to the ballot initiative, arguing it was not a proper subject to be put to the voters. That issue went all the way up to the California Supreme Court. The California Supreme Court, including the Chief Justice, ruled that, yes, a referendum on a United States Supreme Court decision was a proper subject for a ballot initiative in the State of California.
The text of the initiative asked voters the following: “Shall California’s elected officials use all of their constitutional authority to overturn Citizens United v. Federal Election Commission” — and the voters even were provided the case citation, 558 U.S. 310 (2010). The voters answered “yes,” overwhelmingly. So that was it. The voters said they wanted their Legislature to take up all constitutionally available arms and lead them into battle against the United States Supreme Court’s Citizens United case. In the national debate, for the most part, no one noticed. Perhaps nobody noticed because nobody cares what California thinks. But certainly there was not a flurry of op eds or scholarly articles saying that separation of powers or the rule of law was threatened.

I think there’s a serious point here: Perception of the potency of a threat to judicial independence based on criticism of a judicial decision can depend on the extent to which the observer agrees or disagrees with a decision. We have to be careful to check our perception of what actually is a threat to the independence of judicial decision-making. We need to consider whether we are reflecting our own bias as to the correctness of a decision when we worry about politicization of the judiciary based on criticism of judicial decisions.

Turning to institutional independence, in her State of the California Judiciary address, our Chief Justice made a very specific point about what she perceived as a threat to the work of the state courts based on immigration enforcement in state courthouses. As she put it, we should step back and look at why we have checks and balances and recognize what the justice system stands for and what it promises. Our Chief Justice wrote to the Attorney General and to the Secretary of the Department of Homeland Security and asked them to refrain from seizing undocumented individuals within the walls of our state courthouses. The Attorney General wrote back and communicated an unqualified “no” to that request, and, indeed, schooled the Chief Justice on what the Attorney General said was her misuse of the word “stalking.”

I don’t want to get into the political rhetoric about sanctuary states and sanctuary counties and sanctuary cities and sanctuary campuses. But I do want to talk about our state courthouses. They don’t look like federal court. They perform functions that federal courts do not need to perform. State courthouses are places where real people with real problems that can’t be solved anywhere else come to seek justice under law.

If you can envision this in your mind, there is one floor of our largest state courthouse in Los Angeles that to me embodies the needs of the people who come into state courts. On that one floor you can see people waiting outside of our restraining order center to seek an order to protect themselves from domestic violence, or violence in their communities or from their neighbors, or violence in their workplace, or from elder abuse. They wait in the hallway outside the courtroom where we do that work. You can see people on that same floor who are old, who sometimes are in wheelchairs. They look confused, and they are in the courthouse for a conservatorship proceeding because their family is arguing about who will take care of them now that they no longer can take care of themselves. And on that same floor of the courthouse you also can see people who are waiting for child custody evaluations, because they are in conflict about who is going to take care of the kids and who will make decisions about the kids in the circumstances of a broken family. Elsewhere in our court we have unlawful detainer courts, which are eviction courts, and we have dependency courts, which adjudicate what happens to children who are living in families where they are being abused, either physically or otherwise, and judges are trying to see to the protection of those children.

There are an estimated one million undocumented persons in Los Angeles and Orange Counties. There are ten million persons in Los Angeles County. Close to one-tenth of our Southern California population arguably is undocumented. The federal government has exclusive authority under the Constitution for enforcement of the immigration laws. Without pointing fingers about what has happened with immigration enforcement over the last ten or 20 years, at the local level we have been left to try to shape a community that incorporates these individuals. We strive for a society where everyone is protected from criminal violence and where children are protected and where we have remedies for sex trafficking and domestic violence and abuse in the workplace.

The state courts have to be a forum where the people who live in our community can come into our courtrooms. We need witnesses to appear for criminal cases. We need a forum for marital disputes and community disputes. We need to protect children from abuse and sex trafficking. If employer sanctions are not being vigorously enforced, then we need to address abuses of people in the workplace.

So in my judgment, this issue concerns the institutional independence of our state courts. I think our Chief Justice was absolutely correct in saying that the federal government should not act to deter any person from coming into our state courthouses. We must back away from an absolutist approach that could decrease rather than increase the safety of our communities.

— CAROLYN B. KUHL, judge (and former presiding judge), Superior Court of California, County of Los Angeles
In the late 19th century, the 19th governor of Texas, Sul Ross, said the loss of public confidence in the judiciary is the greatest curse that can ever befall a nation. Governor Ross oversaw the dedication of the majestic Texas Capitol and is also the only Texas governor to call a special session of the Legislature to deal with budget surplus. Good times. And he was right about the distinctive role of the judiciary in our constitutional architecture.

Dean Levi asked me to discuss judicial selection and reform efforts currently percolating around the country. *Judicature* recently published a helpful article that I’m sure you’ve all scoured and dog-eared. And I’m going to draw a lot of my material from that terrific overview of current state-level reforms. Judicial selection is certainly an issue that implicates judicial independence and public confidence, but it’s fair to say the perfect system has proven elusive. I think there are just varying degrees of imperfection — and, I confess, I have not cracked the code. I’m intimately acquainted with all the downsides to my state’s partisan-election system. I’ve gotten very up close and personal with all the drawbacks in the Lone Star State.

People are sharply divided — first, about how judges do their job, but also about how judges get their jobs. In Texas, again, we elect on a partisan ballot, and if you were to ask voters — because as Professor Lemos mentioned, partisan elections inspire the least confidence among people — but if you were to ask my fellow Texans, ‘Hey, do you suspect that donations drive decisions? Do you suspect that politics seeps in?’ they might reply, ‘Yeah, I bet it probably does.’ And if you were then to follow up, ‘So, are you willing to give up your right to elect your judges?’ they would probably say, ‘Over my dead body.’

There has been substantial activity around the country lately around judicial-selection reform. Historically, reform efforts wax and wane and ebb and flow, but in the last half-decade, there’s really been a definite uptick, a lot of proposals and a lot of recent activity. But, strangely, there’s no prevailing mood or direction. And again, giving credit where it’s due, I’m drawing heavily here from the recent *Judicature* article [William Raftery, *Trends in Judicial Selection Methods*, *Judicature*, Vol. 100 No. 1, Spring 2016]. States are both adopting and repealing the very same reforms. State A may adopt X as the greatest idea, and State B may rescind or repeal X because they’ve tried it and don’t like it, so they’re going to scrap it for something new. Most of the reform activity is occurring in states that use a judicial nomination commission for judge picking, which is roughly half the states. There’s interest in amending that system, and there’s also interest in ending that system. There are a lot of contentious political fights and tugs of war over who picks the pickers. Who gets to name the members of the judicial nominating commission? How are those members chosen? How many are chosen? What sorts of hard-wired biases are baked into such entities? There are turf battles galore.

Governors are pressing legislatures for more discretion; they want more names on the list, they want a deeper pool, they want a second list or maybe a third list if they’re dissatisfied with the prospects. They want wide-open autonomy. Legislatures are pressing for a confirmation role. It’s not just enough that the governor picks from a list; the lawmakers want a voice as well. And in those states where the appointed judge has a retention election after they’re named, there are proposed reforms to alter the threshold vote required to retain your seat. In every state but two it’s a simple majority: You get 50 percent, you survive. In Illinois, it’s 60 percent. In New Mexico, it is, of course, 57 percent. Some states are considering boosting the percentage required to keep your seat.

Two states have scrapped their merit-commission system altogether. Kansas did it for the Court of Appeals in 2013; Tennessee did it in 2014, scrapping their commission in favor of a straight-up governor-appoint-and-senate-approve system. But while some states are repealing their merit-commission system, other states like Minnesota and Pennsylvania are considering adopting such a system.

Moreover, states that elect judges seem split on the question of partisan versus nonpartisan. West Virginia ended partisan elections for all courts in 2015. North Carolina, which had nonpartisan elections, has now adopted partisan elections for appellate courts, and just recently the legislature passed, over the governor’s veto, a return to partisan trial court elections.

There is also a lot of activity on how judicial campaigns are being funded around the country and how that impacts recusal. In West Virginia, they’ve moved to public financing of appellate court races. On the other hand, some states that had public financing, like Wisconsin and North Carolina, are repealing it.

There are four states that now have mandatory recusal for a set amount of donations; some of these rules are by statute and some are by court rule. In California, they require disqualification if a judge received campaign contributions from a party or an attorney over a certain amount. In Alabama, there’s sort of a sliding-scale rebuttable presumption for recusal or disqualification based on the percentage that a judge received. The Wisconsin Supreme Court is debating a rule to create set-amount limits on recusal and disqualification. In Texas, there are some bills pending to reform judicial selection. Am I hopeful? Absolutely. Am I optimistic? Absolutely not. Every time lawmakers gather, bills are filed to reform judicial selection, but most never make it out of committee or even get a committee hearing.

There are two states today that elect judges on a partisan ballot with straight-ticket voting. About nine states have a partisan ballot, but only two of those nine couple that with straight-ticket voting — Alabama and Texas, though Texas lawmakers are poised to scrap straight-ticket voting for all races. And there’s a powerful tendency for party-line voting and for high-profile, executive-branch, top-of-the-ballot races to drive outcomes, to determine victors and victims in down-ballot judicial races. The overwhelming majority of judges in my state are elected, frankly,
not so much on their legal qualifications, not so much on their judicial philosophy, not so much on how awesome or awful of a campaign they run, but rather on how their party performs at the top of the ballot. Judges are swept in and out of office because of these partisan tidal waves. They’re just along for the ride, carried along by the grander political current. If their party’s having an up year, good for them. If they’re having a down year, bad for them. As I mentioned, Texas has a pending bill to eliminate straight-ticket voting, meaning to cast a vote in judicial races voters would physically have to take the time, make the effort, break the sweat, go down their ballot line by line, and vote for judges individually. You could no longer click the straight-ticket icon on the voting machine and be done with it.

There is another piece of interesting judicial-selection news in Texas: Last summer, 2016, a Voting Rights Act lawsuit was filed challenging the at-large, statewide method, of electing Texas high-court judges. In Texas, we run statewide, border to border, 254 counties and a couple of time zones. The claim in the lawsuit is that because judges are elected statewide, minorities don’t have a fair shot at electing candidates of their choice, and the plaintiffs are proposing that we move to a system where high court jurists are elected by districts, as in some other states.

That’s the lay of the land in terms of judicial selection reform.

In terms of resources and how courts are funded, here, too, I will draw heavily from a recent article in *Judicature* [Roundtable discussion, *Money or Justice? How Fess and Fines Have Contributed to Deep Distrust of the Courts — And What Chief Judges Are Doing About It, *Judicature*, Vol. 100 No. 4, Winter 2016.] In Texas, the judiciary gets a whopping one-third of one percent of the state budget. The judicial branch of government gets roughly one-third of one percent of the state budget. I’m told we’re still flush compared with judiciaries in other states like California and North Carolina. The recession from almost a decade ago is over, but there is an overall sense that many state courts are still feeling the impact. There are still court closures and furloughs taking place or planned for the next fiscal year in states like Alaska, Iowa, and New Mexico. The Connecticut judiciary has endured some large-scale layoffs. In Kansas, many trial court employees have reported needing to take a second job in order to make ends meet.

As noted in *Judicature*, people perceive the courts as being flush with cash, maybe because courts take in fees and fines and costs, which I think skyrocketed during the financial downturn as courts became looked upon as a revenue-generating center by state and local governments. But the public doesn’t really grasp how little of that money stays within the judiciary.

Technology is helping a bit, but technology often requires a big outlay on the front end. You have savings down the road over time, but the big up-front cost is often too daunting for lawmakers to swallow. But people want court technology. There was a survey last year that said only 39 percent of Americans view courts as innovative — 39 percent! That was down about six points from just one year before. Many states are moving to e-filing and e-docketing systems, but for the most part, those are local options, where County A might have a robust e-filing system, but County B next door might have nothing. There is a big ongoing debate about the impact that access to online court records might have on individuals. In criminal cases, for example, should a defendant’s case or docket information be put online at the time of arrest, or at the time of docketing as it is in most jurisdictions? Or maybe only upon conviction — which is how it is in New Jersey? If a person is found not guilty, should the info be pulled from the court’s online system? Alaska passed a law last year requiring that, and a lot of other states have debated it. What about family cases? What about cases involving minors?

There’s also the tension between having a uniform border-to-border statewide system versus lots of little bitty discrete county-level systems, similar to the localized e-filing and e-docketing systems. States are debating whether to end the practice of individual county case management and other e-systems in favor of a statewide system that serves all courts. And then how is it all going to be paid for? By a court technology fee on all cases? Or more kind of pay-per-view model, like PACER, where you view a document and you pay a fee?

As you can see, debates over judicial selection and judicial resources are ongoing and dynamic.

— DON R. WILLETT, Justice, Texas Supreme Court

A time to reflect

I’m going to take us back to the more general questions raised by public criticism of the decisions, role, and authority of the federal courts. President Trump has been quite critical of certain judicial decisions, particularly those involving his controversial travel bans. I want to ask three things about this current round of public actors criticizing federal courts: One, is this level of criticism of the federal courts unusual, historically speaking? Second, is it a bad thing to have criticism of the federal courts? And then third, what is the role of judges themselves, and of the academy, in creating the climate in which criticism is flourishing?
My Con Law students always seem to think that the sky is falling, and that this is the most contentious and polarized and awful age that we’ve ever lived in. So I love telling them about the early Republic, because if you think things are bad now, just imagine what the people in the early Republic had to go through. When the Jeffersonian party came in after the election of 1800 and the Federalists retreated into the judiciary — which they’d appointed all of, mind you — the Jeffersonians did a little more than criticize. They refused to honor certain appointments that hadn’t been finalized, like Mr. Marbury’s. They eliminated a lot of judicial positions that the Federalists had created and therefore threw those judges out of office, notwithstanding Article III’s quaint idea of life tenure. They stripped the jurisdiction of the federal courts by eliminating federal question jurisdiction, which wouldn’t come back until 1875. They cancelled the entire term of the Supreme Court, so the Supreme Court couldn’t pass judgment on what they had done, and then the Jeffersonians started impeaching federal judges — not because the judges in question were drunks or crooks but pretty clearly because the dominant party in Congress disagreed with those judges’ decisions.

That was a little worse than now. If you fast forward to the Civil War and Reconstruction, Congress packed and unpacked the Court. Congressional Republicans expanded the Court to ten justices so that President Lincoln could appoint new justices to out-vote the people that brought you Dred Scott; then when Andrew Johnson became president and Congress didn’t like him, they decreased the number of justices to seven so that Johnson wouldn’t have any appointments. Then there was Lincoln himself, who — in response to Justice Taney’s ruling on circuit in Ex parte Merryman that the president did not have unilateral authority to suspend the writ of habeas corpus — not only defied the ruling and criticized it in a speech to Congress, but also seriously considered locking Justice Taney up. And when, during Reconstruction itself, the Supreme Court was preparing to consider the legality of continuing military government over the South, Congress simply eliminated the Court’s jurisdiction to do so.

That was also a little worse than “attacks” on the judiciary today. Then there’s the New Deal. After the Supreme Court struck down a couple of key New Deal programs, President Roosevelt devoted an entire “fireside chat” to telling the nation — at length and in detail — that the Supremes were not doing their job, not behaving like justices, and standing in the way of economic recovery. FDR also made a huge effort to pack the court, of course. And there are also lesser-known examples. Most significantly, when FDR worried that the Supreme Court might invalidate his abrogation of the “gold clauses” in government contracts and Treasury bonds, the President prepared a speech announcing that he would defy the Court’s order. (Ultimately, the Court ruled FDR’s way and the speech stayed in the drawer."

We do not see, in the contemporary era, any comparable proposals to alter the federal courts’ structure, strip their jurisdiction, or defy their orders. Nor is simple criticism of the courts new with President Trump. In the modern era, Professor Lemos has already mentioned President Clinton’s criticism of federal district judge Harold Baer for being soft on crime. Certainly President Obama criticized the Court over its Citizens United decision with the justices sitting right in front of him at the State of the Union. More importantly, there was a lot of pretty ominous talk out of the White House about why the Court should not dare to strike down the Affordable Care Act that may have actually had some influence on what happened in that case.

So I think what we’re seeing now under the present administration is really a big deal in the media and the academy mostly because Trump is doing it, and whatever he is doing is outrageous almost by definition. My point is not simply that the current criticism is not unusual in historical context. Fundamentally, I do think that the present period is unusual. What is unusual, however, is the astounding level of deference that the federal courts get from the political process in the contemporary era, and the remarkably low level of public criticism of their decisions. What is remarkable, historically speaking, is the very high level of judicial independence that we see at the present moment.

I don’t think that the reasons for that are hard to find. Consider the sorts of things that the federal courts were deciding in the old days when the level of conflict was so much higher: They were deciding cases about slavery; they were assessing the validity of a vast bureaucratic regulatory state; they were considering challenges to segregation in the South and upending the South’s entire way of life. Those were big questions. Those were truly polarized times. There is a technical sense in which our politics now are more polarized than ever, and that is the sense in which for the first time in American history, ideology, and party affiliation largely dovetail. That is a new situation, to be sure, and it has important implications for law. But at bottom, this is a technical meaning of polarization. I think the more natural meaning of polarization would be about the size of the gap that divides the people on one side of the debate from the people on the other, and the size of the stakes involved in political and legal disputes. We don’t have fights anymore about whether you can legitimately own human beings. We don’t have fights anymore about whether there should be a significant federal regulatory state. We don’t have fights about segregation and whether it is fundamentally legal or not. And so it’s not surprising, given that the Supreme Court is not intervening on levels of that magnitude anymore, that judges get high levels of deference and the general temperature of criticism of the Court is historically low. We should remember this before we wring our hands overmuch about the President’s latest anti-judicial Tweet.

Now is criticism bad? I would say no. I think criticism is the primary check, for all practical purposes, on judicial power. My Con Law casebook, for example, includes FDR’s Fireside Chat criticizing the judiciary in its entirety. It’s a remarkable document. It’s the President of the United States sitting down with the American people and talking about the Constitution. How great is that? He’s trying to have a serious discussion about whether the Supreme Court is getting it right or getting it wrong and why. I think that is an
incredibly healthy activity for the body politic to be involved in.

Criticism has to be the primary check on courts because most of the other checks that Congress and the President have on the federal courts are effectively "nuclear options." They are very, very difficult to employ in practice. Consider the tools the political branches have:

**Stripping the jurisdiction of the Supreme Court.** That is a very serious thing to do, and it has hardly ever happened in practice despite numerous proposals meant to limit judicial power in particular areas.

**Impeachment.** We haven’t had a serious attempt at impeachment on the grounds that Congress disagrees with what the Court is up to since the early Republic. And thank goodness for that, as it would seriously undermine the rule of law.

**Constitutional amendment to override Supreme Court decisions.** We have had a few of these but generally on decisions that, while controversial, did not involve basic social controversies. Most recently, the 26th Amendment “overruled” the Supreme Court’s decision that Congress could not require states to let 18-year-olds vote without amending the Constitution. When that decision was overruled, it wasn’t so much an expression that the Supreme Court was out of touch and had gotten it wrong, it was simply a general consensus that the Constitution in fact needed to be changed on that question. But basic social controversies like abortion or same-sex marriage are, by definition, too controversial to permit resolution by constitutional amendment.

In any event, I think these institutional checks on the courts are unlikely to be used often or effectively. That leaves criticism as a crucial check on judicial error and overreach.

Now, I do want to underscore Professor Lemos’ point that there is a whole different set of issues that go to the role of the courts in dispute resolution throughout the society, the increasing use of arbitration, the increasing difficulty of bringing class actions and other forms of getting things into court. Change in what you have to show to survive a motion to dismiss, in how expensive litigation is, and what forms of getting things into court. Change in what you have to show

prefer that most Americans not be able to pick him out of a lineup. This is a man who doesn’t go on trips, who doesn’t give interviews. When he finally was talked into giving that address at Harvard after he retired, I accused him of having become a publicity hound, and I think that’s probably the meanest thing I could possibly have said to him. So I start from a baseline that judges should shut up and judge, and not give interviews, and not talk to the media. But it does seem like the judges are out there a lot, they’re giving a lot of speeches, they’re giving a lot of interviews, and I think that encourages the rest of us to think of them as part of the political process.

Lately their participation has taken a more overtly political tone. Ruth Bader Ginsburg has given multiple political interviews, stating “I can’t imagine what this place [the Court] would be — I can’t imagine what the country would be — with Donald Trump as our president.” She has suggested in interviews that particular decisions — like District of Columbia v. Heller — would be ripe for overruling with a new liberal appointee to the Court. This sort of thing encourages people to think about judges politically. Likewise, when Richard Posner gives interviews and talks about his colleagues at the court as stupid or ridiculous or completely political, when he writes that in the Foreword to the Harvard Law Review and then popularizes it at every chance he gets, that’s not great for the perception that judges are doing something different from politics.

What about the academy? What’s happened in the academy is that we’ve got a fad, if you will, about political science analysis of judicial decisions. It’s called the attitudinal model. The thesis is that courts decide based on their political attitudes and not based on the law. And I think this has become popular in the press, too. For instance when Linda Greenhouse retired at the New York Times and was replaced by Adam Liptak, his first columns in his new capacity as Supreme Court reporter were all about this attitudinal work in political science and how the Supreme Court is driven largely by ideology.

I think that’s dangerous because I think much of it is very, very bad work, frankly. The most fatal problem is that if you’re going to have a scientific analysis of judicial behavior, you need to be able to define what you’re testing against. So what is a political decision? What is a legal decision? What is the difference? That is something that jurispruders have struggled with for centuries, and it’s something the political scientists have really no answer for. But how can you say the “attitudinal model” triumphs over the “legal model” if you can’t define the difference? Moreover, there are hopeless coding problems in trying to figure out what counts as a conservative decision or a liberal decision; the coding criteria are completely indeterminate and contradictory. And you can’t code for relative
effect: For instance, if you decide a case points in a conservative direction, there's no way to code for the possibility that a court could have gone a lot further but it didn't, so maybe it wasn't such a conservative decision after all. So it's just not very good work. And yet it's become the focus of the media's reporting on the Court and has also become the focus of a lot of law professor commentary on the Court — from people who really ought to know better.29

Finally, I think the judges have also contributed to an ideology-based view of the courts by behaving in certain ways that make the attitudinal model seem intuitively plausible. I'll just focus on two. One is the tendency to vote as blocks on the Supreme Court. I think Justice Ginsburg commented a couple of years ago that "[w]e [on the Court's left] have made a concerted effort to speak with one voice in important cases."30 I thought that was a shocking thing to say. When you have very different justices — for instance, justices who have as different a judicial philosophy as Steven Breyer, a highly-sophisticated consequentialist, and David Souter, the historian and the lover of complicated doctrines, the more complicated the better — who always vote together and join common opinions, it's hardly surprising that some observers conclude something else besides the law must be going on.

The other practice I would say would be persistent dissent. By this I mean that a judge, after losing on an issue in a particular case, continues to dissent from future applications of that principle because he just refuses to accept the prior decision as settled law.31 This has occurred most prominently in the Court's state sovereign immunity cases, but it also seems to characterize the Court's jurisprudence on affirmative action, campaign finance, and other crucial issues. When Justices continue to treat their own view of the law as equally valid despite having seen it rejected in prior decisions, the cost is to encourage the view that law is simply politics. Everything, as Justice Ginsburg said of Heller, can be fixed if we get one more vote. Better, I think, to reject the notion that the content of the law can be changed through a few new appointments, as the Court did in Planned Parenthood v. Casey.32 Say what you will of that opinion's result or its reasoning, it demonstrated the continued existence of a practical gap between law and politics. I think judges and professors have to be really careful if we want to maintain that vital separation. The federal courts surely enjoy more deference and independence today than they have at virtually any point in our history. The greatest threat to that autonomy is not bombastic presidents, but rather the gradual erosion of faith that judges are doing something other than politics.

— ERNEST A. YOUNG, Alston & Bird Professor of Law, Duke University

1 For a terrific overview, from which much of the following discussion is drawn, see John Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 72 S. Cal. L. Rev. 553 (1999).
5 Alison Mitchell, Clinton Pressing Judge to Relent, NY TIMES, March 22, 1996.
8 See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
12 17 F. Cas. 144 (C.C.D. Md. 1861).
14 See Ex parte McCord, 74 U.S. 506 (1869) (upholding the jurisdiction strip).
18 See id.
19 See, e.g., Thomas Mann, Forword, in AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION, xxii-xxiv (James A. Thurber & Antoine Yoshinaka, eds. 2015).
24 See Richard A. Posner, Forward: A Political Court, 119 Harv. L. Rev. 32 (2005); see also sources in note 16, supra.
28 See id. at 9-13.
29 See, e.g., Posner, Foreword, supra note 17.
A person who has sought and failed to obtain disability benefits from the Social Security Administration ("SSA" or "the agency") can appeal the agency’s decision to a federal district court. In 2016, nearly 18,000 people did just this. Even though claims pass through multiple layers of internal agency review, many of them — about 9,000 in 2016 — return from the federal courts for even more adjudication. This litigation comprises about 7 percent of the federal district courts’ civil docket and is worthy of study for that reason alone. But also significant are dramatic differences in the handling of social security litigation from one district to the next, even though appeals emerge from an agency attempting to administer a single national program consistently.

If a claimant files suit in Brooklyn, N.Y., for example, a particular set of procedural rules will apply, and she will have a 70-percent chance of convincing a district judge to remand her case to the agency. If she files suit in Little Rock, Ark., she will encounter a different set of procedures, a magistrate judge will most likely decide her case, and her case will be heard in a district where claimants win much less often — only about 20 percent of the time.

In late 2014, the Administrative Conference of the United States asked us to study social security disability litigation, a subject that has attracted a fraction of the scrutiny that disability claims adjudication within the agency has weathered. We understood our charge to involve three main questions:

- What factors explain why claimants prevail so often when they appeal to the federal courts, even after multiple layers of review within the agency?
- What factors explain variations in the rates at which various federal districts remand claims to the agency?
- How does the litigation of disability appeals vary from district to district?

We combined traditional legal research with quantitative analysis to find answers.
The agency supplied us with a substantial amount of data, which we added to docket report information drawn from PACER and publicly available data. To supplement and guide our quantitative inquiry, we interviewed about 150 people involved in the disability claims adjudication process, including federal judges and their law clerks, administrative law judges (“ALJs”), agency officials and staff, and claimant representatives. We also discussed our research with Department of Justice personnel.

In July 2016 the Administrative Conference released the result, a 180-page report discussing all aspects of disability claims litigation. This article summarizes some of the findings that we believe should particularly interest federal judges. These include information, perhaps unknown to federal judges, about how the agency adjudicates claims; a perspective on the national remand rate of about 50 percent and what it signifies about agency and judicial performance; explanations for differences in the remand rate from one district to the next; and commentary on the needless complexities created by the dizzying array of district-specific procedural rules and practices that govern this litigation. We also briefly discuss suggested reforms. The Administrative Conference recently adopted one of our recommendations, a proposal that the Judicial Conference of the United States promulgate specialized procedural rules for social security litigation. This proposal was forwarded to the Chief Justice of the United States and has now gone to the Advisory Committee on Civil Rules. In addition, we understand that the agency is studying our other recommendations. We hope that the federal judiciary will do the same.

**THE PATH OF A DISABILITY CLAIM**

Many of the federal judges we interviewed acknowledged that they know little about the process that generates the nearly 20,000 social security cases they see each year. For this reason, we provide a detailed description of the disability claims adjudication process in the first main chapter of our report. Because federal judges typically review ALJ decisions and the records they compile, our treatment focuses in particular on what happens in the hearing offices where ALJs work. The following summary touches upon just some of the details we believe a federal judge should know.

**Hearing Offices**

An appreciation for at least two institutional facts is essential to understanding ALJs and the work they do. First, the majority of disability claims never go to ALJs. In FY2015, for example, claimants filed 2,756,319 applications for benefits at the initial level, where state Disability Determination Services, working with the agency, decided them. In most parts of the country, claimants whose claims are denied file requests for reconsideration before they can seek a hearing before an ALJ. Ultimately, 746,300 claimants in FY2015 took their cases to hearing offices. Presumably, this docket represents the 25 percent or so hardest cases. A claimant with a strong case for benefits should prevail at the initial or request-for-reconsideration level, and a claimant with a weak case, if rational, should not pursue her claim any further.

Second, any judgment about the success of the SSA’s disability claims adjudication process must grapple with the sobering reality that claimants annually add about 750,000 cases to the national hearing office docket for ALJs to decide. To forestall an intolerable backlog, the agency expects ALJs to render an average of 500 to 700 “legally sufficient” decisions each year. In FY2013, the pace of ALJ decision-making peaked at 48 cases decided per ALJ per month. To handle these crushing dockets, the ALJs we interviewed reported that they spent about two and a half hours per case on average. This time includes all tasks, from beginning an initial review of documents to holding a hearing to signing the final draft of an order deciding the claim.

Caseloads render what was once controversial among ALJs — decision writing by staff attorneys and paralegal specialists — indispensable. Decision writers, virtually unknown to the federal judges whom we interviewed, draft decisions based on instructions ALJs typically provide immediately after a hearing. The SSA has pushed ALJs to give more than a simple thumbs up/thumbs down in their instructions; at a minimum, an adequate set of instructions should include information reflecting the ALJs determination for each step of the five-step sequential process for evaluating a claim. But instructions vary significantly in style and quality. Several decision writers we interviewed reported that they routinely receive extremely cursory instructions that can omit basic information (i.e., the ALJ’s basis for her credibility determination). Like ALJs, decision writers labor under heavy workloads. Until recently, decision writers were instructed to spend up to four
hours on a decision favorable to a claimant and eight hours on an unfavorable decision. To save time and to ensure consistent, policy-compliant draft decisions, decision writers insert language particularized for a specific case into boilerplate generated by the “Findings Integrated Template” (“FIT”), a tool the SSA began to use in 2006. FIT generates templates for various disability decisions. Upon completion, the draft goes to the ALJ to review. While ALJs remain responsible for everything that goes out under their names, the SSA expects decision writers to provide drafts that require little or no editing.

The Appeals Council
If an ALJ denies a claim, a claimant can appeal to the Appeals Council, an office in Falls Church, Va., that reviews ALJ decisions from across the country. Upon arrival, a case receives its first and principal merits workup from an “analyst,” who is either a staff attorney or a paralegal specialist. The Appeals Council’s organization is complicated, but in general and mostly accurate terms, each analyst reviews appeals from hearing offices located within two judicial circuits. Sometimes aided by a short brief from the claimant, an analyst uses something called the “Appeals Case Analysis Tool,” or ACAT, to deconstruct the ALJ’s decision and determine if it is policy compliant. ACAT asks analysts a series of questions about each of the sequential steps to determine if the Appeals Council should grant review of the ALJ’s decision. ACAT also helps analysts prepare short (half-page to page-and-a-half) “action documents” that include recommended dispositions along with supporting analysis. If an analyst recommends that the Appeals Council deny review, the case will go either to an Appeals Officer (“AO”) or to an Administrative Appeals Judge (“AAJ”) for a final decision. A recommendation that the Appeals Council grant review and remand will go to two AAJs.

If hearing office workloads are crushing, the Appeals Council’s docket is arguably even more so. Analysts try to prepare action documents for two cases each day, and AOs and AAJs decide anywhere from five to 12 cases per day. Unlike the Board of Immigration Appeals, another agency appellate body handling a large volume of cases, the Appeals Council rarely issues opinions or otherwise steers the elaboration of governing law through precedent. Its personnel do, however, rely on their review of cases to identify issues for policymaking through other vehicles.

The Federal Courts
The SSA lacks independent litigating authority, so the U.S. attorney is nominally the government’s lawyer when a case moves to federal court. Most of the time, lawyers from the SSA’s Office of General Counsel (“OGC”) do the heavy lifting on the merits brief. In many districts, OGC lawyers litigate as “special assistant U.S. attorneys,” or “SAUSAs,” a designation that enables them to appear with minimal involvement from the U.S. attorney. OGC lawyers are organized into ten regions, with each region covering litigation in all districts within no more than two circuits. Practices vary within these regions. Some OGC lawyers specialize in particular districts, while others litigate in a number of them. Claimant representation is similarly varied. Some claimant lawyers work in multiple districts and a few nationwide. In larger urban areas, claimant lawyers are more likely to specialize.

Among the OGC lawyers we interviewed, workload estimates ranged from four briefs to a dozen briefs due per month, added to a slate of other duties these lawyers handle for the agency. The burden OGC lawyers shoulder keeps many from working on a case in earnest until several days before the brief’s deadline. This timing may explain the prevalence of last-minute extension requests.

Sometimes OGC lawyers determine that the ALJ issued an indefensible decision that eluded an Appeals Council remand. In such instances — about 15 percent of all cases — the OGC lawyer will file a request for a voluntary remand, or “RVR.” The Appeals Council has to sign off on an RVR, which it does 95 percent of the time. While Appeals Council consideration may seem perfunctory, it is important for one key reason. The Appeals Council will not agree to an RVR unless the OGC lawyer can couch the ALJ’s error in terms of existing agency policy. The fact that an ALJ’s decision might conflict with circuit precedent or a line of district court decisions is not enough.

When a federal judge remands a case, it goes back to the Appeals Council, where a specialized division receives it and issues the actual remand order to the ALJ. Typically, a remand will return to the ALJ who rendered the decision in the first instance. Rarely would the same decision writer also work on the remanded case. In fact, feedback from the federal courts to hearing offices is irregular. The agency discourages ALJs and decision writers from citing or relying upon case law, in an effort to ensure policy-compliant decisions that are consistent across the country. In some instances, however, the agency will “acquiesce” to a circuit-level decision on an aspect of social security law or policy. An acquiescence ruling, once issued, will obligate agency personnel who adjudicate claims within the circuit’s boundaries to follow the precedent.

The agency can but almost never appeals a district court decision. Somewhere in the neighborhood of 650 social security appeals make their way to the circuits each year. But the agency files very, very few — only one in FY 2014, for example. This reticence stems, at least in part, from the fact that at least seven SSA and Department of Justice lawyers, including the Solicitor General of the United States, must sign off on any appeal the SSA might want to take. No district judge we interviewed could ever recall an appeal from a remand or reversal order. Claimants control the composition of the courts of appeals’ dockets almost entirely.

THE NATIONAL REMAND RATE AND WHAT IT MEANS
The second chapter of our report attempts to answer an important question: overall, do the federal courts review agency decisions too harshly or too leniently? Over the past five years, the federal courts have remanded between 40 percent and
50 percent of all cases appealed to them. To some, this remand rate makes little sense in light of the deferential substantial evidence standard of review that governs disability appeals. Also, several officials argued to us, it remains stubbornly high even though the agency has undertaken various initiatives to improve the quality of ALJ decision-making over the last decade. On the flip side, some federal judges believe that SSA adjudication is a symptom of fundamental agency failure.

We do not believe that one may reasonably draw either lesson from the national remand rate. The differences between the agency and the federal courts as institutions complicate any effort to judge one based on its interactions with the other.

Quality Assurance and Case Selection
In 2007, the agency’s Chief Administrative Law Judge blamed “most” of the agency’s losses in federal court on ALJ decisions that “did not comply with our own policy.”

Since then, the agency has implemented a number of quality assurance initiatives, some of which are quite cutting edge. It has hired hundreds of new ALJs and overhauled ALJ training; it has developed various electronic tools, such as FIT and ACAT, to ensure consistent, policy compliant decisions; and it has identified ALJs with aberrational decision patterns for focused reviews designed to correct their individualized flaws. Overall ALJ performance has improved considerably, agency officials told us, citing a recent 25 percent decline in the rate at which the Appeals Council remands cases to ALJs, as well as increased decisional consistency among ALJs nationwide. The fact that the court remand rate has remained fairly steady despite all of this, they asserted, confirms that judges review cases too strictly.

We did not have access to data that might have allowed us to determine whether ALJ performance has in fact improved. But even if it has, this change would not necessarily affect the composition of the federal courts’ social security docket. Since 2010, the national ALJ grant rate has dropped from 70 percent to about 45 percent. This dramatic decline may reflect more policy compliant decision-making, as the agency insists, and not some new and unduly harsh threshold for granting disability benefits. Even so, decisions federal judges review may not reflect this improved ALJ performance, because the steep decline in ALJ grant rates means that the size of the pool of potentially appealable ALJ decisions has increased substantially. Suppose that ALJs now correctly deny four of every five claims they would have granted before. Given the total number of cases ALJs must hear, the mistaken one-in-five would still cause the pool of erroneous decisions to expand by thousands. If the private social security bar cannot expand its capacity as quickly as the number of erroneous denials rises, and if claimant representatives are able to identify cases’ strength with some accuracy, then the set of cases appealed now can be expected to be stronger, on average, than the set appealed before.

Claimant representatives’ incentives can, in fact, be expected to steer them to the strongest appeals, adding to the likelihood that cases that make their way to district courts would not reflect improvement in ALJ performance. A complicated set of rules regulating attorneys’ fees boils down to a simple relevant point: claimant representatives get paid if they win. The numbers suggest that this fact does indeed discipline lawyers when they select cases. Only about 3 percent of potentially appealable ALJ decisions — about a half-dozen per ALJ per year — ultimately reach the federal courts, and 85 percent of claimants who lose at the Appeals Council seek no further review.

Substantive Evidence Standard of Review
Agency officials also believe the national remand rate of nearly 50 percent is inconsistent with the supposedly very deferential standard of review and the “extremely limited” role it assigns district courts reviewing ALJ decisions. For a number of reasons, we doubt any such necessary connection. First, and most simply, the substantial evidence standard, aptly described as a “seedless grape,” gives little guidance to judges as they struggle to determine exactly how much leeway they have when reviewing ALJ decision-making. As two scholars have rightly noted, “it is difficult to ‘consider’ the evidence contrary to the agency’s finding, which is required, without reweighing the evidence, which the reviewing court is forbidden from doing.”

Also, for issues that often trigger remands, a lot of disagreement exists over whether they involve alleged errors of fact or law. The difference matters, because a federal judge owes no deference to the ALJ’s legal determinations. The Chenery Doctrine and its relevance to social security litigation offers an important illustration. The agency frequently argues that anything in the record that arguably supports the ALJ’s decision, not just the evidence the ALJ actually marshaled to support her findings, should count in the substantial evidence calculus. But the Chenery Doctrine limits a court’s review to the rationale the agency actually gave when it acted. Representing the majority view, the Seventh Circuit has rejected the SSA’s argument and insists that Chenery precludes reliance on post-hoc rationalizations to support an ALJ’s decision. In contrast, some courts, suggesting that Chenery does not apply in social security cases, ask “whether the ALJ’s decision is supported by substantial evidence based upon the record taken as a whole,” regardless of what the ALJ actually discusses.

A nearly 50 percent national remand rate can conceivably indicate widespread disregard of the substantial evidence standard only if the claimant-friendly characterizations of these issues are pretextual — that is, courts describe flaws as legal errors to cloak a searching review of factual findings — or manifestly wrong. Some probably are. But other issues, such as the Chenery Doctrine’s application, are complicated and contestable.

Different Institutions
If the nearly 50 percent national remand rate does not necessarily suggest that...
federal judges exceed their authority when deciding appeals, does it confirm that agency adjudication is fundamentally and deeply flawed? We do not think so. As institutions, federal courts and the agency differ considerably, in terms of their goals and resources, their legal commitments, and their perspectives. However well or poorly the agency adjudicates claims, an attempt to measure its performance by the national remand rate is misplaced.

On one level, the agency and the federal courts share the same goal: the accurate and efficient implementation of social security disability policy. But their goals diverge on another level. ALJs should strive for quality decision-making, but they also must meet quantity goals. The agency is rightly concerned with adjudication unjustly delayed, and it has endured constant scrutiny for its claims backlog. The importance of production targets gets underscored by “How MI Doing,” a website that tells each ALJ how her rate of decision-making compares to other ALJs in the same hearing office, the same region, and nationally. For the most part, federal judges face much more modest pressures to generate social security decisions quickly, and the sort of peer comparison that How MI Doing gives ALJs is unheard of.

A resource imbalance deepens this institutional difference. A claim that gets denied at the hearing office level will likely command no more than 11 hours of ALJ and decision writer time from start to finish. Federal judges we interviewed estimated that they and their clerks spent a good deal more time on each case. As one ALJ explained to us, an ALJ adjudicating 40 to 50 cases per month and a district judge and her clerk “picking apart a case for a week” have fundamentally different jobs. Before making any judgment about the quality of ALJ decision-making, a federal judge needs to account for the vast gulf between the resources she and the ALJ can invest in a single decision.

Another institutional difference involves legal commitments. The agency has to administer a national program and is committed to its consistent implementation. For this reason, and because of the administrative complexity of accounting for district court nuances when drafting and revising decisions, the agency instructs ALJs and decision writers “not to consider any district court decisions” as sources of legal guidance. The agency may acquiesce in a circuit decision, but most circuit decisions do not trigger the acquiescence process, and it takes time when it does go forward. In contrast, district courts must follow circuit precedent, and district-level case law will often have persuasive force. These different commitments surely generate remands, but not ones necessarily due to dysfunction in agency adjudication. An ALJ could protect a decision from remand if she carefully followed trends in district-level case law, but doing so would thwart her institutional commitment to the agency’s consistent administration of a national program.

Finally, their different vantage points give ALJs and federal judges very different perspectives on claims. ALJs handle a much larger sample of cases than federal judges, and ALJs get their cases earlier in the adjudication process. Presumably the ALJ sees a wider array of types of impairments, with more easy cases. These should get weeded out well before they reach a district court. An ALJ may therefore have a different “cutpoint” for what she believes qualifies as a disability — roughly, the line the ALJ would draw along a given dimension between disability and no disability — than a federal judge. These different cutpoints will give ALJs and federal judges institutionally determined understandings of disability that differ. One ALJ who had previously served as an OGC lawyer described this phenomenon aptly to us. What seemed like a “slam dunk” case for a remand in district court changed when she became an ALJ. “If federal judges saw more of what ALJs grant,” this ALJ told us, “they would appreciate why a case seems more borderline to an ALJ.”

Other institutional differences also matter and confound any attempt to judge ALJ competence based on the national remand rate. The government lacks representation at the hearing office level, for example. ALJs must probe for weaknesses in the claimant’s case, and may therefore develop a skeptical eye that federal judges, benefiting from OGC lawyers’ defense of ALJ decisions, may not have. Factors like these may produce a high national remand rate that has as much to do with contrasts between two different institutions as it does with deficits in agency performance. Unless one could say with confidence that one institution’s commitments, goals, and perspectives are normatively inferior to the other’s, judgments about the remand rate, viewed statically, are hard to draw.

**VARIATIONS IN DISTRICT COURT REMAND RATES**

While the national remand rate yields little useful information about the stringency of judicial review or the success of agency adjudication, the stark disparities among district-level remand rates have more instructional value. Institutional factors that might be expected to produce an irreducible core of court remands do not vary from one district to the next. Yet outcomes in social security appeals differ strikingly. From 2010-2013, for example,
the Eastern District of Arkansas remanded 20.8 percent of all appeals, while the Southern District of New York remanded 76.0 percent. Why do claimants in Albany (53.1 percent remand rate) win much less often than claimants in Brooklyn (71.9 percent)? Should Pasadena claimants (50.6 percent) prevail more often than their counterparts in Fresno (37.6 percent)?

Outcome consistency, or the notion that like cases ought to be treated alike, is an important value that any system of adjudication ought to serve. ALJs and others have attracted criticism for perceived failures to honor this value. Do federal judges deserve similar criticism? Our report’s third major chapter tackles this question.

**Explanations for District-Level Variations**

Using administrative data provided by the agency and additional information from federal court docket reports, we tested a number of hypotheses that might explain why district-level remand rates vary as significantly as they do. Our findings include the following, among others:

- Not surprisingly, circuit boundaries explain a good deal — about 45 percent — of district-level variation in remand rates. Contrasting precedent that districts must follow, as well as “softer” influences like the tone a circuit sets, apparently matter quite a lot to outcomes in district courts.

- Districts with unusually high social security caseloads do not appear to manage their dockets by remanding cases at notably low or notably high rates. Likewise, overall caseloads do not have much of an association with decision patterns in social security cases. A move from 350 cases pending per judgeship to roughly 550 is associated with an increase in the remand rate of only 0.5 percentage points.

- Several agency officials we interviewed faulted individual judges with idiosyncratic views for a district’s particularly high remand rate. But to a striking degree, we found that judges within a district tend to march in step with one another in social security cases. There were only 21 judges — out of the 1,300 in our data — who single-handedly moved their districts’ remand rates by five percentage points or more. And 81 percent of all judges had remand rates within one percentage point of the average for other judges in their district.

- We did not find any relationship between the quantity of decisions a hearing office generates and the likelihood of a remand from the district to which that hearing office’s decisions are likely appealed.

- In some districts, district judges handle all social security cases. In others, magistrate judges shoulder the task. In still others both types of judges work on these cases. Such differences do not explain district-level variations.

- We hypothesized that, in districts with strong labor markets, fewer people who could work opt to pursue benefits instead. If so, their self-selection out of the pool of claimants might improve the general strength of claims that do get filed. The agency would be able to decide such claims more easily, leaving fewer weak agency decisions for federal courts to vacate. Our data supported this supposition. Increases in the employment-to-population ratio within a district four years before the year of the district court’s decision are associated with a substantial decline in the remand rate. (This estimate is statistically significant at conventional levels, but it is imprecise. Estimates for the employment-to-population ratio in other years — three, two, and one year before the decision — were statistically insignificant but sizable in magnitude, with mixed signs.)

**Regional Differences in the Quality of Agency Decision-Making**

Our labor market findings prompted another hypothesis. In theory, regional differences in labor market conditions should not alter the makeup of district courts’ social security dockets. Claims pass through four layers of review within the agency. At each step, the agency’s policy is to measure claims against a single national standard, with some variation here and there prompted by the agency’s acquiescence to circuit case law. If this review worked perfectly nationwide, it should eliminate regional differences in claim quality generated by labor market variation by the time the Appeals Council finished its review of claims. Labor market variation would have no impact on the quality composition of cases left for claimants to file with the federal courts.

Our intuition, however, is that internal agency review of claims is unlikely to be uniform across the country. Some hearing offices probably generate better decisions than others. Analysts in one division of the Appeals Council might review appeals slightly differently than others. If we are right, regional differences in the quality of inputs for district court decision-making could exist and contribute to district-wide impressions federal judges share of ALJ decisions. If Pasadena ALJs happen to generate weaker decisions on average than their colleagues in San Jose, for instance, and if the Appeals Council remands decisions from the two hearing offices at about the same rate, then a potential appeal to the Central District of California from a Pasadena ALJ will be stronger on average than an appeal to the Northern District of California from a San Jose ALJ.

If pools of appeals from various hearing offices differ in composition across districts, then federal judges in one district would review a different body of ALJ decisions than federal judges in a second district, even if the districts are within the same circuit. This phenomenon could help determine district-specific judicial attitudes toward the quality of agency adjudication. This
story could at least partially explain why variation in remand rates does not seem to be driven by individual judges’ idiosyncratic approaches to social security appeals, but does vary in a manner not totally explained by circuit boundaries.

We could not thoroughly test this idea with the data available to us. An extensive qualitative investigation of three districts, however, strengthened our conviction that this hypothesis about uneven agency decision-making merits further investigation. We selected three districts — one with an unusually high remand rate and one with an unusually low one, as well as a district with a rate close to the median — and conducted an extensive array of interviews with federal judges in those districts and OGC lawyers who litigate there. We also interviewed ALJs and decision writers in hearing offices that generate many of the appeals to each district.

These conversations revealed obvious differences. ALJs and decision writers in the hearing office within the low remand district described their work environment very favorably. They reported good morale, stable leadership, and a constructive relationship with federal judges. ALJs used an organized process to derive feedback from district court decision-making. The federal judges in the low-remand district gave the agency mixed reviews, but only one strongly criticized the quality of ALJ decisions.

The average remand district came off as just that — average in every respect. In contrast, a deep, palpable strain of discontent ran through our interviews with high remand district personnel. ALJs described unstable, volatile hearing office management and poor-quality decision writing. They expressed negative attitudes toward judicial review; as one ALJ insisted, the district court was an “anti-ALJ bench.” The hearing offices within the district lack a structured process for learning from district court decisions. Most of the federal judges we interviewed described what one called an attitude of “significant distrust” toward agency decision-making. ALJs have “very little credibility,” a federal judge told us.

**DISTRICT COURTS FUNCTION AS COURTS OF APPEALS FOR SOCIAL SECURITY CLAIMANTS. THE FEDERAL RULES OF CIVIL PROCEDURE, DESIGNED FOR LITIGATION IN THE FIRST INSTANCE, DO NOT WORK WELL FOR THESE CASES. DISTRICTS AND EVEN INDIVIDUAL JUDGES HAVE THEREFORE FORGED THEIR OWN IDIOSYNCRATIC WORKAROUNDS.**

Common sense dictates that the health of a working environment can have an important impact on the quality of work performed. If this is so, and if we did not by coincidence stumble upon the only hearing offices that contrast sharply, then the average strength of an appeal might differ from one hearing office to the next.

Interviews are no substitute for quantitative analysis. Our sense that agency decision-making of uneven quality produces inputs of uneven quality for judicial review needs further study. But at least two empirical findings point in the hypothesis’s direction. First, recent research suggests that the Appeals Council does not adjust its review to account for differences in ALJ decision-making.10 If so, the Appeals Council may not successfully filter out poor quality decision-making from problematic hearing offices, and federal judges in high remand districts may in fact be reviewing poorer quality decisions on average. Second, our finding that judges within a district tend to march in lockstep gestures at the existence of district-wide attitudes toward social security cases. A common experience judges within a district have with ALJ opinions of routinely high or low quality may explain, at least partially, why these attitudes exist and why they vary. It also might explain why a district’s remand rate remains consistent over time, as we also determined. Once an attitude forms, it may resist change, and it may exaggerate or amplify actual differences in the strength of appeals. Federal judges used to uneven ALJ decisions might well search all the more for errors that confirm their background impressions. Conversely, a judge used to high-quality decisions may give a weaker one the benefit of the doubt.

**PROCEDURAL RULES**

Much of what ails disability benefits adjudication and litigation resists an obvious cure. But one problem is readily avoidable. The procedural governance of social security litigation in the federal courts is chaotic. District courts function as courts of appeals for social security claimants. The Federal Rules of Civil Procedure, designed for litigation in the first instance, do not work well for these cases. Districts and even individual judges have therefore forged their own idiosyncratic workarounds. A kaleidoscopic proliferation of procedures is the result, even though social security litigation involves claims governed by a national body of law and emerges from a national administrative process.

Although we could not quantify the costs of these procedural differences, our interviews left us convinced that they create needless complexities. Lawyers with a regional or national practice constantly have to change how they litigate otherwise identical claims based on a district’s or even an individual judge’s particular procedural preferences. The differences are often picayune — one district allows 20-page briefs, another 18 — and thus
of procedural commentators. This arti-
cism from some of the most prominent
rule, district-wide general order, and case
This sort of balkanized regulation by local
parties file their merits briefs, and so on.
limits for briefs, the agency's obligation
social security cases — a "motion for order
In still other districts, local rules make
judges follow other districts' lead and
specialized procedural rules for
social security litigation.

Rules and orders conflict over a host
of other issues as well, including page
limits for briefs, the agency's obligation
to file an answer, the order in which the
parties file their merits briefs, and so on.
This sort of balkanized regulation by local
rule, district-wide general order, and case
management order has attracted criti-
cism from some of the most prominent
of procedural commentators. This arti-
cle's length does not permit a complete
rehearsal of their many objections, but one
finds particular purchase for social security
litigation. Local rules and the like create
"legal clutter," or "background noise" of
procedural variation that consumes time
and distracts lawyers from focusing on the
merits. A lawyer practicing in different
districts or before different judges within
the same district may constantly have
to toggle back and forth among various
requirements for the same task.

This procedural clutter is more than
a mere annoyance, as an example illus-
trates. Cases routinely raise the same
issues, so rather than reinvent the wheel,
lawyers often borrow text from one brief for
another. By testing arguments in a number
of cases and redeploying them, lawyers can
raise the quality of their representation.
Moreover, these practices lower the cost of
social security litigation, both for claim-
ants and the government. OGC lawyers
rarely spend more than three days writing
a merits brief, and claimant representatives
must work on a tight budget. Shortcuts
save invaluable time. But procedural vari-
ation makes economizing difficult, forcing
lawyers to refashion even a successful argu-
ment to fit a judge's procedural parameters.
Not only does such redundant drafting
take time, it also may compromise the
quality of advocacy. And all to a question-
able end, so that a brief will not exceed 18
pages instead of 20, or so that an argument
fits in a joint submission instead of an ordi-
ary merits brief.

SUGGESTED REFORMS
We concluded our report with a number
of suggested reforms, offered to make
social security litigation more efficient,
to improve agency-court communication,
and to help the agency improve its stand-
ing in the federal courts. What follows are
our suggestions premised on an assump-
tion that Congress will not dramatically
increase the agency's budget for hearing
offices and ALJs.

Specialized Procedural Rules
After extensive review and input from a
variety of stakeholders, the Administrative
Conference has adopted one of our
suggestions, a proposal that the Judicial
Conference of the United States promul-
gate a set of specialized procedural rules
for social security litigation. The Rules
Enabling Act delegates authority to the
U.S. Supreme Court, acting through the
Judicial Conference, to promulgate rules
of practice and procedure. Although
these rules are typically trans-substan-
tive, the Rules Enabling Act permits a set
of rules developed for a particular category
of litigation when that litigation's unique
procedural needs warrant them. The
sheer number of social security cases in
the federal courts, their awkward fit with
the Federal Rules of Civil Procedure,
and the needless inefficiencies that the
proliferation of different procedural
workarounds create justify this special-
ized regime of procedural governance.
As of this writing, the Administrative
Conference's recommendation has gone
before the Advisory Committee on Civil
Rules for consideration.

Consistency in Social Security Law and Policy
Other reforms would also improve social
security litigation considerably. The
agency could make better use of tools at
its disposal to reduce inter-circuit incon-
sistencies in approaches to various issues
of social security law, and to reduce diver-
gence between its view of governing law and policy and what prevails in the federal courts. For instance, the agency could appeal more district court decisions. An idiosyncratic treatment of an issue of social security law might persist in a particular district. The agency discourages ALJs and others from looking to district court case law, so the gap between the district’s view of the issue and agency policy will remain. An appeal to the circuit could correct the district’s approach to the issue, or it might result in an acquiescence ruling requiring relevant agency personnel to follow the circuit’s precedent.

The agency almost never appeals from a district court decision, however, due in large measure to the gauntlet the agency must run that ultimately requires Solicitor General approval before it can pursue an appeal. We thus recommend that Congress give the agency independent litigating authority. Not only would this statute relieve U.S. Attorney’s offices of their tangential but confusing role in social security litigation, but it also would remove significant roadblocks that have discouraged the agency from seeking clarification in the courts of appeals.

Another tool would require a change to Appeals Council practice. The Appeals Council could select a small number of cases out of its voluminous docket for decision by full-dress opinion, issued after consideration by a panel of adjudicators. These cases would involve issues that have created inconsistent decisions in the federal courts, or ones where prevailing case law conflicts with the agency’s preferred understanding of policy. Such decisions would receive Chevron deference from the federal courts, a doctrine designed in part to produce greater uniformity in the judicial interpretation of federal statutes. Were the Appeals Council to act on this recommendation, one urged previously by the Administrative Conference, it should craft a process that would give claimant representatives and concerned organizations ample opportunity to participate in any case that might produce a precedential decision.

**Improving Communication**

Another suggested reform responds to our sense that federal judges know little about internal agency practices, and to a concern that ALJs receive too little feedback from district courts. A lack of information flow might cause unnecessary confusion. Several federal judges we interviewed deprecated the boilerplate text they see in ALJ decisions, for example, without an apparent understanding that the agency devised this FIT-generated text to encourage more consistent decision-making. Conversely, a number of ALJs dismissed the instructional value of court remands, and decision writers rarely learn from them.

We propose that each district form a social security standing committee to ensure a better flow of information between the courts and the agency. Federal judges could explain their concerns about recurring issues, such as the use of problematic boilerplate. Agency lawyers could explain why the boilerplate remains or what steps have been taken to improve it. ALJs could explain why record development is challenging, and federal judges could suggest what might improve the situation. Claimant representatives and OGC lawyers could get feedback on briefing and procedural concerns. OGC lawyers could explain the RVR process to judges and thereby make sense of last minute extension requests that may otherwise prove confounding. All could discuss what local rules and standing orders work and which ones cause problems.

**Suggestions for the Agency**

We directed our last several suggestions to the agency itself. Most importantly, we suggest that the agency follow up on our hypothesis that some district-level variation in remand rates results from uneven decision-making by ALJs that the Appeals Council does not smooth out. If our hypothesis proved right, it could prompt significant changes to Appeals Council review that could drain some of the most flawed ALJ decisions from the pool of potential court appeals. We also suggest that the agency experiment with initiatives designed to make better use of feedback from district courts. The low remand rate district we studied had formalized a process whereby it mined district court decisions for useful guidance. The agency could try a version of this process at more hearing offices. The agency could also assign the decision writer who drafted the erroneous decision the first time around the same case on remand, to enable the decision writer to learn from federal court review.

Each of these changes would be helpful. But we believe that only a dramatic reduction in ALJ caseloads could permit significant, across-the-board improvements in decision-making quality sufficient to cause the federal court remand rate to plummet. To avoid a spike in the backlog of claims, the size of the ALJ corps would have to increase. Ultimately, this may be the most important reform of all.

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1 For previous studies of social security disability litigation in the federal courts, see Harold J. Krent & Scott Morris, Inconsistency and Angst in District Court Resolution of Social Security Disability Appeals, 57 Hastings L.J. 367 (2016); Jerry L. Mashaw et al., Social Security Hearings and Appeals (1978). Scrutiny of disability claims adjudication has come from a variety of sources, including Congress, government inspectors general, academic commentators, and others. An excellent recent study is Harold J. Krent & Scott Morris, Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms (Apr. 2013).

2 “Claimant representative” is a term used to refer to those who represent social security claimants. A claimant representative does not have to be an attorney to represent someone in agency proceedings. See 20 C.F.R. §§ 404.1705 and 416.1505. All of the claimant representatives we interviewed, however, litigate in the federal courts and are attorneys.


4 To remain brief, this article does not include extensive citations or all of the support we marshal in our report. The report contains this information and much more detail.


6 The proposal has been docketed and is also posted under the uscourts.gov website’s Federal Rules of Practice & Procedure, under Docket No. 17-CV-D. We understand that the proposal will be considered in the future by the Civil Rules Committee.

7 In several so-called “prototype” states, claimants cannot request consideration and instead take their claims directly to ALJs.

8 Social Security Administration, FY2017 Budget Justification, Table 3-34, available at www.ssa.gov/budget/FY17Files/2017LAE.pdf.

9 The SSA now uses the term “symptom evaluation” in lieu of “credibility.” Soc. Sec. Ruling 16-3p.

10 More than four dozen acquiescence rulings have been issued. Nine are in effect in the Ninth Circuit. No other circuit has generated more than six. See generally https://www.ssa.gov/OP_Home/rulings/ar-toc.html.


15 Elder v. Astrue, 529 F.3d 408, 413 (7th Cir. 2008).

16 Ernest Gellhorn & Glen O. Robinson, Perspectives on Administrative Law, 73 Colum. L. Rev. 771, 780 (1975).


18 E.g., Spira v. Astrue, 628 F.3d 346, 353 (7th Cir. 2010).


20 Hanson v. Colvin, 760 F.3d 759, 761 (7th Cir. 2014).


24 Memorandum to All Administrative Law Judges and All Senior Attorneys from Debra Rice, Chief Administrative Law Judge, (Jan. 11, 2013), at 2.


26 We appreciate that most ALJs and federal judges make their decisions based on a good-faith effort to apply the law to their best understandings of the facts. Within the legal regime for disability determinations, however, there is room for judgment calls, and impressions of claimants and their needs likely influence decision-making.

27 The Middle District of Florida was the median district, with a remand rate of 41.4 percent.


29 Krent & Morris, Inconsistency and Angst, supra note 1 at 396.

30 David Hausman, Consistency and Administrative Review, July 21, 2016, at 48 (Draft, on file with authors).

31 S.D. Iowa Local R. 56(i); see also E.D. Mo. Local R. 56-9.02.


33 D.N.H. Local R. 9.1


37 ACUS Recommendation 87-7, A New Role for the Social Security Appeals Council, 1 C.F.R. § 305.87-7(1)(1995).
Bullet points, yes. Unnecessary dates, no.

Our writing guru, Joseph Kimble, simplifies and adds punch with some fairly quick fixes. He notes: The opinion deals with Defendant’s motion to quash Plaintiff’s notice of deposition. Before the excerpt below, the opinion had already set out the date of Plaintiff’s medical treatment, May 31, 2016, and explained that she alleged unlawful billing practices by Mercy Hospitals and its billing company, MRA. The judge ultimately limited discovery to matters that occurred after Mercy hired MRA. The various items on the left — four of which are omitted to save space — cry out for a list. Bullets work nicely when the items have no rank order. As for the dates, they seriously distract.

Original

Plaintiff served her Rule 30(b)(6) notice on April 24, 2017. . . . The 30 topics listed in the notice relate to: Mercy’s policies and procedures for billing auto insurance medical payments coverage, asserting medical liens, and obtaining patient consent (known as “Consent and Agreement” forms) for patients with health insurance during the periods of December 13, 2013 (the date on which Mercy hired MRA) to the present, and for the three-year period prior to December 17, 2013; Mercy’s billing for Plaintiff’s medical treatment on May 31, 2016; negotiations between MRA and Mercy prior to December 13, 2013; . . . [four items omitted]; and complaints received by Mercy during the period of December 17, 2013 to May 31, 2016 regarding the billing practices described above.

Better

Hoops served her Rule 30(b)(6) notice a month ago. It lists 30 topics related to the following:

• Mercy’s policies and procedures — both before and after December 2013, when Mercy hired MRA — for billing auto-insurance medical-payments coverage, asserting medical liens, and obtaining patient consent for patients with health insurance;
• Mercy’s billing for Hoops’s medical treatment;
• negotiations between Mercy and MRA before MRA was hired; . . . and
• complaints that Mercy received after it hired MRA and before Hoops’s treatment date about the billing practices described above.

Redlined

1. Generally prefer names. The opinion would have said earlier, “The plaintiff, Cynthia Hoops.”
2. The date doesn’t matter.
3. Better to set up the list with introductory words.
4. Use a hyphen with a phrasal (compound) adjective.
5. Unnecessary detail. The form is never mentioned again.
6. A multiword preposition. These gremlins abound in legal writing. They can usually be replaced with a one-word preposition.
7. The opinion seemed inconsistent on the exact day. But it’s probably not needed at this point anyway.
8. Another multiword preposition — and one of the most common. Always use before.
9. Again, the opinion had already identified the treatment date.
10. There are ten dates in the full list. After the one in the first bullet, I think most of them — and probably all of them — can go. The trouble, of course, is that the reader has to keep going back and tying dates to events.
11. Strongly prefer on or about to regarding. Imagine a play called Much Ado Regarding Nothing.

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"UNWARRANTED." Few words mean as many things to hard-working judges. "Unwarranted" can mean that an action is "unauthorized," as in "not permitted" or affirmatively "forbidden." It can mean that an action is "unjustified," as in inadequately or not explained. Or it can be a polite way of saying that an action is just plain dumb. Which takes us to Barry Friedman’s important book about policing, *Unwarranted: Policing Without Permission.*

The book raises a lot of questions. But here’s the good news. The book also gives some concrete and clear answers to those questions and lays out a better framework going forward. And it is fun to read. Did you get that? A book on policing that is so well and clearly written that it is enjoyable to read. Our friends in the academy will forgive a judge for finding it hard to believe that this book came from an academic. It is that approachable, that practical, and that relevant to what judges do.

Friedman clearly means to emphasize "unwarranted" in the sense of "unauthorized," as in police searches or seizures done without the express advance permission of a judge’s order based on probable cause. But he also means to ask us whether the various police actions he describes, usually by recounting actual events ranging from the merely stupid to the tragic, are affirmatively prohibited, not merely unauthorized; unexplained, badly explained, or even hidden; or so ineffective as to be, well, stupid. *Unwarranted* was not written just for judges. Far from it. It’s meant for judges, to be sure, but also for all types and levels of legislators and law-enforcement policymakers. It is also meant for anyone involved in or affected by law enforcement. That, as the book makes clear, is everyone.

Friedman has specific and trenchant criticisms of judges’ failures to help control “unwarranted” police actions. He’s blunt, but he backs up his criticisms with case law, data, and argument. The judiciary, he says, has done a “perfectly appalling job of one of the chief tasks we have given them: protecting our basic liberties. . . .” (p. xiii.) The “judiciary should be ashamed,” because when “[c] onfronted with situations in which the police have done the most inappropriate and untoward things, too many judges simply cannot bring themselves to call foul.” (p. xiv.) Fortunately, Friedman also has specific ideas on how judges can clarify and simplify the legal issues to be decided, can decide hard cases more accurately and sensibly and without repeatedly making bad law even worse, and can become forces for positive change.

The book is the product of a practical scholar’s decades spent studying policing, the Constitution, and the courts, and how they intersect and interact. The Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics at New York University Law School, Friedman is a recognized authority on constitutional law, policing, criminal procedure, and the federal courts. He is the founding director of NYU Law’s Policing Project and the reporter for the American Law Institute’s *Principles of Law: Policing.* He publishes regularly in the nation’s leading academic journals and in the popular press.

In *Unwarranted,* Friedman lays out a path to revise our framework for thinking about the two universal questions of policing. Those questions arise from the government’s monopoly on the use of force and surveillance for law enforcement. What force, and what surveillance, are “warranted,” and when? What amounts of force, what invasions of privacy, are permitted, are properly authorized and explained, and are efficacious and wise? He uses the revised frameworks to examine the twin questions in the context of modern policing’s focus on technology and terrorism. In the process, he unpacks a series of answers to the two questions. These answers are important to the work we all know we need to do. But we have collectively shirked the work because it is difficult, it can be unpopular, it lacks a natural constituency, and that all adds up to a lack of political and judicial will.

Friedman has a clear idea of what needs to be done. We need to bring the democratic governance that we insist on in so many other aspects of our lives to the regulation of policing. The problem of “policing without permission,” he states at
the beginning of the book, is out-of-control policing caused by the failure of the executive, legislative, and judicial branches at all levels to provide clear advance "guidance to policing agencies as to what they are to do (or refrain from doing)." (p. 16.)

We have detailed regulations that provide clear advance rules for many areas of our lives. As Friedman points out, Florida has an administrative code that specifies in detail the classifications for different kinds of tangerines. California has a code of regulation for barbers and barbers’ colleges, and precise rules for the sites of newspaper-dispensing machines in roadside rest areas.

"So ask yourself," he challenges us, "which is more important: regulating vaginal and anal searches of citizens by the side of the road, or specifying the size of newstands and classifying Sunburst Tangerines?" (p. 16.) The question answers itself.

The goal of “[d]emocratic policing is the idea that the people should take responsibility for policing, as they do for the rest of their government, and that policing agencies should be responsive to the people’s will. . . . [W]hat democratic policing requires, at bottom, is that rules are in place before policing officials take action, that the public has an opportunity to participate in the formulation of those rules, and that the rules are available for all to see." (p. 27.)

Why is this important? “Really protecting our liberty — our security from overreaching by the government — means having rules in place that guide (and, yes, limit) government, so that it does not react badly, or overreact, when things are going wrong.” (p. 25.) Having rules in advance is essential not only to security and liberty, but also to efficacy, by which Friedman means that policing is done in an effective and efficient way “. . . most calculated to keep us safe and secure while intruding into our liberty no more than necessary.” (p. 26.)

So how did we get to this state of largely unregulated, out-of-control policing? Friedman takes us to the early days of policing, starting with the American Revolution and the 18th century law-enforcement model of a “loose collection of sheriffs, constables, and night watchmen,” who “often lacked the most basic tools to do their job…. “(p. 35.) Urban police forces came from a mid-1800 spike in perceived civic disorder, but these early forces were only loosely modeled on Sir Robert Peel’s London “bobbies.” The American version of the urban police force was made up of “ill-paid” men “given a uniform, club, handcuffs, and a whistle, and sent out to patrol for crime.” (p. 36.) The temptations to corruption were large and the incentives to resist small. Things became so bad that, finally, a group of “do-good New York citizens appalled by sprawling vice” pressed for an investigation that uncovered a “level of violence and graft that was breathtaking.” (p. 37.) Incompetence and brutality were compounded by widespread electoral fraud facilitated by the police, who were beholden to New York City’s infamous Tammany Hall political machine. The solution was to separate the police from the politicians by creating a professional, autonomous, quasi-military, civil-service-protected, bureaucratic police force. But this independence, a laudable reform in some ways, is one reason that we are reluctant and unaccustomed to govern or restrain the police. It is, Friedman explains, “one of the reasons we don’t have democratic policing.” (p. 38.)

Then came the 1960s, when “it all went south.” In the chaotic times after Martin Luther King’s assassination, the 1968 Democratic Convention in Chicago, the Viet Nam War protests, and campus unrest, “the facade of professional policing crumbled.” (p. 41.) A rise in crime rates and violent protests and demonstrations sparked fear; overzealous police responses sparked revulsion. One attempt at reform that lasted only a short time was an experiment in “community policing” intended to “restore a lack of trust brought about by police misconduct.” (p. 41.) That experiment folded in the face of skepticism about whether it was so amorphous and so all-encompassing as to include everything, including a lot that had little to do with policing. Community policing also had a bleaker side called “order maintenance policing,” (p. 44.) which tried to avoid the disorder-breeding-disorder syndrome by cracking down on nuisance-type offenders, like turnstile jumpers and squeegee men, and by frequently using stops-and-frisks. (p. 44.) The lack of trust between the police and the policed remained and even worsened.

Two more sets of events increased the seemingly inconsistent lack of trust in the police, and the increased reliance on the police. One set was the events of Sept. 11, 2001. Those events led to the focus on trying to predict and deter potential terrorists in advance, to prevent them from acting in the first place. That focus led to a proliferation of new policing agencies and increases in intrusions, surveillance, and secrecy. The depth and breadth of the policing-agency sprawl was fueled by the exponential growth in new technologies that could collect and search information on a scale unimaginable a few short years ago. The fear of terrorism led some to shrug in resignation at the seemingly inevitable loss of privacy and liberty in the interests of security and safety.

The second set of events is best seen in the series of sad headlines that appear with each fatally violent encounter between police and members of the public, often minorities. Both civilian and police deaths have attracted headlines and passionate responses.

Given these events, finding better answers to the twin questions of force and surveillance, answers not mired in legal doctrines formulated before policing and its technology tools fundamentally changed, has taken on a new urgency. Friedman wryly observes that when he first began to write the book in 2012, no one cared much
about policing. (p. 325.) There was little public discussion. Today, in 2017, it is the frequent stuff of headlines, newscasts, and public outcries, if not debates. Events have given the work a spotlight and a momentum that may be cause for optimism.

But before we get carried away, Friedman reminds us how badly we have failed in the past. We don’t have an encouraging track record. The shift from reactive policing — finding and punishing those who have committed crimes — to predictive policing to prevent the crimes, has in turn shifted the emphasis to surveillance and information-gathering. But neither reactive policing nor predictive policing has been adequately regulated or made accountable. We have not made meaningful steps to achieve the proper amount of transparency and the right mix of guidance and autonomy.

So who’s to blame? First up: “legislatures that won’t legislate.” (p. 51.) Why don’t our democratically elected representatives enact statutes or ordinances or regulations that go beyond broad and unhelpful directives to go out and enforce the law? Why don’t legislatures enact rules that would help by “telling police officers and agents how to exercise their incredibly broad discretion,” while recognizing that wide discretion is both “important and unavoidable” to policing? (p. 60.) First, the police are powerful and effective lobbyists for resisting regulation. Their “close cousins, prosecutors,” (p. 61.) lend them great support. Their shared goal is to let the police do their jobs with less regulation and more power. Second, the people most adversely affected by policing are often minorities, less affluent, and usually less capable of effective counter-lobbying. And finally, the most powerful political pressure comes from the voting public’s fear of becoming a crime victim, not a policing victim. The result: Elected officials and legislators don’t have incentives to supervise the police. To the contrary.

And what about the police themselves? Why don’t they follow the common model of executive agency rule-making, by publishing for public comment rules to govern policy choices? Friedman explains that while most police forces do have some internal rules, they are enacted without public input or awareness. And these internal rules are “haphazard” in covering many of the most important and difficult areas, such as the use of informants, consent searches, SWAT teams, or drones. (p. 66.) It’s not mainly because drafting rules would impose a difficult burden on the many small police forces among the 15,000-plus forces around the country. Some police forces have rules on different subjects that can be used as models, tailored to the specific place. Repeated reinvention of the wheel is not required. What is required is effective, consistent pressure or incentives to enact rules that the public has a role in shaping, to address the most intrusive and harmful uses of force and surveillance for and by law enforcement. That’s what has been, and still is, lacking.

Finally, and most at fault, are the “courts that can’t judge.” (p. 73.) He’s talking about us. What makes us so bad at something so important? First, we have a role that is inherently limited. We decide after the fact whether a particular set of facts and acts is consistent with the Constitution. But even within this limited role, we get a resounding D minus. D at best. The best evidence of judicial deficiency? The decisions we’ve reached and the results we’ve allowed to stand and reoccur.Friedman describes how the direction of court decisions since the 1970s has been to leave the police free to do what they did and want to do.

The book carefully explicates the case law that diluted the exclusionary rule prohibiting the use of illegally obtained evidence in trial; judges often and understandably dislike the rule because they see only instances in which the tactics worked and the police “got the bad guy.” Judges do not see the many cases in which violations of the exclusionary rule occurred and proved ineffective. (p. 82.) The effect of this “biased sample” is that judges often allow what the police did in order to avoid releasing a guilty defendant. This in effect permits the police to keep using the same tactic in subsequent cases, without any information about whether the tactic even works in the vast majority of cases. The result is to remove the exclusionary rule as a meaningful limit to police action.

What about money damages against police forces? No prettier story. Judicial distaste for punishing police is expressed through the immunity doctrines, which are applied to avoid holding police liable. For example, cases abound in which judges refuse to find police officers liable for money damages because there was not a decision dealing with virtually the exact same facts from an appellate court in the same jurisdiction providing fair notice. (p. 85.)

The case law also has developed to dilute the search-warrant and probable-cause requirements. Judges don’t insist on search warrants even when they could be obtained. (pp. 117–138.) Friedman exposes significant concerns about the Supreme Court’s movement away from requiring warrants and probable cause as bad history, bad law, and really bad policy. (pp. 125–139; 147–154.) We judges have forgiven police failures to get warrants and we’ve forgiven the absence of probable cause by substituting a “reasonableness” standard. (p. 149; Terry v. Ohio, 392 U.S. 1 (1968)). You may disagree with how Friedman reads the case law, but you should hear him out.

Now, to a happier side of the street. There are solutions to be had, solutions that can help judges. Briefly, here are some.

First, we’ve been thinking about searches and seizures in ways that have obscured the purpose of the warrant and probable-cause requirements and have both complicated and diluted their application. Back to first and basic principles. Cause is nothing more than a good reason before the intrusion of a search or a seizure. Probable cause provides the reason for a
particular search and ensures that an officer is not arbitrarily or discriminatorily singling someone out. A warrant ensures that the officer's judgment as to cause is not biased. A warrant is nothing more than getting approval from, after giving good reasons to, a neutral third party, a judge. These are commonsense ways of thinking about words that get tossed around with little thought about what they in fact mean and why they are important.

Friedman continues this commonsense and simpler approach by dividing searches into two categories, *suspicion-based* and *suspicion-less*. The first kind of search occurs when the police believe that a particular person, known or unknown, is about to or has committed a specific crime, and the police are trying to learn the facts needed to put the perpetrator away. That kind of search is largely reactive. When the police search in reaction to information that makes them suspect a person of a particular crime, the Fourth Amendment tells us what is needed: probable cause and a warrant. Here, technology is on the side of requiring warrants more often, because electronic transmission of information has made it much easier and faster for police officers in the field to get a warrant.

When, as is increasingly the case, the search is *suspicion-less*, a different set of protections kick in. We've been subjected to suspicion-less searches if we've gone through an airport recently, or been stopped at a roadblock or checkpoint. These searches are intended to prevent criminal activity from occurring in the first place, by making it harder for terrorists to endanger airplanes, or for human or drug smugglers to carry or deliver their contraband. These searches also require protections and rules to ensure that they are not arbitrary or discriminatory. What are those protections? A suspicion-less search must be governed by rules that make it universal (think TSA screening) or truly random (think of the times you've been subjected to a more intensive TSA search because the random-selection buzzer buzzed for you). These two categories are a helpful way of thinking about the Fourth Amendment. The framework may help make deciding cases both more predictable and more accurate.

Friedman brings this framework to the vexing problem of racial profiling in stops, searches, and seizures. He does not take an aggressive or hardline position that the Constitution prohibits singling out groups for more frequent searches or seizures. He does insist, persuasively, that the Constitution requires courts to require that the groups singled out in this fashion deserve that treatment. This in turn requires courts to require the government to produce evidence that the problem it is addressing is pervasive in that group, as opposed to others. That has not been a part of the judiciary's analysis of profiling issues. Instead, the analysis has been unsatisfactory and complicated, and difficult to apply. Again, you may not be persuaded, but the arguments deserve consideration.

The last section of the book applies these frameworks, this back-to-first-principles approach, to modern policing and its focus on preventing terrorist acts. The focus here is on technology, on surveillance, on huge government databases, and on privacy intrusions. There is a wealth of information about the "new" technologies that are out there and what they've done, and hints about what artificial-intelligence innovations might bring us in the near and far futures. Friedman takes on the profound disconnect between the modern internet information age and the doctrine that disclosing information to a third party waives any privacy right in that information. When all our information — all of it — is stored in a cloud that is not ours, the third-party waiver doctrine becomes nonsensical. But there it stands.

Here, too, Friedman sets out the beginnings of possible solutions. When the government collects data in bulk in a suspicion-less search, that is fine, as long as it is authorized in advance by law and everyone's data is collected in a nondiscriminatory way. If the government accesses specific data it has collected because of a suspicion that a particular crime has been or is about to be committed, that requires probable cause and a warrant. Again, a clarifying approach that sounds like it could work better than the approaches we use now.

In addition to bringing a clearer and cleaner framework to how judges can analyze the constitutionality of police approaches to stops, searches, surveillance, and seizures, there is one more thing judges can do. Courts can ask, in every case, whether a particular police action was authorized by an existing rule. If the answer is yes, courts must move to the constitutional question. But courts usually skip this first step. If there is only a broad grant of authority, Friedman urges courts to ask if that is enough to cover what the police did. If invasive new technologies are involved, like drones, that were simply not in existence when a broad grant of legislative authority was drafted, courts can plausibly require the government to get that specific legislative authorization before allowing the police action. In this fashion, courts at least invite, and at best insist on, specific legislative authorization for intrusive police actions. To make this work, Friedman pleads with judges to narrowly construe existing legislative authority if it does not speak clearly and directly to the type of police action at issue. By taking this approach, courts can facilitate what Friedman believes is critical: bringing democratic governance to policing.

This book cannot, and does not, do justice to much of what judges must deal with. There's relatively little on the use of force as opposed to searches and surveillance. The run-of-the-mill cases many of us handle are the swearing-match excessive-force claims, often brought by unrepresented plaintiffs. Friedman doesn't offer much here. But he does offer a lot that all of us — judges, lawyers, and all people living in this country — need to think about more, and better. At bottom, not reading this book is unwarranted.
Keeping the balance through changing tides

ATTORNEY GENERAL JEFF SESSIONS recently directed federal prosecutors to “charge and pursue the most serious, readily provable offense” against a defendant. This directive is largely consistent with the charging policy under former Attorney General John Ashcroft, but represents a significant departure from the charging policy articulated by former Attorney General Eric Holder, which allowed for much greater flexibility at the U.S. Attorney level in charging and plea bargaining.

The Sessions directive caused some furrowed brows in the defense and judicial communities. How will the new policy affect the administration of justice in federal courts? How will it affect justice systemically?

Many things contribute to a just system, but I believe one major component is when each branch of government exercises its role while acknowledging it is part of a tripartite system and respecting the roles of the other two branches.

The Sentencing Reform Act of 1984 (SRA) created a mandatory guidelines sentencing system, replacing a system in which judges had virtually absolute sentencing discretion. The guidelines system was designed in part to eliminate “unwarranted disparity.” Too often, a defendant’s sentence was determined by which judge’s courtroom he was in. Inconsistent charging and plea bargaining policies among U.S. Attorneys Offices also contributed to this “unwarranted disparity.”

Opponents of the SRA thought Congress overstepped its role in the tripartite system by prejudging how a defendant — yet to be identified, much less convicted — should be sentenced and by limiting a judge’s discretion to consider the defendant’s individual characteristics in sentencing. Proponents thought that a more rigid system would help restrain a judiciary that had too frequently exalted judicial independence over the judge’s role in the system.

The role of prosecutor also changed under the SRA. Before the guidelines, a charging decision did little more than set the maximum sentence a judge could impose. Under the guidelines, a charging decision determined the mandatory guideline range.

The SRA shifted the balance of power. Judges had much less authority and Congress and prosecutors had much more. When the guidelines became discretionary, the balance of power shifted again, with judges regaining more discretion in sentencing. However, mandatory minimum sentences and enhancements — really mandatory guidelines on steroids — remain. In applicable cases, they affect the system’s balance more than the guidelines did. And the Sessions Memo now directs they be charged and pursued unless the prosecutor provides reasons for not doing so that are documented and approved by a supervisor.

Congress passed the mandatory minimum statutes in order to combat violent and drug crimes — a policy decision within its purview. But, in passing those laws, Congress assumed some of the judge’s role in choosing how to sentence an individual, provided the executive charges under a mandatory minimum statute.

Justice should not depend on which prosecutor draws a case. Neither should it depend on which judge sentences a defendant. In the 1960s and 1970s in the Northern District of California, every judge but one gave draft-card burners probation; one judge gave the maximum sentence every time. No matter how you define justice, that is unjust, unless you think judicial independence trumps fairness. I do not.

Prosecutorial decisions should be influenced to some degree by prior decisions as well as future decisions. Consistency is a major component of justice. Prosecutors do not represent a private litigant with a duty only to the best interests of the current client, irrespective of the interests of other clients. The Sessions Memo emphasizes consistency, a hallmark of fairness. But, it may give a prosecutor pause when a charging decision triggers a minimum sentence. The prosecutor is an advocate, not an impartial referee. The executive’s role changes dramatically when a minimum mandatory crime is charged.

Justice is like beauty: It is desirable, but in the eye of the beholder. Justice to one may be injustice to another, often because of position in the system and political philosophy. If each branch of government considers its place in the system relative to the other two, the system will be more just. Congress should realize that justice is individual to a degree, and a neutral judge is best positioned to apply that. Judges should acknowledge they are part of a system, and discretion does not begin and end at a particular courtroom door. Prosecutors in our system are advocates, and as advocates must realize that we are in a conflicted position mandating a sentence. Thoughtful awareness of each branch’s role in the system will help us all produce just results, no matter what policy is in force.

— STEWART WALZ is an assistant U.S. Attorney for the District of Utah. The views expressed here do not represent the views of the U.S. Attorney Office or the Department of Justice.
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