The 25 Greatest Legal Movies

BRYAN STEVENSON ON JUSTICE
CHANGE REQUIRES HARD WORK, STRUGGLE

THREATENING WORDS
COURTS GRAPPLE WITH ONLINE ATTACKS

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A protester in Dallas burns the American flag and sparks a lengthy legal debate.
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INDIGENT DEFENSE

Regarding “Defendant’s Choice,” June, page 18, as someone who once had the job of appointing counsel of the public defender’s office to various indigent clients, the criteria was the attorneys’ caseloads and the gravity of each and the types of cases. We were trying to spread the attorneys between all criminal courtrooms, factoring in the experience of each attorney and each attorney’s strength. The office of the public defender should continue to appoint the indigents’ counsel and leave the court to appoint counsel when there appears to be a conflict.

We had one lawyer who looked like Abraham Lincoln, and every one of the alleged criminals wanted him. And as we well know, everyone cannot have Abe.

Kathy Dills
Memphis, Tennessee

GHOSTWRITING ETHICS

Regarding “Ghostwriting Controversy,” June, page 24, I am on the fence as to whether this is ethical and a good practice. On the one hand, I agree that ghostwriting can help pro se litigants assert rights and arguments they may otherwise be unaware of. However, what happens when the pro se is asked to make an argument based on the ghostwritten document? If the pro se doesn’t know what his/her own document means, the judge is put in a predicament where he is tempted to assume what the arguments might be. The alternative is to disregard anything but the plain meaning of the document, which can also be problematic. This may cross a line into judicial advocacy. Further, for an argument to be effective and genuine, it should be understood by the person presenting it.

Tony Frank
St. Charles, Illinois

Attorney ghostwriting is bad, but worse is a pro se who does not make relevant arguments. In Los Angeles, there are self-help programs for pro se in family law that assist in writing and editing the forms. The clerks who assist are actual family law paralegals and do a good job of helping low-income people get divorced.

Michael E. Friedman
Hacienda Heights, California

CORRECTION

Due to a reporting error, “Do As I Say,” July, page 34, gave the impression that Nicole Black had reviewed the security of Nuance’s Dragon dictation software. She has not conducted such a review.

The Journal regrets the error.
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President’s Message || By Hilarie Bass

It Was a Very Good Year

Research on long-term careers for women tops President Bass’ achievements

As a woman practicing in big law for more than 25 years, my initiative, Achieving Long-Term Careers for Women in Law, which focused on why women continue to leave the legal profession, hit home. Although women have been graduating from law school in roughly equal numbers as men for decades, their career paths are quite different. Twenty years after law school, when lawyers should be in their most productive years, far too many women have not reached the same success as men, and close to half have left the profession entirely.

There are many theories and anecdotal evidence as to why women are leaving, but anecdotes don’t change policies, data does. So this year, the ABA funded research on legal careers of women lawyers, including surveys, focus groups and studies focused on the long-term career trajectories of women lawyers. We investigated the issues faced by women lawyers over the age of 50 and women lawyers of color. We hosted two national summits with leaders of the profession – at Harvard Law School last fall and at Northwestern Pritzker School of Law in June.

The findings will be released in the coming months, but early analysis shows results for women were dramatically different from their male colleagues. We learned that the reasons for the exodus of women from the profession are many, including success fatigue, implicit bias, lack of work-life balance, sexual harassment and discrimination. Our surveys found:

• 45 percent of women lawyers reported that they had been denied proper access to business development opportunities because of their gender.
• 58 percent of women lawyers reported that they had experienced demeaning comments, stories or jokes.
• Nearly 60 percent of women lawyers reported that they had been mistaken for a lower level employee.
• Approximately 30 percent of women lawyers reported that their gender affected their ability to achieve salary increases or bonuses, desirable assignments and access to sponsors.

Focus groups highlighted stories from women lawyers who felt they were used as a diversity token in a client meeting or had credit for work they had done stolen by a male colleague. Too many women lawyers said they often felt like Lucy and Ethel on the candy assembly line from “I Love Lucy”: stuck with workhorse assignments, expected to solve systemic problems and given unrealistic time expectations. Many women in their 50s with an impressive body of work told us they felt invisible within their law firms. Younger women associates complained about receiving less important assignments that did not allow them to advance. Experienced women attorneys describe “success fatigue,” a feeling of always having to work harder to achieve the same level of success as men.

Implicit bias also plays an important role in explaining many of these disparities. Many people do not believe they have biases, and when they are called out on it, they rationalize their conclusions to justify their behavior. But our studies found implicit bias is a major factor in explaining the differences in compensation and elevation between men and women in the legal profession.

Incidents of sexual harassment only add to the mix, compelling women to leave.

The goal of the initiative is to make empirically based recommendations for legal employers to help create environments that allow women attorneys to achieve their full potential. This will inevitably enhance the likelihood that women will not only reach the highest levels of practice, but also that they will remain in the profession. The recommendations coming out of this study will provide legal employers strategies to minimize or eliminate gender based implicit bias in hiring, elevation and compensation decisions.

We must do a better job of making our profession more hospitable to women and attorneys of color. Success may take a while, but we will have made real progress when the average hardworking woman is as successful as the average hardworking man.

Although my year is over, work on these important issues will continue. And I cannot think of a better steward for the ABA than incoming President Bob Carlson. I wish him every success. ■

Follow President Bass on Twitter @ABAPresident or email abapresident@americanbar.org.
General counsels earn top dollar, new titles and C-suite access

WHEN UBER BEGAN ITS MANAGEMENT OVERHAUL last year, one of its first major hires was Tony West, formerly executive vice president of public policy and government affairs at PepsiCo, as chief legal officer.

It was a critical move, considering the numerous legal challenges facing the embattled ride-sourcing company. But the title given to Uber’s new top in-house lawyer also reflects the elevated status of general counsels as core members of top management.

A growing number of companies are replacing the title of general counsel with that of chief legal officer to signify that position is on equal terms with others in the C-suite, according to BarkerGilmore, a boutique recruiting firm specializing in placement of GCs and chief compliance officers.

And it’s not just ego padding. Seven in 10 general counsels in the U.S., and 64 percent globally, say they report directly to the CEO, according to the Association of Corporate Counsel’s 2018 survey of 1,275 chief legal officers worldwide. What’s more, eight in 10 of those at companies with annual revenue over $3 billion say they regularly attend
Opening Statements

The reinvention of law practice didn’t start yesterday. Our Legal Rebel Trailblazers, innovators in legal practice, speak, looking back at their accomplishments and forward at what is on the horizon.

Having a seat at the table means general counsels have the ability to assert greater influence within the organization.

“One of the biggest differences today versus 10 years ago is that the general counsel plays a proactive role in the business itself,” notes BarkerGilmore co-founder John Gilmore. “What the board and CEO are looking for is for the general counsel to be involved right at the outset of any major business decision.”

U.S.-based general counsels said the executive team almost always (60 percent) or sometimes (36 percent) sought their input on business decisions, per the ACC study. Further, two-thirds of general counsels globally in 2017 said they add value to the organization by counseling the CEO, compared to only half in 2013.

Globalization has also played a part in enhancing the GC role.

“Geopolitical risk management and the importance of compliance all point to having someone who can be part of the strategic decision-making upfront,” says Michael Callahan, former general counsel at LinkedIn and Yahoo. Callahan, who now heads Stanford Law School’s Arthur and Toni Rembe Rock Center for Corporate Governance, cites the general counsel’s broad understanding of a company’s business as another asset increasingly valued in the C-suite.

“A general counsel who can see all different aspects from a legal or compliance perspective is looked at over time less as serving just a legal function and more as an accelerator of the business.”

The expanded profile of the job is also reflected in increased pay. About a third of general counsels at the 500 largest companies (by revenue) trading on U.S. exchanges are listed among the top five highest-paid officers in proxy filings, according to compensation consulting firm Equilar.

The median pay package for male general counsels last year at the 500 biggest firms was $2.7 million. Compensation for former Apple general counsel Bruce Sewell including salary, stock awards and other pay totaled more than $24 million in 2017.

How much Apple is paying Katherine Adams, the former Honeywell GC who succeeded Sewell last year, hasn’t yet been disclosed. But a gender gap persists when it comes to compensation.

Median total pay for male general counsels at U.S. public companies on average was $735,000 last year compared to $560,500 for their female counterparts, according to a BarkerGilmore survey. Despite the imbalance, one encouraging sign is that pay for women appears to be increasing faster than that for men, at 7.6 percent versus 0.2 percent.

Despite gains across the board, general counsels still face long odds of ascending to CEO. The leap is still fairly rare for general counsels, especially compared to that from other top management posts like chief operating officer and chief financial officer.

Lee Hanson, vice chairman at recruiting firm Heidrick & Struggles advises GCs aspiring to the top post to gain profit and loss experience, by successfully running a business unit, for example. “You can prove you’ve got those operational chops, and that will get everyone to think of you differently,” she says.

—Mark Walsh
Alabama Food Fight

WHEN ALABAMA INMATES ASKED what’s for dinner, the sad answer was often a plate with spoiled meat or food contaminated with rodent droppings.

Meanwhile, the state’s sheriffs charged with their upkeep were reportedly pocketing inmate food funds—spending the money on things such as beach homes, personal investments, electronics and home lawn services.

These allegations are the basis of a lawsuit filed by the Southern Center for Human Rights and Alabama Appleseed Center for Law and Justice against 49 Alabama sheriffs after the SCHR received hundreds of letters and calls from inmates about problems with food at county jails across the state.

“Sometimes it’s an inadequate quantity of food or not nutritious,” says Aaron Littman, a staff attorney at the center. “Meat that’s undercooked or spoiled or rotten, or that has foreign substances like dirt or insects or rodent droppings.”

The defendants have justified the practice of pocketing food money under a World War II-era law, Alabama Code Section 36-22-17, which says sheriffs are entitled to keep allowances they receive for feeding prisoners. But Littman says the inmate food funds are really public money—meant to feed inmates—and not for the sheriffs to spend personally.

The SCHR, an Atlanta-based civil rights organization, requested financial records from the accused sheriffs three times in 2017, but the sheriffs refuse to disclose how much food funding they received and how much they kept for personal use, which violates Alabama’s open records law, according to the lawsuit.

“There is tremendous public concern about misappropriation of the money and the effects it’s having on the health and well-being of people in jail,” Littman says. “People are rightfully concerned that incarcerated folks, like other human beings, have a right to be fed adequate and nutritious food.”

The defendant sheriffs have denied they violated the law or converted food funds for their personal use. They also claim, among other things, that the plaintiffs lack standing, and that sovereign immunity protects them from suit.

—Angela Morris
Opening Statements

10 QUESTIONS

A TRUE MARVEL

THIS BROOKLYN LAWYER IS A FORCE ACROSS A GALAXY OF COMIC BOOK GENRES

A YOUNG CORPORATE LAWYER sits at his computer, putting the finishing touches on an email.

CLICKKKKK!
He hits send.
SWOOOSHHH!
His first comic book manuscript is off to the publisher.

Can our hero create a successful career in comics? Will he be able to balance his parallel professions? Can he ever achieve his secret dream of becoming a novelist?

Flash-forward almost 15 years—whtooooooshh!!—and Charles Soule is now a best-selling comic book writer whose character credits include Daredevil, Darth Vader, Superman, Wonder Woman and Wolverine. Soule left BigLaw in 2004 to open a solo immigration practice in Brooklyn, and a few years ago he stepped away from full-time practice. Now he spends most of his time telling stories. His debut novel, a thriller called *The Oracle Year*, was published this spring by HarperCollins, and it already has been optioned for television. And there’s plenty more action to come.

You’ve been a comic book fan since you were a kid, but how did you know how to jump from reader to writer?

It was in the early to mid-2000s, back when posting on message boards was big. A number of prominent comic writers maintained these boards, and while there were a lot of threads about great comic books, you could also find a lot of professional advice about how the industry worked and how to break in.

And you did! You regularly make appearances at comic book conventions around the world where people often dress up like their favorite characters. Have you ever seen someone dressed up like a character you created?

Oh yes, many times! It’s always a massive thrill that someone would connect with the person you’ve written in such a specific way.

Do you have a favorite series you’ve written?

I am very proud of my work on Marvel’s *She-Hulk* title. She’s a complex character—a lawyer named Jennifer Walters who is also an 8-feet-tall, green, superstrong lady who has to balance her working life as an attorney with her work as a superhero. It sounds over-the-top, but I saw it as a chance to talk about issues of work-life balance, solo practice and whatever legal issues I thought would be interesting. Superhero stories are great for that—looking at mundane concepts through an exotic lens.

Did you ever pull inspiration for She-Hulk from your own practice?

Yes, with *She-Hulk*, the storyline I pursued was related primarily to her hanging out her shingle in Brooklyn. Her office was actually in the exact neighborhood where I had my office, and we had little story beats about things like getting her rent raised on her unexpectedly, which happened to me. She also dealt with finding a good assistant, making sure her team was happy and bringing in new clients—all the things that new practitioners deal with. In this case, though, the clients were people like Dr. Doom’s son or Spider-Man. In one case, she goes up against Daredevil to defend Captain America in a wrongful death suit. It was a lot of fun.

I’m glad you mentioned Daredevil. He’s a lawyer, too, but his story is totally different in tone and theme. Was your law background still helpful?

The challenge there was to try to write in a way that

"THE SEED FOR THE BOOK CAME WHEN I WAS JUST STARTING MY LAW CAREER."—CHARLES SOULE
feels true from a legal perspective, but to cover an area of law in which I don’t have much experience. Daredevil is a litigator. Traditionally, he’s a private defense attorney, but in my run, I decided to shift him into the Manhattan DA’s office. Now, I am not a litigator, and I am certainly not in the New York political scene, so telling these stories involved a lot of research into the way the law works. Fortunately, I live in New York City myself, and my time as a lawyer has given me a network that allows me to access people who know things I don’t.

Do comic book writers always do this much research?

I am not sure if other writers choose to write stories that require real-world research—I certainly put that on myself—but anytime you write for a massively complicated superhero universe like DC or Marvel, it requires an extraordinary level of research just to become familiar with all the timelines and the many, many moving parts. Marvel alone has something like 5,000 named characters, I believe.

How do you keep it all straight?

You’re currently the series writer for Star Wars characters Poe Dameron and Darth Vader, and Marvel’s Daredevil, plus you’re writing a run for Wolverine, who’s in the Marvel X-Men realm. Then there’s your own creator-owned book, Curse Words, with its separate universe. Automatically, I am thinking this requires incredible outlining skills.

Absolutely. I have always been someone who is able to keep facts straight. I do think organization is something the law gives you. All of my projects have their own dedicated Moleskine notebook—that goes directly back to when I was practicing, and I had a different legal pad for every matter.

Is it hard to get into the mind of a really evil character like Darth Vader?

My Darth Vader run began when I took the gig, I knew I would be putting myself in the mindset of someone who is constantly in pain and enraged. I was nervous about steeping myself in that for months on end, but that’s the job of a professional freelance writer. One day, I’m writing a light and funny She-Hulk scene, and the next, Darth Vader is methodically murdering most of a planetary population. Let’s talk about The Oracle.

Year. It’s about a man who has a vision that gives him 108 future events due to occur over roughly the next year and what he does when they start to come true. It definitely resonates—I think everyone has something they’re dying to know about the future. How did you get the idea for the book?

The seed for the book came when I was just starting my law career. I was writing on the side the entire time, and balancing that with the intense demands placed on a baby attorney in BigLaw was extremely demanding and grueling. Many, many times I asked myself if it would ever pay off. I’d have given quite a bit to get an answer, to have an oracle to ask. It seemed like that could be a nice seed for a book. I think everyone has their own question about their future—and here we are.

Do you have a dream comic book character you’d like to write for?

I’d love to do a run of Captain America. That could be very interesting. I’d love a shot at Batman. Honestly, though, things are going really well with my own stories, with characters I’ve created. Ultimately, in the long run, those are the stories I want to tell.

—Jenny B. Davis
Opening Statements

MAKING IT WORK

It’s All a Matter of Choice

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

By Rashida La Lande

Like most other working mothers, I sometimes feel life can be overwhelming—a constant juggle among the competing needs of family, career and self. I’m often asked, “How do you make it work?” But what’s critical to me is my own self-affirmation of “Why I make it work.”

My reasons are highly personal. But if I’m clear in my own mind about why I am making the choices that I make, then worrying about the “how” fades. As my grandmother Vivian used to say, “Where there is a will, there is a way.” Four reminders keep me grounded and guide my life decisions.

1. Own your choices. I grew up in Queens as an only child whose favorite companions were books. My mother took many of the neighborhood children under her wing—and some of my best childhood memories include times our house overflowed with them. It was utter chaos—and I loved every minute of it! From then on, I knew that I wanted a large family. My husband and I have two boys and two girls between the ages of 3 and 10. What used to sound like chaos when I was a child now sounds like music to my ears when we’re all home together.

2. My work matters. I love my new role as global general counsel at Kraft Heinz. I work for a company that’s founded on meritocracy and ownership—two values I wholeheartedly believe in. So much so, in fact, that I’m temporarily commuting between New York City and our co-headquarters in Chicago each week. Every single day, I learn something new or face a new challenge. I work with talented, smart, creative, results-driven colleagues that believe in teamwork. I travel the world, learn new languages and explore different cultures as part of my job. And most importantly, I am having fun.

3. Proudly embrace change. My grandparents had 22 children between them, and they had absolutely no ability to independently care for their children. I saw how much stress and pressure that put on them. When they were raising their families during the 1950s and 1960s, women were the sole or primary breadwinner in just 11 percent of American households with children under the age of 18. The percentage is closer to 50 percent today. I’m proud to be among this group of working moms who provide financially for their children, while raising them to be productive members of society.

4. Children learn what they live. When I came home one recent Friday, my 10-year-old son was playing a World Cup soccer video game. Everyone needs a break, I reasoned, so I didn’t give him a hard time about finishing his homework or playing his violin. As I puttered around the room, I heard him exclaim, “This goalie is boss” and “Best goalie ever!” When I looked up, I realized his game featured the women’s U.S. soccer team—and I almost cried. Most amazing was the fact that my son didn’t think playing a game starring female players was a big deal. How the world has changed since I was his age!

That’s what it’s all about, isn’t it? I want both my sons and my daughters to have choices in who they become and what they do. I want them to have a wide, diverse view of success and strength. I’m presenting them with a different view of what working women and a 21st-century family look like.

Journalists are admonished to “show, don’t tell.” That’s what I’m doing for my kids through my own choices each and every day. Actions speak louder than words—and I hope the subtle life lessons I’m teaching come through loud and clear.

Rashida La Lande joined Kraft Heinz in January from Gibson, Dunn & Crutcher in New York City, where she was a partner. She has 18 years of legal experience representing companies and private equity sponsors in the consumer products, retail, financial services and technology industries. As global general counsel and corporate secretary at Kraft Heinz, she leads the company’s legal functions, including corporate governance and securities, transactions, regulatory, intellectual property, litigation, and labor and employment.
Club O

Anthony Ray Hinton’s story of his exoneration after three decades on death row has received a rare honor: a coveted spot as the latest Oprah’s Book Club pick. Hinton’s tragic yet triumphant memoir, *The Sun Does Shine: How I Found Life and Freedom on Death Row*, now has an international platform to shed light on the need for criminal justice reform. *The Sun Does Shine* is the second book club pick in a row to tell the story of a man convicted of a crime he didn’t commit. 

Source: oxygen.com.

Me Too Modifications

In the wake of the Me Too movement, big firms such as Orrick, Herrington & Sutcliffe and Goodwin Procter are modifying their summer associate programs, reducing the amount of drinking built into social events and adding events focused on the wellness and well-being of their summer associates. Goodwin has added cooking classes, spinning sessions and cultural events, including museum tours and theater outings. The firm says there is a correlation between alcohol and bad behavior, and it wants to move away from that summer theme. Goodwin also requires all employees to take anti-harassment training. 

Source: theamericanlawyer.com.

Did You Know?

Under a new pilot program, the University of Pennsylvania Law School has become the first U.S. law school to accept the GMAT in place of the LSAT for admissions, along with the GRE. The move is part of a trend at law schools across the country to give applicants additional options beyond the LSAT. The ABA is scheduled to vote this month on whether to toss the accreditation standard that calls for a “valid and reliable admission test.”

Source: law.com.
Hard Hitting
Youth tackle football faces litigation over head injuries, along with proposals to ban the sport altogether

By Julianne Hill

When he was 8 years old, Tyler Cornell proudly put on shoulder pads and a big helmet for the first time as he joined the Pop Warner Little Scholars football team in Rancho Bernardo, California. For the next 10 seasons, his mother, Jo Cornell, spent hours on the sidelines watching her only child play peewee tackle football organized by Pop Warner, the largest U.S. youth football league. Her son loved the game and all that came with it—the friendship, the teamwork, the adrenaline rush. He played for the Pop Warner team until he switched to the high school team, where he played on the line, taking down countless opponents, enduring countless hits to the head. Right before leaving for the University of California at Santa Barbara, Tyler Cornell changed. He started struggling with depression and anxiety. He became impulsive and moody. He'd start a semester only to be hospitalized for mental health issues. Eventually, he transferred to the University of California at San Diego, which was closer to home. But on April 3, 2014, after seven years of struggles, 25-year-old Tyler died by suicide.

Like most football fans in Southern California, Tyler's mother knew the story of San Diego Chargers linebacker Tiaina Baul Seau Jr., better known as “Junior Seau”—how the linebacker had years of erratic behavior and how after the Hall of Famer's suicide researchers at Boston University discovered he had chronic traumatic encephalopathy, a brain disease caused by repeated blows to the head.

Cornell knew Seau's family was among the more than 4,500 litigants in a federal class action against the National Football League over concussion-related brain injuries.

In her grieving, she wondered: Could her son have had CTE, too, as a result of playing tackle as a child? Signs of CTE include depression, apathy, substance abuse, difficulty thinking, dementia, impulsive behavior and suicidality.

A few months later, she met Kimberly Archie, who lost her 24-year-old son Paul Bright Jr. after he recklessly drove a motorcycle and crashed just months after Tyler died. Like Tyler, Paul also played for years on a Pop Warner team through middle school.

Both played in high school but not in college. Both struggled with erratic behavior and depression. Both mothers sent their sons' brains to the Boston University researchers.

And both brains were found to have stage 1 CTE,
making Tyler and Paul among the youngest players to be diagnosed with the disease.

RE-Thinking Youth Football

Parents such as Cornell and Archie have had enough and are seeking damage awards, as well as calling for bans on youth tackle football across the country. Several states already have considered such bans.

A class action suit against the Pop Warner youth football league filed by the mothers stands to be the first lawsuit to go to trial. The Langhorne, Pennsylvania-based organization, which is a unit of USA Football funded by the NFL, was named after football coach Glenn Scobey “Pop” Warner.

For the past decade, as the list of former NFL players coming forward with dementia and depression grows, professional tackle football has increasingly been under fire. Those flames grew after a well-publicized 2017 study by Boston University discovered evidence of CTE in 110 of the 111 brains that had been donated by families of deceased NFL players.

The backlash is now moving toward youth tackle football, played by nearly 1 million kids. Another 2017 study by BU researchers fueled that fire, finding that children who played football before age 12 had more than twice the risk of problems with behavioral regulation, apathy and executive functioning—and more than triple the risk of clinically elevated depression scores.

“Football is a brutal sport,” says Robert Finnerty, a partner at Girardi Keese, the Los Angeles firm representing Tyler’s and Paul’s survivors in the civil suit. “The NFL cases brought forth the idea that trauma to the brain can result in serious consequences. This is just a continuation.”

Since January, five states—California, Illinois, Maryland, New Jersey and New York—have discussed laws banning tackle football for kids before reaching their teen years.

“I don’t hate football,” says Illinois state Rep. Carol Sente, D-Vernon Hills, who sponsored that state’s bill. “But can’t you just wait while the child’s brain is in a more developmentally stable state before you play tackle?”

A 2016 study reported that more than 6 percent of hits taken by 9- to 11-year-olds were high magnitude—meaning more than 40 times the gravitational pull—or above, most occurring during practice. “That’s like someone punching you in the head. If someone did that to a kid, their parents would be outraged,” Sente says.

However, the controversial proposals were pulled or reduced in April.

“We believe it’s not the government’s role but the parents’ in determining if a child should play football or any other sport for that matter,” says Brian Heffron, spokesman for Pop Warner, which provides tackle and flag football teams. “Significantly more play tackle than flag,” he says.

“It makes great headlines to say, ‘Let’s ban youth football,’” says Francis X. Shen, executive director of education and outreach for the MacArthur Foundation Research Network on Law and Neuroscience and an associate professor at the University of Minnesota Law School. “But the issues are more complex than that.”

“There are concussions in every sport—gymnastics, cheerleading, soccer, lacrosse,” says Hosea Harvey, associate professor at Temple University’s Beasley School of Law. “These proposals are using a hammer to solve a legitimate issue, but it’s imprecise and too big.”

Practicing Protocols

In May 2009, Washington state passed the Zackery Lystedt Law, the first to mandate that youth players showing signs of concussion be removed from the field and cleared before they can play again. Lystedt-style laws typically mandate education for coaches, referees, players and parents, removing players with potential concussions from play and conducting specific protocols to approve their return to the field.

“If you don’t follow these protocols, you’re not legally liable,” says Shen, whose work focuses on the intersection of law and neuroscience. “One option for change might be making the laws that exist already have more consequences.”

However, the Washington Supreme Court moved toward that in 2017, ruling in Swank v. Christian Valley School that juries will decide whether coaches’ negligence in following the protocols would make them liable for a player’s death.

Shen proposes youth football self-regulate with state support. “You would need state funding to facilitate data sharing, such as how many coaches in the Pop Warner league have received their safety training,” he says.

Other youth contact sports have specific rules about
The Docket

brain health. For example, the American Youth Soccer Organization bans headers by anyone younger than 12. USA Rugby mandates that players 18 and younger who have had a concussion sit out two weeks and be symptom-free before beginning the five-day return-to-play protocols.

SAFETY MEASURES

Over the past several years, Pop Warner has adjusted the rules for safety concerns. For example, the league mandated that all coaches receive more training while reducing contact drills to 25 percent of practice time and eliminating kickoffs.

“Datalys Institute’s research data show that Pop Warner rules and Heads-Up football training result in [an] injury rate that has 87 percent fewer injuries than non-Heads-Up/ non-Pop Warner programs,” according to the organization’s website.

“We’ve worked with medical experts to make the game safer than it’s ever been in 90 years. That’s because of coaching education, more stringent rules and greater awareness of concussions. There’s been a change in the culture of youth football,” Heffron says. He would not comment on the ongoing litigation.

“Pop Warner is not engaging in self-regulation,” says Finnerty, who also worked for the NFL players’ settlement. “The NFL and Pop Warner are saying they are making every effort to reduce head trauma. It’s not true, even while they may be engaging in ad campaigns suggesting that.”

The civil suit—filed on behalf of those who played on Pop Warner tackle teams since 1997 and suffered brain injury or disease—claims negligence, fraud and fraudulent concealment on the part of the youth football league.

In February, U.S. District Judge Philip S. Guittierrez rejected a motion by Pop Warner to dismiss the case. A trial date has not been set.

“These mothers would like compensation for their losses, but more importantly they want to raise awareness for other parents about the long-term damage,” Finnerty says.

Split Over Hair

Proponents of deregulation seek to untangle laws on hair braiding

By Stephanie Zimmermann

Carefully layering one tiny strand of hair over another, Tameka Stigers has spent years honing her talent for African-inspired, natural hair braiding.

The style she currently specializes in, delicate little twists trademarked as Sisterlocks, involves a process that can take up to 12 hours and relies on patiently working on small sections of hair with the hands, rather than using chemicals, hair irons or scissors. Stigers’ hair-braiding skills have become so prized that the St. Louis woman opened a free-standing salon dedicated to natural braiding last year.

Yet a cloud is hanging above her new business. Under Missouri law, for Stigers to operate legally, she would have to attend at least 1,500 hours of cosmetology classes, in which she’d learn dyeing, cutting, perming and other skills that have nothing to do with African-style braiding. “It’s the most asinine thing,” says Stigers, who has a master’s degree in public health.

The Missouri legislature passed a bill that will finally give Stigers a break. Instead of making hair braiders earn a degree in cosmetology, the law, passed in May, will require them to watch an in-depth instructional video on health and sanitation, register with the state, and pay a small licensing fee. Former Gov. Eric Greitens signed it on his way out of office in early June; absent a challenge, it will take effect this month.

Braidors such as Stigers, who worked illegally under the old scheme, will be able to come out from the shadows. The old rules, she says, “absolutely did not make sense.” If Stigers were to move her business to nearby Tennessee, however, she’d be back on the wrong side of the law. Braidors there must complete at least 300 hours of training and get a specialty license to run a legal braiding business. An effort to loosen the Tennessee regulations fell apart in March amid a separate fight about combining barber and cosmetology licenses.

RELAXING REGULATIONS

Hair braiding in the United States is governed by a patchwork of regulations—or lack of them—that critics say have not kept pace with popular braiding styles. The hodgepodge is providing an opening for libertarian-leaning lawyers.

The nonprofit Institute for Justice, a legal organization founded with money from free market proponent Charles Koch, has taken on what it says are unfair and oppressive regulations for hair braiders. The trend is in its favor. Over the past four years, more than a dozen states have loosened their rules for hair braiders—with an additional handful of state legislatures close to joining them.

According to the institute’s running tally of legislation, some 25 states had no licensing requirement for hair braiders as of mid-June. Another 15 or so states, including Illinois, Missouri and New York, plus the District of Columbia, have created specialty hair-braiding licenses that have much easier training requirements than for cosmetology. About 10 states require hair braiders to undergo the more rigorous process of going to cosmetology school and getting a cosmetology license.

Even so, some hair professionals still want rules in place to protect consumers from unsanitary practices and give them a place to complain. In 2011, North Carolina shifted from requiring no license for braiders to enacting a specialty license with a 300-hour education requirement.

CENTURIES-OLD CRAFT

African-style braiding has soared in popularity in recent years, as celebrities such as Beyoncé and Nicki

PHOTO COURTESY OF THE INSTITUTE FOR JUSTICE
Minaj have shown off braided locks. Many black and biracial women like that it’s chemical-free and lasts a long time.

Popular styles include box braids—which usually involve adding synthetic hair extensions to square-shaped sections of braided hair—as well as the tiny twists of Sisterlocks and head-hugging cornrows. The work can take an entire day and cost several hundreds of dollars. But clients save time and money by not needing to style their hair each day.

A hair braider’s tools are a comb, hair bands and in some cases boiling water to dip and seal the ends of braids. Although formal hair-braiding schools have cropped up, many braiders say they learned the skill as children from family members.

That simplicity drives some to argue braiding is a different industry from hair styling altogether—for which practitioners attend cosmetology school to learn about color treatments, highlights, permanent waves, chemical relaxers, and cutting and shaping. Some braiders complain that the people in charge of oversight know little about their craft, which dates back centuries to Africa.

Proponents of hair-braiding deregulation say the toughest state rules fail the “rational basis test,” meaning there is no rational connection between the law and a compelling government interest. The libertarian Institute for Justice argues such regulations infringe on a person’s rights to due process and equal protection guaranteed by the 14th Amendment.

The nonprofit has won several lawsuits, including in Texas, where it convinced a federal judge in 2015 that it was unfair to require a woman who taught hair braiding to comply with onerous barber school regulations that were unrelated to her work.

In January, however, the institute lost in the 8th U.S. Circuit Court of Appeals at St. Louis; Stigers was the plaintiff, along with another braider named Ndjoba Niang, suing the Missouri Board of Cosmetology and Barber Examiners. In response, they appealed to the U.S. Supreme Court, but then the deregulation bill passed, effectively making it moot.

Some black female and African immigrant braiders, along with their supporters, complain about a cultural disconnect around the issue of hair braiding.

“The people who made the rules and enforce the rules were totally unaware of and didn’t think through the issues” in many states, says Paul Avelar, a managing attorney at the Institute for Justice. “It was just ‘You’re touching hair, so you need a cosmetology license.’ ”

But not everyone wants government to be hands-off on braiding. In the Missouri case, the state

Tameka Stigers

argued that African-style hair braiding “is, by its very nature, a form of hair care and styling” because it “involves the manipulation of hair for aesthetic effect.” The new Missouri law acknowledges the need for at least some training, albeit through a video, in health and sanitation.

Critics of deregulation point to hair-braiding blunders such as hair being pulled too tight, resulting in ripped follicles and the potential for permanent hair loss. That’s a public health and safety issue that they think warrants government oversight.

Lisa Lane, a black salon owner in Annapolis, Maryland, is a member of the Professional Beauty Association’s advisory council, as well as a past member of the Maryland State Board of Cosmetologists. Lane says she’s heard of bacterial infections occurring with careless braiding jobs and worries about the health implications of unregulated hair braiding. “There can be safety issues,” she says.

Michael Halmon—a black man who owns a cosmetology school with two Florida campuses in Largo and St. Petersburg and vice chair of the board of the American Association of Cosmetology Schools—agrees. While he concedes that hair braiders don’t do perms or color, Halmon says licensing gives consumers a place to turn if something goes wrong. “Some kind of regulation is necessary,” he says.

PUSH FOR PROPER PROTOCOL

In Tennessee, state Rep. Antonio Parkinson, a black Democrat from Memphis, fought hard against the deregulation proposal in part because he feared a torrent of bad actors.

If the state let braiders off the hook because they’re a natural hair business, what’s to stop a barber who doesn’t use chemicals from claiming he’s a natural hair stylist, too, argues Parkinson.

“They could put a sign on their door that says I’m a natural hair stylist,’ ” and escape government oversight, he says.

Parkinson says he grew up in a family that did hair care and was annoyed by the whole deregulation push. “None of the people that were attempting to make these decisions have any hair experience—none. So it’s kind of insulting,” Parkinson says. “I’m not against deregulation of some things … but when it comes to public health, I’m absolutely against it.”

Mark Norris, the white Republican Tennessee Senate majority leader who backed the deregulation bill for Gov. Bill Haslam, ended up withdrawing it after listening to some black caucus members’ concerns.

“We’re all about cutting red tape and being business-friendly,” Norris says. But “it’s a lot of white faces telling folks that they know what’s best for them. It didn’t sit well with me.”

Across the Mississippi River in Missouri, it’s the opposite. Stigers is celebrating what she considers a victory. Now that braiding will become more accessible there, Stigers says she has a new mission: making sure shoddy braiders don’t step in to do poor work at low prices. “We have to stay vigilant,” she says.
In this year’s popular documentary *RBG*, Justice Ruth Bader Ginsburg reflects on, among other things, her years during the 1970s as an oral advocate before the Supreme Court, where she won five of the six cases she argued as a champion of women’s rights.

“I did see myself as kind of a kindergarten teacher in those days because the judges didn’t think sex discrimination existed,” Ginsburg reflects in the film, which includes audio clips of sexist and patronizing comments by members of the then all-male court.

There has been change, of course, with four women having been appointed to the court, three of them serving together now. And female advocates at oral argument are not the rarities they were when Ginsburg last appeared in 1978.

However, Justices Ginsburg, Sonia Sotomayor, Elena Kagan and their male colleagues saw fewer women arguing before them in the 2017-18 term, and the fewest to participate in oral argument in at least seven years.

During the recently completed term, there were 19 appearances at oral argument by women, or about 12 percent of the total 163 appearances, according to statistics kept by Kedar Bhatia for SCOTUSblog. (There were 113 different advocates who argued for parties or amici in the 63 argued cases, with several lawyers appearing more than once.)

The 12 percent figure was a steep drop from the previous term (2016-17), when 21 percent of appearances at oral argument were by women. In the previous five years to that term, the participation rate for women ranged from a low of 15 percent to a high of 19 percent.

“The thing that’s most disturbing to me is the consistency in the data,” says Jennifer Crystal Mika, an adjunct professor at American University’s Washington College of Law in the nation’s capital, who has studied the issue of female advocates before the high court. “There has never been much more than 20 percent female advocates over the last 20 years.”

**SAME WORK, LESS PAY**

It’s a bit of an old story to some prominent female Supreme Court advocates, but one even they admit is worthy of continued discussion.

“I would have thought this would have been fixed by now,” says Lisa S. Blatt, a partner with Arnold & Porter Kaye Scholer who has argued 35 cases—more than any other woman—before the Supreme Court.

In 2010, in the *Green Bag* online law journal, Blatt wrote an article about arguing before the justices in which she observed that men of the elite Supreme Court bar are more likely than women to represent corporate clients, while “the women I see arguing before the court are public interest lawyers, public defenders representing the criminally convicted or government lawyers. Translation: Women are doing the same work but for less pay.”

Today, Blatt holds to her view that one reason men have maintained a stronghold on oral advocacy is that the courtroom is a battlefront where verbal jousting and sparring with the justices is rewarded.

“You have to be not just fearless but aggressive,” she says.

Pamela S. Karlan, a Stanford University law professor who has argued eight times before the high court, says a certain level of aggressiveness is needed not only at the lectern but in seeking out argument opportunities.

“I think it is hard to get a first argument, and without getting a first argument it is hard to get more arguments,” she says. “There is an aggressiveness in rainmaking that not all men have, but most of the people who have it are men.”

She says there are aspects of business development at firms that can feel “arrogant and pushy,” characteristics that “fewer women than men have.”

“I feel completely comfortable arguing before the court, but I often feel diffident about pushing myself as the person who should argue the case,” Karlan says.

Karlan, like Blatt, has been reflecting on the issue for years. In 2010, she participated in an event at Georgetown University Law Center about female oral advocates before the high court that included Justice Ginsburg, as well as some other prominent female attorneys. Ginsburg made the point that while oral argument is an important part of the court’s deliberative process, it is also “a show” and the briefing in a case is much more important.

Karlan argued and won a case this past term, *Lozman v. City of Riviera Beach, Florida*, in which the court held that her client, Fane Lozman, a speaker who was arrested at a city council meeting, could pursue his First Amendment retaliation suit despite the existence of probable cause for his arrest.
Representing Lozman as part of Stanford’s Supreme Court Litigation Clinic, Karlan was one of seven private-sector female lawyers to argue before the justices this past term. The others were government lawyers, mostly with the U.S. solicitor general’s office, but also two state solicitors general and one federal public defender.

The solicitor general’s office in recent years has been the source of frequent participation in oral argument by women, often 15 or more appearances in a given term. Karlan and Blatt note that a number of experienced female advocates have left the key Department of Justice office in recent years and joined Supreme Court specialty firms or top appellate practices of large firms.

These include Nicole Saharsky at Gibson, Dunn & Crutcher; Melissa Arbus Sherry at Latham & Watkins; Ginger D. Anders and Elaine J. Goldenberg at Munger, Tolles & Olson; and Sarah Harrington at Goldstein & Russell.

“I do think the next few years will be interesting because a lot of these women just left the SG’s office,” Blatt says.

RARE PARITY—OR MORE

Though she did not appear before the justices this past term, Blatt drew attention in the fall of 2016, when she squared off against another female advocate, Elizabeth B. Prelogar of the solicitor general’s office, in a case about double jeopardy, Bravo-Fernandez v. United States.

Because the court was shorthanded at the time, with the late Justice Antonin Scalia’s seat still vacant, that meant there were an equal number of men and women participating in the case either as a justice or an advocate. (That’s two female advocates, plus three female justices, alongside the five male justices.)

Neal K. Katyal, a former acting solicitor general under President Barack Obama and a Supreme Court and appellate litigator at Hogan Lovells, notes that in a Foreign Sovereign Immunities Act case argued in November 2016, Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co., there was a likely unprecedented lineup.

“Three women advocates, three women justices and the rest men, so the women outnumbered the men,” Katyal observed at a Supreme Court preview panel last fall.

“That was some progress, but there’s much to be done.”

Mika, whose full-time job is assistant general counsel of the Department on Disability Services in Washington, D.C., wrote a paper in the American University Journal of Gender, Social Policy & the Law. Following her research, she concluded that gender disparity in Supreme Court law clerkships may be affecting how many women gain the experience necessary to join the elite Supreme Court advocacy practices.

“Women have consistently only comprised one-third of the clerks selected by the justices for a given term every year since 2010,” Mika said in the 2017 paper.

“Clerkship experience clearly reflects an interest and aptitude in appellate law, which makes candidates attractive to firms with strong and distinguished practices before the Supreme Court as well as the [solicitor general’s office]. The fact that women continue to be less likely to obtain this experience places potential women Supreme Court advocates at a disadvantage.”

Still, Mika says that for the justices, lawyers, aspiring lawyers or anyone else, looking at the lectern during oral arguments and seeing two or three women participating, even if rarely, represents a measure of progress, but with plenty of room for improvement.

“You want the people who are presenting arguments significant to half the population to reflect that population,” Mika says.

“You half of our profession is female. Why aren’t they represented in what is considered the most significant opportunity you can get as a lawyer?”

“You have to be not just fearless but aggressive.”

– Lisa Blatt
Law students and attorneys seeking guidance regarding legal job interviews and new employment positions often hear advice like: “Sell yourself!” “Exude confidence!” “Wow them!” and “Be alpha!” Considering the day-to-day tasks of many lawyers—fact-gathering, reading, thinking, researching, writing and problem-solving—being gregarious and outgoing is not exactly a prerequisite for numerous, critically important lawyering activities. If hiring managers and legal recruiters allow personality stereotypes to overshadow lawyering competencies and inward-facing analytical capabilities, we risk overlooking highly gifted candidates.

Classic job interviews tend to favor extroverts, on the interviewer and interviewee sides. Employers and applicants with the gift of gab can sail through one-on-one chats. The interviewer might understandably envision the skilled conversationalist representing the firm well at networking events, engaging potential clients in riveting banter, or captivating courtrooms during closing arguments. For naturally quiet individuals such as introverts, who process information, stimuli and energy internally, the forced outward spontaneity of a job interview can be challenging.

Introverts naturally resist the inauthenticity of small talk, which often unavoidably accompanies initial professional interactions. For other individuals who experience shyness or social anxiety—which can stem from a fear of judgment or a history of shame-based criticism—the sizing-up nature of a job interview can be daunting. Introverts naturally resist the inauthenticity of small talk, which often unavoidably accompanies initial professional interactions. For other individuals who experience shyness or social anxiety—which can stem from a fear of judgment or a history of shame-based criticism—the sizing-up nature of a job interview can be daunting. However, experts on introversion, shyness and social anxiety report that these three categories of quiet individuals bring tremendous assets to interpersonal encounters: active listening, deep methodical thinking, creative problem-solving and empathy. These are important traits for lawyers to offer to attorney-client relationships—and the profession. What if we cultivated interview and practice environments in which introverted and otherwise naturally quiet individuals can showcase skills beyond smooth verbal volleys?

LET INTROVERTS SHINE

A novel approach to consider is to ask job candidates—in advance—whether they self-identify as introverts or extroverts. Because introverts process new queries and concepts internally and like to vet and test ideas or responses to questions before articulating them aloud, spontaneous discourse is not always fluid. As an alternative to the traditional interview model, employers could offer introverts the opportunity to write out answers to classic (or creative) interview questions prior to the face-to-face meeting. For example, one recent LinkedIn job posting stands out: A law firm expressly seeking talented legal writers invited candidates to submit a 750-word piece arguing why a particular novel should have won a Pulitzer Prize. This fresh approach would allow candidates to demonstrate strong writing and analytical skills (and possibly even humor and interesting personal traits) while providing both the interviewer and the interviewee with ready-made talking points for the face-to-face encounter. Affording introverts the opportunity to write out thoughts, concepts and opinions before an interview could generate a platform for a remarkably dynamic conversation.

In addition, instead of relying on traditional law job interview questions and gauging how well each candidate converses, an interviewer could ask self-identified quiet candidates to talk specifically about the application of introverted strengths to the advocacy context: active listening, methodical thinking, creative problem-solving, legal writing, etc. The applicant could share examples of how introverted assets helped resolve a conflict or overcome an obstacle. Employers further could set up a...
module within the interview for applicants to model an inward-facing lawyering skill; then, the interviewer and interviewee jointly could debrief the task afterward.

One idea is to give candidates a quiet space and a reasonable time period to mark up a draft contract or brief. Through this simulation, applicants could show their analytical techniques, thought processes and editing style instead of telling the interviewer about their approach to this type of activity.

Rather than encouraging naturally quiet law students and lawyers to fake extroversion in interviews (which does not accomplish much besides perpetuating un-healthy inauthenticity and the “imposter syndrome”), this method emboldens introverts to be their authentic yet appropriately amplified selves, while highlighting their advocacy strengths. An open-minded approach to unearthing diverse and unconventional qualities and abilities in job candidates inevitably will add value to law offices’ teams.

CULTIVATING AN ENVIRONMENT

While some lawyers thrive in environments with multiple competing stimuli, many introverted attorneys need complete peace, quiet and solitude to produce their best work. Some lawyers can draft a complicated contract or a nuanced brief while music, sports or talk radio resounds from desktop speakers.

In contrast, even the sound of a co-worker happily crunching on pretzels in the office next door can compel some introverts to rethink a paragraph structure four times. Some supervising attorneys might bristle at seeing closed doors down a law firm corridor, but some introverts might just need those few precious hours of seclusion to produce an exceptional piece of legal writing.

Law offices can consider encouraging transparency and supporting diverse methodologies in how introverts and extroverts achieve peak performance. An honestly phrased note on a door that says something like “Introvert zone: Finishing a brief that is due in three hours. Will be free for human contact at 6:30!” could be a simple but effective vehicle for better work product and a happier, healthier, more productive introverted lawyer.

BUILDING A PLATFORM

Group or team meetings can pose challenges for introverts who resist interrupting others, even when their brains are brimming with ideas and strategies. Many introverts prefer to let ideas percolate internally before voicing them. Competing extroverted voices tend to dominate group meetings, and a team gathering might end before the introvert has fully fleshed out a theory or proposal enough to be ready to share it.

Non-introverts might misperceive a quiet lawyer as checked out or disengaged in a meeting populated mostly by talkative colleagues. However, introverts often take impeccable notes in meetings, synthesize points made by others, and identify solutions that others may have overlooked. Instead of overtly or implicitly pressuring introverts to speak up at group meetings, law offices can cultivate a platform for introverts to perform roles within groups that sync with their natural strengths, such as note capturer, idea synthesizer, next-step recapper.

Meeting leaders who recognize the challenges that some introverts face in trying to jump into the fray—inauthentically—might encourage the introvert to carve out a role as the “idea collector.” The introvert, who likely is an active listener, can capture the competing voices, sift through and organize the proposed ideas or solutions, prepare a written summary of the meeting, and then circle back to the group either at the end of the meeting or later in writing. Introverts do not need to speak all the time to have an effect on others.

Overall, by understanding that introversion and quietude can be powerful assets in the practice of law, we can transform the way we interview, hire and mentor naturally quiet but hardworking and insightful individuals. We likely will discover vibrant personnel additions to our teams, expand diversity and inclusion in our law offices, and enhance the health and well-being of our profession.

Heidi K. Brown, an associate professor of law and director of legal writing at Brooklyn Law School, was a lawyer in the construction industry for two decades. She is the author of The Introverted Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy (ABA, 2017).
Prime-Time Cases

Celebrity attorneys face challenges, ethical pitfalls

By David L. Hudson Jr.

Some lawyers might find the idea of representing high-profile clients on the public stage to be an exciting career opportunity. These days it’s commonplace to find attorneys such as Michael Avenatti, who represents adult film actress Stormy Daniels, talking about their cases on TV—many hoping to use the public forum to the advantage of their client and their firm.

But attorneys who have been in the limelight say it’s important to be aware of the challenges that come with representing celebrities and how missteps can impact their reputation and yours.

“Attorneys can easily get seduced by the media and spend far too much time focusing on the court of public opinion instead of the court in which the case will be tried,” says Laurie Levenson, a professor at Loyola Law School who has written on lawyers’ free speech rights and dealing with media coverage of cases. “Attorneys can risk violating ethical rules regarding confidentiality, being unprepared for trial, and making improper, extrajudicial pretrial comments.”

HANDLING PRETRIAL PUBLICITY

A major challenge for celebrity attorneys is dealing with the media and the maelstrom of attention foisted on one’s client, particularly when the client is facing salacious allegations of misconduct. Mark Geragos, a criminal defense attorney based in Los Angeles who has represented clients including Michael Jackson, Winona Ryder and Gary Condit, says it’s a factor attorneys must constantly consider “in this day and age of internet trolls and misinformation.”

The legal rules sometimes limit what lawyers can say on behalf of their clients. Additionally, sometimes judges issue gag orders to control the flow of information.

“I’ve always thought the legal profession has had a far-too-narrow conception of what lawyers should be able to say to defend and protect their clients in the public arena,” says Rusty Hardin, an attorney based in Houston who has represented scores of famous athletes, including baseball star Roger Clemens, and political figures.

Rule 3.6(a) of the ABA Model Rules of Professional Conduct reads: “A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”

The U.S. Supreme Court approved this standard when it upheld the constitutionality of a similar Nevada rule in Gentile v. State Bar of Nevada (1991):

“arbitrarily assigns to one party the burden of a public interest or assigns an advantage to one party based on the likelihood of material prejudice to the other party.”

We agree with the majority of the states that the ‘substantial likelihood of material prejudice’ standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state’s interest in fair trials.

But when does speech constitute a substantial likelihood of materially prejudicing a pending case?

“What does that even mean?” Hardin says. “The rule uses vague language. The ethical rules as to pretrial publicity are generally written by people who have never represented famous people. What gets under my skin is that the way the legal profession often looks down on lawyers and public personalities who are only trying to save their careers and feel compelled to speak publicly in defense of allegations that they feel are unfounded.”

Hardin stresses that attorneys should be allowed to respond to the allegations, speculation and innuendo that ricochet across the modern 24/7 news cycle, particularly because livelihoods often are at stake.

“I believe the First Amendment is a lot stronger in many ways than the ethical rules have recognized,” Hardin says. “I do believe there are limits as to what lawyers can say in pending cases. But I think, for example, that gag orders benefit only the government or the person making the accusations. It is unfair to tie the accused person’s hands behind their back when the media is free to talk about it all they want.”

MANAGING EGOS

Celebrities are used to being in control and are accustomed to a level of deference and even impunity. These traits mean their attorneys must continuously ensure clients are remaining candid with them. There is also the challenge of client control and control of what outside handlers do and say.
“Probably the biggest challenge is that you have to resist engaging constantly with all the distractions, whether from outside and often inside your client’s camp,” Geragos says. “It takes quite a bit of restraint and patience.”

The celebrity entourage—from managers to PR flacks—can sometimes work at cross-purposes with legal strategy. So attorneys must learn when to finesse and when to put their foot down.

“PR professionals are a big problem,” Levenson at Loyola says. “They like to spin things, and that doesn’t help a client’s cause. Candor and credibility are important. They also tend to reveal more about the defense strategy than is wise.”

Client and entourage use of social media can compromise a defense. Ethically, attorneys have to make sure their clients and their team understand ground rules and place limitations on social media use related to the case.

“Likely you have a whole team of people doing damage control,” says Ann Murphy, a professor at the Gonzaga University School of Law who published “Spin Control and the High-Profile Client” in the Syracuse Law Review. “The attorney needs to be very, very careful to keep the client’s legal advice separate.”

“Attorneys, as part of their ethical duties, must now counsel their clients on the use of social media,” Murphy says. “Once it is out there, it is out there. Even if someone deletes a Facebook post—it likely has been saved as a screenshot and is of course subject to discovery,” she adds. “Personally, I think the best advice is tell the client that any posts about his or her case must be viewed in advance by the attorney.”

The issue of attorney-client privilege should remain at the forefront—whether discussing the case publicly or dealing with the client and their team at large.

“Attorneys must be diligent in keeping a wall around legal advice—or there will be both attorney-client-privilege waiver issues and confidentiality ethical issues,” Murphy says. “You can’t have all of these considerations and ethical issues that have to be considered; and the answer differs for every client and even for different times of every case,” Geragos says. Levenson agrees that it definitely depends on the individual case.

Experts agree that celebrity attorneys face greater challenges in this era of pervasive social media. Hardin says social media has definitely changed the legal defense landscape.

“It makes it almost impossible to get out front of salacious allegations,” he says. “I’ve reached the stage now where I realize that you have to consider immediately responding to salacious allegations because within 24 hours every blogger is going to write on it and it is all over the internet.”

Levenson agrees that social media is a constant concern, and that lawyers walk a fine line when considering whether to respond.

“Lawyers need to monitor it to see what witnesses are saying, etc., but they don’t want to feed the frenzy,” Levenson says. “It can be difficult to monitor the constant feedback online and resist the urge to respond to misinformation or spin.”

Avenatti has a different take, having publicly stated that he believes in taking an aggressive approach on social media and in the court of public opinion. And he has not shied away from going on the attack. His tactics are playing out daily in the high-profile cases against President Donald Trump by Daniels, whose legal name is Stephanie Clifford.

Ethics authorities have mixed reactions about this approach, which could potentially irritate a judge, and may or may not serve the interest of the client.

Experts also say it depends on the individual case as to whether it is prudent for an attorney to go on the offensive with respect to social media posts and other public responses. “There are a variety of client desires, tactical considerations and ethical issues that have to be considered; and the answer differs for every client and even for different times of every case,” Geragos says. Levenson agrees that it definitely depends on the individual case.

Hardin says the celebrity attorney must remember it is the client’s case and their decision on how to handle these matters. “The lawyer needs to get a quick and comfortable relationship with the client so the lawyer has the client’s trust,” Hardin says. “The lawyer needs to realize he or she is not the Lone Ranger. Lawyers need to remember that the client is the boss.”

Lastly, lawyers representing celebrities must retain their sense of purpose. “Don’t lose your humility or sense of humor, because the worm can and will turn in the most unexpected ways,” Geragos says.
**Practice**

The Situation as I Understand It

Strive for clarity and context in emails that address legal questions

By Bryan A. Garner

Since the 1990s, the means of reporting legal research has changed radically. In the old days, junior lawyers routinely wrote research memos. From their very first days in law school, students were typically taught to write a “question presented” followed by a brief answer in a formal legal memo. The quality of these memos varied widely, but the emphasis was always on framing both a question and an answer (preferably containing a well-considered reason underlying that answer). Yet in recent years, this type of formal legal memo has become much less pervasive in law practice. Instead, questions are answered more quickly (and, truth be told, less reflectively) in emails. A senior lawyer poses a query by email and asks for a quick-and-dirty answer. “Don’t prepare a formal legal memo!” the common refrain goes. “Just email the answer.”

Part of the justification for this trend is efficiency: The old-style legal memo often seemed cumbersome, and juniors might sometimes take too much time winding themselves up to put finger to keyboard. Another part has to do with client relations: Many clients don’t want to pay for formal memos when a quick email will serve their purposes just as well. But perhaps the most important contributor to this trend is the mere availability of email as an all-pervasive means of streamlined communication.

Some of you may think right now: “Even email is too clunky. I just have people text me the answer!” True enough, sometimes. If you have a clear question and know an expert in the field, a text message might well suffice. Let’s say you need to know whether it’s permissible in Massachusetts for an out-of-state resident (a Nutmegger, to be exact) to be appointed the guardian of a person who’s in hospice care. You text a friend who specializes in guardianships and instantly receive the message: “Yes.” You have your answer. If you need the basis for that answer, you can always follow up with your expert friend. But for now, you’re satisfied that you have a definitive answer.

**THE MESSINESS OF LEGAL PROBLEMS**

Most legal questions aren’t quite so succinctly posed or answered. And for these, an email (much less a text) requires more care if that’s the means to be used. And that’s the point of this column: There’s a widespread problem in the way junior lawyers answer questions by email. They tend to respond to moderately complex legal questions merely with answers—without explicitly repeating the question. That’s because email often imitates conversation: There’s a back-and-forth quality to it. Which means that to understand someone’s answer to an issue with even the slightest whiff of complexity, you must read the entire email chain to understand what’s being said. It also means that the requester of the research (the senior lawyer, we’ll say) and the researcher (the junior lawyer, we’ll say) might very well not have an identical understanding of the import of the communication chain preceding the answer.

There are other shortcomings as well, but now let’s consider an example.

Barbara, a partner in a law firm, works primarily on behalf of hospitals. The associate assigned to her, Ari, sits in on a meeting with Barbara and their client, the CEO of a public hospital. They’re discussing pending litigation related to the use of eminent domain for an expansion of the hospital.

At the end of the meeting, the CEO tells Barbara, “By the way, there’s a proposal that the hospital should start holding Alcoholics Anonymous meetings. I’ve heard that this might be a problem.”

“How so?” asks Barbara.

“Well,” says the CEO, “we’re a state institution. I’ve heard that in some jurisdictions, there’s been a problem with the emphasis that AA places on religion—in public hospitals, at least.”

“Yes, I’ve heard about these First Amendment issues,” says Barbara. “Would you like us to look into it?”

“Ari has about seven pages of notes at the conclusion of the meeting, with at least 10 action items relating to the eminent-domain litigation. At the end of the day, Barbara sends several emails to Ari. One of them says, “Don’t forget to look into the constitutionality of the AA meetings.”

Ari responds by email: “I’ve already looked. The cases I found say it’s OK, with limitations. The hospital must narrowly tailor their actions to ensure that there’s no establishment clause violation. See the attachments.”

That’s not a great answer. Perhaps Ari was treating the point as he might in conversation. (The medium of email tends in that direction.) And he was lazy in saying, “See the attachments.” That’s putting the burden on Barbara—an exceedingly busy partner—to figure out what the cases say. She doesn’t feel comfortable just forwarding Ari’s email to the CEO. It’s going to be up to her to summarize, and she doesn’t have the time right now.

Soon Ari is gone from the firm, and Sylvia takes his place as Barbara’s associate. When Barbara raises the
question with Sylvia (by email, since Barbara is on vacation)—mentioning that Sylvia’s predecessor found the AA meetings to be constitutionally acceptable “with limitations”—Sylvia must start from scratch.

Even if the firm has an electronic filing system for keeping Ari’s email in a client-matter file, the email has little or no utility. The whole email chain is cryptic to Sylvia: She wasn’t involved in the meeting with the CEO, and she doesn’t even know that it’s a First Amendment issue.

**A SALIENT POINT**

A question that every legal writer should ask is: “When will clarity come?” Clarity means not just something that Barbara and Ari could understand on a given day but also something they could understand months from now. It means something that Barbara and Ari’s successor could understand.

To make communications understandable to secondary readers, a little context is required. Context is vital to clarity. To provide that, here’s what Ari might have written in the initial response to Barbara:

“Here’s the situation as I understand it. Peterborough Hospital, a public institution, proposes to use public funds to provide Alcoholics Anonymous meetings. AA requires its members to believe in a ‘greater power,’ and it specifically invokes God. Would subsidizing these meetings violate the First Amendment’s establishment clause?

“The answer is probably not. But according to governing caselaw, the program must meet three tests: (1) The government-funded activity must reflect a secular purpose, such as helping people reduce their dependency on alcohol and drugs. (2) The activity’s primary effect must neither advance nor inhibit religion—the declared purpose being the promotion of health. (3) The program must be nonsectarian, avoiding ideological viewpoints—referring only to a ‘higher power’ or even ‘God,’ but avoiding deities peculiar to specific religions.”

“Three circuit cases are attached. I’d be happy to review the client’s promotional materials for its AA meetings, or any other printed matter to be distributed at meetings, to evaluate their compliance with these requirements.”

Now that’s a useful email—one that Barbara might simply forward to the CEO.

What’s the most important part of it? *Here’s the situation as I understand it.* It signals a summing-up. It requires some contextualizing of the question. It’s the email equivalent of the memo heading “Question presented.”

The point is that in an email, if you answer a question as you might in conversation, you’re almost certainly causing some degree of confusion among secondary readers. You’re probably relying on unstated premises, and you may even be causing misunderstandings that will never be brought to light—thereby providing legal advice that is flawed in some respects.

When will clarity come? It should come whenever you start writing about a subject, especially if you’re in the position of Ari or Sylvia. Remember to supply a little context. Avoid launching into an answer without stating the question. The best way to do that in emails that report your research is to begin, not infrequently, with the phrase *Here’s the situation as I understand it.*

Bryan A. Garner, the president of Dallas-based LawProse Inc., has taught legal writing seminars to more than 200,000 lawyers and judges over the past 25 years. The author of more than 20 books on rhetoric, grammar and jurisprudence and the editor of Black’s Law Dictionary, he is among the most frequently cited authors in American law today.
Taking Care
Self-care is the key to stress and anxiety management
By Jeena Cho

When I teach mindfulness and meditation, I’ll often start by asking the people in the room for a show of hands: Do they frequently experience stress and anxiety? Almost all the hands in the room go up. Then I ask, “How many of you take deliberate steps to prevent or let go of stress and anxiety?” Often, it’s only a small percentage of the room that responds.

It’s paradoxical that even though most lawyers would say they would like to lessen the impact of stress and anxiety, only a small percentage of us utilize concrete strategies for doing so. As lawyers, we’re conditioned to work hard, putting our well-being second to our clients. And we tend to hold ourselves to impossibly high standards. We can falsely believe that every minute not spent billing is time being unproductive, therefore wasted. We can discount the importance of resting the mind and the body.

WHAT IS STRESS?
Simply defined, stress is a reaction to a stimulus that disturbs the body’s equilibrium. The stimulus can be anything from someone cutting you off on the highway to an unpleasant exchange with an opposing counsel. Often we place the blame for the stress on others or external circumstances, trying to change what we cannot control. We try to get others to see things from our perspective, act differently and change their behavior.

When we talk about managing stress, there are two obvious strategies. First, get rid of or change the stimulus; two, change our reaction. But there is a third way, which is to become more resilient so that the stimulus becomes less disruptive. Resilience is one’s ability to not only survive the many challenges in life but also learn and grow from the experience.

It’s important to recognize that each of us reacts to stimulus differently. One person may recover very quickly from an unexpected car cutting into their lane, whereas another may stew and continue to experience stress long after the danger has passed. Also, we may react to a stimulus differently based on how we’re feeling physically or emotionally. For example, you may react more strongly to an unpleasant conversation with your client if you’re sleep-deprived or already under a lot of stress.

WHAT IS ANXIETY?
Anxiety is the subjectively unpleasant feeling of dread over anticipated events. It’s similar to stress in that it’s also a reaction to a stimulus; but with anxiety, the stimulus is the anticipation of some future event. Anxiety can trigger rumination and persistent worrying, which can disturb one’s equilibrium.

With both stress and anxiety, we can get better at coping and lessen the impact through deliberate practices.

SELF-CARE, NOT SELFISH
Self-care is any activity or behavior you do to take care of your mental, emotional and physical well-being. Consider these questions: What do you do on a regular basis to care for your own well-being?
What activities do you engage in to give yourself a sense of joy? How do you reconnect with yourself?

The cornerstone of self-care is cultivating a friendly attitude toward yourself and treating yourself as you would someone you care about. Self-care need not take a lot of time or money. But it does take commitment and persistent effort. It’s also about drawing boundaries and putting your well-being ahead of the needs of others.

You may be thinking, “I can’t afford ‘me time.’ That’s being selfish.” Even though the words self-care and selfish sound similar, they are opposite in meaning. If I am being selfish, I am deliberately taking something away from others for my own profit or gain. If I am practicing self-care, I am engaging in behaviors that help charge my own battery. In other words, I am securing my own oxygen mask before helping others.

Here are some examples of self-care activities:
- Enjoying your lunch away from your computer.
- Engaging in a conversation with a loved one.
- Listening to your favorite song.
- Enjoying time in nature.
- Treating yourself kindly.
- Going to the doctor for a physical.
- Drinking more water.

When it comes to self-care, it’s not so much the activity itself that matters but the attitude you bring to the activity. Even a simple activity like washing your hands can be a practice in self-care. Rather than rushing and washing your hands on autopilot, you can slow down, pay attention to the sensation of the soap, the water, and take a moment to reconnect with yourself.

One common objection I get to self-care is the excuse of not having enough time. I too have felt this way, but over time I recognized it for what it was—a narrative created in the mind.

I realized the belief stemmed from thinking that if I am very busy, I must be doing something important—therefore I must in fact be very important. However, keeping constantly busy was also a defense mechanism for not confronting what is painful or not working in my life.

**USING MINDFULNESS**

Mindfulness means paying attention to the moment-to-moment experience with presence and compassion.

You may feel both stress and anxiety when you have to deliver bad news to a client. This is natural. You can approach the situation (and yourself) with compassion by recognizing that this is a difficult moment. You can also approach the situation with negative self-talk: “I am a bad lawyer” or “I am a failure.” These thoughts only heighten the stress and anxiety response. This is called the second arrow.

There is an oft-repeated saying: “Between stimulus and response there is space. In that space is our power to choose our response. In our response lies our growth and our freedom.”

With the increased connectivity and immediacy required in this digital age, it is becoming more crucial that we as lawyers learn to respond rather than react. Instead of immediately reacting and sending an angry email, we can slow down the reaction process so that we can show up as our best selves and respond wisely.

Finally, changing any behavior starts with awareness. You can’t change your reaction if you do not recognize the habitual behavior.

The first step I had to take in choosing to get better at managing stress and anxiety was to make it a priority. Rather than just complain about stress and anxiety, I decided to be proactive and take deliberate steps to increase my resiliency. Also, I learned that ultimately the only thing I have control over is my own reaction.

You can access a short guided meditation on letting go of stress at jeenacho.com/wellbeing.

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.
In a profession defined by zealous representation of clients, it's no surprise that clients are starting to push their outside counsels to beef up cybersecurity.

“The possibility that your outside law firm could be breached and your sensitive data stolen is a huge nightmare for in-house lawyers,” says Sterling Miller, general counsel of Marketo Inc., an online marketing technology company. “Outside counsel need to start taking this very seriously. If a breach happens, that law firm is probably no longer working for you and the malpractice claim could be very large.”

These aren't just idle words. In fact, they underline how serious clients have become when it comes to cybersecurity.

According to the Association for Corporate Counsel's 2018 cybersecurity report, one in three in-house counsels have experienced a data breach—a significant increase from the previous year, when only 15 percent reported a breach. As such, companies are expending more manpower and money on keeping their data safe. The study found that two-thirds of respondents expected their legal department's role in cybersecurity would increase over the following 12 months, compared with 55 percent in the 2015 survey.

Further, 63 percent predict that their company's cybersecurity budget will increase this year, an 8 percentage point increase over two years ago. Additionally, more than 70 percent of responding companies stated they were somewhat confident in their outside counsels' protection of their data, while 9 percent were "not at all confident."

Thus, the question becomes what should a corporate legal department do to ensure the data collected, used and stored by outside counsels is protected? For one,
in-house counsels must ensure that their outside law firms—the hired gun—are not the weak link in the company’s cybersecurity.

**SECURE STATE**

Law firms that represent European clients face greater scrutiny for cybersecurity and privacy. The European Union’s General Data Protection Regulation, which went into effect in May, requires, among other things, law firms based in the EU and those that have EU clients to disclose data breaches to regulators and affected clients within 72 hours of becoming aware of the breach, regardless of whether the investigation is complete.

The legal industry is one of the most targeted sectors for a cyberattack because of the trove of information it possesses about clients and cases. In a profession based on precedent and history, the legal sector often has been slow to adapt to new risks and technological changes. One alarming statistic is that cybersecurity company Mandiant estimates at least 80 of the 100 largest firms in the country, by revenue, have been hacked since 2011.

As law firms wade into cybersecurity best practices, the glaring reality is most law firms are not prepared to respond to a major breach. According to the ABA TechReport 2017, only 26 percent of responding firms had an incident response plan in place to address a security breach, and only two-thirds with 500 lawyers or more had such a plan in place. These plans were not a priority with smaller firms, as 31 percent of firms with 10 to 49 lawyers, 14 percent of firms with two to nine lawyers, and 10 percent of solo practices had such plans.

A top priority for many in-house counsels now is to make sure their outside law firms are in compliance with the rigid requirements of the GDPR. As alluded to already, the GDPR extends existing regulations to any enterprise processing data about EU citizens; and failure to meet these requirements risks fines of 20 million euros or 4 percent of a company’s annual global turnover, whichever is greater. Thus, companies are understandably focusing a lot of attention on ensuring their outside law firms are up to speed in their cybersecurity protocols.

However, it is not just the GDPR that in-house counsels should be thinking about, as one of the “sleeper issues” of 2018 is Chinese cybersecurity rules. China has been rolling out rigorous cybersecurity regulations (some have already taken effect and others will later this year), and some of these obligations include an analysis of cybersecurity programs, assessment of data transfers out of China, and a requirement that certain companies share information about cybersecurity with the Chinese government.

In light of the rise in cybercrimes, many corporate clients are now demanding that law firms respond to exhaustive requests for proposals and describe the data security programs and preventive tools they have in place on the condition of retention.

According to a 2014 article in the *New York Times*, Wall Street banks are now requiring outside law firms to demonstrate their computer systems are employing top-tier technologies to detect and deter cyberattacks. Additionally, the *Wall Street Journal* reported that J.P. Morgan Chase & Co., Morgan Stanley, Bank of America Corp., and UBS AG have subjected outside law firms to greater scrutiny regarding their cybersecurity.

In fact, some financial institutions are asking law firms to fill out 60-page questionnaires that detail their cybersecurity measures, while others are performing on-site inspections.

Furthermore, an increasing number of organizations are bound by governmental regulations that dictate what security measures you should have in place and how they should be audited. The Health Insurance Portability and Accountability Act, GDPR,

### STEPS TO CYBER SAFETY

First, in-house counsels should ensure their outside counsels have conducted a security assessment and gap analysis, have written cybersecurity policies and procedures, and have an incident response plan and team. Preparing in advance for an incident will allow the enterprise to limit its liability, reduce potential damage to reputation, and resume operations as quickly as possible.

Second, in-house counsels should demand their outside law firms regularly conduct security awareness training with all management and employees to be aware of the firm’s cybersecurity protocols, as well as spot phishing emails or other types of malicious attacks. According to Verizon’s 2018 Data Breach Investigations Report, companies are nearly three times more likely to be breached because of social attacks than technical failures—with almost all of these attacks coming via email.

Lastly, all 50 states now have a breach notification law triggered when sensitive and confidential information is accessed or acquired in an unauthorized fashion. Responding to a breach...
is a costly endeavor and can easily add up to hundreds of thousands of dollars. Thus, in-house counsels should demand that outside law firms have adequate cyber liability insurance to help cover breach notification costs, as well as qualified legal and forensic vendors who specialize in responding to breach incidents negotiated into the policy.

Furthermore, new ABA ethics opinions emphasize that to be competent, lawyers must understand technology and maintain the security of clients’ electronic confidential information. These developments are forcing in-house counsels and their outside law firms to be cognizant of the very real and significant risks they face in the 21st century and to acquire the technology sufficient to keep abreast of their clients’ cybersecurity needs.

Read more about how to avoid falling victim to social engineering cyberattacks at ABAJournal.com.

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Chain Reaction

BigLaw firms are working together with the goal of influencing how blockchain technology and smart contracts will operate in the future

By Angela Morris

The cryptocurrency and blockchain technology industry is already crowded with firms eager to nab high-tech startups as clients or help legacy clients navigate a brave new world.

But some BigLaw firms have gone further. Over the past 2 ½ years, several of the largest firms in the world have joined legal working groups aimed at bringing crypto and blockchain attorneys together to share information, learn from one another, and help craft best practices.

“We can achieve more together by sharing and by grappling with these questions together as a group, hearing each person out, than we can wrestling with things alone,” says Joshua Ashley Klayman, formerly with Morrison & Foerster in New York City, who in late June launched her own firm and a blockchain consultancy business, Inflection Point Blockchain Advisors.

Blockchain technology stores records on multiple “nodes” in a network of computers that communicate and capture changes in sync. Blockchain data is more secure because rather than tampering with one record on one computer, a hacker would have to change that record on every single node—in the process burning computer power to solve a math equation posed by the blockchain’s algorithm—which would be nearly impossible.

PARTNER PERKS

Klayman chairs the Wall Street Blockchain Alliance Legal Industry Working Group, which formed in 2016 and was one of the earliest on the scene. It’s like a community, says Klayman, who leads biweekly, in-person meetings of lawyers from BigLaw firms such as Debevoise & Plimpton, McDermott Will & Emery and Polsinelli. “Some have been able to develop relationships that have led to teaming on deals, led to us writing things together—whether articles or thought pieces—and led to better advice,” she says.

Discussions cover blockchain tech in general and don’t favor one blockchain over another. Referrals for paid legal representation are common among the lawyers in the group, and membership is open and free, Klayman says.

Also popping up in 2016 was the Digital Currency & Ledger Defense Coalition, whose members include Am Law firms like K&L Gates and Sidley Austin. It provides pro bono representation to crypto and blockchain defendants and files amicus briefs in cases that could set precedent.

“We’ve raised issues that otherwise wouldn’t be raised with courts in some of the most important decisions in the country,” says Brian Klein, the coalition’s founder and board chairman and a partner at Baker Marquart in Los Angeles.

For example, the coalition filed an amicus brief in Florida v. Espinoza in January, which involves a defendant who sold bitcoins in 2014 to undercover agents who indicated they planned to buy stolen credit-card numbers with the bitcoins.

But the 11th Judicial Circuit of Florida found in 2016 that bitcoins didn’t count as money under Florida law and dismissed defendant Michell Espinoza’s charges of money laundering and illegal money transmission. The state has appealed in Florida’s 3rd District Court of Appeal, and the Digital Currency & Ledger Defense Coalition argues the appellate court should affirm the trial court’s ruling.
The coalition also has chimed in about United States v. Coinbase in the U.S. District Court for the Northern District of California. The IRS sought records in 2016 on Coinbase users who transferred bitcoins between 2013 and 2015 because it suspected the users were underreporting their virtual assets. Coinbase fought the request.

The coalition argued in an August 2017 amicus brief the IRS was “fishing with dynamite” and its request was overly broad. In February, the court narrowed the request of the IRS somewhat, ordering Coinbase to provide records on at least 13,000 users who had at least $20,000 in cryptocurrency transactions between 2013 and 2015.

REAL VALUE, REAL CHANGE

The Wall Street group and the digital defense coalition have been joined by the Enterprise Ethereum Alliance’s Legal Industry Working Group, which started last summer, and enterprise software company R3’s Legal Center of Excellence, which launched in February.

Aaron Wright, chairman of the Legal Industry Working Group, says there’s a great benefit to lawyers involved because they’re talking through cutting-edge legal issues at a very high level, gathering perspectives from their peers, and taking home the best advice they can find for their clients.

“The technology has the potential to make a dent and improve people’s lives, and the only way that’s going to happen is if we have these conversations,” says Wright, a professor at Yeshiva University’s law school.

Wright says his group has 30 law firms as members, including Am Law firms Cooley, Jones Day, and Latham & Watkins, and that members pay annual dues, ranging from $3,000 to $25,000, depending on the organization’s size.

The alliance is divided into subcommittees of anywhere from 10 to 70 lawyers to discuss topics such as best practices for smart contracts, privacy concerns, intellectual property issues, blockchain governance and tax matters. Wright says some of the subcommittees will be issuing reports on their research topics, while others are working on product demos.

Just as Wright’s group covers only one blockchain, R3’s Legal Center of Excellence focuses solely on the Corda.

However, while the other blockchain groups are non-profits focused on open-source platforms, R3 is a for-profit company, and Corda is proprietary software that runs on a private blockchain platform.

R3 clients—mainly financial institutions—already work with BigLaw firms that make up the center’s 13 members, including Baker McKenzie, Clifford Chance and Crowell & Moring. R3 wanted those lawyers to learn about its platform to better advise their clients, says Jason Rozovsky, senior counsel at R3 and head of the legal center.

“We’re moving into a phase where there are pilots launching and real value being moved and real change happening to how people do business,” Rozovsky says. “There are real novel legal issues the technology raises across a variety of industries.”

No Comment

The FCC received millions of comments during the net neutrality repeal debate from bots exploiting stolen or misused identities—what is the agency going to do about it?

By Jason Tashea

Data scientist Jeff Kao was skeptical of the nearly 23 million public comments the Federal Communications Commission received during the net neutrality repeal debate last year.

“I would not guess one in 15 people submitted an FCC comment,” says Kao, a machine learning engineer at Atrium Legal Technology Services in San Francisco.

“The amount doesn’t pass the smell test.”

He challenged his suspicion by analyzing the publicly available comments and found at least 1.3 million were submitted under a stolen or misused identity. While there were fake comments submitted on behalf of both sides of the debate, the vast majority, Kao says, were anti-net neutrality. However, the problem was bigger than he initially knew.

The New York attorney general’s office, which is suing the commission over net neutrality along with 22 other attorneys general, said as many as 2 million Americans had their identities stolen. A 2017 report by data analytics consulting firm Emprata for industry group Broadband for America found that nearly 445,000 were from Russian email addresses, and that a similar number came from Germany.

While the FCC has taken issue with the characterization of the New York attorney general’s claims, Jessica Rosenworcel, an FCC commissioner and a Democrat, released a statement saying the agency’s net neutrality repeal process “turned a blind eye to all kinds of corruption in our
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public record—from Russian intervention to fake comments to stolen identities in our files.”

Even with these allegations, the FCC has not changed its comments process, which Kao says is “concerning because we all start to lose a little bit of faith in our democracy.”

While heralded for improving government access, moving government online has created new vulnerabilities to America’s democratic processes. With known vulnerabilities, governments, advocates and software companies are sounding alarms and promoting solutions. This is a problem not only for the FCC.

**PLATFORM TO SPEAK**

Rosenworcel, who is in the minority on the Republican-controlled commission, tells the ABA Journal that organizations receiving fake comments or comments submitted under stolen identities include the Consumer Financial Protection Bureau, Department of Labor, Federal Energy Regulatory Commission, and Securities and Exchange Commission.

Renee DiResta, head of policy at Data for Democracy, an organization that uses data for social good, says Russia’s misinformation campaign during the 2016 election and the spam FCC comments are examples of “manufactured consensus.”

While this approach to disinformation is most common on social media networks, she says it can be used to sway public policy as well. Rosenworcel adds: “There are eerie parallels between what we saw in the net neutrality public record and the reported interference in the 2016 election. We should pay attention to them. We should figure out what’s going on.”

In the case of the FCC, the public comment portal is “woefully deficient,” Rosenworcel says. To limit the impact of bots and spam, she recommends using Captchas or requiring two-factor authentication before submitting a comment. However, she says the current FCC budget does not include resources to make these changes. The FCC did not respond to a request for comment.

To fight against identity theft, DiResta says the names illegally used to submit comments often come from hacked user lists, which can be found online. Submitted comments could be checked against these lists, helping an agency flag and investigate misconduct.

One company working to improve the online comment system is SmartComment, headquartered in Los Angeles. Keith Guille, a public information officer at the Wyoming Department of Environmental Quality in Cheyenne, says his department uses SmartComment so the public can read about a rule change and make a comment.

Previously, Guille says, the department would take out a legal ad in newspapers or post on an email discussion list or website. Now, SmartComment creates a centralized database of comments received online, through phone calls or letters, for example. “It really helps the staff to organize things much easier,” Guille says. Since adopting the platform, he has seen an increase of comments, but that has not come with an onslaught of spam, he says.

Acknowledging bots play a role in every form of electronic communication, Tim Mullen, co-founder of SmartComment, says agencies have to adopt technology that cuts through the manufactured noise. He says his product uses various features to fight against bots and spam, but he would not be more specific for security reasons.

Rosenworcel at the FCC thinks that “our openness is being exploited,” and that there are concrete steps to be made to protect democratic institutions. “Nobody said that digital age democracy was going to be easy,” she says.

“There are eerie parallels between what we saw in the net neutrality public record and the reported interference in the 2016 election. We should pay attention. ... We should figure out what’s going on.”

– Jessica Rosenworcel

**Cyberthieves are ready... is your practice?**

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LAW AT THE MOVIES
Like all forms of love, even the ones projected on screens eventually fade. What distinguishes American cinema from the same art form elsewhere has always been the proverbial, and even more predictable, happy ending. Americans have traditionally shown little interest in movies that end on a sad note. And they downright despise when a film fades to black, the final credits appear, and the audience is left not knowing how to feel.

Ambivalence is a positively unpatriotic, un-American impulse. In movies, we like to see narrative clarity: good triumphing over evil; heroes riding off into the sunset; and love affairs that, in Act I, seem mismatched, but by the final curtain, the guy gets the girl.

Movies about the legal system have their own familiar plotlines, but they, too, usually have satisfying resolutions—so unlike what happens in actual courtrooms. Hollywood, for instance, has always had a crush on crusading lawyers, unlike in novels, where lawyers are more often depicted as evil and duplicitous—with Dickens, Kafka and Dostoyevsky fine practitioners of that craft.

When it comes to movie heroes, the quintessential moral archetype has been Atticus Finch from To Kill a Mockingbird. But he is not alone. Cinema has offered a virtual parade of eloquent charmers, jury-seducers of the first order. To name a few examples, there’s Paul Biegler (Anatomy of a Murder), Frank Galvin (The Verdict), Henry Drummond (Inherit the Wind), Sir Wilfrid Robarts (Witness for the Prosecution), Sandy Stern (Presumed Innocent) and Kathryn Murphy (The Accused)—among scores of other smooth courtroom specialists—all with a God complex and a clear conscience.

The Legal Players

But judging from the films that have been released in this new millennium, the tropes that once dominated legal dramas have given way to an entirely new twist on the genre. Cinema has developed a newfound cynicism about the once-righteous trial attorney. Nowadays, perhaps consistent with our diminished faith in public institutions, the legal system and its practitioners, as depicted in movies, have been found wanting and guilty. Think of it as the legal analog of fake news.

Here’s an autopsy of the moral attorney in this new age of perpetual injustice in the movies. For starters, we’re likely to see lawyers and law firms engaged in self-dealing, if not outright corruption, as in Changing Lanes and Michael Clayton. A lawyer is easily out-maneuvered by a cleverer defendant conducting his own defense, as in Fracture and Law Abiding Citizen. In Conviction, a man serving a life sentence has been so poorly served by his public defenders that justice hinges on his sister, a housewife and mother, to eventually attend law school and reopen the case on his behalf. Denial, set in the United Kingdom, is much more about a truth-seeking client than her generally remote solicitor and barrister.

Lawyers who possess real skill are shown representing seedy clients and holding court in the back seat of a Lincoln Town Car, which serves as an actual office in The Lincoln Lawyer. A quick-witted Chicago-based lawyer in The Judge returns to Indiana to both reconcile with and represent his father, a legendary trial judge charged with murder. But rather than serving as a hired gun who gallops into town to save the day, it’s the father—the accused judge—who is the moral center of the film, restoring balance to his estranged son’s lost life. Even Marshall, which involves a murder case handled by a young Thurgood Marshall, ends up being more of a buddy film with a hapless Jewish civil lawyer acting as lead counsel to Marshall’s second-chair sage. Loving is about an interracial couple whose true love affair expanded the constitutional right to privacy to include marriage. Their lawyers who took the case to the U.S. Supreme Court barely make a cameo appearance.

But perhaps the film that best represents how justice is cinematically revealed in this present moment is Spotlight, a movie that doesn’t prominently feature lawyers and is set in a newsroom, not a courtroom. Righteous investigative reporters from the Boston Globe are the protagonists in this true story. It is they who shine a spotlight exposing the pedophilic priest scandal in Boston. And it is their moral crusade that most successfully projected justice on a silver screen.

Of course, moviegoers are as fickle as film producers are sometimes feckless. We may one day see the return of the strutting cinematic figure of a lawyer bailing out his or her falsely accused client—projected once more like the lawyers we once loved.

Thane Rosenbaum is a novelist and distinguished fellow at New York University School of Law, where he directs the Forum on Law, Culture & Society, which hosts the annual FOLCS Film Series. He is a regular adviser and contributor on law as portrayed in popular culture for the ABA Journal.
Ten years ago, the ABA Journal published a cover story called “The 25 Greatest Legal Movies,” a roster of top-notch legal-themed films drawn from a panel of judges that included lawyers, law professors and, yes, an actual judge.

We wanted to update the list this year and decided to broaden the scope to consider films that tell stories outside the typical courtroom drama—films that examine how the legal system intersects with our lives in different ways. Once again, we’ve asked a panel to weigh in and recommend their favorite legal-themed films, including those released in the decade since our last top-25 list. The judges voted for many of the classics from our 2008 list, along with some newer films we hope will get you thinking about the reach of the law in new ways.

NEW TO THE LIST THIS YEAR:

Marshall (2017) Before he rose to fame as the star of Black Panther, Chadwick Boseman portrayed Thurgood Marshall, the first black justice on the Supreme Court. The film chronicles Marshall’s life as a young, crusading lawyer who travels around the country defending blacks he believes were unjustly charged with a variety of criminal offenses. In one of the most important cases of his early career, Marshall represents a black chauffeur accused of raping a wealthy white woman.

Trivia—Both Boseman and Marshall went to Howard University.

Spotlight (2015) While not a legal story per se, this film is about the crimes and cover-ups that led to criminal and civil litigation against the Roman Catholic Church after allegations surfaced that priests had been molesting boys in Boston. Based on a true story, Spotlight follows a team of Boston Globe reporters who investigate the accusations of abuse and uncover evidence that the church conspired to hide knowledge of it. The stellar ensemble cast includes Rachel McAdams, Michael Keaton, Liev Schreiber, Mark Ruffalo and Brian d’Arcy James. The film is a tribute to investigative journalism and the power of the press.


Loving (2016) At its heart, this is a love story: the true events of the lives of Richard and Mildred Loving, whose arrest for interracial marriage in Virginia in 1958 led to a long legal battle that made its way to the U.S. Supreme Court. Not long after they begin dating, Mildred gets pregnant, and the couple drives to Washington, D.C., to get married. Virginia was one of 24 states that outlawed interracial marriage. Back home, they try to keep their marriage a secret, but the local sheriff finds out and arrests them. To avoid prison, Richard and Mildred plead guilty and agree to move out of state, but they soon decide to move back home to be near family. With the help of the American Civil Liberties Union, their case eventually reaches the high court, which invalidates Virginia’s law. The film was written and directed by Jeff Nichols, who drew heavily from the 2011 documentary The Loving Story by Nancy Buirski.

Trivia—In Loving v. Virginia, the Supreme Court declared Virginia’s Racial Integrity Act of 1924 unconstitutional, which effectively struck down similar laws across the country.
The Post (2017) Another newspaper movie makes this year’s list: a smartly paced thriller from Steven Spielberg about the drama behind the Washington Post’s decision to publish details from the secret Pentagon Papers, parts of which were already scooped by the New York Times. Set in 1971, the film depicts the intense rivalry between the Post and the Times as more pages are leaked and each seeks to be first with new revelations. In addition, there are the pressures and risks of publishing leaked information against the government’s wishes. Meryl Streep plays Washington Post publisher Kay Graham, who faces her own battles as a female executive, and Tom Hanks is the cantankerous editor Ben Bradlee. Graham and Bradlee put their careers and the future of the newspaper on the line to publish details from the documents turned over by military analyst Daniel Ellsberg. Ultimately, the Supreme Court ruled the government could not block publication of its contents (New York Times Co. v. United States).

Trivia—The Post is the first film in which Streep, Hanks and Spielberg have collaborated.

The Lincoln Lawyer (2011) Based on the best-selling novel by Michael Connelly, the film follows lawyer Mickey Haller (Matthew McConaughey), whose office is in the back of his Lincoln Town Car driven by a former client as payment for delinquent legal fees. Haller is hired to defend wealthy real estate mogul Louis Roulet (Ryan Phillippe), who is accused of assaulting a prostitute. Roulet claims the woman is trying to extort him. But as Haller probes deeper, he finds similarities between this case and an old murder case, and all is not as it seems.

Trivia—McConaughey also played a defense attorney in the 1996 film A Time to Kill, alongside Samuel L. Jackson and Sandra Bullock.

RBG (2018) The first documentary to make the top-25 list, RBG covers the life and career of Supreme Court Justice Ruth Bader Ginsburg. She’s known not only as a thoughtful, respected jurist but also as a pop culture icon whose face has been emblazoned on T-shirts and coffee mugs. With interviews from Ginsburg’s children, colleagues and detractors, the film chronicles the justice’s early career, her work as an ACLU lawyer and her ascent to the high court. It also shows her human side, telling the love story behind her marriage to Marty, her high school sweetheart, who died in 2010. The film was directed by documentary-makers Betsy West and Julie Cohen.

Trivia—Despite their ideological differences, Ginsburg had an enduring friendship with Justice Antonin Scalia.
Legally Blonde (2001) Elle Woods, played by Reese Witherspoon, is the too perfect campus sweetheart, sorority queen and cute-as-can-be West Coast natural blonde in this ridiculous but highly entertaining comedy. Woods gets dumped by her hunky East Coast boyfriend, Warner (Matthew Davis), who’s headed to Harvard Law School where he reignites a romance with an old flame from prep school. Not to be outdone, Woods nails the LSATs and gets admitted to Harvard as well so she can win back Warner. At Harvard, Woods learns there’s more to life than just looks, and she navigates her way through the challenges of a law school education and into the courtroom.

Trivia—In a scene where Elle is studying for the LSAT, her sorority sister, Amy, reads answer choices from an actual LSAT test from June 2000.

Primal Fear (1996) In this tension-filled thriller, Richard Gere plays Martin Vail, an egocentric, prominent Chicago criminal defense lawyer. After seeing a news report about the arrest of an altar boy on charges of murdering a beloved archbishop, Vail offers to represent him pro bono. His client is Aaron Stampler (Edward Norton) who is seen fleeing the crime scene and claims another person killed the archbishop after he blacked out. Secrets about the archbishop and his dealings with Stampler and with civic leaders complicate an ever-twisting plot with a surprise ending.

Trivia—Norton made his Hollywood film debut in this picture. Matt Damon auditioned for the same role.

Criminal Court (1946) In this noir courtroom drama, Steve Barnes (Tom Conway), an ambitious lawyer who’s planning to run for district attorney, accidentally kills gangster Vic Wright (Robert Armstrong) at Wright’s nightclub. It just so happens that Barnes’ girlfriend, Georgia Gale (Martha O’Driscoll), is a singer at the club, and she winds up getting arrested for the murder. Barnes tries to save her by confessing, but authorities don’t believe him. Directed by the great Robert Wise (West Side Story, The Sound of Music), the story packs extortion, politics and courtroom drama into an hourlong film with lots of twists.

Trivia—Early in his career, Wise was hired by Orson Welles, who needed an editor for Citizen Kane, and was nominated for an Oscar for his work on that film.
To Kill a Mockingbird (1962)
Once again, our judges found this movie stands the test of time as one of the greatest legal films. Gregory Peck's performance as Atticus Finch is a joy to behold. Horton Foote's screen adaptation of the Harper Lee novel is riveting, chronicling Finch's quest to challenge the racism of Depression-era Alabama as he defends a disabled black man (Brock Peters) falsely accused of rape. Finch is a character to admire: courageous, contrary, morally grounded and a father. The story unfolds through the eyes of Finch's 6-year-old daughter, Scout (Mary Badham), who witnesses an extraordinary trial and the ugliness and vulnerabilities of humanity.

Trivia—The courthouse in Monroeville, Alabama, which served as the model for the one built on set, is now a museum dedicated to the book, movie and author Lee.

My Cousin Vinny (1992) This movie is still a favorite. Joe Pesci delivers the laughs in one of his finest and funniest roles post-Goodfellas as the not-too-bright, overconfident Brooklyn lawyer Vincent "Vinny" Gambini. Vinny gets in over his head after being called to represent his New York cousin and a friend, both college students, who were accused of murder in rural Alabama while on their way back to school in California. It's a fish-out-of-water story as Vinny learns about the Southern way of doing things and the decorum expected in the courtroom of Judge Chamberlain Haller (Fred Gwynne). Marisa Tomei, who won the Oscar for best supporting actress, plays Vinny's girlfriend and girl Friday.

Trivia—The comic misunderstanding between Vinny and Judge Haller over the phrase "the two utes" was drawn from a real conversation between Pesci and director Jonathan Lynn, who couldn't understand Pesci's New Jersey accent.

Anatomy of a Murder (1959) James Stewart stars as the semi-retired Michigan lawyer Paul Biegler, who decides to defend Army Lt. Frederick Manion (Ben Gazzara), who admitted to killing a local innkeeper after his wife (Lee Remick) claimed that the innkeeper raped her. Filmed on location in Michigan's Upper Peninsula and directed by Otto Preminger, the movie was inspired by an actual case and adapted from a novel written by a Michigan Supreme Court judge. In fact, the role of the judge was played by a real lawyer, Joseph Welch, who represented the Army in the McCarthy congressional hearings. George C. Scott plays prosecutor Claude Dancer, who challenges Biegler's "irresistible impulse defense." There's an unusual twist involving the victim's mysterious business partner (Kathryn Grant).

Trivia—The original score is by Duke Ellington, who makes a cameo appearance in the film.

Inherit the Wind (1960) The movie that taught many about the historic 1925 Scopes "monkey trial," in which a Tennessee schoolteacher was charged with the crime of teaching evolution. The attorneys, played by Spencer Tracy and Frederic March, are renamed versions of attorneys Clarence Darrow and William Jennings Bryan. The film is adapted from a 1955 play by Jerome Lawrence and Robert E. Lee and is a fictionalized account of the famous trial. Though the characters' names are changed, the courtroom testimony is mostly authentic, taken from the trial transcript.

Trivia—The scene in which Tracy delivers his final summation to the jury was filmed in a single take to heighten tension.

The Verdict (1982) Washed-up, down-on-his-luck, alcoholic lawyer Frank Galvin, played brilliantly by Paul Newman, tries to resurrect his career by taking a medical
malpractice case to trial, even though it could have easily been settled. He wants to right what he sees as the wrong done to his client, a young woman left paralyzed and comatose after being given an anesthetic during childbirth. His opponent, Ed Concannon, is played by James Mason. Playwright David Mamet wrote the screenplay, which was directed by Sidney Lumet.

Trivia—A young Bruce Willis can be seen among the people in the courtroom during the dramatic closing argument.

A Man for All Seasons (1966) Paul Scofield plays Sir Thomas More, the highly respected member of King Henry VIII’s court who becomes embroiled in a political clash with the king (Robert Shaw), who’s seeking to divorce his wife, Catherine of Aragon, and marry Anne Boleyn (Vanessa Redgrave). The king’s request to get divorced so he can create a male heir to the throne is in defiance of the Roman Catholic Church. More, a devout Catholic, sticks by his religious principles and seeks to leave the royal court, prompting the king to charge More with treason. It’s a story about how far these men will go to follow their needs and principles.

Trivia—To create a snowy landscape, truckloads of Styrofoam were delivered to the set and arrived just as real snow began falling.

A Few Good Men (1992) Tom Cruise plays an inexperienced Navy JAG litigator, Lt. Daniel Kaffee, who’s assigned to defend two Marines charged in the death of a colleague at Guantanamo Bay. Directed by Rob Reiner, this military courtroom drama moves with intensity, with Kaffee confronting Col. Nathan Jessep, played by Jack Nicholson, about an unofficial punishment known as a “code red,” a hazing that turned fatal. Based on the play by Aaron Sorkin.

Trivia—Nicholson performed his famous courtroom monologue several times while Reiner trained the camera on other actors to get their reactions. The last take had Nicholson on camera yelling, “You can’t handle the truth!”

Young Mr. Lincoln (1939) Henry Fonda becomes young Abe Lincoln in this fictionalized version of his early life, directed by John Ford. The story follows Lincoln as he moves from rural Kentucky to Springfield, Illinois, where he starts a law practice. Lincoln stops a lynching mob from killing two men accused of murder.

Erin Brockovich (2000) Julia Roberts plays an unemployed single mom who helped win one of the largest settlements ever against a California power company accused of polluting a city water supply. In desperate need of a job, Erin Brockovich (Roberts) goes to work for lawyer Ed Masry (Albert Finney) who represented her on a personal injury claim and lost. While going through files, Brockovich uncovers information that suggests Pacific Gas and Electric was trying to buy up contaminated land where it dumped chemical waste and may have poisoned the water supply. Based on a true story, it was directed by Steven Soderbergh.

Trivia—Roberts got $20 million for playing the role, which made her the highest-paid woman in film at the time.

A Civil Action (1998) John Travolta is Jan Schlichtmann, personal injury lawyer and senior partner of a small Boston firm that sues two companies believed to be responsible for contaminating drinking water that caused eight children to die from leukemia. Based on the best-selling nonfiction book, it’s a David versus Goliath story. He runs up against the formidable corporate lawyer Jerome Facher, played by Robert Duvall. Schlichtmann risks his life and career in pursuit of what he sees as justice for the families who lost their children and for trying to save the environment.

Trivia—The real Facher loved Duvall’s performance, a role that had been turned down by Marlon Brando.
and winds up defending them in court in one of his biggest cases. Along the way he loses a girlfriend, courts his future wife and moves into politics.

Trivia—Fonda first turned down the role of Lincoln because he didn’t think he could play such a great man, but he changed his mind after viewing himself in a screen test.

Judgment at Nuremberg (1961)
It’s not surprising that this one remained on the list. It’s the searing story of the 1948 war crimes trials of four German judges accused of allowing their courts to become complicit with the Nazis in crimes against humanity. Directed by Stanley Kramer, the film features Spencer Tracy as Dan Haywood, an American judge struggling to understand how the accused, once-esteemed jurists, chose to follow orders rather than their consciences. Burt Lancaster plays Ernst Janning, one of the accused judges who eventually confesses and offers insight into why Germans such as himself felt bound by duty to their country rather than by their own sense of morality.

Trivia—The 11-minute closing speech from Judge Harwood (Tracy) was filmed in one take.

The Paper Chase (1973) First-year student James T. Hart (Timothy Bottoms) enters the pressure cooker of Harvard Law School where, among other challenges, he endures humiliation from his demanding and stern contracts law professor Charles W. Kingsfield Jr. (John Houseman). Turns out that Kingsfield is the father of the young woman Hart begins dating. Hart, a hardworking student from Minnesota, finds himself struggling but adamant in his drive to please his curmudgeonly professor while maintaining a romance with his daughter.

Trivia—Harvard University allowed only three days to film on campus because the administration was unhappy after permitting crews to shoot Love Story (1970) there, which caused many disruptions.

Adam’s Rib (1949) Spencer Tracy and Katharine Hepburn play happily married lawyers Adam and Amanda Bonner in this classic legal comedy that pits them against one another in a murder trial. Amanda represents a woman charged with shooting her husband after discovering he was having an affair; Adam is on the prosecution team. Amanda argues the law has a double standard when it comes to women, and a man in a similar position might be considered justified in shooting his wife’s lover. Their domestic tranquility is upended, sparking tensions at work and at home. Directed by George Cukor.

Trivia—The Production Code Administration wanted to ensure that the judicial system was treated with proper respect in the film, and that an adulterous relationship was not portrayed as funny.

Michael Clayton (2007) George Clooney plays Michael Clayton, an indispensable “fixer” at a high-priced law firm where he cleans up messes no one wants to touch and operates in the shadows with ethically questionable clients. “I’m not a miracle worker,” Clayton says to one client. “I’m a janitor.” Clayton’s personal life is messy: divorced and in debt with gambling losses and someone trying to kill him. Things get even messier as his firm negotiates a high-stakes merger while defending a corporate client accused of polluting in a multibillion-dollar class action.

One of its lawyers, Arthur Edens (Tom Wilkinson), knows the company is guilty and has a nervous breakdown during a deposition. Clayton is dispatched by his boss Marty Bach (Sydney Pollack) to bring Edens home and learns about Edens’ belief in the company’s guilt. Tilda Swinton plays Karen Crowder, Edens’ belief in the company’s guilt. Tilda Swinton plays Karen Crowder, one of the accused judges who eventually confesses and offers insight into why Germans such as himself felt bound by duty to their country rather than by their own sense of morality.

Trivia—Denzel Washington was having an affair; Adam is on the prosecution team. Amanda represents a woman charged with shooting her husband after discovering he was having an affair; Adam is on the prosecution team. Amanda argues the law has a double standard when it comes to women, and a man in a similar position might be considered justified in shooting his wife’s lover. Their domestic tranquility is upended, sparking tensions at work and at home. Directed by George Cukor.

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FAVORABLE MOVIES
Michael Asimow, visiting professor at Stanford Law School, co-author with Paul Bergman of *Reel Justice: The Courtroom Goes to the Movies*, co-author of *Law and Popular Culture: A Course Book* and editor of *Lawyers in Your Living Room!*  
Believers in the adversary system think that the best we can do is procedural justice. We can never know the truth about what happened in the past. But pop culture consumers expect substantive justice—that the truth is revealed, bad guys have to pay righteous damages, the guilty are convicted and the innocent walk free. So my favorite legal movies are those in which the adversary system fails miserably to deliver substantive justice.

FAVORITE CROSS-EXAMINATIONS
Paul Bergman, professor of law emeritus, UCLA, co-author of *Reel Justice: The Courtroom Goes to the Movies.*

Cross-examination is the most distinctive feature of a U.S. trial. The potential for mano a mano combat that often produces drama, humor and sudden plot shifts helps to explain why courtroom films are popular in countries in which oral adversary trials are unknown. Some great examples of cross-examination:

- *Young Mr. Lincoln* (1939) Lincoln’s famous almanac cross-examination illuminates a killer’s identity.
- *Anatomy of a Murder* (1959) A pie-in-the-face answer dooms a prosecutor who asks one question too many.
- *Inherit the Wind* (1960) Defense lawyer Clarence Darrow and William Jennings Bryan try to make a monkey of each other.
- *Bananas* (1971) A bound-and-gagged pro se defendant demonstrates the power of cross-examination—at least as it is often portrayed in films.
- *My Cousin Vinny* (1992) Just as the Harlem Globetrotters can have fun and win basketball games, Vinny can create comedy while turning into a great cross-examiner when the game is on the line. It helps that the prosecutor goes all Washington Generals when he cross-examines Vinny’s fiancee.

MOVIES THAT INSPIRE
Ron Klain, former chief of staff for Vice Presidents Al Gore and Joe Biden and former senior White House aide to President Barack Obama. His choices this year include *12 Angry Men, Inherit the Wind, A Man for All Seasons* and the more recent *Loving.*

- All of these provide inspiration for me, particularly in these times. These films show how lawyers can fight bias, prejudice and ignorance with facts and a dedication to the rule of law; how they can stand up to authority and popular opinion; and the need for patience and persistence in tackling such battles. Above all, they show lawyers overcoming incredible odds to prevail for these values—as relevant today as when these films were set.

REELING OVER RUTH BADER GINSBURG
Judge Beth Bloom, U.S. District Court, Southern District of Florida

While I enjoyed *Loving,* the *Lincoln Lawyer* and *Spotlight,* my favorite movie is *RBG,* and here is why: As a relatively young woman and judge who credits the opportunities I have been given to the strong women before me who have fought and paved the way, Justice Ginsburg is my real-life superhero. She has dedicated her entire legal career to the pursuit of gender equality. The movie gives the viewer, through the retelling by other strong women and men, an intimate insight into her brilliant and strategic manner of framing issues argued before the Supreme Court. The documentary gives you a rare view of her deep relationships with others and her tremendous commitment to the law. She is notorious not because of the opinions she has authored but because of the tremendous life that she has led. It is a movie I was excited to take my 12-year-old daughter to see and one that women and men—young and old—should experience.

ANOTHER RBG FAN
William Treanor, dean of the Georgetown University Law Center. *RBG* is an illuminating, moving, funny and inspiring documentary about Justice Ginsburg and the way in which her profound commitment to justice has shaped her career and the law—and made her a cultural icon: “the Notorious RBG.” The movie traces her extraordinary career, highlights the gender injustices she has fought, and vividly brings to life both her friendship with Justice Antonin Scalia and her marriage to professor Marty Ginsburg, with his dedication to supporting her career and his great sense of humor. Plus, it has exercise tips!

FAVORITE FIRST AMENDMENT FILMS
Kevin Davis, assistant managing editor, ABA Journal, author of *The Wrong Man, Defending the Damned and The Brain Defense:* Murder in Manhattan and the Dawn of Neuroscience in America’s Courtrooms.
At a time when some in power have called the press “the enemy of the American people,” two recent films underscore that if not for a free press, the people would be in the dark about the darkest secrets that those in leadership would prefer to remain hidden. *Spotlight* tells the story of how a relentless team of reporters at the *Boston Globe* uncovered a decades-long pattern of sexual abuse of boys by Roman Catholic priests, an investigation that led to lawsuits and criminal charges. *The Post* is about the behind-the-scenes struggle at the *Washington Post* over whether to publish details from the top-secret Pentagon Papers, leaked documents that revealed how the U.S. was failing in the Vietnam War. These movies show how the Fourth Estate and the First Amendment can be powerful allies in exposing uncomfortable truths and holding those in power accountable.

**SIZZLING SELECTIONS FROM A BEST-SELLING CRIME WRITER**

Linda Fairstein, former prosecutor and best-selling crime novelist, offers her picks:

- **12 Angry Men**—A terrific drama, but there isn’t a prosecutor alive who wants his or her jurors to see it on the eve of a trial.
- **Presumed Innocent**—The unthinkable! A sex crimes prosecutor is murdered! One of those movies I think is as good as the book, and the Scott Turow book is a superb courtroom drama. One of the first movies to have DNA as a major plot point.
- **Body Heat**—One of the finest noir films ever made, and a brilliant primer on estate planning and the importance of hiring a good lawyer.
- **Anatomy of a Murder**—From a best-selling novel written by a Michigan trial court judge, the defense strategy leads to a brilliant twist at the end. Great cast and riveting court scenes—all set to a Duke Ellington score.
- **Judgment at Nuremberg**—This one is as chilling today as when it first debuted; the war, the law and history in a powerful piece of filmmaking.

**HONORABLE MENTIONS (IN ALPHABETICAL ORDER)**

*The Accused* (1988) When three men are acquitted of raping a young woman (Jodie Foster) in a bar, the prosecutor pursues charges against patrons who urged them on.

*Beyond a Reasonable Doubt* (1956) A writer sets himself up to be charged with murder to reveal the shortcomings of circumstantial evidence.

*Breaker Morant* (1980) Three Australian lieutenants on trial for shooting prisoners during the Boer War in 1901 claim that they acted under orders and were being used as scapegoats.

*Bridge of Spies* (2015) Tom Hanks stars as James Donovan in this compelling look at one lawyer’s impact on the Cold War.

*The Caine Mutiny* (1954) Humphrey Bogart is the mentally unstable Navy Capt. Queeg in this story of mutiny and moral setbacks during World War II.

*Class Action* (1991) A father representing an accident victim finds out his estranged daughter is defending the auto company accused of product liability.

*The Client* (1994) A young boy who witnesses a mafia lawyer commit suicide finds himself in deep water and hires an attorney (Susan Sarandon) to help him.

*Counselor At Law* (1933) A Kafkaesque lawyer (John Barrymore) is in danger of losing his family.

*The Court-Martial of Billy Mitchell* (1955) Based on the real-life story of the maverick general facing court-martial over his efforts to save his air corps, starring Gary Cooper.

*The Devil’s Advocate* (1997) A deal with the devil (Al Pacino) is struck when a new attorney (Genevieve Bujold) comes to work for a powerful law firm.

*The Firm* (1993) A fresh-faced young lawyer (Tom Cruise) is recruited by a prestigious law firm, only to learn that it’s not as pristine as he thought.


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*JFK* (1991) Controversial for being loose with the facts is Oliver Stone’s take on New Orleans District Attorney Jim Garrison’s efforts to solve the Kennedy assassination.

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*Music Box* (1989) Mike Laszlo, a Hungarian immigrant, is accused of being a war criminal and his daughter (Jessica Lange) defends him.


*The People vs. Larry Flynt* (1996) The controversial publisher says the First Amendment protects his right to publish pornography.


*The Rainmaker* (1997) A young lawyer takes on a big insurance company that has stopped paying medical bills for his client, a dying leukemia patient, in this John Grisham adaptation.

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There's a saying in the criminal defense bar: There's nothing more frightening than having an innocent client.

Judging by that standard, you'd think Bryan Stevenson must have been scared out of his wits for the last three decades—but no. It takes a lot to rattle the Harvard-educated attorney, 58, who has won relief for more than 125 people on death row. Success has meant getting a new trial, a reduced sentence or, best of all, complete exoneration. In the latter case the client walks out of prison, sometimes after decades of incarceration, for a crime they did not commit. Invariably they find Stevenson waiting outside the prison gate with arms outstretched.

Former Alabama death row inmate Anthony Ray Hinton experienced that when Stevenson got his conviction overturned in 2015. He says he remains baffled at how Stevenson won his freedom.

“Some people called it a miracle. I like to say that God sent me his best lawyer, his No. 1,” says Hinton. “In almost 30 years on death row, I never saw a lawyer with so much dedication and humanity and such a sharp legal mind, and I’ve never heard of one from another inmate.”

Hinton describes his relationship with Stevenson as
“pure respect for one another.” He adds, “Just being around him makes me feel smarter. He believes in me, sometimes more than I do. Who would have thought I'd get out of prison and write a book?” (Hinton’s book, The Sun Does Shine, recounts his life on death row.)

His 16-year relationship with Stevenson didn't end when he walked out of prison a free man. Long-term inmates face huge challenges when they try to reintegrate into society, even with things most people consider second nature.

“Mr. Stevenson had people teach me how to use a phone. He sent lawyers with me to help me get my Social Security card,” Hinton says. “Now I have choices, and sometimes I don't know what to do. He helps me make the right decisions.”

Hinton has since landed a job as a community educator at the Equal Justice Initiative, a nonprofit organization Stevenson founded in Montgomery, Alabama, in 1989. Its mission is to end mass incarceration and excessive punishment in the United States, to eradicate racial and economic injustice, and to protect basic human rights for the most vulnerable people in American society.

Stevenson, who shares his story in his best-selling book, Just Mercy, and through talks around the country, is scheduled to deliver a keynote address at the ABA Annual Meeting in Chicago on Aug 4. Stevenson also will be awarded the association’s highest honor, the ABA Medal, given to lawyers who have “rendered conspicuous service to the cause of American jurisprudence.”

In addition to his legal work for the EJI, Stevenson is passionate about educating the world about injustice and inequality. He was the force behind the creation of the National Memorial for Peace and Justice, honoring more than 4,000 victims of lynching, which opened in Montgomery in April. “These kinds of projects are very energizing and affirming,” he says.

Despite the heavy responsibilities of the work and the serious nature of his mission, Stevenson has a lighter side, as well. Sia Sanneh, a senior attorney at the EJI who has worked with Stevenson for 10 years, says he has a “deep and wonderful sense of humor. You can't do the work we do and survive it, let alone be a leader, without being able to find the absurdity in the situations we face. It goes from the highest of the highest—seeing a client walk out of prison after spending most of his adult life incarcerated—to the lowest of the low, when a client is executed or killed in prison.”
When they were driving to a hearing in the Hinton case, Sanneh says, she could see the toll it took on Stevenson. “We were losing in every court in Alabama. It was maddening because we had [exculpatory] evidence,” she says. “He remained hopeful, as always, but he said, ‘What we know is that we could lose because so many things are out of our control.’”

Fast-forward 10 years and we win the case.”

It was a long, weighty decade for Stevenson and Hinton, but you’d never know it if you saw the two of them together now, says Sanneh. “If we hear laughter down the hall, we know Mr. Hinton’s here.”

‘A FULL-TIME LIFE’

Staffers say that Stevenson has a hand in everything at the EJI—even the music callers hear on hold. Rather than be subjected to Muzak, they are likely to hear Aretha Franklin belting out Otis Redding’s “Respect” or Nat “King” Cole singing “Get Your Kicks on Route 66.” Stevenson selects all the office music and attends to other details that most managers would delegate. On any given day he may edit a brief, teach moot court and choose the layout of the photos on the walls, says Sanneh. “Nothing in the office is too small for him to care about.”

His day starts at an hour most people consider the middle of the night. The alarm goes off at 4 a.m., and he’s in the office by 4:30, except when he fits in a workout at the gym. He says his most productive hours are before 6 a.m. and after 8 p.m. Some weeks he stays in the office until 11 every night and works through the weekend, but he doesn’t find that remarkable.

“For me it’s a full-time life,” he says, noting that the seven-days-a-week marathon is less complicated for him because he is unmarried and does not have children. He finds his joy in the people he works with and represents.

“Bryan has his own metrics for success,” says Sanneh. “He celebrates things that will never be on our website. When a new attorney gets his first client to open up, we celebrate as much as we do when we win a U.S. Supreme Court case.”

When he learned he’d won Miller v. Alabama say that God sent me his best lawyer, his No. 1.”

- Anthony Ray Hinton
(2012), in which the court held that mandatory life sentences without the possibility of parole are unconstitutional for juvenile offenders, the halls of the EJI rocked with cheers. A staff meeting followed, but it wasn’t a celebration. “It was about how we haven’t done anything yet, and that what the decision means is up to us,” Sanneh says.

Action is one of Stevenson’s major themes. “If I’ve learned anything it’s that you can’t make a difference, you can’t change the world, you can’t create more equality and opportunity and justice if you’re unwilling to do things that are inconvenient or uncomfortable,” he says. “I have come to understand that you change the world with not just the ideas in your mind but those ideas that are fueled by a conviction in your heart. That has been reinforced by the work that I do.”

A SEGREGATED PAST

The great-grandchild of slaves, Stevenson was born and raised in a poor rural community on the eastern shore of southern Delaware that still had what he calls “Jim Crow segregation.” When he started school the education system was still segregated, so he went to an all-black school and transferred to a public school when they were desegregated.

“What I remember most is being told that lawyers came into our community and made them open up the public schools. That intervention is something I never forgot. It made me appreciate the rule of law and how the law can be a tool that helps the disempowered and disfavored,” he says.

Stevenson, who had never met a lawyer before he went to law school, says he entered the profession “by default.” In his senior year as a philosophy major at Eastern University in Pennsylvania, he realized that “no one was going to pay me to philosophize” and started looking into graduate school. “I was a little mortified to discover that if you wanted to do graduate work in history or English or political science, you had to know something about [those subjects]. It seemed that you didn’t have to know anything in particular to go to law school, so I signed up for the LSAT,” he says.

“You can’t just insist on the changes you want to make. You have to work hard and figure out how to achieve them and then struggle to make it happen.”

– Bryan Stevenson

The jars behind Stevenson contain soil the Equal Justice Institute’s Community Remembrance Project gathered from lynching sites across the country. Each jar names one victim of lynching and the date in a memorial wall at the Legacy Museum: From Enslavement to Mass Incarceration.
In 1985, Stevenson received both his MA degree in public policy from Harvard University’s John F. Kennedy School of Government and his JD from Harvard Law School. A week before he started law school in 1981, Stevenson was walking down the street in Boston when a truck approached. As it slowed down, the driver yelled, “Hey, where’s Roxbury?”

Stevenson wasn’t familiar with the city yet, so he didn’t know that Roxbury is a predominantly black section of Boston with a high crime rate. The driver taunted him again: “Hey, where’s Roxbury?” Stevenson took a step closer to ask what he meant, and the trucker shouted, “Go back to Roxbury, n-----!”

It wasn’t Stevenson’s first brush with racism. In college he played baseball, and his team made it to a conference playoff in East Boston. “Some white fans started hurling racial slurs and throwing things,” he recalls. “The conflict between the players and the fans got so bad that they had to call the game in the late innings.”

Stevenson’s experiences have taught him to be more strategic and practical. “You can’t just insist on the changes you want to make. You have to work hard and figure out how to achieve them and then struggle to make it happen,” he says.

Before he established the EJI, Stevenson worked for a nonprofit organization (then called the Southern Prisoners Defense Committee) in Atlanta. Some of his cases took him to Alabama, where there was a great need for indigent defense. His initial plan was to help set up the EJI in Montgomery and then...
go back to Atlanta.

“I never started out imagining that I would create my own organization, but the problems were so acute that I ended up staying,” says Stevenson. “We don't have a public defender system in this state, and there wasn't a culture of strong indigent defense. We had imagined there would be some funding from the state government, but that never happened. Lots of people were facing execution with deadlines, and it wasn't easy finding people who would come work with me.”

DEEP COMMITMENT

Today there are hundreds of applicants for every position the EJI posts, which Stevenson says is “radically different” than 30 years ago. “In the old days I would take any lawyer who I thought was competent and committed because we didn't feel that we could be picky,” he says. “As we began to understand just what this work requires, I began to realize I needed people who were hardworking and who were strong in multiple areas, who had the ability to stand up on their feet and also had top-shelf research and writing skills.”

The initiative needed lawyers with a Peace Corps mentality. “You couldn't come to a place like Montgomery and have the same expectations or social life or cultural life that you might have if you were living in Manhattan or D.C. or LA,” he says. “This was a small community, but it was also a community that in many ways was not going to be supportive of what we were doing and even was frequently nonsupportive. All these things meant that it was going to take someone with a deep commitment to the work.”

Despite the dark days, Stevenson remains motivated. “I am standing on the shoulders of a lot of people who had to do so much more with so much less,” he says. “I'm in a community where 60 years ago people were doing what I'm doing. Like them, my head is bloody but not bowed. Because of that, I feel an obligation to fight and keep going and to push even when it's difficult and challenging. I'm still persuaded that hopefulness is important and critical to our ability to change the world. I've always believed that, but now I believe it even more deeply.”

Darlene Ricker is a legal affairs writer based in Lexington, Kentucky. She is a former staff writer and editor for the Los Angeles Times and the Boston Globe.

In October 2016, Stevenson speaks at the dedication of the historical marker honoring the life of Anthony Crawford, a 56-year-old black farmer who was lynched in Abbeville, South Carolina, after arguing with a white merchant over the price of cottonseed.
Q&A with Bryan Stevenson

How has your work shaped you over the years?
I’ve learned a lot about the human condition. I meet people who are condemned, who are described as “the worst of the worst,” who are told they’re not fit to live in our society. My engagement with them has revealed something very different, and it has made me a believer in the notion that we’re all more than the worst thing we’ve ever done.

What keeps you going in the toughest times?
I’ve had the great privilege of representing people whose lives and value and humanity are so clear to me that I’m very motivated. Winning their freedom is enormously energizing.

How much has the situation improved over the years?
We’ve made progress on some of the substantive issues—we no longer execute children or people with an intellectual disability. We won bans on lifetime parole for kids. A lot of things have improved, but we still have a lot of work to do. Our criminal justice system is still excessive and harsh and punitive in ways that can’t be justified. We still have a system that treats you better if you’re rich and guilty than poor and innocent. Error and unreliability are still characteristics of our system that require immediate reform.

If you could change one thing right now, what would it be?
If I could change just one thing, the first thing I would do is make an assessment of whether everyone in jail or prison is a threat to public safety and get everyone out who isn’t a threat. We have increased spending on jails and prisons from $6 billion in 1980 to $80 billion today. So much of that money is wasted on incarcerating people who don’t need to be incarcerated. We could use that money to actually improve public safety, to prevent crime, to provide services to people who have been victimized. We could do so much more to improve the health of our communities, and this gratuitous, unnecessary, excessive punishment would no longer be an issue.

Who have been the major influences on your life?
I’m a product of the civil rights movement, and so I’ve always been inspired by people like John Lewis, and I had the privilege of knowing Rosa Parks when I was a young lawyer. She influenced me greatly. Steve Bright is a lawyer in Atlanta who persuaded me to get into this work. There are also nonlawyers—people like my mother, who just believed in the power of education and information as a foundation on which change can come.

Which cases are you most proud of or have had the most impact on improving the situation?
Every case we do is so vital and so important. The work we’ve done for children has had broad implications. I’m sort of like Thurgood Marshall in that sense. When he was asked which was the most important case he had ever done, he would always say “the next case.” It’s so important for me to keep looking forward to what else needs to be done and what I can do that I don’t spend a lot of time looking backward.

Which cases are on the front burner right now?
We have a case before the Supreme Court on executing people with dementia, Madison v. Alabama. I am really concerned about how we’re treating the mentally ill in our criminal justice system. There are many people with severe disabilities whose disabilities can’t be considered by law because of mandatory sentencing. We have the ADA that we enforce in private places, but we don’t enforce it in the criminal justice system. That’s cruel and unusual punishment. It’s cruel to sentence someone because he is disabled and unusual to have these protections for the disabled that we don’t employ in the criminal justice context.
Courts lack clarity in determining when rants and raves exceed the boundaries of protected speech and should be considered a real danger.

This past January, a Michigan man named Brandon Griesemer called CNN 22 times and ranted:

“You are going down. I have a gun and I am coming to Georgia right now to go to the CNN headquarters to fucking gun every single last one of you.” He also allegedly stated: “Fake news. I’m coming to gun you all down.”

Authorities arrested Griesemer, 19, and charged him with attempting to extort and threatening to injure. That same month, a 14-year-old student in Maumee, Ohio, posted ominous messages on the social media app Snapchat that were directed at two schools, forcing their closing. The teen now faces two felony counts of making terroristic threats.

These incidents aren’t that unusual anymore. “There has definitely been an increase in the visibility of true-threats prosecutions,” says Jennifer Kinsley, a law professor at Northern Kentucky University who litigates First Amendment cases. She explains that many of these arise from social media posts and from the domestic arena, where divorce parties make angry statements.

These individuals may claim that their spoken words are protected by the First Amendment, that their offensive expressions were merely crude political opinions, jokes or rants not meant to be taken seriously—or misguided attempts to blow off steam. But in an age beset with mass shootings and fear of terrorism, government officials likely will contend that such utterings or mutterings fall into the category of true threats—a type of unprotected speech.
True threats are not protected in part because of the fear and disruption they cause in their recipients. "Speech that places a victim in fear for his or her physical safety is deeply harmful in that it disrupts the target’s life and may deter him or her from engaging in key life activities," says University of Colorado Law School professor Helen Norton, who writes frequently on First Amendment topics. "Indeed, true threats may themselves undermine First Amendment values by silencing the speaker's target."

The push to combat threats is understandable. The problem is discerning the boundaries between protected speech and unprotected true threats. "The unclear part of the definition is what makes a threat 'true,' meaning that it is an expression dangerous enough for the government to have the power to punish, and the definition is narrow enough that it does not chill protected speech," says Leslie Gielow Jacobs, a First Amendment expert who teaches at the University of the Pacific.

"We don't want to criminalize political hyperbole, jokes or drunken rants," Norton explains. "Not infrequently, we say extreme things that we don’t mean to be understood literally, such as 'I am so mad at X that I could kill him.' Speech of that sort furthers an individual’s First Amendment interests in expressive autonomy, and the government’s regulation of it threatens overreaching and other dangers."

The U.S. Supreme Court has struggled mightily through the years in developing the true-threats doctrine and trying to balance the government's interests in protecting victims from fear and disruption on the one hand and preserving expressive and individual autonomy on the other.

HYPERBOLE AT THE HIGH COURT

The justices first examined the category of true threats in *Watts v. United States* (1969). The case involved an 18-year-old black man, Robert Watts, who said at a public rally at the Washington Monument: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle, the first man I want to get in my sights is LBJ."

An investigator for the Army Counter Intelligence Corps overheard the remarks, and Watts was arrested and later convicted for violating a federal law prohibiting threats against the president. Watts’ attorneys argued that his speech was simply a form of political hyperbole, not an actual threat.

"What is a threat must be distinguished from what is constitutionally protected speech," the Supreme Court wrote in a per curiam opinion. The court concluded that Watts engaged in crude and offensive political hyperbole, not a true threat. It based its decision on the context of the statement, the conditional nature of the statement, and the reaction of the listeners—what have become known as "the Watts factors."

While the court provided the *Watts* factors, it did not define what constitutes a true threat. In fact, it did...
In its decision, the court provided a definition: “True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” The court added, “The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’”

“Virginia v. Black is more important for what it held was not a true threat, says Rodney Smolla, dean at Widener University’s Delaware Law School, who argued the case for the Supreme Court on behalf of Black. “The court reaffirmed the core free speech principle that offensive speech, such as flag burning or cross burning, figuratively threatening to people of good will, should not be equated with true threats in the palpable commonsense understanding of criminal and tort law.”

Smolla explains that the true-threat doctrine was not the focus of the parties when litigating Black: “When I briefed and argued the case, we really were not focusing heavily on the exact contours of the true-threat doctrine. ... Rather,
the focus was on whether the particular wording of Virginia’s cross-burning law was an unconstitutional exercise in viewpoint and content discrimination. That may be one of the reasons Virginia v. Black left unresolved the doctrinal elements of a neutral true-threat law—it was not the focus of the litigants or the court.”

While the defining statements in Black were helpful, confusion remained in the lower courts. Should threat statutes require any subjective intent standard on the part of speakers, or does the First Amendment only require a showing that a reasonable person would regard a statement as sufficiently threatening?

Many thought the court might answer these questions in Elonis v. United States, a 2015 case involving a man who posted hostile comments about his ex-wife and others in rap verses on Facebook. The court reversed his conviction, finding that the jury instructions in the case failed to focus on Anthony Elonis’ mental state. The court explained that the jury instructions amounted to a mere negligence standard violating the cardinal criminal law principle that “wrongdoing must be conscious to be criminal.”

Writing for the court, Chief Justice John G. Roberts Jr. noted: “Given our disposition, it is not necessary to consider any First Amendment issues.” Other justices wrote separately, criticizing their colleagues for failing to address whether recklessness was sufficient to sustain a true-threat conviction.

“Given its discussion in Elonis, the Supreme Court appears aware of the need for clarification of what constitutes a true threat, particularly in the digital age where communications may be received remotely, both in time and in physical space,” says Kinsley of Northern Kentucky University. “But the court has yet to provide sufficient guidance as to what level of threat is required to subvert the presumption of First Amendment protection.”

**NEED FOR CLARITY**

The Supreme Court’s true-threat jurisprudence is less than clear. A review of lower court decisions indicates a hodgepodge of different results:

“It is inevitable that in a time of repeated senseless violence—in which the violent actors are often discovered, in hindsight, to have signaled their violence in social media—that we would be increasingly prone to treat violent social media posts as truly threatening.”

—Rodney Smolla
• The Supreme Court of South Dakota recently upheld the conviction of a man for threatening a judicial officer by stating: “Well, that deserves 180 pounds of lead between the eyes,” and “Now I see why people shoot up courthouses.” State v. Draskovich (Nov. 21, 2017).

• A federal district court in Nebraska ruled that the defendant’s statement to an employee at a Social Security office could be considered a true threat: “If you fuck with my family, I’m going to fuck with you.” U.S. v. Schweitzer (Nov. 28, 2017).

• The Connecticut Supreme Court ruled that a man’s statement to his brother—“If you go into the attic, I will hurt you”—could be considered a true threat and denied the defendant’s motion to dismiss. State v. Pelella (Oct. 10, 2017).

• An Illinois appeals court reversed the threat conviction of a man who left the following voicemail on a public defender’s phone: “There is not a day that goes by since I was sentenced at that courthouse that I have not dreamed about revenge and the utter hate I feel for the judge. ... There’s not a day that goes by that I don’t pray for the death and destruction upon the judge and upon every single person who sentenced me.” People v. Wood (Nov. 20, 2017).

• A Kansas appeals court upheld the threat conviction of a man who told his mother: “Try to call the sheriff now, bitch. ... If I’m going to be on the streets, then you’re going to be on the streets because I’m going to burn your shit up. Then I am going to be back this afternoon and you ain’t going to like what I’m bringing for you.” State v. Johnson (Dec. 15, 2017).

“Lower court decisions remain divided nationally on whether the First Amendment’s true-threat doctrine is objective, subjective or both,” Smolla explains. “Similar divisions are also present in statutory interpretation.”

The question becomes what the test should be for true threats. The need for clarity is even greater in an age when there are more threat prosecutions for drunken rants, jokes, etc. could be criminalized.”

More, this leaves open the possibility that hyperbole, utter those words, and that the speaker intended to threaten violent social media posts as truly threatening.”

Kinsley emphasizes that a range of factors should matter in determining whether speech is a true threat, including “the full range of circumstances under which the communication is made, including, at a minimum, the medium of communication, time and distance lapse, preceding communication between the parties, and the speaker’s ability to act upon the threat.”

She explains that a middle schooler sending a threatening Facebook message to a teacher over the summer when the teacher is overseas is much different than a husband threatening his wife’s lover face to face.

Some insist that the test must focus on the perspective of the reasonable listener. “My view, shared by most of the circuit courts, is that the best test is an objective test,” says Jacobs from the University of the Pacific. “The speaker must intend to send a communication that is objectively a threat to an objectively identifiable recipient or recipients. Whether the communication is a true threat should look to the reasonable perception of a well-informed, intended recipient of the threat.”

“The test should have both subjective and objective elements,” Smolla adds. “The speaker should subjectively intend to threaten, and the impact should be objectively threatening to an ordinary reasonable person.”

INEBRIATION AND INTENT

Last year, the Supreme Court denied review in Perez v. Florida, a case in which a man who had spent the day at the beach with friends received a sentence of 15 years and one day for saying he was going to come back and bomb a grocery store. Robert Perez Jr. reportedly said he had a “Molly cocktail” in his backpack, and a store employee thought he said “Molotov cocktail.” Perez told another store employee that he had “only one Molotov cocktail” and could “blow the whole place up.” He later returned to the store, apparently drunk, and stated, “I’m going to blow up this whole fucking world.” Perez contended that he was joking and inebriated, but the state charged him with making terrorist threats.

Justice Sonia Sotomayor agreed with the cert denial, but she wrote a special concurring opinion, emphasizing the need for the high court to clarify its true-threat jurisprudence. “Robert Perez is serving more than 15 years in a Florida prison for what may have been nothing more than a drunken joke,” Sotomayor wrote in her opening sentence. She noted that the jury was instructed to convict Perez based on the words he spoke rather than his intent. “In an appropriate case, the court should affirm that ‘the First Amendment does not permit such a shortcut,’” she concluded.

“The court should also decide precisely what level of intent suffices under the First Amendment—a question we avoided two terms ago in Elonis.”

Legal experts agree with Sotomayor’s assessment of the court’s jurisprudence. “The uncertain state of the law puts both speakers and victims of threatening speech at risk, and it engenders costly litigation,” Jacobs says. “I agree that it would be helpful for the court to clarify what limits the free speech guarantee places on the ability of governments to penalize threats.”

“At this point,” says Norton of Colorado Law, “the court has told us only that the First Amendment requires the prosecution at least to show that the speaker uttered threatening words, and that the speaker intended to utter those words. As Justice Sotomayor noted, without more, this leaves open the possibility that hyperbole, drunken rants, jokes, etc. could be criminalized.”

She adds, “Clarification of the court’s true-threats jurisprudence is long overdue.”

David L. Hudson Jr., a regular contributor to the ABA Journal, serves as the ombudsman for the Newseum Institute’s First Amendment Center.
Surge Protection

More people are applying to law schools, but does the jobs data support increasing class sizes?

By Stephanie Francis Ward

Douglas Sylvester, dean of the Sandra Day O’Connor College of Law at Arizona State University, is confident that the members of the school’s class of 2020 will be able to find jobs when they graduate.

He’s so confident that he plans to admit more 1Ls for this fall than he has in previous years. And he expects the class of 2021 to increase to 300 people from the 280 he projects will graduate in 2020.

Like other law school deans in the United States, Sylvester has seen an increase in applicants. According to the Law School Admission Council, by April there was an increase of about 8 percent in law school applicants nationwide, compared to 2017. The council also reported a 21 percent increase in LSAT scores of 160 or higher, near the top of the scale.

But others are not as sanguine, fearing that rising enrollment at law schools could hurt an already-fragile job market for those who are recent or soon-to-be law school graduates — some of whom take on a huge amount of student loan debt.

Sylvester points to promising regional numbers. “Phoenix and Maricopa County are some of the fastest-growing areas; we’ve seen a huge uptick in the number of opportunities for our students,” he says.

Of the 198 members of his law school’s class of 2017, 74.24 percent had full-time, long-term jobs that require bar passage, and 14.6 percent had JD-preferred positions that were long term and full time. The Arizona Office of Economic Opportunity predicts that the number of individuals performing lawyer services will grow by 5.9 percent between 2017 and 2019, from 12,361 to 13,094.

SUPPLY AND DEMAND

Nationally, there was a 3.72 percent increase in employment for new law grads from 2016 to 2017; 75.3 percent of 2017 graduates found work. But that increase was coupled with a 6 percent decrease in the size of the graduating class, according to employment data released in April by the ABA Section of Legal Education and Admissions to the Bar.

The section also parsed job percentages by industry for 2017. The numbers show that there was an 18 percent decrease in academic jobs, a 5.7 percent decrease in government positions, and a 2.3 percent decrease at law firms. Data from the National Association for Law Placement shows that in 2013, 37,730 jobs for new lawyers were reported. That decreased to 36,530 in 2014, 33,469 in 2015 and 31,354 in 2016.

James G. Leipold, executive director of NALP, says he’s not convinced that the job market will support a larger graduating class.

“I am hopeful that law schools will use this jump in the quality and quantity of law school applicants to shore up the credentials of their incoming class, rather than grow their enrollment,” he says.

Some law school deans and professors have said the job market for new lawyers might pick up as baby boomers retire. Others argue that there aren’t enough attorneys available for consumers who need them, and new lawyers could help fill the access-to-justice gap.

Neither of those arguments for attending law school are persuasive, says Bernard Burk, a former assistant professor at the University of North Carolina School of Law. In April, he spoke about the job market for new law school graduates at a summit on the future of legal education sponsored by the Florida International University College of Law.

“The baby boomers are going to retire, but nobody really knows when, and so far what they’ve proved is that they continue to work long after previous generations retire,” he says, adding that when older lawyers retire, it’s unlikely that new attorneys could fill in where they left off because they haven’t had the same training.

Burk acknowledges that the access-to-justice gap is a significant problem. “But throwing lawyers at it won’t solve the problem. The reason is that people who need lawyers don’t have the money to pay for them,” he says, adding that legal services funding on the state and federal levels continues to be cut.

The number of entry-level law jobs will continue to grow roughly proportionate to the gross domestic product,
Burk says, “which is basically flat.”

Some law school deans say that while they are responsible for preparing students to practice law, they aren’t tasked with finding graduates work.

DEFINING THE MISSION

“Your job is not to solve the market problems. Your job is to make sure that your students can support the market the best that they can,” says Austen Parrish, dean of the Michael Maurer School of Law at Indiana University in Bloomington. Out of 177 law school grads in the university’s class of 2017, 67.2 percent had full-time, long-term jobs that require bar passage, and 12.4 percent had JD-preferred positions, according to the school’s employment data.

The school has had a 5 percent increase in law school applications this year, Parrish says, and he’d like a first-year class of about 170 people. In 2017, the first-year class had 162 students.

“It’s a balancing act. You need to ensure that you are bringing in enough revenue so that you are able to support your program, and you want to maintain the quality of your class,” he says. “If you don’t, you’ll see significant effects over time.”

Law school deans don’t control the job market, and limiting class sizes to improve or protect it is “a little bit anti-competitive,” says Deborah Jones Merritt, a law professor at Ohio State University.

Merritt adds that while the job market for new lawyers might be tight, there are plenty of consumers who need representation. But legal aid budgets have been repeatedly slashed, and many middle-class people can no longer afford attorney fees.

“The way law schools are set up serves very well the needs of corporate and business employers, but nobody is serving the needs of employees who need lawyers,” Merritt says.

Law schools face significant pressure to generate revenue. There were 52,404 first-year law students in 2010, compared to 37,400 in 2017, according to data from Law School Transparency. The nonprofit, which focuses on law school reform, also notes that between 2012 and 2017 net tuition at public and private law schools decreased on average because of more tuition discounts being offered. But more than a quarter of students paid full price in 2017, and that price has increased above inflation during that time period, says Kyle McEntee, the group’s executive director.

“Every law school is trying to hold or enhance its academic credentials of the student body and enhance its revenue as well,” says Gary S. Gildin, dean of Pennsylvania State University’s Dickinson Law.

“My sense is that if schools can raise class sizes without harming academic credentials, everybody will do so,” Gildin says.

Gildin estimates that the applicant pool at his school has increased by 30 percent this year, but he plans to keep his 2018 1L class roughly the same size as in 2017, when 73 first-year students were admitted.

“That’s in part because of jobs,” Gildin says. “But probably an equal problem is that you have law schools where the majority of people fail to do that and destroy themselves financially for the rest of their lives.”

For those who do decide to attend law school, Burk advises finding schools that give them realistic employment opportunities, in jobs they want that pay enough to cover the lifestyle they’d like to maintain. Examining full-time, long-term, bar-passage-required positions to hire, will change the demand cycle,” Gildin says.

CAVEAT EMPTOR

Law schools are required to report the employment numbers for new grads to the Section of Legal Education and Admissions to the Bar. But Burk notes no standard requires that those numbers determine whether a school remains accredited, and he wonders whether that might change.

The idea was supported in The Case for an ABA Accreditation Standard on Employment Outcomes, a 2017 paper by Scott F. Norberg, a law professor at Florida International University who is on the legal education section’s Standards Review Committee.

“The notion that consumers of legal education are completely informed and know all of the information necessary to make a fully informed decision is not borne out by the evidence,” Burk says. “We do want to have opportunities for people to better themselves, and some people who do that will succeed. The problem is that you have law schools where the majority of people fail to do that and destroy themselves financially for the rest of their lives.”

If the percentage of recent graduating classes getting such jobs is less than 75 percent to 80 percent, think carefully about whether your personal prospects make it likely you will get a job you want,” he says. “And always be brutally realistic about your prospects. Everyone is inclined to think they’re better than average, and half of us are wrong.”

Your ABA

Deborah Jones Merritt

Gary Gildin

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It’s not just the crying that concerned ABA President Hilarie Bass when she met with mothers detained at South Texas’ Port Isabel Detention Center. But there was crying.

“It was clear they would give up anything to get their children back. And so to the extent that separation of the mother from her children was done in a punitive way, to prevent them from asserting legal asylum claims, I’d suggest it may well be effective,” she says. “And that’s of tremendous concern to me and should be of concern to any American lawyer.”

Bass traveled to the Rio Grande Valley at the end of June to see how American lawyers can help families separated by federal immigration authorities and to meet with staff from ProBAR, the ABA’s South Texas Pro Bono Asylum Representation Project. ProBAR connects volunteer attorneys with adult and child clients seeking asylum.

Attorneys representing asylum-seekers from Central America frequently work with traumatized clients. But since the federal government began separating families after arresting parents for unlawful entry, ProBAR director Kimi Jackson says the trauma has gotten far worse.

“We’ve served these two populations for years, but never have we seen anything like what’s going on now with these family separations,” Jackson says. “The children who are separated from their parents obviously are very traumatized. And [the parents are] in acute distress because they don’t know where their children are.”

In April, Attorney General Jeff Sessions announced he was working with the Department of Homeland Security to institute a zero tolerance policy and prosecute every person crossing the southern border illegally, even asylum-seekers. In May, he stated that children would be removed from their families and held in separate detention sites.

As images of immigrants in chain-link holding cells and audio of children weeping for their parents found their way into the media, there was a swell of public outrage. Bass issued statements in May and June on behalf of the ABA strongly opposing the policy.

“Separating children from their parents not only violates due process, it is antithetical to the very human values on which this country was founded and sets a terrible example for the rest of the world,” Bass said in her May statement.

Responding to public pressure, President Donald Trump issued an executive order June 20 announcing a policy change “to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.” But a multitude of questions, logistical and legal, linger.

Seeking Asylum

According to Jackson, recent federal policy changes have made every step of the asylum-seeking process more difficult. That starts at the border, where, under U.S. and international law, foreign nationals are supposed to be able to present themselves to a U.S. Customs and Border Protection patrol agent to request asylum. But in a June interview, Jackson said the CBP had been turning them back.

“They started stationing an officer...
at the middle of the bridge, right on the international border, just on the U.S. side, and not allowing the asylum-seekers to set foot in the United States at all,” she said. “People are flat-out being denied access to the legal way to request asylum.”

Those caught entering outside an official crossing were being arrested and taken to CBP stations for processing, which was where parents and children were being separated, she said. Adults generally spent about two days at the CBP station before they were taken to federal court.

There, the adults were asked to plead to unlawful entry—a misdemeanor on first offense, which it is in most cases. These were hearings en masse, Jackson said—up to 100 people at a time were entering pleas on the busiest days.

Marjorie Meyers, the federal public defender for the Southern District of Texas, says the mass hearings predate the Department of Justice’s zero tolerance policy that’s separating families. Her attorneys explain the basics to the entire group and meet with each defendant individually.

But because the facts are usually not in dispute, it generally doesn’t make sense to fight the charges and most people plead guilty.

“So does it violate due process? Arguably,” she says. “Is the result any different if it was individualized? I don’t think so because they’re getting time served.”

The 9th U.S. Circuit Court of Appeals at San Francisco has ruled that these mass hearings violate due process, Meyers says, but the 5th Circuit at New Orleans, which includes South Texas, has not weighed in.

Bass witnessed a hearing in the McAllen, Texas, federal courthouse for the Southern District of Texas and saw 75 defendants plead guilty en masse. Each got only a few minutes with a public defender before their hearings, and all got time served—typically a couple of days in a CBP holding facility—before being remanded directly into an Immigration and Customs Enforcement detention center. There, they’re put into expedited removal—deportation without a court hearing—unless they pass an interview that permits them to claim asylum. This means they don’t appear on immigration court docket, which means ProBAR is not able to provide them with services unless they happen to call. “Many will be deported without ever seeing any attorney,” Jackson said.

Studies show that having a lawyer often makes a difference between success and failure in immigration court—and immigrants are not entitled to public defenders because being deportable is not a crime. The ABA has repeatedly called for court-appointed lawyers to be provided for immigration proceedings, passing resolutions addressing minors in 2001 and 2015, and all immigrants in 2017.

**CALL AND RESPONSE**

The call for assistance is being answered by long-standing advocacy organizations, by newly formed groups such as Lawyer Moms of America, and by multiple entities within the ABA. The Section of Civil Rights and Social Justice has hosted a series of webinars examining the new DOJ policies. Immigration attorneys who have Spanish and indigenous language skills are a critical need in South Texas, so ProBAR is looking for more volunteers.

The association’s Working Group on Unaccompanied Minor Immigrants also has seen a marked increase in requests to do pro bono work for immigrant minors.

Cheryl Zalenski, director of the ABA Center for Pro Bono, says in the space of two weeks in June the working group received more than 50 sign-ups via the ABA’s Immigrant Child Advocacy Network without undertaking any publicity. Although the volunteers were unexpected, they’re very welcome, says Mary Ryan, who co-chairs the working group.

“There’s a crisis in our immigration system right now that’s challenging the ability of any immigrant, but particularly the children, from receiving the due process to which they’re entitled and to which of course the [ABA] is committed,” Ryan says. “Children going through the immigration system is just not something that any lawyer should let happen.”

Unlike ProBAR, the working group and the Immigrant Child Advocacy Network don’t serve immigrant minors directly. Rather, Ryan says it connects volunteer lawyers to local organizations in their areas to help minors in the later stages of their immigration cases.

For those who can’t donate time, money is also welcome. The ABA’s charitable arm, the Fund for Justice and Education, supports more than 200 programs each year, including ProBAR, the Immigration Justice Project of San Diego and the Children’s Immigration Law Academy.

Lea Navarro Snipes, associate director of the FJE, says the nonprofit has received an “unprecedented” level of donations earmarked for ProBAR.

Find out how to donate time or money at bit.ly/ABAImmigration, and see coverage of the evolving responses to the immigration policy changes at ABAJournal.com/immigration.
Women of Distinction
The ABA honors 5 legal trailblazers with the Margaret Brent award, named for the first female lawyer in America
By Liane Jackson

Women who make their mark in the legal field blaze a trail for others to follow. The annual Margaret Brent Women Lawyers of Achievement Award recognizes these pioneers for their service to the profession. The ABA Commission on Women in the Profession established the Brent award in 1991 to recognize and celebrate the accomplishments of female lawyers who have excelled in their specialties and in the legal field, paving a path and setting an example for others.

“We are honored to recognize this spectacular group of women,” says Stephanie Scharf, chair of the women’s commission, in a statement. “We applaud their achievements, knowing that their efforts will inspire a new generation of women lawyers.”

Brent arrived in the American colonies in 1638 and is considered to be the first female lawyer in the country. She was a master negotiator, an accomplished litigator and a prominent figure in the Maryland settlement.

The awards luncheon is Aug. 5 as part of the ABA Annual Meeting in Chicago. This year’s roster of recipients includes top litigators, jurists and women who are fighting for equal rights, social justice and inclusion.

MEET THE HONOREES

Patricia Kruse Gillette
Kensington, California
Gillette is one of the country’s leading experts and speakers on gender diversity and equality. For 40 years, she was an employment lawyer and litigator and a major rainmaker at her firms, including Orrick, Herrington & Sutcliffe. But in 2015, Gillette decided to pursue her passion, resigning from her partnership at Orrick to become an author and keynote speaker. In her writings and presentations, Gillette focuses on career advice and how to bring change to law firm and corporate structures to increase diversity and inclusion. She is co-founder of the Opt-In Project, a nationwide initiative focused on changing the structure of law firms to increase the retention and advancement of women in the workplace. She has served on the women’s commission and on the Task Force on Gender Equity created by former ABA President Laurel Bellows in 2012.

Eileen M. Letts
Chicago
Letts is a civil trial attorney and partner with Zuber Lawler & Del Duca who has litigated dozens of jury trials and more than 100 bench trials, often for Fortune 500 companies and governmental entities. Her defense experience also includes police misconduct claims and commercial disputes. Letts has longtime roots in Chicago’s political and legal communities. She began her career clerking from 1978 to 1980 for Justice Glenn T. Johnson, who served on the Illinois Appellate Court. Letts was on the 1983 transition team of Mayor Harold Washington. She has won numerous awards for her work with bar associations and legal aid foundations and has been in many ABA leadership roles, including as a member of the House of Delegates and co-chair of the Diversity and Inclusion 360 Commission. She also serves on the ABA advisory council for President Hilarie Bass’ Achieving Long-Term Careers for Women in Law initiative.
Judge Consuelo B. Marshall
Los Angeles

Marshall serves on the U.S. District Court for the Central District of California. A native of Tennessee, she began her career in LA as a deputy city attorney and the first woman hired as a lawyer by the Los Angeles city attorney’s office. From there, she began a lifetime commitment to public service and justice. Marshall worked in private practice with the high-profile law firm Cochran & Atkins before transitioning to the judiciary, serving as a Los Angeles Superior Court commissioner, Inglewood Municipal Court judge and Los Angeles Superior Court judge. She was appointed to the district court in 1980 by President Jimmy Carter. In 2001, she became the first woman to be chief judge of the Central District of California. She has served on committees for the 9th Circuit, the Association of Business Trial Lawyers and the Federal Bar Association. She’s also a member of the International Association of Women Judges and is currently on the RAND Institute for Civil Justice’s Board of Overseers and is a board member of Equal Justice Works.

Cynthia E. Nance
Fayetteville, Arkansas

Nance was the first woman and first black person to be dean of the University of Arkansas School of Law, as well as the first female law school dean in Arkansas. As dean of the school from 2006 to 2011, Nance strengthened pro bono activities among the student body and helped the law school increase its minority enrollment to more than 20 percent. She is now the law school’s first director of pro bono and community engagement. Throughout her career, she has been a mentor to women and minorities and is committed to social justice, civil rights and women’s issues. She’s an advocate for victims of domestic violence and volunteers to represent them. She’s a member of the House of Delegates, representing the Section of Labor and Employment Law, and is on the Standing Committee on the Federal Judiciary.

Tina Tchen
Chicago

Tchen co-founded the Time’s Up Legal Defense Fund, which provides legal support to people who have experienced sexual harassment in the workplace. She is also known for her roles in the Obama administration, in which she variously served as an assistant to the president, executive director of the White House Council on Women and Girls, and chief of staff to the first lady. Now a partner and head of Buckley Sandler’s Chicago office, Tchen has more than 30 years of experience in private practice and government service. She is also a leader of Buckley Sandler’s workplace cultural compliance practice, counseling companies on issues relating to sexual harassment, gender inequity and lack of workplace diversity. Over the course of her career, Tchen has handled complex civil litigation and enforcement matters in state and federal courts across the country. She also successfully argued before the U.S. Supreme Court on behalf of Illinois.

2019 REGULAR STATE DELEGATE ELECTION
Pursuant to Section 6.3(a) of the ABA’s Constitution, 17 states will elect State Delegates for three-year terms beginning at the adjournment of the 2019 Annual Meeting. The deadline for filing petitions is Dec. 4. For rules and procedures, go to ambar.org/2019StateDelegateElection. If you are interested in filing or have questions, contact Leticia Spencer (leticia.spencer@americanbar.org, 312-988-5160).

2018 NEVADA STATE DELEGATE VACANCY ELECTION
Pursuant to Section 6.3(e) of the ABA’s Constitution, the state of Nevada will elect a State Delegate to fill a vacancy due to the nomination of Rew R. Goodenow, who was elected to the Board of Governors. The term will commence immediately upon certification by the Board of Elections and expires at the conclusion of the 2021 Annual Meeting. The deadline for filing petitions is Sept. 20. For rules and procedures, go to ambar.org/NevadaVacancy. If you are interested in filing or have questions, contact Leticia Spencer (leticia.spencer@americanbar.org, 312-988-5160).

NOTICE BY THE SECRETARY: NOMINATING COMMITTEE MEETINGS
The Nominating Committee will meet in conjunction with the 2018 Annual Meeting in Chicago on Sunday, Aug. 5, beginning with the business session at 9 a.m. in the Crystal Ballroom B/C, West Tower, Lobby Level at the Hyatt Regency Hotel. Immediately following the business session, the Nominating Committee will hear from candidates seeking nomination at the 2019 Midyear Meeting. This portion of the meeting is open to Association members. If you have questions regarding the foregoing, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org.

NOTICE BY THE SECRETARY: MEETING OF THE MEMBERSHIP
Pursuant to Section 6.11, the Secretary hereby gives notice to members of the American Bar Association that the meeting of the membership will be held in conjunction with the Nominating Committee Business Session and Coffee with the Candidates Forum, Sunday, Aug. 5, at 9 a.m. in the Crystal Ballroom B/C, West Tower, at the Hyatt Regency Hotel in Chicago. If you have questions or want to file a petition, contact Leticia Spencer at 312-988-5160 or leticia.spencer@americanbar.org.
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Sept. 5-7
2018 Southeastern White Collar Crime Institute
Location: Braselton, Georgia • Criminal Justice Section

Sept. 13-15
2018 Business Law Section Annual Meeting
Location: Austin, Texas • CLE Credit options

Sept. 20-21
2018 National Law-Related Conference
Location: Chicago • Division for Public Education

Sept. 25-27
2018 National Conference for Lawyer Assistance Programs
Location: Charleston, South Carolina
Commission on Lawyer Assistance Programs • CLE Credit options

Oct. 3
From Work, to the Pharmacy and Then Home: A Well-Being Approach to Depression and Anxiety Webinar
ABACLE and numerous entities • CLE Credit

Oct. 3-6
2018 Section of Family Law Fall CLE Conference
Location: Tucson, Arizona • Section of Family Law

Oct. 4-6
ABA Forum on the Entertainment and Sports Industries 40th Anniversary Annual Meeting
Location: Las Vegas • Forum on the Entertainment and Sports Industries • CLE Credit options

Oct. 5
ABA Lawyer Retreat
Location: Vail, Colorado • Law Practice Division

Nov. 7-10
12th Annual Labor and Employment Law Conference
Location: San Francisco • Section of Labor and Employment Law • CLE Credit options

Nov. 21
Live Podcast—Mastering Voir Dire and Jury Selection
ABA Solo, Small Firm and General Practice Division • Cost: Free
CONGRATULATIONS to Thomas W. Funk of Lincoln, Illinois, for garnering the most online votes for his cartoon caption. Funk's caption, below, was among more than 200 entries submitted in the Journal's monthly cartoon caption-writing contest.

"Given that they have nine lives, we may have to rethink this lifetime appointment thing."
— Thomas W. Funk of Lincoln, Illinois

JOIN THE FUN Send your caption for the legal-themed cartoon below to captions@abajournal.com by 11:59 p.m. CT on Sunday, Aug. 12, with “August Caption Contest” in the subject line.

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

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Flag Burning Tests the Law

It was a searing August afternoon that found communists and anarchists afoot in downtown Dallas. While attendees of the 1984 Republican National Convention took refuge from the heat on Aug. 22, 1984, protesters had taken to the steamy, nearly deserted streets. Television cameras, hungry for dissonant voices, focused on a keenly theatrical group that called itself the “Republican War Chest Tour.”

Although the Vietnam War was well in rear view, the invasion of Grenada and simmering conflicts in Latin America kept the nation’s foreign involvements at issue, and the protesters were doing their level best to focus that narrative on global divisions between rich and poor. The group scrawled anarchist glyphs on storefront windows, bellowed anti-imperialist slogans while marching through Neiman Marcus, and tumbled to the ground on cue to dramatize the deaths of innocents at the hands of the machinery of war.

Outside the Mercantile Bank Building, several protesters pulled down one of 16 American flags regularly on display. As police watched, they handed it off to one of their number, Gregory Lee Johnson, who stuffed it under his shirt.

As the march reached city hall, Johnson unfurled the flag and, holding it in one hand, flicked open a lighter with the other. When the flag failed to catch fire, lighter fluid was dispensed to hasten the ignition. As the flag dropped to the sidewalk in ashes, the protesters chanted and the police moved in.

As many as 100 protesters were taken into custody for disturbing the peace, but only one was charged. Johnson, a self-described communist revolutionary from Atlanta, was cited under Article 42.09(a)(3) of the Texas Penal Code, which prohibited “desecration of a venerated object,” defined specifically as a public monument, a place of worship or burial, or any state or national flag.

At trial, a Dallas jury found Johnson guilty of a misdemeanor, and he was sentenced to a year in jail and a $2,000 fine. The conviction, however, was vacated by the Texas Court of Criminal Appeals on grounds that the vagueness of the Texas law had not protected Johnson’s constitutional right of free speech.

Since World War II, the Supreme Court had grappled repeatedly with tensions between free speech and patriotism, often involving veneration of the national flag. By the time Texas v. Johnson reached oral arguments in March 1989, Texas authorities had conceded that Johnson’s flag burning was an act of protected speech.

But arguing for the state, Dallas County Assistant District Attorney Kathi Alyce Drew maintained that Texas had a vital interest in protecting the flag against erosion as a national symbol and protecting the public against any potential breach of the peace by those who might be offended.

Justice Antonin Scalia found the Texas position hard to reconcile. Not only was there no violence when the flag was burned, he noted, but the flag’s symbolism seemed to him enhanced, not eroded, by its burning. Johnson’s “actions would have been useless unless the flag was a very good symbol for what he intended to show contempt for. His action does not make it any less a symbol.”

In the resulting 5-4 decision, Scalia joined Justice William Brennan’s majority opinion. In addition to Johnson’s protest being protected speech, Brennan wrote, in another context burning the flag would be perfectly appropriate.

“Johnson ‘had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law,’” Brennan wrote.

One onlooker had gathered the ashes, taken them home and buried them in his backyard—a response he saw as far more effective than a criminal prosecution.

“We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents,” Brennan wrote.
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