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CHADWICK BOSEMAN IS MARSHALL

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**Letters**

**MOVEMENT LAWYERS**

By using the title “Resistance Redux,” August, page 38, the ABA Journal attempts to give credence to radical anti-Trump—and antidemocracy—forces’ characterization of themselves as “the resistance.” This is an insult to the real resistance, which was composed of heroic men and women in occupied Europe who risked torture and death to resist the Nazis.

The Journal compounds this error by publishing loony statements claiming the president is “seizing more and more executive power, and we are in the throes of a takeover and conversion to a totalitarian state.” Of course, President Donald Trump is reversing executive orders and regulations that expanded government power. And he was duly elected under our Constitution. But why bother with reality? We have witches to hunt!

_Donald W. Bohlken_  
_Indianola, Iowa_

**CHARLOTTE SCHOOL OF LAW**

Regarding “Troubled Passage,” August, page 48, this may sound harsh, but the first Latin phrase that every aspiring lawyer needs to learn is “caveat emptor.” If you choose to attend a law school that has demonstrably bad employment outcomes because you fall prey to their “don’t worry, we’re accredited by the ABA” blandishment, you shouldn’t be surprised at your dim employment prospects when you graduate. On the other hand, I would hope that the president of the Mecklenburg County Bar was misquoted regarding resentment over fee competition; if the quote was accurate, your author fell asleep at the wheel by failing to connect it with the discussion of the antitrust laws later in the article.

_Robert Kantowitz_  
_Lawrence, New York_

**HELP FOR PRISONERS**

The fine Ethics story “A Tradition of Jailhouse Lawyers,” August, page 24, might also have included Gary Wayne Nelson. While Nelson—a self-trained expert in prison law—was incarcerated in South Carolina, he filed a federal class action lawsuit in 1982 challenging overcrowding in the state prison system. It resulted in a $75 million settlement requiring the state to improve its treatment of its inmates. I met Nelson in 1985, shortly after his release from prison while I was teaching at the University of New Mexico School of Law. Nelson, who had earned a college degree while behind bars, subsequently went on to earn a law degree from UNM and practice law. As an aside, I was heartened to read your cover story, “Resistance Redux,” acknowledging the dedication to social justice exemplified by, among others, my law school classmates Stephen Bingham and Paul Harris.

_Thomas Goetzl_  
_Bellingham, Washington_

**RULING ON TV JUDGES**

I read with interest “Honoring Our Favorite Your Honors,” August, page 56, particularly the inclusion of James Avery, aka Uncle Phil. However, in mentioning his TV credits you neglected to add that Avery also played a lawyer in a 1990s television sitcom called _Sparks_, which was based on my law practice in Compton, California.

_Judge Kelvin D. Filer_  
_Los Angeles_

**CORRECTION**

Because of an editing error, “Honoring Our Favorite Your Honors,” August, page 56, misidentified William Frawley, the actor who played Charlie Halloran in _Miracle on 34th Street_.

The Journal regrets the error.
CHEAP LABOUR
OR
SLAVERY?

IT’S TIME FOR A DIFFERENT PERSPECTIVE

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The New York Times
President’s Message || By Hilarie Bass

Tackling the Homeless Youth Crisis

Providing legal solutions to assist children in need can lift us all

Imagine wanting to register for school, but having no identification documents and no family members, so you are turned away. Imagine having a chance at your first job that will help pay for food, but without a lawyer to help get a previous minor offense expunged, that door will be slammed in your face. Imagine falling asleep on a park bench and waking up in handcuffs to find the police officer taking you away because you have nowhere else to go.

These are daily challenges faced by some of the more than 500,000 children in this country and an estimated 100 million youth worldwide who have no place to call home. Don’t children—especially our most vulnerable—deserve rights?

The American Bar Association believes this is a global civil rights issue, and we urgently need the help of lawyers and legal leaders across the country. By creating the Legal Rights of Homeless Youth Initiative, together we will address the problems preventing these children in the U.S. and globally from leading productive lives.

In the United States, many homeless youth lack access to critical legal representation that can remove barriers to benefits, education, employment, housing, identification and health care. Our domestic initiative—Homeless Youth Legal Network Pro Bono—will increase access to legal services by connecting lawyers and law firms with homeless youth shelters and drop-in centers.

Of the more than 350 shelters and drop-in centers across the U.S. serving homeless youth, very few have access to pro bono legal services. The ABA project will match shelters with volunteer attorneys who will represent children with urgent legal needs, hold legal clinics to represent groups of youth with similar needs and offer education sessions to teach youth about how to address important legal issues that can help them lead more productive lives.

The ABA has kicked off a campaign asking lawyers, firms and other legal professionals to “adopt a shelter” and visit monthly to provide legal assistance. Tool kits will be available online to answer volunteers’ questions about the legal issues that this population faces. To inspire others, the ABA website will invite volunteers to submit posts on their progress. The initiative will also be the focus of the National Celebration of Pro Bono (Oct. 22-28), when thousands of U.S. lawyers mobilize to provide volunteer services to our country’s most vulnerable residents.

A little help can make a big difference. In September 2016 at the ABA’s Homeless Youth Law & Policy Summit, a young Chicago woman named Shadray Hamilton described the legal help that turned her life around. She received assistance to obtain identification after living on the streets for several years as a teenager. “Without an ID, you’re nobody,” Hamilton said. “You can’t get a job, you can’t go to school, you can’t get food.” Today, she works for the National Network for Youth.

Internationally, the ABA will convene the International Summit on the Legal Rights of Street-Connected Children and Youth in São Paulo, Brazil, on Nov. 28-29 with more than 150 international academics, advocates, funders, lawyers and government officials.

Participants will produce the first comprehensive plan from the world’s experts on addressing the legal issues detailed in the United Nations General Comment on Children in Street Situations. The UN general comment lays out governments’ obligations to street-connected youth under the United Nations’ 1989 Convention on the Rights of the Child, which details the civil, political, economic, social, health and cultural rights of children worldwide.

The principles adopted in São Paulo, to be presented to the ABA House of Delegates for consideration at the 2018 Midyear Meeting, will help guide governments to develop comprehensive strategies on street-connected youth that put children first. These potential improvements will, as an 18-year-old homeless Brazilian boy says in the general comment, “Give us the opportunity to change our story.”

These initiatives by the legal community will help make a difference for homeless youth—and improve the world for all of us.

To learn more about this project, including how to volunteer, visit www.ambar.org/homelessyouth.
WHAT DO YOU MEAN ‘NO PARKING’?

CHICAGO ATTORNEY LAUNCHES PARKING TICKET RESISTANCE

Todd Kooperman is an attorney on a mission. Last summer, he received a $60 parking ticket that he thinks violates his constitutional rights. Kooperman says that the city of Chicago didn’t give him proper notice about street cleaning, and that the law is too vague. To date, Kooperman estimates he’s dedicated close to 100 hours researching and fighting the ticket, on principle.

“I keep thinking about poor people who can’t afford a $60 ticket. What can they do?” he says. “Their cars get impounded.”

Kooperman doesn’t drive his car regularly. He usually bikes to work and passes his car on his way home to see whether any temporary no-parking signs have been placed on his Logan Square block. On July 25, 2016, he rode by his car around 6 p.m. and saw no signs. The next day, a parking ticket was placed on his car at 9:55 a.m.

This prompted Kooperman to look into the law, and he expected to find that 24-hour notice is required to post a sign prior to ticketing. But he instead found that no specific advance notice is required. In the lawsuit, he’s requesting that the court enter an order to stop the city from ticketing during temporary parking bans until it provides clarity on the timing issue.

“Legally, there’s nothing that prevents them from putting up temporary no-parking signs at 9 a.m. and starting their ticketing at 9:01,” says Kooperman, who started a GoFundMe campaign called the Chicago Parking Ticket Resistance. It had garnered $655 of his $1,500 goal at press time.

Kooperman fought the ticket (and lost) in an administrative hearing and chancery court. Now, with the help of Chicago civil rights attorney Mark Weinberg, he’s appealing the circuit court’s decision.

If Kooperman wins, the city could take a financial hit. According to a recent Chicago Tribune article, the Department of Streets and Sanitation issued more than 270,000 street-sweeping tickets in 2016. At $60 per ticket, that amounts to more than $16 million in fines.

He stresses that parking regulations are necessary, but people have to know the rules. “The rules need to be fair, and they need to be consistently and appropriately enforced,” he says. “That’s why I’m fighting this.”

—Kate Silver
Opening Statements

The Depression Coach

Lawyer leads support group to help other legal professionals cope with the illness

At the depth of his depression, when he was 40 years old, attorney Daniel Lukasik sat in his car in a dark parking lot and cried. “Driving home from work, I used to cry almost every day without even knowing why,” says Lukasik, now 55. “If it weren’t for my wife and daughter, I might’ve killed myself. Depression is an illness, not an emotion. It’s a sadness far beyond just being sad.”

Today, Lukasik of Buffalo, New York, still practices law. But he also manages a support group for lawyers who have depression, conducts a coaching practice for attorneys who have or recovered from it, blogs about his own experience and related subjects, and speaks to lawyers across the country about this devastating illness.

Lukasik started his support group and the website Lawyers with Depression 10 years ago and his coaching practice, Your Depression Coach, in 2015. He has coached more than 150 attorneys and law students.

“Coaching provides a toolkit for lawyers to cope with depression and helps them in recovery,” Lukasik says. It includes dietary advice, exercise programs, lifestyle models and other methods of dealing with depression and its aftermath.

According to a 2016 study by the Hazelden Betty Ford Foundation and the ABA Commission on Lawyer Assistance Programs, 28 percent of all working lawyers have depression.

“The support group meets once weekly,” Lukasik says. “We share experiences about [our] depression and urge lawyers who may be depressed to seek help.”

But support groups and coaching are no substitutes for professional treatment, Lukasik says.

Tyger Latham, a clinical psychologist in Washington, D.C., treats lawyers who have depression—a group that makes up about one-third of his practice, he says. “Washington may have more lawyers per capita than other cities, but the high rate of depression among them reflects its prevalence in the legal profession,” Latham says. “Treatment depends on the severity of the depression. We use talk therapy or medications, or a combination of both. The length of treatment also varies depending on severity.”

STIGMA AND STRENGTH

According to Latham, depression is caused by a variety of factors. “Lawyers are susceptible to depression because of the cutthroat nature of their profession,” says Latham, citing observations from his experience and data from formal studies.

“Lawyers are also typically pessimistic. They often don’t feel in control and have a sense of helplessness. They may be answerable to higher-ups in their firms or to their partners. Lawyers also tend to be perfectionists and Type A personalities—very ambitious and overachievers. There is also a genetic factor.”

But Latham warns against attaching a stigma to depression and encourages lawyers to seek help when the symptoms arise. “Depression should not be seen as a weakness of character or mind,” he says.

Lukasik emphasizes this point in his published articles and talks, and in his coaching sessions.

One lawyer, who prefers to remain anonymous, says Lukasik’s coaching helped him. He had depression, and a psychiatrist treated him with talk therapy and medication.

“Dan and I worked on building a toolkit of emotional and physical activities that would help me regain my mental health and return to work,” the lawyer says. “At the time I worked with Dan, I was on leave from my job.”

When it comes to lawyers who have depression, he says: “Get help. … Recovery and continued well-being is a multidisciplinary approach.”

Lukasik agrees. “After the worst of a lawyer’s depression symptoms have subsided, they often need ongoing help and mentoring to keep getting better and to stay well,” Lukasik says.

Find more information on Lukasik’s coaching practice at yourdepressioncoach.com. —Marc Davis
Use of the pictographs in lawsuits increases

The late July release of The Emoji Movie made official what’s become obvious to the most casual internet observer: Emojis are a pop culture phenomenon. But fame has a price. The pictographs that have proliferated across online communications are increasingly turning up in court.

The terms emoji and emoticon—the keyboard-created forerunner of emojis—have cropped up in about 80 U.S. court opinions to date, with about half the case references happening in the last two years, according to a recent paper by Eric Goldman, a professor at Santa Clara University School of Law.

“As emoticons and emojis play an increasingly important role in how we communicate with each other, they will increasingly raise legal issues,” Goldman says. The challenge for civil and criminal courts is interpreting emojis without the aid of clear dictionary definitions and interpreting them within the specific contexts in which they appear.

Further obscuring their precise meaning are various cultural and technical factors, especially differences in emoji icons among different technology platforms. The Unicode Consortium sets basic standards for emoji design, but the characters can appear differently across operating systems, devices and software programs.

In one survey, for example, people thought Google’s version of the Unicode-defined “grinning face with smiling eyes” emoji meant “blissfully happy,” but they construed Apple’s version to mean “ready to fight.”

To help clear up such misunderstandings, Goldman suggests some fixes: The consortium should play a more active role in promoting cross-platform compatibility, platforms should warn users of the potential for miscommunication with emojis, and an emoji dictionary should be created.

Goldman warns that the judicial system must prepare for “the coming emoji onslaught.” That means taking steps that include showing emojis in relevant opinions, making emojis and emoticons searchable in legal research engines such as Nexis and Westlaw, and letting juries review them as part of trial evidence.

After all, if they’re appearing in movie theaters, why not the jury room, too? —Mark Walsh
Rocket Man
Virginia lawyer helps his clients reach for the moon

SPACE—IT MAY BE THE FINAL FRONTIER, but it's not without lawyers. James E. Dunstan has spent more than 30 years specializing in space law—the rules, regulations and negotiations that surround mankind’s reach beyond Earth. The principal of Springfield, Virginia-based Mobius Legal Group, Dunstan is also a computer programmer who wrote the code for a moon rover platform system and a novelist whose chosen genre is, of course, science fiction.

How did you get your start? Did you harbor secret dreams of being an astronaut?
I always wanted to be a lawyer, even as a young child. I got into Georgetown, and I started going down the corporate law track. But I was bored out of my mind. Georgetown happened to offer a class in outer space law, and I instantly fell in love with it. I founded the first student group in the country focused on space law, and I got lucky and lined up a position at a boutique firm where the founder had been one of the world’s first space lawyers.

Did you get to work with space law clients right off?
No, I started out working with the firm’s telecommunications clients, and I’d write articles on space law and speak on panels in my free time. It was a long, long haul to build this practice.

What have been some of your favorite space law deals over the years?
I negotiated having the first pitch of the 2002 World Series thrown from space. Well, not really from space, but from one side of the International Space Station to the other. In 2000, I negotiated a lease for the Russian Mir space station. It had been mothballed, and a group of investors said, “Let’s see if we can buy it.” The Russians wouldn’t sell it, so we said, “Can we lease it?” The only human commercial space flight ever was a launch of two cosmonauts to the space station to check it out.

I love that you based the Mir lease on a commercial real estate lease. Are there other areas where you can have that kind of crossover?
I’ve never met a lawyer who didn’t think they could be a space lawyer after taking a weekend seminar. There isn’t that much of it—only four treaties. But there are a lot of assumptions that people have about space. For example, I was working on a contract yesterday with a term that began: “When the vehicle reaches outer space ....” But there is no legal definition of where outer space begins—it’s been studied for 60 years, but it’s never been decided.

What are the hot areas of space law right now?
In the next 10 years we’ll see more advancement in establishing space law than there has been in the last 60 years. Things like asteroid mining and property rights—can you extract resources from the moon? From asteroids? Debris is also a hot issue. We can’t just turn off things and let them float. Eventually, we’re going to have to start debris remediation. I actually have a proposal circulating to key players in Washington, D.C., on using satellite license fees to incentivize commercial business to take down some of the most dangerous pieces of space debris.

Are companies promising more frequent and less expensive launches—like SpaceX and Blue Origin—raising new issues?
Yes, more frequent launches will break the bureaucracy. The rules were created on the assumption that we’d have a dozen flights a year—traditionally, it’s taken about five years to launch a satellite. Today, a “cubesat” that’s the size of a loaf of bread is being developed that can be launched in four months or less. NOAA [the National Oceanic and Atmospheric Administration, which issues licenses for remote-sensing space systems] has had a
100-fold increase in applicants; and until recently, there was only one person working on applications. The Federal Communications Commission charges an application fee of a half-million dollars for a satellite license plus an annual regulatory fee of a half-million, and it takes three years to get a license. Everyone is stuck in this bureaucratic morass.

Are American companies turning to other countries to build and license their satellites?
I’ve had several clients have to do this. They can go to Luxembourg or to the Isle of Man, which is tax-free and virtually regulation-free. You can get a satellite license from the Isle of Man in a matter of weeks. For several of my clients that include ex-NASA and ex-DOD people, to tell them that they can’t do business here in the United States is heartbreaking.

What about space tourism? Is this a thing?
Space tourism is going to happen; it’s just not going to be the market driver we originally thought. Unfortunately, it’s going to be one of those fields where you know there’s going to be an accident, and that could shut down the industry for a couple years.

Does that mean people won’t be heading into space for a while?
No, there are several proposals out there for private space stations. But it’s not about tourism; it’s about business opportunities like medical experiments and building satellites in space. That way, your antenna isn’t constrained by the size of the rocket. You can build satellites with football-field-size antennas and then push them away from the station.

So I have to ask: Do you think we’re alone out here?
I grew up in Arizona. A lot of funny things happen in Arizona. When I was 11, I saw a UFO—maybe. I was helping my best friend with his paper route. It was 4 a.m., and we saw a light. We thought, “Cool, a satellite!” Then it stopped, and we thought, “Cool, a helicopter!” But then it changed direction, split into two and went different directions in about a second. I am not so slow as to think that we’re the only ones out there. But as to what that means—if it’s bugs on another planet or it’s us existing in another dimension, I don’t know. But I do know that we still have a lot to learn about this Earth and how special it is. And maybe it’s so special that it’s the only one like it and we’re completely alone in all this. How sad would that be? —Jenny B. Davis

DID YOU KNOW WE’RE ON INSTAGRAM?
You Make it Work by Simply Making it Work

Making It Work is a column in partnership with the Working Mother Best Law Firms for Women initiative in which lawyers share how they manage both life’s challenges and work’s demands. Visit workingmother.com for more.

By Tracy Richelle High

I don't mean to trivialize the important question of how you achieve work-life balance. But the answer is quite simple: You make time for the things that matter. Period. What matters most on any particular day changes, and you must be flexible. Some days I devote more time to being a lawyer, and other days I devote more to my personal life. Finding time to devote to my career and personal life is as challenging for me as it is for anybody. But along the way, I have learned to make it work by just making it work.

1. Establish your boundaries and stick to them. This is something only you can do, and you should do it before you get into a bind. Can I miss a dinner at home with my family one night? Yes. Can I miss 30 nights in a row? No. If you know what your boundaries are in advance, you can plan ahead and keep those who need to know in the loop. Don’t let your fear of addressing issues head-on leave people surprised about when you will and won’t be available.

2. Expect others to be understanding. We all have to address work-life balance. Remember, it’s not just you. My expectation of others is that they will be understanding because they, too, face their own challenges. My son is going to be starting preschool soon, and I will be there on his first day. I know people will understand that. We all have events in our lives that are important to us and can’t be missed.

3. Take the “look yourself in the mirror” challenge. Can you look yourself in the mirror and be proud of what you have done? My goal is always to do the absolute best work I can. My yardstick is to be able to look myself in the mirror and say that I have done the best work I can do under the given circumstances and deadlines.

4. Run your own race. Don’t compare yourself to others or measure your achievements by what they achieve. You’re not in competition with others. Your job is to be the best you that you can be and to bring that person to work every day.

5. Make time for yourself. We often overload ourselves because we want to be all things to all people. You can’t do anyone any good if you are burned out—and least of all yourself. Don’t take on everything. Figure out what matters. No matter how busy things get, always carve out some time for yourself. For me, that time is in the early morning.

6. Check your mindset. Each day I wake up, my first appointment entry of the day is a reminder, which reads “Choose joy.” It reminds me that I choose my own attitude, and that I can’t let others or my circumstances define for me who I am or how I feel about myself. Your happiness cannot depend on your circumstances.

7. Be present where you are. Multitasking is great, but it can lead to inefficiencies. If you are always multitasking, you are never fully focused. Figure out those things that you have to have a singular focus on and focus on them.

8. Be confident. When you’re confident in yourself and your abilities, other people will be, too. That’s not to say you should be cocky and arrogant. But you should hold your head up high and carry yourself with poise.

9. Be kind to yourself. We are often our biggest critics. We can always improve and should make efforts to do so. But if you can look yourself in the mirror and say you’ve done the best you can do (see No. 3), then don’t beat yourself up. It’s not productive.

10. Learn from others. The mark of a strong person isn’t shoulderering everything on your own. If you need help, ask for it. Don’t be shy. Be clear about what it is you need help with, and be open to guidance and support.

Tracy Richelle High is the deputy managing partner of Sullivan & Cromwell’s litigation group and co-chair of the firm’s diversity and women’s initiative committees. She is based in New York City at the firm’s headquarters.
**Opening Statements**

**Judge Thyself**

A study from the ABA Judicial Division and the Brennan Center for Justice at New York University School of Law shows that women make up one-third of magistrate and bankruptcy judges but more than half of the U.S. population. People of color make up about 40 percent of the population but 15 percent of magistrate judges and 7 percent of bankruptcy judges. Although the statistics for gender diversity in these courts are comparable to Article III courts, they trail federal courts in racial diversity, where about one-fourth of judges are people of color. Because federal judges appoint magistrate and bankruptcy judges, the judiciary itself can address and rectify this imbalance, the study says.

Source: Building a Diverse Bench: Selecting Federal Magistrate and Bankruptcy Judges (Aug. 7).

**Legroom Litigation**

The U.S. Court of Appeals for the District of Columbia Circuit has ordered the Federal Aviation Administration to conduct a review of whether the spacing and size of airplane seats impacts passenger safety, in what the court describes as the “Case of the Incredible Shrinking Airline Seat.” It’s a score for the Flyers Rights Education Fund, which petitioned the FAA to regulate the size of airline seats and argued that decreasing legroom is a safety hazard.

Source: washingtonpost.com (July 28).

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**Hearsay**

**Scuttlebutt**

Texas’ controversial immigration law and proposed “bathroom bill” prompted the Association of American Law Schools to move its 2018 conference from Austin to Chicago, at a substantial financial cost. The organization says it no longer will host meetings in Texas because the state has authorized police to ask detainees about their immigration status—whether or not they have been charged with a crime. Texas also is considering a bill that requires dedicated bathrooms based on a person’s biological sex.

Source: law.com (July 21).

**5.7%**

The percentage of 2014 law school applicants who majored in math, physics and biomedical engineering. An analysis by a Pepperdine University law professor shows that students with those majors score 160 or higher on the law school entrance exam. However, most law school applicants major in the social sciences and “helping” professions and typically score lower on the LSAT.

Source: law.com (July 19).

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**Cartoon Caption Contest**

**CONGRATULATIONS** to Benjamin Dryden of Washington, D.C., for garnering the most online votes for his cartoon caption. Dryden’s caption, far right, was among more than 100 entries submitted in the Journal’s monthly cartoon caption-writing contest.

**JOIN THE FUN** Send us the best caption for the legal-themed cartoon at right. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, Oct. 8, with “October Caption Contest” in the subject line.

For complete rules, links to past contests and more details, visit ABAJournal.com/contests.

“When I said I’d tell the truth ‘so help me God,’ I didn’t mean it literally!”

—Benjamin Dryden of Washington, D.C.
Face Time
Facial recognition technology helps nab criminals—and raises privacy concerns

By Wendy N. Davis

When convicted killer James Robert Jones escaped from Fort Leavenworth in Kansas in 1977, he couldn't have imagined the circumstances that would lead to his capture nearly 40 years later.

Jones, a former soldier, had been convicted in 1974 for stabbing to death another soldier, 18-year-old Pvt. Lonnie Eaton. His sentence was 23 years in military prison. After escaping, Jones moved to Florida, where he lived under the name Bruce Walter Keith.

Federal marshals located Jones, then 59, in 2014, after they used facial recognition technology to compare Jones’ old military photo to photos from a database of Florida driver’s licenses—including one issued to him as Keith in 1981. After they made a positive match, the authorities arrested Jones at the air conditioning repair shop in Pompano Beach where he had been working.

The sophisticated technology that helped nab Jones enables people to be identified based on photos of them—including pictures taken by state agencies, such as departments of motor vehicles, as well as surveillance footage captured by street cameras.

In general, the software relies on algorithms to compare different photos and determine whether they depict the same person. Although the field is still in its infancy, its popularity is growing. Law enforcement officials are using it to help solve crimes and find fugitives. The private sector is drawing on facial recognition for confirming airport
check-ins, helping people identify their friends on social networking sites and more.

PRIVACY MATTERS

But even as the technology is proving useful on a variety of fronts, its growing deployment is raising alarms among civil libertarians, who worry that the capability to identify people based solely on their appearance will erode privacy.

Cameras are ubiquitous on the streets already. If the technology comes into wider use, people could be identified as they go about their daily business, says Adam Schwartz, a civil rights lawyer at the Electronic Frontier Foundation in San Francisco.

“We take it as a given in a free society that we can go out in public and be a face in the crowd without anyone knowing where we’re going and coming,” Schwartz says.

More than 117 million U.S. adults are already in databases that can be accessed at will by law enforcement officials seeking to deploy facial recognition software, according to a 2016 report by the Center on Privacy & Technology at Georgetown University Law Center.

For example, the FBI has arrangements with officials in 18 states to access driver’s license photos to investigate crimes by comparing them to photos of suspects.

Law enforcement officials say they need all the tools at their disposal to fight crime.

But others think the authorities might be overstepping with these initiatives. “Innocent people should not be on this database,” said Rep. Stephen Lynch, D-Mass., during a recent congressional hearing on the subject. “This is corrosive of our very liberty.”

Delta Air Lines recently started testing a facial recognition system in Minneapolis that allows passengers who have passports to check their bags at a kiosk and then verify their identity via a facial scan.

In June, JetBlue Airways began to test a boarding procedure that relies on scans of passengers’ faces in lieu of physical boarding passes.

And internet companies such as Facebook use the technology to enable people to automatically tag their friends in photos.

Developers in Russia created a dating app, FindFace, that lets people take photos of strangers and then discover their identities, provided they have a photo on the social media network VK, according to the Guardian, a British newspaper.

Schwartz says there’s very little people can do to prevent others from using this kind of software. “It is very easy for someone to get your face without your knowledge or permission,” Schwartz says. “There’s nothing we can do to hide our faces, short of wearing ski masks all the time.”

HOW ACCURATE IS IT?

Alvaro Bedoya, a professor at Georgetown Law and executive director of the Center on Privacy & Technology, says use of the technology by the police might discourage people from engaging in political activity, including protests.

“There’s a real risk with regard to freedom of speech,” Bedoya says. “Are you going to go to a rally against the president, or a gun rights rally for that matter, if you know that law enforcement can take a photo of you and identify you from far away?”

According to Bedoya, some prior studies have suggested that facial recognition is less accurate than fingerprints, which raises the possibility that people will be targeted by the police based on incorrect identifications.

Accuracy levels depend on myriad factors, including the conditions under which the photo was taken. In general, the technology has a high accuracy rate for posed photos, such as passport pictures, in which people are told to look directly at the camera, says Anil Jain, a computer science professor at Michigan State University.

But the technology is less accurate for photos taken under noncontrolled conditions, such as when street cameras capture images as subjects are looking away, wearing caps or making expressions that distort their features.

LEGAL ACTIONS

No federal laws currently constrain the use of facial recognition software, and most observers think national legislation is unlikely, given the divided political environment.

But on the state level, Illinois, Texas and Washington have laws that aim to protect people’s biometric privacy in the commercial sphere. Other states, including Alaska, Connecticut, Montana and New Hampshire, are considering regulating the use of the facial recognition technology.

The Illinois Biometric Information Privacy Act, which was passed in 2008, prohibits private sector companies from collecting some kinds of biometric identifiers, including scans of facial geometry, without obtaining people’s written consent.

That law has already sparked several lawsuits, including putative class actions against Facebook, Google and Shutterfly. The plaintiffs in those cases allege that the tech companies illegally created “faceprint” databases. Google declined to comment, and Facebook and Shutterfly didn’t respond to interview requests.

Shutterfly settled one lawsuit in spring 2016 and was sued a second time last fall. Facebook and Google have been fighting the allegations in court since 2015.

The companies raise several arguments, including that the Illinois statute is ambiguous about whether it applies to photos. The law says the restrictions don’t apply to photos or information derived from them, but the statute also appears to be aimed at regulating the technology.

Attorney Jeffrey Neuburger, co-chair of the technology, media and telecommunications group at Proskauer Rose, says the Illinois law was written before biometrics were prevalent, and that there’s very little legislative history to shed light on...
why photographs were excluded from the law’s definitions.

The plaintiffs argue that the law wouldn’t make sense unless it covers face scans derived from photos. So far, the plaintiffs have prevailed with that argument. “Courts have said excluding that kind of information undermines the purpose and effect of the statute,” Neuburger says.

Those lawsuits also pose questions about whether states can regulate the use of facial recognition software by a national company.

RISK OF IDENTITY THEFT

Jay Edelson, a plaintiffs lawyer in Chicago who is involved in the Facebook case, says that biometric databases could expose people to the risk of fraud.

Databases of fingerprints, voiceprints and faceprints will “be a major target for identity thieves and other bad actors out there,” he says.

Edelson speculates that fraudsters could use a 3D printer to create a mask based on a faceprint, and that it could fool cameras.

But others say there’s no call for laws that could restrict companies from rolling out new services that at least some consumers seem to like—such as Facebook’s tagging feature, which can use facial recognition technology to help people automatically attach their friends’ names to photos.

“Identity theft is illegal today, whether it’s done by impersonating me or by going to a photo database, downloading a model of my face, and printing a 3D mask like in Mission Impossible,” says Carl Szabo, senior policy counsel at NetChoice, a trade group that represents internet companies.

Szabo points out that the technology can have “a multitude of potential positive uses,” including improved security at banks and other establishments.

“Where we see abuses, we should target those abuses,” he says. “What we need to make sure we avoid is the privacy panic.”

Model Prisons

Attorney hopes to import the best of European practices to the United States

By Rebecca Beyer

Attorney Donald Specter spent more than three decades working to protect the rights of incarcerated people before he finally saw a prison he believed in.

He was in Europe, having just won perhaps the biggest ruling of his career—a 2011 U.S. Supreme Court decision in Brown v. Plata that required California to reduce its inmate population by more than 40,000. But Specter, executive director of the Berkeley-based Prison Law Office, wasn’t there to celebrate. He was a co-instructor on a study-abroad trip about correctional practices with University of Maryland students.

This trip included visits to prisons in Denmark, Germany and the Netherlands. Specter says he was blown away. The prisons were nothing like those he had spent his career trying to change in the United States. For starters, they were physically different—built to resemble life on the outside. Inmates had their own rooms and, in some cases, were allowed to cook in communal kitchens. But what struck Specter most was that the prisoners were treated differently, too.

“They still regarded the people in prison as members of the community who were going to return to the community,” he says. “That has a whole bunch of implications.”

Specter, who began his legal career as a volunteer at the Prison Law Office, had long been frustrated by the limits of litigation to bring about meaningful change. In Europe, he began to wonder whether there might be a different way to approach his life’s work.

“By the end of the trip, [the students’] basic question was: Why do we have such lousy prisons when they can be so much better?” he says. “I started thinking about whether the same kind of transformation could happen with people who were a little older and more experienced—hardened correctional officers and the like.”

A PROGRAM IS BORN

In 2013, Specter launched the U.S.-European Criminal Justice Innovation Program, sponsoring weeklong tours of European prisons for U.S. corrections officials, judges and lawmakers. He funds the trips using fees from his lawsuits, including some of the $2.2 million his office was awarded after the high court’s ruling in Brown.

In that case, Specter represented prisoners who challenged the delivery of health care in the California prison system. The high court affirmed an earlier appeals court ruling that overcrowding was the primary cause of the deficient system and ordered the state to reduce its inmate population.

Specter’s first overseas trip was with representatives from Colorado, Georgia and Pennsylvania and included stops in Germany and the Netherlands. Subsequent tours, including one this fall with officials from Alaska, have focused on Norway, which is known for the freedoms it grants eligible inmates.

So far, officials from eight states have participated, including the executive director, president and vice president of the Association of State Correctional Administrators, which has members who oversee 400,000 correctional personnel and 8 million inmates or former inmates.

Although the United States has the highest incarceration rate in the world—676 inmates per 100,000 people, according to the United Nations Office on Drugs and Crime—Specter thinks Americans still have a lot to learn about how to prepare prisoners for life on the outside.

(Norway’s incarceration rate is 80 inmates per 100,000 people.)

At least 95 percent of inmates in U.S. state prisons will return to their communities upon release, according to the Bureau of Justice Statistics,
and more than two-thirds of those will be rearrested within three years. In Norway—where no life sentences exist—the recidivism rate is about 25 percent after two years, according to Kim Ekhaugen, director of international cooperation for the country’s prison system, who helps arrange Specter’s trips.

Participants in Specter’s program learn about the principles of normality—the idea that life on the inside should be as similar to life on the outside as possible—and dynamic security, which is based on interpersonal relationships between guards and inmates.

In Norway, correctional officers are trained to de-escalate potential conflicts, Ekhaugen says. Each officer is assigned to oversee no more than four inmates and make conscious efforts to engage with those inmates on a human level, including participating in recreational activities.

Differences in the American and Norwegian systems are so great that Specter’s program has been met with plenty of initial skepticism. “Quite frankly, I didn’t think what happened over there would translate here,” says John E. Wetzel, the Pennsylvania secretary of corrections.

Kevin Kempf, a former director of the Idaho Department of Correction who went on the 2016 trip, says he thought Norway’s prisons would be “soft.” But he was struck by the many responsibilities inmates had—cooking, cleaning, going to work or school.

As a young warden, Kempf, now executive director of the Association of State Correctional Administrators, once ordered all the trees removed from the grounds of an Idaho prison to get a better line of sight. In Norway, when someone asked a guard at the maximum security Halden Prison what would happen if an inmate climbed a tree on the forested property (surrounded by a security wall), the guard said, “He’ll climb back down at some point.”

**RECRUITING REFORMERS**

Through applications and personal invitations, Specter selects officials who have demonstrated a commitment to reform—sometimes as a result of lawsuits like the ones he oversees in his day job.

The idea is to set “the bar to which all jurisdictions can aspire,” says Dr. Brie Williams, director of the Criminal Justice & Health Program at the University of California at San Francisco, whom Specter hired to help run the program.

“One it’s clear this is not just what happens in Norway … that experience has meaning for systems here,” Williams says.

Indeed, the trips seem to be quietly revolutionizing corrections departments across the United States.

In Idaho, prison officials started small: adding carpeting, plants and color, including murals along the hallways. In North Dakota, “man camps” left over from the state’s oil boom have been repurposed as independent housing units (which also eased overcrowding), and a new law allows the state to prioritize inmate admissions based on the offense’s severity.

In Pennsylvania, Wetzel, who is vice president of the ASCA, created transitional housing units that have expanded re-entry and counseling services for inmates nearing release. Changes of varying degrees are being made across each state’s system, including reducing the use of solitary confinement or administrative segregation.

Rebecca Witt, a re-entry specialist and corrections counselor who helped design the transitional housing unit at Pennsylvania’s State Correctional Institution at Laurel Highlands, says re-entry used to be simply about helping inmates obtain Social Security cards or other identification.

Now, Witt’s voluntary unit provides a range of services. Her 90 inmates (150 are on a waiting list) have their own library and computers with limited internet access. There are parenting classes, mentoring opportunities and extended family visits.

Witt also tries to tailor services to specific needs. When one inmate approached her with concerns about how he communicated, Witt launched a public speaking com-

petition. Most programming used to be done in-house. Today, outside agencies come in, a practice known in Norway as the “import model.”

“Before, the focus was on keeping the community out and keeping the prisoners in,” Witt says. “Now, it’s bringing the community in, so we can get [the prisoners] out. It’s a complete paradigm shift.”

Witt’s transitional housing unit has a recidivism rate of 10 percent since 2016, compared to the state’s average of 60 percent.

**TREATING INMATES AS PEOPLE**

Before it began its own reform process about 30 years ago, Norway’s recidivism rates mirrored those of the United States. Ekhaugen says his country isn’t trying to impose its practices but rather to share knowledge. “Correctional services is kind of a monopoly organization,” he says. “You need to look out of your own box to learn something new.”

Inmates who are in states that have participated in Specter’s program are learning, too. In Idaho, Sean Patrick Cambron, who’s serving 25 years to life for a murder he committed when he was 18, will be eligible for parole in 2019. To prepare for re-entry into society, he takes part in as much programming as he can, including painting murals.

“You stop acting like an inmate when you’re not treated like an inmate,” Cambron says. “When you’re treated like a human being that made a mistake, that’s when change occurs.”

Of course, not all inmates can be rehabilitated, as Specter, Ekhaugen, Cambron and others admit. But policy shouldn’t be based on extremes, Specter says. The prisons he tours are the perfect rebuttal to the common perception that harsh correctional practices are a response to poor behavior among inmates, he says.

“Norway and Germany and Denmark and all these other places show that the exact opposite is true,” Specter says. “If the staff behave in a more humane, respectful, productive and constructive way, the people who are incarcerated will respond in kind.”

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The Supreme Court moves at its own pace when it comes to changes to its traditions and the way it does business. But in November, it is taking a bold leap into the future—one that lower federal courts and many state courts already have taken.

After lengthy deliberation and study, the court will require electronic filing of briefs, initially only by parties represented by attorneys.

“This is obviously a step forward,” says Michael Lissner, executive director of the Free Law Project, a Berkeley, California-based nonprofit that promotes better public access to legal materials online. “They should have taken this step in 1999 or 2000, when everything was moving online.”

The Supreme Court’s electronic filing system is set to launch next month, not quite hitting the target suggested by Chief Justice John G. Roberts Jr. about three years ago.

Electronic filing “may be operational as soon as 2016,” the chief justice had said in his year-end report on the federal judiciary on Dec. 31, 2014.

Roberts said then that the federal courts, including the Supreme Court, “must often introduce new technologies at a more measured pace than other institutions” because of budget, government procurement, security and other concerns.

And “unlike commercial enterprises, the courts cannot decide to serve only the most technically capable or well-equipped segments of the public,” Roberts said, explaining why such systems must be tested for ease of use and compatibility. “Indeed, the courts must remain open for those who do not have access to personal computers and need to file in paper, rather than electronic, form.”

PRINTOUTS PERSIST FOR NOW

Beginning Nov. 13, any attorney who represents a party or an amicus in the court will be required to submit filings electronically. These include petitions for writs of certiorari, responses, merits briefs, emergency applications and most other filings. However, for the time being, attorneys also must continue to submit paper versions of the same material, and those paper documents will be considered the official filings.

“IT is expected that the electronic filing will become the official means of filing, once the system has operated effectively for some period of time,” the Supreme Court said in a Q&A document issued in early August.

Some Supreme Court litigants won’t initially submit anything electronically. These include pro se filers, the incarcerated and others who file under the court’s in forma pauperis rules. The latter already are provided relief from many of the court’s intricate filing rules.

Still, pro se and pauper filings will be scanned by the Supreme Court clerk’s office, with links added to the electronic docket just as there will be for electronic filings by attorneys. While merits briefs and some other filings currently are available on the websites of the ABA and SCOTUSblog, under the court’s new system, the public will have access to a much larger body of filings, including pending cert petitions. And access will be free.

“There is a real hunger for this data,” says Lissner, adding that he expects the Supreme Court’s system to be a better service than PACER, which provides public access to the lower federal courts.

That system charges the public for access to many filings and is daunting to use, says Lissner, whose group recently has taken all the free written orders and opinions available in PACER and made them accessible on the website Court Listener.

“PACER is not a great system or a modern system,” Lissner says.

Neal K. Katyal, former acting U.S. solicitor general under President Barack Obama, says he is thrilled with the move to electronic filing.

“We members of the [Supreme Court] bar are deeply appreciative of everyone in the clerk’s office who is working to make this a reality,” says Katyal, a Hogan Lovells partner who argues frequently before the court (he led all attorneys with six oral arguments).
arguments last term).

The Supreme Court’s public information office says that clerk Scott S. Harris, who spearheaded the electronic filing project, would be disseminating more detailed guidance about the system in advance of the November start date.

Blake A. Hawthorne, the clerk for the Texas Supreme Court, the highest court for civil matters in that state, heard Harris describe the new system at an August meeting of the National Conference of Appellate Court Clerks.

“This is something I know Scott has wanted to bring to the court since he became clerk” in 2013, Hawthorne says. “He’s got a handle on this.”

Hawthorne’s court has required electronic filing for several years now. The rollout was so smooth that within a matter of months, the Texas court eliminated a requirement that litigants also file paper briefs, he says.

John A. Tomasino, the clerk for the Florida Supreme Court, also was at the national court clerks meeting and serves a court that largely converted to electronic filing by 2013.

Tomasino cautions that familiarity with old-fashioned case files can make a paper habit hard to break.

“When you have a physical folder, it can drop behind the desk. But at least you can move the desk and find it,” Tomasino says. “We had 100 years of working with physical files. With an e-file, you don’t want it to fall in the electronic cracks.” —John Tomasino

Hawthorne says that although the Texas court has gone all electronic, some judges still ask for briefs filed electronically to be printed out for them.

BRIEFS ON THE BENCH

That prompts some questions about the U.S. Supreme Court’s new system. The court’s elaborate rules for filing briefs, which will remain in place for the time being, dictate that most briefs be printed in easy-to-thumb booklets with color-coded covers. (Examples include light blue for the petitioner’s merits brief and red for the respondent’s merits brief.)

Some justices still like to have the case briefs being argued on a given day stacked before them on the bench. What happens when there is no longer a requirement for printed briefs? Will the justices bring their tablet computers to the bench instead? Will their clerks print out color-coded briefs for them? Those questions will remain unanswered for now.

Gabe Roth, executive director of Fix the Court, a Washington, D.C.-based organization that pushes the justices for greater transparency, applauds the Supreme Court’s move to electronic filing and a redesigned website that was unveiled in early August.

“It’s been a long time coming.” Roth says of electronic filing. “Just the idea that the court is acknowledging that it has to move in a more modern direction is a positive sign.”

But he’s not totally satisfied. Besides being a longtime advocate for televising oral arguments, Roth keeps a steady drumbeat of pressure on the court for his group’s objectives, which include live or same-day audio of arguments in major cases and greater transparency measures regarding the justices’ potential conflicts of interest.

“The court should be given some credit” for the move to electronic filing, he says. “Hopefully, it is a sign of greater transparency to come.”
What Alfred Hitchcock can teach lawyers about villains and villainy

By Philip N. Meyer

I was struck by the comments and wisdom of the experienced trial lawyers who shared their secrets to effective opening statements in the ABA Journal in "The First Word," February, page 22, and "A Second Helping of First Words," March, page 22. There was recognition of the power of effective storytelling—truthful and meticulous storytelling supported by evidence, of course, but storytelling nevertheless—in shaping outcomes at trial.

For example, Philip Beck wrote about structuring opening presentations to supply “a villain and a hero that every good story requires.” Beck provides this illustration: “In a pharmaceutical case, I start with the disease. The villain is the disease. The heroes are people like my client, who labored to defeat the villain. It is heartbreaking that the plaintiff is one of the few people who experienced the medicine’s warned-against side effect, but that is no reason to punish a company that has bettered all our lives.”

Some years ago, I worked as an associate in a firm representing plaintiffs in personal injury cases. Reading Beck’s observations, I intuitively watched a different movie. In my version of the story, the drug company would be cast in the villain’s role, “taking calculated risks with the lives of consumers—and factoring those risks into the costs of doing business and the price of its drugs and the profits from their sales.”

Both our openings are structured to begin with the depiction of a villain who sets the plot into motion. Both stories strive to depict compelling villains who must be stopped by “heroic” interventions. For it is only against the actions of the villain and the quality of the villainy itself that the character of the hero is tested and measured.

The more successful the villain, the more powerful the story. —Alfred Hitchcock

Melodrama permits us at once to believe in evil and to exorcise it by projecting it onto another—one who is unlike us. —Michael Roemer

Both our openings are structured to begin with the depiction of a villain who sets the plot into motion. Both stories strive to depict compelling villains who must be stopped by “heroic” interventions. For it is only against the actions of the villain and the quality of the villainy itself that the character of the hero is tested and measured.

THE PLOT THICKENS

Many trial stories are packaged into genre containers of melodrama. Here, I don’t mean merely the overblown exaggerations of afternoon television soap operas. Rather, melodrama is a classical narrative form that bifurcates the world into good and evil and simultaneously provides clear narrative correlates for both (e.g., the story’s heroes and villains). It is a form well-suited to combative courtroom storytelling, and trial lawyers draw intuitively and purposely upon this genre, empowering a jury or a judge to intervene, “heroically” fulfilling their oath to deliver justice.

In Anatomy of Criticism: Four Essays, Northrop Frye observes that the theme inherent in melodrama is “the triumph of moral virtue over villainy, and the consequent idealizing of the moral views assumed to be held by the audience.” In Telling Stories: Postmodernism and the Invalidation of Traditional Narrative, filmmaker and literary theorist Michael Roemer adds how melodrama “shows us as we are supposed to be and wish to see ourselves” and “permits us at once to believe in evil and to exorcise it by projecting it onto another—one who is unlike us: the outsider or stranger.”

Melodrama provides a secularized version of stories that go back to the Bible. These stories still matter, affirming our shared Western cultural values about right and wrong. Narrative theorist Peter Brooks says in his book Melodramatic Imagination: Balzac, Henry James, Melodrama and the Mode of Excess, “We do not live in a world completely drained of transcendence and significance. Melodrama daily makes the abyss yield some of its content.”

But here is the curious rub for lawyers: As compelling as melodrama seems as a narrative form well-fitted to the courtroom, it seldom reveals the world outside the courtroom. Instead, it imposes a convenient shell and suggests a familiar and persuasive plot structure that works.

Simply put, villains as the embodiment of pure evil who purposefully propel the plot forward are pretty hard to come by these days. Perhaps that is why we still love our melodramatic movies so much.

For illustrations of archetypal villains, revisit Darth Vader’s deep-voiced hypermasculine superstability beneath his black death mask in Star Wars. Or enjoy Heath Ledger’s masterful performance and his anarchic and compelling verbal mania within the tortured psyche of the Joker in Christopher Nolan’s The Dark Knight.

In contrast, Beck’s harmful disease is, honestly, not really a villain—it possesses no unified character or intentionality structured to test the will of heroic medical professionals. Likewise, the pharmaceutical corporation (aka “drug
company”) in my plaintiff’s version of the same story does not embody evil—or even sinfulness—in a clever calculus of intentional choices apparently motivated by greed or deceit.

Nevertheless, trial lawyers often rely upon the conventions of melodrama—ascripting complex human motivations and intentionality to nonhuman actors (a disease, a corporation) by casting them as the villain. Popular movies provide helpful templates for lawyers attempting to better understand how, in turn, to shape evidence into compelling stories.

MASTERING VILLAINY

Hitchcock was masterful at depicting villains, and capturing the imagination of his audience at different historical moments required various depictions of villainy. In his earlier melodramas, villains were “flat” characters—typically male, powerful and highly verbal, and from the upper classes—whose words concealed nefarious conspiracies and spawned plots testing the will of heroic protagonists.

Take for example, Hitchcock’s wartime melodramas *The 39 Steps* and *Saboteur*. Hitchcock redacted evil in plot-driven melodramatic and escapist entertainments. He provided diversion from the horrors of war and from truthful confrontation with the often unfathomable and consumptive totality of wartime atrocities that could readily overwhelm the audience. He manufactured calculated fright and surprise within clever, closed-ended plots, stocked with two-dimensional villains, depicting villainy that could be ascertained and defeated before the audience left the safety of the theater.

But it is Hitchcock’s later movies that provide narrative templates especially instructive for lawyers these days. For example, lawyers retelling Beck’s proposed defense-framing story, about the disease as a villain who must be stopped by the heroic interventions of doctors and pharma companies, might benefit from revisiting Hitchcock’s *The Birds*. Like that movie, Beck’s trial story must evoke our fear that nature can turn against us and embody our own darkest natures in malignant forces that grow evermore powerful. Risks must be taken. Heroic interventions are necessary to stop dark forces that have tipped the natural landscape out of balance. Of course, there are the costs of these interventions, sometimes there are “side effects,” and sometimes the innocent suffer. But the costs of inaction are intolerable.

BEYOND MELODRAMA

My counterstory for the “villainy” of the pharma company might be modeled upon various narrative templates. Obviously, there is the villainy in Hitchcock’s early melodramas. The deceitful, powerful, highly verbal male villain, whose rhetoric purposefully conceals nefarious plotting, suggests the characterization of a defendant-corporation that thinks in and speaks the language of money and values profits over people. But an alternative counterstory may be suggested by two of Hitchcock’s psychological thrillers: *Vertigo* and *Marnie*.

Here, the villainy is within the compelling and complex characters at the center of both stories: Judy in *Vertigo* initially assumes the identity of Carlotta, as an accomplice to the criminal mastermind covering up his wife’s murder. She falls in love with the protagonist-hero, and her own identity intertwines with the character she has constructed. Marnie, a thief and compulsive liar, is cold-blooded and unable to feel. She refuses to confront the consequences of her actions. Both spin their stories and characters into elaborate self-deceptions. These stories may suggest a template for a plaintiff’s argument for punitive damages in Beck’s case—a counternarrative about a drug company pretending to be what it is not, unwilling to come clean and reveal the true motivations for its actions.

Whether we are aware of it or not, or admit it or not, litigation attorneys are storytellers who shape evidence into courtroom stories fitting genre conventions embedded in jurors’ imaginations. And we have much to learn from masterful popular storytellers, such as Hitchcock, who also do this work so artfully and so well.

**Philip N. Meyer**, a professor at Vermont Law School, is the author of *Storytelling for Lawyers*. 
An Eye for Errors
Test your skills at editorial triage with 10 sentences
By Bryan A. Garner

Every editor must engage in triage: sorting the most urgently needed edits from minor ones that, although desirable, aren’t absolutely necessary. If instead you treat all edits as if they were equally serious—covering the page in red ink—the writer may feel hopelessly inundated and just reject them all.

If you approach editing sensibly, the extensiveness of your edits to someone else’s work will also depend on your seniority (will your marks be taken as orders?), your skill (do you really know what you’re doing?), and your judgment about how amenable your colleagues will be to your changes (are they secure enough to understand that editing is an act of friendship?).

For now, let’s assume that you’re a junior person in the office. Your colleagues have middling writing skills, but they don’t understand the finer points of style. In short, you’re in a very typical situation here. You’ve been asked to review three briefs before they get filed tomorrow, and your seniors want you to be sure that there aren’t any typos or similar gaffes. Assume that they’re addicted to prior to (for before) and pursuant to (for under), and they won’t take kindly to your editing for mere questions of style.

Give these briefs a minimalistic edit—confining yourself to outright errors. In each sentence that follows, find one or more glaring errors and one or more venial errors. The glaring errors (wrong word, poor grammar, misspelling, etc.) must be fixed: They would be regarded as blunders by any informed reader. The venial errors (a finer point of punctuation or word choice) might slide: They won’t tarnish the firm’s image too much because they’re so common. Purely discretionary matters of improvable style (passive voice, wordiness, legalese, etc.) are off-limits here.

Continues on page 27

Take the Editor’s Quiz

1. The statute of limitations do not affect the Defendant’s right to pursue their cause of action against the third parties for contribution and/or indemnity.

2. Since mere need or desire, or a unilateral expectation, are not sufficient to create a right, your review and guidance is hereby requested.

3. The City of Poughkeepsie is a party to the proceeding and as such has a right to notice; such right having a foundation in APRTA as well as the state and federal Constitutions.

4. The Plaintiffs’ are attempting to use this Court for political purposes related to the City’s new airport site selection controversy.

5. The timing and expense of the judicial process is also unknown but could be significant if the process was made more complex by interveners, lienholders, or upon objection by the property owner.

6. Although there is no California case clearly on point, authority from California and federal courts indicate that Anderson may pursue it’s claim for contribution against Callycal should it elect to do such.

7. Neither the defendants nor the Court have cited a case in which the opinion or conclusion of an agent has been imputed to his principle.

8. The burden is on the prosecution to show the validity not only of the confession but also the arrest as well.

9. If either the debtor or the creditor want an extension of the stay, they should make the appropriate application to the Bankruptcy Court under the auspices of § 105.

10. The yardstick by which district court’s measure the admissibility of expert testimony may have now grown another foot or two—at least in the Fifth Circuit, if not a full yard.

Fun, wasn’t it? I cut the quiz short, knowing that you probably spend much of your day consuming such fare. But you can see how important an eagle-eyed editor is for identifying and fixing errors in any draft.
Constitutional Conflict
States split on Model Rule limiting harassing conduct
By David L. Hudson Jr.

States have been divided on whether to adopt new ABA Model Rule 8.4(g), which prohibits lawyers from engaging in harassing or discriminatory conduct. The Vermont Supreme Court has adopted the rule, while the South Carolina Supreme Court has rejected it. The Nevada and Utah supreme courts solicited public comments on the rule through July.

The ABA House of Delegates adopted Rule 8.4(g) in August 2016 at the ABA Annual Meeting. The rule was designed in part to prohibit discriminatory harassment not only in the practice of law but also at bar association meetings and other social functions. Comment 4 to the rule explains that “conduct related to the practice of law” includes not just representing clients and courtroom activity but also “participating in bar association, business or social activities in connection with the practice of law.” An ABA report noted evidence of sexual harassment at “activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law.”

“There are enough incidents of sexual harassment that make it important for the profession to have largely what is a symbolic statement,” notes Stanford University law professor and ethics expert Deborah L. Rhode.

Supporters say that the rule is necessary to enforce anti-discrimination principles, and that lawyers—as officers of the court—should be held to higher standards. Opponents contend it imposes an unconstitutional speech restraint on lawyers and extends too far beyond the traditional definition of the practice of law.

FIRST AMENDMENT CONCERNS
Some constitutional law and First Amendment advocates suggest the rule infringes on core freedoms. In a 2016 article in the *Georgetown Journal of Legal Ethics*, South Texas College of Law professor and constitutional law expert Josh Blackman explains that Rule 8.4(g) fails to require that the harassment or discrimination be severe or pervasive, a key component of federal and state anti-discrimination laws. “A single ‘harassing’ comment could result in discipline,” he writes. He also warns that teaching CLE classes or law school classes could fall within the ambit of the Model Rule.

UCLA constitutional law expert Eugene Volokh, who has written about the relationship between harassment...
and free speech for decades, wrote a letter to the Nevada Supreme Court justices opposing the adoption. In it, Volokh says the rule “would punish and chill a wide range of speech on important topics.” He also warned that the proposed rule in Nevada would “turn ordinary employment disputes into disciplinary matters.” He further questioned the rule’s application to harassment in the conduct of litigation … may be within the courts’ authority to regulate the bar in order to prevent interference with the administration of justice,” Volokh says. “But the proposed rule deliberately goes far beyond that, indeed to social and bar activities related to lawyering, such as continuing legal education events, conversations and bar association dinners, and so on.”

Las Vegas-based First Amendment attorney Marc Randazza also opposes the rule on First Amendment grounds. “The rule is flagrantly unconstitutional,” he says. “Lawyers do not surrender their First Amendment rights for the privilege of practicing law.”

“This rule is not being pushed in order to confront a real problem. This rule will do nothing but ensure that there is always a speech trap for any lawyer who sticks his or her neck out on issues that might be considered controversial.”

In June, the South Carolina Supreme Court declined to adopt ABA Model Rule 8.4(g) into its Rules of Professional Conduct. The House of Delegates of the South Carolina Bar and the state attorney general had previously criticized the rule. The South Carolina high court received comments from 29 individual attorneys and three groups—the majority in opposition to the rule. In its comments, the Christian Legal Society explained that “the most troubling [part of the law] is the likelihood that it will be used to chill lawyers’ expression of disfavored political, social and religious viewpoints on a multitude of issues.”

The Montana legislature also rejected Rule 8.4(g), and the Texas attorney general wrote that the rule infringes on First Amendment free speech, free exercise of religion and freedom of association rights.

However, the Model Rule has its share of defenders too. “ABA Model Rule 8.4(g) does not present any more of First Amendment free speech issues than any of the federal, state and local laws that prohibit anyone from engaging in harassment or discrimination on the basis of race, sex, religion or any of the other groupings where harassment and discrimination has historically occurred,” says Peter Joy, who is a Washington University School of Law professor.

“The rule provides a useful symbolic statement and educational function,” says Rhode, who is Stanford’s director of the Center on the Legal Profession. “I understand the First Amendment concerns, but I don’t think they present a realistic threat in this context. I don’t think these cases are going to end up in bar disciplinary proceedings. They are going to end up in informal mediation and occasionally in lawsuits if the conduct is egregious and the damages are substantial.”

“ABA Model Rule 8.4(g) does not present any more First Amendment free speech, free exercise of religion, and free speech for decades, wrote a letter to the Nevada Supreme Court justices opposing the adoption. In it, Volokh says the rule “would punish and chill a wide range of speech on important topics.” He also warned that the proposed rule in Nevada would “turn ordinary employment disputes into disciplinary matters.” He further questioned the rule’s application to harassment in the conduct of litigation … may be within the courts’ authority to regulate the bar in order to prevent interference with the administration of justice,” Volokh says. “But the proposed rule deliberately goes far beyond that, indeed to social and bar activities related to lawyering, such as continuing legal education events, conversations and bar association dinners, and so on.”

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“When it comes to regulating the conduct of lawyers, some states move very cautiously when considering more regulations,” Joy says. “In terms of Model Rule 8.4(g), 24 states had already adopted an anti-discrimination provision in their rules of professional conduct before the ABA adopted 8.4(g) as part of the Model Rules.”

However, Kim Colby, the Christian Legal Society’s director of the Center for Law and Religious Freedom, argues that the provisions in those 25 other states are more narrowly drafted than Rule 8.4(g). “All of those states’ rules are narrower in significant aspects than Model Rule 8.4(g),” Colby says.

Professor Blackman says that these state provisions “have a much closer nexus to the practice of law.” Illinois Rule of Professional Conduct 8.4(j) provides that it is professional misconduct for a lawyer to “violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer’s fitness as a lawyer.”

Indiana’s Rule of Professional Conduct 8.4(g) is broader. It provides that it is professional misconduct for a lawyer to “engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status or similar factors.” But even this type of provision doesn’t reach social activities, says Blackman.

It remains to be seen how Rule 8.4(g) will fare as more and more states consider its adoption. “Now that it is part of the Model Rules, I expect that the trend will be toward more states adopting some version of the new rule over time,” says Joy. “I think it will end up being like the prohibition of lawyers having sexual relations with clients. Initially, states were slow to adopt that rule, but now that is the norm.”

Not everyone agrees.

“I think that state courts will continue to mostly reject Rule 8.4(g),” Volokh predicts.
Below are the answers keyed to three authorities on grammar and usage. But let me urge you to review your work one more time before glancing over the answers. Six of the professional legal editors at LawProse Inc. have agreed on what qualifies as a glaring error as opposed to a venial error. We hope you’re in step.

Bryan A. Garner, the president of LawProse Inc., is editor-in-chief of Black’s Law Dictionary. His most recent book is Guidelines for Drafting and Editing Legislation.

**Answers**

CMS = Chicago Manual of Style (16th ed. 2010)

1. **Glaring:** (1) statute of limitations should take a singular verb: does not affect. GMEU at 866-68; RB at 192-94. (2) If there’s one corporate defendant, the pronoun reference should be its. If it’s a person whose gender is known, it should be his or her. CMS at 213-16; GMEU at 195-96, 534-35; RB at 179, 181-82. **Venial:** and/or would be better as and. CMS at 266; GMEU at 50; RB at 251.

2. **Glaring:** (1) There’s an agreement error: The first verb should be is, not are. CMS at 238; GMEU at 195, 866-68; RB at 192-94, 197. (2) Oops, there’s another: review and guidance are different things, so the verb should be are, not is. GMEU at 195; RB at 192-94. **Venial:** hereby is unnecessary.

3. **Glaring:** The semicolon is wrong. The language after it amounts to a subordinate clause. Either change the semicolon to a comma or change having to has to make an independent clause. CMS at 325; RB at 213. **Venial:** (1) For parallelism, most editors would want to add in after as well as. CMS at 213; GMEU at 670-71; RB at 211, 214. (2) Constitutions probably shouldn’t be capitalized. RB at 61.

4. **Glaring:** The plural subject needs no apostrophe: It’s just wrong. CMS at 207, 342; GMEU at 745; RB at 57, 135. **Venial:** Most professional editors would want to hyphenate the phrasal adjective: airport-site-selection controversy (no hyphen before the noun controversy). CMS at 227-28; GMEU at 751; RB at 44-47.

5. **Glaring:** (1) There’s a problem in subject-verb agreement: is should be are in the first clause. CMS at 238; GMEU at 195; RB at 192-94, 197. (2) The hypothetical if-clause calls for a subjunctive verb: if the process were, not was. CMS at 236; GMEU at 869-70. (3) The sentence ends with an unparallel listing: It should be by interveners or lienholders, or the property owner (if that’s the meaning). CMS at 259-60; GMEU at 670-71; RB at 214. **Venial:** significant appears here in the extended sense of “having an important effect or influence,” as opposed to its more traditional sense of “having meaning.” GMEU at 830.

6. **Glaring:** (1) There’s a problem in subject-verb agreement: authority takes indicates, not indicate. Perhaps make it Although there is California authority clearly on point, federal and California cases suggest … . CMS at 238; GMEU at 195; RB at 192-93. (2) it’s should be its (the correct possessive form). CMS at 217, 287; GMEU at 534-35. **Venial:** elect to do such would be better as elect to do so. CMS at 297; RB at 311.

7. **Glaring:** (1) There’s a problem in subject-verb agreement. With a neither … nor construction, the verb must agree with the second element: hence has, not have. CMS at 239, 255; GMEU at 623-24; RB at 214. (2) Principle (rule or standard) has been misused for principal (employer of an agent). GMEU at 729; RB at 302. **Venial:** It’s better to call defendants by name (e.g., the Wilsons). RB at 72.

8. **Glaring:** (1) There’s a problem in grammatical parallelism: of could be moved after validity, or another of could be added after also. CMS at 259-60; GMEU at 670-71; RB at 214. (2) not only can take as its completer either but also or but … as well, but it can’t take both without serious redundancy. CMS at 255; GMEU at 634; RB at 214. **Venial:** No venial “errors,” but the sentence could be tightened: The prosecution must show the validity of both the confession and the arrest.

9. **Glaring:** (1) Subject-verb agreement: want should be wants. CMS at 238; GMEU at 195; RB at 192-93. (2) they, strictly speaking, shouldn’t be singular: it would be better if corporate litigants are involved. CMS at 215-16; GMEU at 907; RB at 182. (3) Extention is a misspelling of extension. GMEU at 370. (4) auspices means “sponsorship” and should be deleted: Write under § 105. GMEU at 84. **Venial:** Lots of wordiness, but that’s not quite classifiable as an error. GMEU at 776-77.

10. **Glaring:** (1) Use district courts as a simple plural with no apostrophe. CMS at 207, 342; RB at 56-58. (2) The dash construction amounts to mispunctuation: perhaps either another foot or two, if not a full yard, in the Fifth Circuit or another foot or two—at least in the Fifth Circuit—if not a full yard. CMS at 333-34; GMEU at 750-51; RB at 40-42. **Venial:** The “yardstick” metaphor doesn’t work well.
RISK MANAGEMENT

PRACTICAL CYBERSECURITY FOR LAW FIRMS: HOW TO BATTEN DOWN THE HATCHES

BY SHARON D. NELSON, JOHN W. SIMEK AND MICHAEL C. MASCHKE

WE’RE QUICKLY APPROACHING 2018, and a week doesn’t go by without another variant of malware causing havoc across the globe. First it was the WannaCry ransomware worm, which infected more than 230,000 computer systems in over 150 countries, demanding ransom payments in exchange for the decryption of files. More recently, a new variant using code from the Petya ransomware (named “NotPetya”) struck first in Ukraine, followed by other European countries, and disabled critical utility services, such as the radiation monitoring system at the Chernobyl nuclear power plant, as well as affecting the countries’ banks and commuter systems.
What caught the attention of lawyers was an apparent infection in one of DLA Piper’s European offices that brought the law firm’s normal operations to a halt. As we write, the extent of the damage is still unclear.

Times have changed since CryptoLocker first ran wild in 2013, but the results are still as devastating. The costs of ransoms have significantly gone up from a few hundred dollars to the $1,000-plus range for the decryption key to unlock the affected files—and more than half of those who pay up do not receive the decryption key. So much for honor among thieves!

Ransomware has continued to evolve and is the primary security concern for businesses of all types and sizes.

How do you protect your firm from ransomware, malware and other cyber-threats? Before we get started, as we say all the time (and it rates boldface type), there is no silver bullet that protects against all ransomware. Or all malware for that matter. If a vendor promises you a 100 percent solution, you are being sold a bill of goods.

BACKUPS

Backups are key. Back up all of your data. Don’t forget to periodically conduct a test restore of the data and make sure your backups are impervious to ransomware—either backed up in the cloud or agent-based. (Talk to your IT provider to learn more.)

Backups should be encrypted with a user-defined encryption key, whether on-site, off-site or stored in the cloud. If using a cloud vendor, the vendor should not have access to the decryption key. Encryption should be treated as a must—no questions about it.

The simple solution for most solo or small-firm lawyers? Use an external USB hard disk. Unplug the hard disk after the backup job completes. Just make sure you have at least two USB hard disks and rotate them in case you are attacked while one disk is connected.

PASSWORDS

Develop a password policy. The recommendations for password policies have recently changed. We still live in a password-driven world, but the final guidelines from the National Institute of Standards and Technology for the federal government have now been published. (See Digital Identity Guidelines, SP 800-63-3, on the NIST website.)

While this publication applies to government agencies, it represents new thinking that is sure to be embodied in the NIST Cybersecurity Framework, draft version 1.1, which is in the process of being finalized. NIST is phasing out the requirement of periodic password changes, which has been the foundation of password policies for many years.

Other recommendations include using a length of at least eight characters and choosing a passphrase rather than a password. Some applications and devices allow users to include spaces and even emojis, which users can now include when setting their passphrase.

Do not use dictionary words, as these are susceptible to brute force. Also, make computers require screen-saver passwords, and ensure that passwords are needed after a reasonable period of inactivity.

Newly included is checking all passwords against a database of known compromised passwords, which will of course eliminate all of the dreadfully easy passwords users are so fond of employing.

Users should never share their passwords, write them down or reuse the same passwords anywhere. It is particularly important that credentials used to access a law firm network never be used anywhere...
else. The use of a password manager can make this task quite easy.

Consider enabling two-factor authentication when available. Biometrics alone are not a good solution—once your biometrics are stolen, they will always be stolen. Remember the 5.6 million fingerprints stolen in the U.S. Office of Personnel Management data breach? You can’t change your fingerprint.

A password policy should be part of an overall comprehensive security program, which should also encompass an incident response policy, disaster recovery plan and social media policy, to name a few.

**PATCHES AND UPDATES**

Firms need to prioritize efforts to keep hardware and software as current as possible. Keeping up to date doesn’t always have to cost money—see Windows security updates. You don’t need to be first in line for the latest and greatest, but don’t be the last in line either. Once software becomes unsupported, it is unethical to use it because it is no longer receiving security updates and is vulnerable to attacks.

In January, Microsoft stated that Windows 7 is so outdated that patches can no longer keep it secure. Extended support ends Jan. 13, 2020, so the OS will not get any further enhancements and receive security updates only. What does this mean? It is time to plan an upgrade to Windows 10 if you haven’t migrated already. Windows 10 security is leaps and bounds better than what Windows 7 provides.

Firms need to apply patches as soon as they are available to reduce the vulnerability to attack or compromise. A perfect example: NotPetya ransomware—released by hackers in April—attacks a vulnerability of the Windows Server Message Block that is believed to have been first developed and exploited by the National Security Agency. Even though Microsoft released a patch to address this security vulnerability in March, a computer system that wasn’t updated could be vulnerable to this ransomware variant.

If you have a Windows domain environment, have your IT provider configure Windows Server Update Services to download and push out Windows security updates to all of your client computers and servers as they are released, a free solution to updating your operating systems.

**ENCRYPTION**

Once just technical jargon or something the German World War II Enigma machine used, encryption is now becoming the de facto recommendation from cybersecurity companies. Why? It’s no longer cumbersome and time-consuming but cheap and easy to set up and use—and maybe ethically required for attorneys. (See “21st-Century Standards,” July, page 24.)

Your laptop should be protected with whole-disk encryption—no exceptions. Ditto for any external USB flash drive or hard drive used to store firm information. Stolen and lost laptops are one of the leading causes of data breaches. Many of the newer machines have built-in whole-disk encryption. To state the obvious, make sure you enable the encryption, or your data won’t be protected.

For others, Windows BitLocker and Apple FileVault 2 are free encryption options included with Windows and Mac operating systems. There is no excuse for not using this free protection.

Also, encryption may be used in conjunction with biometric access. As an example, our laptops require a fingerprint swipe at power on. Failure at that point leaves the computer hard drive fully encrypted.

The same applies to mobile devices: Encrypt, encrypt, encrypt. For modern phones, just enable a PIN or password lock code. We recommend six or more characters. Yes, if you use an iPhone, the recommendation is still the same, as these devices are not inherently more secure than others. You would not believe how many users (and attorneys) still believe that Apple products aren’t capable of contracting malware. Apple itself refutes that thought.

For the Samsung Galaxy S8, users can use a fingerprint, iris scan or facial recognition. (Don’t use the selfie—this form of “protection” was compromised within 24 hours!) And don’t forget anti-malware software on your mobile devices, such as Sophos, Lookout, Kaspersky or McAfee. Ransomware attacking mobile devices is on the rise.

Sometimes convenience causes issues. Providing remote or mobile users with access to your computer system can create more vulnerabilities than you might realize. To combat this, mandate that all work-related internet sessions be encrypted. Prohibit the use of public computers and unsecured, open public Wi-Fi networks.

Access to the office network must always occur through the use of a VPN, MiFi, smartphone hot spot or some other type of encrypted connection. For users who need to connect directly to their work computer, use an encrypted remote control solution such as Citrix, LogMeIn or GoToMyPC.

The setup of this kind of software couldn’t be any easier, and we’ve seen many attorneys accomplish this on their own.

**SECURITY AWARENESS TRAINING**

Malware loves to prey on uninformed users. These victims are the primary cause for the continuing propagation of malware infections, with users clicking on things they shouldn’t be.

Why, you might ask? Curiosity, fear, urgency, recognition—such as being named for an award—are generally the top four motivations for clicking.
Over 91 percent of all hacking attacks begin with a phishing email, which is why it’s imperative that you train all of your employees.

Sadly, one of the most overlooked aspects of an organization’s security readiness is end-user training. It is just as important that your employees know what not to click on as it is to have security software installed to help prevent malware outbreaks. Firms should provide social engineering and safe computing awareness training to everyone at the firm at least once a year. And make it mandatory.

With education and practice comes a more informed and safe user. Look into services that provide phishing assessments, such as Duo Insight, as a way to test and educate your employees against phishing emails. Integrating this testing into annual training is a great way to get your employees to learn, to have a fun competition and to identify those employees that may need some extra attention and practice. By the way, a single training session has been shown to reduce the risk of a successful phishing attack by 20 percent. Not a bad return on your money.

**TECHNICAL SOLUTIONS**

You can also augment your training with technical solutions. There are email scanning services such as Mimecast, which convert attachments into a safer format such as PDF. There’s also an option to scan URLs in messages and warn of any suspicious links.

Consider some free and not-so-free solutions that your firm can implement to increase your security posture against ransomware and other malware threats. Much of what we describe is probably included in the software your firm has already purchased. It is just a matter of turning the security settings and requirements on.

Our list of security recommendations could fill a book, but we have tried to include the essentials.

Doing nothing makes no sense: You are just begging to be “owned” by the next piece of ransomware or malware. By implementing some of the solutions described above, you are doing your due diligence to batten down the hatches, protecting your firm from becoming the victim of the threats that will continue to wreak havoc for the foreseeable future.

Cybersecurity is a moving target. As threats morph, so will the defenses. Keeping yourself educated on information security issues is a very high priority for all lawyers.

The authors are, respectively, the president, vice president and CEO of Sensei Enterprises, a legal technology, cybersecurity and digital forensics firm based in Fairfax, Virginia.
Mandating Diversity

Law firms borrow from the NFL to address the makeup of their leadership ranks

By Stephanie Francis Ward

The gap Inc. makes its outside counsels submit annual diversity surveys, and the numbers haven’t improved much over the years, says Marie Ma, a senior counsel with the San Francisco–headquartered company. “That’s not a surprise to anybody,” Ma says. Her employer is one of 55 companies that recently supported the Diversity Lab project, in which participating law firms will agree to abide by the so-called Mansfield rule when making decisions on leadership opportunities within the firm.

The Mansfield rule was inspired by the National Football League’s Rooney rule—named after the late Pittsburgh Steelers owner Dan Rooney—which requires that at least one person of color be interviewed for head coach jobs. Arabella Mansfield was the first woman admitted to practice law in the United States, so the rule mandates that at least 30 percent of a firm’s candidates for leadership positions (defined as firm governance roles, equity partnerships, practice chair positions and seats on compensation committees) be women, attorneys of color or both.

According to a June press release, 44 major law firms will utilize the Mansfield rule, including two of...
the world’s largest firms by lawyer head count: Dentons and DLA Piper. Law firms that implement the rule over the next year will be “Mansfield certified” and can participate in a 2018 client forum, which will pair in-house lawyers with attorneys who are women or people of color for business development opportunities.

MAKING PROGRESS

A group of partners from Am Law 200 law firms and a Stanford Law School student came up with the Mansfield rule idea at the 2016 Women in Law Hackathon. Besides the Diversity Lab, the hackathon was done in conjunction with the law school and Bloomberg Law. The original pitch only addressed women, and it only called for one woman to be considered for leadership choices.

According to Mark Helm, a Munger, Tolles & Olson partner who was part of the team that came up with the idea for the rule, it was modified to get more buy-in from law firms. If candidate pools have more women and people of color, he says, it might be easier to convince some decision-makers that the individuals could do the job in question.

“My firm has done relatively well with diversity, but at the same time I think it’s relative to other law firms,” he adds. “We all feel that the profession as a whole—including our firm—has a lot more to do.”

Indeed, in 2016 only 18.1 percent of equity partners were women, and 5.8 percent were racial or ethnic minorities, according to the National Association for Law Placement.

Rather than focus on current data about how many women and people of color are in leadership positions at law firms, the goal of the Mansfield rule project is to encourage the firms to be more mindful about their candidate pools, pipeline and succession planning, says Caren Ulrich Stacy, the Diversity Lab’s CEO. In a hackathon press release, the group is described as being focused on “innovative ways to close the gender gap and boost diversity in law firms and legal departments by leveraging data, behavioral science and design thinking.”

“In-house legal departments have been gently nudging law firms to increase their diversity for decades,” she adds. “This is a way for the legal departments to say: ‘We’re not just wagging a finger at you; we’re supporting you being mindful, innovative and thoughtful about how you approach diversity and what you do to get it.’”

Stacy, who previously did recruitment and training for Arnold & Porter and Weil, Gotshal & Manges, acknowledges that some law firms say they’d like more diverse leadership but blame the fact that they haven’t established that on “a pipeline issue.”

“In reality, there are plenty of qualified diverse lawyers—specifically women—in the pipeline, at least initially,” she says. “But due to lack of access to work opportunities and sponsorship, unconscious bias in talent management practices, such as interviews and performance reviews and the pay gap, many of these qualified diverse lawyers leave law firms before reaching leadership positions.”

Law firms participating in a project focused on increasing diversity is not new, says professor Joan Williams of the University of California’s Hastings College of the Law in San Francisco, who also serves as director of its Center for WorkLife Law. But so far, she adds, few have had much success.

“Is this a surefire guarantee of progress? Of course not,” she says when asked about the Diversity Lab project. “But one thing is for darned sure: The standard tools haven’t worked, so we might as well try new ones.”

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Statistical Significance

Lawyers employ algorithms to guide pricing, advertising and advising

By Jason Tashea

SAM HARDEN WAS TIRED OF HEARING ATTORNEYS MAKE the hard sell to land clients. “I know some lawyers would tell potential clients the worst-case-scenario sentence as a motivator for hiring them,” says Harden, an attorney in Tampa, Florida. For example, attorneys would tell first-time offenders they were looking at six months in jail for DUI charges, something Harden says is legally possible but also unheard of.

Unfortunately, potential clients did not have the data to confront the validity of these “worst-case scenarios.”

To remedy this, Harden created LegalOptics, a company that analyzes court data to determine likely outcomes for clients facing a DUI charge.

After compiling the data, he found no evidence of a first-time offender receiving six months in jail for a DUI. With this information, clients can now be better informed when seeking legal representation.

Often derided for its aversion to math, the legal field is in the midst of a data-informed renaissance. Across the country, lawyers, firms and legal entrepreneurs are leveraging data and algorithms to improve the business and practice of law.

Currently, LegalOptics is active in Hillsborough and Pinellas counties, Florida, which include Tampa and St. Petersburg, respectively. For $100 a month, attorneys can access the dashboard, search case outcomes and undertake direct advertising. Meanwhile, potential clients can see, for free, how an attorney matches up in front of the judge hearing their case.

According to the platform’s analysis, 78 percent of those represented by an “A-rated attorney,” a determination made by Harden’s analysis, avoided a DUI conviction. This is in comparison to 40 percent of those represented by a public defender and 26 percent of those without an attorney.

St. Petersburg criminal defense lawyer Bruce Denson says LegalOptics improves his practice. “With these new numbers,” Denson says, he can better “articulate to clients” what their situation is. Before, he says, he struggled to convey the same point.

ROOM FOR IMPROVEMENT

Denson wants to see LegalOptics expand statewide and to other case types. However, he has concerns about the lawyer-rating algorithm. Currently, the rating is derived from an analysis of motions filed and case outcomes. Denson reasons that filing more motions for an “A” rating could irritate the district attorney, which may make plea bargaining more difficult. In essence, the algorithm could punish lawyers for collegiality.

Acknowledging this critique, Harden says he is always refining the algorithm to improve it.

Algorithmic blind spots like this are common, says Cathy O’Neil, author of Weapons of Math Destruction and founder of O’Neil Risk Consulting & Algorithmic Auditing.

Algorithms “are marketed as objective and true, and they are, in fact, nothing of the sort,” O’Neil says.
She writes, however, that these shortcomings can be improved through feedback, which is something attorney Drew Vaughn learned firsthand.

The founder of NuVorce, a divorce law firm in Chicago, Vaughn created a cost-benefit formula that turns a consultation into a flat-rate fee structure. Calling the billable hour “asinine,” Vaughn says that he “took a bath” on early cases affected by factors not considered by the formula, such as the mental health of one of his clients.

Vaughn says the formula “is under constant revision to account for changes in law and new variables.”

Currently, both venture capital and law firms are looking to either invest in or buy NuVorce for their algorithms.

Beyond billing, data is also being used to improve legal advertising.

Chad Van Horn is a managing partner practicing bankruptcy law at the Van Horn Law Group in Ft. Lauderdale, Florida. He uses data to inform him on how to reach out to potential clients.

He also uses PACER, the federal courts’ document portal, to compile data that helps him understand his competitors, determine where to geographically place ads and refine his messaging.

As Harden did with attorney ratings, Van Horn would like to expand his data work to include bankruptcy attorney profiles, allowing consumers to compare success rates and fee structures.

Van Horn says this level of transparency “would be a game changer for consumers.” As for data’s growing impact on attorneys, he thinks it can shine a needed light on the profession.

“The legal community,” Van Horn says, “has been shielded from statistics for too long.”

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**PATTERN CROSS-EXAMINATION FOR SEXUAL ASSAULT CASES: A Trial Strategy and Resource Guide**

*By Michael Waddington and Alexandra González-Waddington*

**SUMMARY:**

In sexual assault trials, many prosecution witnesses see themselves as advocates and members of the prosecution team. Some witnesses will do whatever is necessary to win and send the defendant to prison. This may include lying, exaggerating, and misstating facts. NACDL’s *Pattern Cross-Examination for Sexual Assault Cases* was written for criminal defense lawyers on the front lines in the war on sexual assault. It contains pattern questions that can be used to dominate prosecution witnesses and level the playing field at trial.

**INCLUDES CHAPTERS ON:**

- Dealing With Difficult Witnesses
- Cross-Examining the Alleged Victim
- Cross-Examining the Sexual Assault Forensic Examiner
- Commonly Used Sexual Assault Examiner Terms
- Cross-Examining Witnesses Regarding Forensic Evidence
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- Cross-Examining Bystanders/Friends

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Call (202) 465-7661 | www.nacdl.org/TrialGuides
Program helps firms see progress in gender diversity—but is it enough? BY LIANE JACKSON
BY ALL ACCOUNTS, the chief characteristics of a law firm in which women can thrive are simple: Combine gender parity at the outset with substantive work-life balance policies, mix in management opportunities, and add a clear path to equity partnership. In a field premised on protecting the rights of others, law firm equality should be a de facto presumption. But in practice, not enough firms are putting in enough effort to get it right, and even fewer are doing it well.

For most female lawyers at major U.S. firms, the likelihood of becoming a top-earning partner is close to nonexistent. There has been progress over the course of decades. But year over year, growth of female equity partners in the upper echelons of BigLaw has stalled since the early 2000s. The view at the top is slightly less homogeneous than it historically has been, but it remains starkly white and male nonetheless.

“There’s truly been glacial progress,” says Roberta Liebenberg, a senior partner at Fine, Kaplan and Black in Philadelphia. “The number of [female] equity partners is not moving commensurate with the numbers graduating from law school. Projections are there will be no parity for equity partners until the year 2081 the way things are moving.”

Law firm classes don’t start with an imbalance. But within three to five years, a precipitous decline begins, with the ranks of female attorneys thinning at the senior associate and partnership levels—and practically vanishing on the equity partner track. What’s confounding is the fact that despite constant
scrutiny, hand-wringer and the passage of time, the legal field remains one of the
worst industries for diversity—gender and otherwise.
At a macro level, there's a lot of work to be done. But drilling down, there are
courts making inroads to level the playing field. Female lawyers trying to gain
a foothold in the profession often seek out these firms, researching reports and
lists that handicap a variety of data points intended to identify who's doing it well
or, at least, who's doing it better.
WHO'S DOING WHAT?
Working Mother Media's Best Law Firms for Women initiative produces one
of those annual lists and provides a comprehensive assessment of what top firms
are doing to attract and retain female attorneys.
"The goal is always the same. The goal is: How do we move the needle? How
do we help law firms and the women in them do better?" says Karen Kaplowitz,
a former trial lawyer and special adviser to the Best Law Firms initiative.
Working Mother Media began the list in 2007, and participation has grown
significantly as firms increasingly recognize the need to make real progress on
gender issues.
Top law firms are selected from applicant firms with 50 or more lawyers in the
United States. Participation is free, and firms complete an extensive, confidential
questionnaire that focuses on flextime policies, career and business development
initiatives, and women in partnership. Other factors considered include compensa-
sion, paid leave, pro bono work and workplace culture.

ELLYCE COOPER / “I wanted a firm where women with children were succeeding... Sidley seemed to fit that bill.”
opportunity for firms, helping decision-makers understand the link between work-life issues and power and leadership. Participating firms receive a complimentary scorecard showing how they rank compared to other participants and previous years. Firms can also buy in-depth analyses of their survey results.

“Working Mother is trying to provide concrete information that will assist law firms in improving those parts of their system that are either helping them or standing in the way,” Kaplowitz says.

The list is disseminated to general counsels and law schools across the country, as well as to all ABA Journal readers. (The Journal has partnered with Working Mother Media to promote the Best Law Firms initiative.) Recognition on the list rewards innovation in the field, with the goal of setting a benchmark for others.

Working Mother Media says some law firms it advises admit they’re not making the progress they’d hoped. Other firms that were on the list previously didn’t make the cut for 2017.

“One of the things I’ve been struck by in my work on the initiative this year is the value law firms attach to being involved,” Kaplowitz says. “They’ve told us how important it is to the law firms that they get on this list and that they stay on this list. It has real value to them in their diversity and inclusion efforts—including recruiting law students and laterals.”

**TWO TALES**

Ellyce Cooper targeted Sidley Austin when she was looking to make a move as a midlevel associate. Cooper says one reason she chose the firm was because it had a “great reputation with women.” Sidley has been on the Best Law Firms for Women list nine times since its inception.

“I wanted a firm where women with children were succeeding, and based on the investigation I had done, Sidley seemed to fit that bill, in addition to having a great client base and doing high-quality work,” says Cooper, who’s based in Los Angeles.

Cooper made a lateral move to Sidley’s white-collar and internal investigations litigation group in 2003. Since then, she’s been active in the firm’s mentoring program...
and is the Greater Los Angeles chair of its committee on retention and promotion of women.

Cooper says she’s most proud of the community at Sidley that considers the needs of female lawyers at all levels.

“There are a few things you need to see—women in positions of power across the firm, office heads, practice group heads, various levels of firm management. You need to make sure the associates coming through the ranks are getting the resources they need to succeed,” Cooper says. “It’s an overall sense of a firm wanting women to succeed. Around every corner we have people making sure what we’re doing provides for an even playing field.”

Casey Fleming had a similar experience at Foley & Lardner. Early support that included client management has kept Fleming’s nine years at Foley on an upward trajectory. She also recently moved to a flex-time schedule in the firm’s Milwaukee office after having her second child.

Most recently, Fleming co-chairs the firm’s strategic planning committee for diversity and inclusion, helping to develop a three-year plan to focus on retention and recruiting. She also has chaired the associates committee and the compensation and benefits subcommittee. She says she is on track to make partner in February.

“I learned from my mentors the importance of being my own advocate and being open with firm leadership about training and other things I’d like to do—and I keep asking,” Fleming says. “I think it’s important that firms have formal programs like Foley does, but just as important is the mentorship, business development, opportunities for client management, and the amount of confidence and support they throw behind us.”

TOP DOWN, BOTTOM UP

One universal theme is that commitment and support from the top are necessary to support women’s advancement. Firms must continually assess the metrics, along with the money and the resources they’re devoting to cultivate diverse attorneys.

“You can’t make change, and you can’t make something important, if the top doesn’t care,” Cooper says. “The bottom can rally around it, but if the top doesn’t give it attention, you’re not going anywhere. And you need the bottom to help say, ‘What should this initiative be, what’s really going to make a difference, what do we need?’”

Men as allies are absolutely critical to progress in the profession, advocates say, in an “if you’re not part of the solution, you’re part of the problem” way. As long as firm rainmakers, who almost always are men, continue to pass their books of business to other male attorneys, they will perpetuate the cycle that keeps women out of power.

Roger Furey, chair of Katten Muchin Rosenman

ROBERTA LIEBENBERG / "Clients are really demanding not just women in the pipeline but senior women, first-chair trial lawyers, leads on the deal."
and a partner in the intellectual property practice in Washington, D.C., understands this dynamic and recognizes the challenge. With decades in practice and years of experience on diversity teams, Furey is working to build on the progress Katten has made so far.

“I am 100 percent convinced clients want and deserve diversity from their legal advisers,” Furey says. “All the research shows a diversity of view is for the betterment of our institution and our clients. It makes sense to me on every level, and it’s kind of intuitive for me.

“We’ve done training on unconscious or implicit bias, and there’s no doubt on anyone’s mind that it exists with respect to diverse and female attorneys, as in any industry. You have to work very hard because it’s so challenging to succeed at diversity because of the way our institutions are set up. It’s not going to be corrected without people paying attention to it.”

At Katten’s Chicago office, partner Laura Martin, who is on the executive committee, chairs the women’s leadership forum. She’s also developed a national mentoring panel for women to reach out to one another for career guidance. Katten has been on 10 Best Law Firms lists, which is every year a list has been issued.

Martin says women made up only one-third of law school classes when she graduated, and all her mentors were men. But she benefited from partners who took an interest in making sure she got exciting career opportunities early on. Martin wants to ensure that other women aren’t left behind.

“At this point in my career I want to give back,” Martin says. “I’ve been lucky with mentors, etc., and I want to institutionalize some of the things that made me successful. People gave me an opportunity to shine, taking me to pitch meetings, introducing me to clients. I demonstrated early on I was able and willing to do these things.”

LEADERSHIP POSTS ARE IMPORTANT

In addition to the women’s forum, Furey says, Katten has a sponsorship program that targets diverse attorneys and has solid representation of women on key firm committees, ranging from 22 to 25 percent.

According to the National Association of Women Lawyers, women on leadership and management teams are a key metric. Typically, women are underrepresented on compensation committees in BigLaw. But evidence shows that law firms with more women at the table have narrower gender pay gaps.

The NAWL reported after its 2015 retention and promotion survey that firms with at least three women on the compensation committee had female equity partners earning 87 percent what their male peers earned. But firms with two or fewer women on the committee had female equity partners earning 77%.
percent that of their male counterparts.

Despite the lower pay, when comparing the median hours worked by female partners, the numbers are startling. The NAWL reported that women worked 2,224 median hours yearly, compared to 2,198 for men; yet women earned less. Furey says that he is aware of the disparities, and that Katten is working on the pipeline. A firm committee monitors the progress of diverse midlevel and senior associates with a "laserlike focus" to ensure they're with the firm for the long run.

“This isn’t just a ‘check the box,’” Furey says. “It’s something we need to do to get our firm to where we need to get to, so we can be the best at this.”

WHAT’S IN A LIST?

Lawyers and law firms love lists. The affinity starts in law school, where rankings and competitions are part of the culture. Afterward, there are lists that crown super-lawyers and those that categorize firms into top 200, 100 or even 50. If a firm makes the right list, it can mean a lot. Or it could mean nothing at all. Some say the idea of “best law firms for women” is an oxymoron in a climate in which progress is measured in fractions of a percentage point.

“I’m ambivalent about all of these lists,” says Liebenberg, a two-time former chair of the ABA Commission on Women in the Profession. “It’s an easy metric, and firms can feel like ‘We’ve won this and we’re done; check that off.’ Firms see it as a marketing advantage, which is good if they become convinced that it’s important to ensure women lawyers are advancing and succeeding.

“A lot of times these reports are self-reports; the firm submits them. For lawyers thinking about going to these firms, the important metric is how many are equity partners, the composition of women on really important committees like management and compensation. Those are the real hallmarks of how you’re going to see real progress for women in law firms.”

Those were the types of data points labor and employment partner Samantha Grant investigated when she was looking to make a lateral move this past spring. A member of the ABA women’s commission and vice-chair of the Section of Labor and Employment Law, Grant selected Sheppard, Mullin, Richter & Hampton after doing some due diligence. She looked for female-friendly policies and diversity—and inclusion at the top.

Sheppard Mullin didn’t participate in this year’s Best Law Firms survey. But it has before and plans to in the future, says diversity and inclusion manager Carol Ross-Burnett. She says the firm culled best practices information from the survey to further its own gender initiatives.

“Sheppard Mullin was recommended to me, by a mentor, because of how much the firm is doing to make the environment as inclusive as possible,” says Grant, who works out of the Century City office in Los Angeles. The firm, she adds, has “done studies on women in the workplace: what causes them to stay, what causes them to leave ... to make sure the firm is as inclusive as it can be.”

Grant says her firm is working to give female, racially diverse and LGBTQ attorneys a seat at the table through

Find more details about each firm at workingmother.com.
sponsorship programs and policies to help them develop more business. This sort of track record, on paper and in practice, sealed the deal for Grant.

When Grant joined the firm April 28, she became the fourth African-American, female labor and employment partner in the firm’s two LA offices.

“I looked at the fact that a great number of practice group and committee chairs were women lawyers,” Grant adds. “I also saw that almost 50 percent of the elected members of the executive and compensation committees were women—that was noteworthy and important to me.”

Pamela Berman, a partner at Bowditch & Dewey in its Boston office, says these kinds of data points are more important than lists, which can give a false snapshot when interpreted alone. Berman argues that a statistically neutral picture of what it means to be an equity partner can be categorized as great places for women.

“Let’s have one definition—profit per partner for purposes of revenue,” which is something firms are unwilling to disclose, Berman says. “That’s more proof in the pudding than saying ‘We have a lot of women in the firm; we promote them; it’s a great place for women and minorities.’ Is it? Do you really consider them your equal when you’re paying them at the bottom of the scale? It’s distorting statistics.”

Berman also questions whether women at the “best” firms are being represented on management committees in significant-enough numbers to have influence, and whether they have titles without compensation. But Michele Coleman Mayes, immediate-past chair of the ABA women’s commission, says that in the legal field, competition can sometimes be enough to effect change. “If the platform is large enough to get noticed, it’s sparking competition among [firms]. They don’t want to be upstaged or at the bottom of the bar,” she says.

“That is genuine, and it might cause real change because they’re concerned with what the Joneses are doing. I have frequently thought: How do you get people to compete? Because in this country, competition changes behavior.”

Mayes also hopes firms will use the women’s commission’s new toolkit that promotes transparency in the compensation process, so women know the salary range for their level and practice group and whether they’re being paid fairly.
According to a January report from the Commission on Women in the Profession, women make up 36 percent of the legal profession. Their representation across partnership ranks at major U.S. law firms averages 22.1 percent, according to the latest National Association for Law Placement study, despite gender parity in graduating classes during the past two decades.

Dismal as these numbers seem, they are worse for minority women—African-American lawyers in particular. In 2016, women-of-color attorneys composed 7.2 percent of total lawyers at major U.S. law firms and 2.8 percent of partners.

At the highest compensation level, equity partnership, the representation of women has been fairly stagnant for a decade. NALP’s latest data shows that in 2016, 18.1 percent of equity partners were women. Law firms on Working Mother Media’s list average 20 percent female equity partners.

LAURA MARTIN / “I want to institutionalize some of the things that made me successful.”

“That is better than the national average, but only by a little,” Kaplowitz says. “That says there is room for improvement. Another interesting data point we’ve learned this year is that women are advancing faster in single-tier law firms than in two-tiered firms.”

On the Best Law Firms list, 40 percent of equity promotions in one-tier firms went to women last year. In two-tier firms, 32 percent went to women. But according to the NAWL, the compensation gap between men and women is growing, with the average female equity partner earning 80 percent less than her male counterpart—4 percentage points less than a decade earlier.

A SMALL CHANGE

Although there has been no appreciable progress for female equity partners, the numbers are inching in the right direction. NALP found that, in the six years it’s
been collecting data, the percentage of female equity partners has increased from 15.6 in 2011 to 18.1 in 2016. During the same time period, the percentage of male equity partners decreased from 84.4 to 81.9.

“As depressing as the stats may be, it’s a different environment than it used to be, thankfully,” says Bonnie MacNaughton, a partner in the litigation practice group at Davis Wright Tremaine in Seattle and chair of its women’s affinity group.

“It’s changed a lot since I started as an associate in 1982. Back then, I looked around the firm I worked at, and there were no women who had kids across any practice group. Not one. I didn’t see anyone who looked like me working there. Not one person. It became clear to me that my path was elsewhere. But since then, things have changed a lot.”

MacNaughton moved to Davis Wright after working in-house at Microsoft. The firm has been on the Best Law Firms for Women list for four years in a row.

“This is definitely, if not unique, certainly one of the rare law firms that allow people to pursue really interesting careers and a quality of life that is more balanced than most places,” MacNaughton says. “It’s really important to women but also important to our male colleagues here.”

MacNaughton says her firm provides a multifaceted approach to support women in their career and personal lives, with the goal that they “can’t imagine being anywhere else.”

She says that, like most firms, Davis Wright has more women in the younger and midlevel range than the higher range, particularly in the litigation department. But she says the firm is working hard to adjust the imbalances.

“The trick for us, and other firms, is the retention of women lawyers,” MacNaughton says.

Liebenberg is part of a team investigating that topic through one of ABA President Hilarie Bass’ initiatives, Achieving Long-Term Careers for Women in Law. The team is examining the issue and how senior female attorneys are faring at law firms. Liebenberg points to data showing that in firms only 27 percent of lawyers 50 and older are women.

“If you want to see if you’re going to be successful as a young woman lawyer, look and see if there’s a strong corps of senior women lawyers,” Liebenberg says. “That’s probably the best predictor of success.”

CARROT AND STICK

One engine for change that might advance the retention and continued success of female attorneys is the corporate law department. Many general counsels, fed up with the snail’s pace of diversity progress, are changing their approach to awarding business. As companies increasingly seek to tap into a global market and reflect a diverse society internally, they are expecting the same results from outside counsels and are using the power of the purse to get them. “I’ve always thought it had to be an economic-based change,” Berman of Bowditch & Dewey says. “I didn’t think firms would change as long as the people making the money—the men—didn’t think there was an economic reason to change.”

A wealth of research demonstrates that diversity benefits the bottom line. According to a study by market research company Acritas, law firms that provide “very diverse teams” of lawyers tend to receive a 25 percent greater share of legal spending than nondiverse teams, making the business case for diversity hard to ignore.

But many wonder how it’s possible that a business case for diversity has to be made at all, decades after female lawyers have been successfully working alongside men and doing the same jobs—often for less pay.

Last August, the ABA House of Delegates passed Resolution 113. It called on all providers of legal services to expand opportunities for diverse lawyers and, in particular, for corporate legal departments to use their purchasing power to increase economic opportunities for diverse attorneys.

Since the resolution passed, more than 70 companies have co-signed to support the initiative, putting heat on outside counsel by requiring diverse teams and leads, as well as concrete data on diversity efforts. (See “How Can GCs Be a Force for Change?” page 65, about a panel on diversity at this year’s annual meeting.)

“One of the trends we’re now seeing is clients are becoming more demanding and don’t want just lip service to diversity,” says Kaplowitz, the special adviser to the Best Law Firms initiative. “The more clients demand this, the more it will matter to law firms.”

The general counsels acknowledge that change won’t happen overnight. But many have pledged to keep the pressure on until it does. At the law firm level, some women have already noticed a difference.

“Clients are really demanding not just women in the pipeline but senior women, first-chair trial lawyers, leads on the deal—and if you don’t have these at your firm, it will be to a great disadvantage,” says Liebenberg.

It’s easy to be cynical when women have been fighting the same battle for equality during the course of two separate centuries, with nominal advances to show for it. But some of the trends—larger summer associates, a focus on explicit and implicit bias training, and general counsel’s focus on diversity—are offering a glimmer of hope.

“There is still lots and lots of work to be done, but it is getting better,” Cooper of Sidley Austin says. “Sometimes I get discouraged, but then I think about when I started—how few female partners there were, how many had kids, how many were working reduced hours. Looking back 15 to 20 years, yes we’ve made progress. But is it where we thought we’d be 20 years out? Probably not,” she says.

“I have a 9-year-old daughter; my friends have daughters; we talk about where will they be when they’re at a firm. We’re very conscious. We’re trying to make a path for female associates here—but also for our daughters.”
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THE SUPREME COURT’S NEW TERM WILL ADDRESS THE TRAVEL BAN AND OTHER HOT-BUTTON ISSUES WITH PRESIDENT TRUMP’S FIRST APPOINTEE ON THE BENCH

W
hen the U.S. Supreme Court took the bench for the final time of the 2016-17 term in late June, the justices had a few surprises up their sleeves.

By the end of the morning on June 26, the court had issued the final decisions of a relatively humdrum term. But it had also laid much of the groundwork for a return to blockbuster status for the term that begins Oct. 2.

The court’s actions that last day included granting review in a major case about a baker’s religious objections to creating a custom wedding cake for a same-sex couple, ordering new arguments in two immigration cases that were argued before Justice Neil M. Gorsuch joined the court in April, and—in a case that garnered the most attention of all—the issuance of an unsigned opinion taking up the case over President Donald J. Trump’s executive order that seeks to limit immigration from six predominantly Muslim countries.

The action in the consolidated cases Trump v. International Refugee Assistance Project and Trump v. Hawaii plunged the justices headlong into a case involving one of the signature policies of the president’s early tenure.

The court’s last term “was kind of sleepy,” in which it “decided a lot of things with eight justices and didn’t make any waves,” says Paul D. Clement, a Supreme Court litigation specialist at Kirkland & Ellis in Washington, D.C., and a former U.S. solicitor general under President George W. Bush.

For the new term, Clement says, “they’re back to nine, and things are back to front-page news.”

“They’re back to nine, and things are back to front-page news.”
—Paul Clement

PHOTO ILLUSTRATION BY BRENNAN SHARP; AP PHOTO

THE SUPREME COURT’S NEW TERM WILL ADDRESS THE TRAVEL BAN AND OTHER HOT-BUTTON ISSUES WITH PRESIDENT TRUMP’S FIRST APPOINTEE ON THE BENCH

BY MARK WALSH

THEM JOURNAL OCTOBER 2017
recent presidents have had notable encounters with the Supreme Court, whether stemming from personal imbroglios or their major policy initiatives.

For President Richard M. Nixon, it was the Watergate tapes case, with a unanimous ruling in *United States v. Nixon* that the president had to turn over the incriminating tapes, which helped precipitate Nixon’s resignation.

Fast-forward to President Bill Clinton, who ended up in the high court in 1997, when the justices unanimously ruled that a lawsuit filed by Paula Jones regarding alleged sexual advances made by Clinton when he was governor of Arkansas could proceed, even against the sitting president. The court’s decision in *Clinton v. Jones* quaintly predicted that “it seems unlikely that a deluge of such [private] litigation will ever engulf the presidency.”

For Bush, whose terms were defined by the war on terror, the cases over the rights of detainees at Guantanamo Bay were the signature battles. And for President Barack Obama, it was a handful of cases over the Affordable Care Act.

“All of these controversies do make their way to the Supreme Court it seems,” says Thomas Goldstein, a frequent litigator before the court and the founder of SCOTUSBlog (for which this author is a contributor).

Pamela S. Karlan, a law professor and the co-director of the Supreme Court Litigation Clinic at Stanford University, says that President Trump has had two arguably significant achievements in his early months in office: the confirmation of Justice Gorsuch and the issuance of his executive order on immigration.

“And now we have ‘the convergence of the twain,’” she says, referring to Thomas Hardy’s 1915 poem about the fateful encounter between the *Titanic* and an iceberg.

Karlan, who worked for a time in the Obama Justice Department, continues: “Here, two things are going to be tested: One is the constitutionality of the travel ban itself. And we’re going to see early on about the stripes of Justice Gorsuch.”

Josh Blackman, a libertarian and a professor at South Texas College of Law in Houston, says that cases involving presidential power almost inevitably reach the high court, even if not always so quickly out of the gate. “The reason the clashes between the executive and the Supreme Court are so significant is that the president seeks a level of deference that the rest of the federal government and the states do not.”

**‘PASSIONATE POLITICAL DEBATE’**

As for the specifics of the travel ban case, the high court’s June 26 per curiam opinion ordered, among other things, that the merits be argued during the court’s October sitting. Those arguments are set for Oct. 10.

At issue is Trump’s March 6 executive order that U.S. entry be denied to nationals of six predominantly Muslim countries—Iran, Libya, Somalia, Sudan, Syria and Yemen. The order states that conditions in those countries “demonstrate why their nationals continue to present heightened risks to the security of the United States,” and that “some of those who have entered the United States through our immigration system have proved to be threats to our national security.”

The president’s order explained that the pause was necessary while the administration is working to establish “adequate standards … to prevent infiltration by foreign terrorists.” (The order differed in some respects from its original Jan. 27 iteration.)

The order was challenged in one of the cases before the high court by U.S. citizens and lawful permanent residents who want to welcome spouses or other relatives from the six countries. The suit, by groups such as the International Refugee Assistance Project and the

“Two things are going to be tested: One is the constitutionality of the travel ban itself. And we’re going to see early on about the stripes of Justice Gorsuch.”

—Pamela Karlan

**Photo Illustration by Brenan Sharp**
Middle East Studies Association of North America, claims that the travel ban violates the First Amendment’s prohibition on government establishment of religion because it was motivated not by national security concerns but by animus toward Islam. A federal district court entered a nationwide injunction against the ban, and the full 4th U.S. Circuit Court of Appeals at Richmond, Virginia, affirmed, concluding there was a direct link between Trump’s numerous campaign statements that promised a Muslim ban related to certain territories and the executive order. The other challenge before the court comes from the state of Hawaii and a U.S. citizen whose Syrian mother-in-law is seeking admittance to the United States. That suit led to a ruling by the 9th Circuit at San Francisco, not on constitutional grounds but that portions of the executive order likely exceeded the president’s authority under the Immigration and Nationality Act.

The Trump administration brought both cases to the high court. “This order has been the subject of passionate political debate,” the acting U.S. solicitor general, Jeffrey B. Wall, told the justices in one brief. “But whatever one’s views, the precedent set by this case for the judiciary’s proper role in reviewing the president’s national security and immigration authority will transcend this debate, this order and this constitutional moment.”

Most recent presidents have had notable encounters with the Supreme Court.
briefs, potential mootness and other issues late in the Supreme Court’s term, anticipation built for how the justices would handle the case.

Chief Justice John G. Roberts Jr. announced the per curiam opinion as his last order of business from the bench on the term’s final day. The unsigned—though not unanimous—opinion tinkered with the nationwide injunction by narrowing it significantly.

In practical terms, the opinion said, the ban “may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.”

For individuals, this would mean “a close familial relationship,” the court said. (The Trump administration soon caused fresh controversy by issuing regulations that counted, for example, a mother-in-law as a close relationship but excluded grandparents from the definition. Amid legal skirmishing over those rules, the Supreme Court in July upheld a lower court’s order that expanded the definition to include grandparents, aunts, uncles and some other relatives as close family ties. But the justices allowed the regulation’s tight definition of refugees to take effect.)

In the June per curiam, three justices—Clarence Thomas, Samuel A. Alito Jr. and Gorsuch—dissented in part, saying they would stay the injunctions in full and allow that travel ban to go into effect.

Thomas, writing for those three, said, “Weighing the government’s interest in preserving national security against the hardships caused to respondents by temporary denials of entry into the country, the balance of the equities favors the government.”

The per curiam decision “is very muscular,” Clement says. “It’s setting the stage for a case that is going to be very closely watched.”

Blackman notes language by Thomas referring to “the court’s implicit conclusion that the government has made a strong showing that it is likely to succeed on the merits—that is, that the judgments below will be reversed.”

“The court has, by the brief per curiam opinion, signaled that the lower courts got it wrong.”

—Josh Blackman

Of the travel ban, though the justices seem to have given themselves some off ramps. The per curiam asks the parties to address whether the challenges to the key provisions of the March executive order became moot on June 14, which was 90 days after its effective date.

Some legal observers have suggested that even under a more generous reading of when the order became effective, its 90 days would still expire before the Supreme Court takes up the case during the new term.

“Absent some significant change before the court hears the case in October, I think it’s likely we won’t get a ruling on the merits,” says Leah Litman, an assistant law professor at the University of California at Irvine.

That may be so in the end, but the justices have shown they are willing to put the high-profile dispute front and center as their marquee case as the new term opens.

Besides the travel ban case, there are other potential blockbusters in the wings.

RELIGION AND GAY RIGHTS

Lakewood, Colorado, baker Jack Phillips describes himself as a cake artist who specializes in custom wedding cakes. But he is
also a Christian who refused to create a cake for a same-sex couple’s wedding because he says it was contrary to his understanding of biblical teaching. (He also refuses to create cakes celebrating Halloween, atheism, racism or indecency.)

The Colorado Civil Rights Commission found that Phillips violated the state’s anti-discrimination law and ordered him to make custom wedding cakes for same-sex couples on the same basis as for straight couples. The Colorado Court of Appeals rejected Phillips’ First Amendment arguments that compelling him to create cakes for same-sex couples was a form of compelled speech that violated his rights of free speech and free exercise of religion.

The U.S. Supreme Court held on to Phillips’ appeal in Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission for a long time last spring and granted review only after Gorsuch had settled in as a justice. That has fueled speculation that the court’s conservatives are behind the grant.

“The underlying issue is enormously important,” says Erwin Chemerinsky, dean of the law school at the University of California at Berkeley and a contributor to the ABA Journal. “To what extent can people discriminate on the basis of their religious beliefs?”

PARTISAN GERRYMANDERING
The court confronts a seemingly never-ending supply of cases about racial gerrymandering. But in Gill v. Whitford, set for argument Oct. 3, the justices will consider whether there is a workable standard for outlawing excessively political gerrymandering—the drawing of legislative lines to the benefit of the majority party and to put the minority party at a disadvantage.

In this case, a federal district court struck down a plan for Wisconsin state legislative districts that has given Republicans a stranglehold on the state Assembly even though the state is evenly divided between the GOP and Democrats.

The Supreme Court last struggled with political gerrymandering in 2004 in Vieth v. Jubelirer, over redistricting in Pennsylvania. Justice Anthony M. Kennedy provided the fifth vote in a 5-4 judgment upholding the state’s plan but refused to go as far as a plurality that would have held courts should never review claims of political gerrymandering. He wrote a concurrence suggesting there might be times when such partisan line-drawing would violate the Constitution.

“The Supreme Court has struggled with this issue, to put it mildly,” says William S. Consovoy of Arlington, Virginia, the co-director of the Supreme Court Clinic at the Antonin Scalia Law School at George Mason University. “At one point, there was probably a bare majority to say that political gerrymandering is unconstitutional. A lot of those justices who joined those majorities have retired, so it’s only a prediction as to what others will hold on that.”

CELLPHONE DATA
Twice in recent years, the court has issued rulings applying the Fourth Amendment in the context of digital communications. In 2012 in U.S. v. Jones,
the court held that police attaching a GPS device to a suspect's car and monitoring the vehicle's movements constitutes a search. And in 2014, the court said in Riley v. California that police needed a warrant to search the contents of a cellphone seized incident to a lawful arrest.

In Carpenter v. U.S., the justices are being asked whether the Fourth Amendment permits a warrantless seizure of cellphone records that reveal the location of a suspect over an extended period of time.

“This case presents an important next step in the ongoing effort to reconcile enduring Fourth Amendment principles with the reality of a new digital world,” says the appeal, filed on behalf of a man for whom authorities used cell-tower data obtained from service providers without a warrant. The data tied the suspect to a series of armed robberies.

The information was obtained by court order under the federalStored Communications Act, but privacy advocates say authorities sought large amounts of data without a finding of probable cause as to the suspect.

A federal appeals court ruled that the suspect had no reasonable expectation of privacy in cell location records maintained by service providers, saying they were akin to the dialed phone numbers conveyed to the phone company, which the Supreme Court held in a 1979 decision were not protected by the Fourth Amendment.

Chemerinsky says the case could be of wide importance in the digital age. "Our cellphones are constantly giving information about where we're located," he says. "Do police need to get a warrant to do that, or can they just go and get that information?"

**SPORTS WAGERING**

In a high-stakes case (as it were), the justices will consider whether a 2014 New Jersey law that repealed a prohibition on sports wagering at casinos and racetracks is pre-empted by a federal statute, the Professional and Amateur Sports Protection Act.

In Christie v. National Collegiate Athletic Association, New Jersey Gov. Chris Christie and other state officials and authorities (as well as the state's racetrack interests), are pitted against the NCAA, the major professional sports leagues and the federal government.

The state repealed its longtime prohibition on sports gambling in 2014 and gave up efforts to regulate it, which were the basis for an earlier chapter of this long-running litigation. The leagues have long sought to keep state-sanctioned sports wagering in check, and they say the state is licensing and authorizing such gambling in violation of the federal statute.

The full 3rd Circuit, based in Philadelphia, agreed. And it rejected the state interests’ arguments that the federal statute infringed on the state's 10th Amendment rights because it neither compels a state to regulate according to federal standards nor requires state officials to administer federal law.

**THE KENNEDY COURT**

As the justices take the bench this month, it will be the first full term for Gorsuch, who asserted himself quickly during his partial tenure. Meanwhile, Kennedy didn't fulfill retirement rumors (nor the hopes of the Trump administration) this past summer, but he has reportedly told applicants to be law clerks beyond this term that he is indeed considering retirement.

Noting that Kennedy was in the majority 97 percent of the time last term (ahead of Roberts and Justice Elena Kagan, who were tied at 93 percent), Chemerinsky of UC-Berkeley says: “It’s still the Anthony Kennedy court.”

For one more term, at least.
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U.S. Attorney General Jeff Sessions regularly goes a bit off script from prepared speeches, even more so when addressing groups with which he is particularly close.

He jettisoned the entire text in February at the winter meeting of the National Association of Attorneys General, where he was Alabama’s representative for two years beginning in 1995. He talked about a growing crime wave, albeit one whose seriousness is questioned by many experts.

“I’ve got a nice speech here, but maybe we can just chat,” Sessions said after being greeted with a standing ovation. And chat he did in his folksy, earnest way, occasionally bouncing up on the balls of his feet in his compact and tightly wound fashion, eyes darting about as he turned his head and gazed side to side with occasional smiles.

In the unused, written version of his speech, there were details to illustrate a main theme—an increase in violent crime. It mentioned citizens fearing for their lives when leaving home; parents putting children in bathtubs to avoid stray bullets; and entire neighborhoods dominated by drug dealers, gangs and other violent criminals.

It didn’t offer context, but he was highlighting problems in mostly urban environments. But, off the cuff, Sessions—who grew up in a tiny, unincorporated rural Alabama community in the 1950s and ’60s—made this point about fear earlier in his speech, and it was simpler and personal.

BY TERRY CARTER
PHOTO: ASSOCIATED PRESS
Crime had been increasing in the 1960s and was still doing so in 1975 when he became an assistant U.S. attorney, Sessions explained, and “this was a bad trend.”

“The mentality was that nothing could be done,” he explained. That mentality believed prisons made things worse, criminals were victims, police were victims, victims were victims. “Everybody was a victim, and we couldn’t do much about it.”

Those concerns led to “burglar bars, burglar alarms” on everyone’s homes.

“Never been done before; people never locked their doors before in the ’50s,” he said, his voice rising in pitch with the last phrase, as if it were yesterday. “And so, this was a big change.”

For most of those who either lived in the 1950s or are steeped in the sweet and uncomplicated way of life portrayed in TV shows of the day, that culture—somewhat idealized—is long gone. And probably most people in towns and cities larger than Hybart, where Sessions’ father ran a general store, locked their doors at night back then.

Sessions believes the era he remembers for its safe innocence can and should be restored. From the moment he was sworn in as attorney general, he has worked directly through policy to make it happen.

And he has been turning upside down a lot of accepted wisdom and policy in matters of crime, punishment and civil rights, such as voting rights and specific protections concerning sexual orientation.

It leaves many experts bemused.

In May, the American Society of Criminology, an organization of academics, issued a statement saying the Trump administration’s handling of criminal justice had come to “demonstrate an incongruity between administration policy efforts and well-established science about causes and consequences of crime.”

But Sessions appeals more to average people on the street, who likely see themselves as potential crime victims, says Douglas A. Berman, who teaches criminal law at Ohio State University and operates the blog Sentencing Law and Policy.

“You’ve got to understand who he is and what he cares about,” says Berman, who finds Sessions’ motives genuine. “I continue to be hopeful that he will be not only measured but ultimately effective.”

Berman adds that we have an opioid epidemic and significant violent crime problems, particularly in some cities, “and I want him to be successful.”

Much discussion and debate has surrounded the attorney general, especially in midsummer when the man who appointed him seemed dead set on driving him out of office, if not out of town. Still, as of the ABA Journal deadline in early September, he was hanging tough. Sessions’ reputation is that he’s not one to run or to swiftly change directions.

And his recipe for success is simple: Arrest criminals and put them behind bars.

JOINT MESSAGE

Sessions was the first senator to back Donald Trump during the presidential campaign, and they were together on message from the beginning: Fear of immigrants and crime struck a chord with a lot of Americans. The two of them went at that chord in tremolo, with a pick. Sessions had played these themes for decades, while the president came to the effort in more recent years.

“Sessions has never struck me as a particularly complex person,” explains Jonathan Turley, a professor at George Washington University Law School who differs with the attorney general on many issues but believes Sessions is motivated by his views as “first principles.” Turley adds that critics wrongly “ascribe darkest motivations to his conduct.”

“He’s very straightforward and exactly as he appears, quite open and frank about his views,” Turley continues. “I’ve worked with a lot of members of Congress, and it’s not uncommon for them to say in private something diametrically opposed to what they say publicly. He’s one of a couple of senators I’ve found entirely consistent both privately and in public.”

In one jolting announcement after another since he became attorney general, Sessions has challenged or reversed policies he believes are soft on criminals and
threaten public safety, often despite evidence-based findings that suggest otherwise.

Just a few of those initiatives:

• Ordering U.S. attorneys to charge the most serious crimes possible under the available facts, overturning then-Attorney General Eric Holder's memo calling for lesser charges to avoid mandatory minimum sentences for nonviolent, low-level drug offenders.

• Rescinding former President Barack Obama's order to phase out the use of private prisons because they provide less safety and cost more.

• Reviving the use of civil asset forfeiture, permitting law enforcement agencies to seize money and property from people not yet even charged with crimes.

"He views crime in a very linear fashion," says Turley. "The Obama administration sometimes seemed to relish the complexity of modern crime. They almost had a slogan posted above the door: 'It's not that simple.' We'd be better off if we could find a middle ground."

As Sessions sees it, 1970s tough-on-crime policies and the launch of the war on drugs in the 1980s were major factors in the subsequent drop in crime rates, which peaked in 1991 and declined up until 2014. Now we're backsliding, according to Sessions, who told the gathering of state attorneys general that "maybe we even got a bit overconfident when we've seen crime rates decline for so long." He called for a return to "the ideas that reduce crimes."

In his prepared speech for the National District Attorneys Association in July, Sessions described "a multifront battle" with increasing violent crime, vicious gangs, an opioid epidemic, and threats from terrorism and human traffickers, "combined with a culture in which family and discipline seems to be eroding further."

Sessions noted, "Per capita homicide rates are up in 27 of our 35 largest cities," representing "a sharp reversal of decades of progress. My best judgment is that this rise is not an aberration or a blip. ... Yielding to the trend is not an option for America, and certainly not to us."

James Lynch, president of the American Society of Criminology, believes the AG's statistical emphasis is misleading.

"You can mess around the edges about whether homicides are going up in selected cities, but it's not catastrophic or other hyperbole," he says. "It doesn't look like we're going to get the kind of broad-based increases like the crime wave that started about 1987 through about 1994 in almost every large city. [That tracks the crack cocaine epidemic.] Since then it's been bouncing around in specific cities, getting bad and then better."

Sessions' approach to crime, punishment and civil rights is the same now as when President Ronald Reagan appointed him in 1981, at age 35, as U.S. attorney for the Southern District of Alabama. After 12 years in that job, he had to move on when Bill Clinton was elected president, and Sessions soon was elected state attorney general.

SENATE SWITCH

Sessions adopted different methods after he was elected to the U.S. Senate, beginning in 1997, because circumstances changed. He no longer had executive power. Many of his policy ideas were outliers, including his extreme conservatism, especially on crime and immigration, putting Sessions on the fringe. But he still had an impact.

Over the years in the Senate, Sessions repeatedly fought and thwarted legislative efforts—even those backed by Republican colleagues—for immigration and criminal justice reform. In 2013, he was instrumental in scuttling bipartisan, comprehensive immigration reform because, among other things, it included a 10-year pathway to citizenship for those here illegally and thus would flout the rule of law, which he sees as corrosive of society.

"If you look at the young prosecutor Jeff Sessions and project that self through his confirmation as attorney general, there is a remarkable consistency and clarity in what you hear from him," says Turley. "He has always viewed himself as a prosecutor, even when he was a senator, and that's why I think being AG was his lifelong dream."

Sessions said as much in July during an awkward news conference after Trump humiliated him—one in a succession of such attacks by the president that seemed calculated to get Sessions to resign. Trump noted that he would not have appointed Sessions if he'd known the attorney general would recuse himself in the probe of Russian involvement in the presidential campaign. Sessions later said the criticism was "kind of hurtful." But he also has vowed to stay as long as it is "appropriate," saying of the job itself: "It's something that goes beyond any thought I would have ever had for myself."

Some might have walked away under such pressure. But after decades on his anti-crime, anti-immigration mission, Sessions apparently was willing to endure the insults in order to keep his position and the power of policymaking to finally achieve what he set out to do long ago.

CULTURAL WARRIOR?

His approach is as significant as the goal. "He views crime fighting in cultural terms," says David Dagan,

Jonathan Turley: "He's very straightforward and exactly as he appears."
a political scientist and national fellow at the University of Virginia’s Miller Center of Public Affairs and co-author of *Prison Break: Why Conservatives Turned Against Mass Incarceration*. “It’s not just about reducing harm in the sort of neutral language of public policy. It is about taking a side and declaring which side you’re on.”

Among many major shifts in policy, the AG moved to possibly curtail Department of Justice consent decrees with courts monitoring troubled police departments, which he has called a “war on police.” The Obama administration had obtained 14 of them; Sessions ordered a sweeping review of all active ones.

As part of this effort to support police more directly at a time of heightened criticism and scrutiny of their methods, Trump spoke in February at the midyear conference of the International Association of Chiefs of Police. He criticized consent decrees and said law enforcement in general has been “unfairly maligned and blamed for the crimes and unacceptable deeds of a few bad actors. Amid this intense criticism, morale has gone down, while the number of officers killed in the line of duty has gone up.”

Obama had been asked to speak to the IACP every year of his presidency, but declined the first seven invitations. He finally did so in the fall of 2015, shortly after Holder announced at the ABA Annual Meeting that the DOJ would no longer pursue mandatory minimum sentences for nonviolent, low-level drug offenders.

This jockeying for the hearts and minds of law enforcement leaders is another aspect of the culture wars, and Dagan argues that to reverse developments in policy and practice that no longer embrace tough-on-crime measures, it will take a sustained public law-and-order crusade of the kind Sessions has pushed as attorney general.

“I’ve been asked to speak about my experience as an elected public official,” Sessions has said. “I’ve been asked to speak about my experience in law enforcement and my belief that the police have taken a beating in the last five years or so. And I’m happy to do that.”

Not that Jefferson Beauregard Sessions III isn’t experienced at pure politics. He came of age when Alabama was a Democratic stronghold, albeit during the years of Gov. George Wallace, a heavy-handed states’ rights, pro-segregation Dixiecrat. While Sessions was in high school, an English teacher recommended he read the *National Review*, a conservative magazine, which he did. And he quickly went to work in the trenches helping his elders develop Alabama’s modern Republican Party as the state’s true conservative voice.

Sessions organized a chapter of Young Republicans at Huntingdon College, where he worked on the U.S. Senate campaign of Perry Hooper Sr., a pioneer in building the modern party. Hooper lost, but Sessions gained chits in the party. As a highly active youngster in the weaker party, he had little competition.

In 1972, while at the University of Alabama School of Law and active in the Young Republicans, Sessions worked on President Richard M. Nixon’s re-election campaign and attended the Republican National Convention in Miami.

“Sessions was really into Republican organization nationally to support different candidates, not just in Alabama,” says William H. Stewart, retired professor emeritus of political science at the University of Virginia.

“YOU CAN MESS AROUND THE EDGES ABOUT WHETHER HOMICIDES ARE GOING UP IN SELECTED CITIES, BUT IT’S NOT CATASTROPHIC OR OTHER HYPERBOLE.”

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“It’s hard to say how much of this is ideological and how much is based on some kind of political calculus,” Dagan says. “But he clearly sees an opening, with Trump’s election, for this worldview to make a comeback.”

While Sessions adheres to an ideology that is his own eclectic combination of various conservative ideas and beliefs built on his own experience and worldview, a number of observers who watched him at work over the years, such as Turley and Berman, believe he is not a political animal at heart. For example, Sessions has pushed back against the legalization of marijuana, even as it has been accepted by several states and is becoming a significant tax revenue source for them; and that fight could be politically disadvantageous for him.

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Alabama. Stewart has written extensively on the state’s government and politics.

“Through his Young Republican days, Jeff became connected to Lee Atwater and that crowd,” says Armand DeKeyser, who worked for Sessions when he was U.S. attorney and state attorney general, and as his chief of staff in the Senate from 1997 to 2005. Atwater, a bare-knuckled political operative from South Carolina, went on to become an adviser to Reagan, who appointed Sessions to be U.S. attorney and later nominated him to be a federal judge in 1986. Taking into consideration Sessions’ conservative position on race issues, including school integration and voting rights, the Senate committee rejected the nomination.

While researching the Reagan-era DOJ two years ago, Dagan discovered an archived 1982 letter from then-U.S. Attorney Sessions to U.S. Attorney General William French Smith. It opens a window on Sessions’ then-U.S. Attorney and later nominated him to be a federal judge in 1986. Taking into consideration Sessions’ conservative position on race issues, including school integration and voting rights, the Senate committee rejected the nomination.


Sessions opens by saying he knows he’s a presumptuous “resident of the distant boondocks,” then offers his boss detailed suggestions on how the DOJ’s legislative crime package should be crafted.

Be more comprehensive without holding back, Sessions wrote, listing everything the department wants, including every prosecution reform, and don’t leave out controversial issues such as the death penalty.

The “liberals will buzz about with agonizing whines,” he continued, and having “identified themselves as sympathizers for drug smugglers and other assorted criminals, congregating around the bait, they should then be flattened by the president in a full-scale campaign on behalf of the legislation.” “Politically nothing could be better,” he added, noting that the key is personal involvement by Reagan to highlight the differences between liberals and conservatives, and “the bigger the confrontation, the clearer the definition.”

Smith’s response was polite and detailed, as far as legislative proposals in general are concerned. But it made no mention of the details of Sessions’ suggested strategy and said the letter had been passed along to the head of the DOJ’s legislative affairs office.

BACKING OFF CIVIL RIGHTS

While Sessions’ initiatives as attorney general thus far have hammered hardest and most at crime, he also has acted on his strong views concerning enforcement of civil rights laws, raising concerns with many and pleasing a significant portion of Trump’s base. As with criminal law enforcement, he has reversed significant civil rights policies adopted by the Obama administration.

In February, the DOJ pulled back from supporting the key aspect of a lawsuit it brought in 2013, dropping its claim that Texas’ voter ID law discriminated against minorities. (Subsequently, Trump created the Presidential Advisory Commission on Election Integrity to investigate allegations of voter fraud in U.S. elections, with Kris Kobach, a leader in efforts backing voter ID laws, as its vice chairman and operational leader.)

Over the years, Sessions has opposed various gay rights measures, such as same-sex marriage. Shortly after he was confirmed as attorney general, the DOJ pulled back from supporting Obama administration policy protecting transgender students in choice of restrooms in public schools. Then in July, Justice intervened in a federal lawsuit in New York to argue that Title VII does not cover sexual orientation in employment discrimination, and that only Congress, not the courts, can give the law such reach.

Just weeks earlier, Trump nominated Eric Dreiband to head the DOJ’s civil rights division. Dreiband has worked for corporate clients as a management-side employment lawyer handling, among other things, various kinds of civil rights claims.

The messages have been clear: Sessions, as the chief legal officer in the Trump administration, is pushing his brand of conservatism.

When he was in the Senate, Sessions embraced evidence-based solutions in criminal justice—when approached in the right way. Laurie Robinson knew that way.

Robinson was twice appointed to run the DOJ’s research and statistics arm (during the Clinton and Obama administrations) to help with criminal justice. As assistant attorney general in charge of the Office of Justice Programs from 1993 to 2000, Robinson says she worked closely with Sessions on several matters, both in Washington and numerous times in Alabama.

They became close enough that Sessions spoke at Robinson’s farewell event at the DOJ in 2000, saying the key aspect of a lawsuit it brought in 2013, dropped its claim that Texas’ voter ID law discriminated against minorities. (Subsequently, Trump created the Presidential Advisory Commission on Election Integrity to investigate allegations of voter fraud in U.S. elections, with Kris Kobach, a leader in efforts backing voter ID laws, as its vice chairman and operational leader.)

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Sessions and DeKeyser, his chief of staff.

“I always found him to be very straightforward,” says Robinson, a professor in the criminology, law and society department at George Mason University. “He said what he thinks and, right now, he’s saying what he thinks too.”

That qualified last phrase indicates Robinson’s concern with some of Sessions’ efforts as attorney general. She had found him very supportive of her science-based criminal justice efforts while she ran the Office of Justice Programs, and he chaired the oversight subcommittee that monitored her agency for the Senate Judiciary Committee.

“He was interested in smaller, more effective government, and I did briefings for him, he did hearings, and we worked closely together,” Robinson says. She sold him on the OJP’s research, development and evaluation arm, the National Institute of Justice.

“I think I pitched it to him in part as important for evaluating programs to see if they’re effective and if federal money should go to them,” Robinson says. “He liked that idea of seeing what works and what doesn’t. He really got behind it.”

So much so that when Lynch was confirmed in 2010 as head of the office’s Bureau of Justice Statistics, which crunches and analyzes crime data, Sessions invited him to his Senate chambers to talk.

“He was very respectful of data at the time—and very interested in immigration and crime, with strong opinions,” says Lynch, now a criminal justice professor at the University of Maryland.

But Sessions has not been so friendly to evidence-based research as attorney general. In April he disbanded the DOJ’s National Commission on Forensic Science, composed of approximately 30 outside advisers, including scientists, heads of crime labs, prosecutors, defense lawyers and judges. The Obama administration created the commission in 2013 after the National Academy of Sciences reported about problems with crime labs, examiners and researchers analyzing evidence in criminal cases.

The studies pointed to control of the labs by law enforcement agencies as a key problem.

Sessions said he would replace the commission with an internal DOJ senior forensic adviser and crime task force, just the kind of arrangement criticized by the National Academy of Sciences.

“I think dropping the commission bodes poorly for the future,” Robinson says. “It looks like part of the whole Trump administration approach toward science.”

GOING WITH THE GUT

Whatever the president’s reasoning for eschewing scientific data, Sessions tends to go with his gut instincts, developed in rural and then urban Alabama over a lot of years and honed in Washington, D.C. In matters of crime, he has particularly strong views about recidivism.

In a study of prisoners released in 30 states from 2005 to 2010, the DOJ’s statistical arm found that more than 75 percent of those released committed another crime within five years, and 82 percent of those who stole property went back to their old ways.

Several social and economic factors are at work in leading many people to commit crimes and to return to crime when re-entry into society isn’t successfully carried out. But Sessions’ greatest concern is crime victims.

“Sessions looks at the crime rate, which affects everyone, more than the incarceration rate,” says William Otis, a former chief of the appellate division in the U.S. attorney’s office for the Eastern District of Virginia and former special White House counsel for President George H.W. Bush. “There’s a big divide in the country on that, and he primarily views criminals as victimizers.”

Sessions’ mindset is perhaps captured in this recounting of his approach as U.S. attorney in Mobile in the 1980s and early ’90s by his longtime assistant aide-turned-chief of staff, DeKeyser.

“Jeff knew it was the petty criminals who made life difficult,” DeKeyser says. “The ones who steal your TV. If a criminal otherwise didn’t have much of a serious crime but was a repeat offender, if they had a gun, he’d find a way to make a federal case out of it and add an automatic five years. With state charges, they would have gotten out pretty quickly.”

The event line for the Trump administration has accelerated at a pace never seen before, with months and years of significant news and change happening almost weekly. And major breaks from custom and policy have become routine. It has thus far provided Sessions with an almost perfect laboratory for his desire and design to take us back to “better times.”

This is to his delight—as we learn new lessons about lessons learned.
The Power of the ABA

President Bass touts lawyers’ role in protecting democracy

The American Bar Association’s new president, Hilarie Bass, appeared to be speaking partly to nonmembers at the ABA Annual Meeting when she related her experiences in the organization and touted its ability to make changes that enhance public confidence in the justice system.

The ABA is a powerful organization that can make the justice system more effective, more efficient and more available to every American, Bass said in a speech to the ABA House of Delegates in New York City. “That is the power of the American Bar Association,” Bass stated.

She recalled her first association experience happened as a third-year associate at Greenberg Traurig in Miami, when a partner entered her office and told her they were going to a Dade County bar luncheon. Bass said it was the last thing she wanted to do, but she went anyway.

“Little did I know at that time that that lunch would start me on the path that led me here today,” said Bass, co-president of Greenberg Traurig. She became ABA president at the end of the House session on Aug. 15, replacing Linda A. Klein.

Bass said the ABA has helped her to live up to the ideals of fighting for justice and creating social change. Through the ABA, she said, she led a group of lawyers traveling to Haiti after the 2010 earthquake to help rebuild the justice system.

“I assure you, every lawyer on that trip understood the value of ABA membership,” she said.

BAR MEMBER BENEFITS

Through bar membership, Bass noted, she has formed friendships, worked on critical issues, obtained leadership opportunities and gained substantive experience.

Bass also emphasized how the ABA and lawyers can make a difference at a time when many are concerned about whether the nation can be a “shining example” to the rest of the world. “But all can agree it is lawyers who must lead the effort to protect our democracy from its challenges,” she said.

She pointed to lawyers stationed in airports who offered free legal assistance to immigrants, to attorneys general who challenge what they believe to be unconstitutional mandates, and to lawyers who have spoken out about the need for an independent judiciary.

“Our democracy functions best when there are lawyers prepared to protect it,” she said.

One new initiative, ABA Legal Fact Check, is designed to counteract alternative news and fake facts, Bass said. When incorrect assertions about the law are being made, ABA Legal Fact Check will post a press release explaining the truth.

Bass also announced a longitudinal study that will examine why women are leaving law practice in huge numbers. Currently, more women than men are in law schools, she pointed out; however, by ages 40 and 50, women compose barely 25 percent of lawyers practicing.

Bass discussed other association initiatives, including:

• A new focus on how the ABA manages and markets itself. Considerations will include how to provide value to members and how to ensure financial protection for the association.

• A program to pair bar groups, law firms and in-house counsel with homeless shelters to provide pro bono help to more than 500,000 homeless teens and children.

• The Commission on the Future of Legal Education will look at issues faced by law schools, including bar exam scores plummeting nationwide.

—Debra Cassens Weiss

For complete coverage of the 2017 ABA Annual Meeting, go to ABAJournal.com.
Pointing a Lens at Legal History
A Thurgood Marshall trial comes into focus through lawyer’s screenplay
By Jill Werner

Ludwig van Beethoven composed an ode to joy.
Percy Bysshe Shelley wrote an ode to the west wind.
Connecticut attorney Michael Koskoff wrote an ode to the jury trial—and it became the movie Marshall, starring Chadwick Boseman (pictured above) as a young Thurgood Marshall.

Marshall was shown in a special presentation during this year’s annual meeting. It will open in theaters nationwide on Oct. 13. The movie focuses on a high-profile trial in Bridgeport, Connecticut, that Marshall tried during his stint as legal counsel for the NAACP—long before he became the first African-American U.S. Supreme Court justice.

Marshall teamed with local lawyer Samuel Friedman to defend a black chauffeur against charges of sexual assault and attempted murder of his wealthy employer.

Koskoff, an ABA member since 1996, says he was captivated by the culture and dynamics of the 1941 trial. It was a time of considerable racism and anti-Semitism, he says, “and while all this chaos was going on, a black lawyer and a Jewish lawyer combined their talents to defend this poor individual.”

Koskoff’s interest in the story was driven by his own experience as a trial lawyer. Early in his career, he and his father, lawyer Theodore Koskoff, defended members of the Black Panther Party in the 1970s during a series of trials in New Haven.

His reputation as a courtroom litigator grew through personal injury and medical malpractice trials that resulted in sizable awards for his clients.

At 74, he still practices law at Koskoff, Koskoff & Bieder in Bridgeport, where his son Joshua is the third generation of Koskoffs at the firm.

FOCUSING ON FILM
Koskoff’s daughter Sarah, an actress and screenwriter in Los Angeles, sparked his interest in screenwriting when she gave him a how-to book on his 60th birthday.

He recalls her saying: “You have so many stories and so many interesting trials. Maybe you’d like to give this a shot.”

Koskoff was intrigued. He wrote a couple of screenplays that he tucked away in a cabinet. Then a local attorney and history buff told him the story of Marshall’s trial.

He read newspaper accounts of the case and began writing.

“These projects take on a life of their own that you don’t plan,” Koskoff says. “You have to be really lucky to have something like this come into fruition.”

Of course, Koskoff didn’t rely on luck alone. He showed his screenplay to everyone he knew. His script landed on the desk of producer Paula Wagner, Tom Cruise’s partner on the Mission Impossible film franchise.

Wagner saw promise in the script, but she wanted the characters to be more fully...
developed. She suggested Koskoff approach his son Jacob, who is a screenwriter in LA, for assistance. Jacob signed on.

“I provided the skeleton, and he provided the flesh,” Koskoff says. “We worked together in a very collaborative way. It was a joy.”

Wagner convinced prolific writer and director Reginald Hudlin to direct the movie. Hudlin helped the Koskoffs refocus the script on Marshall rather than the trial itself. “We have this great figure in American law, and he was in the screenplay as just a character,” Koskoff says. “We changed it to show the character, the intelligence, the courage and the sense of humor of Thurgood Marshall—things that defined him in his life.”

Koskoff points to Marshall’s courage as he traveled alone through the South trying cases in communities dominated by the Ku Klux Klan. He sees Marshall’s humor in his friendships with Duke Ellington and Langston Hughes. “He was rowdy and boisterous and funny,” Koskoff says. “These are things that people didn’t know about him, and we kind of sneak all of that into the movie.”

The result is not so much a biopic as a thriller.

“I don’t want the movie to be medicine,” Koskoff says. “I want it to be inspirational. I want to show people that the law is an instrument of social change.”

‘THE PEOPLE’S VOICE’

Koskoff calls Marshall his ode to the value and power of the jury trial. “As long as we have the jury, we have a shot at getting justice,” he says. “The jury is the people’s voice. It is the fail-safe mechanism, and we’re losing it.”

Koskoff says that increased moves toward mandatory arbitration and summary judgment have contributed to the erosion of the jury trial. He blames “big money” and government, saying they fear the power of the jury. He is also critical of lawyers who push for settlements because they’re afraid of going to trial and losing.

“I’m an old guy,” he says with a smile in his voice. “I’ve tried a lot of cases. Won some. Lost some. But even when we lose, when my clients feel they’ve had a shot before a jury, they feel some measure of satisfaction.”

That’s all people want in their judicial system, Koskoff says. Without their day in court, they feel some measure of satisfaction.

“I don’t think judges recognize that,” he says. “Running the system efficiently is not the No. 1 concern that courts should have.”

Koskoff’s dismay in the demise of the jury trial doesn’t mar his innate optimism. In fact, he calls optimism the most important characteristic that trial lawyers possess—they need to believe they can win and be willing to accept that they might lose.

“I would never have a movie today if I wasn’t an optimist,” he says. “It was optimism to think there was ever a shot and not to be concerned about failure.”
What Trump Can—and Can’t—Do to Clamp Down on the Press

As president of the United States, what damage might Donald Trump do to the press, and what legal options do journalists have available to them to defend their speech? And how might the administration fight the leaks to the media that appear daily? These were the foremost concerns for the panelists of “Trump v. the Press and the First Amendment: Fake News, Government Leak Investigations, Alleged Biased Media Coverage, Trump’s SLAPP Libel Suits and His Pledge to ‘Open Up the Libel Laws’—Will the First Amendment Survive?” at the ABA Annual Meeting in New York City.

The Section of Litigation and the Forum on Communications Law sponsored the event. Floyd Abrams, a partner at Cahill Gordon & Reindel and a longtime First Amendment lawyer, compared Trump’s attacks on the press to the kind of authoritarian language used by Juan Perón, a former president of Argentina, and by Recep Tayyip Erdogan, the president of Turkey.

“It can have significant antidemocratic results,” Abrams said.

When it comes to Trump’s vow to tighten libel laws, none of the panelists gave it much credence. There are no federal libel laws, and Congress would have to agree to pass new legislation. In fact, there has been momentum in the opposite direction at the state level for passing what are called anti-SLAPP laws, intended to discourage “strategic lawsuits against public participation.”

According to the Media Law Resource Center, 28 states, the District of Columbia and Guam had adopted some form of anti-SLAPP legislation as of 2014.

One panelist who is concerned that U.S. libel standards and anti-SLAPP legislation might make the press too reckless was Tom Clare of Clare Locke. Clare has represented many plaintiffs in libel suits and recently was able to reach a settlement with Rolling Stone for its retracted 2014 article about an alleged gang rape on the university’s campus.

He points to an ACLU settlement with one city as proof. “If Biloxi, Mississippi, can figure out a way not to jail people for fines and fees, and to have a fair bail system, do you really think that other cities in America can’t?” he asked during the program “Just Debt: Reimagining Fines and Fees in America.”

Biloxi officials agreed to hire a full-time public defender to assist those charged with nonpayment of fines and fees imposed by courts. People who enter payment plans or perform community service no longer will be charged additional fees. Judges will receive bench cards with steps to follow to conduct individualized assessments of ability to pay.

The National Task Force on Fines, Fees and Bail Practices developed a similar bench card, and it has published its resources for courts on the National Center for State Courts website. The card tells judges that they shouldn’t jail defendants for failing to pay court-ordered fees and fines unless a hearing is held to determine the reason for nonpayment. If the defendant can’t afford to pay, judges are instructed to consider alternatives to imprisonment.

At the program, moderated by CNN commentator Van Jones and sponsored by the ABA Center for Innovation and the ABA Journal, speakers discussed how people of moderate means are caught up in a cycle of debt when they are assessed fines as punishment, along with fees for the costs of using the court system. In some jurisdictions, there are booking fees, prison room-and-board fees and fees for using a public defender.

One alternative to imprisonment being explored in a pilot program by the NCSC has defendants take an online course about the possible consequences of their actions rather than paying a fine for speeding or driving distracted. Defendants will be followed to see whether repeat offenses occur.

—D.C.W.
WILL SUPREME COURT FACE ‘A BRIDGE TOO FAR’?

Civil rights advocates who are worried about the outcome of pending blockbuster cases before the U.S. Supreme Court can take heart.

If rights continue to be diluted by court decisions, “eventually, you get to a bridge too far,” says retired U.S. District Judge Nancy Gertner. That happens when there is an aberrant case where the rights violation is so egregious that the justices “stick their toe in” and impose limits on the erosion of rights, said Gertner, who spoke at the annual meeting program called “Advancing Civil Rights and Social Justice in the New Supreme Court.”

As an example, Gertner cited the case of Duane Buck, who was convicted and sentenced to death in Texas after his own expert testified on cross-examination that he is statistically more likely to be dangerous in the future because he is black. In a February decision, the U.S. Supreme Court said Buck’s lawyer had been ineffective and he could reopen the judgment.

Gertner noted that new Supreme Court Justice Neil M. Gorsuch will likely bring a different perspective to criminal cases than the justice he replaced, the late Antonin Scalia, who gave a literal interpretation of the Bill of Rights. Scalia was concerned about unreasonable searches and violations of the confrontation clause, while Gorsuch’s appellate opinions haven’t reflected that type of originalism, she said.

Though the Supreme Court has already accepted some voting rights cases this term, Marc Elias, a partner and chair of the political law practice at Perkins Coie, said he believes there will be more. “The bad news from my perspective—as the resident partisan on the panel—is that these cases will come up with a less-friendly Supreme Court to voting rights,” he said.

Panelists also expressed concern about the case involving a Christian bakery owner who refused to make a wedding cake for a gay couple. The case “threatens to fundamentally undermine Title VII,” Gertner said, because a ruling for the baker could support future claims that religious beliefs allow business owners to discriminate against minorities or other protected classes.

Debo Adegbile, a partner at Wilmer Cutler Pickering Hale and Dorr who serves on the U.S. Commission on Civil Rights, pointed to a prior concurrence by Gorsuch in the Hobby Lobby case when he was a federal appeals judge that suggests he could support religious rights over nondiscrimination.

—D.C.W.
How Can GCs Be a Force for Change?

Despite decades of lip service to the importance of diversity in the legal community, the upper ranks of most law firms fail to reflect the gender and ethnic makeup of practitioners or the population at large. This was the issue panelists addressed at a program hosted by the ABA Journal and Working Mother Media: “The Business Case for Diversity: Is It Still Viable?”

Composed of partners at major law firms, general counsels for large corporations and journalists who have studied the issue of diversity in the legal profession, the panel agreed that without pressure from their clients—and consequences for failing to increase diversity in their upper levels—law firms are unlikely to change at the pace needed. But there was some disagreement on who owned the majority of the responsibility to effect the needed changes.

Panelist Vivia Chen of The American Lawyer’s Careerist blog said she felt part of the issue was a flawed premise that everyone is on the same page regarding the importance of diversity. Chen cited figures from a recent trend report by the Association of Corporate Counsel: Out of more than 1,800 in-house lawyers surveyed, only 6 percent reported that their departments collect data on the diversity of the law firms they hired, and only 3 percent said they tracked how many women held management positions in the firms hired.

“If that’s the case, where’s the pressure?” Chen asked.

Jeff Smith, deputy general counsel and senior vice president at Comcast Cable, said he has seen a shift in the way in-house counsels approach diversity in the firms they hire. In the past, he said, the standard line was one of neutrality: Counsels would tell firms they did not care who represented their companies, just that the lawyers be qualified.

Although the intention was to signal that the companies would be open to being represented by women and minorities, this was not forceful enough to move the needle.

Lynn R. Charytan, executive vice president and general counsel at Comcast Cable, agreed and said that in-house counsels must be willing to be more direct and demanding.

“I have called law firms and said: ‘Look at who you’re bringing me—surely you can find me diverse lawyers or women lawyers or both!’” Charytan said. “When I ask, they bring me that team.”

MORE MOMENTUM?

Rick Palmore, senior counsel at Dentons, said he has seen increasing momentum at corporations to speak up and demand diversity in the legal teams that serve them.

“The hue and cry is getting much greater, but the question is: What are the consequences?” he asked.

Palmore said many firms had “a script of platitudes” when he asked about diversity in their firms, but he was met with blank looks when he asked how the firms tracked their data.

With human resources departments being much larger and more influential at corporations than at law firms, diversity efforts have been easier to put into place in the corporate world, the panel said. It’s often hard to determine who at law firms should have the responsibility to gather diversity data, and diversity officers are often overwhelmed by their other duties, such as providing advancement opportunities and mentoring support to young associates. But it is still necessary.

One option for in-house counsels is to start factoring in a firm’s diversity during the pitch process, said Heidi Levine, a partner at Sidley Austin. She brought up a corporation that made 10 percent of each firm’s evaluation dependent on the firm’s diversity levels. When firms are battling for business, tiny fractions can make a real difference, she said.

In closing, Palmore said that when the task of achieving parity for minority groups and women seems overwhelming, he is reminded of the song “I’m Not Tired Yet” by the Mississippi Mass Choir.

“We can’t afford to be tired,” he said. “We haven’t solved the problem yet.”

—L.R.
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The ABA House of Delegates approved several criminal justice resolutions calling for changes that would affect poor and homeless people, juveniles and those denied the right to effective counsel. The measures include a call for bail reform, a ban on solitary confinement for juveniles, and authorization of civil actions for systemic violations of the right to counsel. The ABA Criminal Justice Section sponsored or co-sponsored most of the measures. Resolution 112C urges governments to adopt policies and procedures that favor release on personal recognizance bonds or unsecured bonds, and that permit cash bonds only after a court determines the financial condition is the only way to ensure appearance. The resolution also states that pretrial detention should not occur solely because of an inability to pay, and “bail schedules” that consider only the nature of the offense should not be used. Policies should allow courts to order defendants to be held without bail, however, where public safety warrants pretrial detention and no conditions of pretrial release would suffice, according to the resolution.

Resolution 112D urges governments to bar the use of bail and bond in juvenile cases, to use objective criteria for pretrial release that don’t have a discriminatory impact, and to use the least restrictive conditions of release that protect public safety and ensure likely appearance in court. At the beginning of the ABA Annual Meeting, the association filed an amicus brief, calling the Harris County, Texas, use of a bail schedule unconstitutional. The House also approved a late-offered resolution backing a ban on mandatory minimum sentences, while sponsors withdrew another late-sentencing resolution after hearing from the U.S. Justice Department. Resolution 10B opposes the imposition of mandatory minimum sentences in any criminal case. The resolution calls on Congress and state legislatures to repeal laws requiring mandatory minimums and to refrain from adopting such laws in the future.

Tempered Justice
House supports bail reform, other criminal law measures
By Lee Rawles and Debra Cassens Weiss

that fueled his desire to become a lawyer and help families like his, he told the delegates. He urged them to pass the resolution and secure his future.

Jack Long of the State Bar of Georgia praised Kim for his intelligence and said many law students in his situation would also make fine lawyers, but he opposed the resolution.

“I would love to call them brother and sister lawyers,” Long said. But he expressed that by supporting the resolution, the ABA would not be upholding the rule of law.

There were votes opposing the resolution, but it was passed by the House of Delegates in a voice vote.

Resolution 10C urges U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection to treat courthouses as sensitive locations and to only conduct such arrests there “upon a showing of exigent circumstances and with prior approval of a designated supervisory official.” The measure urges Congress to codify into law guidelines like those issued in a 2011 memo by the ICE director that discusses sensitive locations.

And Resolution 115 calls for counsel to be appointed for an indigent person in deportation proceedings at the federal government’s expense. State, local and tribal governments should pay if the federal system does not.

In other House action:
- Resolution 102B backs trap-neuter-vaccinate-return programs for free-roaming cats, calling for legislation and policies at state and local levels to implement the programs.
- Resolution 110 requires lawyers to provide more information about trust accounts.
**ANNUAL MEETING REPORT**

**Your ABA**

Lawyers would have to disclose the names of financial institutions and account numbers for each account; would have to disclose the names and addresses of people authorized to operate or disburse money from the accounts; and would disclose the name and address of the lawyer responsible for complying with the rules governing the account.

- **Resolution 118B** urges state and local governments to enact laws and regulations authorizing courts to issue gun violence restraining orders. Those petitioning for a restraining order should provide documented evidence that a person poses a serious threat to himself or to others, and there should also be a verifiable procedure to ensure surrender of guns and ammunition pursuant to a restraining order.

### 2018 REGULAR STATE DELEGATE ELECTION

Pursuant to §6.3(a) of the ABA’s Constitution, 17 states will elect State Delegates for three-year terms beginning at the adjournment of the 2017 Annual Meeting. The states conducting elections and election rules and procedures can be found at ambar.org/2018StateDelegateElection.

### 2017 STATE DELEGATE ELECTION MAINE (VACANCY)

Pursuant to §6.3(e) of the ABA’s Constitution, the state of Maine will elect a State Delegate to fill a vacancy due to the resignation of Geraldine (GiGi) Sanchez. The term will commence immediately upon certification by the Board of Elections and will expire at the conclusion of the 2020 Annual Meeting. Go to ambar.org/2017statedelegatemainevacancy.

### 2017 DELEGATE-AT-LARGE ELECTION RESULTS

The following persons were elected to three-year terms as Delegates-at-Large to the House of Delegates at the 2017 Annual Meeting: Myra McKenzie-Harris (Arkansas), Mark D. Agrast (District of Columbia), Thomas Snook (Florida), David F. Bienvenu (Louisiana), Pamela A. Bresnahan (Maryland) and Kari Petrasek (Washington).

### 2017 DELEGATE-AT-LARGE VACANCY ELECTION RESULTS

At the 2017 Annual Meeting the following person(s) were elected to a one-year term as Delegate-at-Large to the House of Delegates due to the election of Michael H. Byowitz of New York and Tom Bolt of the U. S. Virgin Islands to the Board of Governors: Barry Hawkins of Connecticut and Mario Sullivan of Illinois.

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A Jury Rules Against the KKK

As an uneasy spring moved toward Freedom Summer in 1964, Mississippi was roiling. Civil rights initiatives were gaining momentum in the heart of Dixie; and the reaction was unsettling as scores of burning crosses forewarned of a reinvigoration of the Ku Klux Klan.

In Neshoba County, a voter registration initiative aimed to build black political participation and end a county legacy of violence and Jim Crow obstruction. The Council of Federated Organizations canvassed for volunteers at local churches, drawing the ire of Klansmen. Michael Schwerner, a college student from New York City, had been highly visible in the registration effort; and the fact that he was Jewish drew special attention. On June 16, hearing that Schwerner might be at Mt. Zion United Methodist Church in the Longdale community, Klan members swooped in. But Schwerner was elsewhere, and they beat churchgoers and set fire to the building.

Foiled by circumstance, the Klan plot became more elaborate. On June 21, Schwerner and two others—volunteer and fellow New Yorker Andrew Goodman and James Chaney, a local African-American resident trainee—drove to Longdale to view the damage. On the way back, they were stopped in Philadelphia for an alleged traffic infraction. But it was a pretext to hold the three in jail while Klansmen—including members of the police and sheriff’s departments—gathered in darkness and in force.

Upon release, the three were heading toward Meridian on Mississippi Highway 19 when they were stopped again, shoved into a sheriff’s vehicle, carried to a desolated country road and shot dead. Their bodies were carted to the Old Jolly Farm and bulldozed into an earthen dam.

Local law enforcement declined to pursue the case, and the FBI moved in. After a burned-out COFO vehicle was found covered by brush, some 200 agents converged on Philadelphia. By the end of July, a search—tagged Operation MIBURN, short for Mississippi Burning—had not found the volunteers. They did, however, discover the bodies of eight African-Americans, including those of two students who had disappeared that May.

It was a tip that led the FBI to the Old Jolly burial site. And when local prosecutors again declined to pursue the case, a federal grand jury was convened.

In January 1965, the grand jury returned two indictments against 18 defendants, including three law enforcement officers—among them the sheriff of Neshoba County. One felony conspiracy indictment charged the men with violating the constitutional rights of Schwerner and the others under the Reconstruction-era Civil Rights Act. The other, a misdemeanor indictment, accused them of doing so under the color of law.

District Judge William Harold Cox, a Kennedy appointee and avowed segregationist who once derided black defense witnesses as “a bunch of chimpanzees,” dismissed the misdemeanor indictment against all but the three law enforcement officers. He dismissed the felony indictment entirely, arguing that the victims’ rights under the 14th Amendment did not apply. Federal prosecutors appealed. And in a unanimous March 1966 decision, the U.S. Supreme Court reversed and remanded the case back to Cox, declaring his interpretation of the Civil Rights Act “bewildering.”

On Oct. 20, 1967, a federal jury convicted seven of the 18, including Cecil Price, the deputy sheriff who had been key to the abduction, and Samuel Bowers, the imperial wizard of the Mississippi White Knights of the KKK. They received sentences ranging from three to 10 years.

One of the key conspirators—Edgar Ray “Preacher” Killen—was released when a juror refused to convict him because he was a Baptist minister. However, Killen was retried and convicted in 2005 when new accounts emerged detailing his part in the conspiracy.
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