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A REBEL LEADS THE WAY

In the Legal Rebels feature, “Pattern of Progress,” September, page 38, I appreciate that Haben Girma hasn’t displaced anyone in the workplace; she hasn’t demanded that any special accommodations be developed for her or handed to her, even if she might be entitled; and she expresses only joy, not resentments.

She created a worthwhile job for herself and found the ways to make it—and her life—valuable to herself and others. Not every person with disabilities can be so perfect as she seems to be, but she’s an ideal to aspire to. I’m delighted she was covered by the ABA Journal.

Andrew Mead von Salis
New York City

GORSUCH’S STRATEGY

Contrary to what Edna Selan Epstein says in “Beating a Dead Horse,” September, page 22, Judge Neil M. Gorsuch was not caught in Sen. Richard Blumenthal’s net but rather adroitly avoided the trap the senator was laying for him.

Had Gorsuch said, “Yes, I agree with Brown v. Board of Education,” then the senator would have said, “Thank you. Now please answer yes or no: Do you agree with Roe v. Wade (abortion), Citizens United v. Federal Election Commission (campaign finance), District of Columbia v. Heller (gun rights) and Obergefell v. Hodges (same-sex marriage)? And because you answered directly with regard to Brown, I expect you to give a direct answer on each of these cases.” But Gorsuch saw what lay ahead, slipped through Blumenthal’s net and landed on the U.S. Supreme Court.

Walter S. Carr
Chicago

WINNING MATTERS SOME

Regarding “Alas, Poor Atticus! Trials are supposed to be all about winning,” August, page 22: How is it, then, that much of humanity has been captivated by two trial losers—Jesus and Socrates? Should the Socratic method go by the boards because it is named for a suicidal loser? Is Jesus a stark lesson for pro se litigants? Certainly, many pro se litigants believe the system crucified them—because they were pro se.

And winning a trial is no unalloyed good. Look at the trial in The Caine Mutiny. Character Steve Maryk was acquitted and his career went to pieces. Philip Francis Queeg got a promotion, even though Greenwald broke him. Thomas Keefer was not tried, but he was the true yellowbelly when the kamikaze struck the Caine. Mr. Keith became skipper of the Caine and decommissioned her.

Winning matters. But winning is not the whole show; if it were, why would judges write dissenting opinions? Because they set the table for the victorious discovery of truth.

Peter “Nick” Nickitas
St. Paul, Minnesota

CORRECTIONS

Answer No. 6 in “An Eye for Errors,” October, page 24, omits a word. The third line should read: Perhaps make it Although there is no California authority …

“Forgotten Allies, Broken Promises,” September, page 52, should have stated that Afghans may apply for special immigrant visas even after all available SIVs have been awarded, but the State Department will not schedule interviews until more become available. It also should have reported that President Donald Trump’s executive order blocks Iraqi nationals from entering the United States as refugees.

“Resistance Redux,” August, page 38, should have stated that six inmates at San Quentin State Prison allegedly tried to escape. It also should have stated that Paul Harris was Stephen Bingham’s defense attorney at his preliminary hearing but was no longer representing him at his acquittal.

The Journal regrets the errors.
Your client now has a lot more money.

And a lot more questions.

We know, because we know you well.

Knowing clients well gives us the insight to help with their wealth—and their lives. Together, with your expertise and ours, we’ll help your clients grow, protect and transfer their wealth. Find out how strong relationships lead to 95% client satisfaction.
Plugging the Leaky Pipeline

ABA will study, recommend steps to address issue of too many women leaving profession

Sandra Day O’Connor was 51 when she was appointed in 1981 as the first female justice of the U.S. Supreme Court. She reached the pinnacle of the legal world after a distinguished 30-year career as an attorney, state senator and judge. Today, unfortunately, far too many women lawyers are exiting the profession before they have that opportunity to reach the top. Although women have been graduating from law school in roughly equal numbers to men for the past 30 years, they have not enjoyed the same long-term career success as their male counterparts.

Twenty years after graduating from law school—a time when lawyers should be enjoying their most productive years—far too many women have not attained top positions, or have left the profession entirely. Although women comprise 45 percent of law firm associates, they account for only 19 percent of equity partners in private firms, according to a new survey from the National Association of Women Lawyers. And that number has barely increased over the past 10 years. The picture is not much brighter in the corporate world, where male chief legal officers greatly outnumber female chief legal officers.

Why are these women leaving the profession just when they have the most to gain—and so much to contribute? We have plenty of assumptions and guesses. But we lack broad-based, reliable information about their reasons. To find answers, the American Bar Association is launching an initiative called “Achieving Long-term Careers for Women in Law.” Through this groundbreaking initiative, we hope to provide critical data and solutions to this crucial problem.

The first step is getting at the “why.” The initiative will sponsor two invitation-only national summits where participants will discuss what works, and what does not, when it comes to retaining experienced women at law firms, corporate law departments and other employers. The first will be held at Harvard Law School this month (Nov. 7 and 8). The second summit is planned for Spring 2018 at another nationally recognized law school. Summit attendees will include national leaders in the profession, including chief legal officers, general counsels, managing partners and chairs of firms, judges, academics, consultants, practicing lawyers at various levels and lawyers who have pursued non-legal professions.

We also are funding innovative research on the legal careers of women lawyers, using life-cycle models borrowed from sociology, social psychology and economics. We want to study their long-term career trajectories and the factors that move them in one direction or another. We also plan to conduct focus groups to gather more in-depth perspectives on the factors that enhance or impede legal careers. An advisory council consisting of practicing lawyers and specialists in legal careers will guide the research.

The goal is to pinpoint the factors—personal, social and organizational—that affect why more experienced women lawyers stay at or leave their jobs. The research will be conducted in collaboration with the American Bar Foundation and other organizations. Once we know the “why,” we will use these landmark studies to help employers develop policies and practices to promote the retention of senior women lawyers and eliminate this gender attrition gap. The research findings will be released before the 2018 Annual Meeting in August. We also anticipate that one or more ABA conferences and reports will be based on this important research.

When so many accomplished women lawyers are leaving the profession, the adverse impact is significant. It harms the clients who depend upon them, and their law firms, who have invested substantial time and resources on their training, but now need to find others to fill their shoes. For these reasons, many prominent law firms and corporations committed to promoting the advancement and retention of women lawyers are funding this initiative.

It is our goal to help ensure that the gender balance that exists in law schools and among associates will also be achieved among senior lawyers. Stemming the attrition of senior women lawyers will benefit law firms, corporate legal departments, clients and the profession as a whole.
Hamilton for the Masses
Library of Congress uploads the Founding Father’s papers for public viewing

FROM HIS HARLEM HOME TO HIS TOMB in the Trinity Church graveyard in Manhattan, historical sites associated with Alexander Hamilton have experienced a significant uptick in interest thanks to the success of the Broadway musical that bears his name.

It’s partly with the show Hamilton in mind that the Library of Congress announced in late August that it was uploading Hamilton’s papers in full, for the first time, in their original format.

“It was certainly in the queue, but the musical had an effect” on the timing of the release, says Julie Miller, the historian in charge of the library’s early American manuscripts collection.

The 12,000 items in the library’s collection had been microfilmed and previously viewable on-site. The assemblage includes letters, drafts of speeches and writings—including the outline of Hamilton’s speech to the Constitutional Convention, his draft of George Washington’s farewell address, and papers from his days as a land use and maritime attorney in New York.

For example, the 1784 case Rutgers v. Waddington concerned a brewer, Elizabeth Rutgers, whose facilities were taken over by the British during the Revolutionary War. Once they evacuated, Rutgers demanded back rent. But Hamilton represented Joshua Waddington, who had been running the brewery since it was abandoned, out of the conviction that the newly formed United States should make peace with the British loyalists, according to Miller.

The texts of many of Hamilton’s papers previously had been available on a site called Founders Online. But now the papers are a digital collection displaying his work as graphic objects—and it’s more complete. The previous site did not include the legal papers, for example.

“The website we have just created shows them as things,” Miller says. “For example, if you look at the backs of these letters, you can see there was no such thing as an envelope—they would just fold up the letters and seal them with sealing wax.”

She hopes teachers and students in particular will use the new archive. “Maybe even law students,” she says.

—Ed Finkel

STUDY: ‘ADULTIFICATION’ HAS BLACK GIRLS FACING HARSHER PUNISHMENTS

A new study from the Center on Poverty and Inequality at Georgetown University Law Center describes “adultification” of African-American girls that negatively impacts how they’re treated by school administrators, law enforcement and the justice system, beginning in childhood.

Girlhood Interrupted: The Erasure of Black Girls’ Childhood provides data revealing for the first time how adults view black girls, according to its authors. It builds on previous research on adult perceptions of African-American boys.
Opening Statements

The study found that black girls are perceived as less innocent and more adultlike than Caucasian girls, especially between 5 and 14, which results in disparities in school and the criminal justice system. The study reveals that, among other misconceptions, adults think black girls seem older than white girls the same age, know more about sex, and need less support and comfort.

Attorney Rebecca Epstein, lead author of the report and executive director of the center, says the most surprising thing was that girls as young as 5 were subjected to adultification. “Potentially reaching back as early as kindergarten, black girls are viewed as less needing of protection and nurturing,” Epstein says.

Lara Kaufmann, director of public policy for Girls Inc., a national nonprofit that helps young women navigate gender, economic and social barriers, isn’t surprised by the findings. “That speaks to how deep these stereotypes run and how far these biases go,” she says. “Awareness is the first step.”

The study sought to explain stark criminal justice and school discipline disparities between black girls and their white counterparts. For example, black girls are five times more likely to be suspended than white girls the same age, know more about sex, and are viewed as less needing of protection and nurturing, according to the report. And those in decision-making positions think black girls “should know better. They don’t need protection. ... They don’t need a second chance,” Epstein says.

“One of the biggest goals was to start a conversation to recognize the differential treatment of black girls,” she says. “It seems to have resonated.”

The Georgetown researchers say their analysis is the first step, and more work is needed to address, and remedy, the negative stereotypes and implicit biases.

—Cristin Wilson

MARKING A MILESTONE

The Shriver Center celebrates 50 years—and looks toward the future

In the year of its 50th anniversary, the Sargent Shriver National Center on Poverty Law has no plans to slow down. Instead, one of the country’s leading advocates for racial and economic justice is appealing to the social duty of American lawyers as urgently as ever.

The late Robert Sargent “Sarge” Shriver Jr. founded the center in 1967. He was a politician, peace builder and activist for social reform who founded Head Start, Job Corps, Legal Services for the Poor, the Peace Corps and Volunteers in Service to America.

John Bouman, president of the Shriver Center, has strong opinions on his organization’s mission. “These are very grim times for people in poverty, and particularly in minority groups,” Bouman says. “There is an attitude emanating from the White House of granting permission for people—and for state and local policymakers—to disregard established rights, to blame people for their own poverty, to disinvest in key programs that create opportunities and improve a family’s bottom line and enable them to work.”

Bouman says it’s important for private entities to combat what he sees as a political climate where “it’s OK to discriminate” and for the Shriver Center to act as a legal resource that can “push back as the federal government withdraws from enforcing civil rights.”

The center has two projects that address these issues: the Legal Impact Network, a collaborative group of advocacy organizations in 33 states and the District of Columbia, and the Racial Justice Training Institute, which has helped educate more than 150 fellows from 62 organizations in 23 states on issues such as education equity, fair housing and immigrants’ rights.

“Before the Legal Impact Network, there hadn’t been a great
Opening Statements

During the past 18 months, the Shriver Center has trained 2,000 lawyers about how to identify the most important cases for low-income clients.

Core to the center’s mission—especially in this semicentennial year—is highlighting the importance of policy and systematic work at the state and local levels, in which the federal government often has little or no involvement. Connecting those local groups to one another is key to shoring up those local groups to one another is key to shoring up scarce resources and broadening impact, Bouman says.

Kimberly Merchant, network director of the Racial Justice Training Institute, says her work used to focus on fighting injustice through taking on individual cases. For example, she would represent parents and children in disputes with the school district. Every case was a one-off, and there was no way to systematically change the system in place. She just had to keep fighting her way through injustices one lawsuit at a time.

Now in her day-to-day work she examines the root causes of racial inequality and systemic solutions. As the country experiences more tension around race and ethnicity, the center calls to its legal aid lawyers, donors and other supporters to look internally and externally at what they want to manifest, says Merchant.

"People often think that just by helping the poor, or people of color, they are helping racial inequity," she says. "But the work needs to be much more explicitly focused and systemic, or you’re just putting a bandage on a gaping wound. You have to be introspective and ask: ‘How did we get to this point?’"

That is not always easy, particularly regarding whether that reflection involves asking a significant donor or a teacher in a low-income classroom to acknowledge their unconscious biases, Merchant says.

Her colleague Venu Gupta, vice president of development at the Shriver Center, echoes this sentiment. Gupta summarizes a lesson from the Talmud—the collection of writings that constitute Jewish civil and religious law—which she hopes is conveyed in the center’s work.

“All of us are obligated to work for justice,” Gupta says. “When people think about anti-poverty work, it seems overwhelming and especially challenging when you’re in the weeds. And if you don’t see poverty every day, you might think that you don’t have to worry about it. But we know somewhere in our consciousness that living in deep poverty is cruel, and it’s often based on the ZIP code where we’re born. We have a duty to abate that cruelty, even if our work doesn’t get finished in our lifetime or the next.”

—Kate Rockwood

NEW! Grit, the Secret to Advancement
Stories of Successful Women Lawyers

This unique volume contains new research by the ABA Commission on Women in the Profession begun two years ago on grit and growth mindset, two traits that have been shown to impact the success of women lawyers. The original study focused on large law firms; the Commission’s expanded research covered all legal work environments: solo practice; small, medium, and large firms; corporations; government; and nonprofits.

The book also is a collection of 47 letters from a group of diverse women who have used these principles to advance in their careers, and each woman shares her advice, insight, and experience as a female attorney who has achieved success in the practice of law.

You’ll learn from these women how to use grit and growth mindset to blaze your own trail to success.

- Introduction
- Chapter 1 - Important Definitions, Methodology, and Key Findings
- Chapter 2 - Solo Practitioners
- Chapter 3 - Law Firm Lawyers
- Chapter 4 - In-House Lawyers
- Chapter 5 - Government and Nonprofit Lawyers
- Conclusion
- Appendices
- Author Index

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Any proceeds from this book will go toward the projects of the ABA Commission on Women in the Profession.
A Crisis of Faith

Civil rights lawyer Farhana Khera fights for religious freedom for all Americans

FARHANA KHERA IS NO STRANGER TO HATE. As the executive director of Muslim Advocates, she and her staff work with volunteer lawyers and dedicated faith leaders across the country to stand up to hate and bias through education, advocacy and litigation.

Khera helped found the Oakland, California-based nonprofit after 9/11. Since that time, she’s led challenges to discriminatory policing practices, advocated for families of hate crime victims, and assisted travelers caught up in the Trump administration’s travel ban.

Most recently, in the wake of the deadly racial violence in Charlottesville, Virginia, Muslim Advocates filed a suit against a neo-Nazi website for defamation and threats made against an American Muslim comedian. Every day brings a new challenge for Muslim Advocates, and Khera warns that the challenges are far from over.

You’ve been on the inside of the fight for civil and religious liberties for a long time. I’ll just be blunt: How bad is it right now for American Muslims?

At the time we started this organization 12 years ago, we never envisioned that things would get so much worse for the Muslim community. Things have definitely turned in a way that we didn’t expect.

How important is the pro bono help of other lawyers to what Muslim Advocates is able to do?

The pro bono support of the legal community is crucial to our success. I can’t underscore it enough. After the election, we immediately started planning. What is this new order going to be like? What do we need to be preparing for? We received an outpouring of support from lawyers across the country wanting to get engaged. We’ve been deepening some of our impact litigation work, and we’re also looking to create a legal support network to leverage the outpouring of legal support and to match that up to individual community members who need legal help. There has never been a more important time for lawyers, and specifically American Muslim lawyers, to be leading the defense of attacks on the values that we hold dear.

Is there an accomplishment or a victory you’re most proud of?

In terms of legal victories, I am thinking of the decision in Hassan v.

“My interest in civil rights came about in a couple different ways. My family emigrated from Pakistan, and I grew up in a small town in New York called Painted Post. As a child, we would periodically visit relatives in Pakistan, and I would observe the differences in opportunities and in freedom of movement.”
City of New York, a lawsuit against the New York Police Department. The U.S. Court of Appeals for the 3rd Circuit—a three-judge panel that was a mix of Republican and Democratic appointees—ruled unanimously that we had presented sufficient facts that the police had engaged in unlawful surveillance of Muslims to survive a motion to dismiss. Then, just a couple of months later, there were presidential candidates and politicians calling for mass surveillance of mosques and Muslim communities—reminders that even though we’re securing these legal victories, we still have a lot of work to do to change and shift public attitudes toward Muslims so that these legal victories can be true victories.

Before founding Muslim Advocates, you worked for then-Sen. Russ Feingold, and you advised him on civil rights issues ranging from the death penalty to racial profiling and the Patriot Act. You co-wrote the initial drafts of the End Racial Profiling Act and organized the first congressional hearings on racial profiling. How did you get interested in public advocacy and civil rights work?

My interest in civil rights came about in a couple different ways. My family emigrated from Pakistan, and I grew up in a small town in New York called Painted Post. As a child, we would periodically visit relatives in Pakistan, and I observed the differences in opportunities and in freedom of movement. I was able to go to school, learn how to read and write, and get an advanced degree—in contrast to extended relatives, particularly female relatives, who could not read and write. That early consciousness of being in a restrictive society stayed with me and sparked an interest in civil rights work. I started my career in private practice; and when I was at the firm, I took a couple of cases pro bono involving employment discrimination and I really enjoyed working on those matters. It really opened my eyes to wanting to make a difference on a macro level. I wanted to have a bigger impact. I was working in Washington, D.C., at the time, so I started looking for jobs in government. In 1999, I joined the staff of then-Sen. Russ Feingold.

And that’s where you were on Sept. 11?
Yes, when I saw firsthand how instantly the federal attention became focused on people of my faith community.

Have you ever been targeted for your religion?
I personally have never been targeted for a hate crime, thankfully. But a Muslim member of my staff was threatened and harassed on the BART train by another young person. This is in San Francisco, which you assume is a progressive area of the country! Bias isn’t confined to certain areas of the country. It’s everywhere.

What’s the most common misconception about Muslim Advocates?
That we are Islamic law experts. Our focus is on the Constitution, on protecting constitutional rights for all Americans.

On the topic of misconceptions, do you think you are dispelling misconceptions by being a woman who leads a Muslim organization and by not wearing a hijab?
Unfortunately, there are Americans who have the misconception that all Muslim women wear a hijab. That Muslim women don’t speak up. That they’re seen but not heard. That’s not the case in the United States. If I am dispelling those misconceptions as a byproduct of what I am doing, that’s a good thing.

It must seem like you could stay at work 24/7, that the challenges will never end. But there has to be some room to relax. What do you do to unwind?
I am a Green Bay Packers fan. When it’s football season, I like to watch my team and follow what they’re up to. I did not see that coming! How in the world did you become a Packers fan?
I attribute it to working for Sen. Feingold. And I appreciate that it’s the only publicly owned team in the NFL. It’s the fans who own the team. Power to the people! —Jenny B. Davis
Prioritize and Find Success Through Your Support System

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 Jennifer Trusso Salinas

As a woman who cannot say no to a worthy cause, I have really had to learn to prioritize. I learned this lesson very early on, as I got married at 19 years old and had my first son at 21, while I was attending college. My son was 17 months old when I started law school. I had my second son when I was a second-year associate. I made partner when I was a seventh-year associate. People always ask me, “How did you do it?”

Let me first say a few things about myself personally, so you understand that I did not see failure as an option. I put myself through school, so I had no choice but to do well. I absolutely needed the scholarship money, and I had so much more riding on my success than just me.

Second, I don’t lose sleep over the fact that I am a working mother. I grew up with all the women in my life working. My mom, aunts and grandma had to work. There was no other choice. I was the first person in my family to graduate from high school, let alone obtain a college and law school degree.

It wasn’t until I entered this profession that I began to experience the harsh judgment about my “choice” to work. I’ve had a few instances in which other women question my love for my children because I have a career. In fact, I remember being called a “part-time” mom. Any working mom knows that we do not stop being a mom the moment we walk into our offices. I have the text messages to prove otherwise. Many women in this country have no other choice but work. But even for those women who do have a choice and choose to work, they should be supported—not judged.

Last point on this issue: During my career, I became a single mom. I am beyond grateful that I had a career and the resources to take care of my boys when I was a single mom.

Now, as to how I make it work? First, I do not do it alone. I have come to rely heavily on family and friends. I would have never been able to accomplish as much as I have without my close family and friends.

Second, I outsource. I have decided that the best use of my time is not baking every birthday cake, making dinner every night or cleaning my house (although I inevitably do more cleaning than I would like). Outsourcing was a difficult decision, as I grew up being taught, like many Latinas, that your value as a mom was based on how well you cleaned your house and your cooking abilities. I was killing myself trying to do it all. I eventually got over having to do it all. That being said, some things I do hang on to that are very important to me. Because I know my days and nights might be hijacked, I value my morning time with my family. I get up early to make my kids breakfast and their lunches (even my high schoolers).

I also do not outsource anything that relates to my children’s schooling. I try to attend school activities, including their games and performances, and I’m in constant contact with their teachers. When my kids were younger, I would help out in the classroom. The teachers were very supportive and knew that I would not be able to be a consistent presence, but they worked with my schedule. I was very fortunate.

Lastly, I was fortunate to get remarried to a great man who is a true partner. We are very good at dividing and conquering. When I have a crazy week, he’s on kid duty. When he has a crazy week, it’s my turn. In those rare instances where we both have crazy weeks, we call on family and friends.

In short, everyone needs a team to lean on. Find the right team for you and your family.

Jennifer Trusso Salinas is a partner at Troutman Sanders in Irvine, California, where she focuses her practice on intellectual property litigation and strategic counseling on all aspects of clients’ intellectual property portfolios. She is president-elect of the Hispanic National Bar Association.
Hearsay

**80%**

The number of male expert witnesses chosen by attorneys for trial. Those experts are paid an average of 60 percent more than their female counterparts, according to the Expert Institute, a leading provider of expert witnesses. Observers blame the whopping disparity on trial lawyers who make the expert selection, possibly because they think men provide more “gravitas” and will be more convincing to a jury.

Source: bna.com (Aug. 28).

**Did You Know?**

Firms run by lawyer CEOs tend to face less litigation and fare better in court, strengthening a company’s bottom line, according to research by a University of Chicago law professor. But the study found CEOs who have JDs represent less than one-tenth of the CEO pool. Perhaps it’s because lawyer CEOs do better managing high-growth firms that have large amounts of litigation, researchers speculate. The benefits of attorneys in charge waned in low-litigation industries, in which a tendency toward overcaution could negatively affect cash flow or growth.


**Sour Notes**

The son of jazz legend Thelonious Monk is suing the California-based North Coast Brewing Co. for continuing to use his dad’s famous name without permission. T.S. Monk accused the beer brand of trademark infringement and other violations, claiming a verbal agreement to create Brother Thelonious Belgian Style Abbey Ale was revoked last year, and the company was never authorized to use the name on other merchandise.

Source: washingtonpost.com (Aug. 30).

**PHONE HOME**

A class action suit against Apple by iPhone 4 and 4S owners who can’t access FaceTime will proceed for now. Plaintiffs allege Apple disabled the app in older phones to save money, and their phones lost value, and even worse—they couldn’t communicate via video with family members. Apple claimed the plaintiffs failed to allege sufficient harm, but a federal judge found that FaceTime played a “prominent role in the lives of Apple users.”

Source: law.com (July 31).

**Cartoon Caption 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, Nov. 12, with “November Caption Contest” in the subject line. For complete rules, links to past contests and more details, visit ABAJournal.com/contests.
Noxious Neighbors?

To Colorado, marijuana is a business—to the federal government, it’s a criminal conspiracy  

By Lorelei Laird

Phillis and Michael Reilly don’t like marijuana. Unfortunately for them, they live in Colorado.

The Reillys own 105 acres of mostly undeveloped land in Pueblo County, and they go there on weekends to ride horses with their children. In 2014, a group of marijuana entrepreneurs bought more than 40 acres of adjacent land, where they built a farm that serves medical and recreational marijuana markets in Colorado.

That upset the Reillys, who are members of a small, obscure antidrug nonprofit called the Safe Streets Alliance. They say the farm hurts the value of their land by producing a very strong marijuana smell and, because of the large quantity of valuable drugs, potentially attracting thieves.

Normally, that kind of complaint would create, at most, a nuisance case in state court. But the Reillys, with the help of the Safe Streets Alliance, took it further by making it a federal case. Marijuana remains illegal under the federal Controlled Substances Act, and almost every violation of the CSA is an automatic violation of the Racketeer Influenced and Corrupt Organizations Act, which is intended to fight organized crime.

So the Reillys and the Safe Streets Alliance sued the farm—and every business or government agency with any relationship to it—under RICO and won an early victory. In June, the 10th U.S. Circuit Court of Appeals at Denver said the property value complaints were sufficient to survive a motion to dismiss.

And that, observers say, could disrupt the young marijuana industry—in Colorado and the other 31 U.S. jurisdictions that have legalized medical or recreational marijuana. A Denver district court will decide whether the RICO claims have merit. But just having to defend them could drive people out of the industry.
Sam Kamin, a professor at the University of Denver Sturm College of Law, thinks that’s the real intent. He says this kind of lawsuit is “asymmetric warfare.”

“The [lawsuits] may or may not succeed, but they have the opportunity to inflict great costs along the way,” says Kamin, who studies marijuana law.

That’s not just speculation. A different RICO suit the alliance filed in 2015 ended after the targeted marijuana business dropped its plans to set up shop in the disputed location and other defendants settled. And a case in Oregon—filed six days after the 10th Circuit’s June ruling—names 44 defendants, including someone who has only tenuous connections to the farm.

**ODOR AND INJURY**

Under federal law, the decriminalized marijuana industry is in a slightly precarious position. Congress has prevented the Department of Justice from interfering with state-legal medical marijuana, but it left the DOJ free to enforce federal law against state-legal recreational marijuana businesses.

Although RICO was written to fight organized crime, it’s not unusual to see it applied elsewhere. Retired law professor G. Robert Blakey helped craft the statute and several of its state equivalents in the 1970s. He says the U.S. Supreme Court has rejected attempts to narrow RICO’s reach at least twice.

“Whatever you have to read is the statute,” says Blakey, chair emeritus at the University of Notre Dame Law School. “It all applies to you, if you are a person and you do whatever the statute prohibits.”

So the 10th Circuit wasn’t breaking new ground when it let the Reillys’ claims go forward. (The Safe Streets Alliance did not appeal.) For standing reasons, the court rejected a pre-emption challenge to marijuana legalization laws in Colorado, as well as some RICO claims it said were based on personal injuries not permitted under the statute.

But RICO permits recovery for damage to property, and the 10th Circuit ruled that the Reillys had adequately pleaded property damage. The couple had argued that a large quantity of marijuana next door could attract theft. The court found it plausible that a marijuana business openly committing federal crimes next door reduces the value of the Reillys’ land, though it didn’t specify how.

It also agreed that the strong marijuana smell from the farm—which the court described as “foul odors,” “noxious emissions” and a “stench”—creates a nuisance that could plausibly discourage potential buyers.

That claim has been disputed by fans of marijuana. On the blog of the National Organization for the Reform of Marijuana Laws, many commenters said they find the smell pleasant, and one said: “I am perplexed that anyone would object to the odor of cannabis plants.”

More interestingly, the appeals court found that the odor is an injury to property under Colorado common law holding that a noxious odor can be a nuisance. (In prior cases, the disputed odors generally came from livestock.) Congress incorporated common-law property rules into RICO, and the court found that this was enough to survive dismissal at the pleadings stage.

Brian Barnes, an attorney for the Reillys, says that was a major victory. “At least as I read the 10th Circuit’s opinion, as long as we can prove that there’s this persistent foul odor ... we’re going to win,” says Barnes of Cooper & Kirk in Washington, D.C., a law firm aligned with conservative causes.

But Matthew Buck of Corry & Associates in Denver, who represents several defendants, thinks the plaintiffs will stumble when it’s time to prove that the value of the Reillys’ property has been damaged.

“Frankly, none of the states with legal cannabis are the states where you’re going to be able to win that kind of case because they all have extraordinarily high property values,” Buck says.

Buck doesn’t think the goal of the lawsuits is to bankrupt the defendants, mainly because “it’s a simple nuisance case” without expensive discovery. Based on discussions in district court, he thinks the goal is to get before the Supreme Court.

But Barnes and Kamin think the outcome of the 2015 lawsuit in Colorado, Safe Streets Alliance v. Medical Marijuana of the Rockies, is illustrative. Accounting and bonding companies settled for $70,000; a bank dropped the marijuana business as a client; the business ended its plans to open a new location near the plaintiffs’ hotel. The plaintiffs then dropped the case.

“Even if the plaintiffs were never going to prevail on the merits, they essentially achieved their goal”—shutting down the marijuana business, Kamin says.

**WHIFF OF FAMILIARITY**

As another case in point, Kamin cites the Oregon lawsuit, McCart v. Reddow. For defendants, it names 21 people and 23 businesses—including Bank of America, whose involvement is limited to holding a mortgage on one property in which marijuana is produced.

In that case, lead plaintiff Rachel McCart, who’s also an attorney, is representing herself and her husband in a lawsuit against neighbors who grow marijuana. They say the growers have deliberately harassed the McCarts, trespassed, damaged an easement, created a stench of marijuana and disturbed the peace at all hours with their operation.

These actions have damaged their property under RICO, according to the complaint.

McCart declined to comment for this article. But attorney Brooks Foster of the Chenoweth Law Group in Portland, who represents some of the defendants, says she previously had sued many of the same defendants in Oregon state court for nuisance, trespass and defamation. McCart voluntarily dismissed that previous case several days after filing the federal RICO claim.

McCart also has publicly opposed land use changes that would allow
some of the defendants to run businesses from the neighborhood, including a nonmarijuana business. Commercial litigator Clifford Davidson of Sussman Shank in Portland represents other defendants in the RICO case. He says the McCarts will have a challenge not present in Colorado: Oregon’s “right to farm” law. That law blocks common-law nuisance suits aimed at farming.

“If you’re on farmland and your neighbor’s pig farm smells like pigs, you can’t sue them,” says Davidson, who is active in the ABA Section of Litigation and the Section of Intellectual Property Law.

LESSONS IN LIABILITY

Barnes says he has no connection to the Oregon case, and his client the Safe Streets Alliance has been inactive since its founder’s death in 2016. But he’s aware of people in other areas still considering similar claims. He thinks the 10th Circuit’s ruling on odor opens the door for their victory.

The appeals court “had the caveat that, well, we’re not saying every marijuana business can be sued by just anyone anywhere, and that’s fair enough,” he says. “But I think just as a factual matter, most of these cultivations are going to be exposed to liability.”

But Foster notes that Oregon is in the San Francisco-based 9th Circuit, which isn’t bound by decisions of the 10th Circuit. And Blakey, who helped write RICO, says the plaintiffs still must prove their damages.

“I could turn around and say ... I think that [marijuana farm] increases the value of my land because I could now sell it for marijuana,” he says.

Immigrant Class

Student interest in immigration law rises with recent political developments By Mark F. Walsh

Law student Karina Guzman recalls the palpable fear among noncitizen clients of the Cameron Law Offices—a Boston immigration firm where she interned last fall—in the aftermath of President Donald Trump’s election.

Trump had made immigration a signature issue of his presidential campaign, calling for sweeping measures that included deportation of the more than 11 million undocumented immigrants in the United States and construction of a wall across its entire southern border.

“I was getting many calls from clients asking: ‘What am I going to do next? What does this mean? I’m very scared,’” says Guzman, a third-year student at the Northeastern University School of Law.

For her, it was an early sign of the tumult to erupt after Trump took office. In his first few weeks as president, Trump issued an executive order that banned travel from seven Muslim-majority countries to the United States and suspended the U.S. refugee program for 120 days.

The legal and political furor set off by the travel ban and related orders has had a profound impact on U.S. law schools and students such as Guzman. Interest in immigration law is surging, and schools are ramping up programs and staffing to meet soaring demand from students and immigrants.

NEW WAVE OF SPECIALISTS

In the long term, the trend also could birth a new wave of immigration law specialists. “One of the silver linings of this administration’s policy for immigrants is it’s recruiting a generation of advocates,” says Maureen Sweeney, an immigration law instructor at the University of Maryland.

Francis King Carey School of Law.

Evidence that immigration law has gained a new cachet on campuses isn’t hard to find. At the Fordham University School of Law, for example, enrollment for the introductory immigration law course this fall more than tripled to 90 students.

“We had to move to a larger room,” says Jennifer Gordon, a professor who teaches the class at Fordham. “Student demand jumped enormously.”

Similarly, Sweeney says her immigration law class has doubled in size to more than 50 students. Further, 9 percent of incoming students chose immigration as one of their top two law specialty preferences, an increase from 4 percent in 2014.

Karin Hussmann Schroll, the University of Maryland law school’s assistant dean for admissions, says many applicants cited in their essays the legal fight ignited by the Trump immigration policies as a reason they wanted to attend law school.

Getting a better grasp of immigration law at a time when such issues are making headlines is driving interest at a basic level. “But the major motivation for students is to learn something that they can translate into helping immigrants and refugees who are affected by the president’s executive orders and policies,” says Gordon, an expert on immigration and labor law.

That eagerness to get involved surfaced immediately after Trump signed executive orders on immigration and security policy after his inauguration in January. Law school students nationwide packed town hall-style meetings and forums to grapple with the implications of the new restrictions.

The law school community also was on the front lines assisting travelers from affected countries at U.S. airports when the travel
ban was imposed. Those efforts included providing free legal counsel, monitoring the actions of customs officials, and demonstrating against the ban.

“That Friday [when the travel ban took effect], my phone was just blowing up with emails and texts from lawyers throughout the U.S. who were going to airports to assist people who were trying to get in and being blocked,” says Holly Cooper, co-director of the Immigration Law Clinic at the University of California at Davis School of Law.

In the ensuing days, the clinic would help identify people threatened with deportation, prepare emergency motions, and aid in negotiations with customs officials. “That’s where the clinic’s skills in federal litigation were really helpful,” says Cooper, noting that UC Davis has one of the few immigration law clinics in the country that handles deportation cases in federal court.

The 20 students in the clinic also can get experience arguing cases before the 9th U.S. Circuit Court of Appeals at San Francisco. Several assisted in a high-profile case in which the 9th Circuit ruled in July that undocumented immigrants who are victims of crime and cooperate with law enforcement to stay in the country and work legally.

“I’ve seen great demand for the course, which has further encouraged me to design it and teach it,” says Hlass, who previously was director of the Immigrants’ Rights Clinic at the Boston University School of Law. Meanwhile, the Vanderbilt University Law School recently launched its first immigration law clinic—one that focuses on asylum cases. Karla McKanders joined Vanderbilt in the summer, from the University of Tennessee College of Law, to start the clinic and teach refugee law.

“Nashville is a city that has experienced a lot of growth in the last 10 years, so there’s a large immigration population,” McKanders says. “There’s a need for attorneys sophisticated in immigration law here.”

Whether the new zeal for studying immigration law will yield a new crop of specialists is an open question. Traditionally, immigration has been viewed as an arcane area of the law that lacks the appeal of practices such as criminal defense or civil litigation. And it’s hardly a path to riches.

STUDENTS CARE

Still, law school faculty and officials surmise that the immigration battles of the Trump era will have a lasting effect on students. “Part of this is a shift in how people are viewing immigration law,” Sweeney says. “People are seeing not only how complicated and interesting intellectually it is but also that it has a profound effect on people’s lives and society.”

For students such as Emerson Argueta at Fordham, the Trump administration’s barrage of measures to limit immigration and immigrants’ rights has solidified his decision to pursue the field after he graduates in 2018. “I’m still interested in federal litigation. But given the political climate, it’s definitely going to be in immigration law,” says Argueta, a 3L who immigrated to the United States from El Salvador as a child.

He is exploring fellowships such as the Immigrant Justice Corps in New York City, a program that places recent law school graduates with nonprofit legal services organizations for low-income immigrants. Given the government’s backlog of nearly 600,000 cases in immigration court, and stepped-up immigrant arrests since Trump became president, there’s no shortage of potential clients. (See “Legal Logjam,” April, page 52.)

“There’s a great need for immigration lawyers, so students who are specializing in immigration law have certainly got jobs on the way out,” says Rachel Rosenbloom, who teaches immigration law at Northeastern.

For her part, Guzman says she plans to either practice at a firm that specializes in immigration law or pursue the discipline in a public interest capacity. In the meantime, she hopes to sharpen her skills at the school’s new immigration law clinic taught by Rosenbloom.
The encounter in a Lakewood, Colorado, bakery was brief, but it has had a lasting impact on the lives of its central participants. And it has led to a major clash in the U.S. Supreme Court, pitting the rights of free speech and free exercise of religion against anti-discrimination law.

In July 2012, Charlie Craig, 37, and David Mullins, 33, visited Masterpiece Cakeshop with Craig’s mother, Deborah Munn, to buy a cake to celebrate their upcoming marriage. Colorado did not recognize same-sex marriage at the time, so Craig and Mullins were to be married in Massachusetts. They were planning a reception at a Denver-area restaurant, so they came to look at cakes.

While perusing pictures of the different cakes, Craig informed the owner that they wanted one for his and his partner’s wedding, according to court papers.

The owner, Jack Phillips, 61, describes himself as a cake artist who creates elaborate confections for weddings and other occasions. He is a devout Christian who won’t even bake goods that have Halloween or bachelor party themes.

“So right away I’m thinking, ‘How can I tell them politely that I can’t take care of this wedding for them because I don’t do same-sex weddings,’ ” Phillips says. “That’s just against the core of who I am.”

He recalls telling the couple he’d make them birthday cakes, shower cakes, cookies or brownies. “Basically anything else for you,” Phillips says. “The wedding cake itself has so much significance because it’s part of a wedding and a marriage.”

NO CAKEWALK

The legal fight has led to the Supreme Court case Masterpiece Cakeshop v. Colorado Civil Rights Commission. It is one of the most debated and anticipated of the term, in no small part because it involves “the law of cake and whether cake speaks,” says Martin Lederman, an associate professor at Georgetown University Law Center.

As Lederman acknowledges, the case is at the forefront of a debate about whether various types of creative professionals must provide their services for same-sex weddings when they have religious objections. In addition to bakers, florists and photographers are included in this group.

“The majority of the justices think it’s a very bad idea—at least in the short run, until the nation becomes more reconciled to same-sex marriage—to require commercial vendors or others to participate in same-sex marriage when they don’t want to,” Lederman says. The justices may have wished that Colorado lawmakers had provided some form of religious conscience objection to its anti-discrimination law that covers sexual orientation, he adds, “but that’s a far cry from saying there’s a constitutional right to exempt oneself from those state statutes.”

Craig and Mullins, who ultimately received a donated cake featuring layers of rainbow colors for their wedding reception, filed complaints about Masterpiece Cakeshop with the Colorado Civil Rights Commission that they had been discriminated against based on their sexual orientation.

That led to proceedings before a state administrative law judge, who rejected Phillips’ free speech and free exercise claims. Because Craig and Mullins had never expressed to Phillips whether they wanted a particular message or design on the cake they sought, the baker had no free speech right to decline their request, the judge said.

The state civil rights panel upheld the commission, ruling among other things that Phillips

AP PHOTO
“does not convey a message supporting same-sex marriages merely by abiding by the law.”

The Colorado Supreme Court declined to hear the case. This led Phillips to ask the Supreme Court for review, which the justices granted at the end of last term after considering the case at more than a dozen of its private conferences.

**ARTISTS AT WORK**

Kristen K. Waggoner of the Alliance Defending Freedom, who will argue the case on behalf of Phillips, says, "What’s at stake here is whether expressive professionals will continue to have the right to create artistic expression that’s consistent with their convictions."

Phillips received support from scores of amicus briefs in September. Two in particular stand out. One brief is from “cake artists,” and it is officially filed in support of neither party. The brief seeks to convince the court that custom cakes are indeed artistic expression, and that “wedding cakes are the most iconic examples of the cake artist’s craft.”

So rather than rely on mere words for those arguments, the brief (by law firm Baker Botts, no less) is full of vivid color photos of custom cakes for various occasions, including one styled to look like a lobster pot, another in the shape of a T-bone steak, and one shaped like a municipal bus.

Another noteworthy brief, filed on the side of Masterpiece Cakeshop, comes from President Donald Trump’s administration and was signed by then-Acting Solicitor General Jeffrey B. Wall.

Amid reports of intense disagreement within the Department of Justice (which was disputed by the department’s spokesperson), the brief argues that “forcing Phillips to create expression for and participate in a ceremony that violates his sincerely held religious beliefs invades his First Amendment rights.”

The federal brief draws a distinction between an exemption from anti-bias laws for objections to same-sex marriage and an exemption that might be sought to laws against race discrimination.

“A state’s ‘fundamental, overriding interest’ in eliminating private racial discrimination—conduct that ‘violates deeply and widely accepted views of elementary justice’—may justify even those applications of a public accommodations law that infringe on First Amendment freedoms,” the brief says.

Lederman says this is “the first time in history that the United States has filed in favor of an exemption” to an anti-discrimination law. “The solicitor general has tried very hard to craft a very narrow theory for an exemption, although I’m not sure I understand what the limiting principles are,” he adds.

**‘A COURT OF ONE’**

Louise Melling, deputy legal director of the American Civil Liberties Union, which is representing Craig and Mullins, says the case is about the fact that “you have a business that opened its doors to the public and decided to offer a product,” she says. “If you choose to offer cakes, you can’t pick and choose to whom you sell your cakes.”

The free speech argument “would allow you to turn people away for any reason, providing you contend you have some expressive message,” Melling says. “It is a really radical argument to say that the Constitution protects your right to discriminate.”

Gregory G. Garre, a former U.S. solicitor general under President George W. Bush and a partner at Latham & Watkins in Washington, D.C., says the case starkly presents two competing narratives, both of which will likely aim at the center of the court: Justice Anthony M. Kennedy.

“This is a case where we are likely to have a court of one: Justice Kennedy,” says Garre, who is not involved in the case. Competing for Kennedy’s vote will be two ideals evinced in his majority opinion in the 2015 case Obergefell v. Hodges, which held that states must license and recognize same-sex marriages.

One ideal, of course, is the idea that the 14th Amendment protects gay couples seeking same-sex marriage.

The other rests on Kennedy’s observations in Obergefell that “many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises,” and that “those who adhere to religious doctrines may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”

Yaakov Roth, a partner at Jones Day in D.C. who also isn’t involved in the case, says in Masterpiece Cakeshop, “we have two aspects of Justice Kennedy’s jurisprudence that are being pitted against each other.”
Civil litigation is predicated on broad discovery. It allows lawyers to seek the truth broadly by discovering opponents’ evidence through a variety of means. The premise is that by doing so they will arrive at the "truth," thereby making trials a revelation of that information for the fact-finder.

Most civil litigation, however, is settled not by trial but by mutually agreed terms once each side has ferreted out the truth through discovery of the other side's case.

In the name of the truth-finding process, extensive discovery of relevant documents—including depositions of each side's witnesses, as well as those of nonparties—is permitted. A very broad net can be cast to discover documents that are relevant and may lead to the discovery of other pertinent ones. Such document discovery and depositions can be conducted not only from the other side but from that of third parties not directly involved in the litigation. Less universally, however, are interrogatories used to ferret out the facts of an opponent's case before giving notice about taking a deposition.

Rule 30 of the Federal Rules of Civil Procedure now limits to 10 the number of depositions that may be taken without leave of court. Thus, in most cases, there is judicial skepticism about the desirability or benefit to the truth-seeking process of allowing limitless depositions. And we all know that disputes about which documents are and are not privilege-protected from discovery have become the tail that wags the dog of document discovery, chewing up time and financial resources and taxing the patience of judicial fact-finders.

Is there a way to determine who from the universe of possible witnesses you should target for deposition while setting up an argument to the court that they should be permitted, if necessary, to take more than 10? Is there a way of focusing the discovery disputes surrounding documents? Yes to the former question and perhaps to the second.

How many of you routinely use interrogatories as a preliminary to taking oral depositions? I venture to guess that not many of you use such a technique frequently or are required by your opponents to answer such interrogatories as a preliminary to determining which depositions should be taken. Many litigators feel that interrogatories are an inefficient, suboptimal method of gleaning facts compared to document production and depositions.

9 QUESTIONS

Be aware that many courts limit the number of interrogatories that can be posed without leave of court. Rule 33 of the Federal Rules of Civil Procedure allows 25. So courts share some of the skepticism many attorneys show about the discovery results of interrogatories.

Before you start giving notice to potential witnesses for oral depositions—and before engaging in a broad net of document discovery—you would benefit from asking opposing counsels to:

1. Identify the witnesses they plan to call to testify during their case in chief.
2. Provide the gist of the testimony each is expected to give.
3. Identify the facts upon which the testimony of each witness will be based.
4. Produce any documents they authored on the matters at issue.
5. Produce any documents the witness received on the matters at issue.
6. Produce any documents the witness reviewed in the course of preparing to testify.
7. Ask whether a claim of privilege is being asserted in respect to any of those documents. If so, identify the documents and the basis upon which they make their claim of privilege in a log that conforms to the rules of this court.
8. Ask whether a claim of privilege is being asserted in respect to any of those documents. If so, identify the documents and the basis upon which they make their claim of privilege in a log that conforms to the rules of this court.
9. Identify any individuals they are aware of with knowledge of the facts in dispute whom they do not intend to call as a witness in their case in chief.

And at that point you might wish to repeat steps 2 through 8 in respect to potential witnesses.
Despite the skepticism as to the effectiveness of interrogatories, there are multiple advantages to posing such interrogatories before delivering notice of and taking depositions.

The answers to these interrogatories:
• Should allow you to identify those witnesses you must depose and those you may not need to.
• Require the opposing side to make a commitment as to who its likely witnesses are. The likelihood of a previously unidentified witness appearing on a pretrial order or at trial is thereby substantially reduced.
• Provide you with an alternative and more useful method of winnowing through relevant documents and identifying allegedly privileged ones.
• Will allow you to lay the groundwork for a motion to increase the number of depositions from the permissible 10 to a larger number. This motion will be based on your opponents’ answers rather than your speculation about what potential witnesses you believe you need to depose may have to contribute to the fact-finding process.

NO EASY ANSWERS

Discovery disputes seem to be particularly abhorrent to judges, however necessary they often seem to the litigants’ counsels. Other than the interminable arguments about whether some document sought in discovery is privileged, disputes about whether interrogatory answers are sufficient seem to be the most difficult to successfully mount and argue.

Yet, just as fights about privileged documents have become more contentious, so too has the process of getting adequate answers to interrogatories. It seems particularly difficult because the process requires the side that must provide the answers to actually do some work.

First, that side must “discover” the facts and witnesses that are essential to its case. Second, the answering party has to make strategic decisions as to which witnesses it will use to prove its case. Let’s face it: Lawyers automatically start with a wide web-document request and follow up with deposition notices as the review of documents suggests the identity of key witnesses.

Posing the interrogatories suggested above interrupts that usual discovery trajectory. It puts the onus on each side to provide cogent answers about the identity of its actual and potential witnesses, what they know and how they know it. You and your opponent cannot merely trust that the facts will magically unfold and become evident to each side during discovery.

The party responding to such interrogatories may try to fob off providing cogent answers with a generalized objection—perhaps based on work product protection grounds. Most courts asked to rule on such objections should recognize them as nonstarters. After all, the interrogatories merely seek answers early on in discovery that each side will have to provide in a pretrial order at the end of discovery in all events—at least if the matter is being litigated in a federal court.

Since they ensure that subsequent deposition discovery will be focused instead of casting too broad a net, courts should both welcome and readily understand the purpose motivating such interrogatories. And courts should be willing to enforce the provision of adequate answers.

Finally, should you need to take more than the 10 permissible depositions, your opponent will have provided the self-explanatory evidence as to why more than 10 are necessary.

Edna Selan Epstein is retired from the daily practice of law. She established her own firm in Chicago in 1989, handling a variety of litigated matters. Epstein also served on the book publishing board of the ABA Section of Litigation and the editorial board of its journal, Litigation.
**Balancing Act**

Opinion gives guidance for legal services lawyers on how to dispense advice when working with nonlawyer professionals

By Bruce Green

**Ethics**

There are too few publicly funded attorneys, combined with pro bono lawyers, to help everyone with a civil legal problem who cannot afford a lawyer. Often, the only option is self-help because states’ provisions on the unauthorized practice of law ordinarily do not let nonlawyers assist. But sometimes nonlawyer professionals can step in. For example, applying for Medicaid occasionally raises tricky legal questions, but you do not have to be a lawyer to help someone with a Medicaid application.

Suppose a caseworker who has been trained regarding the Medicaid program encounters a problem while assisting a Medicaid applicant. May the caseworker, acting on behalf of the applicant, call a knowledgeable legal services lawyer, explain the difficulty and the relevant facts, and benefit from the attorney’s legal judgment about how to handle the situation?

This is a common scenario, says Randye Retkin, director of LegalHealth, a medical-legal partnership under the auspices of the New York Legal Assistance Group.

“We often interface with social workers and other health care professionals who seek our guidance about patients we have not met,” she says. “We can leverage our resources by giving advice to health care professionals who help patients with law-related problems.”

A recent opinion from the New York City Bar Association’s Professional Ethics Committee, Formal Opinion 2017-4, illustrates how legal services lawyers can help clients navigate the legal complexities of Medicaid while leaving it to the clients’ caseworkers to provide other necessary help.

The opinion interprets ethics guidelines based on rules 1.2(c) and 6.5 of the ABA Model Rules of Professional Conduct.

**COLLABORATION NAVIGATION**

The opinion is unusual and noteworthy, says Philip Genty, a professor at Columbia Law School, because “relatively few ethics opinions are directed specifically to lawyers who work in legal services programs serving low-income communities.” Consequently, legal services lawyers nationwide might find the opinion useful if their own state rules are written or may be interpreted slightly differently.

The opinion acknowledges that lawyers collaborate in various ways with nonlawyers—for example, attorneys sometimes employ other professionals (including those who work in social services) or are employed or retained by them. The opinion focuses only on the particular situation in which the legal services lawyer agrees to briefly represent the Medicaid applicant, with a trained and experienced caseworker serving as the applicant’s agent.

This differs from the common situation in which a caseworker gets a quick answer to an abstract legal question, without providing information about the applicant and without expecting the lawyer to exercise legal judgment in response to the applicant’s specific situation.

If providing brief legal advice to the Medicaid applicant through their caseworker, the opinion cautions, the lawyer should clarify that the applicant is their client and make certain that the caseworker is authorized to engage the lawyer on the applicant’s behalf. The opinion shows that, with care, the legal services lawyer ordinarily can provide legal advice in this fashion.

For starters, the opinion says the lawyer doesn’t have to conduct a time-consuming check for conflicts of interest, as lawyers ordinarily do before they accept a new representation.

The New York City bar’s rule based on Rule 6.5 reduces obstacles to participation in programs that provide short-term limited legal services in a “program sponsored by a court, government agency, bar association” or other nonprofit legal services organization.

“By relaxing the usual conflict rules, Rule 6.5 reduces obstacles to participation in programs that provide short-term limited legal services, thereby increasing the availability of such services to people in need,” according to the opinion.

It concludes that a legal services office’s informal practice of answering caseworkers’ calls about Medicaid law would qualify as the kind of program that the rule covers.
INFORMED CONSENT AND COMPETENCE

Next, the opinion says that under the New York City bar’s counterpart to Rule 1.2(c), the legal services lawyer may limit the scope of the representation to providing quick advice on the telephone if doing so is “reasonable under the circumstances.”

“Given the caseworker’s training and experience in completing Medicaid applications, and assuming there is ‘no apparent reason to believe that [the caseworker] will misjudge the extent to which legal advice is needed[,]’ the opinion concludes that brief advice will ordinarily be reasonable in that it “advances the client’s objective of a successful Medicaid application.” This is true even though the applicant might benefit more “from the lawyer reviewing and advising on the entire application.”

The opinion adds that Rule 1.2(c) requires an attorney providing limited legal services of this kind to first obtain the client’s informed consent. The legal services lawyer must make sure that the Medicaid applicant understands that the lawyer is giving advice regarding the caseworker’s specific questions, not accepting the ongoing representation or overseeing the caseworker.

While the lawyer may speak with the Medicaid applicant directly, it also is permissible for the caseworker to communicate the lawyer’s explanation to the applicant and then tell the lawyer whether the applicant understands and has consented. If so, the lawyer may proceed to give brief assistance, with the caseworker as the go-between.

Finally, the opinion raises the basic duty of competence. A risk arises that in communicating through the caseworker, the lawyer may not obtain the necessary facts or their advice will be implemented incorrectly. It is ordinarily all right to communicate through the caseworker, the opinion says. But sometimes doing so is unreasonable or attorneys must do so carefully, such as when it comes to language barriers.

The opinion’s usefulness is not limited to Medicaid applications. Nonlawyer professionals are authorized by law to provide assistance with other legal problems.

Indeed, social services professionals currently assist low-income individuals with their legal problems in large numbers. But they do so mostly under the radar, according to a 2014 law review article by David Udell, executive director of the National Center for Access to Justice, and Richard Zorza, founder of the Self-Represented Litigation Network.

Udell says the New York City bar’s new opinion “is welcome, as it underlines the principle that lawyers should, at least, not be discouraged from offering guidance to nonlawyers when, as occurs routinely, nonlawyers step into the breach in this way.”

At the same time, “the opinion reminds legal services lawyers that even in their informal interactions with service providers and community members, lawyers must be mindful of their ethical obligations,” Genty of Columbia says. “This protects both the lawyers and their clients.”

Bruce Green directs the Louis Stein Center for Law and Ethics at Fordham University School of Law. He chairs the ABA’s Criminal Justice Standards Committee and the New York City Bar Association’s Professional Ethics Committee. Green is also a co-author of the casebook Professional Responsibility: A Contemporary Approach.

Of Lists and Tabs
Transforming transactional drafts to make sense

By Bryan A. Garner

WHAT’S THE SINGLE MOST IMPORTANT sentence-level reform in transactional drafting? It’s a seemingly simple idea that would require massive retraining of lawyers. Here’s the proposition:

With few exceptions, every list in a contract or other transactional instrument should be set off and indented (with a hanging indent, mind you).

To make this reform possible, several things would have to happen: (1) legal drafters would need to adopt a tiered numbering system conducive to tabulating lists; (2) as part of that system, they’d have to abandon the use of romanettes, which typically clutter text and, with their varying number of characters (v as opposed to viii), disrupt the evenness of hanging indents; and (3) the syntax of existing forms would have to be modified so that lists invariably occur in the predicate—that is, the operative verb would have to precede the listings. In short, legal drafters would have to learn some new tricks.

INTO THE THICKET

Consider Figure 1 on the next page. It’s from a consulting agreement with a Fortune 100 corporation. At first glance it appears to be a single sentence, but in fact there are 13 sentences. Although there are no headings, there are generous helpings of romanettes, legalese, and mispunctuated phrases and clauses. This provision is typical of many that appear throughout the agreement.

Let’s stipulate that all the content is important. Let’s accept that every detail is necessary. Now consider Figure 2. All the content is more comprehensible and, yes, attractive—with headings and subparts within hanging indents. This isn’t a mere matter of aesthetics: It’s a matter of professional accuracy and acumen. Drafting of the type you see in Figure 2 isn’t just easier for clients to follow; it’s also easier for lawyers themselves to check for precision, consistency and correctness. Simply put: If you use this style, you’re going to do better legal work.

Note one key thing that’s happened in the transformation from Figure 1 to Figure 2. What had been 13 sentences has now become 25. The average sentence length has dropped from 66 words to 21 words. Study after study has shown that this type of writing is much more readable and easier to
Practice

understand. Seems obvious, doesn’t it? Redrafting of this kind takes more than a little work. But the more often you do the work, the easier it becomes. After a while, it becomes second nature. And whenever you do it—simply listing terms with hanging indents while imposing a sensible numbering system on the document—you’ll uncover substantive deficiencies in the forms you’ve been working with. That’s a good reason to do it, even if you’re not convinced on aesthetic grounds, or on grounds that your clients will appreciate you more, or on grounds that you’ll pay closer attention yourself.

FIGURE 1

At first glance, (ii) would seem to have two types of subparts, (b)-(c) and (2)-(i) (the latter in that reversed order). Actually, the romanettes ((ii)-(iii)) all go under (a), and the needless word/numeral pairs “two (2)" and “one (1)” just add to the confusion in this intimidating mass of verbiage.

The numbering system for embedded subparts has shifted here to (A)-(B).

Note how odd “two (2)" and “one (1)” are when none of the other numbers are similarly doubled.

Here begins a second set of romanettes. A clear cross-reference to (b) (6) isn’t possible.

The wording issues in this provision are legion.

This is the last of the second set of romanettes, two of which contained embedded subparts.

(6) For the legal consulting services provided pursuant to paragraph 4, the Company shall pay or provide, as applicable, to Consultant the following: (a) a quarterly retainer of $50,000, payable as of the commencement of the one-year term beginning May 8, 2014 and continuing quarterly thereafter for each quarterly period Consultant is obliged to provide legal consulting services pursuant to paragraph 4, provided that (i) Consultant has provided legal counseling services as reasonably requested in accordance with paragraph 4 for the immediately preceding quarterly period, and (ii) with respect to the one-year term beginning May 8, 2015, Consultant has elected to renew the initial 2-year term referenced in paragraph 4, and (iii) with respect to the one-year term beginning May 8, 2016, Consultant has elected to renew the second successive one-year term referenced in paragraph 4; (b) a cellular telephone and fax machine; the cost of maintaining two (2) cellular telephone lines and one (1) fax telephone line; and the cost of a fax machine maintenance agreement; and (c) a Deferred Stock Award (the “Award”), to be awarded as of the effective date of this Agreement, with respect to the 75,000 shares (the “Shares”) of the Common Stock of the Company (the “Common Stock”), subject to the following terms and conditions: (i) The Award shall vest and the Shares shall be issued and distributed to Consultant in accordance with the following numbers of shares vesting/distribution dates: 25,000 on May 7, 2015; 25,000 on May 7, 2016; 25,000 on May 7, 2017; provided that (A) with respect to Shares scheduled to vest in 2015, Consultant has provided legal consulting services as reasonably requested in accordance with paragraph 4, (B) with respect to Shares scheduled to vest in 2016, Consultant has elected to renew the initial one-year term referenced in paragraph 4 for the period May 8, 2015 through May 7, 2016 and (C) with respect to Shares scheduled to vest in 2017, Consultant has elected to renew the second successive one-year renewal term referenced in paragraph 4 and has provided legal consulting services as reasonably requested in accordance with paragraph 4 for the period May 8, 2016 through May 7, 2017. (ii) Any unvested portion of the Award shall be forfeited to the Company upon (A) the termination of Consultant’s employment with the Company for any reason other than due to Retirement at or after age 65, (B) Consultant’s death or Disability prior to the one-year term beginning May 8, 2014 referenced in paragraph 4, or (C) upon Consultant’s failure to comply with his obligations under the Agreement or the Agreement described in paragraph 14. In the event of the termination of this Agreement due to Consultant’s death or Disability during or after the one-year term beginning May 8, 2014 referenced in paragraph 4, any unvested 3 portion of the Award shall be forfeited on a pro-rata basis upon Consultant’s death or Disability as follows: the number of shares to be forfeited shall be the product of 25,000 and a fraction equal to the number of days after Consultant’s death or Disability remaining in the current one-year term during which Consultant dies or becomes disabled divided by 365. (iii) Consultant will not have the right to receive a certificate for the Shares or vote the Shares or receive dividends on the Shares prior to the date such Shares vest pursuant to the terms of this paragraph 5. However, during the Consulting Term, the Company shall pay to Consultant cash payments in lieu of and equal to dividends otherwise payable with respect to the 75,000 Shares, as such dividends are declared and paid on the Company’s Common Stock. The Company’s obligations to make payments in lieu of dividends on the 75,000 Shares shall cease once Shares vest pursuant to the terms of this paragraph 5 or in the event the Shares are forfeited. (iv) Until the Shares vest pursuant to the terms of this paragraph 5, such Shares are non-transferable and may not be assigned, pledged or hypothecated and shall not be subject to execution, attachment or similar process. Any attempt to violate these restrictions will result in the immediate forfeiture of the Award and the Shares. (v) Upon the vesting of the Shares pursuant to the terms of this paragraph 5, a Certificate for such Shares will be issued to Consultant by the Transfer Agent. (vi) The terms and provisions of this Award (including, without limitation, the terms and provisions relating to the number and class of Shares subject to this Award) may be adjusted by the Company in the event of any recapitalization, merger, consolidation, reorganization, stock dividend, stock split, split-up or other change in corporate structure affecting the Common Stock. (vii) The Award is made pursuant to the 2011 Performance Incentive Plan (the “Plan”) of the Company, to the extent any provision of this Award is inconsistent or in conflict with any term or provision of the Plan, the Plan shall govern. Capitalized terms not otherwise defined herein have the same meaning set forth in the Plan. The Company shall reimburse Consultant for reasonable business expenses incurred in providing services pursuant to this Agreement.

Average Sentence Length: 66 words.
You will actually come to discover deficiencies in forms you've been working with for years—or even decades. Try it. If I'm wrong, write and tell me so.

And to prove I'm wrong, send me that contract with long, dense paragraphs packed with run-in lists. Please explain why there's nothing wrong with it.


FIGURE 2

3.3 Compensation for Legal-Consulting Services.

(A) Forms of compensation.

(1) **Cash retainer.** Company will pay Consultant a quarterly retainer of $50,000 when the one-year term starts on May 8, 2014, and again for each successive quarterly period in which Consultant provides legal-consulting services as reasonably requested under § 3.2. If Consultant elects to renew, quarterly payments will continue through the renewal terms described in § 3.2.

(2) **Communications equipment.** Company will give Consultant a cellphone and fax machine. Company will also pay for two cellphone lines, one fax line, and a fax-machine maintenance agreement.

(3) **Reasonable expenses.** Company will reimburse Consultant for reasonable business expenses incurred in providing services under this Agreement.

(4) **Deferred-stock award.** As of this Agreement’s effective date, Company will award Consultant a deferred-stock award of 75,000 shares (the “Shares”) of Company’s common stock. Until the Shares vest under § 3.3(B), they:

(a) are nontransferable;
(b) cannot be assigned, pledged, or hypothecated; and
(c) are not subject to execution, attachment, or a similar process.

(5) **Cash in lieu of dividends.** For Shares that are neither vested nor forfeited, Company will pay Consultant cash equal to the dividends that Company declares and pays on each share of its common stock.

(B) **Vesting of Shares.** When Shares vest, the Transfer Agent will issue a Certificate to the Consultant for the Shares. The Shares will vest and Company will issue and distribute Shares according to this schedule and these conditions:

(1) **First vesting:** 25,000 Shares on May 7, 2015, if Consultant has provided legal-consulting services as reasonably requested during the initial one-year term;

(2) **Second vesting:** 25,000 Shares on May 7, 2016, if Consultant has elected to renew for a second one-year term and has provided legal-consulting services as reasonably requested during the period; and

(3) **Final vesting:** 25,000 Shares on May 7, 2017, if Consultant has elected to renew for a third one-year term and has provided legal-consulting services as reasonably requested during the period.

(C) **Forfeiture of unvested Shares.** Consultant will forfeit to Company any unvested Shares if Consultant:

(1) is no longer employed by Company for a reason other than Consultant’s retirement at or after age 65;

(2) fails to meet obligations under this Agreement or the Agreements described in § 3.7;

(3) attempts to transfer, assign, pledge, or hypothecate unvested Shares or to subject them to execution, attachment, or a similar process; or

(4) dies or becomes disabled during or after the one-year term beginning May 8, 2014, the unvested portion of the deferred-stock award is calculated as follows:

\[
25,000 \text{ shares } \times \left( \frac{\text{current one-year term - days up to and including day of death or disability}}{365} \right) + 365
\]

(D) **Company’s right to adjust deferred-stock award’s terms.** Company may adjust the terms of this award (including the terms relating to the number and class of Shares subject to this award) if any change occurs in the common stock, including recapitalization, merger, consolidation, reorganization, stock dividend, stock split, and split-up.

(E) **Performance Incentive Plan.** The deferred-stock award under § 3.3(A)(4) is made under Company’s 2011 Performance Incentive Plan. If a provision of this award conflicts with a term of the Plan, the Plan governs. Capitalized terms not otherwise defined in this Agreement have the same meaning as in the Plan.

Average Sentence Length: 21 words.
One thing is certain in life and in business: No new journey or pursuit is devoid of risk. Risk, difficulty and unanticipated circumstance are almost a certainty in great personal and professional endeavors.

If you are thinking of starting your own law firm or have begun the process, you likely already have engaged in some form of risk-reward analysis and for unique reasons determined it might be the path for you. Maybe you have discovered you are an entrepreneur at heart; maybe you value being the master of your own calendar and time; or perhaps you...
have dreamed up an innovative and inclusive law firm culture and are daring greatly to set out and create it. Whether your purpose is practical, time-centered or more altruistic, it is a worthwhile personal and professional pursuit and one that, by design or not, simultaneously expands the reach of legal services to our communities.

But at the end of the day, a law firm is a business, and young businesses often fail when business owners fail to engage in risk management at the outset. Many businesses and business owners do not adequately consider or plan for unanticipated financial loss (or overspending). Despite doing all the right things otherwise, they quite simply run out of cash or capital to keep the firm or business going.

Risk management involves protection from certain unanticipated expenses while also having a source of funds available in the event of some type of financial loss. The latter might be addressed by a first step in risk management, self-insuring, which essentially means saving three months to one year of personal and business expenses before you start your practice. In reality, this is a difficult-to-impossible task for most.

Insurance, though, is an invaluable risk-management tool and one you should explore as you begin your practice. If you are starting out, it’s also a more cost-effective and realistic way to engage in risk management from the beginning.

Here are a handful of insurance tools you should consider heavily when starting your firm. Some are necessary at your firm’s inception, while others should simply remain on your mind and be explored further as your firm evolves.

**TOOL 1: PROFESSIONAL LIABILITY**

Obtaining professional liability insurance, aka malpractice insurance, is not a thrilling task to think about while you are getting excited about the design of your firm website or the amazing new client software you just tested. It is, however, a basic risk-management tool a law firm should have in place before you begin practicing.

Professional liability insurance covers legal liability that arises from your delivery of legal services. It might not seem necessary at first, and some practitioners might think they are not at risk of a claim either because of the type of clients they serve or their practice area. But professional liability insurance, like most insurance, is a risk-management tool you might not think you need—until you do. It is the layer of liability protection most intimately tied to the practice you are working hard to build and the clients you are serving. As such, it should be considered an essential.

How do you obtain professional liability insurance? If you are like me, you will ask a colleague or that friend of a friend who went solo. That process can bear fruit, but keep in mind that you will have many tasks in starting your practice. In general, it can be wise to outsource as many of those tasks as is practicable.

Using an insurance brokerage company is invaluable. It can compare rates for you and, perhaps most importantly if you are starting out, the company will be in the know on specialty rates given for new attorneys in their first year or two of practice. Most state bar associations can provide a recommendation on a brokerage company.

A final note on malpractice insurance: Some types of insurance are required by law—automobile insurance, for example. Professional
liability insurance might or might not be required by your state bar. But in most states, such as California, attorneys are at least required to inform a client in writing at the time of engagement whether the attorney carries a policy.

TOOL 2: HEALTH
You cannot be your best self and the best advocate for your clients if you are not healthy. Healthy means taking care of yourself mentally and physically. But it also means having peace of mind that you have access to quality, affordable health care should you become sick.

Health insurance is a sizable expense for almost anyone, and when you first start your practice, cash flow might be your principal hurdle. Speaking from recent experience, I can tell you it is worth prioritizing. Having quality health insurance in place can set your mind at ease, and knowing you will be cared for if you become sick will free your professional brain space.

As a risk-management tool, a health insurance policy removes some uncertainty for potential expenses in that you will likely have some idea of the maximum you will pay out of pocket. Whether it’s a catastrophic plan or a PPO plan, a health insurance policy turns a potentially unexpected or unknown personal and business cost into an expense you can plan for based on the particulars of your policy.

TOOL 3: DISABILITY
If you’re starting a law firm, chances are you are the entire firm. So what happens to your business if you become sick, disabled or otherwise unable to work? Even if you engage in the self-insuring discussed earlier, there is a chance you’ll have nothing to come back to if a surgery or illness puts you on the sidelines beyond the time frame for which you’ve saved. Disability insurance is a cost-effective way to transfer risk when you don’t have the capital or time to self-insure via a personal savings plan. It’s then a risk-management tool that replaces lost income if you’re sidelined.

There are various kinds of disability policies you might consider depending on your situation. One specific type is disability overhead insurance, which pays your business overhead if you are unable to work as a key employee. You should consult an insurance professional to address your individual circumstance and find what is fitting for you.

When choosing a company or provider for a disability policy, keep in mind that not all companies, contracts and rates are created equal. Do your research, and enlist some help.

There’s good news for attorneys—even new ones or those finishing law school: Although most companies require proof of income to establish particular amounts of coverage, some will waive this requirement or provide lower rates for specialty-degreed professionals such as lawyers.

TOOL 4: LIFE
Life insurance is a critical personal planning tool. In the familial context, it is often the primary and largest source of funds used to care for our families when we die. Typically, it’s also most accessible and efficiently distributed upon the death of the policyholder and provides liquidity to pay expenses and debts and care for our families. When starting your own firm, life insurance might similarly be a critical tool for the continued care of your business, business partners and family should something happen to you.

If you have any form of shared debt heading into starting your firm, you will want to consider life insurance as a tool for paying that debt upon your death. Shared debt might include your law school loans if a parent or spouse co-signed on your agreement. In that case, life insurance can be used so that your co-signer is not left with the loan balance.

Shared debt also might mean a business partnership if you are starting a law firm with others. This is a topic to be explored in-depth elsewhere. But in sum, if you have a partner or partners, you want to consider a buy-sell agreement. There are many ways to structure these agreements. But the important thing to note briefly in
this context is that life insurance can be used to fund buy-sell agreements and can generally be leveraged as your firm develops.

There are various types of life insurance. You might be most familiar with term life insurance, whole or permanent insurance, and universal. Opinions vary about the best type of insurance to buy. You should consult an insurance professional on what is best for you, but it likely comes down to your goals and budget.

Permanent insurance advocates argue it can be used to protect your family while you build equity in your firm, among other benefits. Northwestern Mutual, New York Life and MassMutual have a strong track record relative to the industry as it relates to permanent insurance.

But for most attorneys starting out, a term policy is an inexpensive way to protect yourself, your partners and family. Again, you should consult an insurance professional to discuss these differences and make the best choice.

FLEXIBILITY FOR THE UNEXPECTED
Additional risk-management tools include business structures that reduce or eliminate personal liability, umbrella insurance polices to cover office property in the event of damage or theft, and various insurance types for potential future employees.

If you talk to anyone who has recently set out to start a law practice, I suspect you will hear stories of trial and error and receive advice on remaining flexible as times change and your practice evolves. Changes in the delivery of legal services come to mind, such as billing strategies that are easier for clients and the use of technology. But I think flexibility also applies to our thinking about managing the unexpected or unanticipated.

Unanticipated expenses can be crippling to your new practice. Insurance such as the types discussed here are tools you can use to ensure that while you are doing all the right things—pursuing the highest-level competence in your practice, networking, using legal tech tools, marketing on social media—your hard work, dedication to your practice and commitment to your clients remain at the forefront in the presence of the unexpected.

Jessica Youngblood is of counsel at the Knight, Morris & Reddick Law Group in its Los Angeles office. She specializes in comprehensive estate and trust planning.
When she’s in the courtroom, San Francisco-based trial consultant Carol Bauss knows the value of quickly getting background data on prospective jurors.

And these days, Bauss regularly uses the proprietary software and tech information services of Telluride, Colorado-based Voltaire to help her pick the right jurors. Voltaire’s software can search through billions of data points, including public records and social media posts, and—within a matter of minutes—pull up all kinds of information on prospective jurors. The software, which is powered by IBM Watson, also uses deep psycholinguistic and behavioral analysis to discover the biases and views of prospective jurors and to deliver real-time predictions on how they might vote.

 Powered by IBM Watson, Voltaire gives lawyers real-time predictions on how potential jurors might vote  By Scott Carlson
“We can determine personality factors by the way people write on Facebook and Twitter and analyze them,” says Voltaire CEO Basit Mustafa. According to him, Voltaire’s custom-designed reports can be viewed from a laptop computer or smartphone app, making the process of jury research and selection—or what is known as voir dire—much more efficient and productive.

Voltaire can also help reduce the burden of doing repetitive or menial work in the search process, says Mike Miceli, Voltaire’s chief marketing officer. “We help lower costs and the amount of resources needed, and we help develop a more effective trial communication strategy.”

Since debuting in October 2015, Voltaire has provided information to attorneys in 105 trials, including 25 clients. Currently, Voltaire is a five-person shop, and the company says its revenue has grown more than 200 percent in the last year.

“We have equal amounts of plaintiff and defense law firms [as clients],” Mustafa says. “But we have done more plaintiffs’ cases.”

Mustafa came up with the idea for Voltaire while serving on the board of his local American Civil Liberties Union. He observed that law firms didn’t do a very good job using technology to assist them in their cases. In one instance, a jury consultant lamented that his client had probably lost the case because of not knowing much about one juror. When he heard that, Mustafa says, he responded, “I am a tech guy; I can solve that.”

PICKING THE RIGHT JURORS

From 2013 to 2014, Mustafa created a prototype of Voltaire, developing its proprietary data algorithms. Beta testing began in December 2014, and the company generated its first revenue in October 2015. The company’s services first were used in Denver in a “slip-and-fall” case where it was serving a defendant, one of the nation’s largest retailers.

Mustafa previously worked for IBM as its chief financial officer and has maintained ties to his former employer. Voltaire has a partnership with IBM and is tapping the giant tech company’s Watson service. “We have heavily leveraged a lot of IBM technology,” Mustafa says. “It is like going to the hardware store and getting the best hammer possible. IBM Watson is an alchemy library.
Burst Bubble?
At a time when the e-discovery market seems to be shrinking, some see an opportunity

By Jason Krause

Last year, more than 30 major e-discovery companies were acquired or merged, or they disappeared. To an outside observer, it looks like an industry that is shrinking or contracting.

But at the same time, venture capital firms poured millions of dollars into startups and upstart companies offering technology to manage electronic documents in litigation. It’s enough to make lawyers wonder: Is it an industry in decline or on the rise?

The answer is a little of both. Large corporate clients are resistant to paying millions for litigation support services when a lawsuit arises. Rather, large organizations are investing in tools to manage electronic records before litigation ever happens. “E-discovery revenue streams and technology are opening up opportunities for companies with a focus on data from the point of creation, rather than just from the point of a legal trigger event,” says Rob Robinson, an e-discovery consultant who tracks industry investment activity on his website ComplexDiscovery.

That means less opportunity for traditional e-discovery consultants and lawyers, who often treat litigation like crisis management. But it can mean new opportunities for upstart service companies that can help organizations manage electronic records before litigation ever happens. “E-discovery revenue streams and technology are opening up opportunities for companies with a focus on data from the point of creation, rather than just from the point of a legal trigger event,” says Rob Robinson, an e-discovery consultant who tracks industry investment activity on his website ComplexDiscovery.

That means less opportunity for traditional e-discovery consultants and lawyers, who often treat litigation like crisis management. But it can mean new opportunities for upstart service companies that can help organizations manage electronic records proactively. “The difference now is that corporate counsel is driving the market,” says Sean Doherty, a New York City-based lawyer and industry analyst.

“IT’s not about cashing in on a couple of big pieces of litigation but a more measured approach around the enterprise business cycle. The e-discovery providers that will survive are the ones that can help clients cope with their ongoing needs.”

A SHRINKING PIE

Every year or so, a breathless new study predicts that the e-discovery industry is poised to explode. But those estimates have frequently proven to be grossly optimistic. For example, analysts at IDC Research claimed the e-discovery industry earned $9.7 billion in revenues in 2006 and predicted they would explode and hit $21.8 billion by 2011. But last year, IDC published a new set of figures. It said the industry had only just surpassed $10 billion in revenues, making a much more modest prediction of $14.7 billion in revenue by 2019.

For a lot of what we have.”

Bauss says her company, NJP Litigation Consulting, has used Voltaire in some 30 to 40 trials and finds it is “most useful when I don’t know much about the juror.” She says trial lawyers and consultants “don’t have time to explore these processes, or jurors are reluctant to talk about themselves.” That’s where Voltaire steps in. It puts information at the fingertips of lawyers, giving them one more piece of the puzzle, Bauss says.

For example, in one case Bauss learned that a prospective juror, a secretary, also had her own ministry and was a motivational speaker.

That additional information told Bauss that the woman was a strong leader and, therefore, could have a particularly strong impact on the opinions of her fellow jurors.

For now, Voltaire is plowing most of its money back into expanding its services with resources being used for expert analysis and criminal law. “There are a lot of avenues [still open] to better serve attorneys,” Mustafa says.

He foresees the day when Voltaire may be bought out by a bigger information technology player, such as Thomson Reuters’ LexisNexis or Google. He says Voltaire has raised nearly $800,000 for its startup and operations.

“We are pushing the limits on products and technology,” Mustafa says. “That is the best way for us to reach the most lawyers and help them make good decisions.”

Word of the day: Lawyaw
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The best explanation for this retrenchment is that corporate clients have been able to rein in their spending on litigation support services. In the more recent figures, IDC analysts assume a much more modest 9.8 percent compound annual growth rate, compared to a five-year compound annual growth rate of 17.6 percent in 2007. “These estimates are made under the assumption that corporate America will scale spending to keep up with data volumes,” says Monica Enand, CEO of the e-discovery software company Zapproved. “That’s impossible to sustain. Eventually, legal departments were going to have to find ways to get control of this spending.”

LESS FEAR LEADS TO NEW LANDSCAPE

The business of e-discovery is changing. That is at least partially thanks to updated Federal Rules of Civil Procedure, which makes the threat of sanctions less likely if litigants fail to preserve electronically stored information. Specifically, Rule 37(e) now holds that if lost ESI can be replaced or restored, no sanction will be imposed. If the information cannot be replaced and the requesting party is prejudiced, the court may order sanctions “no greater than necessary to cure the prejudice.”

Before the rule change, large clients felt compelled to keep massive amounts of data in the event of litigation. Now they are less terrified of sanctions and less willing to spend big bucks on a service provider who will collect and process massive data sets.

In response, old-line e-discovery vendors are responding by consolidating. Among the biggest moves were LDiscovery’s $410 million acquisition in October 2016 of Kroll Ontrack and the $240 million combination of OpenText and Guidance Software in July.

Others, including Silicon Valley investors, are seeing opportunities. OpenView Venture Partners has invested $10 million in San Francisco-based software company Logikcull, and Chicago-based Esquify has recently secured a new round of funding from Network Ventures. This new generation of e-discovery companies hopes corporations will be willing to pay smaller sums but over a longer period to have data managed in anticipation of litigation.

That helps explain the investments by Vista Equity Partners in a company such as Zapproved, which offers to manage electronic evidence from prelitigation phases and through the close of a matter. “It sounds like a Chinese curse, but we really do live in interesting times,” Enand says. “The business is changing and up for grabs. The question is who can truly automate the processes of litigation.”

SEARCH, SEIZURE & SURVEILLANCE: PRE-TRIAL LITIGATION & SUPPRESSION

A Trial Strategy and Resource Guide

SUMMARY:

Motions to Suppress are one of the most important and effective procedural tools that have traditionally leveled the playing field for the defense in court. But now modern law enforcement tools and techniques have raised new constitutional questions regarding our right to privacy and to be secure in our persons, houses, papers, and effects. In order to get that courtroom victory for your client, you need to be on the cutting edge of Fourth Amendment pre-trial litigation issues.

This brand-new edition from NACDL is the best way to stay up to date on the most important issues in Suppression and Fourth Amendment cases. Compiled from top-rated contributors, this new manual provides information you can immediately apply to your current cases. Available as a spiral-bound, hard-copy book containing over 500 pages of content including scholarly articles, sample briefs and motions, practice tips and techniques, and more!

CHAFTERS INCLUDED:

1. Recent Developments in Federal Search & Seizure Law
2. US Supreme Court 4th Amendment Update
3. Litigating Consent and Coercion in Searches
4. Challenging Computer Warrant Searches
5. Litigating DNA & Bodily Fluid Seizures
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10 MYTHS SHOW THE HARSH REALITIES OF EMPLOYMENT CIVIL RIGHTS LITIGATION

Illustrations by Steven P. Hughes and Celia Krampien

BY ELLEN BERREY, ROBERT L. NELSON AND LAURA BETH NIELSEN
Gerry Handley faced years of blatant race-based harassment before he filed a complaint against his employer: racist jokes, signs reading "KKK" in his work area, and even questions from co-workers as to whether he had sex with his daughter as slaves supposedly did.

Handley (a pseudonym) had an unusually strong case with copious documentation and co-workers’ support, and he settled for $50,000—even keeping his job.

But victory came at a high cost. Legal fees cut into Handley’s winnings, and tensions surrounding the lawsuit poisoned the workplace. A year later, he lost his job due to downsizing.

Handley exemplifies the burden plaintiffs bear in contemporary civil rights litigation. In the decades since the movement, we’ve made progress—but not nearly as much as it might seem.

On the surface, America’s commitment to equal opportunity in the workplace has never been clearer. Virtually every company has anti-discrimination policies in place, and there are laws designed to protect these rights across a range of marginalized groups.

But our examination of nearly 1,800 civil rights cases and interviews with parties and their lawyers shows that this progressive vision of the law falls far short in practice. When aggrieved individuals turn to the law, the adversarial character of litigation imposes considerable personal and financial costs that make plaintiffs feel like they’ve lost regardless of the outcome of the case. Employer defendants also are dissatisfied with the system, often feeling “held up” by what they see as frivolous cases.

And even when the case is resolved in the plaintiff’s favor, the conditions that gave rise to the lawsuit rarely change.

In fact, the contemporary approach to workplace discrimination law perversely reinforces the very hierarchies that anti-discrimination laws were created to redress.

EXTENSIVE ANALYSIS

In our book, *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality*, we offer a comprehensive analysis of the system of employment civil rights litigation, using both statistical data from a large random sample of cases and in-depth interviews with plaintiffs, plaintiffs lawyers, defendant employers and defense lawyers about their experiences with and perspectives on discrimination lawsuits. All the names of interviewees we use are pseudonyms as part of our human subjects protection protocol.
With support from the American Bar Foundation, the National Science Foundation and the Searle Foundation, we sent teams of research assistants to federal records centers to code the characteristics of a random sample of employment civil rights cases filed over a 15-year period—1,788 cases in all.

Most research on discrimination litigation examines only cases that generate published opinions. Such research leaves out the vast majority of cases that do not generate opinions, leaving analysts to study “the iceberg from its tip” (a phrase coined by colleagues John Donohue III and Peter Siegelman).

After performing statistical analyses on case outcomes, we drew a random subsample of cases in the four major types of claims (race, sex, age and disability) and four case outcomes of greatest theoretical interest (dismissal, early settlement, late settlement and trial). We then conducted in-depth interviews with parties and their lawyers. The interviews were recorded, transcribed and analyzed. This combination of data generated many findings that run counter to common misunderstandings about employment discrimination litigation.

THE MYTH LIST

Myth 1. Employment discrimination is a thing of the past.

While public opinion data shows Americans are now much less prejudiced on the basis of race and sex, and while the crudest forms of such segregation have been eliminated from the American workplace, several studies demonstrate that employment discrimination persists. Among the most striking, a 2007 study by Harvard University sociologist Devah Pager found that black men without a criminal background were less likely to receive a callback for a job interview than white men with a criminal background.

Myth 2. Workplace discrimination primarily takes on subtle forms and is confined to acts resulting from implicit bias.

While there is abundant research on the pervasiveness of unconscious bias, the plaintiffs’ stories we heard—such as that told by Handley—were often anything but subtle. Our plaintiffs spoke of having chocolate dildos put in their face at work, of a woman being told she could have a job when she could use the men’s room urinal, of being fired upon informing the employer of a diagnosis of cancer. Defendants typically contest these facts, but the asserted behavior is often flagrant.

Myth 3. Targets of discrimination are quick to sue.

Taking the example of race discrimination claims, we estimate that only about 1 percent of African-American workers who perceive they have been discriminated against at work in the last year file a charge with the Equal Employment Opportunity Commission. Our research shows that, across different types of plaintiffs, less than a quarter of EEOC charges lead to the filing of a lawsuit.

Myth 4. The number of employment civil rights lawsuits continues to grow, placing increasing burdens on the federal courts.

While the number of employment civil rights suits increased dramatically during the 1990s, reaching a peak of 23,735 in 1998, the number of lawsuits filed has declined dramatically since, falling to 13,831 in 2014.

Myth 5. A large proportion of employment civil rights claims are brought as class actions or with the intervention of the EEOC.

In fact, 93 percent of lawsuits are brought by a single plaintiff; only 1 percent of lawsuits are certified as class actions; and the EEOC intervenes in some 400 cases a year.

Myth 6. Plaintiffs have high odds of success and win large awards.

Although media coverage gives that impression, we find that some 36 percent of plaintiffs have their cases dismissed or thrown out on a motion for summary judgment and 50 percent of plaintiffs receive settlements early on, with an average settlement of $30,000. Of those cases that go to trial (6 percent), only one-third end with a win for the plaintiff.

More significantly, we find that plaintiffs often pay a high personal cost for their involvement in discrimination lawsuits. Beginning in the workplace, once they start to raise the possibility that they were discriminated against and certainly if they file a charge, they face ostracism from management and even co-workers. Handley became estranged from his wife and was forced to live out of his car because of financial difficulties.

Many plaintiffs report experiencing depression, alcoholism and divorce flowing from the stress of litigation. Many plaintiffs begin litigation hoping to get their job back; that almost never happens. Sam Grayson, a police officer who sued on a disability claim, received what we know was a large monetary settlement. His reaction: “I didn’t want any money. I wanted my job back. And I actually, to be completely honest with you, cried and left and felt like I had lost because it wasn’t about the money.”

Myth 7. Employers are opposed to anti-discrimination law.

On the contrary, we find that defendants and their lawyers voice support for a discrimination-free workplace, claim they do not tolerate discrimination in their organizations, and say that “if they find it they fix it.”

How do they explain discrimination claims brought against them? Overwhelmingly, they tend to reject the validity of any particular
plaintiff’s claim. We refer to this phenomenon as employers perceiving “the right right, but the wrong plaintiff.” Employer defendants tend to see plaintiffs as problem employees and eventually as legal adversaries of questionable judgment and integrity.

**Myth 8. Many plaintiffs’ lawsuits are frivolous.**

Our interviews with defendants and their lawyers reveal that they often believe plaintiffs are ill-informed about the law or seeking undeserved compensation. Yet there is no straightforward test to determine at the outset of a case whether it is weak on the merits. Unlike medical treatment files, which can be objectively reviewed by experts, employment files are themselves created by employer-defendants and may contain subjective assessment of performance and misconduct.

One indication of this difficulty can be seen in our data. The EEOC created priority codes to predict the odds of success when charges are filed. We obtained commission records and matched them to a large subset of our filings cases. The EEOC priority codes had no power to predict the outcomes of our cases.

**Myth 9. Plaintiffs lawyers accept too many weak cases.**

Defendants and their attorneys often blame plaintiffs lawyers for failing to act as gatekeepers on weak cases. Our interviews with plaintiffs lawyers found that they typically accept only about one in 10 potential employment civil rights cases they review. Indeed, plaintiffs lawyers articulated a long list of criteria they employ in assessing whether to take a case.

An unfortunate consequence of their screening is that it may work against less resourceful plaintiffs and people of color. Black plaintiffs were significantly less likely to have legal representation in litigation, with the result that they were more likely to have their cases dismissed.

**Myth 10. Employment civil rights lawsuits now contain a large proportion of sexual harassment claims.**

Such high-profile cases as the sexual harassment claims brought against the late Roger Ailes and former Fox News commentator Bill O’Reilly may give the impression that such claims have become predominant in the employment civil rights docket. Yet all sex discrimination claims continue to trail race discrimination claims in court filings (37 percent and 40 percent, respectively), and age (22 percent) and disability (20 percent) claims also make up a significant share of cases. Sexual harassment is raised in 17 percent of the cases in our sample. Far more common are claims of discriminatory firing, retaliation and promotion.

**“When I started this case I wrote down that sometimes a win is not a win; but if you do not try, you have failed. So I do not believe I failed.”**

—Pamela Richardson

**REINFORCING INEQUALITY**

Our work identifies a central paradox in the American approach to workplace discrimination: Despite society’s embrace of a right to a discrimination-free workplace, how these rights are actually implemented in the workplace and in court tends to reinforce the very illegitimate inequalities that the law was created to address. We identify this as reinscription. Various legal processes reinscribe inequalities throughout litigation, from the financial cost of hiring an attorney to defendant employers’ reliance on small settlements.

One prime example of reinscription is how stereotypes about protected groups of workers find their way into the workplace and into the litigation process. Employers treated black plaintiffs as potentially criminally dangerous. Interviewee Franklin Williams was led out of work in handcuffs. Inside counsel referred to an African-American plaintiff as “trying to hold us up” in making a race discrimination claim, thus equating the plaintiff’s behavior with theft.

Another stereotype reinforced through litigation was of black women as overbearing and angry. Annie Daley complained to her supervisor that subordinates called her “a black bitch.” When she went to the human resources department to complain that her supervisor was doing nothing in response, she was fired two weeks later. When we interviewed defense counsel in the case, she said the plaintiff came across in a deposition as “sort of bitchy.”

The polarizations produced by the adversarial process encourages defendant employers and their counsel to present plaintiffs in the worst possible light. Stereotypes are one readily accessible way to tarnish individuals as problem employees with illegitimate claims. Plaintiffs lawyers are also influenced by these stereotypes when they weigh whether to take a case and in advising clients on such critical matters as whether to accept a settlement or go to trial.

One purpose of a litigation-based system of rights enforcement is to encourage employers to root out discriminatory processes. As we noted above, although most large employers have anti-discrimination policies and inside counsel and HR professionals to apply them, employer defendants tend to circle the wagons in response to a legal claim.

Settlements—the predominant outcome of cases—also serve to reinforce social inequalities and buffer the workplace from change. Settlements typically include a confidentiality clause that prevents plaintiffs from discussing the terms of the settlement or disparaging management. As a result, there is seldom a feedback loop from litigation to the workplace that might highlight issues identified in a case. This functions to isolate the discrimination dispute from the workplace and forestall reform. Management maintains control over information about allegations of discrimination.

**A VOICE IN THE WORKPLACE**

At the conclusion of our interview with Handley, after learning of the personal toll the litigation had taken on his life, we asked him what he would do if he had to do it over again.
His reply: “I’da took it. When [co-workers] said that, you know, about my daughter, I would have just took it and kept my mouth shut and not tell anybody. Keep your mouth shut and just take it, you know, because if you fight back, it ain’t worth it. The legal system and the justice—it ain’t there.”

His experiences—and that of many of the plaintiffs we interviewed—reflect the harsh realities of the litigation process in employment civil rights cases. These stories offer a cautionary tale to workers, employers, lawyers and judges about the problematic aspects of this system, a system in which they all participate but none of them controls. While this system has many imperfections, there are no obvious alternatives to remedy workplace discrimination that seem politically feasible in the near term.

One of the important functions of employment civil rights law is that it gives voice to individuals and groups who feel they have been discriminated against. It often is a losing battle for plaintiffs, but even many plaintiffs who recognized that they lost at law felt vindicated in their effort to achieve justice.

Pamela Richardson, who lost at trial after her lawyer quit her case, recounted through tears, “When I started this case I wrote down that sometimes a win is not a win; but if you do not try, you have failed. So I do not believe I failed.”

WHAT TO DO

In the conclusion of our book, we assess prospects for change in this system and offer policy recommendations. Given the entrenched and opposed positions of workers and employers, meaningful change will be difficult. Yet we suggest several reforms.

First is to recognize the realities we have revealed about employment civil rights litigation. Plaintiffs need to understand the challenges they will face in litigation and the significant advantage of having even one other employee join their lawsuit. Defendants and their lawyers might be sensitive to the tendency of the employing organization to dismiss, even demonize, allegations of discrimination.

Second, many of the problems we identify stem from the predominance of individual cases and the relative absence of systemic litigation, such as class actions or cases in which the EEOC participates on behalf of the plaintiff.

The EEOC has made systemic cases a priority in recent strategic plans but has yet to significantly increase the number of cases in which it litigates. While judicial rulings have limited class actions, systemic cases promise more significant impact on employment civil rights.

Third, offer more access to legal representation. Some 23 percent of plaintiffs lack legal representation and suffer far worse litigation outcomes than plaintiffs with lawyers. Moreover, we find that African-American plaintiffs are less likely to obtain representation. The legal profession should take steps to eliminate this racial disparity.

Fourth, provide more resources to the EEOC and state fair-employment agencies so they may conduct more effective investigations and conciliation efforts.

Fifth, enforcement agencies and the courts should develop more effective forms of communication with plaintiffs so they understand what is happening in their cases.

Sixth, increase the amount of information available to employees about the demographic composition and earnings of their employer’s workforce, which will inform workers about whether they are being treated fairly.

This article is based on Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality (University of Chicago Press, 2017). Audio recordings and other materials are available at rightsontrial.com.

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ADVOCATES WORK TO KEEP YOUNG FEMALE OFFENDERS OUT OF PRISON THROUGH EARLY INTERVENTION

SAVING THE GIRLS

BY JULIANNE HILL
PHOTO ILLUSTRATION BY BOB FERNANDEZ
The first time Amber was arrested, she was 16 and brought in for assault and battery after fighting another girl.

The judge in Mercer County, West Virginia, placed the 5-foot-6-inch girl with sandy brown hair on home confinement for six months. She was expected to work with a probation officer and stay out of trouble.

But going back to her home in the foothills of Appalachia ignited painful memories. It was the place where Amber’s problems began as a child, where she witnessed her father attacking her mother numerous times and where years of family dysfunction took their toll.

“They were never just smacking or shaking each other. They tried to kill each other many times,” the Princeton, West Virginia, native says of her parents. “There was always blood involved: axes, hammers and knives.”

Her father, a coal miner, had a history of arrests for driving under the influence and fighting. Her mother also had a drinking problem and has bipolar disorder, Amber says. The couple divorced when she was 9.

According to Amber, she and her mom are estranged and seldom speak. (Her father died in 2013.)

To ease the pain from her troubled childhood, Amber started drinking at 11. By 15, she was using hard drugs, including OxyContin, Percocet, cocaine, crack and morphine. “I had a period where I was prostituting too” to fund the addictions, she says. “I put myself where I didn’t feel anything.”

After her arrest at 16, Amber was unable to pass the mandatory drug screenings during her court-ordered improvement period. “Before the six months were up, the judge told me I was a lost cause,” she says. She was sent to Sam Perdue Juvenile Center in Princeton.

“I stayed locked up for hours on end,” Amber says. “I got out to eat for one hour each meal; one hour for recreation. It was very scary for me.”

INTO THE SYSTEM

For the next seven years, Amber moved in and out of the criminal justice system—first as a minor, then as an adult. Experts say her experience reflects an all-too-common pattern: A girl endures trauma at home only to face more trauma in the justice system.

“It is quite distressing. These stories about girls play out over and over,” says Michele Goodwin, a chancellor’s professor of law at the University of California at Irvine. “More often than not, it is the poorest young women who are brought into the system. And it doesn’t matter if it is urban or rural poverty—poverty is poverty.”

In pockets around the country, the movement to keep kids out of detention homes and prisons is beginning to give more focus to girls, whose experiences and vulnerabilities are markedly different from those of boys. Programs in New York and Illinois, for example, are taking a close look at how to help girls address their problems instead of detaining them.

“The way to do it is to catch the girls before entering the system,” says Francine Sherman, a clinical associate professor at Boston College Law School and co-author of the study Gender Injustice. “Give them support services on the front end and keep them out of the system.”

The problem starts with early arrests. Girls are more likely to be brought in for lower-level, nonviolent charges that wouldn’t be crimes if they were over 18. These are known as status offenses—including truancy, breaking curfew and running away.

“The question should be why. Why are they running away from home? What are they trying to leave?” Goodwin asks.

In 2013, 37 percent of girls arrested were brought in
for status offenses and technical violations, compared to 25 percent of boys, according to the Department of Justice’s Office of Juvenile Justice and Delinquency Prevention.

This means a disproportionate number of girls are funneled into the juvenile justice system for behaviors that would be overlooked if committed by boys, several experts say. Goodwin says that police are more likely to be called when girls get into fights than boys.

“People have expectations about how girls are supposed to behave: ‘Be nice, don’t act out, don’t break rules,’” says Stephanie Covington, co-director of the Center for Gender and Justice in La Jolla, California. “Boys will be boys. But if girls do the same things, that’s horrible and they are arrested.”

“Girls are brought into the system as criminals instead of being treated as survivors of terrors within their own homes,” Goodwin says. Four out of five girls brought into the juvenile justice system have witnessed domestic violence or sexual abuse at home, she adds.

Like Amber, many girls often act out as a cry for help, says Kathy Szafran, CEO and president of Crittenton Services Inc. in Wheeling, West Virginia, which maintains a 48-bed residential treatment center. She served as clinical supervisor on Amber’s case in 2011 when the girl was court-ordered to receive residential treatment because she was 17, pregnant and using drugs.

“Often, the judges put girls in the system to keep them safe from perpetrators,” Szafran says. “With boys, they put [them] into care so they don’t harm anyone else. It’s a very different standard.”

Like Amber, who lives with depression, anxiety, anorexia and bulimia, girls labeled with learning or emotional disabilities are more likely to be in the system, according to a study by Goodwin.

Once they’re in the system, there’s not much help for girls. Programs to help kids get out of the system are most often exclusively focused on boys, experts say.
While the total number of arrests for boys and girls has declined in recent years, the rates of girls’ arrests from 1996 to 2011 fell at a much slower pace than boys’—42 percent vs. 57 percent, according to Gender Injustice. While girls made up 20 percent of all juvenile arrests in 1992, they accounted for 29 percent in 2012, the latest year for which statistics are available.

For girls, problems that begin early in life often lead them into the adult system. Between 1980 and 2014, the number of incarcerated women increased by more than 700 percent, rising from a total of 26,378 in 1980 to 215,332. Though many more men are in prison than women, the rate of growth for female imprisonment outpaced that of men by more than 50 percent between 1980 and 2014, according to the Sentencing Project.

To help prevent women from going to prison, some programs are focusing on reaching them when they’re girls.

EFFORT IN THE BIG APPLE

Last February, New York City launched a seven-month effort to bring the number of girls in detention down to zero by creating a task force—including city officials, police officers, nonprofit leaders and academics—to address their problems.

The Vera Institute of Justice pulled together the various agencies that are now looking at what brings the girls into the system, such as low-level status offenses, and how best to disrupt those well-worn pathways to detention.

Funded by the Office of Juvenile Justice and Delinquency Prevention, the task force hopes New York’s project will become a national role model, says Lindsay Rosenthal, a Vera senior program associate and gender justice fellow.

Two months after the task force’s creation, New York Gov. Andrew Cuomo signed the Raise the Age reform bill, which will move cases for 16- and 17-year-olds out of the adult system and into family court by October 2019. Of that age group, more than twice the number of girls enter the adult system, compared to those 15 and under, Rosenthal adds.

As a result, the task force extended its work by two months until November to address the anticipated influx of girls’ cases, Rosenthal says.

In 2016, 479 girls were admitted into family court in New York; 307 were unique to the system, according to Rosenthal. “We are working to better understand why the girls come back multiple times,” she says. “Are there 10 girls coming through eight times or are many coming in twice?”

The task force found that 53 percent of girls were coming from the child welfare system. Two-thirds were in foster care. The other third were from families being investigated by child welfare or receiving preventive services. “That means the girls are usually still at home with the family,” Rosenthal says. “It is a really good opportunity to think about prevention and what strategies at the different points can be used to prevent arrest.”

Support from all aspects of the child’s life—ranging from family members to teachers to various social service agency personnel—will be part of the solution, but there will not be cookie-cutter approaches, she adds. “We also know there is a lot of diversity, different types of interventions; some girls have significant psychiatric issues, as opposed to others who are struggling for other reasons, and the family needs support,” Rosenthal adds.

STRATEGIES IN ILLINOIS

Illinois is taking its own approach to keeping girls out of detention. In March, the state received a $267,000 federal grant through the DOJ to examine how girls get into the system and then develop strategies, policies and programs to keep girls brought in for domestic abuse out of confinement.
GIRLS’ COURTS UNDER SCRUTINY

As courtrooms specializing in girls’ cases crop up around the country, the U.S. Department of Justice is examining whether they actually work.

Since the early 2000s, an estimated 20 specialty girls’ courts have been created nationwide, though these gender-specific courts mean different things in different places. Sometimes it’s simply a docket dedicated to cases for girls. Others specialize in linking young female defendants with social services. There are even courts that hear only sex trafficking cases.

Leading the examination is the Office of Juvenile Justice and Delinquency Prevention’s National Girls Initiative. “The study is a chance to look at where they are, what do they look like and how do we define their effectiveness,” says Jeannette Pai-Espinosa, president of the National Crittenton Foundation in Portland, Oregon, which coordinates the National Girls Initiative with the office.

The major concern is whether these courts are bringing more girls into the system and keeping them in detention and in prison longer or offering alternatives to incarceration.

The researchers are meeting with judges around the country, including Jennifer L. Ching, presiding judge of the Hawaii Girls Court. Established in 2004 as part of the Family Court of the First Circuit in Honolulu, it’s one of the country’s first such courts. It focuses on girls brought in on status charges, such as running away, skipping school or breaking curfew.

“Girls’ court is about the actual court hearings but also about supporting gender-specific, empowering activities,” says Karen Radius, founding judge of the Hawaiian court.

Girls form a group, or cohort, and their monthly court dates are held on the same day. Together, they participate in mandated activities, such as community service and family counseling, which keeps the girls in touch with court staff at least once a week. Other cohort activities have included visits to Hālekalo National Park on Maui and surfing programs with mentors.

Meanwhile, in California’s Alameda County, the 4-year-old girls’ court aims to serve as a safety net for underaged girls arrested for prostitution or for acting on orders from an exploiter. The program links them with partners that include the public defender’s office, the district attorney’s office, county social services, probation officers and a host of community agencies and therapists.

The idea is to holistically treat them. “We ask: Are you in school? Are you being exploited at home? Does someone in the family have mental illness?” says Barbara Dickinson, Alameda County assistant public defender and supervising attorney for the juvenile unit.

On their court date, the girls and their families are brought in one at a time and greeted by all of the partners in court. “Virtually everyone says out loud, ‘My goal is to get you off probation and keep the record sealed,’” Dickinson says.

All girls’ courts are well-intentioned, but they are not always proven effective, says Francine Sherman, a clinical associate professor at Boston College Law School. “We have to have evidence-based practices with some data supporting if they are helpful behind them.”

The idea is to bring stakeholders—domestic violence advocates, law enforcement, probation officers and others—together to figure out what can be done differently. “We do not want them brought into the system unnecessarily,” says Lisa Jacobs, program manager for Loyola University Chicago’s Center for Criminal Justice, Research, Policy and Practice.

The new statewide project examines the context of the girls’ arrests, including family dynamics and previous traumas. One scenario includes a girl defending herself from an abusive parent or adult.

Girls who are defending themselves can be arrested because the state’s criminal codes apply to juveniles just as they do for adults, including mandatory arrests for domestic abuse. The law was designed to protect women in abusive intimate-partner relationships, but it also applies to children who fight with their parents, even if the parents are the abusers, Jacobs says.

“Say a girl and her mom fight. No one is hurt, but the police come,” says Wendy Nussbaum, executive director of the Illinois Juvenile Justice Commission in Chicago. Police then determine who is the primary aggressor—mother, child or both—and arrest them.

If the daughter is arrested, she could go to detention. “Often, these kids are not causing serious injuries, but in some counties the policy of mandatory arrest brings more girls into the system than anything else,” Nussbaum adds. “The number of kids brought in for domestic battery with trauma in their background is off the charts. We need to make sure we have trauma services for them and not create more trauma with an arrest.”

In Illinois, 13 percent of all girls in detention were brought in for adolescent domestic battery, compared to 5 percent of all boys, according to a 2015 study by the Juvenile Monitoring Information System at the University of Illinois and the Illinois Juvenile Justice Commission. Of those detained, girls of color accounted for 62 percent.

“The more we talked in Illinois, the more we realized we’re applying adult models developed for adults and intimate-partner violence,” Jacobs says. “We were getting it wrong in two ways. Now we are taking the time and resources to
look at girls.”

The grant-funded project builds on policies created in suburban DuPage County. There, if a child is arrested for domestic battery and the parents say the child must leave the home, the minor is brought into a detention center for no more than 40 hours before appearing before a judge. If it’s a first arrest, the child and parent will meet to determine whether home is a safe environment. If so, the social worker will offer the youth a diversion program to keep the child out of detention. If the youth does well, all charges can be dropped.

The goal is to first divert girls at the police station and avoid detention altogether. “It’s a lofty goal and, of course, we have to determine which kids really are a risk,” Nussbaum says.

“Some cases don’t need to be in the juvenile justice system at all,” Jacobs says.

THE ROAD BACK

Amber’s experience has proven that help is better than incarceration. “Communities need to come together and start something for girls—programs that help them instead of locking them up,” she says.

Amber says her incarceration in West Virginia didn’t help at all. “I knew in my heart that if someone had intervened, if someone had given me patience, love and tolerance for me at that age—things would have turned out a lot differently. I wouldn’t have been so lost.”

Today she is clean and sober. Detention and jail did not scare Amber straight, she says, but the therapeutic intervention she received along the way did. She credits support from counselors and recovery groups for pulling her out of her darkest moments: losing custody of the baby boy she had at 17 and an almost fatal overdose.

During her journey toward sobriety, support services forged her path toward receiving a GED and then community college. “What worked is finding someone willing to hear me out and not judge me and not lock me up,” Amber says.

Now she’s studying criminal justice at West Virginia University at Parkersburg, where she serves as a peer counselor; and she’s working as a waitress. She’s raising her baby girl with her long-term partner, who is also in recovery.

“When we lock away these girls, it is a disservice to them and a disservice to our society,” Goodwin says. “These are individuals with potential.”

Julianne Hill is a Chicago-based freelance writer.

Wendy Nussbaum
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To Form a Nation

by Lorelei Laird
NATIVE HAWAIANS WAGE AN ONGOING BATTLE TO ORGANIZE THEMSELVES INTO A SOVEREIGN NATION
NATIVE HAWAIIANS have been considered Americans for more than 100 years. But they haven’t forgotten the original sin that created their state.

That sin—the forcible ouster of the Hawaiian monarchy—has some Native Hawaiians waging a legal battle to this day to regain some measure of independence. Under the monarchy, American and European businesspeople had prospered. But they wanted control in this land of paradise. So in 1887, they assembled a militia and forced King David Kalākaua at gunpoint to sign the Kingdom of Hawaii Constitution, nicknamed the “Bayonet Constitution,” which reduced his power and increased the power of wealthy, white landowners.

When the king’s sister, Queen Lili‘uokalani, inherited the throne a few years later, she was determined to reverse this imbalance of power by writing a new constitution. But backers of the Bayonet Constitution got word of the plan. On Jan. 16, 1893, they gathered their militia across from her palace. The U.S. minister to Hawaii, John L. Stevens, ordered about 160 armed American troops to come ashore—ostensibly to protect American property, but most of the troops set up camp near the palace.

At dusk the next day, fearing a war, the queen gave up her throne. “Now, to avoid any collision of armed forces—and perhaps the loss of life—I do, under this protest and impelled by said forces, yield my authority,” Lili‘uokalani wrote.

Despite good relations between the United States and the kingdom, American leadership never intervened actively to reverse the overthrow. The United States annexed Hawaii in 1898—without the consent of its people or its former queen—and declared it a state in 1959.

But Native Hawaiians haven’t forgotten that they were once independent. They’ve been trying to regain that independence for decades—especially since the 1970s, when there was a renaissance of interest in Hawaiian culture. The state’s Office of Hawaiian Affairs was established in 1978 to support sovereignty; former Hawaii Sen. Daniel Akaka, a Democrat, introduced yearly bills to achieve it; and islanders have tried several times to organize a vote on whether to form a Native Hawaiian government.

But those votes have been challenged repeatedly—and in 2000, one of those challenges resulted in a U.S. Supreme
Court precedent that has stymied self-governance efforts since then. *Rice v. Cayetano* held that under the 15th Amendment, which expressly says states may not deny any citizen the right to vote based on race or color, a Hawaii state agency may not hold elections only for Native Hawaiians.

That means current efforts are in danger. A 2016 constitutional convention, called an ‘aha in the Hawaiian language, produced a proposed constitution for a Native Hawaiian government, whose form and relationship to the United States is not yet settled. But the ‘aha also got organizers sued for violating *Rice*. That forced them to rely on private funding to ratify the constitution. As of December 2016 (the most recent data provided), organizers had only a little more than an eighth of the money they need. Opponents of the effort are watching closely for anything they think is illegal.

“We are actively involved in making sure that we’re ready to go if this rears its head again,” says Robert Popper, director of Judicial Watch’s Election Integrity Project. “There is going to be a serious problem no matter how they structure this, and we are dedicated to making that argument.”

**INDIGENOUS ENOUGH**

*Rice* highlighted a quirk of Native Hawaiians’ legal status: They’re an indigenous people of the United States, but federal Indian law doesn’t apply to them. Hawaii was admitted to the Union well after most Indian law was written, and no one has sought to include Native Hawaiians after the fact. That’s fine with some Native Hawaiians, who dislike being lumped in with mainland tribes. But if Hawaiians had a tribal-style government, *Rice* might have
SOME NATIVE HAWAI'ANS WOULD PREFER FULL SOVEREIGNTY, EVEN IF IT MEANS SECESSION FROM THE UNITED STATES.
come out differently. The Supreme Court has held that Indian status is a political affiliation with a tribe rather than a racial category.

However, Native Hawaiians are still legally a bit different from other Americans, says Melody Kapilialoha MacKenzie, a professor at the William S. Richardson School of Law at the University of Hawaii at Mānoa who directs its Ka Huli Ao Center for Excellence in Native Hawaiian Law. Congress has passed more than 150 laws addressing Native Hawaiians in some way, she says—some of which include them with American Indians and Alaska Natives.

Among those laws are several creating benefits programs. Funded by land held in trust by the state government, they provide inexpensive homesteads, small-business loans, college scholarships and more. That’s needed in some segments of the community; Native Hawaiian poverty runs higher than average for the state. And Rice may threaten it all.

“In my perception, Rice v. Cayetano kind of sent the whole movement into a tailspin,” says Davis Price, a nonpracticing attorney who works for the Office of Hawaiian Affairs and participated in the ‘aha. “The fear was all the programs established up to that point that were set up to benefit Native Hawaiians were going to get taken out as a result of that ruling.”

Indeed, many of those programs were challenged in court after Rice. These challenges have largely failed for lack of standing, MacKenzie says—but nobody expects them to stop.

For some Native Hawaiians, the answer is federal recognition as a separate quasi-sovereign government. This would not require them to form a mainland-style tribe but give the Native Hawaiian government the same kind of sovereign-within-a-sovereign relationship to the federal government. The ABA supported this with Resolution 108B in 2006, which envisioned it as a way of protecting Native Hawaiian benefits. A rule finalized last fall by the federal Department of the Interior created a pathway for recognition of a Native Hawaiian government, if one should be formed.

Former Gov. John Waihe'e says federal recognition is a tool for reaching three important ends: protecting Native Hawaiian institutions, allowing Native Hawaiians to manage their own resources, and permitting them to decide their own future as a people. For example, he says, why should the state of Hawaii manage the Hawaiian Homes Commission? “They haven’t done a good job,” Waihe’e says. “Perhaps Hawaiians can do a better job.”

But the Native Hawaiian community’s opinion on federal recognition is deeply divided. Some prefer full sovereignty, even if it means secession from the United States—which some consider an illegal occupier of Hawaiian land. A Native Hawaiian government might be able to draw on trust lands set aside for Native Hawaiians, as well as the private financial
trusts that benefit the Hawaiian people. But that's assuming the federal government would be willing to let Native Hawaiians go.

Noelani Goodyear-Ka'ōpua, a political science professor at the University of Hawaii at Mānoa, would prefer a process that includes complete independence as an option. More importantly, she says, she's concerned that the push for federal recognition is mostly coming from political elites and the state itself, rather than from the Native Hawaiian community.

"There was stunningly little real, genuine education about what this process would look like, what it should do or any sort of debate on the ground," she says. "When people don't know what's going on, they're not going to just jump on the bandwagon."

Because of this controversy, the organization that threw the 'aha, the Na'i Aupuni, expressly did not advocate any particular form for a proposed Native Hawaiian government. However, backers of full independence argued that the the group was associated with too many members of the political establishment who do support federal recognition. (That includes Waihe'e, whom the ABA Journal reached via an organization related to the Na'i Aupuni.)

Price, who is less concerned with the form of government than the needs of Native Hawaiians, says the pro-independence side worries that federal recognition advocates will do anything to protect Native Hawaiian programs—even give up the right to seek independence. That's led to a lot of mudslinging, he says. "I feel like my role, and really my generation's role, is to sift through all the mud and try to figure out a path forward," Price says. "And that's why I participated in the 'aha."

ALOHA 'OE

Meanwhile, not every Native Hawaiian wants any kind of Native Hawaiian government. The lead plaintiff in the lawsuit challenging the Na'i Aupuni election was Keli'i Akina, president and CEO of the Grassroot Institute of Hawaii, a conservative think tank. He was joined by five others, three of

FEDERAL RECOGNITION WOULD PROTECT NATIVE HAWAIIAN INSTITUTIONS. THE STATE HASN'T DONE A GOOD JOB MANAGING THE HAWAIIAN HOMES COMMISSION, AND "PERHAPS HAWAIIANS CAN DO A BETTER JOB."

—JOHN WAIHE'E
whom also are Native Hawaiians.

Price considers these to be largely outside forces, supported by mainland political groups—but they successfully derailed the Na‘i Aupuni voting. Akina argued that the Na‘i Aupuni was having a state election in which only people of certain races may vote, just like in Rice. This violated the 15th Amendment, plaintiffs said, and also the 14th Amendment’s due process and equal protection clauses, the Voting Rights Act and more. The Na‘i Aupuni was a state actor because it was using the OHA grant money to pursue one of the affairs office’s explicitly stated goals, according to the lawsuit.

Popper says this is unconstitutional and offensive.

“To just lightly set [constitutional provisions] aside because someone has an idea about how they could create a governmental entity for their own purposes, to lightly have a voter roll where people ... are told that they can’t [vote] because they’re the wrong race—to have that in this country in 2017 is so offensive,” he says.

Popper, who came to Judicial Watch from the Voting Section of the Department of Justice’s civil rights division, thought the case was “a slam dunk.” But it was never fully decided. The case was tied up in appeals after the district court declined to issue a preliminary injunction against the voting, saying the Na‘i Aupuni was a private organization that had a private vote.

That decision in Akina v. Hawaii triggered an appeal to the 9th U.S. Circuit Court of Appeals at San Francisco in June 2016, as well as an emergency injunction by the Supreme Court to stop the vote counting. But long before oral arguments, the Na‘i Aupuni canceled the election and invited all the candidates to be delegates. On Aug. 29, 2016, the 9th Circuit ruled that the issue was therefore moot.

Former Hawaii Sen. Daniel Akaka, a Democrat, introduced yearly bills to achieve sovereignty.

PHOTOGRAPHS COURTESY OF SHUTTERSTOCK AND WIKIMEDIA COMMONS
Both sides are slightly disappointed that the appeals court never reached the merits of the case. Former Gov. Waihe’e says organizers thought they had a strong case—especially after Judge J. Michael Seabright’s ruling—but didn’t want to tie up the effort in court. Popper says a December 2016 ruling from the 9th Circuit, on voting in the Northern Mariana Islands, suggests that the appeals court would have sided with the plaintiffs.

They might have another chance. Popper says if the ratification vote is privately funded, the voter roll organizers used for the delegate election—which was created by the state of Hawaii—raises many of the same constitutional issues. If a vote is held using another roll, he says, Judicial Watch still might object to any bid to seek recognition from the Department of the Interior, on statutory and constitutional grounds.

It’s not clear whether a majority of Native Hawaiians—who compose 6 to 26 percent of the state’s population, according to the 2010 census and depending on how you define “Native Hawaiian”—would seek recognition. The DOI surveyed Native Hawaiians before it made its recognition rule and concluded from written testimony that a majority was in favor. But political science professor Goodyear-Kāʻōpua made a study of oral testimony at the Interior meetings on the islands and says the vast majority was against the rule.

It’s not because the community is apathetic, she says. During the meetings, Native Hawaiians were turning out in force to protest a proposed new telescope on Mauna Kea, a dormant volcano on Hawai‘i’s Big Island that’s considered to be a sacred site.

“You saw this kind of amazing activation and mobilization,” Goodyear-Kāʻōpua says. “The DOI and Na‘i Aupuni process was a complete opposite. ... People were not engaging in that process, and there was a reason for that.”

OHA’s Price thinks those viewpoints can and should reconcile. Ultimately, the people must decide. “This is meant to be taken back to the community and then to let the community decide,” he says. “Yes or no, it’s going to be up to the Native Hawaiian people.”
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### 2017 Annual Report

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<th>2016</th>
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| Net assets at beginning of year | 118,303,128 | 123,725,642 |
| Net assets at end of year | $131,334,015 | $118,303,128 |

**Notes to Financial Statements**

To view the 2017 ABE Annual Report in its entirety, please visit: abendowment.org/about/report.asp

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Post-Mortem Exam
In the wake of Charlotte School of Law’s closure, how can the ABA improve law school compliance?  By Stephanie Francis Ward

Few were surprised when the Charlotte School of Law closed in August. After about a year of fraud allegations and wrangling with multiple administrative agencies — coupled with a bar passage rate under 50 percent for first-time test takers — many wondered why it didn’t happen sooner.

Some point their fingers at the ABA’s Section of Legal Education and Admissions to the Bar. Charlotte was notified by the ABA that it seemed to be out of compliance with various admissions standards in January 2015. But the public didn’t find out about the issues until November 2016, when the law school was placed on probation.

The time between a compliance review and specific action taken by the section can be concerning. That’s why its council is considering a restructuring process, which could make the process quicker when appropriate, according to Barry Currier, the section’s managing director of accreditation and legal education. The restructuring concept, announced in June, would combine the Accreditation Committee, the Standards Review Committee and the council into one body.

“The challenges Charlotte School of Law encountered are not unique. Certainly, other schools will face similar challenges if the law school applicant pool and the job market for law graduates remain in low- or non-growth modes,” Currier wrote in an email to the ABA Journal.

HIDDEN FIGURES
The issue of transparency also has been raised. Many matters that relate to law school accreditation are confidential, according to the ABA Standards and Rules of Procedure for Approval of Law Schools. This includes evaluation reports from site visits and decisions or recommendations the section gives to law schools. Exceptions to this confidentiality include when schools receive sanctions, are placed on probation or have accreditation withdrawn. Law school applications for provisional or full approval, or a variance, also are public.

Various groups, including the ABA, post public information online annually about accredited law schools’ LSAT ranges and bar passage rates. Some Charlotte students say they were aware of the data when they enrolled.

Between 2011 — when the law school received full ABA accreditation — and 2016 — the year of the law school’s most recent Standard 509 Information Report — its median LSAT score decreased from 148 to 144. Its bar passage rate was 46.26 percent for the 2015 exam.

The data seems to suggest problems, but school leaders frequently appeared to assure current and potential students that they were working on improvements. In hindsight, once-confidential ABA findings about the law school indicate otherwise.

HOPE ‘ON THE HOOK’
Charlotte continued to claim that it was working toward coming back into compliance with the standards — even after the Department of Education pulled the law school’s federal loan money in December 2016. The DOE took that action because it determined the school had made “substantial misrepresentations” to current and future students about its

By Stephanie Francis Ward
accreditation issues.

After the department pulled the school's student loan money, Charlotte repeatedly told students and the press it was prepared to be reinstated into the federal student loan program. That included this past July, the same month the ABA's Accreditation Committee informed school leaders it rejected the school's "reliable plan for bringing the law school into full compliance with each of the standards." Under the ABA Standards and Rules of Procedure for Approval of Law Schools, that finding was confidential.

"Charlotte School of Law has acted sketchy throughout this process," says Kyle McEntee, executive director of the nonprofit Law School Transparency. "They've been using hope as a means of keeping people on the hook."

McEntee's organization plans to ask the ABA for a full review of the accreditation process, focused on consideration of what parts should be more transparent and at what stage in the process information should be disclosed.

"There was some point at which the ABA should have made its determination about Charlotte School of Law public. I don't know when that was; I just know that it was sooner than when it was done," he says.

On top of the rebukes from the ABA and the DOE, Charlotte lost its state license in August. It's still under investigation for civil fraud, says North Carolina Attorney General Josh Stein, who'd also like to see more transparency in the accreditation process.

"Information is key when students are shopping for a school, and one of the data points students look for is accreditation," Stein says. "While I understand the desire to not hurt a school's reputation while an accreditor's investigation is ongoing, you have to weigh that with a student's right to know potential problems with the educational program they are investing potentially hundreds of thousands of dollars in buying."

CHASING COMPLIANCE

Law school officials see things differently. They would have liked more time to come into compliance with the standards before federal student loan money was originally pulled in December, says Paul Meggett, who was Charlotte's dean when it closed.

"The law school was required to have an ABA-approved teach-out plan to keep its state license. The legal education section's council, which has final authority on teach-out plans, had a scheduled meeting on Aug. 11, one day after the state licensing deadline."

"And the council did not have—and would not create—a mechanism to decide on CSL's plan prior to the council's scheduled meeting to assist the school under these exigent circumstances," Meggett says.

Charlotte has until Feb. 3 to come into compliance with the ABA standards. Meggett says the law school has no plans to reopen.

"What is most unfortunate is that even though the ABA, the state accreditor and the Department of Education all are charged with protecting students, it is the students who were harmed the most by their actions," he says.

UNDER SCRUTINY

When the ABA announced that Charlotte was on probation, it also announced a public censure for the Valparaiso University Law School. Like Charlotte, Valparaiso was found to be out of compliance with ABA standards 501(a) and (b), which focus on admissions. Candidates' LSAT scores play a significant role in the decision process.

Valparaiso submitted its reliable plan to the ABA in December 2016, and it was approved in the spring, says Andrea Lyon, the law school's dean. She came to the school in 2014, replacing Jay Conison. After Conison left Valparaiso, he was appointed as dean at Charlotte, a position he held until this past spring.

Part of Valparaiso's reliable plan was to improve its median LSAT score, and this fall it averaged out to 151, Lyon says. Comparatively, the law school's 2016 median LSAT score was 147. Also, between 2015 and 2017, the school's 1L class decreased from 139 students to 28 students.

Recruiting students, particularly ones who have high LSAT scores that could help with standards compliance, is challenging when a law school has a public censure, Lyon says. Her career has centered on defending murder cases and teaching criminal defense skills in clinical law classes. She credits the skills she developed representing people charged with horrendous crimes for helping her lead a law school through challenging times.

"You just have to press forward; that’s all you can do. I file a motion, and it gets denied—I don’t just go home; I still have to try the case, and I have to respect the court," she says. "That’s part of what I think you have to do when dealing with the accreditation committee.”
Measuring Justice

Rule of Law Index helps compare strengths and weaknesses of countries’ legal systems

By James Podgers

The full story of how effectively the justice systems of various nations operate can’t be told simply by rankings. But by collecting data from around the globe, the World Justice Project—which began in 2006 as an ABA initiative—provides fascinating reference points for countries’ progress in its annual Rule of Law Index.

It’s hard for anyone—even experts—not to linger over the tables that summarize how well the nations included in the index rank in comparison to one another.

It’s also difficult not to notice, for instance, that the United States comes in at No. 18 in the overall global rankings, just behind the Czech Republic and just ahead of the Republic of Korea.

At the top of the global rankings is Denmark, followed by Norway, Finland, Sweden and the Netherlands.

But the goal of the index, says Juan Carlos Botero, the executive director of the World Justice Project, “is not to shame and blame governments but to bring issues into perspective.”

Botero has worked with the World Justice Project since its early days, when it was founded by William H. Neukom of Seattle as one of his key presidential initiatives for the ABA.

The World Justice Project became an independent nonprofit organization in 2009, with offices in Washington, D.C., and Seattle.

“We have deliberately downplayed the numerical rankings,” Botero says. “Rather, we focus attention on the underlying data.”

The rankings show that “the United States has lagged in providing justice services for several years,” he says. “But when you can show how it’s lagging” in comparison with countries in Western Europe and the Asia-Pacific region, “it helps to focus attention on making improvements.”

The Rule of Law Index has followed the same basic approach since it was introduced in 2010, when it measured adherence to the rule of law in 35 countries. The 113 nations—including 11 new ones—measured in the 2016 edition account for some 95 percent of the world’s population, Botero says. Most of the countries not included in the latest index are smaller nations, primarily in Africa. The index also provides comparative rankings of nations by region and income group.

The WJP acknowledges that the rule of law is hard to pin down.

“The rule of law is notoriously difficult to define and measure,” states the introduction to the 2016 report. “A simple way of approaching it is in terms of some of the outcomes that the rule of law brings to societies—such as accountability, respect for fundamental rights or access to justice—each of which reflects one aspect of the complex concept of the rule of law. The WJP Rule of Law Index seeks to embody these outcomes within a simple and coherent framework to measure the extent to which countries attain these outcomes in practice by means of performance indicators.”

4 KEY POINTS

The index’s analytical framework is built on an inverted pyramid of elements, starting with what the index describes as four universal principles of the rule of law:

• Government and private entities are accountable under the law.
• Laws are clear, publicized, stable and just; are applied evenly; and protect fundamental rights.
• The processes by which laws are enacted, administered and enforced are accessible, fair and efficient.
• Justice is delivered in a timely fashion by competent, ethical and independent representatives and others who are supported by adequate resources and reflect the makeup of the communities they serve.

A country’s adherence to these principles is measured through the application of eight factors—constraints on government powers; absence of corruption;
open government; fundamental rights; order and security; regulatory enforcement; civil justice; and criminal justice—that are further broken down into 44 subfactors.

Botero emphasizes that the data collected does not come from government sources. Instead, it has two primary sources: surveys of 1,000 residents in each country’s three largest cities and questionnaires completed by in-country practitioners and academics with expertise in civil and commercial law, criminal justice, labor law and public health.

In addition to the overall rankings, each subfactor finding for every country is given a numerical value. They are summarized in a circular chart that looks something like the results of national Rorschach tests.

The collection and analysis of data in the Rule of Law Index “has changed in multiple ways,” says Botero. “The validity of the report has grown exponentially. We are going deeper within countries and deeper in topics.”

HOME TRUTHS
The WJP’s findings show, for instance, that an overall strong performance by the United States on most of the rule of law factors is undercut by significant weaknesses in a few key areas.

One of those areas is access to and affordability of civil justice services, where a comparatively low ranking for the United States comes as no surprise to William C. Hubbard, a past ABA president who chairs the World Justice Project board of directors.

Inadequate access to and cost-prohibitiveness of civil justice services are long-standing problems in the United States. As part of its efforts to address these problems, the ABA has been a leading advocate for increasing federal funds to the Legal Services Corp., which distributes grants to local offices that provide civil legal services to low-income people.

The ABA also has called for greater pro bono efforts by lawyers, and a task force has called for more creative approaches to providing legal services, including the increased use of technology and even the possibility of allowing nonlawyers to provide certain legal services.

Hubbard notes that three-quarters of civil cases in state courts involve at least one self-represented party.

“Until we can close that gap, we’re not going to be able to lead the world in the rule of law,” says Hubbard, who is a partner at Nelson Mullins Riley & Scarborough in Columbia, South Carolina. Moreover, he says, “there is lots of room for improvement in the criminal justice system on a whole host of issues.”

But the overall picture the index presents about the rule of law in the U.S. is not all bleak, Hubbard and Botero say.

The data indicates that this country performs well in areas such as constraints on government power, regulatory enforcement, open government and absence of corruption—a severe obstacle to effective rule of law in many nations.

“The fundamentals are very strong...
Your ABA

in the United States,” Botero says, “and recent events show the system of checks and balances is working as it should.”

The current Rule of Law Index is based on data collected in October 2016, before the November elections. Botero says the 2017 index may show trends resulting from the election outcome more clearly.

ADDING TO THE DIALOGUE

The index is playing an increasingly important role in the international dialogue about rule of law issues, Botero and Hubbard say. “You can’t solve a problem if you can’t measure it,” Hubbard says. “This is the most comprehensive rule of law measurement in existence—the most comprehensive and in-depth.”

The WJP is in the process of expanding its efforts. In 2015, the project launched an open government index, and it recently started an environmental rule of law index in conjunction with the ABA Section of Environment, Energy and Resources.

A section task force helped develop the questionnaire that went to five pilot countries—Argentina, Colombia, Germany, Japan and Kenya—and provided contact with lawyers who would participate, says task force member Claudia Rast, a shareholder at Butzel Long in Ann Arbor, Michigan. The section also has provided funding, she says.

The section has been discussing this kind of project with the WJP since 2009, Rast says. “The Rule of Law Index itself is very helpful for comparing and evaluating rule of law efforts in various countries,” she says, “but we thought it was important to seek to meet those goals in the environmental field.”

In Hubbard’s view, this collaboration reflects the close relationship between the World Justice Project and the ABA, and he credits Neukom for having the vision to launch the project. “This has been one of the most successful projects we’ve thought of in the international dialogue about rule of law issues, and the section is working as it should.”

Hubbard says, “and recent events show the system of checks and balances is working as it should.”

Rule of Law Rankings

The 20 highest-ranking nations (out of 113) are shown, based on their overall scores, along with a representative sample of other countries around the world. Each country’s numerical score is based on a scale of 0.00 (lowest adherence to the rule of law) to 1.00 (highest adherence). The 2016 edition of the Rule of Law Index accounts for some 95 percent of the world’s population, and the data was collected in October 2016.

COUNTRY GLOBAL RANKING SCORE

<table>
<thead>
<tr>
<th>Country</th>
<th>Global Ranking</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>1</td>
<td>0.89</td>
</tr>
<tr>
<td>Norway</td>
<td>2</td>
<td>0.88</td>
</tr>
<tr>
<td>Finland</td>
<td>3</td>
<td>0.87</td>
</tr>
<tr>
<td>Sweden</td>
<td>4</td>
<td>0.86</td>
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<tr>
<td>Netherlands</td>
<td>5</td>
<td>0.86</td>
</tr>
<tr>
<td>Germany</td>
<td>6</td>
<td>0.83</td>
</tr>
<tr>
<td>Austria</td>
<td>7</td>
<td>0.83</td>
</tr>
<tr>
<td>New Zealand</td>
<td>8</td>
<td>0.83</td>
</tr>
<tr>
<td>Singapore</td>
<td>9</td>
<td>0.82</td>
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<tr>
<td>United Kingdom</td>
<td>10</td>
<td>0.81</td>
</tr>
<tr>
<td>Australia</td>
<td>11</td>
<td>0.81</td>
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<tr>
<td>Canada</td>
<td>12</td>
<td>0.81</td>
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<tr>
<td>Belgium</td>
<td>13</td>
<td>0.79</td>
</tr>
<tr>
<td>Estonia</td>
<td>14</td>
<td>0.79</td>
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<tr>
<td>Japan</td>
<td>15</td>
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<tr>
<td>Hong Kong SAR, China</td>
<td>16</td>
<td>0.77</td>
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<tr>
<td>Czech Republic</td>
<td>17</td>
<td>0.75</td>
</tr>
<tr>
<td>United States</td>
<td>18</td>
<td>0.74</td>
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<tr>
<td>Republic of Korea</td>
<td>19</td>
<td>0.73</td>
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<tr>
<td>Uruguay</td>
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<td>0.72</td>
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<tr>
<td>France</td>
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<tr>
<td>South Africa</td>
<td>43</td>
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<tr>
<td>Argentina</td>
<td>51</td>
<td>0.55</td>
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<tr>
<td>Vietnam</td>
<td>67</td>
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<tr>
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<td>80</td>
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<tr>
<td>Russia</td>
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<tr>
<td>Zimbabwe</td>
<td>108</td>
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<tr>
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<td>Egypt</td>
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<tr>
<td>Afghanistan</td>
<td>111</td>
<td>0.35</td>
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<tr>
<td>Cambodia</td>
<td>112</td>
<td>0.33</td>
</tr>
<tr>
<td>Venezuela</td>
<td>113</td>
<td>0.28</td>
</tr>
</tbody>
</table>

The overall rankings are based on how well each country performs on eight specific factors. Below is the score and global ranking for the United States on each of those factors.

<table>
<thead>
<tr>
<th>Factor</th>
<th>Global Ranking</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constraints on government powers</td>
<td>13</td>
<td>0.81</td>
</tr>
<tr>
<td>Absence of corruption</td>
<td>20</td>
<td>0.73</td>
</tr>
<tr>
<td>Open government</td>
<td>12</td>
<td>0.78</td>
</tr>
<tr>
<td>Fundamental rights</td>
<td>21</td>
<td>0.75</td>
</tr>
<tr>
<td>Order and security</td>
<td>31</td>
<td>0.80</td>
</tr>
<tr>
<td>Regulatory enforcement</td>
<td>19</td>
<td>0.71</td>
</tr>
<tr>
<td>Civil justice</td>
<td>28</td>
<td>0.65</td>
</tr>
<tr>
<td>Criminal justice</td>
<td>22</td>
<td>0.68</td>
</tr>
</tbody>
</table>

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 2018 Annual Meeting. The states conducting elections and election rules and procedures can be found at ambar.org/2018StateDelegate.

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 expires at the conclusion of the 2020 Annual Meeting. Go to ambar.org/2017StateDelegateVacancy-Maine.

2018 BOARD OF GOVERNORS ELECTION

The Secretary hereby gives notice that at the 2018 Midyear Meeting, the Nominating Committee will announce nominations for district and at-large positions on the ABA Board of Governors for three-year terms beginning at the conclusion of the 2018 Annual Meeting. The deadline for receipt of nomination petitions is Jan. 5, 2018.

A list of the district and at-large positions conducting elections, and the election rules and procedures, can be found at ambar.org/2018BoardofGovernors.
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NOVEMBER 2017 ABA JOURNAL || 69
Boosting Bail Reform

ABA urges Congress to limit use of cash bail

By Rhonda McMillion

The ABA is concerned that more than 450,000 people are in jail across the country awaiting trial because they cannot afford bail. So the association is urging Congress to take action to limit the use of cash bail as a condition of pretrial release in criminal cases.

These people represent one-third of the nation’s total incarcerated population, and state and local governments spend $14 billion per year to house them. (See "Bail’s Failings," ABA Journal, April 2016, page 54.)

The ABA has long supported actions to limit the use of cash bail. In August, the association reinforced its position by adopting a policy that favors the release of defendants on their own recognizance or on unsecured bond and by urging governments to “prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay.”

The policy also opposes using “bail schedules” that consider only the nature of the charged offense. Instead, the ABA supports procedures that require courts to make bail and release determinations based on individualized, evidence-based assessments that use objective, verifiable release criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, disability, sexual orientation or gender identification.

DAMAGE TO DETAINEES

Another argument against unnecessary pretrial confinement comes from new research showing that when low- and moderate-risk people are detained in jail for more than a day, they are significantly more likely to commit a crime in the future.

In addition, thousands of detainees report being sexually victimized, and the trauma and stigma that people endure from pretrial detention leads to a high rate of suicide.

Another negative impact is that those incarcerated before trial are more likely to be convicted and receive longer prison sentences than those who were released pending trial. Bills introduced in the Senate and House seek to address the issue.

“Americans should be able to expect fair and equal treatment under the law regardless of how much money is in their pockets or how many connections they have,” said Sen. Rand Paul, R-Ky., in a July statement. He is co-sponsoring a bill with Sen. Kamala Harris, D-Calif.

The Senate bill, S. 1593, would authorize a $10 million Department of Justice program for three years to provide grants directly to the states to fund bail reform programs tailored to individual states’ specific needs. The states would be required to ensure that their reforms are not discriminatory, to report on their progress, and to institute systems for better data collection.

The House bill, H.R. 1437—introduced by Rep. Ted Lieu, D-Calif., and more than 25 co-sponsors—would prohibit the Edward Byrne Memorial Justice Assistance Grant Program from awarding funds to states that use payment of money as a condition of pretrial release. In addition, the bill would prohibit the use of bail money for pretrial release in federal criminal cases.

“The fact that many Americans decide to plead guilty purely to get out of jail because they cannot afford bail is intolerable,” Lieu said in a March press release.

In letters to the leadership of the judiciary committees in the Senate and House, Thomas M. Susman, director of the ABA Governmental Affairs Office, urged support for the bills, “so we can limit the detention of poor or disadvantaged people before a court decides if they are guilty or innocent.”

“Financial conditions should be imposed only when no other less restrictive conditions of release will reasonably ensure the defendant’s appearance in court,” Susman wrote, emphasizing that “businesses, the economy and families also suffer, as defendants often lose their jobs, homes and, in some cases, the custody of their children simply because they do not have the financial resources to post bail.”

This report is written by the ABA Governmental Affairs Office and discusses advocacy efforts relating to issues being addressed by Congress and the executive branch of the federal government. Rhonda McMillon is editor of ABA Washington Letter, a Governmental Affairs Office publication.
### Statement of Ownership, Management and Circulation

1. **Title of publication:** ABA Journal.
   1A. **Publication Number:** 0747-0088.

2. **Date of Filing:** September 25, 2017.

3. **Frequency of Issue:** Monthly.
   3A. **Number of issues published annually:** 12.
   3B. **Annual Subscription price:** ABA members ($5.50) is included in their dues. The price of an annual subscription to members of the Law Student Division of the ABA ($2.75) is included in their dues. Domestic annual subscriptions to others: Individual - $75; Institutional - $120. International annual subscription for others: Individual - $99; Institutional - $144. Single copy price, $7.

4. **Complete mailing address of known office of publication:** 321 North Clark Street, Chicago, Cook County, IL 60654-7598.

5. **Complete mailing address of the headquarters or general business offices of the publisher:** 321 North Clark Street, Chicago, Cook County, IL 60654-7598.

6. **Publisher:** Molly McDonough, 321 North Clark Street, Chicago, Cook County, IL 60654-7598.
   **Editor:** Molly McDonough, 321 North Clark Street, Chicago, Cook County, IL 60654-7598.
   **Managing Editor:** Reginald Davis, 321 North Clark Street, Chicago, Cook County, IL 60654-7598.

7. **Owner:** American Bar Association, 321 North Clark Street, Chicago, Cook County, IL 60654-7598.

8. **Known bondholders, mortgagees and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages, or other securities:** none.

9. **The purpose, function, and non-profit status of this organization and the exempt status for federal income tax purposes have not changed during the preceding 12 months.**

10. **Extent and nature of circulation:**

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    | A. Total number copies (net press run):                                       | average number copies each issue during preceding 12 months = 290,924; number copies single issue published nearest to filing date = 279,962. |
    | B. Paid and/or requested circulation:                                          | 1. Sales through dealer and carriers, street vendors and counter sales; and other non-USPS distribution: average number copies each issue during preceding 12 months = N/A; number copies single issue published nearest to filing date = N/A. 2. Mail subscriptions (paid and/or requested): average number copies each issue during preceding 12 months = 281,758; number copies single issue published nearest to filing date = 277,203. |
    | C. Total paid and/or requested circulation (sum of 10B1 and 10B2):           | average number copies each issue during preceding 12 months = 281,758; number copies single issue published nearest to filing date = 277,203. |
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    | F. Copies not distributed:                                                   | 1. Office use, left over, unaccounted, spoiled after printing: average number copies each issue during preceding 12 months = 8,767; number copies single issue published nearest to filing date = 2,728. 2. Return from news agents = 0. |
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Among the guardians of public morals at the start of the 20th century, none rivaled Anthony Comstock. As founder of the New York Society for the Suppression of Vice in 1873, he spent his life rooting out anything and everything that smacked of sex.

Comstock was authorized as a U.S. postal inspector and a deputy sheriff. Armed with a federal law that bore his name, he seized pornographic pictures, closed brothels, patrolled saloons, boarded up bookstores and, by the time of his death in 1915, convicted more than 3,000 for violations of state and federal morals laws.

The Comstock Act was grounded in Great Britain’s Hicklin rule, a mid-19th-century declaration that obscenity should be defined by its potential to deprave the young or vulnerable. But as American society became more urban and modern, the moral regime behind the Comstock and Hicklin laws began to chafe against social reality and the imaginings of art.

At the epicenter of the modernist debate on both continents was Irish author James Joyce, whose growing body of short stories and novels refracted the grit and grace of working-class Dublin in a vernacular that rambled between lyric and crass. The boldness of his language, nested within interwoven interior narratives—a style dubbed “stream of consciousness”—gained regard as unmistakable genius and unrepentant smut.

Joyce’s artistic arc was marked by pursuit of a masterpiece, a novel that sought to replicate a specific day—June 16, 1904—in the lives of three characters, narrated through a vapor trail of unreliable memories and half-imagined intimacies. The novel, which became known as *Ulysses*, was epic in its sprawl and poetic in its purpose.

Behind *Ulysses* lurked a bohemian drama. Plagued by persistent poverty, virulent headaches and recurring blindness, Joyce spent more than 10 years producing, editing and reshaping chapters that were published individually in magazines in Europe and the United States. Each issue was considered a literary event—as well as a violation of the Comstock and Hicklin measures—precipitating an agonizing game of censor and mouse.

From their base in Paris, Joyce’s agents employed elaborate smuggling schemes to place *Ulysses* in the hands of readers. Censors on both sides of the Atlantic seized and burned thousands of copies of each iteration of Joyce’s master work. This strange dance ended in May 1932, when civil liberties lawyer Morris Ernst dropped off a copy of *Ulysses* at a U.S. customs office, demanding that reluctant officials seize it.

Ernst and Joyce’s American publisher, Bennett Cerf, had decided to confront the continuing censorship by creating a federal challenge under customs regulations in which the book would be prosecuted without criminal consequences.

Before *U.S. v. One Book Called Ulysses*, arguments regarding the First Amendment revolved around political speech. But postwar labor turbulence and the Great Depression had fused art and politics in ways courts were just beginning to address.

On Nov. 25, 1933, the case went before Judge John Woolsey, who had spent his summer reading *Ulysses*. He was perplexed and intrigued by a narrative style unlikely to attract the young and vulnerable souls protected by Comstock and Hicklin. When Ernst argued that Joyce’s intent was to replicate the meandering consciousness of everyday life—however mundane or obscene—Woolsey took his point.

He said to Ernst in open court that while listening to him, Woolsey was thinking about a Hepplewhite chair behind him. In an extraordinarily revealing opinion about two weeks later, Woolsey wrote that he found the book to be more tragic than pornographic, “a sincere and serious attempt to devise a new literary method for the observation and description of mankind.” It did not “stir the sex impulses,” he said.

Endorsing the book’s legal entry into the United States, Woolsey wrote: “It is only with the normal person that the law is concerned.”

**Ulysses Goes on Trial**

Photographs by Bettmann/Getty Images

Precedents || By Allen Pusey

Paris publisher and bookseller Sylvia Beach and *Ulysses* author James Joyce

**Nov. 25, 1933**

A *Ulysses* first edition from 1922
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