THE EXECUTIVE BRANCH PUSHES THE BOUNDARIES OF THE SEPARATION OF POWERS

SCOTUS EYES GERRYMANDERING
FEMALE HUMAN RIGHTS LAWYERS
FASTCASE AND CHILL
MIDYEAR MEETING NEWS
ADVANCING KNOW-HOW

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FASHION FAUX PAS
Was that really the best photo you could have chosen to introduce the otherwise progressive article “What Suits You?” February, page 50? The picture of three men standing or sitting professionally while surrounded by women seated atop and leaning suggestively over the back of the sofa made me cringe. Wearing dull or bright colors, in pantyhose or bare legs, women lawyers don’t sit like this.
Suzan Charlton
Washington, D.C.

I dress very conservatively for court in dark solid colors, pants in the winter and skirts in the summer. As a middle-aged woman of color, to deviate even a little from this is to risk being mistaken for the litigant, the court reporter, the social worker or any other actor in the dramatis personae of American courts. My suits are my uniform; my briefcase/bag my weapons. With them, I am ready to make my argument, take testimony, bargain in the hallways with opposing counsel, and infuse my client with confidence. If I stray away from the strictest of dress rules in court (comfier flats, brighter colors, sweater sets in family court, prints), I am automatically pegged as a nonlawyer and I first have to fight to establish who I am before I can get down to the business of lawyering. I stay conservative because if I do not, I cannot practice my profession effectively.
Rosemarie A. Barnett
Freeport, New York

I was deeply disappointed by this article about alleged evolution in lawyer fashion. Little, if any, of the article reflected actual changes in personal presentation beyond the elimination of hosiery and addition of spike heels. Instead, the same “traditional” tropes were described and embraced by male and female lawyers.
As a femme gay man who daily works with queer, transgender and gender nonconforming colleagues and clients, I felt the article completely failed to address the truly novel, forward-leaning and beautiful realm of queer professional and personal gender and style presentation. The challenges of finding “male” suiting to flatter “female” bodies, the struggle for a male-presenting lawyer to find a court-appropriate shade of nail polish or the profound sacrificing of personal identity (via fashion style) for the benefit of a client’s case or career advancement represent a true evolution in both fashion and the legal profession.
Failing to recognize these colleagues is exactly the subtle oppression that continues to keep minority communities feeling unwelcome and underrepresented in the legal profession.
Nicholas J. Hite
New Orleans

ON EXPANDING A RIGHT TO COUNSEL
Regarding “Justice for All,” February, page 9: I thought the source of Americans’ rights is the U.S. Constitution and its antecedent sources—including, of course, those of all men that, as Jefferson so eloquently stated, are “endowed by their creator.” Apparently, all one needs to do to manufacture new rights (out of thin air) is to simply “promote” them.
Whether providing greater legal representation in civil cases to the less fortunate serves a social good and, if so, how best to allocate scarce resources to accomplish that goal is certainly worthy of debate for a democratic society to undertake via the legislative process. Such benefits can and should be eligible for expansion and contraction. However, to attempt to manufacture some kind of “right” to taxpayer-funded civil legal representation only leads us to an ever-expanding government that will curtail all our liberty and property rights, including those that actually are enshrined in the Constitution.
Karl Burgunder
Oviedo, Florida

A NAMING ISSUE
Those who revile the attitudes and conduct of their 19th-century benefactors (“What’s in a Name,” February, page 16), such as Boalt and Hastings, often seem happy enough to complacently accept the benefits. At the very least, there should also be constant and conscious acknowledgment of our own irreparable debt to those who were deprived of their native lands and lives so that our modern American lifestyles can even have a place to be.
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The Balance of Power

2018 Law Day theme of separation of powers highlights important bulwark against tyranny

The concept of “separation of powers” has been very much in the news lately—and not in a positive way. At times, respect for this fundamental concept appears to be breaking down.

A disintegration of the checks and balances among the three branches of our government can have a destructive outcome. Our constitutional framers understood that too much power amassed by one group or one person, without appropriate checks in place, would destroy the balance that protects the framework of our democracy.

The breakdown can manifest itself in many ways. The legislative branch might fail to effectively provide oversight on the executive branch. Our lawmakers might launch personal attacks on judges after rulings they disagree with. The balance could also be swayed if the executive branch circumvents the lawmaking duties of Congress, or when legislators seek to slash judges’ pay—or even try to impeach them—because they hand down unfavorable decisions.

Though the term “separation of powers” does not appear anywhere in the text of the United States Constitution, the concept of three separate but equal branches of government is one of the most important ways our government defends the liberties essential to our democracy.

As James Madison wrote in The Federalist #47: “The accumulation of all powers, legislative, executive, judicial … may justly be pronounced the very definition of tyranny.”

Unfortunately, much of our citizenry is ignorant of the concept of separation of powers. A 2016 Annenberg Public Policy poll found that only 26 percent of Americans can even name the three branches of government.

How safe is the framework of separation of powers and the critical concepts it protects, such as judicial independence, if so much of the citizenry does not even know the system exists — or what its role is?

That is why the 2018 theme for Law Day, “Separation of Powers: Framework for Freedom,” is so important—to lawyers, to our communities and to our children.

Law Day is observed annually on May 1 and celebrates the role of law in our society. Events are held across the country and around that date with the goal of cultivating a deeper understanding of the legal profession and its importance to our nation.

State and local bar associations from across the country are organizing hundreds of events in their communities to engage and educate both students and adults. Essay, poster, photography and video contests are being held throughout the country, from Springfield, Mass., to Houston, Texas. Many colleges and universities bring in high school students for a full-day workshop such as Cabrillo College in Santa Cruz, Calif., and John Jay College in New York. The Idaho Bar Association is holding a podcast contest for high school students, and there are even 5K Law Day runs in places like Ventura, Calif., and Orange County, Fla.

To recognize people who have promoted a better understanding and respect for the rule of law, many bar associations also hold award luncheons or dinners. The Liberty Bell Award, presented by local bar associations on Law Day and endorsed by the ABA, was established more than 40 years ago to acknowledge outstanding community service and was given to a lawyer or judge who encouraged greater respect for law and the courts.

Some associations, such as the State Bar of Michigan and the Mecklenburg County Bar in Charlotte, now reserve the award for nonlawyers who have contributed to good government in the community.

The ABA Division for Public Education has a planning guide on its website that can help you organize an event that works for your community. Please consider volunteering in your community for this critically important public education effort.

We all can make a difference, and Law Day 2018 is a good place to start. Our institutions must be protected and preserved. By understanding and safeguarding the way power is shared in our government, we can uphold our liberties and advance our rights.

See this year’s Law Day planning guide online at ambar.org/LawDay2018.

Follow President Bass on Twitter @ABAPresident or email abapresident@americanbar.org.
IN DECEMBER, U.S. ATTORNEY GENERAL JEFF SESSIONS REVOKED OBAMA-ERA GUIDANCE WARNING LOCAL COURTS against engaging in the common practice of fining poor defendants in misdemeanor and civil infraction cases in order to boost revenue. These practices had been decried as unlawful moneymaking ventures that preyed on poor and minority residents.

Months earlier, the U.S. Commission on Civil Rights had recommended the Department of Justice continue to promote the guidance to local courts through what was known as the “Dear Colleague” letter. Catherine E. Lhamon, chair of the commission, calls Sessions’ decision devastating.

“It’s just so wrongheaded,” she says, adding that, in making its recommendation, her commission found bipartisan recognition of the harms of what she calls “cash-register justice,” or jailing people for failure to pay fines and fees stemming from low-level offenses such as parking tickets.

The March 2016 letter was written after a 2015 Department of Justice report on its investigation into policing in Ferguson, Missouri, where the city was found to have “routinely issued arrest warrants ... without any ability-to-pay determination”—in part to increase revenue. After the Ferguson report, the DOJ and the White House held a meeting on the connections between poverty and the criminal justice system. The letter, which offered seven “basic constitutional principles” to help courts
“protect individuals’ rights,” followed soon after.

In his announcement rescinding the letter, Sessions said the materials were either “unnecessary, inconsistent with existing law or otherwise improper.”

But Lisa Foster, who co-authored the letter with Vanita Gupta, then the principal deputy assistant attorney general for civil rights, says the guidance was specifically requested at the Justice Department meeting by the very people who deal with fines and fees regularly—state and local judges, court administrators, lawmakers, prosecutors, defense attorneys and civil rights advocates.

According to Foster, who was director of the DOJ Office for Access to Justice when the letter was written, “We were asked [to provide clarity], so we did. Our point was to give them a tool that they could use with their own judiciaries.”

Practitioners who work on the issue say they are cautiously optimistic that reforms—begun as a result of the Ferguson investigation, the Dear Colleague letter, and a growing number of lawsuits challenging the unconstitutional use of fines and fees—will continue, even though the letter is no longer backed by Justice (or up on its website).

The National Center for State Courts, for instance, has a variety of resources dedicated to the topic. Foster is launching a new center devoted to ending the “unjust and harmful imposition and enforcement of fines and fees.” And several cities and states have entered into settlements to resolve related lawsuits or have passed legislation.

“Thankfully, Jeff Sessions can’t rewrite the Constitution,” says Gupta, now president and CEO of the Leadership Conference on Civil and Human Rights. “The legal framework that is articulated in that letter remains the law of the land.”

But she and many others still feel the rescissions dealt a blow. The Commission on Civil Rights called for Sessions to reinstate the letter. ABA President Hilarie Bass issued a statement asking the Justice Department to reconsider.

The rescission “certainly is not helpful to the cause of trying to bring an end finally to these practices,” says Blake Strode, executive director of ArchCity Defenders, a nonprofit civil rights law firm in St. Louis that published a 2014 white paper on the topic and continues to litigate on the issue. “Obviously we’re not counting on the Justice Department to do that.”

Alec Karakatsanis, executive director of Civil Rights Corps, whose 2014 lawsuit against Montgomery, Alabama, helped launch the most recent wave of challenges, agrees.

The letter “drew attention to an issue, it embarrassed a lot of state courts, but—in order to accomplish the radical changes we need in the American criminal system—that’s got to come from below,” he says. “That’s not the kind of thing the Department of Justice does for you.”

—Rebecca Beyer

7 MARATHONS, 7 CONTINENTS, 7 DAYS
Lawyer goes to extreme lengths for a good cause

When attorney Bret I. Parker, executive director of the New York City Bar Association, was diagnosed with Parkinson’s disease 11 years ago, he committed himself to spreading awareness about the disease and raising funds to finance research for a cure. But he doesn’t take a traditional approach: Parker pushes himself to the limits of his physical endurance running marathons to achieve his fundraising goals.

“So far, in the past five years, I’ve been able to raise approximately $450,000,” says Parker, a veteran marathoner.

This February, Parker took his marathon fundraising efforts to the ultimate extreme. For the first time, he ran the World Marathon Challenge: seven marathons on seven continents in seven consecutive days.

The event attracts participants from around the world, including others with medical challenges, according to Richard Donovan, a World Marathon Challenge spokesperson. Parker was the only
runner with Parkinson’s.

Marathoners run in Africa, Antarctica, Asia, Australia, Europe, North America and South America. The World Marathon Challenge provides a plane to transport runners from location to location.

In frigid Antarctica, Parker ran the marathon in laps around a landing strip of packed ice and snow at Novo, a Russian research station. He ran the seventh and final marathon in Miami.

Unlike the first marathoner, the legendary Pheidippides, who in 490 B.C. ran a single 26-mile journey from the city of Marathon to Athens with news of a Greek victory and collapsed, Parker stayed on his feet.

“No collapsing,” says Parker, “but I was very stiff and tired.” He says he was also “exhausted, relieved and ecstatic.”

But Parker says that running doesn’t exactly describe his mode of locomotion in the seven marathons. Yes, he ran, says Parker, “if by running you mean running, walking, limping and hobbling.”

Parker’s seven-continent journey raised more than $250,000 for the Michael J. Fox Foundation. Through other runs, triathlons, a skydive and a mountain climb, Parker has earned more than $500,000 total to support the foundation’s Parkinson’s research.

Parker says he probably won’t tackle another World Marathon Challenge, but the result was worth it. “I’m so grateful and a bit overwhelmed by all of the support, donations and interest in what I’m doing to try to raise awareness of and find a cure for Parkinson’s.”

—Marc Davis
10 QUESTIONS

A Birth and Many Firsts

LA lawyer and former congresswoman blazed a trail for women and minorities

There's a baby crib next to Yvonne Brathwaite Burke's desk.

It's for Burke's granddaughter—she enjoys bringing the busy toddler up to her Los Angeles law office while she completes work stemming from her arbitration practice or her position on the Amtrak board of directors.

Blending work, family and success is nothing new for Burke, 85. For decades, she balanced a high-profile, barrier-breaking career as a politician and big-firm partner with the demands of parenting. Case in point: In 1973, she became the first African-American woman from California to serve in the U.S. House of Representatives, and that same year she became the first member of Congress to give birth while in office. She also was the first congresswoman to be granted maternity leave—a benefit that at the time had to be specifically authorized by the speaker of the House of Representatives.

Across your career, you've consistently been a first. Was that ever intimidating?

No, I think you just decide what you think you can do and how you can contribute. You don't think about whether or not you are the first. That's what you find out later. It's whether you have the ambition to do it.

You went to law school in the 1950s, a time when there were very few women of color enrolled, and job opportunities were very limited. How did you end up deciding to follow that challenging path?

I was a public administration major, and my college counselor said, "I don't know what to do with you. I don't think there are very many women who are city managers, and I don't think anyone will appoint a black woman to be mayor." He also said, "If you become an attorney, who will come to you?" But I knew an African-American woman who was a lawyer—I had been to her home—and I knew she was doing pretty well. I thought, if I had the ability, I should be able to become a lawyer and be successful, too.

What sparked that initial drive to be a lawyer?

When I was growing up in Los Angeles, Asians couldn't own property, and in many areas of L.A., African-Americans couldn't buy property. You couldn't buy homes. I was very aware of this, and my mother was aware of it. There were actually covenants in the deeds that said "This property can only be occupied by someone of the Caucasian race," and this prevented us from moving. We lived in a not-so-desirable area and the schools were not great, and we wanted to move. Then there was a case in the U.S. Supreme Court [Shelley v. Kraemer (1948)]. Loren Miller was the attorney, and he was able to set aside these restrictive covenants. I think every African-American in the U.S. was aware of this decision. I happened to know his nephew; and when I was 15, I was invited to a birthday party at his nephew's house. I saw his uncle sitting in a library surrounded by all these books and I said, "That's going to be me." And I never looked back.

I had already said, "I am going to be like Loren Miller and have all these important cases," but when I saw him and those books, I knew there was nothing that was going to keep me from going to law school.

Throughout your career, you've served in local, state and national government and have seen so many changes in politics, both positive and negative. With the internet and the pervasiveness of criticism and just nastiness, do you think it's harder to be a politician these days? Do you have any advice for women in politics?

Politics is different these days. It was bad when I was there, but it's really tough now. I would say: Be sure your family can take it. Don't destroy yourself and your family. That's what I said to my daughter, who is in the [California] legislature. She has seen how it's difficult, but she is not a wilting violet. It bothers her, but she is strong. She has the will to overtake it.

It's become much more common to see women running against women and races that involve women of color. How do you feel when you see this representation?

We are in a position where we have many, many experienced and effective women—white, African-American, Latino—and they are prepared to run, they know how to put together a campaign, and they know how to put money together. Back when we were attempting to get into public office, we were very saddened that we had to be the only ones around. When I was in the state legislature, there were only three of us, and when I was in the House, there were only 19 out of 435. But it's a new day, and the dynamics are different. You're going to see more women emerge—this is what we fought for.

Let's talk about your time in the House, when you had your daughter. You were not only the first to have...
to navigate those waters, but you were also new to Congress. How did you handle that?

I didn’t announce [my pregnancy] right away because I really had no idea what the reaction would be. Also, I didn’t know if I’d be sick or well. I waited as long as possible, but when it did become apparent the reaction was overwhelmingly positive—from men, women, everyone. I only got one letter from a constituent saying, “We didn’t send you there to have children,” but I had incredible support. The motion to give me maternity leave was made by a conservative Republican! My daughter was born Nov. 23, so I had the Thanksgiving and Christmas breaks, but I wasn’t gone very long. There was an important bill in the subcommittee I was on, so I came back once the session started in January.

You balanced the commute between LA and Washington, D.C., until your daughter was 4 years old and then became a law partner in a major international law firm. I can’t even imagine how challenging that was to balance.

Let’s face it, it’s not really easy in any job you have. But it’s particularly difficult if you have to leave home and go to another city. We hear about congressmen living in their office, but that’s not an alternative for women with children. Who wants to leave their children for a week or two weeks at a time? Working out all these things are sometimes difficult, but they are with whatever job you have.

Isn’t it easier if you have a grandmother willing to baby-sit?

Yes! I do take care of my granddaughter if my daughter has to go away for work or if the nanny isn’t available on the weekends. Let me tell you, my house is full of toys—and in my office, I have a crib that matches my desk.

You’ll be 86 this year. You’ve got an arbitration practice, you serve on the California Transportation Commission and several corporate boards, including Amtrak, which requires you to travel back and forth to Washington, D.C., every month. Do you ever think about retiring?

I certainly have no plans to retire right now, and I was just reappointed to the transportation commission for four years. I was thinking I might not do that, but another board member who is 92 just signed on for another four years; and this man still runs a company, so I was not going to not serve. I’ll continue until I feel like I am no longer mentally or physically competent.

I guess when you’re used to being busy, you don’t notice it—I mean, you’ve been keeping up this pace for like ...

All my life!

—Jenny B. Davis
Opening Statements

MY PATH TO LAW

One Immigrant’s Journey

#MyPathToLaw celebrates the diversity of the legal profession through attorneys’ first-person stories detailing their unique and inspiring trajectories.

By Jeena Cho

I WATCHED A LOT OF LAW & ORDER GROWING UP. MY FAMILY IMMIGRATED TO THE U.S. IN 1988 (the same year Korea last hosted the Olympics). I was 10 years old and didn't speak a word of English. Neither did anyone else in my family. As I watched, I repeated the phrases the lawyers said on the show, trying to learn the words, the intonation, the meaning.

When we moved to the U.S., we settled in Astoria, Queens, where my grandparents owned a grocery store. My dad went from being an architect at Samsung to working seven days a week at the grocery store. My mom had been an art teacher; in New York City, she worked at a nail salon. Here’s the thing: When you're an immigrant in a country where you don’t speak the language, where you aren’t familiar with its rules and laws, you get taken advantage of.

We moved into an apartment with no hot water but plenty of cockroaches and rats. We didn’t know for years that you can report the landlord to housing agencies. I still remember waking up in the middle of the night, screaming, terrified because a rat ran across my torso. Eventually, my dad bought a laundromat. More than once, customers threatened to sue him for some claimed loss or damage to their clothing. He usually paid them because he didn’t understand how the legal system worked.

I knew from watching Law & Order that there were rules in this country designed to protect the innocent, punish wrongdoers and restore justice. I loved the show. In 60 minutes, bad people were always prosecuted and justice served.

To my naive 12-year-old self, this was obviously my path: Go to law school. Become a prosecutor. Send bad guys to jail. Protect the innocent.

As a sophomore in high school, I decided I was going away for college, but my parents were very traditional and didn’t approve. They often said that the only way I would be allowed to leave the house was if I were (1) married or (2) dead. Neither option appealed to me.

I saved every dollar I could from my job as a cashier at Boston Market and applied for colleges out of town. I faked their signatures on the applications, completed all the financial aid forms, and got into the State University of New York at Buffalo (420 miles away) with a full scholarship.

Once it was clear that I wouldn’t need their permission or financial support, I “ran away” to college. I was 17 years old. I didn’t speak to my parents for a long time after that.

‘DEEPLY TRAUMATIZING’

As an immigrant working menial jobs, you often feel unseen and unrecognized. I'll never forget the summer I worked in my mom's nail salon. She told a customer—very proudly—that had I been an art teacher; in New York City, she worked at a nail salon. Here’s the thing: When you're an immigrant in a country where you don’t speak the language, where you aren’t familiar with its rules and laws, you get taken advantage of.

So, will you be working here then?”

Stunned, I paused and responded that I was there for the summer but was starting law school in the fall. Her facial expression changed and she responded, “Well, good for you.”

I graduated from law school at 24 and got my dream job as an assistant state attorney. There, I learned that one privilege of having that role is seeing images we’ll never be able to unsee and hearing stories we’ll never be able to unhear.

I was assigned to the domestic violence unit where I learned that our criminal “justice” system is a terrible mechanism for helping people.

Later, I was assigned to misdemeanors court. The first day was arraignment day. The judge, through a Spanish-speaking interpreter, asked everyone who was there for driving without a valid license to move into the jury box. A group of about 30 men stood and walked over. There were too many of them for the jury box, so they huddled around it. They looked tired, with leathered skin from working in the fields, their hands and fingers swollen.

The judge had the interpreter tell them his rule. “The first time you’re caught, it’s a fine. Second time, it’s 10 days in jail. Third time, 364 days.” For comparison, a third-time DUI carried with it a minimum mandatory sentence of 30 days.

One by one, the men were asked to plead. Those who pleaded guilty were sentenced according to the judge’s rule. Often, the defendants didn’t understand the consequences of pleading guilty and, more than once, would start wailing when they were taken straight from arraignment to jail. Those who didn’t plead were assigned a public defender and set for trial.

This was deeply traumatizing. Although I was in the
PHOTOGRAPH COURTESY OF THE JC LAW GROUP

Opening Statements

Hearsay

56 state attorneys general have signed a letter to Congress urging lawmakers to end secret, forced arbitration in cases of workplace sexual harassment. AGs from every state and U.S. territory told leaders in the House of Representatives and Senate that while arbitration provisions may provide benefits in other contexts, alternative dispute resolution isn’t appropriate for sexual harassment claims. One AG noted that “decades of private arbitration proceedings regarding sexual harassment have had the unintended consequence of protecting serial violators.” The group also expressed concern that victims of workplace sexual harassment were required to pursue relief from decision-makers who aren’t trained as judges.

Source: myfloridalegal.com (Feb. 12).

Justice Files

A U.S. district judge in Florida has ruled the state’s system that bars former felons from voting is unconstitutional and potentially tainted by racial, political or religious bias. Judge Mark Walker blasted the state panel led by Republican Gov. Rick Scott that decides whether to restore voting rights to people who have completed their sentences. The court said the voter restoration system has to be changed ASAP. Separately, the issue of whether to automatically restore voting rights for felons will appear on a Nov. 6 ballot measure.

Source: washingtonpost.com (Feb. 2).

Blowing in the Wind

Thousands of people convicted of marijuana offenses in San Francisco, dating back to 1975, will have their convictions dismissed or reduced. The announcement by San Francisco District Attorney George Gascon is one of the most aggressive moves to wipe away old convictions in the face of new laws legalizing marijuana in California and other states. The DA’s office plans to dismiss and seal 3,038 misdemeanor marijuana convictions, and review and possibly resentence 4,940 felonies—all adjudicated before California voters legalized marijuana in 2016.

Source: wsj.com (Jan. 30).

U.S. legally, I could see myself and my family in the faces and stories of these workers.

Bryan Stevenson asks in his book Just Mercy: “Why do we want to kill all the broken people?” I didn’t try capital cases, but his question resonates with me. As an assistant state attorney, I saw how we want to lock away, criminalize and shun people who are broken.

Like most state attorneys’ offices, we were overworked—I had over 250 cases —and there was no time. I was burning out, desperately trying to keep my head above water, and having regular nightmares of seeing my parents in the jury box—nightmares of their being taken away from me for 364 days.

I needed a change. So, I moved from Tampa, Florida, to the Bay Area. I met my husband, Jeff Curl, who is also a lawyer, and we started a bankruptcy practice. This was the perfect practice area for me, even though it doesn’t make me very popular at cocktail parties. I get help people who are experiencing financial trauma and give them a fresh start. It is healing and restorative.

The first bankruptcy case I ever filed was for a very sweet 69-year-old immigrant. He was HIV-positive and struggling with bipolar depression. After meeting with a group of creditors, we hugged, and he cried.

I started practicing mindfulness and meditation in 2011 after being diagnosed with social anxiety disorder. This eventually led to co-authoring a book for ABA Publishing, The Anxious Lawyer with Karen Gifford.

Here’s what I know: While my 12-year-old self’s understanding of how our justice system works was flawed and naive, what I’ve retained is the deep desire to make a difference, to create a better world, and to live with compassion.

As Rainer Maria Rilke writes in his book Letters to a Young Poet, “The point is to live everything. Live the questions now. Perhaps you will then gradually, without noticing it, live along some distant day into the answer.”

Every day, I live with the question “What would be the most kind, generous and compassionate response?” I am practicing living into the answer.

Read more #MyPathToLaw stories on Twitter, where the hashtag was created by Exeter University lecturer Matthew Channon.
Pet Threat

Courts are awarding significant damages to families whose dogs are killed by police

By Arin Greenwood

On Feb. 1, 2014, a Maryland police officer investigating a robbery shot and killed a family’s beloved dog.

Officer Rodney Price, who’d been on the force for a year, was in the waterfront neighborhood of the Baltimore suburb of Glen Burnie searching for witnesses. Price encountered Vern, the Reeves family’s 4-year-old Chesapeake Bay retriever, in the yard after knocking on the front door. He shot Vern twice after the dog went at him, he claimed.

Timothy Reeves, one of the family’s adult children, and his father, Michael, were in the basement hanging a dart board. They hadn’t heard Price knocking or the gunshots. Reeves’ then-girlfriend saw Price in the yard and told Reeves he had better come upstairs.

Reeves ran out to find Vern “bleeding out and gasping,” he says. Michael followed his son outside. When he saw Vern, he put his fingers into the bullet wounds, trying to stop the bleeding. Vern died a short time later.

According to the Baltimore Sun, Price said at the time that Vern had “confronted and attacked” him, provoking the shooting. “I unloaded on your dog. Your dog attacked me, and I killed it,” Price reportedly told the family.

The Reeves family filed suit against Anne Arundel County and Price. More than three years later, in May 2017, a jury awarded Michael Reeves, Vern’s primary owner, $1.26 million, the largest civil judgment in U.S. history for a pet’s death at the hands of police.

However, the court later reduced the judgment to $207,500 under a Maryland statute that limits local governments’ liability. “This is still one of the biggest awards ever for the shooting of a family pet by police,” says Cary Hansel, a Baltimore lawyer who represented the Reeves family.

Hansel, animal advocates and the family say they...
hope the judgment sends a message and leads to changes that will protect more pets. "No one ever needs to experience what we did," Timothy Reeves says.

**DOGS, DOGS EVERYWHERE**

According to the American Pet Products Association, nearly 90 million dogs are now living in homes in the United States, and the number is rising every year. That raises the likelihood of police encountering dogs on the job.

No one knows exactly how many pets are killed by law enforcement officers every year because there is no uniform reporting or collection of data on animal killings. The most widely cited estimate from the U.S. Department of Justice is that every day, police officers kill 25 to 30 dogs—or some 10,000 per year.

Pets are considered property under the law in nearly every respect, which creates challenges in determining their value in civil litigation. By and large, when a pet is killed—by police or civilians—the damages are limited to the animal’s economic value, though some states also allow for emotional damages, either by statute or common law.

Across the country, there have been some substantial, high-profile awards in cases in which judges found constitutional violations against owners.

It began in California in 2005, when the 9th U.S. Circuit Court of Appeals at San Francisco held that San Jose police officers committed an unconstitutional seizure in violation of the Fourth Amendment by killing three dogs during raids on a Hells Angels clubhouse and several members’ homes.

The city paid a $797,500 settlement, according to Randall Lockwood, a senior vice president for the American Society for the Prevention of Cruelty to Animals. “This is part of a trend of recognizing that pets are beloved and valuable members of the family whose emotional value is indeed inestimable,” Lockwood says.

There have been a handful of high settlements and judgments since. Among them, in 2016, the city of Detroit entered into a $100,000 settlement after an officer killed a dog chained up next to a home.

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"The argument that we can’t afford the time or money to provide training obviously falls away when you realize the cost of not training."

— Randall Lockwood

Last year, the city of Hartford, Connecticut, settled for $885,000 with a family whose dog was shot and killed during what the 2nd Circuit at New York City deemed to be an unlawful search. A Colorado family received a $262,500 settlement in 2016 for the death of their dog at the hands of a police officer.

**A MATTER OF TRAINING**

These settlements have not only compensated the families involved but sent a message by illuminating the need for better training and more restraint.

"Law enforcement agencies across the country are getting slammed with settlements and judgments that are costing them thousands of dollars that could be better spent within their agencies," says attorney Chelsea Rider, director of the National Law Enforcement Center on Animal Abuse. "However, it can be easily addressed by simply providing training."

Training is widely seen as a way to reduce the number of dogs shot and killed by police officers. Unfortunately, Lockwood says, while a number of states have passed laws requiring officers to undergo training, it often comes after a shooting has taken place.

Lockwood sees this changing, in part because of awards like the one to the owner of Vern. "I think the law enforcement agencies are realizing that you get a $700,000 settlement or $1.26 million settlement, and that’s a pretty serious hit," he says. "The argument that we can’t afford the time or money to provide training obviously falls away when you realize the cost of not training."

There is now a movement to create a training program that can be used nationwide. Dog aggression expert Jim Crosby, a retired police lieutenant from Jacksonville, Florida, who also headed two animal control agencies, is working with the National Sheriffs’ Association to develop the curriculum. Crosby expects to launch with a pilot program this year.

“This course will set national standards for officer training, with the goal of keeping officers, the public and dogs safe by giving officers the knowledge and tools needed in canine encounters,” Crosby says.

Even if every officer were trained, there are sometimes situations in
THE COST OF BRUTALITY

John Thompson, deputy executive director of the National Sheriffs’ Association—who is recognized as a leader in bringing concerns about animal welfare to the law enforcement realm—says he is hopeful that the training curriculum will be warmly welcomed, at least in part because of large judgments like the one for Vern’s shooting.

“Pets are people’s families now. The courts are starting to realize it,” he says, adding that even with all the incentives in place, he expects change might not come quickly enough. “I have this feeling and fear there’s going to be a lot more shootings before we can get the training out.”

Hansel of Baltimore says he’s optimistic that the judgment in Vern’s case, along with other large awards, will help lead to more training and fewer shootings. “Unwarranted police violence has its roots in the same place, whether the victim is an innocent person or an innocent animal,” Hansel says. “Until society raises the cost of police brutality and punishes it appropriately, it will continue to affect all of us—those we care about and even our pets.”

Reeves says that for his family, their lawsuit was never about money, although a large judgment sends the strongest possible message that police officers need serious training so that other dogs do not get killed.

“There are steps that should be taken so it doesn’t happen in the future,” he says.

Fighting Words
Can anti-profanity laws and the fighting words doctrine be squared with the First Amendment?

By David L. Hudson Jr.

In an age of declining civility and amplification of offensive speech via social media, it may seem strange, un-American or downright silly for people to be arrested for uttering profane speech. But it happens.

People can, and have been, arrested for uttering profanity in public, cursing in a canoe, engaging in a toilet tirade in their own home, or cursing near a school or church.

Anti-profanity laws remain on the books in some states with statutes that in many cases are relics of a bygone era, dating back to the 19th century but never erased. A 1962 South Carolina law prohibits cursing on a public highway or within hearing distance of a church or school. A Mississippi law, passed in 1848, prohibits using profane or vulgar language in the presence of two or more people. Those in violation can receive a $100 fine or up to 30 days in county jail. A Rhode Island law, enacted in 1896, provides that: “Every person who shall be guilty of profane swearing and cursing shall be fined not exceeding five dollars ($5.00).”

“In my opinion, laws banning profanity are unconstitutional on their face,” says Jennifer Kinsley, who teaches First Amendment law at Northern Kentucky University’s Salmon P. Chase College of Law. “The sole justification for these laws is morality-based, which the Supreme Court has held insufficient to justify laws regulating fundamental rights.”

How can anti-profanity laws be considered constitutional in the wake of the U.S. Supreme Court’s famous decision in Cohen v. California (1971), where the court reversed the breach-of-the-peace conviction of Paul Robert Cohen, who wore a jacket with the message “Fuck the Draft” into a Los Angeles county courthouse? Justice John Marshall Harlan II began his opinion with these words: “This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.” He also famously wrote that “one man’s vulgarity is another’s lyric” and warned that government officials might ban particular four-letter words as a way to silence particular viewpoints.

The reason why such laws are sometimes considered constitutional is the fighting words doctrine—words that the Supreme Court defined in Chaplinsky v. New Hampshire (1942) as “words which by their very utterance inflict injury or cause an immediate breach of the peace.”

Walter Chaplinsky, a Jehovah’s Witness, was convicted of breach of the peace for cursing a marshal.

The high court unanimously upheld his conviction, writing that fighting words “are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

IN YOUR FACE

In later decisions, the court narrowed the doctrine by limiting it to direct, face-to-face personal insults and by construing such laws narrowly to only fighting words. For example, in Cohen, the court pointed out that the man did not direct the message on his jacket to any particular individual. Justice Lewis Powell also explained in a concurring opinion in Lewis v. New Orleans (1972) that speech directed to police officers may not rise to the level of fighting words because officers receive special
training to be able to deal with obstreperous individuals. While the U.S. Supreme Court has reversed the convictions in its fighting words cases, the doctrine remains active in the lower courts. The 4th U.S. Circuit Court of Appeals at Richmond, Virginia, upheld South Carolina’s anti-profanity law in 2016 in Johnson v. Quattlebaum, affirming the conviction of Krystal Johnson, who had called the police to a house where she was staying to get help in obtaining her car keys from a family member. While the police were there, Johnson allegedly said: “This is some motherfucking shit.” The officer arrested her under the state anti-profanity law. Her problem: She was within 50–60 yards of a local church. The 4th Circuit upheld her conviction, writing that the law is neither unconstitutionally overbroad or vague because it only applies to fighting words.

**IT’S PART OF THE JOB**

An even more recent case provided a new twist in the fighting words jurisprudence, holding that store managers are akin to police officers as recipients used to dealing with profanity. Nina Baccala was convicted of disorderly conduct for uttering profanity at a store manager at a Stop & Shop in Vernon, Connecticut, because the manager had informed her it was too late to obtain a Western Union money transfer.

In overturning her conviction last year, the Connecticut Supreme Court emphasized in *State v. Baccala* that store managers are accustomed to angry, irate patrons. “Store managers are routinely confronted by disappointed, frustrated customers who express themselves in angry terms, although not always as crude as those used by [Baccala],” the court wrote.

“The Supreme Court of Connecticut emphasized that context is key in determining when the fighting words exception to free speech applies,” says Clay Calvert, director of the Marion B. Brechner First Amendment Project at the University of Florida. “And that’s correct. There is no laundry list of fighting words. It all depends on how a word is used and to whom it is addressed. It’s a fact-intensive inquiry and, as the court in *Baccala* got it right, the fighting words determination must be made ‘on a case-by-case basis.’”

The state of Connecticut petitioned the U.S. Supreme Court for review, contending that the state high court went astray in creating a “store manager exception” to the fighting words doctrine. The state argued in its petition for certiorari that “only a police exception is consistent with the fighting words doctrine.”

“We don’t see this as a huge jump in the law, although we recognize that the state of Connecticut feels differently,” says Damian K. Gunningsmith, co-counsel for Baccala.

“The fighting words exception to the First Amendment is justified as a prophylactic means to prevent immediate violence. If violence was not actually likely in the real-word context, then the words cannot be punished,” Gunningsmith says.

Kinsley supports the idea of recognizing store managers as recipients who are accustomed to profanity, calling the decision a “move in the right direction.”

Calvert is less sure, pointing out that a “store manager seems far removed from a police officer, who is a government employee and who goes through rigorous training.”

A larger question concerns the future of the fighting words doctrine in First Amendment jurisprudence. “The fighting words exception should remain in place,” says Calvert. “A Nazi calling a black person the N-word in a face-to-face, one-on-one confrontation is a classic instance where speech deserves no protection. But the *Baccala* case highlights the problems of drawing lines under the fighting words exception.”

The categorical approach created by the court in *Chaplinsky* more than 75 years ago could be on borrowed time. “The fighting words doctrine is really arcane in terms of the realities of modern expression when so much communication occurs through digital and social media,” says Kinsley. “To measure the legality of speech by its reaction in the listener has always been problematic, but it has never been more flawed than now.”
Taxing Question
The high court weighs whether internet retailers must collect state sales taxes
By Mark Walsh

About a quarter century ago, those seeking office supplies probably had a variety of possible sources, but buying on the internet wasn’t yet one of them. Amazon.com was two years away from being founded, and brick-and-mortar chains such as Staples and Office Depot were in their infancy.

The average consumer in a state such as North Dakota could turn to an old-school catalog retailer. The Quill Corp., a national retailer founded in 1956, provided a catalog with multiple choices in office equipment and supplies. It had about 3,000 customers in North Dakota who got an extra benefit from ordering: The catalog company did not collect the state sales or use tax.

In a challenge by the state, the U.S. Supreme Court soon agreed with the retailer. In Quill Corp. v. North Dakota, the justices ruled in 1992 that the state’s enforcement of a use tax against Quill placed an unconstitutional burden on interstate commerce.

The decision had enormous consequences that were not necessarily foreseen at the time. Now, in a new case brought by North Dakota’s southern neighbor, the high court may be poised to overrule the 26-year-old precedent. In South Dakota v. Wayfair, set for argument on April 17, the justices will consider whether to overrule Quill and uphold a law that requires most out-of-state internet retailers to collect sales tax.

The court in Quill stood by an earlier decision about taxation of out-of-state sales, National Bellas Hess v. Department of Revenue in 1967, which imposed a “physical presence test” requiring sellers to have a physical nexus to the state, such as an office or a warehouse.

In 1992, the court questioned the validity of the physical presence test because of intervening rulings but stuck with the Bellas Hess rule as a matter of stare decisis, as well as the idea that mail-order retailers faced difficulties in complying with tax obligations from about 6,000 separate state and local taxing jurisdictions nationwide.

The retail landscape would soon change dramatically, of course. Amazon was founded in 1994 and e-commerce took off, fueled in part by the effective discount consumers received by not having to pay sales tax on most purchases. The advent of smartphones boosted web commerce to higher levels to the point where brick-and-mortar stores face an uncertain future.

“The way commerce was conducted in 1992 compared with 2018, there’s just nothing in common,” says Oren Teicher, CEO of the American Booksellers Association. “Everything has been turned on its head.”

AN INVITATION FROM A JUSTICE

The states, meanwhile, have been losing out on billions in sales tax revenue over the years (one estimate cited in court papers suggests they’ll lose about $34 billion this year). This comes as some big internet retailers have begun collecting sales tax regardless of whether they have a physical presence in the buyer’s state.

Amazon, which increasingly has a physical presence across the country through warehouses, its purchase of Whole Foods and its bookstores, collects sales tax on items it sells, although not on items sold by its affiliated sellers.

The states, along with some brick-and-mortar retailers and mom-and-pop stores that have been on the losing end of Quill, have urged Congress to come to their rescue. But federal lawmakers have not acted, partly to maintain the growth of e-commerce and partly out of a fear any action they took would be perceived as a tax increase.

In 2015, however, the states got a boost from
Justice Anthony M. Kennedy.

In a concurrence in a Colorado case related to state sales and use taxes, Kennedy called for the court to re-examine *Bellas Hess* and *Quill*.

“There is a powerful case to be made that a retailer doing extensive business within a state has a sufficiently ‘substantial nexus’ to justify imposing some minor tax-collection duty, even if that business is done through mail or the internet,” Kennedy wrote in *Direct Marketing Association v. Brohl*. “This argument has grown stronger, and the cause more urgent, with time.”

Kennedy, who had joined the result in *Quill*, noted that e-commerce sales were totaling more than $3 trillion per year in the United States.

“Because of *Quill* and *Bellas Hess*, states have been unable to collect many of the taxes due on these purchases,” Kennedy continued. “States’ education systems, health care services and infrastructure are weakened as a result.”

“The legal system should find an appropriate case for this court to re-examine *Quill* and *Bellas Hess*,” Kennedy concluded.

The political system, certainly, answered Kennedy’s call.

South Dakota, which has no state income tax, relies heavily on its sales and use taxes. In 2016, lawmakers passed SB 106, which imposes an “economic presence test” on out-of-state retailers to subject them to sales tax liability. The measure applies to any retailer with at least $100,000 in sales or at least 200 individual transactions in the state.

South Dakota “took the writings of the Supreme Court to heart and came up with a viable solution,” says state Attorney General Marty J. Jackley. “This has become South Dakota leading the fight with a lot of help.”

Jackley, a Republican who is running for governor this year, cites the numerous amicus briefs that were filed on the state’s side at the petition stage, including one by 35 other states that calls for the court to overrule *Quill*.

“This is a fight to save Main Street America,” Jackley adds, highlighting the harm *Quill* has caused mom-and-pop retailers. “The physical presence requirement is outdated.”

Teicher of the American Booksellers Association, which represents independent bookstores across the country, also filed a brief in support of South Dakota. He says internet retailers that do not collect sales taxes “had a radically competitive advantage over those of us who do collect them.”

“If a sales tax is passed by the state legislature and local governments, it ought to be collected across the board,” Teicher says.

### 12,000 TAX JURISDICTIONS

South Dakota sued four out-of-state internet retailers, seeking to require them to begin collecting taxes and to test the validity of its new law. One retailer, Systemax, threw in the towel and started collecting sales taxes. The other retailers decided to fight. They are Wayfair, a retailer of home goods; Overstock.com, a general retailer; and Newegg.com, which specializes in tech products.

The South Dakota Supreme Court agreed with the retailers that *Quill* remained the controlling precedent, and that the state could not bypass the physical presence rule to impose sales taxes on the out-of-state retailers.

The retailers, in their preliminary U.S. Supreme Court brief (which unsuccessfully urged the justices not to take up the case), argue that *Quill* was not badly reasoned and the physical presence rule is a perfectly working standard.

The retailers also are concerned about the difficulties of complying with sales tax obligations that they say remain quite complex.

“There are 12,000 sales and use tax jurisdictions” across the country, says George S. Isaacson, a senior partner at Brann & Isaacson. The Lewiston, Maine-based law firm specializes in tax issues and is representing the internet retailers before the Supreme Court.

Among the complications, Isaacson says, is that some local jurisdictions recognize state tax holidays and some don’t; and the computer software designed to simplify such collections often does not accurately identify items that are exempt from sales taxes in a given state or locality.

“This notion that there is a very easy fix to collecting tax is not true, especially for small companies,” he says.

The internet retailers also are concerned about possible retroactive tax liability, although South Dakota’s law makes clear there is not retroactivity.

“The fact that the state of South Dakota as a matter of legislation has said we will only apply this prospectively isn’t binding on any other state,” Isaacson says. “The risk of retroactive liability is very real.”

Daniel Hemel, an assistant professor at the University of Chicago Law School, says he is unconvinced by the retailers’ retroactivity concerns.

“No state has suggested it wants to apply this retroactively,” says Hemel, who signed an amicus brief by law professors and economists in support of South Dakota.
Inclusive Legal Writing
We can honor good grammar and societal change—at the same time
By Heidi K. Brown

Unlike in social media—in which abandonment of punctuation and proper differentiation among you're, your and the dreaded ur is unfortunately becoming a norm—precision in language, grammar and punctuation matters in legal writing. The meaning of a contract provision can turn on the inclusion or omission of a comma. A litigant’s entitlement to attorney fees as part of a base settlement offer can depend on the drafter’s choice between phrases such as inclusive of or plus.

Many of us learned how to write from college English teachers, legal writing professors in law school or meticulous law firm mentors who drilled respect for grammar traditions into our brains. The grammar blunders permeating governmental tweets, menus at high-end restaurants, Hollywood scripts, and sometimes even breaking-news tickers on major networks cause some careful writers to shake their heads.

Recently, however, I realized there is an evolving grammatical modernization to which I must adjust. As a legal writing professor and mentor to junior law firm associates in their brief writing, I constantly write margin comments such as "court is a singular noun, but they is a plural pronoun. ... Corporation is a singular noun, but they is a plural pronoun. ... Court is an it, not a they. ... Corporation is an it, not a they."

When I read a sentence like "A taxpayer may owe a penalty when they file a late tax return," my instinct is to comment: "They is not a gender-neutral singular pronoun." As important as long-held grammar conventions are in my role as a legal writing professor and brief writer, I need to be open to change on this pronoun rule in order to model inclusive legal writing. The concept of inclusive legal writing is an opportunity for lawyers to be at the forefront of balancing grammatical correctness and cultivation of gender inclusiveness.

The esteemed Académie Française—the highest authority on matters pertaining to the French language—is not yet so sure about this "inclusive writing" idea. In French grammar, nouns are deemed either masculine or feminine. A well-entrenched grammar rule grants the masculine dominance over the feminine.

In other words, when describing a collection of professionals—one male and 500 female—a writer would reference the group using the male plural version of the word. French language activists have advocated for more inclusive usage, removing gender stereotypes and bias when feasible. For example, a writer might indicate inclusion of both the female and male versions of the foregoing plural noun by inserting a feminine "(e)" before the plural "s." However, the Académie Française has declared the French language in "mortal peril" from this inclusive writing campaign.

GOING NEUTRAL

As lawyers, are we similarly resistant to changing grammar norms in legal writing? Legal writers indeed have many phrasing techniques available to avoid using they as a gender-neutral singular pronoun. We can modify a sentence to replace they with who: "A taxpayer who files a late tax return may owe a penalty." We can pluralize the noun: "Taxpayers may owe penalties when they file late tax returns." We could even use he or she instead of they: "A taxpayer may owe a penalty when he or she files a late tax return." But the last choice is not inclusive.

Writing style experts, including members of the Associated Press, copy editors at the Washington Post and the American Dialect Society already have recognized the singular they. As legal drafters, will we get ahead of the curve or mirror the Académie
Française’s resistance to inclusive writing?

Our job as legal writers often is to persuade audiences. Good persuasive legal writers carefully balance Aristotle’s three modes of persuasion—logos, pathos and ethos—combining logic, emotion and character/ethics to lead a reader down a path to a proposed outcome. A brief writer may write the most well-researched, logical, emotionally impactful, clearly articulated legal argument and yet fall short in ethos by resisting inclusive language or stubbornly adhering to outdated language conventions. Words matter, and they reflect the mindset of their drafter.

I notice, in memoranda and briefs, when legal writers refer to male litigants by their last names but female litigants by their first names, or when they address female parties or witnesses as Ms. or even Miss instead of Professor, Detective, Doctor, Principal or Captain, despite the official titles attributed to these individuals in the factual record. To effect change, we can set an example through precision in our own word choices.

When in doubt about the proper pronoun (or title) to use, we should choose the correct and inclusive one or respectfully ask. We can pay attention to others’ “preferred pronoun” indicators in their email signature blocks. We can identify our own preferred pronouns. We can respect gender inclusiveness when writing about occupations or societal roles: flight attendant, businessperson, chairperson, server, police officer, jury foreperson, member of Congress, layperson. We can advocate for amendments of statutes that still use the phrasing husband and wife instead of spouse or partner. We can take the time to update outmoded contract and estate planning forms, replacing archaic, gendered, hierarchical or exclusionary language with neutral or, even better, inclusive terms (i.e., working hours vs. man-hours; worker’s compensation vs. workmen’s compensation).

CULTIVATING DIVERSITY

Another way to inspire broader usage of inclusive language in our legal writing is to cultivate diversity in our contract- and brief-writing teams. In August, former U.S. District Judge Shira A. Scheindlin wrote an op-ed in the New York Times called “Female Lawyers Can Talk, Too,” in which she noted gender inequality in courtroom appearances. She advocated that the lawyers who write the briefs—often women—should have more opportunities to deliver oral arguments.

A couple of weeks later, the Times ran an article by Alan Feuer emphasizing that several federal jurists, including Judges Jack B. Weinstein and Ann M. Donnelly of the Eastern District of New York, have issued court rules calling for “a more visible and substantive role” in court for junior members of trial teams. Christine Simmons reported in the New York Law Journal that Chief Judge Dora L. Irizarry planned to amend her rules along the same lines. Perhaps composing our legal drafting and courtroom teams with diverse voices—in gender, sexual identity and level of seniority—will enhance open-minded and inclusive language choices in our written and oral advocacy.

After all, as the great philosopher Bono sings in U2’s song “Invisible,” “There is no them. There’s only us.”

Heidi K. Brown is an associate professor of law and the director of legal writing at Brooklyn Law School. Brown was a litigator in the construction industry for two decades, drafting numerous lengthy contracts and trial briefs. She is the author of The Introverted Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy.
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Test Your Usage Skills
Law review editors missed a few, so now we have this quiz for you

By Bryan A. Garner

Early each year, I collect for the *Green Bag* the most egregious gaffes to have appeared in the previous year’s law reviews. The abundant findings this time around prompted me to create an English-usage quiz for the readers of this column.

For each question, the law review cited actually printed the incorrect choice. Whether that’s the fault of the original author or a law review editor is an unanswerable question for most of us; but if you’re familiar with law review practices, you’ll probably agree that it’s fairer to name the journal than the author.

One thing to keep in mind is that language changes over time, and what begins as an error can ultimately become enshrined as good usage. The shift may take centuries. Until that shift happens, though, editors generally do their best to comply with prevailing literary usage. With the questions in this quiz, the language hasn’t yet come close to accepting the “incorrect” choices as standard written English.

The answers, of course, are printed at the end. But be disciplined! Try your hand at all the questions before you peek (not *peak*) at the answers.

**QUIZ**

1. “Do civil rights laws impact the [(a) deep-seeded; or (b) deep-seated] white racism that exists in the fabric of society?” (Creighton Law Review) Extra gaffe credit for not only bungling the phrase at issue but also failing to hyphenate both the phrase and the sentence’s other phrasal adjective, *civil-rights*—as well as for using *impact* as a verb—and still more extra credit for the mixed metaphor involving fabric (five bungles within 17 words).

2. “The State of Florida ultimately spent $33,000 in sequestration costs and, [(a) all told; or (b) all-tolled,] the trial cost the Seminole County Sherriff’s [read Sheriff’s] Office $320,000.” (Touro Law Review) Extra credit for the orthographical issue related to sheriffalty.

3. “Similarly, publication notice is appropriate where the class [(a) is composed of; (b) is comprised of; or (c) comprises] members less likely to use modern communication technologies.” (University of Pennsylvania Law Review) Extra credit for repeating the error five more times in the article.
4. “[T]he Court noted that had the defendant used any different combination of elements to recreate [(a) the same exact; (b) the exact same; or (c) exactly the same] game, they could have avoided infringement.” (The John Marshall Review of Intellectual Property Law) Ample extra credit for referring to the defendant, a software company, as they instead of it, for using recreate (=to amuse oneself) instead of re-create (=to create anew), and for the illogic of implying that different elements could create an identical product.

5. “As a former Division I athlete, the author of this article can attest that athletes will not resent a teammate who makes more money than [(a) they; or (b) them] particularly because, under the Duke Model, compensation is based entirely on performance.” (Brooklyn Law Review) Extra credit for using the awkward self-referential third person (the author of this article instead of I) and for omitting a comma or dash before particularly.

6. “The Multiple-Use Conflict Resolution Act ... would allow the federal government to compensate grazing permittees and [(a) leases; or (b) lessees] $175 per AUM.” (Idaho Law Review) Extra credit for using the awkward ee forms instead of grazing-permit holders and lease holders.

7. “He [(a) could care less; or (b) could not care less] about testing America’s constitutional resilience.” (Fordham Law Review)

8. “ALJs do not have [(a) free rein; or (b) free reign] to reconsider legal issues.” (Yale Journal on Regulation)

9. “[T]he Court went on to strike down laws forbidding aliens ... to serve as [(a) notaries public; or (b) notaries public].” (Vanderbilt Law Review)

10. “[B]ut of course ‘voluntary accompaniment’ meant that the man should have been free to leave at any time [(a) anyways; or (b) anyway].” (University of Pennsylvania Asian Law Review)

11. “If death sentences are meted out on the basis of arbitrary or invidious characteristics of the offender (like race or ethnicity), then by definition, the death penalty is not being imposed according to offenders’ [(a) just desserts; or (b) just deserts].” (Valparaiso University Law Review)

12. “[H]e had informed ConAgra that his religion [(a) forbade; or (b) forbid] him from handling pork.” (Rutgers Journal of Law & Religion)

13. “He attempted to introduce evidence that the victim was [(a) cohabiting; or (b) cohabitating] with her boyfriend.” (Harvard Journal of Law and Gender)

14. “Neither of them [(a) are protocol standards; or (b) is a protocol standard], and, even if they were, they would not be binding.” (Columbia Science and Technology Law Review)

15. “Santiago ... was [(a) beat; or (b) beaten] up by the border patrol.” (Santa Clara Journal of International Law)

16. “The school could have reasonably [(a) forecast; or (b) forecasted] a substantial disruption.” (Widener Law Review)

17. “[T]he women have been employees of the USSF since each of them [(a) were; or (b) was] selected to play on the WNT.” (University of San Francisco Law Review)

18. “Officers pointed their guns and fired at Kinsey after he [(a) lay; or (b) laid] on the ground with his hands in the air.” (Maryland Law Review)

Bryan A. Garner, president of LawProse Inc., is also the editor-in-chief of Black’s Law Dictionary and the author of many books.

ANSWERS


1. (b): GMEU at 252.
2. (a): GMEU at 38.
3. (a) or (c): GMEU at 191; CMOS § 5.250, at 320.
5. (a): GMEU at 899; CMOS § 5.46, at 239–40.
6. (b): GMEU at 556.
7. (b): GMEU at 226; CMOS § 5.250, at 323.
8. (a): GMEU at 412.
9. (b): GMEU at 633.
10. (b): GMEU at 59; CMOS § 5.250, at 311.
11. (b): GMEU at 542; CMOS § 5.250, at 325.
12. (a): GMEU at 401–02.
13. (a): GMEU at 177–78;
14. (b): GMEU at 623–24;
15. (b): GMEU at 99.
16. (a): GMEU at 403.
17. (b): GMEU at 313;
18. (a): GMEU at 553–54, 563; CMOS § 5.250, at 339.
According to the 2016 Hazelden Betty Ford Foundation/ABA study, 19 percent of lawyers suffer from anxiety. In my experience from working with lawyers, anxiety is the unwanted roommate inside the mind that you can’t get rid of. We may learn to live with it, like a bad skin rash or perhaps an incurable tumor.

Sometimes, when I offer workshops on stress and anxiety management, I’ll distribute the symptoms of anxiety disorders, the most common being generalized anxiety disorder. According to the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders, the manual therapists refer to for diagnosing mental health conditions, GAD is defined as “excessive anxiety and worry (apprehensive expectation), occurring more days than not for at least six months, about a number of events or activities (such as work or school performance).”

Common symptoms include:
• Restlessness, feeling keyed up or on edge
• Being easily fatigued.
• Difficulty with concentration

I’ve had more than one lawyer share that they are paying for therapy out of pocket.

— Jeena Cho

HIDING IT
The stigma our profession has against seeking mental health treatment is unfortunate. I’ve had more than one lawyer share that they are paying for therapy out of pocket rather than go through the firm’s insurance plan for fear that they may be found out.

Here’s the thing: Often, regardless of how well we do our jobs, our ability to effect any particular outcome is highly constrained.

This is where mindfulness and meditation can be an incredibly powerful tool. When we are being mindful, we get to know ourselves better and build the ability to deal with mental reactions such as anxiety.

When I was diagnosed with social anxiety disorder, I was in a hurry to get rid of it. I was surprised to find that even after 10 weeks of intensive cognitive behavioral therapy, I still experienced anxiety. I shared this frustration with my therapist and she gently inquired, “Do you remember when you started experiencing anxiety?” I paused,
reflected and said, “For as long as I can remember, but certainly since law school.”

She reminded me that it took many years for the anxiety to get this bad, and that it’s going to take some time to work through it. It turns out that having an anxiety disorder is similar to any other illness. No matter how hard we demand it, the body and the mind have their own timelines for healing.

**WARNING SYSTEM**

What I have learned is that anxiety actually serves an important function. It’s the body’s way of letting me know there is a reason for concern. It’s like a smoke detector. The trouble is that my smoke detector was hyperactive.

The challenge was to figure out how to recalibrate the smoke detector. The first step, surprisingly, was to become more familiar with the anxiety. This sounds terrible, I know. Why would you want to pay attention to the anxiety? It’s an awful feeling. However, by understanding it—getting to know the reaction—you can achieve more autonomy from your anxiety. Over time, I was able to detect when the mind and body were going down the spiral of anxiety. I started to notice, as I sat in the courtroom waiting for my case to be called, the tightness in the pit of my stomach, the fl fluttering heartbeat, the sweaty palms. What used to happen was that these physiological responses would be interpreted as anxiety and the mind would go into catastrophe mode.

“Maybe you should’ve attached that affidavit from the witness (even though his statement wasn’t entirely relevant),” the anxiety would suggest. This, of course, only makes the anxiety worse. Rather than focusing on calming the anxiety, I’d let the anxiety sit in the driver’s seat and go through 150 ways in which this hearing will lead to disaster. I would also have anxiety about the fact that I was so anxious.

Having a regular mindfulness and meditation practice, carving out time every day to simply sit in silence and observe the mind, has been incredibly useful in not only managing anxiety but also retooling it as helpful fuel. Anxiety can be a powerful motivator. Yet I also learned that using anxiety as fuel only attracts more anxiety.

Anxiety also zaps creativity and joy. The regular meditation practice helped me to see that I’ve been using the whip to drive myself and becoming curious about what using a carrot might look like.

Learning to be a good friend to ourselves is key in discovering how to work with anxiety. ■

Jeena Cho consults with Am Law 200 firms, focusing on strategies for stress management, resiliency training, mindfulness and meditation. She is the co-author of The Anxious Lawyer and practices bankruptcy law with her husband at the JC Law Group in San Francisco.

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**MANTRA MEDITATION**

Meditate with the awareness that there is a center of deep contentment and even joy within you. Should feelings of defeat or self-doubt arise while you are meditating, permit yourself the confidence to know these feelings aren’t real—they’re just something your mind is creating in the moment. Let them pass.

1. Sit with a straight spine in a comfortable position you can hold for the time you will be meditating. Commit to that posture.
2. Notice the internal and external landscape: sounds in the room, sensations of the body, emotions you may be feeling, the quality of your thoughts. Allow these to be exactly as they are.
3. Turn your attention to your breath. You may want to take a couple of deeper breaths to help yourself settle, breathing in deeply and breathing out completely through the nose. Allow your breath to return to normal.
4. Now add a mantra to your breathing. If you have a mantra you’d like to work with, you can use that. Otherwise, use the mantra “Let go.” Repeat “let” on the in-breath and “go” on the out-breath.
5. Meditate, repeating the mantra in coordination with the breath. You may find, after some time, the mantra naturally falls away—and that’s fine. If you feel you are distracted or are getting caught up in thoughts, return to the mantra.

You can hear an audio version of this meditation at jeenacho.com/wellbeing.

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Cloudy Ethics

Lawyers have an ethical duty to safeguard clients’ confidential information—a task that’s become more complicated as the cloud becomes more ubiquitous. By Jason Tashea

With a Funeral Home in Ashes and an insurance company refusing to pay benefits, the last thing you’d expect to hear about is online security and the cloud.

But that’s exactly what happened in 2014 when the Holding Funeral Home lost a building in Castlewood, Virginia, to a fire and Harleysville Insurance Co. refused to pay out the claim, alleging misrepresentation and other issues.

During the investigation, security video footage of the incident was shared between the insurer and the National Insurance Crime Bureau through the cloud storage service Box. The investigator who created the account didn’t password-protect it. Pretty soon that account contained the entirety of the plaintiff’s case file, including privileged information. Anyone who had a link could access it.

Sure enough, the opposing counsels mistakenly received access. After downloading the entire file, the funeral home’s attorneys saw everything, including privileged documents, but they did not notify the insurer’s attorneys, thinking that privilege had been waived.

At first, the insurer and its lawyers seemed out of luck.

In 2017, U.S. Magistrate Judge Pamela Meade Sargent sided with the funeral home’s attorneys in Harleysville Insurance Co. v. Holding Funeral Home and determined the failure to limit permissions and create a password did waive privilege. She wrote that it was “the cyberworld equivalent of leaving its claims file on a bench in the public square and telling its counsel where they could find it.”

Luckily for the insurer, U.S. District Judge James P. Jones, on appeal, rejected the magistrate’s reasoning. Jones concluded that the disclosure was inadvertent and the unique URL of 32 randomly assigned characters created by Box, which was needed to access the account, made it “impossible for anyone, let alone a particular person connected with the case, to accidentally stumble across the Box folder.”

While failing at cybersecurity basics, the judge determined that the insurer had acted reasonably and privilege hadn’t been waived.

Be Reasonable

Whether for personal or professional applications, remote storage has become the standard for millions of Americans. However, this and other internet-enabled technologies can...
create unique ethical quandaries for lawyers. With changes to ethics rules reflecting technology’s role in the profession, many find the prevailing reasonableness standard difficult to interpret. For cybersecurity ethicists, however, an ethical attorney is not just doing one thing; they are in a constant state of evolution and growth to keep pace with threats and best practices.

When discussing cybersecurity and legal ethics, “there are four basic rules that govern,” says Sharon Nelson, president of Sensei Enterprises, a cybersecurity company. Those are ABA Model Rule 1.1, which deals with competence; Rule 1.4, which involves communications; Rule 1.6, which covers the duty of confidentiality; and rules 5.1 through 5.3, which focus on lawyer and nonlawyer associations. However, she calls competence and confidentiality “the big two.”

When the ABA updated the Model Rules of Professional Conduct in 2012, two significant changes occurred regarding confidentiality and competency. The rules now require “reasonable efforts” to avoid the “inadvertent or unauthorized” disclosure and access to client information, and for lawyers to not only keep abreast of the law but technology, as well.

By using terms such as “reasonable,” the new rules “are flexible enough to protect the public in the face of new risks that may not have existed at the times the rules were written,” says Michael McCabe, an attorney in Potomac, Maryland, and a vice-chair of the ABA Standing Committee on Ethics and Professional Responsibility. Further, he says, what is reasonable cybersecurity for a large, multistate firm may not be reasonable for a small or solo operation.

Similar to negligence standards, reasonable cybersecurity has the potential to create many debates and proceedings, such as in Harleysville. This is because experts, and often official ethics opinions, generally agree that reasonable efforts are about process more so than a particular technology or practice.

For example, the updated comment to Rule 1.6(c) on confidentiality provides a nonexhaustive list of factors to consider whether an attorney acted reasonably in the lead-up to a breach of client data, but it does not endorse a specific approach. The comment recommends considering the type of information stored, the likelihood of a breach without putting safeguards in place, the challenges and costs to implementing safeguards, and how those safeguards may affect the attorney’s ability to represent the client.

**LACK OF SPECIFICS?**

Last May, the Standing Committee on Ethics and Professional Responsibility built on existing guidance concerning confidentiality with Formal Opinion 477R.

“It’s the most current, most thorough guidance on lawyers’ duties to protect confidential and privileged information,” says Lucian Pera, a partner at Adams and Reese in Memphis, Tennessee, and co-author of an article in the second edition of the *ABA Cybersecurity Handbook*.

This opinion replaced a document from 1999, which many interpreted as a greenlight to send confidential client communications through nonencrypted email in every circumstance, Pera says.

The new opinion says the 2012 Model Rules changes “do not impose greater or different duties of confidentiality.” However, “how a lawyer should comply with the core duty of confidentiality in an ever-changing technological world” does require some reflection.

For many reasons, Pera likes the opinion. Notably, he says, one can give it to an IT vendor and, without too much legalese, the company can comprehend the standards lawyers have to meet.

The guidance recommends that an attorney learn about the nature of threats, how client information is transmitted and stored, and best practices generally. It continues by saying client confidential documents should be labeled appropriately; lawyers and nonlawyers working on a matter should be trained in cybersecurity and confidentiality procedures; and due diligence should be conducted on technology vendors.

The updated Model Rules have been adopted by 28 U.S. jurisdictions, according to the ABA Center for Professional Responsibility’s Policy Implementation Committee. However, state ethics committees are split on whether to add specifics or keep it general.

A 2014 Kentucky Bar Association opinion on cloud computing and confidentiality exemplified the general approach when it didn’t take a stand on a particular practice because “technology evolves every day.”

The general approach is not on account of the new rules, however. A New Jersey ethics opinion from 2006 stated there’s a reluctance to create an interpretation or requirement “tied to a specific understanding of technology that may very well be obsolete tomorrow.” In support of this conclusion, it referenced a 1983 opinion that called personal computers a novelty and focused on confidentiality issues raised by floppy disks, “the prevailing data storage device” at that time.

On the other hand, many states have tried to provide more specific guidance and considerations for lawyers. Catherine Sanders Reach, director of law practice management and technology at the Chicago Bar Association, says she understands why some bars want to write more general opinions. But she prefers those that provide multiple scenarios because “it gives people a definitive way to plug in.”

As an example, she points to a Texas Center for Legal Ethics opinion
from 2015 regarding whether email should be used to send confidential information.

While determining that a lawyer could ethically communicate confidential information via email, the opinion provided a half-dozen circumstances in which heightened security may be prudent, including whether the email is sent from a public or borrowed computer, whether there was reason to think people outside the matter could access the receiving email account, and whether there was reason to think law enforcement may read the email—with or without a warrant.

**LEARNING PROCESS**

Other states have made separate attempts to provide more specific guidance, including ways to consider a cloud computing vendor, the use of public Wi-Fi, and how to discard old devices that store data. These efforts, Pera argues, are broadly helpful, but lawyers routinely want more. “Many lawyers I talk to say, ‘Tell me what cloud providers I can use, and which I can’t,’” he says. But Pera does not think ethics opinions are the place for this discussion, saying that the “day that kind of guidance came out, it would be on the path to obsolescence.”

At the core of Pera’s concern is that lawyers’ adoption of technology, and the technology itself, is constantly changing. The ABA’s Commission on Ethics 20/20, which recommended the updates to the Model Rules, also acknowledged this by including a comment that extended attorney competency to include technology.

Comment 8 of Rule 1.1 says, “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

To Pera, this means attorneys have to use technology they understand, find tech gurus to shore up their knowledge, and use easy and inexpensive—if not free—security measures to decrease risk whenever they can.

Using *Harleysville* as an example, he says, “we would never have that case” if the insurer made the easy choice to create a password.

To help lawyers understand cybersecurity, CLEs are popping up around the country. However, the Florida Bar has gone above and beyond. In September 2016, the Florida Supreme Court adopted the amended ABA Model Rule 1.1. At the same time, the Florida Bar became the first state bar association to require at least three hours of CLE training in a technology program over three years.

Adriana Linares, a technology consultant to the Florida Bar, told the *ABA Journal’s* Legal Rebels Podcast in late 2017 that the bar wanted to use mandatory CLEs to signal that technology is important and worth paying attention to. While cybersecurity is only one component of provided classes, Linares says the response from members is “overwhelmingly positive.”

Following Florida’s lead, the Pennsylvania Bar Association in January recommended the state supreme court adopt a technology CLE requirement of one hour every two years.

Technology “is an important area for lawyers given our responsibilities,” says Dan Harrington, chair of the PBA’s Legal Ethics & Professional Responsibility Committee.

He says the adoption of this requirement would benefit lawyers and their clients, and it’s not clear whether the state supreme court will approve this recommendation.

Regardless of whether technology CLEs are mandatory, Nelson of Sensei Enterprises says everyone should be attending the classes. “If you don’t attend one cybersecurity CLE a year, you’re likely doing yourself a disservice,” she says, adding that putting in this work can go a long way. “Anytime you’re getting better in cybersecurity, you’re doing pretty well.”
Seven weeks remaining; Mondays 9 am ET through May 14

Griswold v. Connecticut (1965)
Katz v. United States (1967)
Brandenburg v. Ohio (1969)

New York Times Co. v. United States (1971)
Gregg v. Georgia (1976)
Regents of the University of CA v. Bakke (1978)

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Inspired by Netflix, the legal research service is creating its own content by relying on an old, possibly outdated model

By Rich Acello

Of course, another well-known adage is “What’s old is new again.” That seems to be the one that legal research provider Fastcase relied on when it decided to launch its latest venture.

In January, Fastcase, which serves more than 800,000 subscribers, launched RAIL: The Journal of Robotics and Artificial Intelligence & Law—a print publication available via subscription. The journal, which features law review-style articles and commentary from experts in the legal tech field, will be published six times per year and be the flagship publication for Fastcase’s new publishing arm, Full Court Press.

According to Fastcase CEO Ed Walters, the “back to the future” venture is an example of being somewhere others aren’t. “We’ve always been zigging when everyone zags,” says Walters, who decided to launch RAIL because he and others at Fastcase were interested in the topic and because he teaches a law of robots course at the Georgetown University Law Center.

The company also was inspired by a 2009 article by Malcolm Gladwell, “How David Beats Goliath.” Walters says, “It’s the story of a basketball coach who couldn’t teach his players to jump higher, so he taught them how to do a full-court press defense on every inbound. When he was accused of cheating, he said, ‘I’m just not playing your game.’ ”

Walters also points to Netflix as an inspiration. “While Netflix started out as an aggregator of movies, they said over the long term we’re going to create our own original content,” Walters says. Like Netflix pre-House of Cards, Walters found that users had to rely on other services when they hit the limit of what Fastcase provided.

“There are more than a million searches on Fastcase every week,” Walters says. “But when lawyers need expert commentary about the law, they need to stop using Fastcase and go somewhere else. For the future, we needed to make the Netflix kind of move, and that’s where Full Court Press comes from. We will be our own publisher with our own content. We know what people are searching for, so we can publish treatises targeted to people’s interest. We can marry our catalog to their searches.”

RAIL WAYS

How much of Fastcase’s audience will be tempted by the chance to curl up with a journal about robotics and AI? “I don’t know what the readership for RAIL will be,” Walters says. “We don’t want to be like every other journal in the world—we want to do it differently.”

Among the book lovers at Fastcase is Steve Errick, chief operating officer. “I was at a tech conference recently, and everyone was saying there’s not a lot being written about artificial intelligence,” says Errick, former managing director of research.
information at LexisNexis and owner of Book and Leaf, a bookstore in Brandon, Vermont. “I’m starting to hear from authors who want to bring their books to us. We’re looking to publish books that will be a combination of print, e-books and online. In addition, print publishing is much more affordable. You can print for a third of the price 10 years ago.”

Hugh Logue, director and lead analyst at Outsell, a research company based in Burlingame, California, wrote an article in November in which he claimed the market for printed publications may be boosted by “screen fatigue.”

“Fastcase’s strategy to introduce books in the legal space is a timely move, … as consumers increasingly look to switch off from the pressure of social media and electronic devices in their downtime,” Logue wrote.

He cited a recent Publishers Association survey that reported in the United Kingdom, sales of consumer e-book titles decreased by 17 percent to 204 million pounds in 2016, the lowest level since 2011, while print book sales hit a five-year high.

Logue also pointed to a 2016 Pew Research Center study, which reported that 65 percent of Americans read a print book in the previous year, more than double the rate for e-books and quadruple the rate for audiobooks.

Can print publications be successful in a digital-dominated media landscape? Logue says, “The growth of digital content does not need to be at the expense of print. Under pressure to hit targets to increase digital usage, for the last decade or so, commissioning editors have developed a lot of poor-quality digital content.

“There are now countless blogs that never get updated, podcasts that go unheard, and dull videos of lawyers reading a monotonous script to camera. This is digital for digital’s sake and a complete waste of time. The good editors are now the ones returning to print and figuring out how to make it work in a mixed media world,” he adds.


“Books need to be more,” Walters says. “You can have paper books that point you online where you can download forms, download cases and use hyperlinks. What an opportunity for 21st-century legal publishers. It’s a very exciting time.”


“I wanted people calling me on the phone prepared to pay me $10,000 to $20,000 for a case rather than getting ten $2,000 cases... that’s one big difference; we’ve been getting a lot more of the bigger stuff.”

- Mark Hammer
The Hammer Law Firm, LLC

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New School

Founded by Yale Law School and the San Francisco city attorney, a civil litigation clinic aims to train law students—and make a difference  By Stephanie Francis Ward

CIVIL PROCEDURE IS OFTEN THE HARDEST CLASS IN LAW SCHOOL, BUT YALE LAW SCHOOL THINKS STUDENTS WILL LEARN MORE BY DOING.

The school has set up a law clinic for first-, second- and third-year students to work on novel lawsuits with the San Francisco City Attorney's Office. This approach makes the subject easier and more meaningful, according to some of the students.

A 'SECRET WEAPON'

The students already have made an impact. A recent lawsuit that involved the clinic, known as the San Francisco Affirmative Litigation Project, was City and County of San Francisco v. Trump. In the case, filed last year in the U.S. District Court for the Northern District of California, the clinic argued it’s unconstitutional to withhold federal funds from cities that limit local law-enforcement cooperation with federal immigration agents.

In November, the court blocked President Donald Trump’s executive order to deny federal grants to sanctuary cities. The case has been appealed to the 9th U.S. Circuit Court of Appeals at San Francisco.

“Had I not been working on the case, I don’t know if I would have been as motivated,” says Emma Sokoloff-Rubin, another 3L. “Working with a librarian learning research skills can seem boring until you are applying them and you learn how they matter.”

MORE WINS

California law allows certain state and local officials, including the San Francisco city attorney, to bring lawsuits on behalf of all state residents.

Other matters the project has handled include a 2014 state court action that resulted in a $1.1 billion judgment against three lead-paint manufacturers, and Hollingsworth v. Perry, which argued that California’s same-sex marriage ban was unconstitutional.

The 9th Circuit found in 2012 that the voter-passed law known as Proposition 8, which banned same-sex marriage, violated the Constitution. The state of California opted not to defend the action, and in 2013, the U.S. Supreme Court found that the petitioners, intervenors affiliated with groups that opposed same-sex marriage, did not have standing.

“This was dubbed the trial of the century, and my students got to help,” says Heather Gerken, leader of the clinic. She was appointed dean at Yale in 2017 and says she opted to continue overseeing the clinic rather than teaching a lecture class because she finds the work fulfilling.

“Sometimes the model in other schools is that you have a one-semester model. You learn a little bit, and you do a small case,” Gerken says. “Our students are able to put five semesters into a clinic where they can do incredibly sophisticated work. I said to my students, ‘You know, you’d be lucky to get to work on a case like this once in a lifetime. You never win a nationwide case against the president.’ ”

Heather Gerken: Yale students “put five semesters into a clinic where they can do incredibly sophisticated work.”
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IMBALANCE OF POWER

THE EXECUTIVE BRANCH PUSHES THE BOUNDARIES OF THE SEPARATION OF POWERS

BY TERRY CARTER
When President Donald Trump was elected with what he saw as a mandate to shake things up, the stolid study of constitutional law suddenly became operatic, including the political doctrine of the separation of powers. Aspects of it are now dramatic topics, sometimes even on the street in a fashion, though only a quarter of Americans can name the three branches of government.

Most view the discussion through their own lenses, and many legal scholars are no different.

Take, for example, the president’s direct attacks on the judiciary in general and some individual judges in particular—calling one a “so-called judge”—when his travel ban ran into a wall in the courts.

For Josh Blackman, a libertarian professor at South Texas College of Law Houston, “The tweets are all bark and no bite, and don’t go anywhere. It’s just the president venting, and I wish he wouldn’t do it. But there actually are policy achievements going on.” Blackman notes that despite presidential fulminations, the Justice Department has continued to follow law and procedure.

Blackman’s former teacher Ilya Somin at the Antonin Scalia School of Law disagrees. He’s a public choice theorist who believes that the widespread “rational ignorance” of voters—people too busy at work and life to study politics—is harming our system of government.

“I think there is bite, and the barking itself has some significance. If he’s perceived as getting away with this and not paying a political price, then future politicians will say, ‘If he can get away with it, maybe I can, too.’ It becomes the new normal.”

But then Tara Leigh Grove, a professor at the William & Mary Law School who studies how the federal judiciary is affected when brought into hot-button issues, believes the system has shown remarkable resolve. She shares Somin’s fear of possible long-term implications as well as Blackman’s emphasis on the Justice Department having hewn to the law.

“As soon as a single federal district judge issued an injunction with the first travel ban,” Grove says, “the Department of Homeland Security complied.”

Later, another federal judge issued an injunction against President Trump’s move to rescind President Barack Obama’s Deferred Action for Childhood Arrivals immigration policy, and 700,000 people got to remain in the U.S. for an indeterminate period.

“This was because a single judge ruled against the government,” Grove says. “A lot of people don’t realize how extraordinary that is when compared to other societies. In our culture, it’s just the norm.”

As for the norms that uphold that judicial independence, Grove adds, “they’re robust but also fragile, like a plate that could break if you drop it. I think they’re in trouble, but they’re not broken yet.”

One’s position on such a conversation between governmental branches doesn’t necessarily depend just on what one believes, but perhaps also on presidential cycles. When a new administration brings a change in political party, there is a reversal of polarity in mindsets.

Blackman likes how Harvard Law School professor Adrian Vermeule put it in his blog just weeks after Trump’s election, describing a scene in any movie adaptation of a Jane Austen novel, when two lines of dancers switch to opposite sides of the ballroom. The dance continues with the same structure, but the dancers are suddenly facing in opposite directions.

Vermeule writes that “after a short period of confusion and recalibration, we would see liberal lawyers become critical or suspicious of presidential administration under Trump, but the conservative lawyers will make their peace with the administration. We will see a bewildering switch of places, but no major change in legal doctrine.”

**Shifts in the Balance?**

There has been, though, a significant change in the public face of the presidency, and the kind of tone set at the top. But is President Trump actually upsetting the balance of power? Is his characteristic breach of norms—“tough talk” and sometimes mercurial action—itself unsettling enough to throw things off? Or is this just his time on the stage and no more?

This is all playing out as the three branches of government work through their duties: Congress making laws; the executive implementing them; and the courts resolving inevitable questions and disputes.
But it is not so simple as a game of rock-paper-scissors.
There also is a fluid dynamic of communication between the three branches, a complex dialogue that is sometimes subtle, sometimes sharp. It is clear the tenor and method have changed. Trump—to the expectation of much of his political base—doesn’t waste time on subtlety and puts a serrated edge on sharpness.

As part of the growing discussion, the ABA’s theme for this year’s Law Day, chosen by President Hilarie Bass, is “Separation of Powers: Framework for Freedom.” Congress in 1958 set May 1 of each year for celebration of the rule of law, as proposed the previous year by then-ABA President Charles S. Rhyne.

“The threats to the separation of powers and the public’s and many in government’s apparent lack of understanding of the concepts of three separate but equal branches of government led me to make this my Law Day 2018 theme,” Bass says. “Without a healthy and functioning separation of powers, we run the very real risk of degenerating into tyranny.”

While other presidents in recent years had several or more major legislative victories early in their terms, Trump’s most significant policy accomplishments have come through assertions of executive power—a bag of tools that includes executive orders and the appointment of agency heads.

A number of Trump’s agency appointments, including Cabinet members, have been controversial in ways that, among other things, indicate radical policy changes—the individuals’ beliefs and goals are antithetical to the agency’s mission or customary activity.

For example, Environmental Protection Agency Administrator Scott Pruitt, when he was Oklahoma’s attorney general, had sued the agency, challenging its clean power plan—and the EPA itself is now moving against it. And the Consumer Financial Protection Bureau’s acting director, Mick Mulvaney—a sharp critic of the agency since before it was launched and also director of the White House’s Office of Management and Budget—requested zero funding for the CFPB for the first quarter of this year. Along with that largely symbolic gesture, given that the agency had reserve funds, the CFPB dropped several high-profile lawsuits against payday lenders.

These moves are part and parcel of the Trump administration’s declared war on the so-called administrative state. That enemy is composed of scores of agencies with “armies of bureaucrats” working under the “misguided notion that...”

“AS SOON AS A SINGLE FEDERAL DISTRICT JUDGE ISSUED AN INJUNCTION WITH THE FIRST TRAVEL BAN, THE DEPARTMENT OF HOMELAND SECURITY COMPLIED.”

—TARA LEIGH GROVE

“I THINK THERE IS BITE, AND THE BARKING ITSELF HAS SOME SIGNIFICANCE.”

—ILYA SOMIN

“PHOTOGRAPHS COURTESY OF WILLIAM & MARY LAW SCHOOL AND THE ANTONIN SCALIA SCHOOL OF LAW”
independent experts rather than our elected representatives are best suited to govern national affairs,” White House Counsel Donald McGahn said in a November speech.

Addressing the Federalist Society’s annual convention—he’s been a member since law school—McGahn said, “The greatest threat to the rule of law in our modern society is the ever-expanding regulatory state.”

The administration’s Office of Information and Regulatory Affairs reports that in 2017, federal agencies withdrew or delayed 1,579 planned regulatory actions, though many were long-dead wood.

And the president signed 14 legislative repeals of Obama-era rules through the Congressional Review Act, under which Congress has 60 legislative days to disapprove regulations—typically so-called midnight rules, adopted at the end of the previous president’s term. The CRA had been used only once previously.

Not only that, but at the outset of his administration Trump signed an executive order for agencies to repeal two regulations for every one they adopt. But the year-end OIRA report promises more for 2018: “Agencies plan to finalize three deregulatory actions for every new regulatory action.”

The president has added showmanship with public signings of executive orders, a gesture President Bill Clinton had used to the same effect—taking credit for what agencies had done, perhaps with suggestion from the president but, after all, actions by the agencies themselves. McGahn spoke to the Federalist Society about pushing decision-making away from administrative agencies and back to the Congress, which, he says, “often punts the difficulty of lawmaking to the executive branch.”

DEFERRING TO CHEVRON

Those who follow that purist libertarian-conservative view would end what they see as breaches of the separation of powers when courts give deference to administrative agencies under the Chevron doctrine and the delegation of legislative power to them.

This line of thinking is supported by Supreme Court Justices Clarence Thomas and Neil M. Gorsuch. Under Chevron, when a court finds a statute ambiguous and that it contains an express or implied delegation of authority to the agency, it defers to the agency’s interpretation.

Blackman favors an end to deference and delegation. He was encouraged that Trump has tried to restrain the very executive power that he himself enjoys, such as when he moved to rescind Obama’s pushing the boundaries of prosecutorial discretion with DACA.

“It has surprised me that Trump has taken steps to rein in his own authority,” Blackman says, believing that such decisions are for Congress to make.

“I like what McGahn has to say,” he continues. “That would be significant. I wait to see if he follows through on it.”

But such an effort likely won’t go far anytime soon because the Supreme Court “has largely accepted delegations,” says Cary Coglianese, who teaches both regulatory law and political science at the University of Pennsylvania.

McGahn knows that. His context was judicial nominations, while lauding Gorsuch and throwing shade at Chief Justice John G. Roberts Jr.—who left conservatives seething when he voted to uphold the Affordable Care Act. Speaking at the Conservative Political Action Conference in February, McGahn said Trump is targeting the “regulatory apparatus” with new judges.

“There is a coherent plan here, where the judicial selection and the deregulatory effort are really the flip side of the same coin.”
The more realistic possibility for battle over the separation of powers would be changes in the _Chevron_ doctrine, says Coglianese, who chairs the rulemaking committee of the Administrative Conference of the United States and formerly chaired the ABA Section of Administrative Law and Regulatory Practice's committee on rulemaking.

The Trump administration, McGahn has said, wants courts to take harder looks at agencies’ authority and to move away from _Chevron_.

A liking for the doctrine sometimes depends on which party is in power, though conservatives generally dislike it more, despite the fact that the underlying case had been a significant victory for the Reagan administration. The 1984 _Chevron v. Natural Resources Defense Council_ opinion had the effect of limiting the reach of the Environmental Protection Agency.

"_Chevron_ seems to me relatively neutral between pro- or deregulatory action," Coglianese says.

Notwithstanding the administration’s distaste for _Chevron_ and a professed dislike for Congress ceding power to the presidency, agencies acting in accordance with the president’s wishes have been reinterpretating statutes in significant cases—saying the Obama administration had misinterpreted them.

The Department of Health and Human Services, for example, adopted two rules for the Affordable Care Act, allowing employers to drop coverage of contraception in health insurance plans if they have religious or moral objections to doing so.

A federal judge in Philadelphia issued a preliminary injunction in _Pennsylvania v. Trump_, saying that it went against the statute’s text, and that the rules would also permit an employer to claim a moral conviction that women don’t belong in the workplace in order to deny contraception coverage.

The reinterpretation of statutes is an easier way to make such a change. Trying to remake the rule itself would require the same lengthy process of notice and comment needed initially to implement it.

"On the one hand, McGahn is making a pitch that some in the conservative community have been making, that _Chevron_ gives the executive too much authority," says Coglianese, "and on the other hand knows this is the way to prevail."

**POWER-GRABBING**

A president assertively increasing presidential powers is not new. In recent decades, those in the office have steadily pushed boundaries and expanded a president’s reach and impact, while at the same time Congress has ceded more and more power to the presidency.

President Obama, for example, frustrated that the Republican-controlled Congress failed to act on certain problems, put his own pen to work, issuing executive orders for so-called major rules—regulations measured by their impact on the economy—nearly double what his predecessor, President George W. Bush, had done. The result was sweeping change of a kind typically wrought through legislation in health care, financial industries, environmental protection, wages and workplace conditions, and equal rights, among others.

Obama also enjoyed a number of important legislative victories during his first two years, when Democrats controlled both the House and the Senate, passing the Affordable Care Act as well as legislation for economic stimulus, against hate crimes and opposing discrimination in women’s pay.

But Trump, even with Republican control of both houses of Congress, has had only one significant legislative effort with the Tax Cuts and Jobs Act of 2017.

Opponents called Obama the “imperial president.” A tag from President Trump’s critics remains a work in progress.

“Talking about the separation of powers inevitably requires talking about the politics of the moment,” says Josh Chafetz, a Cornell Law School professor who studies legislation and politics. “So, I have a necessarily political view of the separation of powers.”

Though acknowledging Congress’ long, steady practice of handing off power to the presidency, Chafetz argues that the legislative branch still has significant sway vis-à-vis the presidency. This happens more when a president is perceived as weak, as he believes Trump is, considering the fact that he entered office with relatively low approval ratings and has maintained them.

Over a number of decades, Congress has pulled back from legislating on hot-button issues for a variety of reasons, some structural and some external—nearly all political. Some argue that its protracted inaction, such as with immigration reform, is a feature, not a bug, ensuring more careful action.

But choosing not to cast yes-or-no votes on divisive issues also helps protect members of Congress from pushback by voters in these increasingly partisan times.

"But still," says Chafetz, "I find it fascinating that thus far in the Trump presidency, Congress hasn’t fallen in line behind the president. You’d expect that, with the same
In an interview, Ornstein ticks off a long list of breached norms during Trump's presidency, addressed in the recent book. They include the time when he phoned and congratulated Turkey's President Recep Tayyip Erdogan for his win on a constitutional referendum that gave him sweeping new powers, which most saw as a power grab. Trump owns buildings in Turkey.

Just days later, the president extended an invitation for a White House visit to President Rodrigo Duterte of the Philippines, where Trump also owns property, and where Duterte has ordered thousands of extrajudicial killings of suspected drug traffickers.

That leaves other players in the traditional back-and-forth of politics flummoxed, Ornstein says. Republicans tend to go along, he argues, because they're getting what they want, such as tax legislation and, at least, enough harm to the Affordable Care Act to endanger its viability. Democrats can complain.

**TWEETS AND THE TRAVEL BAN**

But, again, the right or wrong of some of these actions sometimes is determined in the eye of the beholder. For example, plenty of conservatives believe that some judicial opinions in which injunctions were issued against Trump initiatives went too far in both style and substance by using as evidence his own statements made during the campaign and elsewhere.

In issuing an injunction against the travel ban, for example, U.S. District Judge Derrick Watson of the District of Hawaii repeatedly used Trump's own words against him in the opinion, from tweets and other statements.

The judge wrote, with a quote from the Trump presidential campaign's website, "There is nothing 'veiled' about this press release: Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States."

Conservatives didn't just argue against using campaign rhetoric to judge subsequent presidential decision-making; they believe the judges breached norms, too.

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DEMOLISHING NORMS

Contentious as that episode seems, there's a normalcy to it as far as the separation of powers is concerned. But Trump has brought other tools to bear that, while not new in the game, arguably have been taken beyond what the nation has seen before—at least, perhaps, since the brash and combative populist Andrew Jackson, in the first half of the 19th century.

Trump has demolished norms, enough so to spark concerns about long-term damage. Ours is a system of laws and rules, but it is undergirded by norms—those informal understandings that guide social, including political, behavior.

While there has been no dearth of assertive presidents, Trump, a nationalist-populist who appeals to the hopes and fears of many, has his own public style, which they tend to like: direct, unrelentingly in-your-face—and when opposed, attack, attack, attack.

But what would happen to the choreographed synchronicity in that Jane Austen scene if a leading dancer started twerking?

"We can have all kinds of rules in place—these traps in the separation of powers—and they can be wonderful in theory, but they're still dependent on a web of norms of behaviors," says Norman Ornstein, a resident scholar at the American Enterprise Institute, a conservative think tank. "When norms disappear, you're really lost."

Ornstein has been a nonpartisan fixture in Washington for decades. But, along with co-author Thomas Mann of the Brookings Institution think tank, he broke out of that mold with their 2012 book, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism.*

They blamed the radicalization of conservatism for our dysfunctional government. Last September they released a new book, along with co-author E.J. Dionne Jr., titled *One Nation After Trump: A Guide for the Perplexed, the Disillusioned, the Desperate, and the Not-Yet Deported.*

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Conservatives didn’t just argue against using campaign rhetoric to judge subsequent presidential decision-making; they believe the judges breached norms, too.
“I disagree with the decisions, but the manner in doing so is stunning,” says Blackman, a fan of Trump policies but not his behavior. “There’s no reason why a court needs to cite his tweets. It was totally gratuitous.”

Not so, says Somin, who was born in the Soviet Union (now Russia) and came to the U.S. at age 5 with his family.

“It was necessary because the tweets are relevant evidence of motives, like other presidential statements,” Somin argues. “An official, unmediated statement of the president’s motives is strong evidence of discrimination. Once he behaved that way, the courts had a duty to take account of it.”

However these cases play out, the legitimacy and dignity of the justice system have been dinged.

The president lashed out at injunctions concerning the travel ban, his denial of funds to so-called sanctuary cities, his ban on transgender individuals entering the military and his rescinding of DACA, an executive order that did what Obama thought Congress should have done.

In his venting on Twitter and elsewhere, President Trump variously called the rulings “ridiculous” and the product of “judicial overreach” by “unelected” federal judges in a court system that is “broken and unfair.”

Trump has stoked the fire under simmering issues over the separation of powers.

Optimists hope that is a good thing, forcing the nation to rethink and better understand the most basic principles of our government. Pessimists fear the fabric being torn beyond repair.

There are different perspectives on whether it’s good or bad that a president can do so much on his own, says Grove, the William & Mary Law School professor.

“First, you have to figure out what you think,” she says.

**Tipping the Balance of Justice**

While President Donald Trump’s brash style and bold actions in dealing with the other branches of government have made the study of the separation of powers popular again, the greater concern is a more subtle balance of powers within the executive branch—the level of independence accorded the Department of Justice.

The DOJ must be politically accountable, but it also should be free from political pressure in certain matters, particularly criminal investigations.

These strains were laid bare as the White House has at times bullied the attorney general, the FBI director, who was fired, his successor and others at the top of that agency and the DOJ, seeking to halt an investigation of contacts between the Trump campaign and representatives of the Russian government.

“At least since Watergate, practices and policies have recognized it as almost sacrosanct to have appropriate limits on communications between the White House and DOJ,” says Randall Samborn, a former assistant U.S. attorney in Chicago. Samborn was spokesman for U.S. Attorney Patrick Fitzgerald when he was a special counsel investigating possible White House involvement in a leak identifying a covert CIA operative during President George W. Bush’s term.

“But they’ve been breached at times, as seen in recent battles over the level of independence for DOJ in handling politically tinged criminal investigations that reach into the White House itself,” Samborn says. “Nothing less than preserving the rule of law is at stake.”

While the DOJ doesn’t have any constitutional claim to independence from the president, there are norms and practices to prevent federal law enforcement from being a tool for the president’s personal or partisan use. Some of these have been set through memoranda by post-Watergate attorneys general seeking to keep the department “impartial and insulated from political influence,” as the most recent iteration, by Attorney General Eric Holder in 2009, put it.

In 1993, just three people at the top of the DOJ and four in the White House could be involved in initial contacts about investigations. Attorneys general John Ashcroft and Alberto Gonzales in the Bush administration raised those numbers dramatically, ultimately to 895 in the White House and 42 at DOJ for discussing matters that didn’t involve national security.

That combined with politicized hiring at the main DOJ led to scandal when eight U.S. attorneys were fired in 2007. Among the allegations, they had failed to follow directives to pursue voter-fraud cases or refused to prosecute certain Democrats and pull back from the same with some Republicans.

One of those fired, Paul Charlton, who was the U.S. attorney for Arizona, was targeted mainly for seeking reconsideration of his decision not to pursue the death penalty in a case in which he believed the evidence was too weak for it. Ashcroft and Gonzales had been pushing for more capital cases.

“So long as we have career men and women in the Department of Justice to temper the natural instincts of the political appointees to pursue factional purposes, then I think the department will function correctly,” says Charlton.

Long before today’s controversies, Charlton was passing along to others a quote from John Boyd, a famed Air Force fighter pilot and later a military strategist: “If your boss demands loyalty, give him integrity. But if he demands integrity, give him loyalty.”

by Robert W. Tarun and Peter P. Tomczak

The new fifth edition of *Foreign Corrupt Practices Act Handbook* is a comprehensive guide for attorneys, at every level, who represent businesses doing international work. With its comprehensive analysis of potential FCPA liabilities and sound practical suggestions as to how to deal with them, this book is a very valuable asset for both unseasoned and seasoned FCPA practitioners.

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Author Robert W. Tarun, a former Executive Assistant U.S. Attorney in Chicago, has counseled and conducted sensitive investigations for multinational companies in over 60 countries. Listed in Best Lawyers in America (Commercial Litigation and White Collar Criminal Defense) and Chambers USA, he was named Best Lawyers’ White Collar Criminal Defense Lawyer of the Year in 2017 for San Francisco. Tarun, who taught White Collar Criminal Practice as a Lecturer in Law at the University of Chicago Law School, is a Partner at Baker McKenzie LLP in San Francisco. Co-author Peter P. Tomczak has conducted investigations in more than twenty countries and counseled companies and their boards of directors on anti-corruption issues. After graduating first in his class from the University of Michigan Law School, he clerked for Vice Chancellor John W. Noble of the Delaware Court of Chancery. He serves on the Steering Committee of Baker McKenzie’s North America Litigation and Government Enforcement practice group, and is the Chair of the Chicago office of that practice group.

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“The Foreign Corrupt Practices Act Handbook is ridiculously good.”
—John S. Siffert, Founding Partner, Lankler Siffert Wohl LLP, New York

“This is a must read for any lawyer handling FCPA matters. It is a comprehensive and well written book by Bob Tarun, one of the country’s outstanding white-collars criminal lawyers.”
—Robert S. Bennett, Partner, Hogan Lovells LLP, Washington, DC
MEET 3 HUMAN RIGHTS LAWYERS FIGHTING FOR CHANGE IN THE U.S. AND AROUND THE GLOBE

BY MAUREEN STAPLETON
In December 2016, Sarah Belal received the inaugural Franco-German Prize for Human Rights and the Rule of Law for her work as the president of Justice Project Pakistan. When she went to collect the award, she noted that the majority of the 15 winners were women.

“I don’t think that’s a coincidence that women engage in human rights law and stick around with it longer,” Belal says. “Work in human rights law is thankless. Women are better at being resilient and getting through that, and [it comes] at a huge personal cost.”

Brittany Benowitz, director of the Justice Defenders Program for the ABA Center for Human Rights, says this tallies with her experiences.

“Certainly there are a disproportionate number of women working on international human rights and rule of law issues within the ABA,” she says.

Benowitz points out that four of the five regional directors for the ABA Rule of Law Initiative are women, and says the majority of the attorneys on her staff are also female.

Benowitz says that some part of the high number of women in the field may be attributable to socialization. “The human rights field often involves thankless, difficult work,” Benowitz says. “It therefore attracts people who are primarily motivated by a desire to help, which women are socialized to prioritize.”

Azadeh Shahshahani, who works as legal and advocacy director at Project South in Atlanta, says the job does come with plenty of challenges.

“As a woman, you do have to have a lot of tenacity, patience and persistence just to keep at it,” Shahshahani says. “Definitely there is sexism in the legal field, and that is also something to fight against.”

But even in regions where the law has long been the province of men, female lawyers are contributing to human rights law.

Kimberley Motley, who is based in Afghanistan, says that when she first started practicing in that country, she was unique. “Me winning cases there was definitely a shock to the system for them,” she says.

“I do think it’s a benefit for me to be a foreign woman,” Motley adds. “I can see everything. There’s no way an Afghan woman is going to see a male foreign lawyer. I can go to secret meetings with women.”

“The advantages for women in the human rights field are that the employers tend to pay greater attention to issues of equality, it can contribute to a sense of self-worth and there is often good camaraderie,” Benowitz says. “The disadvantages are that women who chose to go into human rights are afforded less recognition than those working for for-profit enterprises.”
Sarah Belal never gives up. As president of Justice Project Pakistan, she can't. The nonprofit human rights law firm she founded in 2009 is leading the fight against the death penalty in Pakistan, which has the largest death row in the world.

“We ... believe that you should just keep at it,” Belal says. “There is a moment where things just change, and we’ve seen enough of that in our eight years of dealing with the government and various stakeholders to know it’s a longer fight.”

“The trick in this is just stick around long enough so you experience some of the change,” she adds. “All you need to see is a centimeter of change, and that motivates you enough to go another decade.”

JPP also works to help victims of police torture, detainees in the war on terror and mentally ill prisoners. And the group uses nontraditional forms of advocacy such as art exhibitions to highlight injustices. “That is a critical part of what we do—it’s going to change hearts and minds,” Belal says. “You have to push back against the dominant narrative that’s being pushed by the government.”

With 27 crimes eligible for the death penalty, Pakistan has 8,200 prisoners on death row. The United States has about 2,800.

Pakistan put a de facto moratorium on executions in 2008, but that was lifted in 2014 after the massacre of 141 people at the Army Public School and Degree College. Since then, the country has executed more than 480 prisoners, including 320 executions in 2015 alone. “It was a bloodbath,” Belal says. “The entire time we were working on this during the moratorium, we said ... it’s a very tenuous situation; and the minute it flips, a lot of people are going to die. And that’s exactly what happened.”

When the executions resumed, Belal says, “there was a lot of trauma, just going through so much death.” She adds that “it’s kind of ridiculous that there’s only one tiny organization working on the death penalty as an issue” in the country with the largest death row in the world.

JPP, with the Allard K. Lowenstein International Human Rights Clinic at Yale Law School, conducted one of the few studies of police brutality in Pakistan. Over six years in the Faisalabad district, it found evidence of widespread and systematic torture, with medical confirmation...
in 1,424 cases and another 96 cases requiring further investigation.

Belal says JPP's study and ongoing monitoring of torture by Pakistani police are related to its death penalty work because the majority of people on death row also are tortured by police. “It’s linked,” Belal says.

Despite the heartache that accompanies the cases JPP handles, Belal is adamant that good lawyers continue to empathize with their clients. “You can’t separate yourself from it, and I don’t think it makes you a good lawyer if you do because you don’t try as hard if you separate yourself from it.”

A human rights attorney, particularly in capital cases, must be prepared for the highs and lows. “If you save somebody, there’s no feeling like it in the world,” she says. “But then the flip side is more often you lose somebody than save somebody.”

Although Belal now considers human rights law her calling, it took a few years. After graduating from Smith College with a history degree in 2001, Belal returned home to Pakistan to work in her father’s businesses and realized she wanted to do something about the injustice in her country. “I wanted to do what I could ... and the only road I saw was law.”

By the time Belal entered law school at the University of Oxford, she had the specific aim to become a human rights lawyer. Her ambition crystallized one day during a lecture by Reprieve founder Clive Stafford Smith, who was touring law schools with a client freed from death row in the U.S South. “I remember ... a giant lecture hall and I was just crying,” she says. “It was the only time at Oxford where I felt like someone was speaking to the reasons why I went to law school.”

Belal graduated from Oxford in 2006, qualified in the U.K. in ’07, earned her Pakistan law license in ’08, and founded JPP in ’09.

“I was raised by parents who never quit. It’s kind of in our DNA,” she says. “Not doing this work alone really matters. I’m surrounded by a team of people that really believe in this, and it’s a joy to go to work with people like that.”

Despite the challenges she faces in Pakistan, Belal says she is “absolutely” optimistic about its future. “Pakistan is this incredible place where as rigid as it seems, it has this incredible ability to transform, and that in and of itself gives me a lot of hope,” she says.
When she first entertained the idea of being a human rights attorney, Azadeh Shahshahani thought she would be doing that kind of work abroad. But she quickly came to realize that her legal expertise and advice was just as needed in the United States by immigrants like herself.

“The types of situations these folks are facing are human rights situations, and this is the type of work we have to be doing right here in the United States,” Shahshahani says.

She says she has found that her workload has increased exponentially since the start of the Trump administration in January 2017. “I have to say that I haven’t had a true moment of rest since the inauguration. Every day there’s something new,” she says. “Muslims and immigrants, and especially communities of color, are fearing for their lives in some instances. We are working on policies and procedures so people can feel safe.”

Shahshahani works as the legal and advocacy director at Project South in Atlanta, a leadership-development organization that mobilizes communities through education, partnerships and alliances, and organizing. It’s a continuation of the work she has done with immigrant communities throughout her legal career, including posts with the American Civil Liberties Union in North Carolina and Georgia, before she joined Project South in 2016.

“It’s clear to me that the immigrant community is facing a human rights crisis,” she says. “Pretty much every day, we’re hearing about some kind of government action that is targeting the immigrant communities, and there’s a huge need for legal support.”

Shahshahani knows all too well what it’s like to live amid danger, and also what it feels like to be an American immigrant. The daughter of a doctor, she was born just days after the start of the Iranian revolution in 1979 and lived through the Iran-Iraq
war from 1980 to 1988. Her family left Iran when she was 15 and immigrated to Memphis, where she became a high school sophomore.

“The immigration experience is hard. It’s uprooting,” she says. “I had a privileged immigration experience because I was with my parents and we were documented. The one thing it taught me, though, was to be aware of how difficult the experience can be for other people.”

During her university years, Shahshahani thought she would want to follow in her father’s footsteps and become a doctor. She was even accepted into the University of Michigan medical school. But she changed her mind and enrolled in the law school instead. She was only one week into law school in September 2001 when the 9/11 terrorist attacks occurred. Witnessing Iranian friends being interrogated by the FBI and the special registration program enacted primarily for immigrants from majority-Muslim countries solidified her desire to become a human rights lawyer.

Every day is different as advocacy director at Project South. One recent week found her making a presentation to immigrants about their rights in Durham, North Carolina, then leading a seminar for lawyers about how to help immigrants in the Trump era the next day. And all the while she is monitoring legislative developments and continuing to highlight the conditions at immigration detention centers in Georgia.

Project South released a report written by Shahshahani last May arguing that the two largest immigration detention facilities in Georgia, the Stewart Detention Center and the Irwin County Detention Center, should be shut down because of the conditions, including prolonged detentions, inadequate health care and involuntary work programs. Immigrants at the private prisons have gone on hunger strikes to protest the conditions, which she describes as “horrendous.”

Shahshahani says that actions taken by the Trump administration have made it a difficult time to be a social justice activist in the United States—but also a positive time to do the work, since there are many people who are willing to be engaged. “You feel like you’re not isolated and there’s a lot of outrage out there,” Shahshahani says.

“As long as I’ve been out in the field, I’ve never seen this level of outrage—ever. It’s a moment that allows an opportunity to build a stronger social justice movement, and it gives us as lawyers an opportunity to use the law to do so.”

One notable human rights case Shahshahani litigated was her representation of Lisa Valentine. A Muslim woman, Valentine was jailed for 10 days in 2008 for contempt of court after refusing to remove her headscarf in a Douglasville, Georgia, courthouse.

Shahshahani not only secured a settlement for Valentine from the city but also wrote the now-adopted binding policy of the Georgia Supreme Court that allows people to wear religious clothing of their choice while in courthouses.

“The reason the case has stuck with me is because it was really outrageous, what she had suffered. But we were able to address the situation in a systematic way,” she says. “The issue becomes a policy that we can talk about and create. This is a systematic way to make sure that it doesn’t happen to any individual.”

Although much of her work is in the United States, she has participated in human rights delegations to Haiti, Honduras, Palestine, Tunisia, Egypt and Venezuela. Shahshahani isn’t disappointed that her daily work doesn’t require her to use her passport, given the need for her services in her adopted homeland.

“This is what I want to do with my life,” Shahshahani says. “I’m happy. My work is very much needed, especially where I am, in the U.S. South. I’m in a privileged position to connect with people from around the world.”
Kimberley Motley believes that her style of working is so unique, she's trademarked it.

Unique is one way of putting it. Motley arrived in Afghanistan in 2008 as part of a U.S. Department of State program to train and mentor Afghan defense attorneys and to create a legal aid system.

She says she took the post purely for economic reasons—she couldn't even find Afghanistan on a map when she accepted the job—because she could earn more money abroad than she could as a public defender in Milwaukee.

She decided to stay in Afghanistan and establish her own law practice, which now encompasses criminal, commercial, contract, civil and employment law.

During her 10 years there, she's learned how to adapt to a variety of legal settings—from appearing before the Supreme Court of Afghanistan to sitting crosslegged on the ground to negotiate with a jirga, a traditional assembly of leaders that makes decisions by consensus. Motley says she was the first foreigner to try cases in Afghanistan's criminal courts.

Although she divides her time between Kabul, Milwaukee and Charlotte, North Carolina, Motley says she is liable to jump on a plane and handle cases in other countries, too, including the United Arab Emirates, Ghana and Uganda. "I treat planes like cars," she says. "I'm good at flipping times. I don't get jetlag."

Her grand idea is to train other lawyers in her litigation style and create an eclectic law practice with no fixed headquarters whose lawyers can be deployed anywhere with the nimbleness to adjust to whatever court or country they find themselves in.

"Now I'm going to take this style and train lawyers in it. When I come to countries like Afghanistan, I have to adjust to the environment; you have to figure it out," she says. "If you do things like you always did them, it's not going to work. You're going to have to remix how you practice law."

According to the trademark granted by the U.S. Patent and Trademark Office, "Motley's Law" is "a training program for lawyers, legal practitioners and people interested in legal affairs that provides instruction on handling cases from beginning to end, including client and witness interviewing, litigation techniques, written legal practices in international jurisdictions with
an emphasis on understanding and analyzing human behavior through cultural, environmental, geographic, social, religious, environmental and economic perspectives.

"Motley's Law is adjusting to your environment and updating your playlist," she says. "Laws are music, and you need to use the laws that are for or against your client."

Updating her playlist after every case clearly works. Motley says she's won five presidential pardons in seven years in Afghanistan. Motley is quick to point out that she's not simply a human rights attorney but an international attorney who chooses to do human rights cases.

Her firm, Motley Legal Services, is a for-profit business. She estimates that 70 percent of her work is representing companies and nongovernmental agencies in Afghanistan, with the remaining 30 percent being pro bono work, including human rights cases.

"I have to get the paid work so that I can do the human rights work," she says.

Although she practices various types of law, her human rights work attracts the most attention.

In December 2016, she was detained by Cuban police and interrogated after representing Danilo "El Sexto" Maldonado, a dissident Cuban artist. Maldonado, who received the Vaclav Havel International Prize for Creative Dissent from the Human Rights Foundation in 2015, had posted a Facebook video mocking Fidel Castro's death.

Motley was released by police after agreeing to leave Cuba, and Maldonado was released a month later.

In 2013, she represented child bride Sahar Gul, who was the victim of domestic violence and torture at the hands of her 34-year-old husband's family, which attracted international attention when it came to light.

Motley represented Gul before the Supreme Court of Afghanistan after three of her in-laws, who had been convicted of attempted murder, were released by an appeals court. In a landmark decision, the supreme court overruled the appeals court and sentenced Gul's in-laws, father and brother to five years in prison.

The court also ruled that Gul could sue for civil compensation.

Motley says the case, which marked the first time she appeared in the Afghan supreme court, was one of the cases of which she is most proud. "Sahar believed in the law the way I believed in the law," Motley says.

Motley earned her law degree from Marquette University Law School in 2003, after earning master's and bachelor's degrees from the University of Wisconsin at Milwaukee.

Her unusual working practices led to her presenting a TED Talk, "How I Defend the Rule of Law," in 2014. That was followed by a 2015 documentary film about her life in Afghanistan that was called, appropriately enough, Motley's Law.

Although she says it was scary when she first struck out on her own in Afghanistan, now she can't imagine working any other way.

"There were a lot of people who were against me. A lot. Everyone thought I was crazy," she says. "Now it's great."

Maureen Stapleton is a freelance journalist based in London.
DATA SCIENTISTS HELP COURTS GET WITH MODERN GERRYMANDERING

BOUNDARIES

By Mark Walsh
Last summer, a group of academics organized a workshop about gerrymandering— the manipulation of political lines based on party, race or some other factor.

Such a workshop wouldn’t be uncommon or out of place at a law school or a college political science department. But the one at Tufts University was organized chiefly by mathematicians and with mathematical principles in mind. The “Geometry of Redistricting” workshop mixed math, law and civil rights, with seminars for would-be expert witnesses, teachers, lawyers and the general public. The goal? To create evidence-based solutions to the problem of gerrymandering.

The term gerrymandering dates to the early 19th century and has been the subject of U.S. Supreme Court cases going back decades with very little resolution of the issue. But there is a movement of mathematicians motivated by a brazen and self-confident idea: That mathematical principles can solve the riddle of unconstitutional gerrymandering. Now they just have to convince the courts.

“This isn’t mathematicians trying to liberate us from politics,” said Moon Duchin, an associate professor of mathematics at Tufts and a key organizer of the workshop, at the Aug. 7 opening. “This is mathematicians trying to be in conversation with politics.”

Justin Solomon, an assistant professor of electrical engineering and computer science at the Massachusetts Institute of Technology, told attendees, “It’s no secret with these redistricting problems that, at a very base level, it’s a geometric challenge. Somehow, at the end of the day, we have to draw shapes on a map.”

The question of what shapes, and how they are drawn, is at the heart of state and federal court cases across the country.

‘BLOCKBUSTER TERM’ FOR GERRYMANDERING

Duchin and Solomon are among the founders of the Metric Geometry and Gerrymandering Group, a somewhat awkwardly named organization that put on the first workshop.

The August session could not have come at a more propitious time. It happened several weeks before the Supreme Court heard arguments in Gill v. Whitford, a Wisconsin case that was the first major lawsuit about partisan gerrymandering to be taken up by the justices in 14 years. The last big ruling on partisan gerrymandering was in Vieth v. Jubelirer (2004).

In Gill, the high court is reviewing a lower court’s decision striking down the state’s 2011 Republican-drawn redistricting plan for the Wisconsin State Assembly as a partisan gerrymander. The three-judge federal district court panel
relied heavily on a mathematics-based test for undue partisanship in such plans called the “efficiency gap.” That test was developed by California political scientist Eric McGhee and University of Chicago law professor Nicholas Stephanopoulos.

But even as the justices privately deliberated about what course they would take in Gill after the October arguments, new cases continued to emerge.

“It is shaping up to be a blockbuster term on gerrymandering at the Supreme Court this term,” says Richard L. Hasen, a professor of law and political science at the University of California at Irvine and author of the authoritative Election Law Blog.

In December, the court announced it would hear arguments in another partisan gerrymandering case, Benisek v. Lamone, from Maryland. That case involves a challenge by voters to a 2011 congressional remap drawn by Democrats, which the plaintiffs claim resulted in a massive swap of Republican voters for Democratic ones in Maryland’s 6th Congressional District. The longtime Republican incumbent was ousted by a Democrat the next year.

“The fact that the Supreme Court agreed to hear a second one of these [partisan gerrymandering] cases means this is really the chance” to establish a standard for such claims, Hasen says.

Meanwhile, activity on partisan gerrymandering has been increasing in the lower courts. In January, a three-judge federal district court panel in North Carolina struck down that state’s congressional redistricting plan because it was drawn by Republicans “motivated by invidious partisan intent,” according to the opinion.

Also in January, a three-judge federal court panel in Pennsylvania, in a challenge to that state’s congressional remap, held 2-1 that no claims for partisan gerrymandering could be brought in federal courts under the elections clause in Article I of the U.S. Constitution. (Most of the other partisan gerrymandering claims have been based on the First Amendment’s speech and association rights or the 14th Amendment’s equal protection clause.)

Meanwhile, the Pennsylvania Supreme Court struck down the Republican-led state legislature’s
congressional remap based on partisan gerrymandering that the court found to violate the state constitution. The state's highest court ordered that a new map be drawn for this year's elections. Justice Samuel A. Alito Jr., acting as a circuit justice for the federal circuit covering Pennsylvania, declined a request from Republican lawmakers to stay the order.

And back at the Supreme Court, which has had a steady diet of racial gerrymandering cases in the past 20 years, the justices agreed in January to take up a major racial gerrymandering case from Texas. It involves challenges to remaps for the state's congressional districts and the lower house of its legislature.

**SALAMANDERS, PACKING AND CRACKING**

The August workshop of the Metric Geometry and Gerrymandering Group drew as many as 600 participants, organizers estimate. Three out of four were in math-related fields or other academic disciplines.

There were about 100 K-12 educators, for whom there were some breakout sessions regarding teaching about gerrymandering and perhaps getting young people involved in the effort to solve it. There were students, community advocates and, of course, lawyers.

Those districts, however, have not been struck down.

As professional redistricting mapmakers use more sophisticated data and tools, gerrymandering can be carried out in districts without crazy shapes.

“You can have districts that are perfectly compact that are nonetheless very unfair to one party,” says McGhee, a research fellow at the Public Policy Institute of California in San Francisco.

Two of the most widely used forms of gerrymandering today have the snappy names “packing” and “cracking.”

With packing, the party in control of the map packs as many voters of the opposing party into a handful of districts, which they'll win easily with so-called wasted votes. With cracking, the mapmaker spreads the minority party's voters across multiple districts in a way such that they don't have a chance to win.

“So by making those two things play off each other—packing your opponents into districts, and then cracking and dispersing the ones left over—that's a way to maximize your representation,” Duchin said at the workshop.

She went on to outline the high stakes and sophistication of current methods.

“The threat of gerrymandering, or precision drawing of voting districts in particular to meet some agenda ... is really intensified” today, Duchin said. “It's intensified by technology, it's intensified by data and better handling of big data sets. We have GIS, or geographic information systems, we have maps that are manipulable down to the house level, and we have very rich voter-data files.”

“We can now know an enormous amount of information about voters—age, race, income, political preference and so on,” Duchin continued. “And if you overlay the data on the map, you can rig maps to get all kinds of outcomes. And that's what we're here to talk about.”

The lessons quickly got more complicated. They included the legal background of redistricting and gerrymandering from the likes of Steve Ansolabehere, a Harvard Law School government professor; Ellen D. Katz, a law professor at the University of Michigan; and Kristen Clarke, president of the Lawyers' Committee for Civil Rights Under Law.

Then the mathematics began. There was a lesson called “Computational Social Science” by Wendy K. Tam Cho, a multidiscipline professor (Asian-American studies, law, political science and statistics) at the University of Illinois at Urbana-Champaign, a leading academic in redistricting.

There was also “Geometry of Data: Algorithmic Approaches to Gerrymandering” by Solomon of MIT. And also “The Quantitative Anatomy of a Voting Rights Case,” by Megan Gall, then the staff social scientist of...
the Lawyers’ Committee and now with the NAACP Legal Defense and Educational Fund. “As one of my lawyer colleagues likes to say, ‘You have to get a little bit ’mathy,’” in tackling gerrymandering issues, Gall told the workshop.

JUSTICE KENNEDY’S HOPES FOR COMPUTERS

The chief goal of the MGGG and the workshop—as well as a series of regional workshops happening around the country—is to get mathematicians, engineers, social scientists and other scientists involved in cases.

Besides the general sessions, there were specialized training tracks for participants to work on technical solutions (or “hacks”) and to train the science crowd to become expert witnesses in court cases. Progressive-minded groups such as the Lawyers’ Committee, the LDF and the Campaign Legal Center (which challenged the Wisconsin remap) are most likely to intervene. But workshop organizers took pains to make clear that their approach is nonpartisan.

Clark Bensen, a longtime Republican redistricting consultant, was a panelist at the August workshop. Misha Tseytlin, the Wisconsin solicitor general who defended the Republican-controlled legislature’s map in the Supreme Court just days earlier, was a panelist at an October regional workshop at the University of Wisconsin at Madison. And Cho of the University of Illinois had been an expert witness last year defending a Republican-drawn remap in Pennsylvania.

Still, organizers acknowledge that they are more likely to work with civil rights and progressive groups challenging the various forms of gerrymandering.

“We have strong interdisciplinary support in the academic community, and we continue to strengthen our work with civil rights organizations and community leaders,” Duchin said in a statement released by Tufts’ communications office. (Duchin declined to be interviewed for this article.)

In some ways, the math community is responding, belatedly, to an invitation from Justice Anthony M. Kennedy to apply technical or scientific abilities to the issue of gerrymandering, more specifically partisan gerrymandering.

In Vieth, Kennedy joined with the court’s conservative bloc in rejecting a challenge to the Republican-controlled Pennsylvania General Assembly’s congressional remap as a partisan gerrymander.

The four-justice plurality opinion, written by Justice Antonin Scalia, questioned whether challenges to partisan gerrymandering were “justiciable,” or something that the courts have the authority to hear.

But Kennedy joined only in the result, and he wrote a solo concurring opinion that no “workable standard” yet existed for proving unconstitutional partisan gerrymandering.

“That no such standard has emerged in this case should not be taken to prove that none will emerge in the future,” Kennedy wrote. He pointed to computers, in the form of “computer assisted districting,” as among the possible paths to coming up with a workable standard.

“These new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties,” Kennedy wrote.

‘SOCIOLOGICAL GOBBLEDYGOOK’

Progressives think that the time predicted by Justice Kennedy has come, and that the new methods of analysis can identify partisan gerrymandering that goes too far. But the recent Supreme Court argument in Gill, the Wisconsin case, underscored just what data scientists are up against.

Chief Justice John G. Roberts Jr. scorned social scientists’ efforts to come up with a standard for measuring partisan gerrymandering.

“As one of my lawyer colleagues likes to say, ‘You have to get a little bit ‘mathy,’” in tackling gerrymandering issues. —Megan Gall
Amid a discussion during the argument that touched on the efficiency gap, as well as some other social science tests for excessive partisan gerrymandering, Roberts said to Paul M. Smith, the lawyer defending the lower-court ruling striking down the Republican-drawn map, “The whole point is you’re taking these issues away from democracy and you’re throwing them into the courts pursuant to—and it may be simply my educational background—but [what] I can only describe as sociological gobbledygook.”

The comment drew laughter in the courtroom and plenty of press attention. Smith responded, “Your honor, … this is not complicated. It is a measure of how unfair the map is.”

In the same session, Justice Alito practically mocked McGhee’s theory, even citing the researcher by name during oral argument.

“In 2014, a young researcher publishes a paper—Eric McGhee publishes a paper, in which he says that the measures that were … the leading measures previously, symmetry and responsiveness, are inadequate,” Alito said. “But I have discovered the key. I have discovered the Rosetta stone, and … it is the efficiency gap.”

The theory is “full of questions,” Alito declared.

McGhee, the California political scientist who co-developed the efficiency gap theory and was a speaker at the regional MGGG workshops, was present in the courtroom that day.

“My view is when you deal with some complex topics, you’re going to have some gobbledygook,” he says. “There is a complexity here that I think people dismiss sometimes, and it’s that we have a geographic-based system of representation that has political parties layered on top of it.”

On his perception that the chief justice’s “sociological gobbledygook” comment was directed at least partly to him, McGhee says, “I don’t think we should dismiss out of hand Roberts’ concern about the legitimacy of the court” in gerrymandering cases.

Still, McGhee stands by the efficiency gap, saying it “is a solid-enough idea, and there is no contrary argument to validate the Wisconsin plan.”

IN THE TRENCHES

If the Supreme Court ends up recognizing partisan gerrymandering claims, it will take people such as Gall working in the trenches to bring successful challenges to politically drawn maps.

Gall, the summer workshop speaker who left her job as the staff social scientist with the Lawyers’ Committee to join the Legal Defense and Educational Fund in a similar role, is deeply involved in using computer tools to prove all forms of unconstitutional gerrymandering. Gall has a master’s degree in geographic information systems and a PhD in political science and describes herself as a “quantitative political geographer.”

At the civil rights groups where she has worked, she has used her social science skills to help vet potential redistricting challenges.

“It’s a huge advantage for the organization to have someone in-house who can say, ‘There’s not enough quantitative evidence in this one to hang our hats on,’ or ‘There is enough evidence; let’s go,’” she says.

“One of the other big tasks is the data gathering,” Gall adds. “A good bit of my job is to work with the lawyers to pull these data sets together. And the data are a huge problem. Because we live in a federal system, every state does it differently. Counties and municipalities do it differently.”

She has participated in drawing remaps for about 40 to 50 jurisdictions, either as part of legal challenges or at the negotiation level.

Gall says the August workshop was “a really inspiring week because of the collaboration that came out of it. Take myself. I’m the only scientist where I am. I work in relative isolation. Then to go to a place where educators, mathematicians, computer scientists are all gathered; that really helped with the thinking outside the box.”

REDRAWING THE STATES

Gall points to Kevin Hayes Wilson as an example of a young mathematician who came to the Massachusetts workshop as a relative neophyte on gerrymandering but who became energized enough by the gathering to become an activist.

Wilson, 31, has a PhD in mathematics with a focus in number theory from Princeton University and was an academic in mathematics for several years before going to work in technology. He now works for the District of Columbia’s municipal government, applying number theory and his other math skills to problems such as rats.

On his own time, Wilson developed a tool after the 2016 election that allowed users to shift counties between states. If just three properly selected counties in the entire nation were shifted between states, Hillary Clinton would have won the White House against Donald Trump, the tool showed. It is called Redraw the States.

Wilson got some press for his endeavor, and he started learning about redistricting and gerrymandering—enough to sign up for the workshop at Tufts.

“I was curious about what math could actually bring to the gerrymandering debate besides these irreconcilable questions,” he says. “My perception of it is that you have a lot of people who see gerrymandering as a problem. You have a lot of approaches to fixing it. But gerrymandering has a lot of reasons for existing.”

Wilson attended the expert-witness track, and he says he could imagine himself taking the stand. “But it was also impressed upon us how much work and preparation go into that role,” he says.

Since the workshop, he has taken to reading up on the issue and has signed on to help Gall with one of her gerrymandering projects.

Wilson says, in somewhat of an understatement, “It turns out there is a bit of a translation issue between mathematicians and social scientists on the one hand and lawyers and judges on the other.”

Mark Walsh is a freelance writer based in Washington, D.C.
In one of its final acts at the 2018 ABA Midyear Meeting, the House of Delegates took a stand against sexual harassment, approving a resolution to urge all employers to create and enforce effective sexual harassment policies.

“There can hardly be a resolution more timely,” said Stephanie Scharf, chair of the ABA Commission on Women in the Profession, as she introduced the resolution on the meeting’s last day in Vancouver, British Columbia.

Scharf pointed to earlier leadership from the ABA on the issue of sexual harassment, when it passed a 1992 resolution that sexual harassment should not be tolerated. Unfortunately, Scharf said, “it continues to affect individual people by driving them away from work they enjoy and that they are eminently qualified to perform.”

Resolution 302, introduced by the women’s commission, the Section of Litigation and the Section of Civil Rights and Social Justice, garnered support from numerous other ABA entities and minority bar associations.

It urges that all employers adopt and enforce policies to “prohibit, prevent and promptly redress” harassment and retaliation based on “sex, gender, gender identity, sexual orientation and the intersectionality of sex with race and/or ethnicity.”

An amendment to the original resolution was proposed by Mark Schickman of Freeland Cooper & Foreman in San Francisco. He characterized the language changes as easy fixes that could make a good resolution a bit better and bring it in line with recommendations from a 2016 Equal Employment Opportunity Commission task force report on harassment in the workplace.

Schickman’s fixes included items such as removing the word “confidential” from “confidential reporting” and replacing it with “anonymous.” In current employment law best practices, “we train people not to promise confidentiality,” he said.

The amendment passed.

SPIRITED DEBATE

Gene Vance of the Litigation Section spoke in favor of
the resolution, telling the House that men had to be willing to engage in the fight against sexual harassment.

“Men have an obligation to end this now,” he said to applause from the delegates. “Men must refuse to enable, to ignore, to excuse. Men must say, ‘Time’s up.’”

And a spirited debate preceded the House vote to allow the accreditation of a privacy-law specialty certification program.

The resolution was sponsored by the International Association of Privacy Professionals based in Portsmouth, New Hampshire.

The Standing Committee on Specialization in the ABA Center for Professional Responsibility reviewed the IAPP’s proposal and reported that the organization had met the requirements to administer a lawyer specialization program. Resolution 103A accredited the IAPP’s privacy law program for a five-year term as a designated specialty certification program for lawyers.

Several people spoke in opposition to the resolution and expressed concerns, including issues with the way the IAPP defined privacy law and the potential for client confusion about what a privacy law specialization entails.

Barbara Howard, chair of the Standing Committee on Specialization, was the last to speak. She reminded the delegates that her committee’s purview was only to evaluate whether an organization had met the requirements set out in the ABA’s Standards for Accreditation of Specialty Certification Programs for Lawyers and to approve it for accreditation if the requirements were met. It is not empowered to tinker with the IAPP’s definition of privacy law, she said.

The voice vote was close enough that Deborah Enix-Ross, chair of the House, had to call for a second voice vote, after which she declared that the resolution had been approved.

FOUR MORE MEASURES

In other measures the House approved: Resolution 108A urges legislatures to draw up laws allowing solitary confinement “only in exceptional cases as a measure of last resort, where less restrictive settings are insufficient, and for no longer than is necessary to address the specific reason for placement, typically not to exceed 15 consecutive days.”

It further urges that solitary confinement be completely prohibited for “individuals with intellectual disability or serious mental illness; the elderly; women who are pregnant, are postpartum or recently had a miscarriage or a terminated pregnancy; and individuals whose medical conditions will be exacerbated by such confinement.”

Resolution 10A, proposed by the New York State Bar Association, calls for law firms to develop initiatives to provide female lawyers with opportunities to gain trial and courtroom experience, for judges to “take steps to ensure that women lawyers have equal opportunities to participate in the courtroom,” and for corporate clients to ensure that women have equal participation opportunities in litigation and in alternative dispute resolution proceedings.

The resolution, prompted by an NYSBA report revealing that women participate in court at lower rates than men, passed overwhelmingly in a voice vote.

Resolution 108C asks the Department of Justice to reconsider the guidelines laid out in a May 2017 memorandum issued by Attorney General Jeff Sessions to all federal prosecutors. That memorandum directed that “prosecutors should charge and pursue the most serious, readily provable offense” and advocated for charges that carry mandatory minimum sentences.

The resolution recommends that all prosecuting authorities use charging policies consistent with the ABA Standards on the Prosecution Function, which was last revised in 2015, and assess each case individually, taking into account a defendant’s criminal history and culpability in the crime. The resolution also urges that prosecuting authorities prohibit the use of enhanced charges intended to induce a guilty plea.

The House also challenged another Sessions interpretation, approving Resolution 116A, which says employment discrimination based on gender identity and sexual orientation should be prohibited under a proper interpretation of Title VII of the Civil Rights Act of 1964.

It also urges Sessions to withdraw his interpretation, announced in October, that Title VII “does not protect transgender citizens against workplace discrimination.” The resolution was sponsored by the Section of Civil Rights and Social Justice and the Commission on Sexual Orientation and Gender Identity.

For more coverage of House action, go to ABAJournal.com.
Candidates Seek President, Treasurer Posts in Rare Election Contests

By Lorelei Laird and Lee Rawles

For the first time in years, the election of an ABA president will be a contested race. But it won’t be for the next presidency of the association, scheduled to pass to President-elect Robert Carlson of Butte, Montana, at the close of the ABA Annual Meeting in August. Nor is it for the president-elect position for 2018-19, which Judy Perry Martinez of New Orleans is running for unopposed.

Rather, it’s for president-elect in 2019-20; that officeholder will assume the 2020-21 presidency. Patricia Lee Refo of Phoenix, the immediate-past chair of the House of Delegates, will face G. Nicholas Casey of Charleston, West Virginia, a former ABA treasurer. Also running for office in 2019 are two candidates for treasurer, Kevin Shepherd of Baltimore and Timothy Bouch of Charleston, South Carolina.

The Nominating Committee won’t name a candidate for the job until next January, but the candidates spoke at a committee open meeting during the 2018 ABA Midyear Meeting in Vancouver, British Columbia.

PRESIDENT-ELECT CANDIDATES

Serving the two-year term as chair of the House of Delegates, Pat Refo has often been a path to the ABA presidency. But Refo said she never took for granted that she would be elected president. She looks forward to “a spirited exchange of views on the future of the ABA.”

In her speech before the Nominating Committee, Refo quoted former University of Michigan football coach Bo Schembechler: “You’re either getting better or you’re getting worse. Nobody stays the same.”

“And I think that’s true for institutions as much as it is for people,” Refo said. “I am deeply optimistic about this association, and I know and believe that we are already on the road toward getting better. And by August of 2020, which is the term for which I am asking for your support, I believe we will already be a new institution on a path that has been agreed upon by everyone to address and move forward, so that we can stay on the important issues that are the outward-facing issues of our profession.”

Tracey Giles, chair of the Standing Committee on Membership, praised Refo’s work when she was in that position when introducing her before the Nominating Committee.

“She saw these trends and these difficulties in membership and financing coming in 2010 and before, and tried to warn people and tried to make changes,” Giles said. “Some of them were made; unfortunately many of them were not. But Lord knows she told us.”

Refo’s work as a partner at Snell & Wilmer in Phoenix also makes her the right candidate, Giles said.

Refo chairs the ABA Day Planning Committee, serves on the council of the Section of International Law, and has leadership roles in the Section of Litigation. Outside the ABA, her professional involvement includes service on rules of evidence committees for the Judicial Conference of the United States and the Arizona Supreme Court.

Addressing the committee and the other three candidates, Casey said, “Some would say, ‘Nick, we appreciate that you’ve got a pretty good background; you might actually understand the ABA completely after all these years’—I served three terms on the Nominating Committee—‘but Nick, it’s not your turn this time!’

“But let me tell you, when you lose 6,000 people in a third of a year, and you know you’re going to have these crises come be before you, sometimes you’ve got to get out of turn. I think that I bring to you the ability, the experience, the transparency and kind of the backbone to be able to guide us in 2020 through the gap.”

Casey said his concerns about how the ABA has dealt with blows to revenue created by the decline in dues-paying members led him to enter the race. He thinks the association should complement recent ABA actions with an effort to reduce duplication of efforts within the association.

For example, he said multiple ABA entities have projects that deal with diversity, often supported by staff members. Those efforts could be consolidated under one staff member.

Casey’s financial background includes two stints as the finance chair of the Board of Governors and credentials as a certified public accountant. He’s a former president of the West Virginia State Bar and was chief of staff to one of the state’s former governors. He is retired from the law firm of Lewis Glasser in Charleston.

TREASURER CANDIDATES

Timothy Bouch served on the Board, chairing its Finance Committee, from 2012 to 2015. Bouch pointed to his experience running large and small firms and said he’d met lawyers from across the nation through his practice.

“I think I understand lawyers and the financial pressures that are on them,” Bouch told the committee.

“You’ve heard throughout this meeting the ABA has some financial challenges. Headwinds, I think some have called it. But we’re lawyers. We got this. We can handle it.”

Kevin Shepherd is on the Board’s Finance Committee and has chaired the finance committee of his law firm, Venable, for about 20 years. He is a past chair of the ABA Section of Real Property, Trust and Estate Law.

“We are all familiar with the challenges we are facing, ranging from declining dues-paying membership to lack of growth in nondonus revenue to the evolving and changing needs of our members to the erosion of our reserves,” Shepherd told the committee.

“The board has worked hard to address these issues in a proactive, meaningful fashion, and we’ve made progress. But more hard work and difficult decisions lie ahead. Indeed, we’ve already made the easy decisions.”
Executive Director Calls for ABA Action to Increase Lawyer Members

By Molly McDonough

Quoting Dr. Martin Luther King Jr., ABA Executive Director Jack Rives told the ABA’s policymaking body that “this is no time to ... take the tranquilizing drug of gradualism.” He called on ABA leadership to take action to increase lawyer members. Rives’ call to action on a new membership model came after a stark presentation of the ABA’s continuous market share decline.

Forty years ago, 50 percent of the lawyers in the United States were members of the ABA. The ABA currently has a 22 percent market share.

Speaking to the House of Delegates at the ABA Midyear Meeting, Rives said the ABA’s membership currently stands at 412,499 members, 70 percent of whom are lawyers. Another 26 percent are students, and 4 percent— including paralegals and international lawyers—are associates.

To reverse the decline, ABA leadership, staff and marketing consultants are working on a new membership model that is on a trajectory to be presented to the House during the annual meeting in Chicago.

In the current version of the new membership model, there is a focus on bundling benefits and significantly simplifying ABA dues categories. Rives noted there are currently 157 dues categories at the ABA, depending on the types of work members do, their length of service and other considerations.

The model would reduce the dues categories to three. Bundled benefits would include two sections, access to a CLE library and access to content that will be organized behind a members-only paywall.

Rives said the changes, which will require an investment in products and resources, are necessary for the ABA to remain a robust professional association and maintain its status as the voice of the legal profession.

A later presentation by ABA Treasurer Michelle A. Behnke put a finer point on the membership decline, which has resulted in significant revenue losses for the organization. Even with deep cuts in the past year, the ABA’s operating deficit was $7.7 million for fiscal year 2017.

While the ABA’s investments put the association in the black for the year, Behnke said such a strong performance shouldn’t be relied upon. A more telling moment came when she showed delegates the association’s operating budget decline over the past five years and a projection for fiscal year 2019. In that time period, the ABA’s operating budget has decreased from $116 million in 2014 to $96.1 million for fiscal year 2018. Behnke is projecting the need to further decrease the budget by more than $5 million for fiscal year 2019 to $90.8 million.

Behnke said she agreed with the adage that you can’t cut your way to a healthy organization but cautioned that the ABA also can’t ignore the reality of the expense and revenue picture.

While she praised the work of the ABA throughout the United States and the world, Behnke said the revenue decline must reverse for the ABA to be able to conduct its mission work.

“No money, no mission,” she told delegates. “We’ve got to pay attention to our finances and take some bold steps to reverse our dues decrease so that we will be able to defend liberty and pursue justice.”

ABA President Hilarie Bass urged House leaders to make tough decisions when they’re asked to do so, likely at the August annual meeting when the ABA celebrates 140 years. During her travels in her first six months in office, Bass said, she has become aware of the ABA’s power to effect change.

She’s also been made keenly aware that the ABA’s “power can only be as strong as our organization itself.”

She said the House, which sets policy for the ABA, has to “recognize that the association needs to evolve and adapt to the changing needs of the profession and its lawyers.”

Bass urged that when delegates are presented with proposed changes, they shouldn’t nitpick and take the recommendations personally. The changes must be made for the ABA to maintain the power to do its work, she said.

After the midyear meeting ended, Rives announced a buyout plan for veteran ABA employees. The Voluntary Separation Incentive Program is being offered because “decisions on reorganization and staff restructuring will be necessary in the near future,” Rives said in a staffwide announcement.

In a town hall meeting, Rives said he’s proposing a restructuring to center around the four goals of the association: to serve members, improve the profession, eliminate bias and enhance diversity, and advance the rule of law. The reorganization plans are expected to be announced this month, he said.
Rising Law School Tuitions Prompt Ideas for Federal Student Loan Reform

Could reforming federal student-loan programs be a way to halt the skyrocketing cost of attending law school? At the 2018 ABA Midyear Meeting, the American Bar Foundation gathered a panel to discuss the issue in “The Perennial (and Stubborn) Challenge of Cost, Affordability and Access in Legal Education: Has It Finally Hit the Fan?”

“If I have to put the blame for the title of this panel on any one place, I would put it on these student loan programs and the fact that they are basically unregulated, really, in terms of the amount,” said Barry Currier, the ABA’s managing director of accreditation and legal education. “The students can borrow as much money through those programs as they want,” Currier said. “So if Harvard Law School or New England Law School said, ‘Tuition at our school next year is $200,000, and living expenses are $50,000,’ the federal government wouldn’t say, ‘You’ve got to be kidding me!’ They would say, ‘Where can we send that check for $250,000?’ ”

THE PROSPER ACT

Currier made sure to mention he was not speaking for the council of the Section of Legal Education and Admissions to the Bar at “The Perennial (and Stubborn) Challenge of Cost, Affordability and Access in Legal Education: Has It Finally Hit the Fan?”

THE PROSPER ACT

Currier made sure to mention he was not speaking for the council of the Section of Legal Education and Admissions to the Bar. “I’m here on my own behalf.” And he also issued the caveat that the jury was still out on whether tuition increases were conclusively driven by the federal student-loan programs. “But I think if you had to pick one place, that’d be where I would go.”

Currier and Stephen Daniels, a senior research professor at the American Bar Foundation, both drew attention to a current bill that would affect federal student-loan programs and potentially cause havoc for law schools and law students. HR 4508, the Promoting Real Opportunity, Success and Prosperity through Education Reform Act, was introduced in the House of Representatives in December.

“That bill, as currently written, eliminates the loan forgiveness programs that are now in effect, and it puts a cap on student borrowing for graduate and professional education of $28,500 a year,” Currier said. “And I venture to say that if a cap of $28,500 per year were put on law school borrowing through the federal student-loan programs, one of two things would happen: A lot of students would then not go to law school because they couldn’t afford it. Or the interest rate they would have to borrow on the private loan that they would have to take out to supplement that would be at a rate of interest that would make it really difficult to justify the decision to go to law school.”

‘PIE IN THE SKY’ SUGGESTIONS

Asked by an audience member how he would approach reforming the federal student-loan programs, Currier had four suggestions, some of which he admitted were “pie in the sky.”

• The federal government could decide to reduce the profit margin it takes on student loans.

• States could reinvest in legal education as a way to increase access to justice.

• Law schools could be allowed to limit the amount their students could take out in loans.

• Risk could be shared between the federal government and law schools, so that if a student defaulted on their loan, the federal government would recoup some of the money from the school.

“Let the schools have a little bit of skin in the game,” Currier said of this last suggestion. “That might trim the school’s appetite for taking students that they aren’t sure can graduate and pass the bar and get a good job.”

—L.R.
Could Canada Be a Haven for ‘Dreamers’?

When President Donald Trump canceled the Deferred Action for Childhood Arrivals program in September, the fates of about 700,000 young adults were thrown into doubt. DACA recipients were set to begin losing their status in March, and the ABA House of Delegates passed a resolution urging Congress to put legislation in place allowing DACA recipients and others to apply for permanent legal status and citizenship. But if that doesn’t happen, could DACA recipients find a safe harbor in Canada?

Under current Canadian immigration rules, it wouldn’t be impossible for DACA recipients to find legal status in Canada—but it would be difficult, said Andres Pelenur, a founding partner of the Toronto-based Borders Law Firm and a specialist in citizenship and immigration law.

Pelenur was speaking during “Lessons Across Borders: What the U.S. and Canada Can Teach One Another About Establishing a Successful Immigration Policy,” a CLE program at the 2018 ABA Midyear Meeting in Vancouver, British Columbia. The program was co-sponsored by the Commission on Immigration and the Commission on Hispanic Legal Rights & Responsibilities.

Panel member Gordon Maynard of Maynard Kischer Stojicevic in Vancouver said broadly speaking, there are four paths for being accepted into Canada as an immigrant: economic, in which the selection is skill-based; family reunification; asylum; and humanitarian and compassionate grounds.

A CLEAR FIX?

About 58 percent of immigrants were accepted through the economic route last year. But if you’re a DACA recipient, your chances of getting a temporary resident visa for study or work purposes “are virtually zero,” Pelenur said. “To have standing to apply for a temporary resident visa, you have to have a legal status in the country that you’re applying from.”

Even if the standing issue were overlooked, the federal department called Immigration, Refugees and Citizenship Canada would look with suspicion on any claims that a DACA holder would stay in Canada only temporarily.

The next option would be to apply in the skilled worker class. The point system Canada uses is heavily biased toward people who already have Canadian work experience or who’ve studied in Canada.

“Even if you have to prove you have a fear of being persecuted in the U.S., you have to prove you have a fear of being persecuted in the U.S.,” Pelenur said.

Then there is the refugee path, if DACA holders were able to enter Canada through unguarded areas of the border and file a claim. “You cannot claim: ‘Oh, they hate me in the U.S. and I’m suffering in the U.S., so because of my problems in the U.S. please let me stay in Canada,’” Pelenur said.

Of DACA holders, 20 percent are still in middle school or high school, 18 percent are in college, and 4 percent have their bachelor’s degrees.

Then there is the refugee path, if DACA holders were able to enter Canada through unguarded areas of the border and file a claim. “You cannot claim: ‘Oh, they hate me in the U.S. and I’m suffering in the U.S., so because of my problems in the U.S. please let me stay in Canada,’” Pelenur said.

“You have to prove you have a fear of being persecuted in the U.S.,” Pelenur said.

Panelists Gordon Maynard, David Ware, Margaret Stock and Andres Pelenur at the “Lessons Across Borders” CLE program.
persecution in your country of origin.” Acceptance via humanitarian and compassionate grounds is also a possibility, Pelenur said. “But it’s not a clear fix for the hundreds of thousands of DACA people,” he added. “In my opinion, one of their best hopes is a special measure from the government.”

Pelenur said, adding that a member of Parliament has “already gone on camera to say: ‘We actually like the DACA demographic, and we should enact through the will of Parliament a special category specifically for DACA.’ That actually is potentially the best hope for the DACA people.”

Panelist Margaret Stock of Cascadia Cross Border Law Group in Anchorage, Alaska, applauded the Canadians “for thinking about how to swipe our U.S.-educated workforce and put them to work for Canada. It makes perfect sense.”

Stock is a retired lieutenant colonel for the Military Police Corps in the Army Reserve. She won a “genius grant” fellowship in 2013 from the John D. and Catherine T. MacArthur Foundation for her work as an immigration attorney in shaping policies at the Pentagon and the Department of Homeland Security.

Resolution 108E, passed by the House of Delegates later approved. Robert L. Weinberg, a past president of the District of Columbia Bar and the Bar Association of the District of Columbia, brought up Resolution 111, which the House of Delegates later approved.

The resolution urges all death penalty jurisdictions to prohibit the execution of offenders who were 21 or younger when their crimes were committed but “without taking a position supporting or

David Ware and Margaret Stock

US Is on Its Own Path in the Death Penalty Debate

When it comes to imposing the death penalty, the United States has long outpaced North American neighbors Canada and Mexico, according to Cassandra Stubbs, director of the American Civil Liberties Union’s Capital Punishment Project.

Stubbs, speaking at the ABA Midyear Meeting, told the audience of “A North American Perspective on the Death Penalty: The American, Mexican and Canadian Experiences” that although the death penalty was legal in Mexico and Canada during the early to mid-20th century, neither country actually carried out many death sentences.

Between 1908 and 1961, only 11 people were executed in Mexico, and the last civilian execution took place in 1937. Although the penalty remained on the books until 2005, no one was executed after 1961. Canada conducted its final execution in 1962 and fully abolished the death penalty in 1998.

In contrast, Stubbs said, executions in the United States increased in the 20th century, despite a 10-year period from 1967 to 1977 when no executions took place. In 1972, the U.S. Supreme Court suspended capital punishment with Furman v. Georgia, but the justices’ 1976 decision in Gregg v. Georgia allowed for its resumption. The greatest number of executions took place in the 1930s and 1940s with another, smaller spike in the 1990s, Stubbs said. But executions have been steadily declining: In 1997, 74 people were executed; in 2017, 23.

In the CLE session, sponsored by the Criminal Justice Section, Stubbs walked the audience through the current state of the death penalty in the United States, how racial discrimination affects who is sentenced to death, and how the diminished use of the death penalty could form the basis for a future Supreme Court decision abolishing it entirely.

“We have seen a major shift in terms of international and national opinions about the death penalty as people have begun to realize that we exonerate an enormous number of people on death row,” Stubbs said. “We are getting it wrong. We are sentencing people to death, when they are innocent, at a very high rate.”

OPPOSING VIEWS

Robert L. Weinberg, a past president of the District of Columbia Bar and the Bar Association of the District of Columbia, brought up Resolution 111, which the House of Delegates later approved.

The resolution urges all death penalty jurisdictions to prohibit the execution of offenders who were 21 or younger when their crimes were committed but “without taking a position supporting or
opposing the death penalty.

“Do you think it would make any difference if the ABA were to change its neutral position and come out for abolishing the death penalty?” Weinberg asked. “Do you think that would have any effect on the Supreme Court?”

“Yes, I think that’s an important part of the ‘evolving standards of decency’ that the Supreme Court explicitly said,” Stubbs said.

Weinberg brought up the issue again during debate on Resolution 111, which was proposed by the Death Penalty Due Process Review Project and the Section of Civil Rights and Social Justice, and proposed removing that language. “We stand almost alone among the progressive democracies in adhering to capital punishment,” he said.

Michael Byowitz, the Board of Governors’ liaison to the Death Penalty Due Process Review Project, spoke in opposition to Weinberg’s amendment.

“I do so with some trepidation and sadness because Bob Weinberg is a personal hero of mine,” Byowitz said. “My heart pulls me in the direction he would have us go, but my head pulls me in a different direction.”

Byowitz said marginal efforts chipping away at the use of the death penalty are the most effective ways of addressing the problem.

“We will be ignored if we are perceived in many of the councils that matter as against the death penalty,” he said. “Let’s not let the perfect be the enemy of the good.”

The amendment was defeated in a divided vote, but Resolution 111 was passed overwhelmingly.

—L.R.

**Message to Potential Candidates: Run, Woman, Run!**

Ellen Rosenblum, the first woman to serve as attorney general for Oregon, has a message for all women considering a run for office: Don’t overthink it.

“When the thought hits you, go for it,” Rosenblum said. “Please run. We need you.”

Rosenblum spoke Feb. 2 during “Challenges and Rewards for Women in Politics: Both Personal and Professional,” a luncheon hosted by the Canadian Bar Association of British Columbia’s Women Lawyers Forum during the ABA Midyear Meeting. She was joined by Suzanne Anton, the former attorney general and minister of justice for British Columbia.

“There’s sort of a cliche that there’s too many lawyers in politics,” Anton told the sold-out crowd. “I don’t know where that cliche came from because it’s actually not true. There are not enough lawyers in politics.”

**‘HOW ABOUT PRESIDENT?’**

The focus of the panel discussion was on the need for better representation for women in politics and the practicalities of running for office. The luncheon was co-sponsored by the National Conference of Women’s Bar Associations and the ABA Commission on Women in the Profession.

Anton had been a math teacher and a prosecutor but took time off to raise her children. Then she became involved in community sports in Vancouver. That led her to a run for the Vancouver Board of Parks and Recreation and, ultimately, to being elected as a member in the Legislative Assembly of British Columbia. From there, she was appointed attorney general and minister of justice until 2017.

“Lawyers have a number of attributes—good training, good understanding of the law, good ability to communicate with people, a fairly thick skin, used to a bit of the rough-and-tumble of life—and of all of those things, a very good understanding of how people work,” Anton said. “Lawyers like people, and they like issues. And if you like those two things, you make a good politician.”

For Rosenblum, a passion for consumer protection dating back to law school was the force that drove her into politics. After working as a prosecutor, she ran in Oregon’s nonpartisan judicial elections, serving on the Multnomah County Circuit Court and then the Oregon Court of Appeals. In 2012, she was appointed attorney general of Oregon and has won two subsequent elections to retain that position.

Rosenblum and Anton agreed that for women considering whether to run for office, participating in someone else’s campaign could be extremely helpful.

“When you don’t know much about politics but you’re kind of interested, join a campaign,” Anton said. “There are always elections underway. So figure out who you want to support and go work in their office. Make phone calls, knock on doors, do what you can to help them. That gets you immersed in politics.”

Rosenblum said, “What we need to keep in mind is not only do we need women running for political office, women judges, women AGs, but we need women in other positions of power, like editorial boards. So just think about that.”

“How about president?” interjected the moderator, Jeanne Marie Clavere, a board member of the National Conference of Women’s Bar Associations.

“That would be great,” Rosenblum said to laughter from the crowd.

—L.R.
James Podgers, Retired
**ABA Journal Editor, Dies at 67**

By Debra Cassens Weiss

Funeral services took place in February for James Podgers, 67, a retired *ABA Journal* editor known for his deep knowledge of the American Bar Association and its inner workings. He died as this year’s ABA Midyear Meeting opened in Vancouver, British Columbia. Midyear and annual meetings were assignments he regularly covered during his years with the magazine.

Podgers died from islet cell neuroendocrine cancer, barely one year after his retirement. He had battled the cancer for 14 years, but that didn’t stop him from spending long days as an assistant managing editor sharpening copy and writing articles about two of his favorite topics: the association and international law.

Podgers’ wife, Cis Redmond, says her husband would have wanted his specific cancer diagnosis in his obituary. “He would complain bitterly that obits usually don’t include the cause of death; I laugh thinking of him wondering how this or that person died, and he didn’t even know them!” she adds.

Podgers interviewed a wide range of people in his work for the *Journal*. They included former President Gerald Ford, Telford Taylor (an attorney who assisted Robert Jackson at the Nuremberg tribunals), Bianca Jagger and numerous ABA presidents. While on assignment in London, he approached the podium after a speech by Margaret Thatcher and pilfered her paper clip, Redmond recalls.

He wrote about political divisions in the ABA, the Nuremberg trials, and the creation of the International Criminal Court and the Hawaiian sovereignty movement. His last article, written for the *Journal* as a freelancer, profiles a lawyer whose hobby is bullfighting. “Jim was the picture of a classic Chicago journalist,” says Molly McDonough, *ABA Journal* editor and publisher. “He was inquisitive, dogged and skeptical.”

Podgers was “truly devoted to the craft,” McDonough says. “Jim was a good listener, a serious editor and maintained his dry sense of humor till the end. In my last conversation with him about a week before he died, Jim called me in part to let me know he wouldn’t be able to turn in his last assignment.

“He’ll always have a place in our hearts and ABA Journal lore.”

Podgers, a lawyer, worked for the ABA for 30 years in two different stints. He left the *Journal* after three years as a reporter and rejoined the staff in 1992 as an editor. He also worked as a reporter for the *Herald-News* in Joliet, Illinois, and as the assistant dean for public affairs at the Chicago-Kent College of Law. He earned a bachelor’s degree in history from the University of Wisconsin at Madison and a JD from Chicago-Kent.

**‘HE LOVED THE ABA’**

Podgers also had a love of travel, books, jazz, golf, friendly poker games and the Wisconsin Badgers. He was the lead saxophone player in a big band group and a charter member of FATS at UW-Madison. FATS stands for Federation of All-Star Tummy Stuffers, Redmond says. Other members included a professor, a doctor, a priest, a radio personality and a comedian. “He collected interesting friends,” she says.

In a bereavement notice to ABA staffers, Reginald Davis, *Journal* managing editor, noted that Podgers was known for his “cogent questions” at the end of staffwide information sessions known as town hall meetings. Before his death, Podgers received an email about another staffer “who is bravely taking over his task of asking the questions at the town halls,” Redmond says. “We got a charge out of that. He loved the ABA.”

In addition to his wife, Podgers is survived by their children, Hilary, Kevin and Michael.

See a selection of articles by James Podgers at ABAJournal.com.
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ABA Notices

ACTION OF THE NOMINATING COMMITTEE AT THE 2018 MIDYEAR MEETING
In accordance with Section 9.1 of the Association’s Constitution, the House of Delegates Nominating Committee, at its meeting on Sunday, Feb. 4, nominated Officers of the Association and members of the Board of Governors. For the list of all the nominees, go to ambar.org/resultsActionstaken.

DELEGATE-AT-LARGE ELECTION
Pursuant to Section 6.5 of the ABA Constitution, six Delegates-at-Large to the House of Delegates will be elected at the 2018 Annual Meeting for three-year terms beginning with the adjournment of that meeting and ending with the adjournment of the 2021 Annual Meeting. Candidates are to be nominated by written petition. The deadline for petitions is Wednesday, May 16. For rules and procedures, go to ambar.org/largeelection.

 GOAL III MEMBERS-AT-LARGE ON THE NOMINATING COMMITTEE
The ABA President will appoint one Goal III Minority Member-at-Large, one Goal III Woman Member-at-Large and one LGBT Member-at-Large to the Nominating Committee for the 2018-2021 term. These appointments will be made from broadly solicited nominations from the diversity commissions, sections, divisions and forums, state and local bar associations, and the membership at large. If you are interested in submitting a nomination or have questions, contact Leticia Spencer (leticia.spencer@americanbar.org, 312-988-5160) c/o Office of the Secretary, by Friday, May 4.

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JOIN THE FUN Send us the best caption for the legal-themed cartoon below. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, April 15, with “April Caption Contest” in the subject line.

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

CONGRATULATIONS to Douglas Jeffrey of Miami for garnering the most online votes for his cartoon caption. Jeffrey’s caption, below, was among more than 100 entries submitted in the Journal’s monthly cartoon caption-writing contest.

“Better wish my retainer gets paid if you really want the evidence to magically disappear.”
—Douglas Jeffrey of Miami

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Precedents || By Allen Pusey

**Sam Sheppard Seeks a New Trial**

ABC aired the first episode of *The Fugitive* in September 1963, dramatizing the saga of Dr. Richard Kimble, a fictional physician who escaped custody while facing the death penalty for the brutal murder of his wife. The hit show marked a shift in fortune for Dr. Sam Sheppard, the Ohio surgeon on whose case the show was based.

On April 13, five months before *The Fugitive* debuted, Boston lawyer F. Lee Bailey filed a writ of habeas corpus in federal court challenging the fairness of the extraordinary 1954 trial in which Sheppard was convicted. By any measure, his trial for the bludgeoning death of his pregnant wife, Marilyn, had been a spectacular media event. But Bailey argued that prejudicial publicity in the case had trampled the delicate boundaries between a right to public information and Sheppard’s right to a fair trial.

Before dawn on July 4, 1954, Sheppard had called a friend—the mayor of Bay Village, the Cleveland suburb where the Sheppards lived, to report that an intruder had murdered Marilyn. The mayor arrived with the police a few minutes later to find the doctor injured and disoriented.

Sheppard recounted a rambling story: He had fallen asleep watching television, was awakened by his wife’s screams upstairs and twice confronted a “bushy-haired” man who had beaten him—first in their bedroom, then outside the house after Sheppard took chase.

The doctor’s story sat poorly with police and the county coroner. To them, the bludgeoning suggested an angry confrontation and the crime scene a robbery staged for their benefit. They quickly focused on a relentless effort to make Sheppard confess.

Media attention was equally relentless. Police seized Sheppard’s home but allowed access to a stream of news crews and curious onlookers. Urged by local newspapers to do so, police interrogated Sheppard at his hospital bedside without his lawyer present. When a front-page editorial demanded an immediate inquest, coroner Sam Gerber obliged, giving Sheppard and his lawyer one day’s notice.

In a televised, three-day inquest before a packed school gymnasium, Gerber interrogated Sheppard about the intimacies of his marriage. When his lawyer William Corrigan objected, Gerber had him removed to the roar of an approving crowd. Just days later, a headline in the *Cleveland Press* screamed: “Why Isn’t Sam Sheppard in Jail?”

By that evening, he was.

With a change of venue denied, the carnival continued at trial. In court, the press sat inside the bar, able to hear and report the whispering of jurors and lawyers, and able to scrutinize evidence before it was presented. Names and addresses of jurors and witnesses were published in the newspapers; their families were interviewed. Sensational articles promised “bombshell testimony” that never materialized. By the time Sheppard was convicted, only five months after the murder, the presumption of his guilt in Northern Ohio had long been regarded as fact.

Three months after the habeas was requested, a federal judge released Sheppard pending a new trial. Though it was reversed on appeal, Sheppard remained free to attend Bailey’s U.S. Supreme Court oral arguments in *Sheppard v. Maxwell*. In June 1966, writing for an 8-1 majority, Justice Tom Clark detailed the barrage of “virulent and incriminating” media coverage of the Sheppard investigation and excoriated the failure of the trial court to control media access to jurors.

Time and television helped temper public animus in his case. And by August 1967, when *The Fugitive* proved Kimble’s innocence to a record TV audience, Sheppard had been retried and found not guilty by a Cuyahoga County jury.

After a litigation-plagued return to surgery, he had a brief career as a professional wrestler. His ring moniker was “the Killer.” Sheppard’s freedom was short-lived. He died in 1970 due to complications of alcoholism.
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