Williamsburg

National Conference of Appellate Court Clerks

Forty-Ninth Annual Meeting · July 31 — August 4, 2022 · Williamsburg, Virginia

An Afternoon with George Wythe
George Weathers

Adapting Quality Management Practices to Appellate Court Operations
Jarret Perlow

Real Leaders Negotiate!
Jeswald Salacuse (OPPERMAN SPEAKER)

A Forgotten History: Trial by Jury and the American Revolution
Beth White

Courtroom Technology for Appellate Courts
Frederic Lederer & Martin Gruen

Updating Courtroom Technology to Enable Hybrid Oral Arguments…
Polly Brock, Jenny Kitchings, & Tristen Worthen

NCSC/COSCA Rapid Response Team and What Was Learned from the COVID-19 Pandemic
John Doerner & Nora Sydow

Navigating a Changing Judicial Society
Edwin Bell

Court Statistics Project Dashboard
Sarah Gibson & Allison Trochesset

Current and Future Trends Affecting Appellate Courts
Paul Embley & Katie Wilson

Increased Information/Cyber Security Risks in Appellate Courts
Barbara Holmes

A Conversation with United States Supreme Court Clerk Scott Harris

Preventing Burnout, Setting Boundaries, and Creating Work-Life Harmony
Danielle Hall

Ethics and the Role Our Emotions Play in Meeting Our Obligations
Danielle Hall

What's Bugging You?
Greg Hilton

NCACC Awards Luncheon
Mary McQueen

National Conference of Appellate Court Clerks

49th Annual Meeting · July 31- August 4, 2022 · Williamsburg, Virginia

Saturday, July 30, 2022

	9:00 a.m. – 12:00 p.m.	**Executive Committee Meeting**	Magnolia Room
	2:00 p.m. – 5:00 p.m.	**Registration**	Foyer

Sunday, July 31, 2022

	9:30 a.m. – 1:30 p.m.	**Registration**	Foyer
	1:45 p.m. – 2:15 p.m.	**New Members and First Time Attendees Orientation**	Garden Room
	1:45 p.m. – 2:15 p.m.	**Family and Guest Orientation**	Maple Room
	2:30 p.m. – 4:15 p.m.	**Roll Call of the States and Business Meeting (Session I)**	Dogwood Room
	BREAK: 15 MINUTES		
60	4:30 p.m. – 5:30 p.m.	***An Afternoon with George Wythe*** Robert Weathers - Colonial Williamsburg	Dogwood Room
	BREAK: 15 MINUTES		
	5:45 p.m. – 7:30 p.m.	**Reception**	Cascades Terrace
	7:30 p.m. – 8:30 p.m.	**Education Fund Silent Auction & Morgan Thomas Slideshow**	Dogwood Room
	9:00 p.m. – 12:00 a.m.	**Hospitality Room Opening Night**	Hospitality Suite

Monday, August 1, 2022

	7:00 a.m. – 10:30 a.m.	**Continental Breakfast**	Hotel Lobby
	8:20 a.m. – 8:30 a.m.	Morning Announcements & Mindfulness with Ashley Dunasta	Dogwood Room
90	8:30 a.m. – 10:00 a.m.	***Adapting Quality Management Practices to Appellate Court Operations*** Jarrett Perlow – Chief Deputy Clerk, United States Court of Appeals for the Federal Circuit	Dogwood Room
	BREAK: 15 MINUTES		
60	10:15 a.m. – 11:15 a.m.	***Real Leaders Negotiate!* (Opperman Speaker)** Jeswald Salacuse – Dean Emeritus, The Fletcher School of Law and Diplomacy, Tufts University	Dogwood Room
	LUNCH ON YOUR OWN:	1 HOUR, 45 MINUTES	
90	1:00 p.m. – 2:30 p.m.	***A Forgotten History: Trial by Jury and the American Revolution*** Beth A. White – Executive Director, West Virginia Association for Justice	Dogwood Room
	BREAK: 15 MINUTES		
75	2:45 p.m. – 4:00 p.m.	***Courtroom Technology for Appellate Courts*** Frederic I. Lederer & Martin E. Gruen – Center for Legal & Court Technology, William & Mary Law School	Dogwood Room

Educational Session | Business Session | Vendor Show | Vendor Supported or Sponsored

60	4:00 p.m. – 5:00 p.m.	***Updating Courtroom Technology to Enable Hybrid Oral Arguments and Lessons Learned Returning to the New Normal*** Polly Brock – Clerk, Colorado Court of Appeals; Jenny Kitchings – Clerk, South Carolina Court of Appeals; Laruen Vint – Chief Deputy Clerk, Maryland Court of Appeals; Tristen Worthen – Clerk, Washington Court of Appeals: Division III	Dogwood Room
🥂	6:00 p.m. – 10:00 p.m.	**Thomson Reuters Event**	Jamestown Settlement
🍸	9:00 p.m. – 12:00 a.m.	**Hospitality Room**	Hospitality Suite

Tuesday, August 2, 2022

🍽	7:00 a.m. – 10:30 a.m.	**Continental Breakfast**	Hotel Lobby
🍽	7:30 a.m. – 8:20 a.m.	**Past President's Breakfast**	TBD
	8:20 a.m. – 8:30 a.m.	**Morning Announcements & Mindfulness with Ashley Dunasta**	Dogwood Room
90	8:30 a.m. – 10:00 a.m.	***NCSC/COSCA Rapid Response Team and What Was Learned from COVID-19 Pandemic*** John Doerner and Nora Sydow – National Center for State Courts	Dogwood Room
	BREAK: 10 MINUTES		
90	10:10 a.m. – 11:40 a.m.	***Navigating a Changing Judicial Society*** Edwin Bell – National Center for State Courts	Dogwood Room
	BREAK: 20 MINUTES		
60	12:00 a.m. – 1:00 p.m.	***Court Statistics Project Dashboard*** Sarah Gibson & Allison Trochesset – National Center for State Courts *Lunch provided by NCSC*	Dogwood Room
	BREAK: 10 MINUTES		
75	1:10 p.m. – 2:25 p.m.	***Current and Future Trends Affecting Appellate Courts*** Paul Embley – Chief Information Officer, Nevada Supreme Court & Katie Wilson – Appellate Applications Director, Indiana Supreme Court	Dogwood Room
	3:00 p.m. – 5:00 p.m.	**Tour of NCSC Headquarters**	
	3:00 p.m. – 7:00 p.m.	**Golf Tournament**	Golden Horseshoe Golf Course
	3:00 p.m. – 7:00 p.m.	**Cornhole Tournament**	Woodlands Hotel & Suites
	5:00 p.m. – 9:00 p.m.	**Free Evening**	
🍸	9:00 p.m. – 12:00 a.m.	**Hospitality Room**	Hospitality Suite

Wednesday, August 3, 2022

	6:30 a.m. – 7:30 a.m.	**Fun Run/Walk**	
🍽	7:00 a.m. – 10:30 a.m.	**Continental Breakfast**	Hotel Lobby
	8:20 a.m. – 8:30 a.m.	**Morning Announcements & Mindfulness with Ashley Dunasta**	Dogwood Room
120	8:30 a.m. – 10:30 a.m.	***Increased Information/Cyber Security Risks in Appellate Courts*** Barbara Holmes – National Center for State Courts	Dogwood Room

Educational Session | Business Session | Vendor Show | Vendor Supported or Sponsored

	BREAK: 10 MINUTES		
	10:40 a.m. – 10:55 a.m.	**Vendor Introductions & Opening of Vendor Show**	Dogwood Room
	BREAK: 5 MINUTES		
	11:00 a.m. – 11:30 a.m.	**Vendor Showcase I** *Thomson Reuters C-Track Case Management Solution* *Creating a Connected World with Lexis-Nexis* *Appellate Solutions: Digital Tools for Appellate Courts*	 Garden Room Cascades 1 Azalea Room
	BREAK: 10 MINUTES		
	11:40 a.m. – 12:10 p.m.	**Vendor Showcase II** *Modernizing the Courtroom with Case Center's Digital Evidence Platform (Thomson Reuters)* *Creating a Connected World with LexisNexis* *Clearbrief for the Courts: Bringing the Facts to Your Fingertips with Microsoft Word*	 Garden Room Cascades 1 Azalea Room
	12:10 p.m. – 1:30 p.m.	**Vendor Lunch**	Lower Level Foyer
	1:30 p.m. – 2:00 p.m.	**Vendor Showcase III** *C-Track Users Meeting* (1:00 p.m. – 2:00 p.m.) (Attendance is limited to NCACC members whose Court uses C-Track ori s in the configuration process with C-Track) *Creating a Connected World with LexisNexis*	 Garden Room Cascades 1
	BREAK: 15 MINUTES		
60	2:15 p.m. – 3:15 p.m.	***A Conversation with United States Supreme Court Clerk Scott Harris*** Facilitator: Larry Royster – Clerk, Michigan Supreme Court	Dogwood Room
60	3:15 p.m. – 4:15 p.m.	***Preventing Burnout, Setting Boundaries, and Creating Work-Life Harmony*** Danielle M. Hall – Executive Director, Kansas Lawyers Assistance Program	Dogwood Room
	4:15 p.m. – 5:15 p.m.	**Vendor Happy Hour**	
	6:00 p.m. – 10:00 p.m.	**LexisNexis Event**	American Revolution Museum
	9:00 p.m. – 12:00 p.m.	**Hospitality Room**	Hospitality Suite

Thursday, August 4, 2022

	7:00 a.m. – 10:30 a.m.	**Continental Breakfast**	Hotel Lobby
	8:20 a.m. – 8:300 a.m.	**Morning Announcements & Mindfulness with Ashley Dunasta**	Dogwood Room

Educational Session Business Session Vendor Show Vendor Supported or Sponsored

60	8:30 a.m. – 9:30 a.m.	***Ethics and the Role Our Emotions Play in Meeting Our Obligations*** Danielle M. Hall – Executive Director, Kansas Lawyers Assistance Program	Dogwood Room
90	9:30 a.m. – 11:00 a.m.	***What's Bugging You?*** Greg Hilton – Clerk, Maryland Court of Special Appeals	Dogwood Room
	BREAK: 10 MINUTES		
	11:10 a.m. – 12:00 p.m.	**Business Meeting** (Session II)	Dogwood Room
	12:00 p.m. – 1:30 p.m.	**Awards Luncheon** SPEAKER: Mary McQueen – President, National Center for State Courts	Dogwood Room
	2:30 p.m. – 3: 30 p.m.	**Critique Session**	Dogwood Room
	9:00 p.m. – 12:30 p.m.	**Hospitality Room**	Hospitality Suite

The NCACC annual conference is paid for with NCACC funds, most of which are derived from non-vendor sources, such as dues, registration fees and member contributions to the Education Fund. All of the educational sessions are supported entirely by non-vendor funds. Some conference events, particularly social activities, are paid for, directly or indirectly, by vendors who do business with courts. Programs and events that are supported, in whole or in part, with vendor funds are clearly identified on the conference schedule.

Members are urged to review the ethics rules of their jurisdictions to determine whether they may participate in the events supported by vendors. An advisory opinion prepared by the Judicial Conference of the United States Committee on Codes of Conduct, Advisory Opinion No. 91, Solicitation and Acceptance of Funds from Persons Doing Business with the Courts, June 2009, discusses some of the issues related to the use of vendor funds for conferences involving federal court personnel.

A "buy-out" option has been implemented which may enable members who would otherwise be ethically unable to participate in a vendor-sponsored event to do so. Members have the option of paying for a vendor-supported activity themselves. Members who wish to exercise this option should contact the conference host about the cost of the event and the procedure for payment.

Educational Session Business Session Vendor Show Vendor Supported or Sponsored

AN AFTERNOON WITH GEORGE WYTHE

Speaker: Robert Weathers

Robert Weathers, George Wythe, has been performing as a character interpreter for the Colonial Williamsburg Foundation since January 2008. An Atlanta native, he graduated from Young Harris College in 2004 with an AFA concentration in theatre, and Valdosta State University in 2007 with a BFA in theatrical performance. Before taking the role of Mr. Wythe, Robert had the pleasure of portraying numerous 18th century titans, to include Henry Knox, Lord Dunmore, George Whitefield, and even George III. As Mr. Wythe, Robert enjoys focusing on 18th century law, philosophy, education, and the natural sciences, especially astronomy. In the evenings, Robert is co-creative lead of the Colonial Williamsburg Evening Dance Ensemble, where he teaches various dances from the period and develops new programming for the Historic Area. Outside the bounds of the Enlightenment, he spends his free time with his lovely wife, Kaitlyn, visiting various roller coaster parks across the United States, tending to his carnivorous plant garden (aptly named Hortus Mortis), and watching his favorite television show, *The Simpsons*.

GEORGE WYTHE: EARLY MODERN JUDGE

Wythe Holt[*]

George Wythe[1] was one of many leaders of the American Revolution who are little known today.[2] Though Wythe lived mostly in the eighteenth century, his landmark judicial opinions are startlingly modern in their assumptions and socioeconomic import. We might think of him as a founder of the American judicial tradition. This essay will study four of Wythe's opinions to establish and discuss their modernity.

THE ESSENTIAL FACTS ABOUT GEORGE WYTHE

Born to landed if petty gentry in eastern Virginia in 1726 or 1727, Wythe was fairly well known at the time of the founding of the United States.[3] He had been a successful colonial lawyer and an important politician in the lower house of Virginia's legislature. As a well-liked member of the Continental Congress, he was among the earliest, strongest, and most influential advocates of American independence, and was a signer of the Declaration of Independence. John Adams said that he wrote his *Thoughts on Government* in response to a statement of need from his friend Wythe.[4]

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* University Research Professor of Law Emeritus, University of Alabama School of Law. I am deeply grateful to Dean Kenneth Randall and the University of Alabama Law School Foundation for the funding which supported the research for this essay. It is an honor and a pleasure to be a part of this symposium, originally organized as a series of scholarly and friendly critical talks by my fellow workers in American legal history, with much hard work from my kind colleagues Alfred Brophy and Norman Stein. I appreciate the bibliographic suggestions of Staughton Lynd and Norm Diamond. I have not altered spelling, punctuation, and capitalization in quoting from my sources.

1. The reader will have noticed a sameness in the names of author and subject. I am descended from Wythe's sister Ann Wythe Sweeney.

2. *See, e.g.*, Wythe Holt, *How a Founder Becomes Forgotten: Chief Justice John Rutledge, Slavery, and the Jay Treaty*, 7 J. S. LEGAL HIST. 5 (1999).

3. Careful, thoroughly and imaginatively researched studies of Wythe include W. Edwin Hemphill, "George Wythe the Colonial Briton: A Biographical Study of the Pre-Revolutionary Era in Virginia" (1937) (unpublished Ph.D. thesis, University of Virginia), ALONZO THOMAS DILL, GEORGE WYTHE: TEACHER OF LIBERTY (1979), and ROBERT B. KIRTLAND, GEORGE WYTHE: LAWYER, REVOLUTIONARY, JUDGE (1986). Lively and insightful accounts, emphasizing differing aspects of Wythe's life, but not free from error are IMOGENE E. BROWN, AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE (1981) and WILLIAM CLARKIN, SERENE PATRIOT: A LIFE OF GEORGE WYTHE (1970). Also useful is JOYCE BLACKBURN, GEORGE WYTHE OF WILLIAMSBURG (1975). The widely accepted facts in this section of the essay are taken from these sources.

4. 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 332 n.3 (L.H. Butterfield ed., Atheneum 1964) (1961) (describing Apr. 9, 1814, letter from John Adams to John Taylor). *But see* KIRTLAND, *supra* note 3, at 95 & n.20, 106-07 ("There is, however, some question about how the essay came to be written, and much of the account given here depended upon the memories of old men about long-past events."); DILL, *supra* note 3, at 34-35 (noting Wythe was among the inspirers of Adams's pamphlet).

A delegate to the Constitutional Convention, Wythe would have signed the Constitution too had not the terminal illness of his wife called him home from Philadelphia in the early summer of 1787. Estimated contemporaneously to be one of the most learned men of his time, the essentially self-taught Wythe was product and part of the Enlightenment. He was a well-reputed student of the Greek and Latin classics (in the original), read French and other modern languages, learned Hebrew in his seventies, and was an expert amateur in mathematics and the natural sciences while being well-read in the letters—material which peppers his judicial opinions.[5]

Wythe tutored several young men in the law in his home, including Thomas Jefferson, with whom he had a long, warm, and productive intellectual friendship. Then he became the second professor of common law in the Anglo-American world, after Blackstone at Oxford, when in 1779 Governor Jefferson engineered a reorganization of the faculty at the College of William and Mary to establish for his mentor a Chair of Law and Police. John Marshall was Wythe's best-known student. Henry Clay acted as Wythe's clerk after his ten-year professorial stint ended, and many other of his pupils became distinguished lawyers and politicians.

The word "police" in the title of his professorial chair meant what would today be known as "political science" or "government."[6] True to the title, Wythe proved an innovative law teacher. Designed to produce lawyer-citizens both dedicated to the cause of liberty and productive in state and national legislatures,[7] Wythe's course of lectures included government and political economy as well as the common law of Virginia and England.[8] He revived the custom of student moot courts, or mock trials of causes Wythe devised, and in which he sat as judge and preceptor in legal procedure. And he introduced the mock legislature, where on Saturdays in front of the populace of Williamsburg his law students debated and often amended bills Wythe brought forward out of the large number of proposals constituting a total revision of the laws of Virginia he, Jefferson, and the equally renown and venerated Edmund Pendleton had spent years drawing up, at legislative behest.[9]

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5. Wythe's copious judicial citations to classical sources are analyzed in Richard J. Hoffman, *Classics in the Courts of the United States, 1790-1800*, 22 AM. J. LEGAL HIST. 55 (1978).

6. *See generally* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 35-59 (1993).

7. *See* OSCAR L. SHEWMAKE, THE HONORABLE GEORGE WYTHE 17 (2d prtg. 1954) ("to form such characters as may be fit to succede those which have been ornamental and useful in the national councils of America" (quoting Dec. 5, 1785, letter from George Wythe to John Adams) (internal quotation marks omitted)); Letter from Thomas Jefferson to James Madison (July 26, 1780), *in* 3 THE PAPERS OF THOMAS JEFFERSON 506, 507 (Julian P. Boyd ed., 2d prtg. 1972) [hereinafter JEFFERSON PAPERS] ("This single school by throwing from time to time new hands well principled and well informed into the legislature will be of infinite value.").

8. *See* Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 535-36, 574 (1990).

9. *See* Letter from John Brown to William Preston (July 6, 1780), *in* 9 WM. & MARY Q. (1st ser.) 79-80 (1900). On Pendleton, see DAVID JOHN MAYS, EDMUND PENDLETON 1721-1803: A BIOGRAPHY (Virginia State Library 1984) (1952).

As if these important careers were not enough, Wythe was named one of the three Chancellors of a new state high court of equity in 1778 (and as such he was also a member of the Virginia Court of Appeals, the state's highest court). Eleven years later, in a reorganization of Virginia's courts establishing a Court of Appeals staffed with its own judges, he became sole Chancellor. Then in 1802, as he entered his fourth quarter-century and fell behind on a burgeoning docket, he was named one of three Virginia Chancellors who sat separately, not as a single court. Wythe thus had been an important trial (and, at the beginning, appellate) judge for 28 years upon his death in 1806.

It is of his jurisprudence—the product of perhaps the best-read and most erudite of our founding judges[10]—that my story is told here. I will look at four opinions he wrote, to demonstrate that he was in a sense ahead of his time and out of his southern place.[11] Unlike many of Wythe's contemporaries, modern judges—say, at least from the late nineteenth century onwards—have agreed with the idea of judicial review despite its antidemocratic tendencies, have enforced valid contracts no matter what circumstances occurred after their making, and have believed that workers should not be enslaved, but free to bargain with their employers. In terms of the ideological assumptions and the socioeconomic effects of his jurisprudence, George Wythe was a modern, bourgeois[12] judge.

10. The other candidate for this accolade is James Wilson, named to the first U.S. Supreme Court in 1789—and indeed it is Wilson who I would argue is that contemporary American judge most like Wythe in jurisprudential approach and in the socioeconomic implications of his opinions. *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 60-61, 192-95 (1995) (analysis notes Wilson's protection of his investments in at least one judicial opinion); Hoffman, *supra* note 5, at 63, 66-68, 78-80 (noting Wilson's use of classical sources). Hoffman shows, briefly, that there were several other classical scholarly judges in the founding period, if perhaps they were not as deep, contemplative, or contextually aware as were Wilson and Wythe.

11. Only one of Wythe's biographers attempts to assess his judicial work. KIRTLAND, *supra* note 3, esp. at 205-10, focuses on Wythe's jurisprudence of equity, arguing cogently that the great Chancellor refused to accept British decisions as controlling authority, as a measure of the newly won liberty of Americans, *accord* Hoffman, *supra* note 5, at 64-66, and that he attempted to institute and justify a novel "tradition" of equitable jurisprudence as a republican, freshly American antidote to the difficulties and lacunae of (mostly British) common law rules. This essay takes a different but not inconsistent tack.

12. In this essay, I use the word "bourgeois" to refer to ideological support of the capitalist system. Marx uses the term "bourgeois" as synonymous with "capitalist." *See* KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO (Int'l Publishers Co. 1975) (1848).

THE FOUR OPINIONS

Commonwealth v. Caton (The Case of the Prisoners)[13] *and the Power of Judges*

During the American Revolution perhaps two thirds of the inhabitants of the colonies did not support the independence movement. Many were neutral. However, many others (called "Tories") favored the king; of these, large numbers fled to England, Canada, or other English dependencies, but many stayed at home. In Virginia, the seaboard area around Norfolk, especially Princess Anne County, was a Tory hotbed.[14] Tensions were naturally high; Patriots made life dangerous and miserable for known or suspected Tories, and most of the latter kept silent. When, however, in 1781 three British armies were ravaging the countryside, and General Tarleton had chased Governor Jefferson and the Virginia government across the mountains to Staunton, Tories came out of the southeastern Virginia woodwork to aid the British cause. Horses were stolen, nighttime violence was wreaked, and Patriots were just as cowed and terrorized as their Tory neighbors had recently been.

The tables soon turned again. General Cornwallis was cornered at Yorktown, the French fleet kept the English from rescuing him, General Washington force-marched his army from hundreds of miles away to hem him in and to accept his surrender (using Wythe's nearby home as his headquarters), and independence was won. Because of Tory strength in Princess Anne, special criminal courts were ineffective to handle the trials of those who, briefly, had joined the British cause, and in spring 1782, as examples, three men—Joshua Hopkins, James Lamb, and John Caton—were marched from the Princess Anne jail to Richmond to be tried for treason before the General Court. They were duly convicted and sentenced to be hanged. Upon their application to the General Assembly (Virginia's legislature) for pardons, a compassionate House of Delegates granted their request, but the Senate refused to concur. Opaque language in the Constitution of Virginia could be read to give the House the sole power of pardon, while a legislative

13. Commonwealth v. Caton, 8 Va. (4 Call) 5 (Ct. App. 1782); *Pendleton's Account of "The Case of the Prisoners" (Caton v. Commonwealth)*, *in* 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON 1734-1803, at 416, 416-27 (David John Mays ed., 1967) [hereinafter PENDLETON PAPERS], *discussed in* 2 MAYS, *supra* note 9, at 187-202; DILL, *supra* note 3, at 60-62; CLARKIN, *supra* note 3, at 158-61; KIRTLAND, *supra* note 3, at 216-19. Mays's discussion is definitive, especially since, as Mays notes, the report of the case by Daniel Call was written only in 1827 and is incomplete and sometimes inaccurate, as compared with the contemporary bench notes taken by Edmund Pendleton (one of Wythe's fellow Chancellors, and thus on the Court of Appeals). *See* 2 MAYS, *supra* note 9, at 385 n.9. The facts in the text are from Mays's narrative.

14. My ancestors William and Rhoda Holt, the former being a third-generation farmer in Princess Anne County, sold their farm and left Virginia in 1774, as I have learned from my own genealogical researches. When I got interested in family history as a child, my grandfather—their great-great grandson Harry Holt—somewhat sheepishly told me "I think our family were Tories during the Revolution." The son of William and Rhoda Holt, another William, returned to Princess Anne County soon after 1800, and was welcomed by the local community.

act passed almost simultaneously with the Constitution required the concurrence of both houses. The instance went back to the General Court, which, because of the difficulty of the issues, voted to adjourn the case to the Court of Appeals (consisting of Virginia's Chancery, General Court, and Admiralty judges all sitting together). The prisoners waited in an overcrowded, sometimes "fetid and unwholesome" jail cell for months.[15]

On November 2 the eight sitting judges[16] delivered their opinions *seriatim*, as was the judicial custom at that time. A young John Marshall, two years after having attended some of Wythe's William and Mary lectures, was among "the very numerous and respectable audience [which] attended the Argument and [the] delivering [of] the Judgment."[17] The crowd was large because the newspapers had trumpeted an impending decision of "[t]he great Constitutional question,"[18] that is, whether a court could declare a legislative act void as contrary to the Constitution.

The decision was something of a let-down. Six judges tortuously found that the statute did not contravene the constitutional language and thus that the pardon, requiring Senatorial concurrence, was void. Two judges found the pardon good, but only one of them (Wythe's student James Mercer) concluded that the statute violated the Constitution. Most of the judges avoided "the great Constitutional question" like the plague. Wythe, in dictum (since he found the act not inconsistent with the Constitution), apparently alone among the judges spoke clearly and directly to the question of judicial review. His ringing language answered the question positively, giving what have become the usual protective reasons why unelected judges may overturn an act of the elected legislature.[19]

Wythe began by approving of the principle of separation of powers, because thereby "tyranny has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty promoted."[20] But why were governmental powers separate when the members of one department had the final say about whether the act of another department was valid? Moreover, why should an unelected branch control the "sphere" of an elected branch in a democracy? Further, what of minority rights? Were not Tories still "citizens," whose "liberty" should be "promoted" through the operation of separation of powers, rather than (as actually occurred) having their pardons denied by the "separate" judiciary?

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15. 2 MAYS, *supra* note 9, at 190.

16. Three of the eleven judges did not sit.

17. *Pendleton's Account of "The Case of the Prisoners," supra* note 13, at 427. For Marshall's presence, see 2 MAYS, *supra* note 9, at 194.

18. Letter from Edmund Pendleton to James Madison (Nov. 8, 1782), *in* 2 PENDLETON PAPERS, *supra* note 13, at 427, 428.

19. It would be most interesting to learn the opinion of the sole judge—Peter Lyons—who declared himself "[a]gainst the Power of the Court to declare an Act of the Legislature void, because it was against the Constitution," *Pendleton's Account of "The Case of the Prisoners," supra* note 13, at 426, but that opinion is lost. The notes made by Attorney General Edmund Randolph, who argued against the power of judicial review in the case, are also lost. KIRTLAND, *supra* note 3, at 230 n.9.

20. Commonwealth v. Caton, 8 Va. (4 Call) 5, 7 (Ct. App.1782).

Wythe ignored those difficulties. His opinion glided past the difficult issue of the operation of "separation of powers" where judges sit in review of legislatures, just as most modern judicial opinions do. He presumed that judges were "impartial[]." Since they had neither the power of the purse nor the power of the sword, they could act as referees in such instances, "[f]or thus the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of [each] authority peaceably established."[21] Wythe adopted the myth that judges are somehow apolitical, above politics and economic interests, able to be fair when the supposedly political branches cannot be, a position which now lies at the heart of modern American constitutional law.

On the difficulty of minority protection, Wythe made moves which have also become typical in modern judicial review. Protecting popular rights was at issue, but he did not distinguish between majority and minority rights, nor did he deal with issues of power or oppression. He made no mention of the relative powerlessness of Tories as a minority, or any needs or "rights" they might have had. In *Caton*, Wythe saw himself as protecting the rights of the "whole community" against legislative invasion. An unnamed English judge who had declared it "his duty to protect the rights of the subject, against the encroachments of the crown" was equaled by Wythe, who, he said, had the same "duty . . . to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other," a duty he would "fearlessly . . . perform."[22] When usurpations occurred, Wythe, as appellate judge, would

> say to the [lower] court, *Fiat justitia, ruat coelum* [let justice prevail even though the heavens fall]; and, to the usurping branch of the legislature, you attempt worse than a vain thing, for although you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.[23]

Virginia's Constitution had been neither drafted nor adopted by "the people."[24] Though the franchise in Virginia at the time excluded women, African Americans, Native Americans, slaves, and those other adults not pos-

21. *Id.*
22. *Id.* at 8.
23. *Id.*
24. Virginia's Constitution of 1776 was drafted by two Conventions (assemblies of popular delegates) and was not submitted to a popular vote. *See* 7 THE FEDERAL AND STATE CONSTITUTIONS 3812 n.a (Francis Newton Thorpe ed., William S. Hein & Co. 1993) (1909).

sessing sufficient property,[25] at least the legislature was elective. Wythe did not mention the lack of democracy connected with judicial review, much less talk about recurring to a popular vote on fundamental constitutional questions,[26] or any other more democratic resolution.[27] Just as most moderns assume, for Wythe, presumed judicial neutrality provided all necessary safeguards.

Wythe himself was estimated at the time to be the epitome of an incorruptible person and a fair, neutral judge. "As an attorney, he refused to defend unjust causes and abandoned those in which he had been misled."[28] As a judge, John Randolph of Roanoke recalled of Wythe, "he lived in the world without being of the world. . . . [H]e was a mere incarnation of justice, . . . his judgments were all as between A. and B.; for he knew nobody, but went into Court as Astraea was supposed to come down from Heaven, exempt from all human bias."[29] Jefferson said of him, "His virtue was of the purest tint; his integrity inflexible, and his justice exact . . . . [A] more disinterested person never lived."[30] Wythe himself said that "compassion ought

25. *See* ALLAN KULIKOFF, TOBACCO AND SLAVES: THE DEVELOPMENT OF SOUTHERN CULTURES IN THE CHESAPEAKE, 1680-1800, at 285-86 (1986) (explaining that only Virginia's white male freeholders had the franchise).

26. Jefferson came to differ severely with his mentor about judicial review. At first, he seemed to agree, but when the federal courts proved to be (in his view) instruments of the Federalist Party, he rapidly changed his mind. When the issue was federal judicial review of state laws, Jefferson in the 1798 Kentucky Resolution argued that the federal court should not be the final judge of constitutionality; rather, that job was for the state legislatures. *See* Richard E. Ellis, *The Persistence of Antifederalism after 1789*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 295, 302 (Richard Beeman et al. eds., 1987). As President, Jefferson adopted what has been called the tripartite theory, that each branch of the federal government was the final arbiter of the Constitution within its own sphere of operation. *See, e.g.*, Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* THE ADAMS-JEFFERSON LETTERS 278, 279 (Lester J. Cappon ed., 1959). Ultimately, Jefferson imagined, in a democracy the people would arbitrate any constitutional crisis at the ballot box. He knew "no safe depository of the ultimate powers of the society but the people themselves." Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 160, 161 (Paul Leicester Ford ed., 1899) [hereinafter JEFFERSON WRITINGS]. *See generally* DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 257-94 (1994).

27. A contemporary, more thorough analysis of judicial review was given by James Iredell, a future Supreme Court Justice but at the time a North Carolina lawyer in the process of successfully arguing that the North Carolina constitution's guarantee of jury trial overrode a statute denying jury trials to those (Tories and Englishmen) seeking to recover lands confiscated during the Revolution—that is, he used judicial review to protect property rights—in *Bayard v. Singleton*, 1 N.C. 5, 1 Martin 48 (1787). Like Wythe, Iredell did not deal with issues of power or oppression. But unlike Wythe, Iredell recognized that judicial review was undemocratic; he responded that more democratic remedies for unconstitutional legislation—such as a popular petition, a fresh election for the legislators, or a popular uprising—would fail to protect (propertied) minority rights. *See* James Iredell, *An Elector* (Aug. 17, 1786); Letter from James Iredell to Richard Speight (Aug. 26, 1787), *both in* GRIFFITH J. MCREE, 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 145, 172 (1857), *discussed in* CASTO, *supra* note 10, at 216-20.

28. Julian P. Boyd, *The Murder of George Wythe*, *in* THE MURDER OF GEORGE WYTHE: TWO ESSAYS 3, 6 (2d prtg. 1958).

29. B.B. Minor, *Memoir of the Author*, *in* GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA, BY THE HIGH COURT CHANCERY, WITH REMARKS UPON DECREES BY THE COURT OF APPEALS, REVERSING SOME OF THOSE DECISIONS 91 (B.B. Minor ed., 1852) (1795) [hereinafter Wythe's Reports] (quoting a letter from Judge Beverly Tucker to B.B. Minor, which in turn quotes Randolph).

30. Thomas Jefferson, *Notes for the Biography of George Wythe*, *in* 1 THE WRITINGS OF THOMAS JEFFERSON 166, 169-70 (Albert Ellery Bergh ed., 1907).

not to influence a judge, in whom, acting officially, apathy is less a vice than sympathy."[31]

Wythe and his eulogizers were doubtless speaking of a judge acting under overt, conscious bias. Political and economic biases, however, need not be consciously recognized, or consciously pursued. Our actions and, sometimes, our opinions reflect our unstated and perhaps unrealized economic interests, even when our conscious ideology is otherwise. This essay, I think, demonstrates that Wythe's greatest opinions as a judge followed a protomodern, bourgeois bias—likely one Wythe would not have himself understood, much less recognized.

Moreover, all understood that self-interest affected the actions and opinions of human beings.[32] The reason Wythe's disinterestedness received such praise was the fact that it was highly unusual. They were *sub silentio* recognizing the truth, that bias is usual in human affairs, even in the activity of judges. And thus, Wythe's assertion of the neutrality of judges was not only unproven, it was suspect. In Wythe's view, unelected, *assertedly* disinterested judges were to be the guardians and protectors of the body politic, whether the electorate liked it or not, and they could overturn considered judgments of an elected legislature in their guardianship. Ultimately, that is a bias against democracy and in favor of guidance by an elite, a bias in my view consistent with the mores and judicial habits of most American judges in the two centuries that have passed since Wythe's death.

Wythe used judicial review in *Caton* for majoritarian purposes, helping (if not directly leading to) the overturning of a pardon generously granted to members of a hated and mistreated minority.[33] Although Wythe's tone in places seemed to adopt Patriot attitudes of disdain and enmity towards Tories, his rhetoric ignored both any characterization of the relative power of the groups involved, and any question of protecting the rights of an oppressed minority. In my view, democracy requires attention to such distinctions, especially a self-consciousness about majoritarian biases when the rights of an oppressed minority are in contention. Wythe's opinion contained an antidemocratic triple paradox. First, he advocated judicial supremacy within a government whose powers had been supposedly equally divided into three coequal branches, in order to overturn the act of that branch which was elective. Second, he was unperturbed by unelected officials' taking the fore in setting "the boundaries of [each] authority"[34] in a supposedly popularly run democracy. Third, he trumpeted the protection of rights without dealing with the kind and quality of the citizens' rights involved in

31. Field v. Harrison, Wythe's Reports, *supra* note 29, at 273, 282 (Va. Ch. 1794).

32. *See, e.g.*, THE FEDERALIST Nos. 10, 51, at 53-60, 285-90 (James Madison) (E.H. Scott ed., 1894). Like Wythe, the authors of THE FEDERALIST believed judges were somehow free from these concerns. THE FEDERALIST Nos. 78, 79, at 521-34 (Alexander Hamilton) (E.H. Scott ed., 1894).

33. Interestingly enough, after their loss in *Caton*, when the three Tories again petitioned the General Assembly for a pardon, the House granted each of them a conditional pardon, and the Senate concurred. 2 MAYS, *supra* note 9, at 201-02.

34. Commonwealth v. Caton, 8 Va. (4 Call) 5, 7 (Ct. App. 1782).

the case, as this seemed to suit the court's purposes. Such an approach was two decades later to be enshrined by his auditor John Marshall as Chief Justice of the United States in *Marbury v. Madison*, used then, as judicial review is in my view usually used, not to protect the rights of a popular majority, not to protect civil rights, but to protect the property rights of an entrenched, powerful, but threatened minority.[35]

Page v. Pendleton[36] *and the Rights of Creditors*

When the Virginia courts shut down in 1774 because of the impending break with England, huge sums—probably totaling as much as two million pounds[37]—were owed by Virginians to English and Scottish merchant-creditors, largely for household and fancy goods which British mercantilistic laws did not allow to be made in America, purchased on credit given against the promise of future crops. Then came the Revolution, which kept the courts closed as to enemy aliens, and with newly invented compound interest adding more debt by the minute, British merchants were very desirous of settling accounts. (Over the course of time, these became notorious as the "British debts.")[38]

For Virginians during the Revolution, there was a grave problem in the courts' being closed. Reopening them, however, might allow a lot of unwanted "British debt" liability, due to local holding of British commercial paper, the assignment of British debts to locals, or suits by resident agents of British creditors. Legislator Thomas Jefferson tried and failed to get the courts opened in 1777. He succeeded in 1778, after passage of his act to "Sequester British Property, enabling debts owed to British subjects to be paid into a loan office established by the State."[39] Jefferson's loan-office scheme was ingenious, and it was soon adopted by Maryland to accomplish

35. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). On Supreme Court protection of property rights over human rights, see generally for example FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955 (1955); DIALECTICS OF THE U.S. CONSTITUTION: SELECTED WRITINGS OF MITCHELL FRANKLIN (James M. Lawler ed., 2000); THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, FEMINIST, MUCKRAKING, PROGRESSIVE, AND ESPECIALLY SOCIALIST CRITICISM (Bertell Ollman & Jonathan Birnbaum eds., 1990); JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983).

36. Page v. Pendleton, Wythe's Reports, *supra* note 29, at 211 (Va. Ch. 1793), *discussed in* KIRTLAND, *supra* note 3, at 219-23, 227-28; JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 31-32 (1976); BROWN, *supra* note 3, at 258-59; CLARKIN, *supra* note 3, at 190-91, 197-98; *see also* 5 THE PAPERS OF JOHN MARSHALL 261 (Charles F. Hobson et al. eds., 1987) [hereinafter MARSHALL PAPERS].

37. Emory G. Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia*, 19 WM. & MARY Q. (3d ser.) 511, 511 (1962); *see also id.* at 517-18, 524-25; Jacob M. Price, *The Rise of Glasgow in the Chesapeake Tobacco Trade, 1707-1775*, 11 WM. & MARY Q. (3d ser.) 179, 196-98 (1954).

38. For the background and details of the British debt issue, see generally Wythe Holt, *'To Establish Justice': Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1430-35.

39. Clarkin gets the dates wrong, but has the idea correctly stated, and is the only scholar I have found who notes that the loan-office scheme was Jefferson's idea. CLARKIN, *supra* note 3, at 136-37. The loan-office statute is 9 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 377-80 (Univ. Press of Va. 1969) (1821).

the same results.[40] Under the scheme, the state confiscated all pre-Revolution debts owed by its citizens to British creditors, so that the creditors or their representatives or assigns had to sue the sovereign Commonwealth of Virginia for recompense—making successful suits highly unlikely under contemporary notions of sovereign immunity. Virginians could pay their British debts with payments into the loan office—using the rapidly depreciating Virginia paper currency of the time, allowing much debt to be paid off by little in the way of actual value—and the state could use any revenues thereby generated to prosecute the war. Many Virginians, including Thomas Jefferson and George Wythe, availed themselves of this opportunity to eliminate debts cheaply.[41] (The problem was not confined to Virginia. "British debtors" existed in every state, and the best historian of the issue estimates that the total debt exceeded five million pounds.[42] Every state enacted some sort of legal barrier to the collection of British debts.[43])

Jefferson was named one of the American representatives to negotiate a peace treaty with Great Britain, but he never sailed for Europe. The Treaty of Paris was thus negotiated by creditor-oriented lawyers John Jay of New York and John Adams of Massachusetts, with a more debtor-kindly Benjamin Franklin of Pennsylvania unable to sway the position they took on repayment of prewar debts. With the English negotiators under severe pressure from many hard-up or nearly bankrupt merchant-creditors furious at the many legal barriers Americans had erected, Article IV of the Treaty provided that creditors would meet with no legal impediments to the collection of prewar debts, and that they would receive pounds sterling in payment. No consideration at all was given to the now perilous situation of debtors.[44]

And perilous the situation was. Virginia (and many other states) had been devastated by marauding and deliberately destructive British troops, so that the farm resources and crops they had pledged to use to repay these debts were largely unavailable. This formed the basis of the most important legal argument made against collection of the debts, as will be recounted below.[45] Another argument made by many Virginians was that, by winning the war—still the longest in American history, and one bloodily and bitterly fought—they had cancelled their debts to now-despised British subjects.[46] Moreover, all hard money had rapidly flowed out of the nation at the begin-

40. Perhaps Georgia had a similar scheme too. *See* Wythe Holt, *John Blair: "A Safe and Conscientious Judge," in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 155, 192 n.32 (Scott Douglas Gerber ed., 1998).

41. *See* CLARKIN, *supra* note 3, at 201 n.15.

42. Evans, *supra* note 37, at 511.

43. Holt, *supra* note 38, at 1435-39.

44. *Id.* at 1439-40 & n.56.

45. *See infra* notes 62-64 and accompanying text.

46. George Mason reported in 1783 that everywhere he heard the question, "If we are now to pay the Debts due to British Merchants, what have we been fighting for all this while?" Letter from George Mason to Patrick Henry (May 6, 1783), *in* 2 THE PAPERS OF GEORGE MASON 1725-1792, at 769, 771 (Robert A. Rutland ed., 1970).

ning of the war, little specie was in circulation,[47] the British prevented the lucrative trade Americans had formerly enjoyed with the British Caribbean, bad crop years accentuated the problem, and a deep economic depression began in 1783 or 1784. State court dockets filled with domestic debt suits. Article IV of the Treaty was greatly resented and excoriated throughout the nation, British merchants or their agents attempting to collect debts were assaulted, and every state passed at least one act contrary to its terms, erecting or continuing various impediments to repayment of the British debts. Virginia's courts remained shut to British merchants or their agents.[48]

British merchants and the British government remained angry at this disobedience to the treaty, but a treaty clause which Americans read as requiring the British government to compensate them for the thousands of slaves who had fled to the British lines was also not being enforced, and several British forts erected within what was now the boundary of the United States remained in British hands contrary to express provisions of the treaty. The Confederation government attempted to obtain repeal of all state laws impeding the repayment of British debts, but Virginia responded in 1787 with a statute guaranteeing that the courts would be reopened once the British complied with these other portions of the Treaty.[49] A creditor-oriented Constitutional Convention established a federal court system, made treaties past and future a part of the supreme law of the land, allowed jurisdiction for the new courts over claims by foreign plaintiffs and over violations of federal law, prohibited state laws impairing the obligation of contracts, and forbade states' making anything other than gold and silver a tender (to deal with one way of avoiding British debts), all to ensure that a non-state-legislature-controlled court system might rule in favor of the British creditors.[50] In Virginia, resistance to the new federal government was strong, in no small part because of the British debt issue, and no further changes in the law were made.[51]

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47. An admittedly interested Thomas Jefferson—who as executor of his slave-trader/merchant father-in-law's estate was to be plagued until his death by British debts—estimated in 1786 that "[w]ere all the creditors to rush to judgment together, a mass of two millions of property would be brought to market [in Virginia] where there is but the tenth of that sum of money in circulation to purchase it." Letter from Thomas Jefferson to Alexander McCaul (Apr. 19, 1786), *in* 9 JEFFERSON PAPERS, *supra* note 7, at 388.

48. Holt, *supra* note 38, at 1440-51.

49. 12 HENING, *supra* note 39, at 528; Holt, *supra* note 38, at 1437, 1440, 1444, 1451-52.

50. Holt, *supra* note 38, at 1459-66.

51. *See* Letter from Edmund Randolph to James Madison (Apr. 4, 1787), *in* 9 THE PAPERS OF JAMES MADISON 364, 364 (Robert A. Rutland et al. eds., 1975) (Foreign Affairs Secretary Jay's report declaring that the peace treaty is the law of the land, so that states cannot violate it, unanimously adopted by Congress, "will bring the question to a crisis. But will not this add a fresh reason *here* against the reform of the confed[eratio]n?"); Letter from Randolph to Madison (Oct. 23, 1787) (Article III, bringing British debts into the federal courts, "is [to the Virginia General Assembly] the most vulnerable and odious part of the Constitution."); Letter from Randolph to Madison (Mar. 27, 1789) ("If the peace of this country is interrupted by any untoward event, one of three things will have a principal agency in the misfortune: the new Constitution, British debts, and taxes."); Letter from St. George Tucker to John Randolph (June 29, 1788) ("[T]he Constitution has been adopted in this State. . . . The recovery of British debts can no longer be postponed, and there now seems to be a moral certainty that your patrimony will all go to satisfy the unjust debt from your papa to the Hanburys [a prominent British mercantile firm]."), *last*

However, a December 1791 ruling by the federal Virginia circuit court in *Jones v. Walker*, refusing immediately to overturn the Virginia loan-office statute as a legal impediment, outraged the creditors—"'[T]he courts of Justice in Virginia are still shut for the recovery of British debts,' one of them fumed"—and gave heart to the debtors.[52] A bill was filed in Wythe's Richmond Chancery Court by Carter Page, executor of the heavily indebted estate of Archibald Cary, against the estate's British creditors and some Virginians (including Edmund Pendleton as executor of another estate) who held Cary's bills of exchange drawn on British merchants. Page argued that the 1787 statute opened the Virginia courts to such suits, pled payments into the loan office by Cary under the loan-office statute, and prayed for extinction of any indebtedness thereon to the merchants and holders of the bills.[53]

Wythe smashed debtors' hopes when he courageously gave his opinion on May 3, 1793. He had heard the arguments of his fellow Virginians, as embodied in the passionate three-day oration debtors' attorney Patrick Henry gave against repayment of the debts in *Jones v. Walker* at the December 1791 session of the federal court. An upset creditor's agent said that "all the declamatory talents of Patrick Henry were displayed to inflame Mens minds, prevent their Judgments & drive them to acts of Outrage."[54] Wythe was equally as angry about Henry's arguments. "[S]ome months before this opinion was delivered," he said in *Page*, "a similar case was argued in another court [*Jones*] ... [in which] rhetoric [was] copiously poured forth . . . in order to prove that an american citizen might honestly as well as profitably withold money which he owed to a british subject."[55] Wythe mused that "a stranger, who heard" Henry, and saw the "admiration, adulation, [and] adoration" with which Virginians received his arguments, "might have suspected that one of the cardinal virtues, as they are called, either is not cultivated in America, or is not understood to be the same there as it is in all other civilized countries."[56] Wythe had clearly if unconsciously adopted the creditor standpoint, which for him was unquestionable, the only "civilized" position. Knowing how important the issues were, he attempted to respond directly to Henry's arguments, and to those of his fellow Virginians. To be as persuasive as possible, in the face of a largely hostile opposing populace, Wythe adduced as many reasons as he could in favor of the continuing validity of the British debts.[57]

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three in MONCURE DANIEL CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH 96, 121-22, 106 (1888).

52. Holt, *John Blair*, *supra* note 40, at 170, 191-92 (quoting Letter from James Ritchie to William Molleson (Feb. 1, 1792), *in* vol. 14, Foreign Office ser. 4, Public Record Office, London).

53. Page v. Pendleton, Wythe's Reports, *supra* note 29, at 211 (Va. Ch. 1793); KIRTLAND, *supra* note 3, at 219.

54. Holt, *John Blair*, *supra* note 40, at 169-70 (quoting Letter from Alexander McCaul to James Ritchie (Feb. 1, 1792), *in* 14 Foreign Office ser. 4, Public Record Office, London).

55. *Page*, Wythe's Reports, *supra* note 29, at 211 n.(a).

56. *Id.* For Henry's argument in 1791, see WILLIAM WIRT, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY 219-58 (rev. ed. 1850).

57. Some of Wythe's arguments seem tendentious or erroneous to me, and I speak in the text only to

Wythe noted at the outset that victory in the Revolutionary War did not free British debtors, for war cannot extinguish antecedent obligations of the citizens whose nations are at war. And to the argument (enshrined in the 1787 statute) that American debts were not due until England fulfilled its obligations to return or pay for slaves and to evacuate the forts, Wythe forthrightly replied that he had no power to order the king to do anything, stating that this was a political issue and implying (correctly, I think) that the treaty provisions were separate and the obligations under them also separate.[58] The most important of Wythe's arguments was that Article IV of the Treaty had been rendered the supreme law of the land by the Constitution, and thus had been "abrogated the acts of every state in the union, tending to obstruct the recovery of british debts from the citizens of those States,"[59] such as the loan-office scheme.

However, Wythe was so thoroughly convinced of the new bourgeois contractual morality that in fact he completely ignored the chief legal argument made by the debtors. (Something similar has happened to other true believers in the new system.[60]) He felt deeply that people who refused to pay their debts were uncivilized, barbaric—beyond the pale.[61] However, an entire society does not rest its actions upon open immorality.[62] The debtors had a clear and sophisticated legal position, one however entirely premodern, anticommercial, and inconsistent with the rules of capitalism. It was thus likely unrecognizable to those, like Wythe, who were convinced of bourgeois morality. It was an older tenet of the law of contracts, that "consideration" (which is necessary for a legally complete contract, and is what each party gives up, something important and meaningful, as they enter into a contract) is *substantive* and must exist throughout the term of the contract. If one party destroys the other party's consideration, the debt is extinguished. "[W]hen a British army lands in France," Henry thundered, "they plunder nothing. . . . Were we thus treated? . . . No sir. What became of our agriculture? Our inhabitants were mercilessly and brutally plundered, . . .

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those I consider valid and pertinent to the issues of this essay.

58. *Page*, Wythe's Reports, *supra* note 29, at 212, 217-18.

59. *Id.* at 217.

60. *E.g.*, Massachusetts judges, convinced of the necessity of modern contract rules, similarly ignored their own law to the contrary in 1824. *See* Wythe Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law*, 1986 WIS. L. REV. 677, 728 (Massachusetts court, energetically instructing workers that quitting before the end of the contract meant no recovery of pay earned but not paid, quickly passes by an earlier rule allowing servants who quit to recover for work done). Modern authors uncritically believing that capitalism must be correct may suffer the same blindnesses. *Compare* Peter Karsten, *"Bottomed on Justice": A Reappraisal of Critical Legal Studies Scholarship Concerning Breaches of Labor Contracts by Quitting or Firing in Britain and the U.S., 1630-1880*, 34 AM. J. LEGAL HIST. 213, 221-25 (1990) (asserting that there was no such earlier rule), *with* TOMLINS, *supra* note 6, at 273-78 & nn.48, 49, 52, 53, 58 (giving evidence for the earlier rule as claimed by Holt).

61. *See Page*, Wythe's Reports, *supra* note 29, at 211 n.(a), 212 n.(b).

62. Henry said as much in his argument: "I am not willing to ascribe to the meanest American the love of money, or desire of eluding the payment of his debts . . . . No, sir. He had nobler and better views. But he thinks himself well entitled to those debts, from the laws and usages of nations, as a compensation for the injuries he has sustained." WIRT, *supra* note 56, at 249.

[o]ur slaves carried away, our crops burnt, . . . [the] disability to pay debts [was] produced by pillage and devastation, contrary to every principle of national [natural] law."[63] The debtors essentially argued that *there were no longer any debts to enforce*.[64]

Wythe had made his arguments from positive law—that is, their authority rested upon rules made by government—and they would be entirely sufficient for us. But Wythe was, of course, not entirely modern. He had been reared in a natural law atmosphere[65] and the heart of his opinion (though single-mindedly pursuing a modern, commercial *goal*) rests upon what, for him, was law higher than what mere humans might say or do in legislative or executive action. It was law founded upon "consent of those, who were members of the community, when the laws were instituted," and, more deeply, upon what he variously called "natural reason," "the law of nature, called common law, because it is common to all mankind," and (as we have seen) "the cardinal virtues . . . understood . . . in all . . . civilized coun-

63. *Id*. at 238-39 (reporter mistranscribes "national" for "natural"). Henry soon made the legal argument explicit:

> Describe the nature of a debt: it is an engagement or promise to pay—but it must be for a valuable consideration. . . . Notwithstanding the equity and fairness of the debt when incurred, if the security of the property received was afterward destroyed, the [obligation] has proved defective . . . . [T]he [obligation] was destroyed by the very offenders who come here now and demand payment. Justice and equity cancel the obligation as to the price that was to be given for [the property received], because the [consideration] is destroyed . . . . For this long catalogue of offences committed against the citizens of America, every individual of the British nation is accountable . . . . The individuals, and the nation they compose, are one.

Id. at 239-40 (I have substituted modern words for some of those Henry used.); *see also* Holt, *supra* note 38, at 1443. Henry was well aware of the economic forces behind the legal claims.

> "Though every other thing dear to humanity is forfeitable [during a war, by capture or killing], yet *debts*, it seems, must be spared! Debts are too sacred to be touched? It is a mercantile idea that worships Mammon instead of God . . . . The principle is to be found in the day-books, journals and le[d]gers of merchants; not in the writings or reasonings of the wise and well-informed . . . ."

WIRT, *supra* note 56, at 256.

64. Interestingly enough, Jefferson and Wythe differed on these points. Jefferson, as U.S. Secretary of State, sounded much like Henry in a lengthy 1792 note to George Hammond, the representative of the British government, responding to the latter's complaint about nonpayment of the British debts. His entire discussion of the debt situation was premised, as was Henry's (and the Virginia statute of 1787), on the allegedly prior refusal of the British government to return or pay for the escaped slaves and to remove its troops from the various forts on American soil. *See* Letter from Thomas Jefferson to George Hammond (May 29, 1792), *in* 23 JEFFERSON PAPERS, *supra* note 7, at 551-92, esp. §§ 26-29, 38, at 568-71, 577-78. While he forbears to claim that the devastation wrought by the marauding British armies went so far as to cancel the debts, *see id.* § 35, at 574-75 (Jefferson thought it did however provide a practical reason for not collecting the debts immediately), he explicitly claimed that "that universal devastation, which took place in many of these States during the war" was sufficient legal ground for juries to lessen or deny interest during such a "general national calamity . . . where the loss has been produced by the act of the Creditor . . . . [A] nation as a Society, forms a moral person, and every member of it is personally responsible for his Society." *Id.* § 54, at 591-92 (emphasis omitted).

65. On natural law, see CASTO, *supra* note 10, at 2, 34-36 (noting Blackstone suffered the same ambivalence as Wythe, asserting modern commercial values in a partially natural law exposition), 158-59, 192-95; Holt, *John Blair*, *supra* note 40, at 176; and Wythe Holt, *Separation of Powers? Relations between the Judiciary and the Other Branches of the Federal Government before 1803*, *in* NEITHER SEPARATE NOR EQUAL: CONGRESS IN THE 1790S, at 183, 186-87 (Kenneth R. Bowling & Donald R. Kennon eds., 2000).

tries."[66] One of the fundamental tenets of natural law, which no legislature could contravene, Wythe knew, was "to deal faithfully," that is, to pay debts (in the kind of "money which their people had before obliged themselves to pay") and to fulfill promises.[67] These tenets "are perceived intuitively to harmonize with our innate notions of rectitude," as we have elevated ourselves from that "barbarism" which approved "acquirement by conquest."[68] Except for the first ("the prohibition to kill or wound our fellow men"), the tenets Wythe listed are hallmarks of liberal, bourgeois morality: "the prohibition . . . to defame [our fellow men], to invade their property . . . to deal faithfully, [and] to make reparation for injury."[69]

For Wythe, life was either civilized or barbaric, and civilized life was founded upon the right of individuals to have their reputations unsullied, to own property exclusively and individually and to have that property safe from invasion and theft ("peiracy"),[70] to be repaid for injury, and to have promises and deals completed and enforced as understood by the contracting parties.[71] To violate a property agreement, a contract, or a commercial obligation was to violate the most sacred aspect of civilized life. A mere legislature surely could not do so. The modern values of commerce were the acme of civilization, for Wythe "innate," unquestionable, and excellent—even though Wythe used the older natural law language to uphold them. He felt so strongly about such values that he risked the severe opprobrium and distaste of the large majority of his fellow Virginians in stating them, in making British debts viable.[72] (It apparently did not concern this deeply upright man that he, himself, had made payments into the loan office. When the same issue came before Wythe's former Virginia colleague as Chancellor, John Blair, now a United States Supreme Court justice, that worthy uniformly recused himself from hearing it because of his own payments into the loan office.)[73]

66. Page v. Pendleton, Wythe's Reports, *supra* note 29, at 215 n.(e) (source of first three quotes), 211 n.(a) (fourth quote).

67. *Id.* at 215 n.(e) (first quote), 216 (second quote).

68. *Id.* at 215 n.(e) (first quote), 212 n.(b) (second quote).

69. *Id.* at 215 n.(e). Property, in the modern, bourgeois view, is exclusive and private, is individually owned, is not limited to what one might reasonably be able to use, is not shared, and is not communally owned. *See* KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 33-34 (Maurice Dodd ed., S.W. Ryazanskaya trans., 1972) (1859); MARX & ENGELS, *supra* note 12, pt. II. People—especially merchants—have an important property in their reputations (though elites in an earlier, feudal socioeconomic formation also demanded such protection, they would not have imagined reputation to be something that common people could claim protection for), and since property is basically exchange value, every injury to it or deprivation of it is quantifiable and deserves recompense.

70. *Page*, Wythe's Reports, *supra* note 29, at 212 n.(b).

71. Note that the modern law school first-year curriculum in the bourgeois United States almost universally contains precisely these subjects: property, criminal law, torts, and contracts.

72. For other cases in which Wythe favored mercantile and creditor interests, loosening old strictures in their favor, see *Love v. Donelson*, published in pamphlet form (Va. Ch., n.d., but after 1801), *listed in* KIRTLAND, *supra* note 3, at 283, *discussed in id*. at 248-50; and *Norton v. Rose*, 2 Va. (2 Wash.) 233 (Ct. App. 1796) (reversing Wythe), *discussed in* KIRTLAND, *supra* note 3, at 247-48.

73. Holt, *John Blair*, *supra* note 40, at 170 & 191-92 nn.31 & 32.

Those fellow Virginians were probably less devoted than Wythe was to the values of commercialism. Southerners lived in a mixed socioeconomic world, with slavery rather than wage labor the dominant mode of organizing labor—and the South had a ruling group which openly displayed the values of feudal aristocracy (rather than those of shopkeepers or industrialists), such as patronage, the opulent display of wealth, a consciousness of social class, an open contradiction between humans as laborers and humans as property itself[74]—but with commerce quite important too, especially in tobacco (soon cotton), in a few other staple crops, and in slaves. Wythe's lack of ambivalence about bourgeois values may have grated, perhaps subconsciously, as much as did his attack on their pocketbooks and on their deep sense that the British had, through wanton pillage and arson, destroyed the ability of Virginians to farm, destroyed (that is) the consideration which underlay the debts and thus forfeited the debts themselves.

It was of course expected that Wythe's opinion would be soon reversed. However, probably following Blair's example, three of the Court of Appeals judges recused themselves from hearing the appeal, and *Page* was sent to a specially constituted appellate court. After many continuances, the appeal was dropped by the plaintiff in November 1799.[75] While Wythe's decision and much of his opinion was sustained by the United States Supreme Court in 1796 in *Ware v. Hylton*,[76] and despite his status as venerated elder statesman, he reaped what he had sown: Virginia public opinion was severely upset and angered by *Page*. One of his biographers notes, "[W]e know from several sources that Wythe was intensely unpopular in his native country after this case," while another says, "The old Chancellor was never forgiven . . . by some leading families in the state."[77]

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74. *See generally* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974); MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981).

75. Edmund Randolph, writing soon after Wythe rendered his opinion in *Page*, said: "Mr. Wythe indeed, as chancellor, has determined against the British debtor; but his decree will, it is conjectured, be reversed in the Court of Appeals, unanimously." Letter from Edmond Randolph to George Washington (June 24, 1793), *in* CONWAY, *supra* note 51, at 151, 153. For the subsequent history of the case, see 5 MARSHALL PAPERS, *supra* note 36, at 326 n.9.

76. 3 U.S. (3 Dall.) 199 (1796). James Wilson, concurring in *Ware*, like Wythe rested both on the positive law ground that the Treaty abrogated the loan-office statute and payments thereunder, and upon natural law grounds—with the latter much more important to him. *See* CASTO, *supra* note 10, at 192-95. For the legal proceedings in *Ware*, and why it was substituted for *Jones v. Walker* as the Virginia test case on the British debts, see 5 MARSHALL PAPERS, *supra* note 36, at 295-329.

77. CLARKIN, *supra* note 3, at 191; BLACKBURN, *supra* note 3, at 125. Wythe was not the only Virginian to rule against their neighbors on the question of repayment of British debts. Even though he had to recuse himself from all cases involving the loan-office issue, *see supra* note 73 and accompanying text, former Virginia Chancellor and Supreme Court Justice John Blair, sitting in various federal circuit courts, uniformly and at least once proactively ruled against the debtors on all other issues. *See* Holt, *John Blair*, *supra* note 40, at 170. So far as I am aware, however, Blair suffered none of the public opprobrium meted out to Wythe for his defiance of his neighbors' economic desires and beliefs.

Pleasants,[78] Wrights,[79] *and the Rights of Slaves as Human Beings*

The economic foundation of Virginian prosperity and the rights and freedoms litigated in the previously discussed cases rested on the enslavement of human beings, overwhelmingly African in origin. The tobacco was grown by slave labor. The fine mansions and public buildings were built by slave labor. The leisure, education, and sophistication of Virginia's white elites—who wrote magnificently and fought desperately for independence and "freedom" during the Revolution—rested upon the backs of African and African-American people deprived of freedom. While many elite Virginians, recognizing the contradiction, claimed during 1775-1810 to desire the abolition or amelioration of this cruel, bleak, inhumane labor arrangement, most actually received too much benefit from it to do anything consistent with those supposed desires. A very few—like George Washington and (as we shall see) the wealthy Quaker John Pleasants—freed their slaves, but only upon their own deaths (thus accepting slavery's economic benefits during the interim), or when the slaves reached a certain age, 30 in Pleasants' case (thus accepting the benefits of their labor during the best years of the slaves' lives). The result was a culture unwilling either to discuss slavery meaningfully or to tolerate genuine attacks on it.

George Wythe's relationship to this fundamental socioeconomic institution was deep, complicated, and even more contradictory than it was for most of his neighbors. Wythe's mother Margaret was a Quaker, Margaret's grandfather the notorious and militant Quaker preacher George Keith and his Philadelphia congregation had published the first Quaker anti-slavery tract in 1693,[80] and the Quakers were known for abhorrence to the institution of human slavery. Quakers in Virginia in 1768 disallowed the further purchase of slaves by Friends. The Henrico Quarterly Meeting in 1774 advised its membership to petition the General Assembly to allow manumission of slaves, and success was eventually obtained in this regard in 1782.

78. Pleasants v. Pleasants, 6 Va. (2 Call) 319 (Ct. App. 1799) (misdated 1800 in the report); *Virginia: In the High Court of Chancery, March 16, 1798 . . .* ([Richmond, 1800?]) (pamphlet containing all of Wythe's rulings in *Pleasants*) [hereinafter *Wythe's Decree in Pleasants*], *discussed in* 5 MARSHALL PAPERS, *supra* note 36, 541-49 (for the proper dating, see *id.* at 544 n.8); James H. Kettner, *Persons or Property? The Pleasants Slaves in the Virginia Courts, 1792-1799*, *in* LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA 136, 136-55 (Ronald Hoffman & Peter J. Albert eds., 1996); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 69-71 (1975).

79. Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134 (1806), *discussed in* NOONAN, *supra* note 36, at 33-60; COVER, *supra* note 78, at 51-55; A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1239-41 (1993); KIRTLAND, *supra* note 3, at 148-49; BROWN, *supra* note 3, at 266-67. Cover's is the best of these. We do not have Wythe's opinion in the Chancery Court—probably styled *Wrights v. Hudgins*—and must divine what he held from the opinions in the Court of Appeals reversing his decision, and Judge St. George Tucker's bench notes and the other papers collected in his case file on the appeal.

80. *See* DILL, *supra* note 3, at 4-6.

Quakers were instrumental in founding the Virginia Abolition Society in 1790.[81]

Wythe himself was never a Quaker, but he was decidedly opposed to slavery. Jefferson wrote to a prominent British abolitionist, in 1785, that Wythe's "sentiments on the subject of slavery are unequivocal."[82] A historian of slavery in Virginia, cautiously and properly finding that "the anti-slavery pronouncements of Virginia's statesmen were so rarely accompanied by any positive efforts against slavery as to cast doubt on their sincerity," nevertheless placed Wythe alone on a pedestal: "[O]nly George Wythe seemed to take the position that Negroes held the full attributes of humanity . . . . Like the Quakers, Wythe entertained a direct concern for the Negroes which took precedence over the safety, convenience, or profit of their masters."[83] The record is in fact more equivocal.

Wythe owned many slaves, seventeen in 1784. After his wife's death in August 1787, Wythe began to exhibit a decidedly less opulent lifestyle; in that year he gave thirteen slaves to his wife's relatives and he took advantage of the Quaker-backed emancipation law by setting free at least five others in that and the succeeding years—though he still owned at least two slaves as late as 1797. The three household blacks who served him in the years before his death in 1806 had all been freed.[84] One of them, the cook Lydia Brodnax, had been freed upon his wife's death in 1787 and apparently lived in a house of her own (which Wythe owned).[85] Another, a teen named Michael Brown, whose care was entrusted to Jefferson by Wythe's will, was apparently being taught Latin, Greek, and natural science by Wythe—contrary to Jefferson's published belief that blacks were, as to whites, "in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid."[86]

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81. Kettner, *supra* note 78, at 139-40 & n.10, 136-37 & n.2.

82. Letter from Thomas Jefferson to Richard Price (Aug. 7, 1785), *in* 8 JEFFERSON PAPERS, *supra* note 7, at 356, 357.

83. ROBERT MCCOLLEY, SLAVERY AND JEFFERSONIAN VIRGINIA 124, 136 (1964).

84. DILL, *supra* note 3, at 52-53; BROWN, *supra* note 3, at 266-67; Letter from Henry Clay to B.B. Minor (May 3, 1851), *in* Minor, *supra* note 29, at xxxv (when Clay wrote down an early version of Wythe's will, before he left Richmond in 1797, the will emancipated all slaves). For Wythe's opulent lifestyle during his political career and marriage, see BLACKBURN, *supra* note 3, at 44, 59-60; CLARKIN, *supra* note 3, at 70. Wythe suffered terribly from his wife's passing, becoming "silent and grave; . . . [full of] gentle sadness," *id.* at 173 (quoting Nathaniel Beverly Tucker (internal quotation marks omitted)), and "isolated almost completely from human contact," *id.* at 186. According to Henry Clay who as a teen was his clerk from 1794-96, "Mr. Wythe's personal appearance and his personal habits were plain, simple, and unostentatious. . . . [H]e generally wore a [plain] grey coating." Letter from Henry Clay, *supra*, at xxxv.

85. KIRTLAND, *supra* note 3, at 146-47.

86. Thomas Jefferson, *Notes on Virginia*, *in* 3 JEFFERSON WRITINGS, *supra* note 26, at 87, 245. *See generally id.* at 244-50; Thomas Jefferson, *Autobiography*, *in* 1 JEFFERSON WRITINGS, *supra* note 26, at 1, 68. Constantin Francois Volney, who voted in the French revolutionary assembly to abolish slavery and "who understood that race was invented merely to divide the workers apart," PETER LINEBAUGH & MARCUS REDIKER, THE MANY-HEADED HYDRA: SAILORS, SLAVES, COMMONERS, AND THE HIDDEN HISTORY OF THE REVOLUTIONARY ATLANTIC 342 (2000), visited Jefferson at Monticello in 1796 and watched with bemused disgust as the great libertarian's field slaves actually obeyed their master and worked only when his eyes were turned toward them. "The master took a whip to frighten them . . . those

Federal circuit judge and legal historian John Noonan finds Wythe as insincere on slavery as the rest of his Virginia cohorts. When Wythe, Jefferson, and Pendleton were tasked with complete revision of the laws of Virginia after 1776, the only ameliorative slave bills they actually submitted to the General Assembly were ones "eliminating some of the cruel punishments inflicted upon slaves and banning the further importation of slaves."[87] Thus, in fact "they *maintained* slavery" and the inhuman notion that a person could be utterly rightless, a piece of property. "[T]hey proposed no law by which their enjoyment of human liberties was recognized."[88] Noonan notes that, contemporaneously and notoriously, Blackstone had stated that negroes were humans and had the absolute rights vested in them by the "immutable laws of nature,"[89] and that Edmund Burke "in 1792 proposed a code [drafted 12 years earlier!] for the amelioration of the conditions of slavery in the British colonies. . . . [A]ccepting the slaves as human beings, Burke worked toward their enjoyment of human liberties."[90] Wythe, Jefferson, and Pendleton did draft a bill which would have gradually emancipated all slaves, educating them at public expense—and would have sent these recently freedpersons overseas (fully equipped with weapons, seeds, animals, and knowledge)—but the "emancipation [was] so gradual that it would guarantee the planters of Virginia slave labor for several generations, and the entire project was [so costly that it was] dependent on a federally subsidized removal of all free Negroes."[91] The bill, however, was never submitted to the legislature. As Jefferson later hinted, social economics trumped ideology: "[T]he public mind would not yet bear the proposition."[92] Slaves were too important for planter profits, power, and leisure.

Half the property cases Wythe heard, in Noonan's opinion, involved the disposition of slaves. Noonan recounts two of them, in which the Chancellor ordered slaves transferred as property (quoting Wythe) "with as little judicial ceremony as a single quadruped, or article of house or kitchen furniture."[93] While in none of these cases did Wythe "conclude [consistent with his beliefs] that slavery could not exist,"[94] Noonan does not however note that in at least two cases—not property cases but instances in which enslaved persons asked for their freedom—Wythe went beyond the existing

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whom he looked at directly worked the best, those whom he half saw worked least, and those he didn't see at all, ceased working altogether . . . ." *Id.* at 344 (reminiscence Volney wrote). Volney left the little mountaintop of freedom in sadness and anger. *Id.* at 341-44. For the invention of race in Virginia in order to divide the black workers from the white ones, see EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975).

87. BROWN, *supra* note 3, at 189.

88. NOONAN, *supra* note 36, at 52.

89. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *124.

90. NOONAN, *supra* note 36, at 49-50, 52.

91. MCCOLLEY, *supra* note 83, at 130; *see* BROWN, *supra* note 3, at 189-90; NOONAN, *supra* note 36, at 46-54.

92. Jefferson, *Autobiography*, *supra* note 86, at 68.

93. Fowler v. Saunders, Wythe's Reports, *supra* note 29, at 322, 327 (Va. Ch. 1798); *see* Turpin v. Turpin, Wythe's Reports, *supra* note 29, at 137 (Va. Ch. 1791); NOONAN, *supra* note 36, at 54-58.

94. NOONAN, *supra* note 36, at 56.

law, and far beyond his elite Virginia contemporaries, courageously to rule against slavery and in favor of freedom. In both, Wythe challenged the legal and ethical basis of slavery.[95]

The wills of emancipating Quakers John Pleasants (died 1771) and his son Jonathan (died 1776) came before Wythe in 1798. Both wills were written and took effect before Virginia (at Quaker urging, as we have seen[96]) reversed its prior course in 1782 (overturning a 1748 statute) to allow masters to free slaves.[97] John's other sons Robert and Samuel emancipated 90 slaves in 1782 and 1783, partially fulfilling the desires of their relatives, but John's grandson Samuel Jr. and Charles Logan, the husband of John's daughter Mary, balked at setting free the many slaves they had inherited from the two emancipators.[98]

There were at least five major legal difficulties. First, the law of Virginia in 1771 and 1776 forbade emancipation; could wills effective at those dates nevertheless free slaves in the future? Second, since the wills' emancipatory effect would occur only when the General Assembly passed a suitable statute, at an unknown time in the future as seen from the perspective of the dates of the testators' deaths, the legatees of the slaves would suffer under a condition restraining their sale or mortgage of the slaves for an indefinite time, and unreasonable "restraints on alienation" were void.[99] Third, the 1782 act required emancipators to provide support and maintenance for emancipatees who were minors, enfeebled persons, or persons over 45, while neither Pleasants will made any such provision. Fourth, both Pleasants had set the date of freedom to be at age 30, whenever an enslaved person might reach that age, including all those slaves born after their deaths. The Rule Against Perpetuities under Virginia law at that time required property rights to vest (i.e., be free from conditions) within lives in being at the effective date of the conveying instrument (in these instances, the death dates of John and Jonathan) plus a "reasonable" period thereafter,[100] but for any person born to a female slave (who was not yet alive at the death of John or Jonathan, whichever was relevant) after the death of the owner, the

95. *See id.* at 56-57. Noonan's treatment of *Hudgins v. Wrights* is unduly dismissive of Wythe's efforts. *See id.* at 56, 180-81.

96. *See* Kettner, *supra* note 78 and accompanying text.

97. 11 HENING, *supra* note 39, at 39.

98. Kettner, *supra* note 78, at 137-39, 142-47.

99. OLIN L. BROWDER ET AL., BASIC PROPERTY LAW 249-50 (5th ed. 1989).

100. So the law was stated in the appellate arguments of both John Warden and John Marshall, attorneys for the Pleasants estates, *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 329-30 (1799). As the Rule Against Perpetuities universally exists today (where it has not been abolished), instead of lives in being plus a "reasonable" period, the time limit is lives in being plus twenty-one years. *See generally* BROWDER, *supra* note 99, at 246-49. Edmund Randolph argued, for the appellants, that the 21-year-period was the law in Virginia at the time, and thus the 30-year-period made the condition too remote, *see Pleasants*, 6 Va. (2 Call) at 332-33, and Spencer Roane, the only appellate judge to discuss the matter in detail, agreed with Randolph that the 21-year-period was the law in Virginia, *id.* at 336. *See generally* JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 671-74 (7th ed. 2005) [hereinafter DUKEMINIER & JOHANSON]; Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982).

condition would be void, and it was questionable whether 30 years was too long to be a "reasonable time." And fifth, it was doubtful whether anyone else but a Pleasants slave could bring suit.[101] Robert Pleasants as executor of both his father and his brother, plus one of Jonathan's slaves named Ned, sued the recalcitrant members of the family to force emancipation.

Wythe's decree was founded upon the humanity of slaves and the importance of human freedom. Openly favoring freedom over property rights,[102] he cut through the many legal tangles to order freedom (immediately for some, at least at age 30 for others) for more than 400 slaves.[103] In his opening sentence he described "men, women and children detained in slavery"—not "slaves" or "Negroes"—seeking the "blessing" of "the right to freedom" and "deliverance from thraldom."[104] These people were desirous of "the *restitution*"—not the obtaining—"of a right, of which they . . . could not have been deprived without violation of equitable *constitutional* principles."[105] He wondered whether "the doctrine of perpetuities"—a property notion—could ever be "applicable to any cases, in which human liberty is challenged."[106] Wythe did not enlarge, in *Pleasants*, on the possible constitutional source of the slaves' "right" of freedom, but the tenor of his language leads at least the modern reader to see it as the heart of the opinion.

In Wythe's view, it was utterly appropriate for these petitioners to seek the meliorative benefits of the law of equity.[107] Wythe found that the wills of John and Jonathan Pleasants had imposed a trust upon the legatees of their slaves, to emancipate them if and when the General Assembly permitted it, and trusts were properly construed and effectuated by equity courts. The establishment of such a trust did not violate Virginia law when the wills became effective, Wythe concluded, because such law must be construed narrowly when the rights claimed might be protected by "equitable constitutional principles."[108] Therefore the 1748 statute must be confined to over-

101. The case is a difficult one, and the report of the arguments of the attorneys is not very clear. I have extracted these five points of law (others were also argued) from the arguments made in the Court of Appeals, especially those of lawyers John Wickham, Warden, and Marshall, *Pleasants*, 6 Va. (2 Call) at 324-33; from the discussion in Kettner, *supra* note 78, at 148-52; from the discussion in COVER, *supra* note 78, at 70-71; and from the discussion in 5 MARSHALL PAPERS, *supra* note 36, at 541-49.

102. Wickham argued, when Wythe's decree was appealed, for the appellants: "[A]lthough it may be true that liberty is to be favored, the rights of property are as sacred as those of liberty." *Pleasants*, 6 Va. (2 Call) at 324.

103. For the number, see 5 MARSHALL PAPERS, *supra* note 36, at 541.

104. *Wythe's Decree in Pleasants*, *supra* note 78, at 2.

105. *Id.* (emphasis added).

106. *Wythe's Decree in Pleasants*, *supra* note 78, at 3. Surprisingly, the constitutional language of Wythe in *Pleasants* has not been previously noted.

107. Throughout his opinion, Wythe was at pains to emphasize the distinction between equity and law, and the important function of courts of equity "to foster and effectuate conscientious fideicommissa," that is, fiduciary desires. *Id.* at 2. Thus, the opinion is consistent with Kirtland's observations about Wythe's jurisprudence as a whole. *See supra* note 11.

108. *Wythe's Decree in Pleasants*, *supra* note 78, at 2. Wythe's language is often obscure and his syntax terribly complicated. He put what is said in the text this way: "ampliation of the statute . . . is reprobated . . . where the defendants, in a court of equity, are invoking its aid to hinder the restitution of a right, of which they . . . could not have been deprived without violation of equitable constitutional principles." *Id.*

turning attempted present manumissions, not future ones. Moreover, the heir and executor of John Pleasants and a principal legatee of his slaves, and the executor of Jonathan—Robert Pleasants—as one of the trustees was "the proper party to vindicate that freedom."[109]

Wythe joined together the two issues of restraints upon alienation and violation of the Rule Against Perpetuities, after (as we have seen) doubting whether such property rules apply to issues of human freedom. He concluded that, first, for slaves still alive who were in existence at the deaths of the testators, and for slaves still alive born to mothers who were in existence at the deaths of the testators, neither rule applied because all were either lives in being or were born within lives in being. (For this latter group, Wythe probably ruled contrary to a modern understanding of the Rule Against Perpetuities.) All such slaves who had attained the age of 30 at the time of the passage of the emancipation act in 1782 he declared free, and all other such slaves he declared free upon their attaining age 30. Second, for all slaves still alive "born since the said statute was enacted"—that is, born to mothers technically free since 1782 or who would be freed after 1782 at age 30—Wythe lept out of existing perpetuities doctrine to declare them "at their birth intitled to freedom."[110] In essence, Wythe applied what is today called the "wait and see" doctrine—he did not apply perpetuities law strictly, construing matters as of the effective dates of the instruments (1771 and 1776) without taking into account anything that happened thereafter, but saw that the statute allowing emancipation was passed in 1782, "not [as Wythe put it] after an intolerable length of time,"[111] thereby giving an insufficiently short time to allow the birth of slaves by 1782 to a slave mother conceived after either 1771 or 1776, for whom the condition of reaching age 30 would be too remote and void, thereby voiding the entire gift since, under perpetuities law (the "all or nothing" rule), if the gift to *any* member of the donee group was void, the entire gift (including gifts to legatees which did not violate the time period) was void.[112] "Waiting" until 1782 showed no possible actual invalidities under perpetuities restrictions. Wythe here also went beyond the wills—which both clearly gave a slave freedom only at age 30—probably because under existing Virginia law the offspring of a free mother would be free. Wythe totally ignored the requirement of the 1782 emancipation statute that persons freed at age 45 or older, or enfeebled when freed, must be given support from the emancipator or his or her estate.

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109. *Id.* at 3. It is astounding to the modern reader that no notice is taken in Wythe's opinion that the slave Ned was also a petitioner and was undoubtedly a proper party to demand his own freedom, and thus to raise all the important issues in the case. Procedural difficulties, discussed on the appeal by Judge Carrington, probably prevented Ned's case from being useful. *See Pleasants*, 6 Va. (2 Call) at 349 (Carrington, J., concurring).

110. *Wythe's Decree in Pleasants*, *supra* note 78, at 3.

111. *Id.*

112. For the modern "wait and see" doctrine, including the "all or nothing" rule, see DUKEMINIER & JOHANSON, *supra* note 100, at 686-87, 698-700.

In his most significant departure from existing practice, Wythe decreed an accounting for the "profits, to which [the freed slaves] who have been wrongfully detained[,] are intitled,"[113] because they had been free since 1782 (or since they had attained the age of 30 after that date) and had been working for no pay.[114] For Wythe, the "freedom" accorded to the Pleasants slaves by emancipation—indeed, as he hinted, a "right" "restor[ed]" to them under the Virginia Constitution—was not abstract, but meant that they should have the full dignity of being waged workers. Where he could not ingeniously fashion equitably useful rules or arguments to give them such freedom, he cut through or ignored legal difficulties and even the clear intent of the emancipators.

When Jackey Wright presented her petition for freedom to him in late 1805 or early 1806, Wythe went even further. Wright had courageously halted a procession of slaves being taken "to one of the Southern states" in Petersburg, Virginia—probably not coincidentally the home of the person who would become her attorney, George Keith Taylor (a brother-in-law of John Marshall).[115] She and her children had been living in slavery, apparently in rural northeastern Mathews County, Virginia, and had been sold by Holder Hudgins to one Cox, a slaver. Wright, however, knew that she was in fact a free person, as were her children. At Petersburg she applied to the Chancellor of the Richmond Chancery District of Virginia, Wythe, for a writ *ne exeat*, that is, an order preventing her from being taken from the state while she pursued her claim of freedom.[116]

Slaves in Virginia had but one statutorily given legal right, the right to claim freedom.[117] Since "all negroes, Moors, and mulattoes, except Turks and Moors in amity with Great Britain, brought into this country by sea, or by land, were slaves[,] . . . the descendants of the females [among them] remain slaves, to this day, unless they can prove a right to freedom, by actual emancipation, or by descent in the maternal line from an emancipated female."[118] Wright had not been emancipated, as had been the Pleasants slaves, so she had to take the latter course. It presented many difficulties, among which were burdens of proof. Wright claimed to be an Indian. "American Indians brought into this country since the year [1691], and their descendants in the maternal line, are free."[119] In law, since she had been

113. *Wythe's Decree in Pleasants*, *supra* note 78, at 3.

114. Such a ruling was "an unprecedented action by a Virginia judge in a suit for freedom." 5 MARSHALL PAPERS, *supra* note 36, at 542.

115. Petition of Wright, "Hudgins v. Wrights" folder, Box 71, Tucker-Coleman Collection, Manuscripts and Rare Books Department, Earl Gregg Swem Library, College of William and Mary [hereinafter Tucker Papers] (source of quote).

116. *Id.*

117. 1 SAMUEL SHEPHERD, THE STATUTES AT LARGE OF VIRGINIA, 1792-1806, BEING A CONTINUATION OF HENING 363-65 (AMS Press, Inc. 1970) (1835), *discussed in* MCCOLLEY, *supra* note 83, at 159-61.

118. Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134, 137 (1806) (Tucker, J.).

119. *Id.* at 138 (Tucker, J.). A very few Indians were enslaved in Virginia by acts of 1679 and 1682. These acts were repealed, but the date of repeal was in some doubt. Many took the date to be 1705, the date of a compilation of Virginia laws in which the repealing act appeared, but Judge St. George Tucker

enslaved, was she presumed to be black, thus having the burden of proving her freedom, or was she presumed to be the Indian she claimed she was, with the burden of proof then placed upon those claiming her to be a slave?

First Wright had to substantiate her maternal descent. Her petition traced through her mother Phoebe Wilson (now apparently free herself) and her grandmother Betty Mingo, to great-grandmother Frances Wilson, whom she claimed to be an Indian. She claimed that, in each generation, there had been no intermingling of African blood, including with respect to her own children. Apparently one white person was ready to testify to the truth of this lineage.[120] Witnesses for the defendants, however, said that Phoebe Wilson was the daughter of Hannah, who in turn was the daughter of Butterwood Nan, the daughter of an Indian father. Petitioner's witnesses testified that, when young, Phoebe's daughter Jackey was "perfectly white" with blue eyes; and defendants' witnesses said that Hannah was Phoebe's mother, was copper-colored with long straight black hair, was reputed to be an Indian and called "Indian Hannah," and was reputedly free, threatening her master with a suit for freedom but lacking the resources.[121] This pedigree, probably because it was supported by key defendant witnesses, was accepted by the courts.

Wythe ruled that Jackey Wright and her children were free, resting on alternative grounds. First, he inspected them visually—Phoebe, Jackey, and the children being present in court.[122] Wythe saw persons with no markers of Negro descent, and held that Wright and her children "were the descendants of free white men and Native American women."[123] (Defendant's attorney Edmund Randolph was highly upset at this mode of judicial decision-making. He thought only witness testimony should be allowed, and that "[j]udges ought to sit in the dark."[124]) But more importantly, in the summary of reviewing Court of Appeals Judge St. George Tucker,

> [t]he Court of Chancery [alternatively] decreed that the burthen of proof was on the defendants, as claiming a right to hold the peti-

thought the actual repeal occurred in 1691. *See id.* at 135-36, 138-39.

120. Petition of Wright, *supra* note 115. The testimony of Diana Farrell to support Wright's claimed pedigree was "wa[i]ved," apparently by Wright's attorney Taylor, apparently because of the strength of the alternative pedigree given by the testimony of witnesses for Hudgins and Cox, the defendants. *See id.* (Farrell's name and her proposed testimony crossed out of petition); Bench notes of Judge St. George Tucker, "Hudgins v. Wrights" folder, Box 71, Tucker Papers, *supra* note 115. Apparently Phoebe Wilson was in court for the hearing, but did not testify herself about her lineage. The conflicting lineages are a mystery I cannot solve. Since no Indians are listed as presenting testimony, probably it was illegal for them to do so.

121. All of this comes from the Petition Taylor drew up and had printed on Wright's behalf, which summarizes defendants' testimony too. Tucker's bench notes confirm the testimony, though often not in such detail, and add that defendant's key witness Robert Temple also testified that he had seen Butterwood Nan, who he thought was Hannah's mother and Phoebe's grandmother. *See* Bench notes, *supra* note 120.

122. *See* COVER, *supra* note 78, at 51.

123. Petition of Wright, *supra* note 115 (summary by Taylor of Wythe's ruling).

124. Bench notes, *supra* note 120.

> tioners in slavery; that freedom is an inherent blessing, of which according to the [Virginia Constitution's] bill of rights, they could not be deprived; and therefore [since defendants had introduced no evidence of African descent] that they were free.[125]

The mysterious basis for Wythe's constitutional assertion in *Pleasants*, and for his use there of the word "restitution" with respect to the slaves' freedom, is now cleared up. Human freedom, for Wythe, was an "inherent" natural law right of *all* humans, confirmed by the language of the first article of Virginia's 1776 Declaration of Rights, which recited that "all men are by nature equally free."[126] This reasoning could shake slavery to its roots. It forced Virginians to confront the humanity of their slaves, the inhumanity of their treatment of slaves, and the legal basis for slavery itself, all in the context of their own revolutionary heritage of seeking freedom. It is indeed merely an evidentiary argument—dealing with burdens of proof—and it is true that Wythe applied these beliefs only to instances in which enslaved persons claimed their freedom, as Noonan says, not in the scores of other cases before him in which slaves were treated as property by the pleaders and existing legal categories. Moreover, in *Page* Wythe had been so inflamed over what he saw as violations of the natural law of contracts that he overthrew decades of practice to overturn them—risking social opprobrium—but he did not so utilize another principle of natural law in the slavery cases. The many conflicts in Wythe's life and culture over the fundamental socioeconomic institution of slavery were apparent, even here. But Wythe went further than any other Southern antebellum judge I know of. As Edmund Randolph recognized, in arguing before the Court of Appeals that Wythe's decree should be reversed, "the grounds of the decree are subversive of slavery."[127]

At least three aspects of these slavery cases demonstrate once again Wythe's bourgeois modernity. First, comparing *Page* with *Pleasants* and *Wrights* as a matter of rhetoric,[128] we can conclude that commerce and contract rights were more important to him than the enslavement of human beings.[129] In the former decision he went further than in the latter two, he overturned more of his neighbors' economic practices, and he was more direct and forthright (dealing substantively with the issue, not remaining ensconced inside the procedural law of evidence). Repaying debts was more fundamental to civilized life than were the freedom and the humanity of the

125. *Id.*

126. 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 24, at 3813.

127. Bench notes, *supra* note 120.

128. If we move from mere words to the purely economic level, we can readily spot another reason for the differences in Wythe's approach to the two cases. Despite the millions at stake in the British debt cases, many more millions—and a whole way of life, for whites—were at stake in the slavery cases.

129. The rhetoric of most moderns today overlooks or denies the inherently oppressive operation of capitalism, see *infra* note 131, since most are uncritically assured that commerce and profits are wonderful, of primary importance, and in any case inescapable and inevitable. Like Wythe, as a matter of rhetoric, then, they judge the operation of capitalism as being more important than the workers it grinds down.

enslaved. Second, Wythe's concept of "freedom" for enslaved humans was not abstract, idealized, rosily disconnected from culture and context, but it was also no deeper or more complicated than "freedom" as it was supposed to exist in bourgeois society. Wythe in *Pleasants* essentially awarded the freed slaves their back pay. He treated them as, and apparently fully expected them to become, wage laborers, working for employers just as did white (and free black) people in similar socioeconomic positions in the free states. As many workers and others were then beginning to realize,[130] those were positions in which the freed slaves would *also* be essentially unfree, enthralled by the grossly superior socioeconomic power of employers.[131] Unlike the contemporary visiting Frenchman Volney, there is no indication that Wythe possessed the essentially socialist understandings "that race was invented merely to divide the workers apart,"[132] or that "free" wage workers had a very restricted socioeconomic position too.

Third, despite Wythe's magnificence in *Pleasants* and *Wrights*, Noonan is correct to suggest that, like Jefferson and most of his other contemporaries, he was abysmally confused and ambivalent over the proper social location of African Americans within bourgeois culture. Wythe did not free all of his own slaves immediately upon passage of the 1782 statute; he was willing to hold some people in slavery until they reached the age of 30 (as was also the supposedly freedom-devoted, humane Quaker John Pleasants!); and the property he wanted to bestow by will upon the freed servants who stayed on to serve him was to be held for them in trust, not to be held by them outright.[133] Despite Wythe's giving an excellent Enlightenment education to one of them, the youth Michael Brown, because of his apparent be-

130. *See generally* LINEBAUGH & REDIKER, *supra* note 86.

131. Marx explains clearly that politically "free" wage workers are exploited *by the fact* of working for capitalists. Capitalist employers, thanks to their economic position and superior economic and political power, take from each worker most of the excess value (over what is necessary for the worker's maintenance as a human being) the worker creates in each work period. Capital's superior economic situation (which allows this theft, disguised in the legal form of a contract) derives from the facts that (1) workers have no capital—no control over their own means of production—and (2) all employers are capitalists, so there is no one else to work for; thus, confrontation with starvation makes them available to work for capitalists who do control the means of production. *See* Karl Marx, *Value, Price and Profit*, *in* WAGE-LABOUR AND CAPITAL & VALUE, PRICE AND PROFIT 29-62 (Int'l Publishers Co. 2d prtg. 1978) (1865) [hereinafter WAGE-LABOUR] (especially the portions on "surplus value"); MARX, *supra* note 69, at 201 ("An individual who has neither capital nor landed property of his own is dependent on wage-labour from his birth as a consequence of social distribution."); Karl Marx, *Wage-Labour and Capital*, *in* WAGE-LABOUR, *supra*, at 15, 30 ("The existence of a class which possesses nothing but the ability to work is a necessary presupposition of capital."). Skilled workers, who do in a sense have capital in their skill, are constantly reduced to unskilled status by capitalists. *See* HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1974). Workers, then, to improve their situation, must struggle with capital both to gain a greater part of the surplus, and ultimately to attempt to replace wage labor and the capitalist organization of work in order to terminate their oppressive circumstances. "The question resolves itself into a question of the respective powers of the combatants." Marx, *Value, Price and Profit*, *supra*, at 58. Wythe—like most moderns today—saw only "freedom" in wage labor.

132. LINEBAUGH & REDIKER, *supra* note 86, at 342, *discussed and quoted in supra* note 86.

133. *See* Wythe's will and its codicils, *in* Minor, *supra* note 29, at xxxvii-xxxix (except that there was an outright gift of "fuel" to Brodnax).

lief that "Negroes held the full attributes of humanity,"[134] he did not treat *all* blacks in the same fashion. The same ambivalence pervades our bourgeois culture today: racism from whites (even if unconscious to the whites, it is nevertheless racism) still holds most African-Americans in its thrall, despite generations of freedom-fighting, civil rights acts, militant demonstrations, and consciousness-raising—because it is socioeconomically important in bourgeois capitalism for workers to be divided against each other.[135]

Although on appeal Wythe's decrees of freedom for many of the Pleasants slaves and for Jackey Wright and her children were affirmed, and although Wythe obtained the vote of appellate judge (and former student) Spencer Roane to uphold the grant of freedom at birth for offspring of the Pleasants slaves born after 1782,[136] the Court of Appeals reversed him on all of his revolutionary, slavery-threatening points.

In *Pleasants,* slaves who had been sold or mortgaged, or who might be subject to the debts of the legatees, would not receive their freedom until it could be accomplished equitably to all parties.[137] Slaves above the age of 45 and those still infants who had been born after their mothers reached 30 were not to be freed until Robert Pleasants, the legatees, "or any other" person posted sufficient bond that they "not become chargeable to the public."[138] Subject to the debt limitation (above), all slaves between the ages of 30 and 45 were to be immediately freed, along with those adults born after their mothers had reached 30; but (as argued by John Wickham for appellants) "a new species of property" was created by the court,[139] unknown to the system of estates at common law, which kept each person in each successive generation enslaved until age 30 with all of the increase born to females under that age not free—as Wythe and Roane had declared—but still enslaved until *they* attained 30.[140] The Court unanimously disapproved of Wythe's awarding of "profits" (back pay) to freed slaves.[141]

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134. MCCOLLEY, *supra* note 83, at 136.

135. "Labour cannot emancipate itself in the white skin where in the black it is branded." 1 KARL MARX, CAPITAL: A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION 287 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Int'l Publishers Co. 1947) (1889). *See generally* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (The Free Press 1998) (1935); BRIAN KELLY, RACE, CLASS, AND POWER IN THE ALABAMA COALFIELDS, 1908-21 (2001); Staughton Lynd, *History, Race, and the Steel Industry*, 76 RADICAL HISTORIANS' NEWSL. 1 (1997).

136. Pleasants v. Pleasants, 6 Va. (2 Call) 319, 339 (Ct. App. 1799) (Roane, J.) ("[S]uch children are not the children of slaves. They never were the property of the testator or legatees . . . . [T]he great principle of natural law . . . [is] that the children of a free mother are themselves also free. The condition[] of the will then, as applicable to such children, . . . is void, as being contrary to law."). Roane also followed Wythe in applying what we now call "wait and see": "The contingency has happened, within the limits. The effect is, that the limitation over has thenceforth become vested, in interest, in all the appellees, then in esse . . . ." *Id.* at 338. Finally, Roane agreed with his teacher that freedom for the slaves had been properly put into trust, not violating the 1748 statute. *Id.* at 341.

137. *Pleasants*, 6 Va. (2 Call) at 354-55.

138. *Id.* at 354.

139. *Id.* at 328.

140. *Id.* at 356. On remand, Wythe freed 185 slaves as either between 30 and 45 or born after their mothers reached 30, but 246 Pleasants slaves remained in slavery, with their offspring born to them when under the age of 30 also still enslaved. Kettner, *supra* note 78, at 153.

141. *Pleasants*, 6 Va. (2 Call) at 343 (Roane, J.); 348-49 (Carrington, J.); 350 (Pendleton, P.).

The Court was even more emphatic in its reversal of *Wrights*. The first ground of Wythe's decree—that anyone could plainly see a total lack of Negro markers in Wright and her children—was upheld, and the Wrights were free.[142] Although the Virginia Constitution was not mentioned in the opinion of Judge Roane or in the decree concurred in by all the participating members of the court, it was unanimously held to be the law that whites and Indians were presumptively free, while blacks were presumptively slaves, with the burden of proof in the first instances on those claiming enslavement, but in the instance of blacks on them to prove freedom —an almost impossible task.[143] The Court explicitly disapproved of "the Chancellor's principles and reasoning . . . as . . . relates to native Africans and their descendants, who have been and are now held as slaves by the citizens of this state."[144] Judge St. George Tucker, Wythe's student and his immediate successor in the chair of law at William and Mary, who had in 1796 submitted a plan to the General Assembly for the gradual emancipation of all slaves and who had opposed slavery as cruel and undemocratic in his widely distributed 1803 Virginia edition of Blackstone,[145] said: "I do not concur with the Chancellor in his reasoning on the operation of the first clause of the Bill of Rights, which was notoriously framed with a cautious eye to this subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom" to slaves.[146] The institution of slavery was not going to be threatened by Wythe's ruling, and not even an openly antislavery judge would come close to agreement with him. Economics was much more important than ideology.

His ruling in *Wrights* probably subjected Wythe to even greater public opprobrium than had that in *Page*.[147] And it may have affected the inquiry into his apparent murder.[148] On the morning of Sunday, May 25, 1806, the

142. Hudgins v. Wrights, 11 Va. (1 Hen. & Mun.) 134, 139-41 (Tucker, J.); 141-42 (opinion of Roane, J., concurred in by Fleming & Carrington, JJ., & Lyons, P.).

143. *Id.* at 139 (Tucker, J., Indians and whites presumptively free); 140 (Tucker, J., blacks presumptively unfree); 141 (Roane, J., blacks presumptively slaves); 144 (decree of Court that whites and Indians are presumptively free; Africans, presumptively slaves). "Often the greatest barrier to slaves in court was not the bias of white jurors, but the onerous burdens of proof placed on them in freedom suits." Higginbotham & Higginbotham, *supra* note 79, at 1237.

144. *Wrights*, 11 Va. (1 Hen. & Mun.) at 144.

145. *See* CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA 1772-1804, at 149-53 & n.20 (1987). Tucker had said in his pamphlet,

> Whilst we were offering up vows at the shrine of liberty . . . we were imposing upon our fellow men, who differ in complexion from us, a *slavery*, ten thousand times more cruel than the utmost extremity of those grievances and oppressions, of which we complained . . . . [H]ow perfectly irreconcilable a state of slavery is to the principles of a democracy, which form the *basis* and *foundation* of our government.

Id. at 150 (quoting from Tucker's edition of Blackstone, in which his pamphlet arguing for gradual abolition was included as an appendix).

146. *Wrights*, 11 Va. (1 Hen. & Mun.) at 141.

147. *See* KIRTLAND, *supra* note 3, at 149.

148. Facts not specifically footnoted in this and the following text paragraphs come from the exhaustive and, I think, definitive investigations made into the matter by historians Julian P. Boyd and W. Edwin Hemphill in THE MURDER OF GEORGE WYTHE, *supra* note 28.

old man—already whispered to be senile, and having been asked by the Governor of Virginia to resign[149]—came down with a violent disarrangement of his digestive system. Though he had long been subject to digestive attacks,[150] his freed cook Lydia Brodnax and the freed mulatto youth Michael Brown who lived with him simultaneously fell similarly ill. His great-nephew, favorite, and residuary legatee, George Wythe Sweeney—a fourth member of Wythe's household, then about 17[151]—was notoriously profligate, had been caught stealing from Wythe for gambling money, and two days after the appearance of the mysterious household illness was charged with forging six checks on his benefactor and jailed. Sweeney did not become ill, and was soon suspected of poisoning Wythe, Brodnax, and Brown. Brown was also a beneficiary of Wythe's will, but should he die before attaining his majority his share would pass to Sweeney.

The old man would not bail Sweeney, and—severely ill and abed himself—directed friends to search Sweeney's room after Brown's death on June 1. Strawberries laced with arsenic were found there—and the typically frugal vegetarian household supper on Saturday, May 24, had consisted of milk and strawberries. Statements gained during the criminal investigation demonstrated that Sweeney had inquired recently about arsenic and then had shown that he had found some; that a paper package full of arsenic was found in the yard next to the jail in which Sweeney was confined; and that Sweeney was known to have possessed a heavy packet made of paper when he came into the jail.[152] The search of the trunk in Sweeney's room had already confirmed his possession of a quantity of the same sort of paper. Brodnax (who alone recovered) stated that she had seen Sweeney reading Wythe's will; moreover, she had seen him throw something into the boiling coffee kettle on Sunday morning, and then place a piece of white paper into the fire.

The evidence for Sweeney's having poisoned Wythe seems quite strong. Several courts agreed at the time, as have commentators since 1806. After Brown died, Wythe immediately changed his will to eliminate his legacy, but more importantly, he also disinherited Sweeney. He then demanded that Sweeney's room be searched, and, before he died on June 8, asked that he be autopsied. One can only conclude that Wythe, too, thought he had been poisoned by his namesake.

Sweeney was tried for the two murders but, amazingly enough, he was acquitted. While a newspaper report stated that the acquittal was due to the

149. Letter from William Browne to Joseph Prentis (Sept. 24, 1804) (Prentis Papers, University of Virginia Library), *quoted at length in* BROWN, *supra* note 3, at 283 (senility); W. Edwin Hemphill, *Examinations of George Wythe Swinney for Forgery and Murder: A Documentary Essay*, *in* THE MURDER OF GEORGE WYTHE, *supra* note 28, at 33, 33 (governor's resignation request). Note that Sweeney's last name is spelled variously in the sources; I use the spelling common in our family.

150. Hemphill, *supra* note 149, at 50 (testimony of Dr. James McClurg).

151. *Id.* at 41 n.27 (quoting June 10, 1806, letter from William Wirt to James Monroe stating that Sweeney was 16 or 17).

152. The jailor testified that he had found a heavy paper-wrapped package in Sweeney's pocket but had not taken it from him. *Id.* at 45.

inadmissibility of Brodnax's testimony—even a free black could not testify against whites—it can be seen that her testimony would have been only supererogation, as there was still damning evidence from white persons about the poisoned strawberries and about Sweeney's quest for and possession of arsenic.

The real difficulty in the way of conviction, in my opinion, lay in the testimony, and the actions, of the doctors. James McCaw and James McClurg were old and good friends of Wythe, McClurg having been his fellow Constitutional Convention delegate. They performed autopsies on both Wythe and Brown, but remarkably enough their testimony was equivocal as to whether arsenic might have caused the two deaths. McClurg apparently said that bile, not arsenic, was the culprit in Wythe's instance.[153] In addition, they did not perform tests which, even in the juvenile state of forensic science at the time, could have conclusively demonstrated the presence of arsenic.[154] There are certainly other possible answers for this mystery,[155] but the doctors could have failed to perform tests which might have conclusively demonstrated that Wythe was murdered, because of lingering rancor over Wythe's relatively recent and notorious *Wrights* decision[156] and his open opposition to the economic backbone of their prosperity. The venerable old man was gone, and they may have not have wanted even so reprehensible a white man as Sweeney to receive capital punishment for the deaths of a mulatto youth to whom Wythe was giving a classical education to prove full Negro humanity, and of the only white judge of his era to have attempted judicially to undermine slavery.

CONCLUDING THOUGHTS

George Wythe's judicial opinions on judicial review, the rights of creditors, and the rights of African American slaves are surprisingly modern, consistent in content, argument, and result with what modern American judges might say on these subjects—despite the natural law language within which Wythe tended to phrase his views. They were, in the latter two instances, opinions which clashed gratingly against the more complicated and conflictual devotion his fellow Virginians had to a mix of modern and premodern sentiments on commerce and human rights, although the positions

153. William Wirt, the eminent Virginia attorney and a former student of Wythe, was convinced in part that he should defend Sweeney at his murder trial because "the eminent McClurg, amongst others, had pronounced that his death was caused simply by bile and not by poison." *Id.* at 55. This information was delivered to Wirt by Judge William Nelson of the General Court, a relative of the deceased Mrs. Wythe and another supposed friend of the Chancellor. *Id.*

154. *See id*. at 50-51 (testimony of the doctors); 52 (none of the doctors pursued arsenic identification very rigorously, while proper testing known at the time could have confirmed its presence).

155. *See id.* at 57-59.

156. The Court of Appeals did not reverse Wythe in *Wrights* until after Wythe's death. Thus, at the time of his murder, Wythe's ruling that blacks were just as presumptively free as whites was still good law.

of moderns on the status and position of African Americans within today's bourgeois culture are themselves quite ambivalent and confused.

There is no easy answer to the question of how Wythe, a relatively backwoods, self-educated petty aristocrat from eastern Virginia, reached a position so far ahead of most of his contemporaries. In large part it was the extensive reading he pursued throughout his adult life, in no small part his mother's Quaker heritage and values helped, and he was conversant with many other American Enlightenment "characters" (as he would have called them) during a time of tremendous social, intellectual, and civic ferment. However, his pupil and great friend Thomas Jefferson, who shared many of these formative experiences, including years of intellectual conversation with Wythe himself, in each of the three areas had an older, less modern sensibility and opinion.[157]

Wythe's views were modern in the bourgeois sense, fully within an emerging culture of capitalism, far ahead of many of his contemporaries. Capitalism had been growing in England and around the Atlantic littoral, as an economic institution and as an enveloping cultural realm of ideas and beliefs consistent with the economic bases of this way of organizing production, since at least the sixteenth century.[158] I cannot account for Wythe's being so far ahead, but the ideas themselves were current in the Atlantic world of his time, and somehow he had absorbed them pretty fully. And, like many prophets major and minor, his devotion to his bourgeois principles and ideas—the basis of civilized life, for Wythe—led him to loneliness, social opprobrium, and perhaps even an unrequited involuntary passing from life.

157. For Jefferson's differing views, see *supra* notes 26 (judicial review), 64 (debt repayment), and 86 and accompanying text (humanity of slaves).

158. *See* 1 MARX, *supra* note 135; DAVID ROLLISON, THE LOCAL ORIGINS OF MODERN SOCIETY: GLOUCESTERSHIRE 1500-1800 (1992); LINEBAUGH & REDIKER, *supra* note 86.

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AN AFTERNOON WITH GEORGE WYTHE

Robert Weathers - Colonial Williamsburg

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ADAPTING QUALITY MANAGEMENT PRACTICES TO APPELLATE COURT OPERATIONS

Speaker: Jarrett Perlow

Jarrett B. Perlow has served as Chief Deputy Clerk of the U.S. Court of Appeals for the Federal Circuit since December 2016. Over the past eighteen years, he has held legal and managerial positions within the federal judiciary and has presented at programs on executive education, workforce management, managing organizational change, court operations process enhancements, quality management systems and practices in government, and developing public education resources. He currently serves on the Federal Judicial Center's Executive Education Advisory Committee and the Administrative Office of the U.S. Courts' Court Administrative and Operations Advisory Council.

In 2018, he was awarded the federal judiciary's Director's Award for Excellence in Court Operations following his efforts to improve mission-essential functions in the Federal Circuit during his first 18 months with the court. Under his leadership, the Clerk's Office subsequently received the national 2019 W. Edwards Deming Outstanding Training Award in Human Capital Management for quality process enhancements to the court's training program, becoming the first court in the federal judiciary to receive this honor. His five-year effort to integrate quality management practices into the Clerk's Office led to the office's validation in March 2022 at the silver level by the American Society for Quality Government Division under the ASQ/ANSI G1:2021 Guidelines for Evaluating the Quality of Government Operations and Services, becoming the first government entity to attain any award-level validation under the G1 Standard.

Mr. Perlow received his Bachelor of Arts and his law degree, with honors, from American University, where he was Editor in Chief of the Administrative Law Review. He previously taught as a member of the adjunct faculty of American University's Washington College of Law for ten years and is currently on the executive education faculty of the Federal Judicial Center. Through the American Society for Quality, he is currently the Chair of the Government Division's Center for Quality Standards in Government, a Certified Manager of Quality/Organizational Excellence, and a Designated Evaluator of ASQ/ANSI G1:2021. He is also a Certified Court Executive through the National Center for State Courts and is presently in the 52nd Class of the Center's ICM Fellowship Program.

JOURNEY OF EXCELLENCE:

A CASE STUDY ON THE USE OF THE ASQ/ANSI G1:2021 STANDARD IN THE FEDERAL JUDICIARY

U.S. Court of Appeals for the Federal Circuit, Clerk's Office

Case Study

March 2022

EXECUTIVE SUMMARY

Following a leadership change in 2016, the Clerk's Office of the U.S. Court of Appeals for the Federal Circuit spent the next five years redesigning its processes; adopting proven quality-based methods to evaluate and enhance operations and services; and developing a staff culture focused on delivering quality services to the court's judges, members of the bar, unrepresented litigants, and the public. Based on a precursor system management maturity model, and then the new ASQ/ANSI G1:2021 Guidelines for Evaluating the Quality of Government Operations and Services ("G1:2021"), the Clerk's Office used these frameworks to guide its overall maturation process.

Through its focused and incremental approach toward quality management and then G1:2021 over the past five years, the Clerk's Office achieved the following results by the end of FY 2021: case processing times reduced by an average of over 49%, time to train new staff reduced by 75%, overall employee satisfaction increased by 8%, and case manager accuracy sustained at an average of 95%. In March 2022, the ASQ Government Division certified the Clerk's Office's case processing system at the silver level under G1:2021, making the Clerk's Office the first government entity to be awarded any level under G1:2021.

ABOUT THE CLERK'S OFFICE

Unique among the thirteen federal appellate circuits, the U.S. Court of Appeals for the Federal Circuit has nationwide jurisdiction over a variety of subject areas, including international trade, government contracts, patents, trademarks, certain monetary claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefits claims. The Clerk's Office of the U.S. Court of Appeals for the Federal Circuit provides operational and administrative support to the judges of the court in adjudicating these cases of significant consequence to the nation's economy and administration of government. The mission of the Clerk's Office, therefore, is to impartially facilitate the progression of cases through the adjudicatory process and to faithfully preserve the court's record.

The Clerk's Office is the primary contact for the court's litigants and is responsible for managing cases until they are ready for a panel of judges to decide and then providing support to the panels until a decision is issued. In practice, this means that new cases start and thereafter spend most of their time pending with the court in the care of the Clerk's Office. To that end, it is imperative that the Clerk's Office record receipt of the initial appeal, confirm filings are legally compliant, track the timely filing of briefs and responses, track the filing and processing of motions, calendar cases and assign to judicial panels for

decisions, record decisions, and inform all parties of the results. These actions combined keep the cases moving quickly and accurately to support the judges' ability to provide for timely resolution and decision. The Clerk's Office must also keep accurate case records and provide timely information to the parties and the public entitled to that information.

Staff of the Clerk's Office in front of the
National Courts Building in Washington, D.C. (October 2021)

ORGANIZATIONAL NEEDS

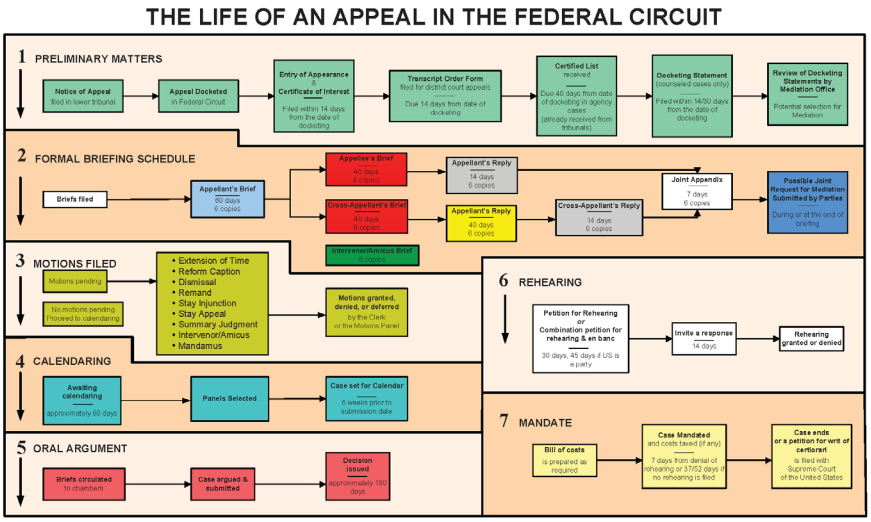
After an internal management assessment of the Clerk's Office, court senior leadership challenged the Clerk's Office to transform itself into a high-functioning organization capable of delivering exceptional public service. Through this assessment, management identified the following new goals for the office: (1) an organizational structure or system to support the mission; (2) greater staff focus, understanding, and alignment with the mission; (3) equitable and appropriate distribution of work based on stakeholder needs; (4) training and support for new and existing staff; (5) appropriate quality control over case management data systems; (6) defined processing standards or requirements; (7) current, standardized operating procedures; and (8) a system to evaluate any performance effectiveness.

What follows is an overview and explanation of the Clerk's Office's five-year transformative journey to accomplish these goals.

IMPLEMENTING SOLUTIONS

ORGANIZATIONAL ALIGNMENT

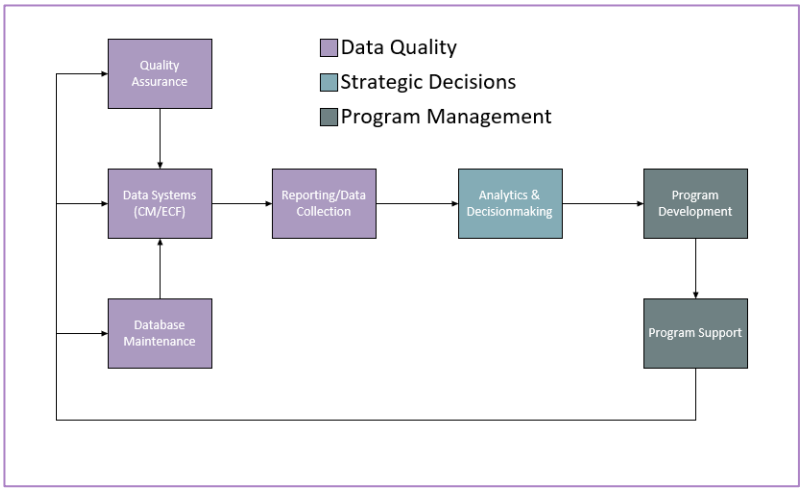
With these goals in mind, Clerk's Office leadership began its quality journey by better defining its workflow and more tightly aligning staff to that workflow. Through functional alignment around its existing Life of an Appeal system map (pictured below), the Clerk's Office divided into



new functional-specific and focused work units: Case Management (for handling steps 1-3 of the system map), Court Services (for handling steps 4-6 of the system map), Data Quality and Program Management (for handling quality management functions for the other units), and Administrative (for handling general office administrative support needs). This realignment helped to focus on a new mission statement and core values (right) to guide the work of the office.

DEVELOPING QUALITY CONTROL AND CONTINUOUS IMPROVEMENT SYSTEMS

As part of these changes, the office created a business unit focused on quality management that would (1) implement quality control and quality assurance systems for the office and (2) identify data measurements to evaluate the success or failure of Clerk's Office programs, services, and performance targets. Since its creation in FY 2017, the Clerk's Office's quality management unit has used the below quality management system model, based on the Plan-Do-Study-Act Cycle, to guide its work, which was first used to redesign and implement new training performance standards for case managers.



Clerk's Office Quality Management Cycle (2018)

Given its commitment to quality case processing and accurate record-keeping, the Clerk's Office started its work by focusing on tracking and improving the quality (timeliness and accuracy) of the work of its case managers, who are responsible for reviewing and processing most case filings and entries on the public docket. Initial assessments in 2017 showed an average case manager accuracy at 84.3%, including a high degree of variability between individual case managers. This data demonstrated a significant risk in both public visibility and mission

impact of permitting such a performance level to continue. As a result, continuous improvement efforts focused first on shoring up existing case manager training and creating a new case manager training program to provide a permanent, preventative process to ensure new case managers would begin their work with the court with a validated, high level of accuracy.

> A year after implementing the new training program, case manager accuracy increased by 9.2%, with an overall accuracy of 94.7%.

Given the then-existing risk and challenges with case manager accuracy, the Clerk's Office worked on implementing a quality control program for case managers, including a 100% check of mission-critical entries and random sampling of non-critical entries. During the four-month pilot program in the summer of 2017, over 200 errors were identified and resolved; errors that likely would not have been identified under prior quality control measures. Using this starting set of data, case manager-specific training needs were identified and supplemental training was provided beginning in the fall of 2017. Beginning in the spring of 2018, the quality control program was expanded to double the number of entries reviewed and to add a timeliness review component to case manager activity.

Case Processing Training and Standardization

In FY 2018, following the above case manager data collection process, the Clerk's Office developed and launched a new module-based training program. Prior to implementing this new program, new case managers typically spent their first 12-16 months training with existing case managers who were expected to maintain a

full caseload while also training new staff. In the face of changing workforce trends, entry-level staff turnover, and a need to reduce on-boarding time, the existing training program posed significant problems for meeting operational needs.

To address this concern, the Clerk's Office formalized a new training program to reduce training time while building in quality assurance tools and training standards to sustain a high level of accuracy. The new training program used a phased, cumulative training model with clear evaluative criteria and minimum accuracy scoring—originally set at 85%—needed before trainees could advance to the next training phase. The training program also incorporated hands-on experiential training in a training case management database where the trainee was able to work with sample case materials. This use of a simulated environment eliminated the prior risk of case managers training on and creating errors in real cases. Case managers were now fully validated at minimum performance levels before being allowed to work on a real case.

> During the 18-month pilot period, training time was cut by about 75%, reducing average training time for case managers to get a full caseload from over 13 months to only four months.

As further validation of the success of this program, in October 2019, Graduate School USA named the Federal Circuit Clerk's Office the recipient of the 2019 W. Edwards Deming Outstanding Training Award in Human Capital Development. This award is presented annually to a government organization that exemplifies excellence with an initiative or project that focuses on enhancing quality processes within the

organization. In receiving this award, the Federal Circuit Clerk's Office became the first office in the federal judiciary to be recognized with this honor.

Clerk's Office Staff Accepting the W. Edwards Deming Outstanding Training Award, Washington, D.C. (October 2019)

To assist with these training and quality control efforts, the Clerk's Office also developed a brand-new knowledge management system concurrent with updating and documenting its existing operating procedures. Launched in November 2017, the Clerk's Office Minute Book stored all procedures and policies in a central, easily accessible location; served as a tool for training and standardizing Clerk's Office functions; provided useful organizational tools to assist in performing daily Clerk's Office functions; and served as a communication tool for Clerk's Office staff. This site removed any guesswork needed to complete basic essential functions and provided a solid foundation for future improvements and additional developments. Quality management staff also reviewed data within the court's electronic case

management system for accuracy and corrected data as needed. Data collection and reporting tasks were also standardized, which, when coupled with improved case manager entry of new data, increased both the accuracy and reliability of system data.

With a new standard process for training, documented essential procedures, and a basic quality management system in place, three years later, the Clerk's Office reported an average case manager accuracy of 96.1%. After five years of data (including the hiring of new entry-level case managers), the Clerk's Office had an average case manager accuracy of 95%, or about a 13% sustained increase in accuracy from the original baseline. Given the sustained level of case manager performance, Clerk's Office management increased the minimum accuracy requirement from 85% to 90% during training and the first two years of experience, followed by a minimum 95% accuracy requirement for staff with more than two years of experience.

Operational Planning and Alignment

Over several years, the Clerk's Office has implemented and used multiple forms of risk management and program alignment and evaluation. The office launched an annual planning and initiative development program in 2018, which has allowed the office to focus on many of these improvement efforts. The annual program included a formal evaluation system of new initiatives and adopted standard project management concepts and tools to drive meaningful change within the Clerk's Office. Following an extensive internal evaluation and assessment period in FY 2021, the Clerk's Office annual project planning process was substantially updated to further incorporate proven risk management systems and improved stakeholder engagement metrics and tools.

In FY 2019, the office completed comprehensive updates to the Federal Circuit's business continuity plan and implemented an after-action review program to (1) identify group strengths, weaknesses, and areas of improvement after the completion of a project, initiative, or event; and (2) create an action plan based on these lessons to improve future projects, initiatives, and events.

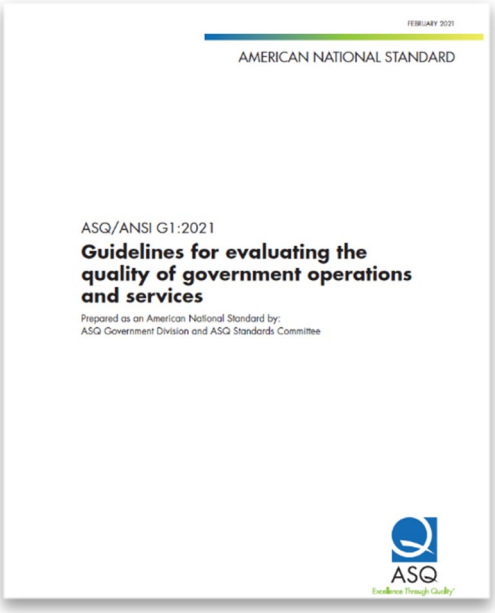
MONITORING PROGRESS

In addition to the above case management performance measurements, the Clerk's Office also implemented an employee satisfaction survey in August 2018 for evaluating how projects, programs, initiatives, and events affect employee satisfaction.

During the same year, the Clerk's Office began issuing an annual report to highlight key events and accomplishments, as well as basic data tracking points, for the Clerk's Office over the course of the fiscal year. This annual reporting served the dual purpose of evaluating the success of annual planning and conveying the office's efficacy to its internal stakeholders.

G1: A SYSTEM FOR QUALITY

After several years of development within the American Society for Quality (ASQ) Government Division by a team of government practitioners from around the world, a new uniform, objective standard now exists by which government agencies can develop and independently validate the level of sustainable quality and performance of their operations and services to support the implementation of their mission. Adopted by the American National Standards Institute on March 21, 2021, the ASQ/ANSI G1:2021 Guidelines for Evaluating the Quality of Government Operations and Services ("G1:2021") addresses the inherent challenges in applying cost-driven, quality management focuses to public entities by using maturity modeling and best-practice models as the evaluative bases.



G1:2021 promotes the achievement of overall organizational objectives through the definition of all important organizational workflows and the documentation of best-known management practices for each key workflow through system and process modeling. Examination under G1:2021 results in assigning a maturity rating to the organization based on its use of quality practices and effectiveness of addressing organizational risks.

Under G1:2021, maturity "refers to the degree of formality and optimization of processes and systems, from ad hoc practices . . . to

formally defined . . . to active and continuous improvement."[1] G1:2021 establishes maturity models for both processes and systems, each consisting of six levels. Processes are evaluated based on their level of standardization, whether adherence to requirements is evaluated, and whether quality improvement is incorporated across the process. Systems are evaluated based on whether they have a defined and documented structure, the extent to which system outputs are goal-directed through performance measurements, if risk is actively managed and mitigated, and evidence that the systems are regularly aligned with management and evaluated for effectiveness.

APPLICATION OF G1:2021

Building upon the earlier successes and work implementing quality management concepts and tools into its work, the Clerk's Office started adopting maturity modeling concepts and practices in 2020 while G1:2021 was being finalized. These efforts, which significantly increased upon the release of G1:2021 in March 2021, provide a clear roadmap for the office to focus additional organizational development around the four areas of G1:2021: systems purpose and structure; goal directedness through feedback; management of intervening variables; and alignment, evaluation, and improvement. The following summarizes how the Clerk's Office has implemented G1:2021 into its operations.

SYSTEMS PURPOSE AND STRUCTURE

Systems purpose and structure addresses the underlying organization of a government agency's management system. G1:2021 measures this by looking to defined groups of interrelated functions

[1] American Society for Quality Government Division and Standards Committee. (2021). *Guidelines for Evaluating the Quality of Government Operations and Services* (ASQ/ANSI G1:2021).

called Principal Activity Groups (PAGs)[2] with clear process inputs and outputs and system design through process mapping, and the documentation of supplies, inputs, processes, outputs, and customers (SIPOC). [3]

While the Clerk's Office worked toward adopting G1:2021, the first steps required a deeper understanding and construction of an effective system structure. First, using SIPOC analysis, the Clerk's Office dissected its existing Life of an Appeal system map to identify the key inputs and outputs for each milestone in the case processing system. The below SIPOC analysis of the motions phase of case processing illustrates how the system receives inputs (motions) from suppliers (counsel and litigants). The Clerk's Office then performs a process on those inputs (quality review) and generates an output (either an order or non-compliance notice) that is provided to customers (judges, counsel, and litigants).

SIPOC Analysis of a Motion				
				
Suppliers	Inputs	Process	Outputs	Customers
Counsel Litigants	Motion	Quality Review	Order or Non-Compliance Notice	Judges Counsel Litigants

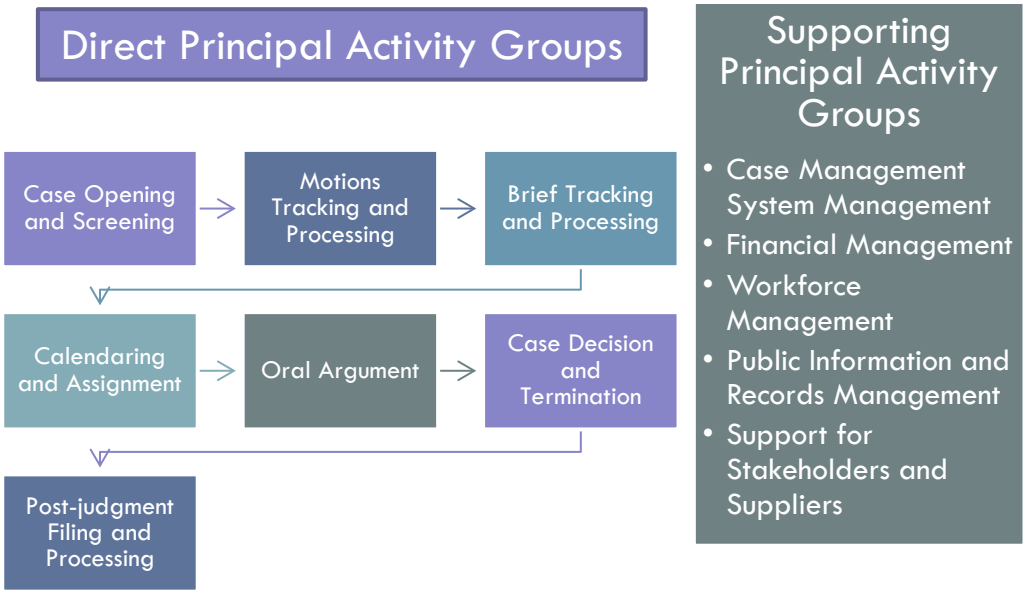
By understanding the full workflow of each milestone in its overall system map, the Clerk's Office was then able to identify necessary resources to

[2] Under G1:2021, Principal Activity Groups "represent a business purpose or function, that deliver outputs with defined requirements, and that may be incremental parts of the business system aim or purpose . . . . distinguished by defined and unique output requirements, which are often presented as attributes of success and attributes of failure."

[3] SIPOC is an acronym for the quality management tool that is also used in G1:2021 to mean "[t]he documentation of the suppliers, inputs, processes, outputs, and customers of an agency, office, or work unit."

run the process and appropriate means to monitor inputs and outputs, as well as create integrated processes and workflows to convert the inputs into outputs with a focus on the needs of both suppliers and customers.

Next, using the SIPOC analysis of the Life of an Appeal system map, the Clerk's Office identified 12 PAGs. These activity groups represented business purposes and functions that deliver outputs with defined requirements and are represented at the highest level by system milestones with discrete end results. The below chart illustrates how the system map was divided into the resulting PAGs: Life of an Appeal milestones were categorized as direct PAGs and all other functions that support these milestones were categorized as supporting PAGs.



Next, the office analyzed each PAG to define its desired outcome[4] ("what is the purpose?"), influencing factors[5] ("what does success look like?"), and intervening variables[6] ("what actions drive success and avoid failure?"). From the identification of influencing factors, the office used cause-and-effect diagrams to identify the intervening variables applicable to achieving the desired outcome of the PAG. Finally, key measures[7] were identified within each PAG (discussed below). The result was an overall system structure to direct and plan relevant quality management systems, as seen in the structural analysis for the Motions Processing PAG on the next page.

Finally, as part of this clarified structure, the office created process maps to graphically define every essential Clerk's Office process within each PAG and assist with continued process evaluation and efficiency reviews, as well as a training and reference tool for staff performing these functions. Identification of these processes occurred via reference to G1:2021's definition of a key process[8] and the Clerk's Office Mission to focus on supporting judicial stakeholders and case processing efficiency.

[4] G1:2021 defines "outcome" as "[t]he impact that outputs have on effectiveness, efficiency, mission accomplishment, or other measurable and meaningful results and indicators."

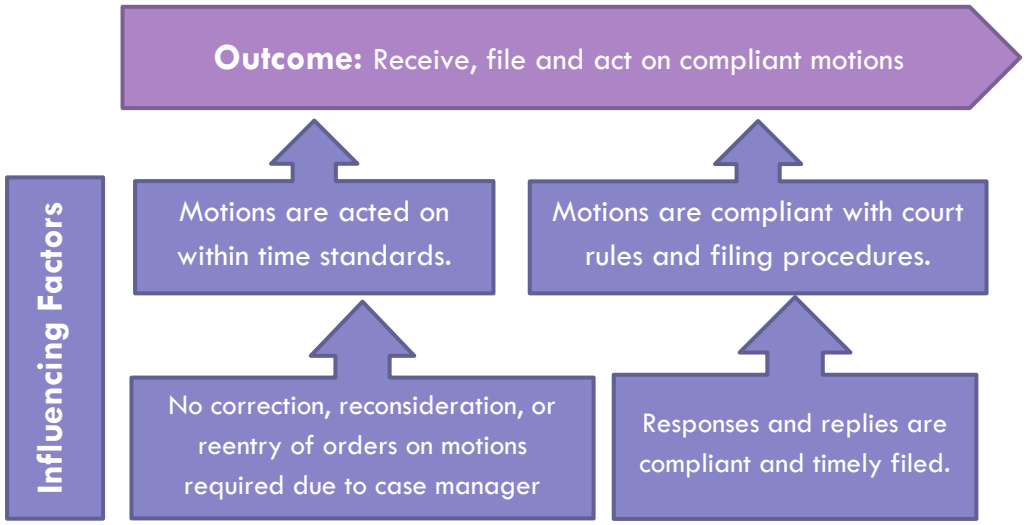
[5] G1:2021 defines "influencing factors" as "[t]asks and activities that are causes of success within each Principal Activity Group. These can be identified as the principal forces of positive causation, on a cause-and-effect diagram."

[6] G1:2021 defines "intervening variables" as "the categorical variables in system cycles that require adjustments to the known and expected pattern of performance . . . akin to common cause variation in processes."

[7] G1:2021 uses the term "key measures" to describe "metrics and indicators associated with optimal performance of process and system tasks and actions, which are leading measures of success. Output measures that reflect achievement of process or system requirements are also included in key measures."

[8] G1:2021 defines a "key process" as "one or more processes that are recognized as being primarily responsible for fulfilling the agency, program, or office mission, and for satisfying major consumer requirements."

Principal Activity Group: Motions Processing



Intervening Variables: Maintain an operational case management system. Receive and send mail and deliveries. Maintain access to a nighttime drop box. Maintain access to public intake. Train staff. Maintain operational phone and email systems. Maintain access to an electronic filing system. Maintain an operational case assignment system. Post current court rules and electronic filing procedures. Post current fee schedule. Maintain current internal procedures, guides, and process maps. Maintain current processing standards. Maintain a defined and managed quality assurance system. Post current court forms. Post current and user-friendly information and resources for filers. Maintain a referral and communication system with staff attorneys. Maintain non-compliance criteria and a processing system. Maintain current court order templates.

Key Measures:

- Timely processing of motions, responses, and replies
- Rate of filer compliance with motions requirements
- Number of corrections or granted reconsiderations on motions due to case manager error

GOAL DIRECTEDNESS THROUGH FEEDBACK

Goal directedness through feedback ties performance requirements into each PAG. These requirements connect stakeholder expectations and opportunities for feedback through all parts of the system. By documenting all tasks, accountabilities, contributing factors, intervening variables, and system risks, leadership can develop effective indicators that help gauge whether the system as a whole and individual PAGs are providing uniform quality outputs in a predictable manner.

Additionally, the evaluation of these goals allows management and staff to understand whether they are meeting stakeholder expectations and where improvements are needed. Positive levels of performance in various areas also provide a transparent means of demonstrating quality service levels both to staff and to stakeholders. Using G1:2021 and an integrated quality management system, the Clerk's Office focused its expansion of available data points for each PAG and used this data to evaluate trends and existing processes, to create plans for future development, to identify areas in need of additional resources or evaluation, and to make operational decisions throughout the year.

The Clerk's Office undertook a multi-pronged approach to satisfy goal directedness and increase its feedback capabilities. First, the Clerk's Office developed new case processing standards to define performance requirements in line with stakeholder feedback and expectations, including existing legal and regulatory requirements. These expanded standards accounted for accuracy, timeliness, and precise minimum performance requirements that varied based on the specific input being processed by staff. The Clerk's Office then enhanced the information-gathering capabilities of the quality control system by changing from periodic snapshots to real-time reporting and integrating

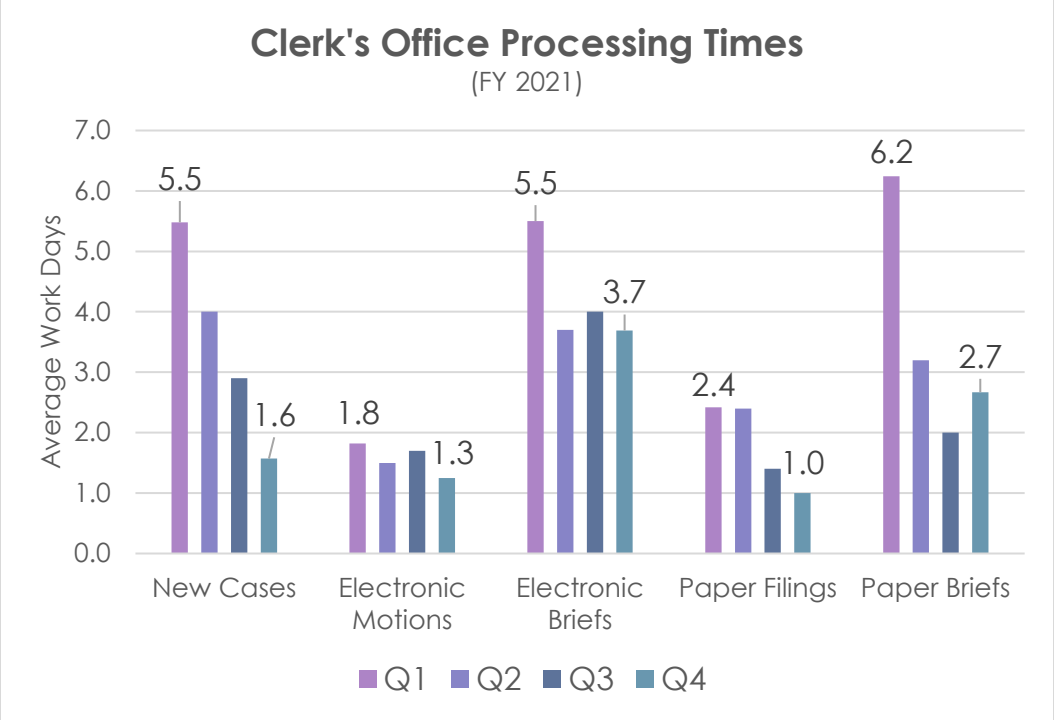
the new performance standards into the quality control process. The enhancements also included automatic notifications to case managers and functional supervisors about quality errors, along with a tracking system for monitoring the resolution of these errors.

Case Processing Minimum Performance Standards		
Years of Experience	Accuracy Minimum Standards	Timeliness and Precision Minimum Standards
0-2	90%	90%
2+	95%	98%

Finally, the Clerk's Office used the above-identified inputs, outputs, process outcomes, influencing factors, and intervening variables to create key measures, which were locally called "key performance indicators" (KPIs), to provide regular and detailed feedback on how the office was performing for each PAG. In general, the KPIs have allowed management to monitor the progress of continuous improvement efforts and have served as an early indicator of whether preventative action may be needed to address low-performing KPIs. Significantly, these operational KPIs focus on whether the Clerk's Office is performing mission-critical functions at minimally acceptable performance levels based on office standards and requirements.

At the end of FY 2021, the Clerk's Office was meeting or exceeding standards in 27 out of 30 performance areas, with positive improvement in all areas across the year. These results followed from the Clerk's Office closely monitoring and identifying solutions to discrete portions of overall case processing, which in turn enabled the Clerk's Office to significantly decrease processing times over the course of one year.

Notably, the average time to process new case openings decreased from 5.5 days in Quarter 1 of FY 2021 to just 1.6 days by the end of Quarter 4, a 70.9% decrease. Days to process electronic motions decreased from 1.8 days to 1.3 days (-27.8%). Days to process electronic briefs decreased from 5.5 days to 3.7 days (-32.7%). Days to process paper filings decreased from 2.4 days to 1.0 days, a 58.3% decrease, while days to process paper briefs decreased from 6.2 days to 2.7 days, a 56.5% decrease. Overall, case processing time averages were reduced by 49% over this period.



MANAGEMENT OF INTERVENING VARIABLES

Managing intervening variables requires an active, dynamic, and systematic approach to managing risk. The Clerk's Office has adopted an overall risk mitigation strategy for its intervening variables—as identified when structuring the system—that integrates quality assurance and control measures into its essential business processes. At the same time, the Clerk's Office actively manages its risks by integrating metrics into regular reporting to, and review by, management as part of the office's strategic alignment and quality management systems. Through these systems, the Clerk's Office regularly determines potential issues that need to be addressed to ensure that the Clerk's Office can achieve the requirements of its mission-essential functions while implementing necessary process improvements to enhance the performance and delivery of the Clerk's Office's services.

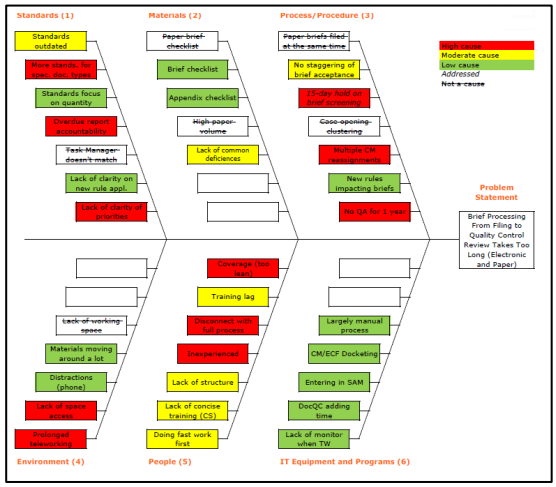
In creating its risk management system, the Clerk's Office needed to first identify, categorize, and assess all potential risks to office essential functions. The Clerk's Office used Strength, Weaknesses, Opportunities, and Threats (SWOT) analysis to prepare an annual comprehensive list of threats and opportunities that could affect the office from achieving its goals and objectives. Each identified risk event was then assigned a number from 1 to 5, corresponding to how likely a risk will become reality and its potential impact. The higher the number, the larger the risk.

		Risk Occurrence Impact on Operations				
		Negligible	Minor	Moderate	Major	Critical
Likelihood of Occurrence	Almost Certain	2	3	4	5	5
	Likely	1	3	3	4	5
	Possible	1	2	3	3	4
	Unlikely	1	1	2	2	3
	Remote	1	1	1	1	2

Clerk's Office Risk Assessment Matrix (July 2021)

If any of the identified risks are actualized and essential operations are seriously impacted, the Clerk's Office has developed a program to effectively deal with the impacts of these events through critical incident reporting, root cause analysis, and a corrective action program. Under the Clerk's Office's program, both potential and actualized critical incidents require a focused and concerted response and ongoing management by office senior leadership.

The Clerk's Office's corrective and preventive action program is used to focus problem-solving efforts following a critical incident to (1) identify root causes of the critical incident through cause-and-effect root cause analysis and (2) identify and evaluate solutions to prevent future incidents from occurring using the Plan-Do-Study-Act continuous improvement cycle. The goal of such a process is to establish permanent corrective action. Upon receipt of a critical incident report, Clerk's Office management identifies and directs immediate actions needed to minimize and mitigate any additional risk from the critical incident. Such actions may include changes to office policies or procedures, specific actions by staff to resolve the issue, or directing a formal review and recommendation for additional corrective or preventative actions.



Cause and Effect Diagram for Brief Processing Analysis (January 2021)

In tandem with its existing after-action review program, the Clerk's Office has been utilizing root cause analysis teams to evaluate process changes. These work teams spend several months identifying, studying,

and evaluating potential solutions to address identified causes of recognized problems. One of these analysis teams was responsible for studying and implementing solutions that led to the previously described reduced case processing times across FY 2021.

Alignment, Evaluation, and Improvement

Alignment, evaluation, and improvement requirements center around acknowledging a system's existence and whether there are integrated activities within said system to learn and improve, as well as align and realign the overall system and processes with performance requirements. One of the preliminary requirements for alignment involves identifying the roles of responsibility, accountability, consultation, and informing (RACI) for all PAGs. Through RACI documentation, communication and productivity needs are established and designated staff can focus on their assigned roles within each PAG. In FY 2021, as part of its efforts in system documentation and integration, the Clerk's Office identified these RACI roles for its PAGs.

At the end of FY 2019, the office completed its first strategic plan and identified several strategic objectives and goals to align office development and growth for the next few years. Although work on the plan was deferred in FY 2020 due to the court's operational focus on its pandemic response, in FY 2021, the Clerk's Office rolled out its Strategic Balanced Scorecard.

In addition to the regular reporting, reviewing, and identifying needed changes from quarterly KPI data, the Clerk's Office has used the Strategic Balanced Scorecard to evaluate and track the progress of the goals and objectives of the strategic plan. The Balanced Scorecard considers measurements within four areas for review: (1) business

processes used to achieve the mission and requirements, (2) stakeholder experience, (3) business processes used to plan for future needs, and (4) staff development. The scorecard is updated and reviewed quarterly by management and staff, and the office's Strategic Alignment Working Group evaluates how well the Clerk's Office is meeting its strategic objectives and goals—directing operational modifications while approving new initiatives and program realignments as needed.

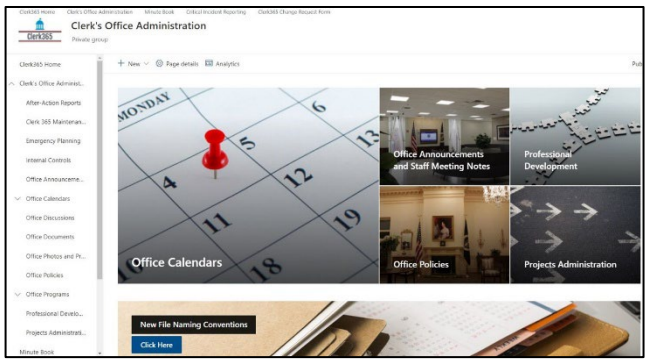
U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT CLERK'S OFFICE							
VISION	As a national court, we will be a leader in court operations through innovative, cost-effective, and results-oriented practices designed to deliver quality service to our stakeholders.						
MISSION	We impartially facilitiate the progression of cases and faithfully preserve the court's record.						
CORE VALUES	Communication – Accountability – Transparency – Stewardship						
Reporting Quarter				FY 2021 by Quarter			
PERSPECTIVES	ALIGNMENT QUESTIONS	FOCUS	METRICS	TARGETS MET Q1	TARGETS MET Q2	TARGETS MET Q3	TARGETS MET Q4
MISSION	How will we achieve our mission?	Standardize Office Procedures	11	1	2	5	9
STAKEHOLDER EXPERIENCE	How can we deliver quality service to meet the needs of our stakeholders?	Improve Service to Stakeholders	11	0	1	3	6
INTERNAL PROCESSES	How are we planning for future mission needs?	Utilize Data in Decision-Making	9	3	3	4	5
PEOPLE	How are we developing the culture, capabilities, and skills of our staff?	Increase Employee Engagement	7	1	4	4	5

Clerk's Office Balanced Scorecard (FY 2021)

Further bolstering improvement capability and operational alignment, the office revamped and expanded its Minute Book into an all-around work platform and knowledge management system: Clerk365. The new, SharePoint-based system contains updated operational procedures and policies and integrates many office functions into one platform.

G1 CERTIFICATION AND CONTINUING THE JOURNEY

In March 2022, the Clerk's Office received a silver level award (level 3) validation and certification under G1:2021, becoming the first government entity to both seek and attain an award-level validation under the new standard.[9]



Clerk's Office Knowledge Management System (2021)

Following its silver level award and certification under G1:2021, the Clerk's Office is continuing to identify new opportunities and areas of growth under the G1 framework.

As the office begins to chart out its next five years, the Clerk's Office has already identified the following items to develop and implement:

- Integrating a Customer Relationship Management system to standardize and to evaluate stakeholder interactions, service requirements, and service quality;

- Completing system integration for tracking all supplier inputs and measuring process outputs, as well as in the performance of essential processes and workflows;

[9] "ASQ Government Division Awards Clerk's Office for the U.S. Court of Appeals for the Federal Circuit in Washington D.C.," https://www.prnewswire.com/news-releases/asq-government-division-awards-clerks-office-of-the-us-court-of-appeals-for-the-federal-circuit-in-washington-dc-301495157.html (Mar. 3, 2022); "Clerk's Office Earns Award for Cutting Case Processing Time in Half," https://www.uscourts.gov/news/2022/03/08/clerks-office-earns-award-cutting-case-processing-time-half (Mar. 8, 2022).

- Expanding measurement capturing and reporting capabilities with a regular means for adapting to stakeholder requirements;
- Integrating a cyclical review of all processes for efficiencies and changing requirements;
- Formalizing and integrating change management best practices and concepts into new program and initiative development;
- Implementing annual review and evaluation of all essential process performances; and
- Creating a new strategic plan and updated Balanced Scorecard to align and measure progress.

As courts and other public agencies look to evaluate and demonstrate the value and quality of their services, the Clerk's Office's journey and application of G1:2021 can provide valuable lessons and examples of how others can follow a similar approve to integrating quality management systems and performance improvement into their operations.

ADDITIONAL INFORMATION

Learn more about the U.S. Court of Appeals for the Federal Circuit at www.cafc.uscourts.gov and contact the Clerk's Office about its use of G1:2021 at publicinformation@cafc.uscourts.gov.

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Patrick B. Chesnut has served in the Federal Circuit Clerk's Office in various capacities, including his current position as Special Programs Coordinator, since October 2018. He earned his B.A. in Political Science from the University of California at Los Angeles.

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The authors wish to thank and acknowledge the following for their editorial and substantive assistance in the creation of this case study, data analysis, and the implementation of G1:2021: James Alvino, Kerry Bass, Katie Hempill, Joseph Liporace, Richard Mallory, and Peter R. Marksteiner, as well as the Center for Quality Standards in Government of the ASQ Government Division.

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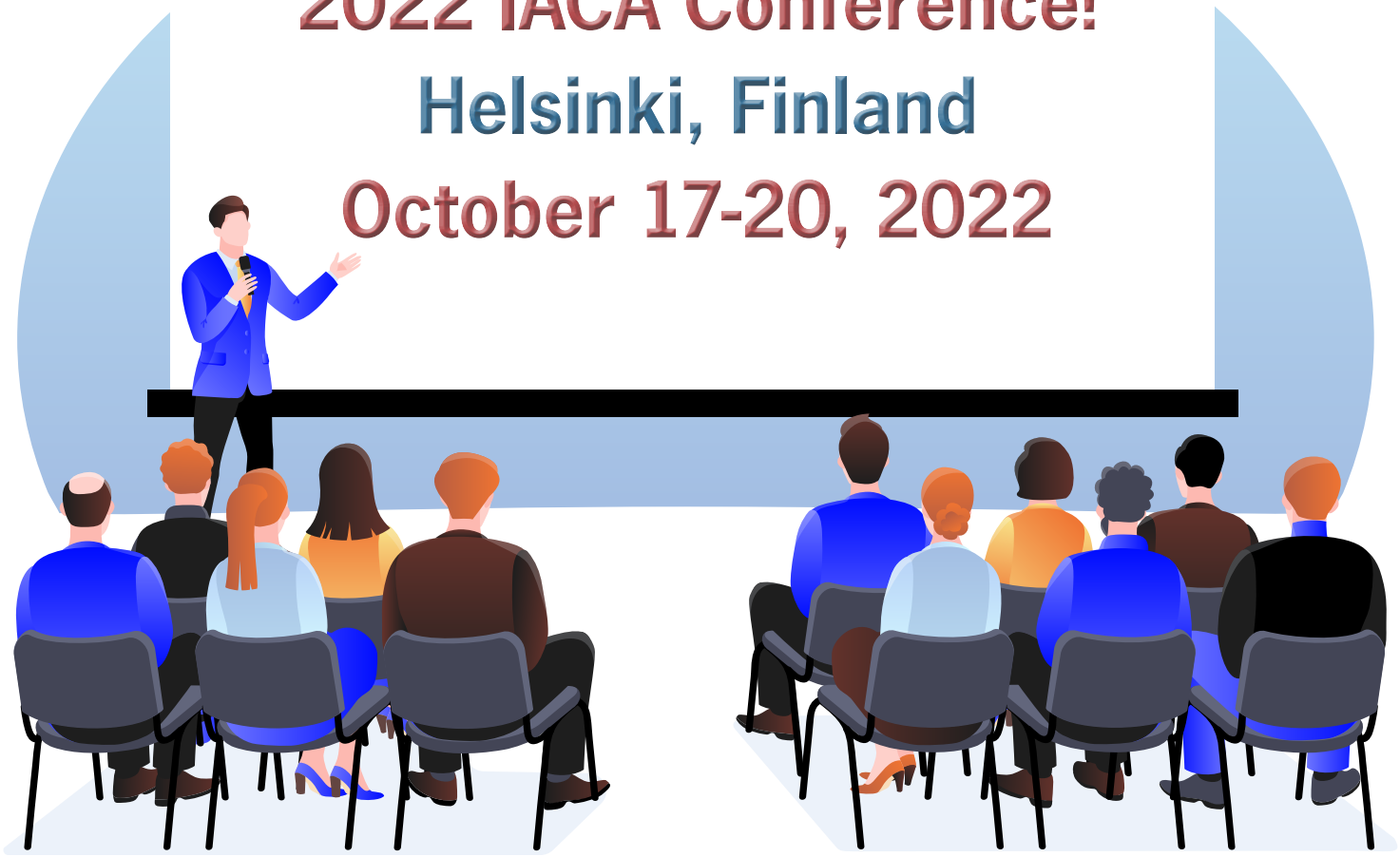

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Organizational Maturity in Court Administration: A New Evaluative Standard for Court Administrators[1]

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Summary

Quality management has long been an effective tool for driving organizational excellence however current standards are geared primarily toward private, cost-driven entities. A new standard for public sector agencies now exists that addresses the inherent challenges in applying cost-driven, quality management focuses to public entities by using maturity modeling and best practice models as the evaluative bases. This article explains how the Clerk's Office of the U.S. Court of Appeals for the Federal Circuit has used this new standard to enhance its operations and has since been awarded certification under this standard, which is a useful tool other courts can use to review and adapt their own processes.

Introduction

For the past two years, courts around the world have both struggled with and had to make rapid changes to their operations in the face of the COVID-19 global pandemic. Whether it was using new technologies to continue court proceedings remotely or struggling to determine how continued legacy paper-based systems could function in the face of mandated closures and physical distancing, critical changes happened very quickly. Some court administrative structures showed considerable resilience while others struggled and needed more time to adapt to the new reality. What made the difference? For those court administrative structures that struggled, what can be done to prepare better for the next challenge? Additionally, as the world enters the third year of this pandemic and we look toward the future, how can court administrators evaluate which of these new systems and processes should stay and which should go?

Those courts, as well as other government entities, with robust, mature processes and systems that were designed to be adaptable and resilient likely experienced more favorable outcomes than those without. Organizations that possess and maintain strong quality management systems increase the level of sustainable operations during normal times and their ability to manage the risks of crisis. New quality management maturity measurement standards for government agencies offer a path forward for courts to assess their current state so they can improve operations today and start planning now for future challenges.

continued

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Quality Management in the Judiciary

Quality management systems, long in use in the private sector, offer several resources and tools that can be used to develop, enhance, and deliver effective services within judicial administration. The application of quality management principles to court administration began as part of general trends in government in the 1990s to "reinvent government" through the introduction of performance measurement and improvement concepts into the public sector.[2] Within the United States, there has been considerable focus and attention on identifying and measuring court performance and then applying this data to evaluating and enhancing court performance.[3] Notably, the National Center for State Courts developed CourTools to provide uniform accountability performance measurements for trial and appellate courts. CourTools identifies ten performance measures for trial courts and six performance measures for appellate courts that can be used to "clarify performance goals, develop a measurement plan, and document success."[4] More broadly, the International Consortium for Court Excellence has created the International Framework for Court Excellence, which is an international standard quality management system that courts and judicial agencies can use to improve judicial administration based on seven "areas of court excellence."[5]

Currently, ISO 9001 from the International Organization for Standardization (ISO)[6] provides the internationally-accepted standard for organizations looking to design and to implement a total quality management system.[7] The latest version of ISO 9001 looks beyond data-based decision making and evaluation and increases the need for risk management awareness and planning into effective quality management system requirements.[8] Unfortunately, ISO 9001 is designed for the private sector, which unlike public sector agencies such as courts, focuses much on cost-savings and reduction efficiencies. While effective court administration requires good stewardship over public funds and resources, the end objective of court administration is the effective administration of a government's judicial system. The International Framework for Court Excellence provides effective standards and measurement tools within the spirit of ISO 9001 quality management system standards, but the International Framework relies on self-assessment to evaluate implementation and does not offer a mechanism for independent validation, as is available under ISO 9001.[9]

New Quality Standards in Government

After several years of development within the American Society for Quality (ASQ) Government Division by a team

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2 See generally Alexander B. Aikman, Total Quality Management in the Courts: A Handbook for Judicial Policy Makers and Administrators (National Center for State Courts 1994).

3 See National Association for Case Management, NACM Core®: Accountability and Court Performance Competency, https://nacmcore.org/competency/accountability-and-court-performance/ (establishing competency standards for court professionals in the areas of accountability and court performance); see also National Association for Case Management, The Core® in Practice (2015), https://nacmcore.org/app/uploads/The-Core-Guide-FINAL.pdf.

4 See National Center for State Courts, CourTools, http://www.courtools.org. Examples of trial courts and appellate courts that have implemented CourTools are also available at the CourTools website.

5 See International Consortium for Court Excellence, International Framework for Court Excellence (3d. ed. 2020), https://www.courtexcellence.com/__data/assets/pdf_file/0021/51168/The-International-Framework-3E-2020-V1.pdf; International Consortium for Court Excellence, https://www.courtexcellence.com/. The International Framework is based around the Plan-Do-Study-Act cycle, which is the generally accepted model for quality management systems.

6 Based in Geneva, Switzerland, ISO is an international membership organization of national standards bodies that develops international standards to facilitate compatibility between products, to promote safety and compliance, and to share and promote best practices within various industries and management areas. See ISO, ISO in Brief, https://www.iso.org/publication/PUB100007.html (2019), https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100007.pdf. Within the United States, the national standards body is the American National Standards Institute (ANSI). See ANSI, About ANSI, https://ansi.org/about/introduction.

7 See ISO, ISO 9000 Family Quality Management, https://www.iso.org/iso-9001-quality-management.html.

8 See American Society for Quality, "What Is ISO 9001:2015- Quality Management Systems," https://asq.org/quality-resources/iso-9001 (explaining the new 2015 standard and highlighting the changes since the 2008 standard).

9 At least one court, the Klaten District Court in Indonesia, has been accredited under ISO 9001 and has also implemented the International Framework for Court Excellence. See Hon. Alberta Usada, "Framework Actualized: The Implementation of the Seven Areas of Court Excellence at Klaten District Court, Central Java, Indonesia," International Consortium for Court Excellence Newsletter, 6-7 (July 2018), https://www.courtexcellence.com/__data/assets/pdf_file/0026/7298/icce-newsletter-no-11-v1-aug-2018.pdf

of government practitioners from around the world, a new uniform, objective standard now exists by which government agencies can develop and independently validate the level of sustainable quality and performance of their operations and services to support the implementation of their mission. Adopted by the American National Standards Institute on March 21, 2021, the ASQ/ANSI G1:2021 Guidelines for Evaluating the Quality of Government Operations and Services ("G1 Standard")[10] addresses the inherent challenges in applying cost-driven, quality management focuses to public entities by using maturity modeling and best practice models as the evaluative bases.[11]

The new G1 Standard promotes three objectives: (1) to provide an objective standard by which public entities can confirm the level of sustainable quality of their operations and services, (2) to provide a simple and clear framework for public entities to evaluate the organizational maturity of critical processes and systems on a macro (i.e., overall) or micro (i.e., a specific department or office) level, and (3) to fill the missing gap in the public sector for implementing quality management systems such as Lean Six Sigma or best practice management techniques such as the Baldrige Excellence Framework.[12] Overall, the G1 Standard assigns a maturity rating to the organization based on the use of quality practices and effectiveness of addressing organizational risks.

Under the G1 Standard, maturity "refers to the degree of formality and optimization of processes and systems, from ad hoc practices . . . to formally defined . . . to active and continuous improvement."[13] The G1 Standard establishes six-level maturity models for both processes and systems.[14] Processes are evaluated based on their level of standardization, whether adherence to requirements is evaluated, and whether quality improvement is incorporated across the process.[15] Systems are evaluated based on whether they have a defined and documented structure, the extent system outputs are goal-directed through performance measurements, if risk is actively managed and mitigated, and evidence that the systems are regularly aligned with management and evaluated for effectiveness.[16]

Simplified System Maturity Model of the G1 Standard

- Level 0 – Not Using Quality
- Level 1 – Initiating
- Level 2 – Standardizing
- Level 3 – Streamlining
- Level 4 – Capable
- Level 5 -- Excellent

For example, a court administrative office that has neither begun to implement any quality practices nor identified any risks is likely at a level 0 maturity, which is the lowest ranking under the G1 Standard. A court administrative office that has adopted basic quality practices, such as the Plan-Do-Study-Act Cycle or DMAIC,[17] and has defined all its major risks would be in the measuring and testing maturity phase, or a level 3. At the highest maturity level of a 5, the court administrative office is innovating through its quality practices and actively managing its risks.

Among the anticipated benefits to court administrative entities applying the new G1 Standard include (1) providing a framework for continuously improving the quality of operations in carrying out approved mandates and achieving program objectives; (2) creating a culture of quality for the purpose of improving cost-effective delivery of services; (3) providing a tool and framework for court managers at all levels to confirm and demonstrate that

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10 ASQ/ANSI G1:2021 Guidelines for Evaluating the Quality of Government Operations and Services is available at https://asq.org/quality-press/display-item?item=T1574E (hereinafter "G1 Standard"). Like all ANSI standards, the document is copyrighted and requires purchase to view. However, those interested in learning more about the Standard and its requirements can view an online information session about the Standard. See ASQ Government Division, The ANSI: G1 Standard – A New Beginning Point for Efficiency and Effectiveness in Government, WebEx Presentation (Aug. 26, 2021).

11 See Richard E. Mallory, Quality Standards for Highly Effective Government, (2d ed. 2018), cited in G1 Standard, "Foreword."

12 Baldrige Excellence Framework, https://www.nist.gov/baldrige/publications/baldrige-excellence-framework.

13 G1 Standard at 12.

14 Under the Guidelines, a process is "a set of interrelated work activities that transform inputs [something obtained by the agency] into outputs [something provided to internal or external customers]," and a system is "a group of interdependent processes and people that together perform a common mission." Id. § 3.

15 Id. § 5.2, Table 5.2.

16 Id. § 5.2, Table 5.3.

17 See ASQ, The DMAIC Process, https://asq.org/quality-resources/dmaic.

key work units follow a documented best-known practice in all primary court administrative business areas; (4) an empirical, professionally recognized tool for court managers to demonstrate key systems processes capability and maturity; and (5) establishing a uniform basis for development of a quality scorecard of key systems and processes throughout the court.

Once a court decides to use the G1 Standard, there are two options for evaluation. First, courts can perform a self-evaluation using internal staff who have been trained as designated examiners under the G1 Standard or other internal staff with auditor training and knowledge of the G1 Standard. Second, courts can request formal evaluation by external ASQ designated examiners, who have been trained in the G1 Standard and who have either formal training or experience in quality management and program evaluation.[18] Courts who complete the formal evaluation process are then eligible for registration by the Center for Quality Standards in Government of the ASQ Government Division.

However, the benefits of the G1 Standard can be realized either well-before or even without going through the formal evaluation process.

Use of the G1 Standard in the Clerk's Office of the U.S. Court of Appeals for the Federal Circuit

Following a leadership change in 2016, the Clerk's Office of the U.S. Court of Appeals for the Federal Circuit has spent the past five years redesigning its processes; adopting proven quality-based methods to evaluate and enhance operations and services; and developing a staff culture focused on delivery quality services to the court's judges, members of the bar, unrepresented litigants, and the public.[19] Based on a G1 Standard precursor system management maturity model, and then the actual G1 Standard, the Clerk's Office has used this framework to guide its maturation process.

One of the first tasks taken was forming a business unit focused on quality management that would then identify data measurements to evaluate the success or failure of Clerk's Office programs, services, and performance targets. Performance standards based on legal and court-directed requirements were adopted and integrated into staff training programs.

The Clerk's Office identified 12 principal activity groups,[20] such as motions process and scheduling hearings, with corresponding performance metrics aligned with the purpose and inputs and outputs for each group. Performance metrics are reviewed quarterly by management and staff and resources and improvements are adopted as needed.

The Clerk's Office initially focused on tracking and improving the quality (timeliness and accuracy) of the work of its case managers, who are responsible for reviewing and processing most case filings and entries on the public docket. Initial assessments in 2017 showed an average case manager accuracy at 84.3%, including a high degree of variability between individual case managers. This initial data demonstrated a significant risk, public visibility, and mission impact of permitting such a performance level to continue. As a result, initial continuous improvement efforts focused on shoring up existing case manager training and creating a new case manager training program to provide a permanent, preventative process to ensure new case managers would begin their work with the court with a validated, high level of accuracy.

Three years into the training program and after incorporating verified quality management processes, the Clerk's Office reported an average case manager accuracy of 96.1%, and after five years of data (including the hiring of new entry-level case managers), the Clerk's Office had an average case manager accuracy of 95% (or about a 13% sustained increase in accuracy from the original baseline).[21] After working on case manager accuracy, the Clerk's Office next focused on decreasing internal processing times, which

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18 Courts may opt to perform a self-assessment before seeking formal evaluation. As part of the formal evaluation process, the Center for Quality Standards in Government will also provide action plans for continued process improvement aligned with the Standard, as well as identify public agencies as appropriate for participation in case studies evaluating the effectiveness of the Standard.

19 The U.S. Court of Appeals for the Federal Circuit is one of the thirteen intermediate appellate courts in the federal judiciary. The Federal Circuit has nationwide jurisdiction over a variety of subject areas, including international trade, government contracts, patents and trademarks, monetary claims against the United States, federal personnel matters and veterans' benefits claims. For more information about the court, visit the Federal Circuit's website at https://www.cafc.uscourts.gov.

20 Under the G1 Standard, a "principal activity group" "represent[s] a business purpose or function that deliver[s] outputs with defined requirements, and that may be incremental parts of the business system aim or purpose." G1 Standard § 3.

21 Jarrett B. Perlow, Patrick B. Chesnut & Greta Mun, Training the Next Generation of Case Managers, (Oct. 29, 2021), at https://govwhitepapers.com/whitepapers/training-the-next-generation-of-case-managers.

would impact both the overall disposition time of cases before the court and the time for cases to be assigned to merits panels. After a yearlong focused approach in FY 2021, the Clerk's Office averaged a 49% reduction in overall processing time and averaged a 58% reduction in the time from the end of case briefing to calendar and panel assignment.

In the areas of management of risk and program alignment and evaluation, the Clerk's Office implemented after-action review programs into all office activities,[22] SWOT (strengths, weaknesses, opportunities, threats) analysis in annual planning and program development efforts, and a root cause analysis-based corrective and preventative action program. The office launched an annual planning and initiative development program in 2018, which has allowed the office to focus on many of these improvement efforts. The annual program includes a formal evaluation system of new initiatives and adopts standard project management concepts and tools to drive meaningful change within the Clerk's Office.

In March 2022,[23] the Clerk's Office received a silver level award (level 3) validation under the G1 Standard, becoming the first government entity both to seek and to attain an award-level validation under the new standard. As courts look for new ways to integrate quality and performance improvement into their strategic planning, using the G1 Standard provides a new, validated opportunity for court leaders to differentiate the excellence of the performance of their organizations, to support their missions through continued resource challenges, and to demonstrate to their stakeholders and funding entities the value and quality of services provided by the courts.

22 The After-Action Review tool was developed by the U.S. military to identify following an event and then identifying how those lessons might be applied to a future event. See generally "Learning in the Thick of It," Harvard Business Review (July-August 2005), available at https://hbr.org/2005/07/learning-in-the-thick-of-it (last accessed Feb. 8, 2022).

23 U.S. Courts, "Clerk's Office Earns Award for Cutting Case Processing Time in Half" (Mar. 8, 2022) at https://www.uscourts.gov/news/2022/03/08/clerks-office-earns-award-cutting-case-processing-time-half; see also Jarrett B. Perlow, Patrick B. Chesnut & Jason Woolley, Journey of Excellence: A Case Study on the Use of the ASQ/ANSI G1:2021 Standard in the Federal Judiciary (Mar. 23, 2022) at https://govwhitepapers.com/whitepapers/journey-of-excellence-a-case-study-on-the-use-of-the-asq-ansi-g12021-standard-in-the-federal-judiciary; U.S. Court of Appeals for the Federal Circuit Clerk's Office Journey to Silver Award for Performance, WebEx Presentation (Mar. 23, 2022) at https://youtu.be/PFfwr3HNy4o.

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ADAPTING QUALITY MANAGEMENT PRACTICES TO APPELLATE COURT OPERATIONS

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REAL LEADERS NEGOTIATE!

Speaker: Jeswald W. Salacuse
Opperman Speaker

Jeswald W. Salacuse, Tufts University Dean Emeritus and Distinguished Professor Emeritus, served as Dean of The Fletcher School of Law and Diplomacy, Tufts University, for nine years and was previously Dean of the Southern Methodist University Law School. His teaching and research interests include leadership, international negotiation, law and development, and international arbitration and investment law. With a J.D. from Harvard University, a B.A. from Hamilton College, and a diploma from the University of Paris, Salacuse served as Visiting Professor of Law at Harvard Law School, held the Fulbright Distinguished Chair in Comparative Law in Italy, and been a visiting professor in the United Kingdom, France, and Spain. He has also been a lecturer in law at Ahmadu Bello University, Nigeria, a Wall Street lawyer, professor and research director at the National School of Administration, Congo, the Ford Foundation[1]s Middle East advisor on law and development based in Lebanon, and later the Foundation's representative in Sudan.

Salacuse has served as Chairman of the Institute of Transnational Arbitration, Chairman of the Board of the Council for International Exchange of Scholars, and the founding President of the Association of Professional Schools of International Affairs (APSIA). He also serves as a Senior Advisor on Judicial Leadership to the National Center for State Courts. A consultant to multinational companies, government agencies, international organizations, universities, foundations and foreign governments, he is a member of the Council on Foreign Relations, the American Law Institute, and the executive committee and faculty of the Program on Negotiation at Harvard Law School. He is also Chairman of the Board of the India Fund, president and member of international arbitration tribunals in investor-state disputes under the auspices of the World Bank's International Centre for Settlement of Investment Disputes (ICSID), and the former lead independent director of the Legg Mason closed-end funds. The author of twenty books, his recent works include *Real Leaders Negotiate! – Gaining, Using, and Keeping the Power to Lead through Negotiation*, (Palgrave Macmillan, 2017), *The Three Laws of International Investment* (Oxford University Press, 2013), *Negotiating Life* (Palgrave Macmillan 2013), *The Law of Investment Treaties* (Oxford University 3rd ed. 2021), *Seven Secrets for Negotiating with Government* (2008), *Leading Leaders* (2006), and *The Global Negotiator* (2003).

INTERNATIONAL ARBITRATION AND DISPUTE SETTLEMENT EXPERIENCE

Member: Panel of Conciliators, International Centre for Settlement of Investment Disputes (ICSID), appointed to a six-year term (2011-2017) by the President of the World Bank.

Tribunal Member: SCC Arbitration V2021/039: Modus Energy International B.V. ./. Ukraine, Stockholm Chamber of Commerce, 2021-

Tribunal President: Stadwerke München GmbH, RWE Innogy GmbH, and Other v. Kingdom of Spain, ICSID Case No. ARB/15/1, International Centre for Settlement of Investment Disputes, 2015 – 2019.

Tribunal President: Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. (Claimants) v. The Argentine Republic (Respondent), ICSID Case No. ARB/03/19, International Centre for Settlement of Investment Disputes, 2003 – 2015.

Tribunal President: Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.(Claimants) v. The Argentina Republic (Respondent), ICSID Case No. ARB/03/17, International Centre for Settlement of Investment Disputes, 2003 – 2015.

Tribunal President: AWG Group (Claimant) v. The Argentine Republic (Respondent), UNCITRAL Rules, administered by the International Centre for Settlement of Investment Disputes, July 2003 - 2015.

Tribunal Member: Alasdair Ross Anderson et. al. (Claimants) v. Republic of Costa Rica (Respondent), ICSID Case no. ARB(AF)/07/3), International Centre for Settlement of Investment Disputes, 2008 – 2010.

Tribunal President: Aguas Cordobesas S.A., Sociedad General de Aguas de Barcelona S.A., Suez (Claimant) v. The Argentine Republic (Respondent), ICSID Case no. B/03/18, 2003-2007.

Salacuse is a member of the bars of New York and Texas.

Looking at Judiciary Leadership from the Demand Side:

Judges: "Invisible Leaders"?

Jeswald W. Salacuse

While the literature on leadership is vast and continues to expand at a rapid rate and while educational programs and courses on leadership exist at academic institutions of all levels and quality, judges and the judiciary are hardly ever considered fit subjects of study by leadership scholars and teachers. For them, "leaders" worthy of the name are to be found in corporate executive suites, presidential palaces, military commands, and even professional football teams, but not in the courts. As a result, in virtually all well-known books on leadership, judges are invisible. Moreover, even within the body of legal literature, in-depth studies on judges as leaders are scant.

Judiciaries, like corporations, armies, and governments, are fundamentally social organizations. Like all social organizations, they require leadership to function effectively and achieve their goals. This fact has not escaped certain historians, particularly those who study the U.S. Supreme Court. They have underscored the crucial role that the Chief Justice, as leader of a coequal branch of government, has played in leading the Court and in thereby profoundly influencing the development of the American constitutional system. John Marshall and Earl Warren have drawn particular attention for their qualities as judicial leaders, as the very titles of two highly regarded biographies—Jean Edward Smith's *John Marshall—Definer of a Nation* (1996) and Bernard Schwartz's *Super Chief—Earl Warren and His Supreme Court* (1983)—make clear from the outset.

Marshall laid the foundations for constitutional government in the United States not only through his legal ability but equally important through his skill at leading the other Supreme Court justices to forge unanimous opinions on key issues—much to the consternation of Marshall's political adversary, President Thomas Jefferson, whose other appointees to the Court, much to Jefferson's dismay, seemed all too willing to join Chief Justice Marshall in his decisions.[1] Before Marshall's arrival at the Court, its six justices wrote separate opinions in each case they decided. Marshall viewed this practice as limiting the Court's strength. In a feat of judicial leadership with far-reaching consequences, he convinced the other justices that speaking with one voice would increase the court's institutional strength and influence. He urged them for each case to write one opinion embodying their decision. In his first three years on the court, Marshall participated in 42 cases. He wrote all the decisions and all of them were unanimous. Later when President James Madison appointed Joseph Story to the Supreme Court in 1811, he assured a dubious Jefferson that Story would remain faithful to Jeffersonian principles. Within a short time, Story had become Marshall's strongest supporter, while expressing the worry that Jefferson's continuing influence "would destroy the government of his country."[2] In his thirty-four years as Chief Justice, John Marshall presided over more than 1,000 cases with fewer than a dozen dissents—surely a remarkable feat of judicial leadership.

Similarly, Earl Warren skillfully led the court in the desegregation cases, beginning with ***Brown v. Board of Education***, to render unanimous opinions, a factor that was crucial in giving those decisions legitimacy in the eyes of the public. When ***Brown*** was first argued while Warren's predecessor Fred Vinson was Chief Justice, the Court appeared to be strongly divided. As Felix Frankfurter would later write, "I have no doubt that if the ***Segregation*** cases had reached decision last Term there would have been four dissenters—Vinson, Reed, Jackson and Clark.…That would have been a catastrophe."[3] The Court reheard the case after Warren became Chief Justice. Its decision in 1954 was unanimous. The only differences between the two terms were the death of Vinson, the appointment of Earl Warren as Chief, and the interjection of Warren's compelling leadership into the Court's deliberations.[4]

While both Marshall and Warren may have been overlooked by leadership scholars, they and countless other members of the U.S. judiciary have contributed in many ways through their leadership to building both a strong judicial system and a democratic and prosperous society for the country. One of the factors that distinguish Marshall, Warren, and other chief judges from traditional corporate CEOs, military commanders, and many political officials, of course, is that as judicial chiefs they had no real or legal authority over the judges they were supposed to lead on their courts. Thus, in thinking about judicial leadership, one question that needs to be addressed is what is it that enabled Marshall, Warren, and other similarly placed Chiefs to lead other judges and what lessons about judicial leadership can we learn from them today. More broadly, at least four important questions are central to a consideration of judiciary leadership:

Footnotes

1. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 448 (Henry Holt 1996).
2. Michael J. Glennon, *The Case that Made the Court,* WOODROW WILSON Q., Summer 2003, at 20-28.
3. Quoted in BERNARD SCHWARTZ, SUPER CHIEF—EARL WARREN AND HIS SUPREME COURT 72 (New York University Press 1983).
4. Justice Frankfurter compared Warren's manner of presiding over the court with Toscanini leading an orchestra, while Justice Potter Stewart called him "the *leader* leader," saying of Warren: "he was an instinctive leader whom you respected and for whom you had affection and … as the presiding member of our conference he was just ideal." *Id.,* at 31.

1. What is the essence of effective judicial leadership? 2. What are the tasks of leadership that judges and other members of the judiciary are required to carry out? 3. What are the essential skills and qualities that judicial leaders must possess to perform those tasks? And 4. How may these skills and qualities be taught to and developed in members of the judiciary through judicial leadership education? The purpose of this article is to explore those questions.

Finding answers to these questions is significantly complicated by the great diversity of judicial systems among American states and the differing leadership roles played by key actors within those systems. The development of national judicial leadership educational programs and theories must somehow find commonalties among fifty states and a federal system whose judiciaries differ widely in fundamental ways. Chief justices, for example, can be elected to that position by the public or by their fellow justices. Some serve for life, others for two-year terms. Similarly, trial court presiding judges can be elected by the local bench or appointed by the chief justice or a state's Supreme Court. Most serve terms of one or two years, but some remain the presiding judge for a decade or more. Moreover, the role of the chief justice in some states is limited to leading a state's Supreme Court, while in other states the chief justice is seen as leading the judiciary.

In addition, the leadership challenges faced by presiding judges are complicated by the degree to which trial courts depend upon human and other resources not under the control of the judiciary. In some states, for example, court clerks are employees of an independently elected or appointed clerk of court responsible for keeping court records. Court security in most states is provided by sheriffs or police chiefs. Trial courts also can have supervisory responsibilities for services such as probation, public defenders, and other essential justice system functions. Senior administrators also play differing roles from state to state. Moreover, at both the state and trial court level, they have longer tenures in office than their judicial counterparts, a factor that may affect the extent to which initiatives of a chief justice or a presiding judge continue once they have stepped down from their leadership positions. The diverse nature of leadership roles and systems within state judiciaries thus raises fundamental questions as to how a course or a book on judicial leadership should treat such diversity.

THE DEFINITIONS AND DOMAINS OF JUDICIARY LEADERSHIP

The search for the meaning of leadership has become the modern alchemy of organizational management. Although everyone agrees that leadership is important, indeed vital, for the success of all organizations, a clear understanding of its nature has eluded scholars and practitioners, just as the means for turning lead into gold eluded medieval alchemists. In the search for the meaning of leadership during the last hundred years, scholars have developed and pursued a series of theories. One of the first of these was the "great person theory," sometimes called "trait theory," that sought to explain leadership by focusing on the personal characteristics of famous leaders and how they differed from people who were not leaders. Much of this work assumed that leaders had special personal talents denied ordinary mortals that enabled them to lead groups, organizations, and nations. The great person theory not only influenced organizational scholars but also seemed to animate scholarly histories, as well as folklore, that told the stories of famous national leaders from Alexander the Great to Nelson Mandela.

"What are the tasks of leadership that judges and other members of the judiciary are required to carry out?"

Eventually, trait theory would cause scholars to focus on what leaders actually do, prompting the development of a new scholarly orientation that concentrated on leadership style. Further study led to the realization that the ability of a person to lead effectively depended on the circumstances in which that person was called to lead since an individual with admirable theoretical leadership traits might succeed in one situation while failing in different circumstances. In short, the ability to lead was contingent on circumstances. Thus, scholars looked for the explanation of leadership in the situations that give rise to effective leadership, and less to the personal traits or the styles of the leaders concerned.[5] A person who is an effective leader in one situation, for example, as CEO of a multinational corporation, could prove to be a disaster in another situation, say, as president of a university.

More recent scholarship has sought to explain leadership in terms of the relationships that exist between leaders and their followers. For example, in his seminal study ***Leadership***, the eminent historian James MacGregor Burns relied on a relational theory of leadership in drawing a fundamental distinction between ***transactional leadership***, which focuses on leading others by mediating among their competing interests, and ***transformational leadership***, which leads people by changing their attitudes and beliefs.[6] This multiplicity of explanations and definitions of leadership has served to complicate the search for its essence. But while fashions of studying and interpreting leadership have changed over time, no one has yet seriously suggested that leadership study be abandoned as alchemy finally was.[7]

The word "leadership" expresses a complex and at the same time flexible concept that has allowed scholars and practitioners to define it in many ways. The English word "leader" is derived from the old English ***laedan***, which meant to show the way, to be ahead of—an expression that conjures up images of shepherds walking in front of their flocks so as to lead them to a particular destination. It also implies the notion of sheep willingly following a shepherd. In this respect, it is to be distinguished from the

5. WILLIAM A. WELSH, LEADERS AND ELITES (Holt Rinehart and Winston 1979).
6. JAMES MACGREGOR BURNS, LEADERSHIP (HarperCollins 1978).
7. For brief histories of leadership scholarship, see LEE G. BOLMAN & TERRENCE E. DEAL, REFRAMING ORGANIZATIONS—ARTISTRY, CHOICE, AND LEADERSHIP 337-369 (5th ed. 2013); Deanne den Hartog, *A Serious Topic for the Social Sciences,* EUR. BUS. F., Summer 2003, at 7; and Robert Goffee and Gareth Jones, *Why Should Anyone Be Led By You?,* HARV. BUS. REV., Sept.-Oct. 2000, at 63, 64.

"Leadership is not accidental, but a willed, deliberate activity."

idea of driving a herd of cattle from the rear by using force. The modern English word "leadership" also suggests the action of showing the way, of moving a group of people willingly toward an objective. Many languages, including French and Spanish, seem to have no precise equivalent for the English words "leader" or "leadership." As a result, the English words for these terms have found their way into those languages. So, French books and articles on politics and management often refer to "*le leader*," and French books have titles like "*Comment Trouver Le Leader en Vous"* ("How to Find the Leader in You") and "*Le Leader de Demain"* ("The Leader of Tomorrow"). In Spanish, the word *el lider*, which seems to have supplanted the more indigenous "*jefe,*" is also derived from English.

Leadership implies the existence of followers. To be a leader you need persons who will follow you. One person alone on a desert island could never be a leader. The arrival on that island of another survivor from a shipwreck creates the potential for leadership. Not only does leadership require the presence of other persons, it also requires that those persons be willing to follow the leader in an indicated direction.

Leadership, as we understand it today, is, of course, much more than merely showing the way. It also implies the ability to persuade or cause persons to whom the way is shown to move willingly in that direction. History is filled with prophets who have tried to show the way but have failed to move their potential flocks. We may revere their wisdom today and lament the ignorance of those who rejected them, but we cannot say they were leaders. They were not leaders precisely because no one would follow them. To be a leader, you must have the ability to cause other persons to move in the direction that you want them to go. Leadership is not accidental, but a willed, deliberate activity. The test of leadership is followership.

For purposes of this article, then, we may define leadership as "*the ability through communication to cause individuals to act willingly in a desired way to advance the interests of a group or organization."* The precise action desired of followers and the needed acts of leadership to achieve that action will vary according to the situation and the circumstances. As we will see, effective communication by the leader is a principal tool of leadership regardless of the environment in which that leader may function.

Traditionally, organizational leadership is seen as vested in a single individual. In many situations, however, teams, units, or in the case of courts "productive pairs"[8] may exercise some or all of an organization's leadership powers. Indeed, one of a leader's tasks may be to foster or create such leadership teams.

In thinking about judicial leadership, one can conceive of it as being exercised in three separate domains: 1) within the judicial system itself; 2) within the judicial system's interactions and relationships with other branches of government; and 3) within the community at large.

Leadership within the judicial system itself: In any society, the judicial system exists to carry out certain needed social functions and consists of actors who must perform a diverse set of designated actions and tasks to carry out those functions. Thus, Marshall and Warren led their Supreme Court colleagues, all of whom were individuals having their own independent and diverging wills and interests, to exercise the judicial function in a desired way that each Chief Justice believed would benefit the country and the Court. Conceptually, this domain of leadership may be divided into two sub-domains: 1) the jurisprudential sub-domain, which relates to the various judicial decisions made by courts, and 2) the administrative sub-domain, which relates to various other operations of the court system.

Leadership in the judicial system's interactions and relations with other branches of government: To perform its functions effectively, the judicial system needs to obtain resources, support, and cooperation from other branches of government. It usually befalls judicial leaders to secure these vital elements as part of their leadership roles. Exercising judicial leadership in this domain is greatly complicated by the fact that state and local court systems are increasingly battle grounds for seeking partisan advantage. Aa a result, the legislative and executive branches of government, alone or with the support of special interest groups, may seek to curb the authority of the judiciary. Judicial leaders therefore have the responsibility to protect courts from attacks on their judicial independence, a function requiring a special set of skills that many judges do not possess or are reluctant to exercise.

Leadership in the wider community. Because of their status, social positions, and abilities, judges are often called upon to play various leadership roles, formal and informal, within the communities in which they live. Sometimes, the subject of their leadership concerns the interests of the judiciary and sometimes it concerns broader social interests. One historic example of the latter situation was the appointment by President Johnson of Earl Warren to head what would become known as the "Warren Commission" to investigate the assassination of President John F. Kennedy. Less publicized but nonetheless important community activities for judges may include chairing civic committees investigating issues such as police brutality, the opioid crisis, and the treatment of undocumented persons. Important questions to address with respect to this leadership domain are the nature of the benefits and costs and the challenges and risks for members of the judiciary in assuming and playing these non-judicial leadership roles in their communities.

The same individual, for example, a chief justice, may be called upon to exercise leadership in all three of these domains; however, success in all three is complicated by the existence of significant differences among the three, particularly with respect to the persons to be led, the leadership goals to be pursued, and the institutional settings to be navigated. The existence of these

8. Center for Applied Research, Briefing Note: Productive Pairs (2010), at http://www.cfar.com/sites/default/files/resources/BN_Productive_Pairs.pdf

three domains also raises certain questions in designing a course on judicial leadership. First, which domain or domains should such a course focus on or emphasize? Second, what are the principal leadership challenges in each of the three domains and how should each be addressed? Third, what teaching techniques and materials are appropriate to train judges to operate successfully in each domain?

THE TASKS OF JUDICIAL LEADERSHIP

In conceptualizing leadership, one may borrow from the field of market economics. Like markets, leadership has both a supply side and a demand side. Most discussions of leadership look at the subject from the leader's perspective, from the viewpoint of individuals who are supposed to supply organizations with this elusive but supposedly essential quality. So, scholars of leadership tell us what leaders do and how they do it, and leaders themselves in their memoirs recount their triumphs and failures. They are looking at leadership primarily from "the supply side." While an understanding of leadership from the leader's perspective is undoubtedly illuminating, it is equally important to examine leadership from the follower's point of view, that is, from "the demand side"—to ask what is it that organizations need and want from their leaders. Indeed, that organizational perspective may the most be most important since the whole purpose of leadership is to serve the organization, not the leader.

DEMAND-SIDE LEADERSHIP

So, what is it that organizations need from their leaders? More specifically, with respect to judicial leadership: What specifically does the judiciary need and want from its leaders?

It is often said that people in organizations want and need to be led.[9] But what exactly do organizations and institutions, employees and associates expect, want, and need from their leaders? When a corporate vice president says that his company needs "better leadership," what exactly does he mean? When a professor complains of her university's "poor leadership," what precisely is she concerned about? When a museum trustee calls for more "effective museum leadership," what is it that she is seeking? When court administrators complain of judges' "inadequate leadership," what are they really talking about? As consumers of leadership, what is it that all these people feel they need but are not getting?

One way of trying to answer this question is to look at the tasks and functions that followers expect of their leaders. In a previous publication,[10] I identified seven daily tasks of leadership that leaders are expected to accomplish to serve their organizations. This article will use that seven-point framework in discussing the tasks of judicial leadership.

The first task is ***direction.*** Every organization, large and small, looks to its leader to articulate and help establish the goals of the organization. That does not mean that the leader simply declares his or her vision for the organization and then orders its members to follow it. The process of goal setting in a complex organization with a diverse group of followers and constituents is usually complicated, lengthy, and elaborate. For example, Goldman Sachs needed nearly a decade of discussions among its partners to decide to convert itself from a partnership to a publicly traded international corporation. Mere articulation of a vision for the future is not enough. Leaders must also convince their followers to accept it. Indeed, a leader's principal function may be to orchestrate a process whereby the followers can participate in defining and shaping the vision that is to guide the organization's future development. In the early days of the U.S. Supreme Court's existence, John Marshall persistently pointed the way to his colleagues to make the Court a strong and influential part of our country's nascent government. Marshall's belief in a strong central government for his new government was born, it is said, from his experience of being part of an ill-equipped and ill-fed Revolutionary army that suffered terribly through a miserable winter at Valley Forge, an experience that a stronger government, Marshall believed, would have prevented or ameliorated.

"Like markets, leadership has both a supply side and a demand side."

Organizations not only demand that leaders point the way but, like shepherds directing their flock, they also need to oversee the organization's movement in that direction. Many failures of corporate governance, such as the collapse of Enron in 2001 and the sub-prime mortgage crisis of 2007, which led to financial loss, civil suits, and even criminal charges, have been the result of failed oversight by corporate leaders. Effective performance of the task of direction includes oversight to assure that the organization avoids the legal, ethical, and financial traps that lie in wait as it moves forward, especially when it is moving onto terrain that it has never entered before.

The second everyday leadership skill is ***integration*****,** that is, community building. All organizations require their leaders to bring together diverse persons, each with individual wills, differing interests, and varied backgrounds, to work for the common interests of the organization. All leaders seek in varying degrees to integrate the persons they lead into a single organization, team, or community. Many persons, driven by their individual interests, resist efforts at integration, a fact that requires the application of innovative approaches to the process, including creative problem-solving negotiation. John Marshall sought to build that sense of community among the judges of the court. He persuaded them to live together in same boarding house in Washington, D.C., where they ate dinner together and discussed life and their cases over a bottle of claret, usually supplied by Marshall himself. Warren, a skilled and successful politician and former governor of California, also fostered a sense of community within the Court. When Felix Frankfurter compared Warren to Toscanini, the great conductor of the New York Philharmonic, he was not praising Warren's musical knowledge. Rather, he was

9. See, e.g., ROBERT H. ROSEN WITH PAUL BROWN, LEADING PEOPLE: THE EIGHT PROVEN PRINCIPLES FOR SUCCESS IN BUSINESS 7 (Penguin Books 1996).
10. JESWALD W. SALACUSE, LEADING LEADERS—HOW TO MANAGE SMART, TALENTED, RICH, AND POWERFUL PEOPLE (AMACOM 2006). *See also,* JESWALD W. SALACUSE, REAL LEADERS NEGOTIATE! GAINING, USING, AND KEEPING THE POWER TO LEAD THROUGH NEGOTIATION (Palgrave Macmillan 2017).

"A final task of leadership is *trust creation.*"

lauding Warren's skill at integrating the members of the Court into a cohesive community since it is the fundamental role of a conductor to integrate excellent individual musicians into a great orchestra.

The third leadership challenge is ***conflict management***. All organizations consist of persons with different and often competing interests, a factor that invariably results in conflict among its members. Individuals in the same organization may struggle over turf, resources, responsibilities, and policies. Indeed, most organizations, no matter how harmonious they appear on the surface, are rife with conflict. When an organization's members are unable to resolve their disputes, they usually look to their leaders to settle the matter. Leaders normally do so in one of two ways, by arbitration, in which they impose a solution on disputants, or by mediation, a process in which they, like Jimmy Carter at Camp David or George Mitchell in Northern Ireland, help the contending parties reach a negotiated settlement of their disagreement. Chief Justices and presiding judges must often mediate conflicts between their judicial colleagues. William Rehnquist, it is said, sometimes intervened in the occasional testy relationship between Sandra Day O'Connor and Antonin Scalia to foster the effective functioning of the Supreme Court. It is rumored that on one occasion he called Scalia and left a message on his voice mail: "Nino, you're pissing off Sandy. Stop it."

Education is the fourth everyday leadership task. Leaders educate, coach, guide, and advise the people they lead. Through that process, leaders give the necessary knowledge and skills that empower the persons led to carry out the jobs of the organization effectively. The traditional view is that leaders give orders to get things done in organizations. In fact, many modern leaders achieve their goals through advice and counsel. Generally, the more decentralized the organization and the more educated its members, the more important advice and education become as a tool of leadership. This is especially true when leading highly educated professionals such as judges who are often loath to seek help and quick to reject attempts to educate them.

The fifth daily skill of leadership is ***motivation***. Persons in an organization look to the leader to motivate them, encourage them, and strengthen them to do the right thing for the organization. But to find the effective incentives that will move people in productive ways, leaders may have to engage in a process of negotiation with them. For example, to retain a valued judicial colleague who is contemplating leaving the bench to return to the practice of law, a presiding judge will have to patiently probe to understand what interests are driving that colleague and how the judicial branch can satisfy those interests to avoid a departure. A presiding judge may have to engage in the same kind of exploration to motivate a judicial colleague who has developed a habit of recessing court early in the afternoon to adopt more reasonable hours of work.

Representation is the sixth daily leadership task. Leaders are constantly representing the organizations they lead, whether they are negotiating a labor contract or attending a reception given by a customer, persuading the company's board of directors to improve the bonus system, or seeking to arrange a merger with another corporation. In the case of the judiciary, the Chief Justice is often the judicial system's principal representative to the outside world in seeking the support needed from the other branches of government or the society at large to obtain the resources needed by the judiciary to function. Such representative acts may be formal, for example, making an annual speech on the State of the Judiciary or attendance at or participation in various official ceremonies, like the inauguration of a new governor, or substantive, such as meeting with legislative committees to negotiate the judiciary's share of the state budget. The task of representation has three basic functions that are vital to the life of the organization: 1) resource acquisition; 2) relationship management; and 3) image projection.

A chief justice or presiding judge may carry out these functions daily as he or she negotiates with the legislature over the court's budget, maintains constructive working relationships with legislative leaders, and constantly communicates to the public and politicians the judiciary's independence and commitment to the rule of law. Chief Justice John Roberts was carrying out an important task of judicial leadership in November 2018 when in response to a comment by President Trump that a ruling against his administration had been made by an "Obama judge," he stated: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[11]

A final task of leadership is ***trust creation*** or, more specifically, earning the trust of the persons led. Creating trust is a vital skill, and having the trust of persons you lead is an invaluable asset. Without it, leaders will find it difficult, if not impossible, to direct, integrate, resolve conflicts among, educate, motivate, or represent the persons in their organizations. In short, without trust, a leader cannot lead effectively. Creating and maintaining the trust of an organization's members, who are often skeptical of new initiatives, raises special challenges for its leader.

From the demand side, trust by followers in a leader is ultimately founded on followers' belief that their leader's actions will advance, or at least not injure, their interests. Therefore, leaders need to recognize that people trust them not because of the leader's charisma, vision, or charm but because of their individual calculations about their interests. Accordingly, to build trust, leaders should keep the following principles in mind: 1) Leaders need to work to understand the interests of the people they lead; 2) Trust building takes time, so be prepared to invest the necessary time in the process; 3) Leaders need to find ways to demonstrate that their interests are the same as their followers; 4) Trust building proceeds by increments, so effective leaders have a plan for a sequence of trust-building measures; 5) The provision of information and a stance of openness to the persons

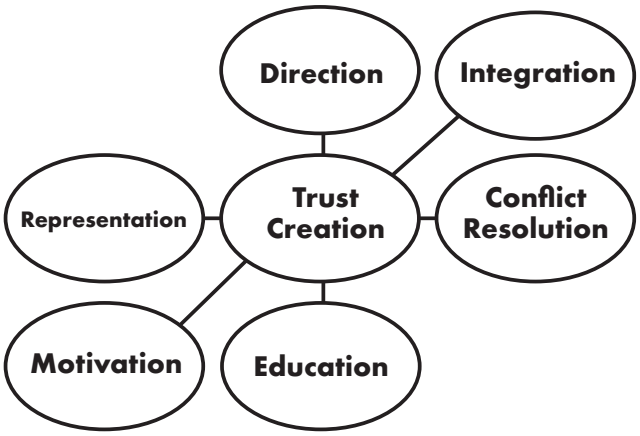
11. Pete Williams & Associated Press, *Chief Justice Roberts Slams Trump for Comment about "Obama Judge,"* NBC NEWS, Nov. 21, 2018, at https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-trump-comment-about-obama-n939016.

led are important building blocks of trust building; and 6) Trust building requires that leaders be consistent and predicable in their actions.

The seven tasks of leadership, while conceptually separate, are interrelated in practice. Helping a judicial organization find an agreed-upon direction may also facilitate its integration, since a common goal gives a sense of unity to its members. Similarly, arriving at a common agreement on organizational direction may first require a leader to engage in extensive education of its members about the external threats and opportunities that face the organization. All good leaders perform each of these tasks every day. No leader has the luxury of focusing on one to the exclusion of all others. Leaders must multitask constantly. If they don't, they may not stay leaders for long. The diagram below illustrates the interconnections among the seven tasks of leadership:

Few leaders do all seven tasks equally well. Some leaders perform certain of these tasks more effectively than others because of differences in natural abilities or personal preferences. An outgoing, gregarious chief justice, who in a previous life had been a politician, may spend more time on and be more effective in representing the judiciary to various outside constituencies than in mediating the internal conflicts among judicial colleagues that are paralyzing the court and keeping it from adopting a new management system. While resolving internal conflicts should be

7 Daily Tasks of Leadership



a matter of priority at this particular moment in the history of the court, the chief justice without the ability or the desire to engage in conflict resolution may find more satisfying, not to say easier, ways to exercise leadership by spending time working on what he or she considers "essential matters" of representation.

For both leaders and followers, it is therefore vital to understand the individual tasks of leadership in all their complexity so that leaders may deliver this vital commodity more effectively and followers may better evaluate and use what is being delivered.

IMPARTING THE SKILLS OF JUDICIAL LEADERSHIP: A SUGGESTED CURRICULUM FOR THE DEMAND SIDE

What, then, are the specific skills needed by persons to lead judiciaries effectively? More concretely, what skills should a training program on judicial leadership seek to impart to its participants? A curriculum on judicial leadership should consider the inclusion of at least the following four topics: 1) Communications; 2) Negotiation; 3) Dispute Resolution; and 4) Pedagogy.

"[A] close examination of what effective leaders do reveals that negotiation is an important tool of leadership within organizations."

COMMUNICATION

It will be recalled that this article adopted as a working definition that leadership is "*the ability through communication to cause individuals to act willingly in a desired way to advance the interests of a group or organization.*" Communication is an essential skill for any leader. Thus, a judicial leadership course might seek to impart basic communication skills to course participants. Leaders communicate with their followers in many ways, but one can basically divide leadership communications into two types: mass-produced and tailor-made. Mass-produced communications, like speeches at conventions, television appearances, memorandums to staff, and tweets, are designed to reach and move large numbers of persons at one time. Tailor-made communications, like those that happen in private meetings and telephone conversations, are shaped and directed at influencing specific individuals. Judges and judicial administrators, of course, must engage in both types.

NEGOTIATION

Many leaders, particularly in highly structured, hierarchical institutions such as the military and traditional manufacturing corporations, see little role for negotiation in leading the people in their organizations. For them, leadership is a matter of command and control to be achieved by the using their authority and "charisma." Certain leaders of state courts may also see their roles in similar terms. On the other hand, a close examination of what effective leaders do reveals that negotiation is an important tool of leadership within organizations. Certainly, Earl Warren applied that skill, honed through years of experience as a politician, to lead the Supreme Court during his tenure as Chief Justice. Courses on negotiation have become staples in professional education from Harvard Business School to West Point Military Academy. Such courses should also have a role in training judges to exercise leadership in the judiciary.

DISPUTE RESOLUTION

Related to negotiation is the skill of dispute resolution, the ability to facilitate the settlement of disputes and conflicts among other persons. While courts are increasingly resorting to mediation to resolve disputes among actual and potential litigants, the proposed course would consider the subject from the standpoint of judicial leadership. It might, for example, consider the role of the chief judge in mediating disagreement among colleagues on the court to arrive at decisions in cases. Earl Warren's leadership in achieving unanimous decisions in the desegregation cases relied significantly on his ability to mediate among the differing views of his Supreme Court colleagues. Indeed, the skills of mediation among persons of differing interests and perspectives is fundamental to the task of organizational integration.

PEDAGOGY

Effective leaders are good teachers. Unfortunately, many persons in leadership positions undervalue or fail to recognize the importance of their teaching roles. In my own experience in conducting executive training programs, I have found that the leadership task that participants were least drawn to among the seven has consistently been education, while at the same time acknowledging its crucial importance for the future of their organizations. The reason for this reluctance seems to be that the executives generally felt ill-prepared to deal meaningfully with the educational challenges of their organizations. Few law and business school programs, for example, explicitly teach their students, once they are in the workplace, how to educate their subordinates.

Any training program in judiciary leadership should include material on the basic techniques of educating the people they lead. Drawing on established pedagogical theories, frameworks and techniques, a course in judiciary leadership should first heighten the awareness and appreciation of participants' educational roles arising out of their leadership positions and then offer strategies and tactics for fulfilling those roles effectively.

CONCLUSION: A SUGGESTED FUTURE AGENDA FOR JUDICIARY LEADERSHIP EDUCATION

The purpose of this article has been to stimulate discussion on the nature of judiciary leadership and how it may be developed through education and training. It has sought to achieve that goal by raising important questions that designers of judiciary leadership courses should address. In view of the great diversity of judicial systems throughout the United States, this article has refrained from offering a detailed judiciary leadership curriculum applicable to all U.S. states and situations. Instead, it closes by suggesting the following agenda of questions that persons seeking to design judiciary-leadership-training programs might consider.

1. Who should be the audience for a program on judicial leadership?
2. What are the specific judicial leadership problems and challenges that such a course should address? To what extent are they specific to systems and situations or common to judicial systems in general?
3. What should be the specific goals of such a program?
4. What specific domains of leadership should be its focus?
5. How should a program on judicial leadership address the great diversity of leadership roles existing among different state judicial systems and within them?
6. What pedagogical methods should such a course employ?
7. What is the essence of effective judicial leadership?
8. What are the tasks of judicial leadership that the judicial system and society expects of judicial leaders?
9. What are the essential skills and qualities that judicial leaders must have?
10. How may these skills and qualities be taught and developed through an educational program?
11. What can such a program teach leaders about ways of maintaining judicial independence in times of strong political partisanship?
12. What are the risks and challenges that face judiciary members who assume positions of community leadership outside of the strict confines of the judiciary? How should a leadership course address those challenges?
13. What specifically does the judiciary want and need from its leaders?
14. Does the seven-point framework discussed earlier reflect accurately the tasks that judicial leaders must carry out in the specific state or locality? Would the application of this framework to the specific contexts of individual judiciaries help leaders to better understand and carry out their roles?
15. What specific skills are needed to carry out the tasks demanded of judicial leaders?
16. How should an educational program seek to inculcate such skills in program participants?

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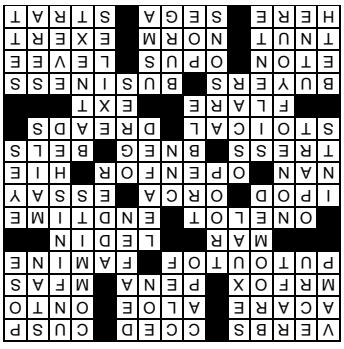
Answers to Crossword
from page 82



Review Essay

Connecting the Dots: The Nexus Between Leadership and Negotiation

Joshua N. Weiss

Jeswald Salacuse. *Real Leaders Negotiate: Gaining, Using, and Keeping the Power to Lead through Negotiation*. New York: Palgrave Macmillan, 2017. 235 pages. $40.99 (hard cover). ISBN: 113759114.

Uniting Two Fields

In his book *Real Leaders Negotiate: Gaining, Using, and Keeping the Power to Lead through Negotiation*, Jeswald Salacuse does something critically needed. He has taken two disparate, but deeply interconnected fields, negotiation and leadership, and united them in a way that illuminates the value of negotiation to leaders and of leadership to negotiators. With the notable exception of *The Manager as Negotiator* by David Lax and James Sebenius (1986), few books have examined this overlooked relationship in great detail until now.[1] Salacuse, a senior faculty member at the Fletcher School of Law and Diplomacy at Tufts University and author of such books as *The Global Negotiator, Leading Leaders,* and *Making Global Deals*, delves deeply into the key intersection between these two fields in this lucid and readable treatise.

Popular schools of leadership for years assumed that leaders did not need to negotiate – that they should, in fact, do the opposite of negotiating – by providing strong, even unyielding, direction. According to this traditional theory of leadership, negotiation was an indicator of weakness: if the leader was too open to other's opinions and perspectives, he or she did not possess the gumption to lead. Theories of leadership, however, have changed dramatically, with the ideal shifting from the strong authoritative leader to one with polished "soft" skills who can oversee many different types of

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10.1111/nejo.12224

organizational structures, delegate, manage, and convince people to follow her or him using persuasion and by communicating a clear and inspiring vision, not through coercion.

Real Leaders Negotiate begins by examining the meaning of leadership. Salacuse explores the role of the shepherd driving the flock as an analogy for how leadership evolved from authority and coercion. He then describes the evolution of dominant leadership theories over time, from emphasizing

- *traits*, the specific personality traits that separate leaders from non-leaders, to
- *situations*, the idea that leaders are made and shaped by the situations they find themselves in and must adapt to those to be effective, to
- *transactional theories* that conceptualize leadership interactions as pragmatic tools for achieving specific goals, and, finally, to
- *transformational theories* that advise leaders and followers to develop close relationships and enhance each other's levels of motivation.

Picking up on the transformational leadership notion, Salacuse argues that the real test of leadership is *followership*. To truly engage followers, leaders must persuade, influence, build trust, and cultivate mutual interest; in short, they must excel at all the skills of effective negotiation. He identifies the traits that negotiation and leadership have in common: they both rely on proficient communication and a focus on interests, induce some form of action, are process-oriented, and deeply involve issues of power. "The goal of both negotiation and leadership," he writes (12), "is to persuade other people to agree to and support an action that the negotiator or leader is seeking."

Salacuse structures the book around three broad concepts: leadership attainment, leadership action, and leadership preservation and loss. His examination of each of these concepts culminates with a set of easy-to-follow rules. For example, he lists "Rules for Negotiating Community," which include making the common interests of members apparent through meaningful activities, ensuring members know how to appreciate history, learning to understand cultural differences, focusing on the needed processes of communication, dealing directly with spoilers, and demonstrating by word and deed how you, as the leader, put the interests of the organization first.

Becoming a Leader

In the section focused on leadership attainment, he discusses the negotiations involved in securing a leadership position. Those who seek to acquire leadership positions, Salacuse argues, must be able to view and examine a situation from a "negotiation campaign" (see Lax and Sebenius 2011)

perspective – in other words, as a series of interconnected negotiations – and use points of leverage to achieve their desired leadership position. Salacuse deftly cites numerous examples, including public scenarios from companies such as Disney.

He also uses many of his own encounters, such as his negotiation to become dean of Southern Methodist University's (SMU) law school in 1979, to illuminate the intricacies of negotiation in such scenarios. He explains that he started at SMU as a visiting professor, a position quite removed from dean. But shortly after his arrival, the law school dean announced his resignation. A popular teacher, Salacuse was hired as a full-time faculty member after a few months, with the promise of consideration for a tenure track appointment. He watched prospective deans come and go but fail to impress the search committee, staying above the fray, watching, but not interjecting.

One day four faculty members came to his office and asked if he would be interested in the dean's position. He realized then that people had begun to see him as a potential leader. Although he had never really given being a dean any thought, he found himself intrigued by the possibility. He quickly shifted into strategic leadership and negotiation mode. Explaining his thinking at the time, he writes, "It is well to remember when you seek the leadership of any group or institution, you are also likely to encounter opposition that you never suspected existed for reasons you may never have guessed. As a result, when you set out on the road to leadership, you need to think about strategies for dealing with roadblocks and obstacles" (20).

Salacuse's question to the faculty members was simple: why me? He concluded from their responses that over time he had unwittingly built a coalition through his actions. As the process unfolded, his colleagues asked questions that conveyed to him what was important to the various constituencies he would lead, highlighting a fundamental negotiation and leadership lesson: listen to questions because they reveal the underlying needs and interests of the people who ask them.

After a lengthy process the choice came down to Salacuse, who had no experience as a dean, and a candidate with ten years' experience as a dean at a different university. The SMU president logically offered the job to the other candidate, but he was unable to take the position for a year, which opened the door for Salacuse. At this point, Salacuse began negotiating with the realization that SMU's best alternative to a negotiated agreement (BATNA) was quite poor. He subsequently negotiated his way to the position on terms favorable for both himself and the school.

Acting as a Leader

In the section devoted to leadership action, Salacuse examines negotiating everyday leadership issues *within* the organization, a task that he argues the

leadership literature has neglected. "The word 'negotiation,'" he writes (10), "usually conjures up images of high-stakes international diplomacy or multimillion-dollar business deals." On a daily basis, however, leaders confront endless scenarios that require negotiation skills and a negotiation mindset. When leaders view the challenges that arise inside and outside of their organizations as *opportunities* to negotiate, they approach them differently than when they see them as crises, or as "fires" they need to extinguish.

Salacuse then moves on and emphasizes the value of perspective-taking as the key to effective leadership and internal negotiation. He argues that leaders must view any situation from the perspective of their followers and ask themselves two questions: "Why should the people I am supposed to lead follow me? And what am I supposed to give this organization to help it succeed?" (55).

These questions pushed him to articulate the seven tasks of leadership, which form the core of any leadership effort. They are:

1. *Direction*: The leader must negotiate with others to establish the goals of the organization, which she must then articulate throughout the organization and then negotiate internally to make sure they are achieved.
2. *Integration*: The leader must bring diverse groups together to negotiate to achieve common goals.
3. *Conflict management*: The leader must be able to help members of the organization effectively resolve difficult disputes that may arise between them.
4. *Education*: Because they can't do everything themselves, leaders must educate and set others up for success.
5. *Motivation*: Motivating others requires negotiating with them in order to understand their interests.
6. *Representation*: The leader must also represent her organization and negotiate on its behalf.
7. *Trust creation*: Negotiation is a key to building and preserving trust.

To illustrate these seven tasks, Salacuse describes how, in 1991, famed investor Warren Buffett saved the venerable investment firm Salomon Brothers from **a** disastrous challenge initially created by unauthorized bids that violated U.S. Department of Treasury rules. The crisis was exacerbated when John Gutfreund, the company's chief executive at the time, tried to cover up the problem, which was eventually leaked to the press. Several governmental entities got involved and the United States Congress prepared to hold hearings on the matter. At this point, Buffett and a colleague stepped in to rescue the company and succeeded, according to Salacuse, by accomplishing all seven of the listed leadership tasks.

Buffett began as interim chairman after Gutfreund and others were forced to resign, with Deryck Maughan, Salomon's cohead of investment banking, taking over operations. They faced a daunting situation that required, according to Salacuse (62),

1. finding a new direction for the firm that would lead to its rehabilitation;
2. holding together . . . its staff, primarily to persuade its top employees to remain with the firm at a time when their careers seemed in jeopardy;
3. negotiating a host of conflicts with regulators, prosecutors, and creditors, to name just a few;
4. motivating a demoralized staff that felt threatened and embarrassed by the scandal;
5. planning and executing the re-education of the firm in a way that would change its culture and prevent a repetition of the regulatory violations that threatened its existence;
6. representing the firm to the government, regulators, creditors, clients, and the public in a way that would convince them that a new Salomon Brothers was emerging from the crisis; and probably most important,
7. regaining the trust of the firm's numerous vital constituencies in a business that is crucially dependent on trust.

Under extreme pressure, Buffett and Maughan accomplished these goals step by step, using their considerable negotiation skills to save the firm. Salacuse described their strategy as "full candor, transparency, and a willingness to apologize for the firm's errors" (63). In the end, it was neither Buffett's charisma nor commanding presence, according to Salacuse, but rather his skill and effectiveness as a negotiating leader that resurrected Salomon.

On a more cautionary note, Salacuse tells the story of Carly Fiorina's leadership of technology manufacturer Hewlett Packard (HP) from 1999 to 2005. As Salacuse writes, Fiorina had gained the trust of the board, which was a big reason why she was chosen for the job. When she came into her new role, however, a confluence of events combined with her early actions as chief executive officer (CEO) to set the stage for her downfall.

First, the board that voted to bring her on in 1999 changed rather dramatically rather quickly: one-third of the members were gone within eighteen months of her appointment, and the new members trusted her less. Second, Fiorina launched negotiations to acquire the company Compaq without the full support of the board – several members of the board as well as the family of one of HP's founders tried to stop the merger. The merger went through, but it was a costly "win" for Fiorina. Finally, Fiorina tried to change the culture of HP too quickly without first achieving some

agreement about the direction the company should take, eroding whatever trust the board still had in her. In short, she failed to accomplish several of the key leadership tasks Salacuse argues are needed for success.

To conclude this section of the book, Salacuse examines informal leadership, recounting numerous situations in which people who lacked formal power took on leadership roles out of necessity. He describes how this kind of leadership transpired and how these people relied on trust, a focus on interests (not positions), and most of all, persuasion, to get others to follow them.

Surviving as a Leader

In the final section of the book, on leadership preservation and loss, Salacuse turns his attention to how leaders use negotiation to preserve their power and, when necessary, yield it to others responsibly. He examines the challenges that leaders confront within themselves as well as the external complications that lie outside their control and are found in the contexts in which they operate.

Describing the internal challenges, Salacuse states (204): "The ability of a leader both to do the job effectively and to maintain the support of people necessary to gain and hold onto the leadership job is crucially dependent on the leader's mental and physical state." When the mental faculties of the candidate for leadership are called into question, he or she is unlikely to succeed. To emphasize his point, Salacuse cites numerous leaders who suffered from health problems (i.e., Franklin Roosevelt, Winston Churchill, and John F. Kennedy), but concealed them from the public for fear of looking weak and incapable of doing the job. He also explains that leaders, such as Salomon's CEO Gutfreund, are sometimes afraid to show what might be perceived as a weakness by admitting a mistake when doing so might actually help them extricate themselves from a crisis. The underlying psychological process, if not understood well, can severely limit a leader's effectiveness.

Describing the external dynamics that lie outside a leader's control, Salacuse writes (207): "A corporate leader's failure to deal effectively with technological changes in the market, to curtail employee criminal behavior, or to increase company profitability can be seen as indirect causes for the removal of a CEO." These and many more issues, including a loss of allies or changes in organizational structures, can expose the leader to extreme pressure. He offers a number of strategies for dealing with threats to leadership, including reaffirming and strengthening one's alliances, making new alliances, agreeing to yield to power later, stepping aside but not down, choosing a successor, sharing leadership, and dividing leadership.

At some point and for any number of reasons, the leader also may realize that she or he is no longer the right person for the job. Salacuse suggests that when leaders reach this conclusion they should strategically negotiate

away their role. Putting in place a successful transition may be one of the leader's most important final acts. To do this properly requires a tremendous amount of careful negotiation.

Consider this example (226):

> When the trustees of Tufts University decided that it was time for Jean Mayer to step down as president, he negotiated a departure that not only gave him the position of chancellor with responsibilities for unspecified areas of institutional development projects but would also give him an undefined role in selecting his successor. He energetically set about trying to find a successor that he might influence, if not control. For example, he sent the university's provost, Sol Gittleman, down the road from the Tufts campus to Harvard to persuade a Nobel Prize–winning scientist, a man with no experience in or desire for university administration, to become a candidate, seeing him as someone who, if chosen president, would certainly need the guidance of the experienced university chancellor.

With *Real Leaders Negotiate*, Jeswald Salacuse has contributed enormously to our understanding of the integral role that negotiation plays in effective leadership and vice versa. He has analyzed the role of negotiation at every rung on the leadership ladder, from becoming a leader to acting as a leader to preserving leadership and knowing when and how to leave that leadership role most effectively. Those who read this book will see much more clearly how negotiators lead and also find it impossible to imagine effective leadership without negotiation.

NOTE

1. Other books that wade into these realms and weave them together include *Negotiating in the Leadership Zone* by Ken Sylvester and *Shaping the Game: The New Leaders Guide to Effective Negotiating* by Michael Watkins.

REFERENCES

Lax, D., and J. K. Sebenius. 1986. *The manager as negotiator*. New York: Free Press.

— — —, and — — —. 2011. *From single deals to negotiation campaigns*. Harvard Business School NOM Unit Working Paper No. 12–046. Available at papers.ssrn.com/sol3/Papers.cfm?abstract_id=1974610.

Sylvester, K. 2016. *Negotiating in the leadership zone*. London: Elsevier.

Watkins, M. 2006. *Shaping the game: The new leaders guide to effective negotiating*. Boston: Harvard Business School Press.

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REAL LEADERS NEGOTIATE

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A FORGOTTEN HISTORY: TRIAL BY JURY AND THE AMERICAN REVOLUTION

Speaker: Beth A. White

Beth White is the executive director of the West Virginia Association for Justice. She worked with the association as its political and media consultant before being named executive director in 2005. Beth is also a published historian and lecturer, focusing on United States history from the colonial period through the Civil War era, and United States political history. For 18 years, she has studied, written, and lectured on the history of trial by jury and the 7th Amendment to state and national audiences. Beth is a graduate of West Virginia State University and earned her master's degree from Syracuse University.

"Inherent and Invaluable"
The Forgotten History of Trial by Jury

Beth A. White
West Virginia Association for Justice

"Trial by jury in the inherent and invaluable right of every British subject of these colonies."
1765 Declaration of Rights ◆ Stamp Act Congress

In the United States, there are two places where every American is supposed to be equal--at the ballot box and in the courtroom. That equality is a powerful right that should be championed by every one of us regardless of political affiliation. It is the very definition of a free people. Indeed, John Adams wrote, "Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."[1]

Unfortunately, equality at the ballot box is now questionable. While we still adhere to "one person, one vote," our political process is teeming with money. It is now cost prohibitive for many people to run for office, and candidates receive big money contributions. Following the U. S. Supreme Court's ruling in Citizens United, millions more are being spent in independent expenditures to influence elections. More often than not these are "dark money" campaigns whose donors are never disclosed to voters. After being elected to office, lawmakers come under the influence of special interest lobbyists.

That leaves our courtrooms and the right to trial by jury as the last citadel of equality, but that is threatened as well because corporations and other special interests want the same level of influence in America's courtrooms as they have with other elected officials. Under the 7th Amendment in the Bill of Rights, Americans have the right to trial by jury in civil cases. Corporate special interests want to eliminate that right. Why? As U. S. Sen. Sheldon Whitehouse (D-RI) noted, "Corporations hate juries. It is the one part of government that you can't buy."[2] As a result, the same special interests spending millions on the elections are also leading this effort to restrict access to our courts. It is being done two ways. First, Americans are often required to sign restrictive contracts with binding arbitration agreements that prohibit them from filing claims in the court system. Second, these special interests are behind state and federal efforts to pass so-called "tort reform" that limit what claims may be filed as well as restrict what juries are allowed to do.

Trial by jury is one of the most fundamental rights we have as Americans. Thomas Jefferson wrote, "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the

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[1] Letter from the Earl of Caledon to William Pym (Jan. 27, 1776), THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH THE LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS (Charles Francis Adams, ed. 1856).

[2] E. J. Dionne, *Whose Supreme Court Is It?* WASH. POST (June 28, 2010).

principles of its constitution."[3] It is a sentiment echoed by the late U. S. Supreme Court Chief Justice William Rehnquist. "The right to trial by jury in civil cases at common law is fundamental to our history and jurisprudence . . . the founders of our nation considered the right to trial by jury in civil cases an important bulwark against tyranny and corruption."[4]

It is imperative that the right to trial by jury be protected, but it is a right and history unknown to most--even though that history is the very bedrock of the United States of America. As Justice Hugo Black wrote in 1961, "[the denial of trial by jury] led first to the colonization of this country, later to the war that won its independence, and finally, to the Bill of Rights."[5]

The Trial That Sparked the American Revolution

Most Americans don't realize that it was a trial that first ignited the fire that became the American Revolution. John Peter Zenger was the publisher of the *New York Weekly Journal*. In 1734, the newspaper published a column that criticized Royal Governor William Crosby for removing Justice Lewis Morris from the bench. Outraged, Crosby had Zenger arrested and imprisoned for seditious libel. The charges against Zenger were heard in a criminal jury trial in 1735.

Zenger was represented by Andrew Hamilton of Philadelphia. Hamilton, one of the leading colonial lawyers at the time, appealed directly to the New York colonists who comprised Zenger's jury. "Jurymen are to see with their own eyes, hear with their own ears, and to make use of their own consciences and understandings, in judging the lives, liberties, or estates of their fellow subjects."[6] He argued that Zenger was not dissimilar to them and that they had the right to challenge their rulers. The jury found Zenger not guilty because he had printed the truth.

Zenger's case guaranteed freedom of the press--newspaper editors and publishers could no longer be found guilty for libel when they printed the truth. It was a landmark decision that is not only being studied in law schools, but also journalism schools still today. As a result of the decision, the colonial newspapers were free to openly criticize the British crown, and it was in the press that the revolutionary fervor grew in the decades following the *Zenger* decision. As Gouvernor Morris, who helped write the U. S. Constitution noted, "The trial of Zenger in 1735 was the germ of American Freedom, the morning star of liberty that subsequently revolutionized America."[7]

But why, in a society as oppressive as Crosby's New York, did Zenger have the opportunity to present his case in court and be tried by a jury of his peers? That answer goes back another 500 years to the signing of the Magna Carta by King John I and the reaffirmation of the rights enshrined there in the 1689 British Bill of Rights.

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[3]Thomas Jefferson, *Letter to Thomas Paine, July 11, 1789* Jefferson Papers, NAT'L ARCHIVES, available at https://founders.archives.gov/documents/Jefferson/01-15-02-0259

[4] Parklane Hosiery Co. Inc. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

[5] Cohen v. Hurley 366 U.S. 117 (1961) (Black, J., dissenting).

[6] ROBERT R. BELL, THE PHILADELPHIA LAWYER: A HISTORY, 1735 – 1945 33(1992) .

[7] Gouvernor Morris to Dr. John W. Francis. Morris was the grandson of Judge Lewis Morris. Cited in *Crown v. John Peter Zenger* Historical Society of the New York Courts. http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-crown-zenger.html.

The Magna Carta is the "great charter" that protected the civil liberties of English subjects and guaranteed the two pillars of Democratic society--representative government and trial by jury. Chapter 29 reads, "No man shall be taken, outlawed, banished or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." While Chapter 29 does not provide for jury trials explicitly, immediate and subsequent interpretation of the clause by British sovereigns, Parliament, the courts, and legal scholars such as Thomas Coke guaranteed the right to British subjects in both civil and criminal matters. "Over time, people in England came to think of trial by jury as a protection against royal tyranny and, over time, they began to associate it with Magna Carta . . . as early as the 14th century, the jury of presentment was coming to be thought of as part of the procedural guarantees of Chapter 29." [8]

The Origins of Trial by Jury

There is much debate among legal and British history scholars regarding when the concept that became "juries" first appeared in the countries that comprise Great Britain. Some argue that it arrived in Britain with the Norman Conquest in 1066. Still others point to earlier forms of trial by jury centuries before in Anglo-Saxon Britain and that these forms were influenced by invasions by the Romans, Norse and, ultimately, the Normans. In his 1921 journal article Robert von Moschizer wrote, "The exact time of the introduction of the jury trial into England is a question much discussed by historians, some of them contending that it was developed from laws brought over by William the Conqueror, while others point to certain evidence of its existence, in an embryo state, among the Anglo-Saxons prior to the Norman Conquest; and still others suggest even an earlier date."[9] In his Commentaries on the Laws of England, written 1765-1769, William Blackstone wrote that "[trial by jury] hath been used time out of mind in this nation, and seems to have been coeval with the first government thereof . . . certain it is that juries were in use amongst the earliest Saxon colonies in England."[10]

It is believed that the present system is one which represents the gradual evolution of ancient customs brought to Britain by invaders over the centuries. As the complexity of society there grew, so did its jury system. As William Forsyth noted in his 1875 *History of Trial by Jury*, the jury does not owe its existence to any preconceived idea of jurisprudence, but evolved gradually out of modes of trial in use among the Anglo-Saxons and Normans, both before and after the conquest.[11] Von Moschizer advanced this theory as well. "The most tenable theory is that the present system represents a gradual development of ancient customs, brought to England by the earliest invaders, upon which, most likely, the Norman influence wrought material changes, and that subsequent developments kept pace with the increasing complexity of society."[12]

One reason for the debate is the many forms juries took and their changing roles in early and medieval British history. John Proffatt wrote in *Treatise on Trial by Jury*, "Perhaps the reason opinion has been so divided here is that many would look for the establishment of the jury in the same form and character, with the same functions as it possesses at the present time, not realizing or perceiving that it was a growth

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[8] THOMAS J. MCSWEENEY, *Magna Carta and the Right to Trial by Jury*, in MAGNA CARTA AND THE RULE OF LAW 153 (Randy J. Holland ed., 2014)

[9] Robert Von Moschizer, *The Historic Origin of Trial by Jury*, 70 U. PA. L. REV. 1-2 (1921).

[10] J.E.R Stephens, *The Growth of Trial by Jury in England* 10 HARV. L. REV. 151 (1896).

[11] WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 5 (J. W. Parker ed., 2d ed.1852).

[12] Von Moschizer, *supra* note 9, at 5.

of several centuries from its first introduction in a rudimentary form, until it attained its present form and development . . . It is in vain to look for such a settled procedure at that early day, in that rude age . . . ."[13]

It should also be noted that trial by jury was not the only method of trial available in early and medieval Britain—even after Magna Carta. Trial by oath, or compurgation, existed for centuries. The accused would swear, as would witnesses for the accused, that the individual was innocent or not liable. Compurgation means to "thoroughly cleanse or excuse." Trial by ordeal was used frequently, particularly in criminal cases. One of the most prevalent methods involved being bound and tossed into water blessed by a cleric. If the person sank, he or she was innocent since the "holy water" accepted the body. If they floated, they were guilty. Other methods included dipping an arm into boiling water or carrying hot irons. These and other methods involved clerics as well, under the assumption that God would intervene and protect the innocent. After the arrival of the Normans in 1066, there was also trial by battle. The parties involved would duel, and the winner would be proclaimed to be right. This method would continue in Britain until 1818, when it was finally abolished.

The idea of a group of persons brought together to render a decision on a question of importance goes back millennia. Beginning around 2000 B.C., ancient Egyptians adjudicated matters through Kenbet. It was comprised of eight men, four from each side of the Nile. In the 6th century B.C., Greece developed the Dikastes or Dikasteries--courts of justice. Each year 10 panels, with 500 citizens each, were selected from 6,000 citizens. A magistrate presented questions of law and his answers to each. This was followed by statements of those involved and their witnesses. The Dikastes would then consider the information presented and determine if the magistrate's decision was correct. The Dikastes were the ultimate judges of both facts and law. The Greek system evolved in Rome's Comitia (Assembly), also known as Judices, by the 4th century B.C. The Comitia would delegate criminal matters to a select group of members who would conduct a proceeding *in judicio*--court of justice. "They employed a formal system of pleading, to determine the issues for trial, and, in a proceeding *in jure*, a magistrate defined in writing the disputed points, referring them for trial . . . to a lay judge or judges (judices)" In this system, there was no officer, i.e. judge, who oversaw the proceedings and acted separately from the jury. In each, the citizen panel served as both judge and jury. Some believe that it was the Roman Comitia system that was most likely the first form of juries in Britain, with it arriving on England's shores with the Roman Conquest.[14]

Norse invaders brought similar trial by jury systems with them to Britain, particularly to Scotland. "Norway had a judicial body called 'laugrettomadr' meaning 'law-amendment-men,' the designation being derived from the circumstance that they were judges of both law and fact." Similar systems also existed in Sweden and Denmark. It has been argued that the Norse models also influenced trial by jury and its evolution in Normandy.[15] Others point to even earlier origins, arguing that the system developed naturally among the ancient people in Britain as it had in other European countries and elsewhere. William Blackstone, the great historian of British common law, wrote, "Some authors have endeavored to trace the origin of juries up as high as the Britons themselves, the first inhabitants of our island, but certain it is that there were in use among the earliest Saxon colonies, their institutions being ascribed by Bishop Nicholson to [Oden] himself, their great legislator and captain."[16]

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[13] *Id.* at 3.

[14] *Id.* at 5 - 6.

[15] *Id.* at 8 - 9.

[16] 2 WILLIAM BLACKSTONE, COMMENTARIES 152 *349 - 350
http://avalon.law.yale.edu/18th_century/blackstone_bk3ch23.asp

The Anglo-Saxon kings used various legal procedures that mirrored juries beginning in the 6th century. Called "inquests," the system used 12 knights in the local area to provide information in disputes over who owned property or what crimes had been committed. By the late 800s, under the leadership of Alfred the Great, inquests became the norm throughout most of England. As in the earlier forms, the citizen panel continued to serve as both judge and jury.

On the European continent, the Frankish Inquest was developed in 829 A.D. by Louis the Pious, son of Charlemagne. It was a "jury of administrative inquiry," and through it royal rights were determined by twelve of the "best and most credible men" in the locality. The Frankish Inquest, influenced by Norse methods of trial by jury in Normandy, arrived in Britain with William the Conqueror in 1066. The English word "juror" comes from the Old French word "jurer," which means to swear. Blackstone considered the Frankish Inquest as the start of the modern jury system in Britain, but there was still no distinction between judge and jury. After the Conqueror crowned himself William I, he became the first British king to appoint judges. As representatives of the Crown, they would ride circuits and oversee the trials even though questions of both fact and guilt or liability were determined by the juries.

Both civil and criminal jury systems evolved significantly under King Henry II, who ruled 1154 - 1189. There were four important changes. First, the systems moved from their earlier advisory role to one where jurors were finders of fact. This was possible due to the second change--significant changes in the evidence, testimony and other proof that could be presented. Third, an independent court administrator who was appointed by the king, oversaw the trials and was separate from the reviewing body. Each was responsible for traveling a circuit, and courts were convened when he was in the county. Finally, the new courts protected laymen from being charged in ecclesiastical courts by the church on untrustworthy evidence. Both historians and legal scholars point to the Henry II's reign as the beginning of the common law jury.

Under the 1164 Constitutions of Clarendon, new legal actions were developed to resolve disputes over land and inheritances. Twelve "free and lawful" men of the local hundred (the country was divided into hundreds, which each comprised of approximately 100 estates) and four from the local village comprised the jury. They assembled and, under oath, swore to who was the true property owner or heir. While these juries were still self-informing--they used their existing knowledge of the facts--they considered additional evidence presented to them.

In 1164 the Assize Utrum introduced a standard form. Subjects could purchase a writ or command in the form, with the local sheriff or clerk filling in the necessary information. It also ordered the sheriff to summon "twelve free and lawful men of the vill" to hear individual claims. Both the standard form writ and the use of juries became the basic elements of the numerous reforms introduced during Henry II's reign. Thomas McSweeney wrote that "by introducing the jury—the twelve free and lawful men who were commanded to come hear the case—into the Assize Utrum, the jury too became a mainstay of English law."

In 1166, the Assize of Clarendon established what was then known as the presenting jury, the forerunner of today's grand jury. It required twelve summoned jury members to report under oath whether they knew of crimes being committed in the area. As with the civil system, the jurors presented what they knew instead of reviewing presented evidence. If the presenting jury determined a person had committed a crime, that individual would then stand trial. While there is evidence that petit juries were used in criminal cases as early as the 11th century, they were the exception. In the majority of cases, the accused

faced trial by ordeal. This changed under the Assize of Clarendon. The subsequent Grand Assize in 1179 also allowed an individual facing trial by battle to elect to have trial by jury rather than fight the duel.[17]

The use of trial by jury in civil cases was well-established and the norm by 1215 when Magna Carta was signed. The success of subsequent laws governing trial by jury in civil disputes resulted in Chapter 18 of the document, which guaranteed that circuit courts would convene in each county several times per year to adjudicate disputes. This was not true for criminal cases. While Chapter 29 protects the right to trial by jury, it was still limited for criminal cases at the time the document was signed. That changed soon after.

In 1215, the church began to review its role in trial by ordeal. Canon 18 of the Fourth Latern Council issued that year prohibited the participation of clerics in the practice. Without the clergy's involvement, trial by ordeal was no longer valid. Countries, including Britain, had to develop alternatives. On the continent, this grew into what became the Inquisition, which limited the rights of the accused and restricted civil liberties. In sharp contrast, Britain chose to adapt its existing trial by jury system. Those accused of crimes faced two juries--first, the larger, presenting jury (later known as the grand jury) and then the smaller, petit or trial jury. By 1221, trial by jury became the standard for trying felons in the royal courts.[18]

Both the civil and criminal jury systems evolved further in the 14th century as juries moved away from being self-informing to one where juries heard and weighed evidence presented at trial. A statute passed in 1351 confirmed that Chapter 29 of the Magna Carta guaranteed the right to trial by jury--"from henceforth none shall be taken by petition or suggestion made to our lord the King, or to his counsel, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deed be done, or by process made by writ original at the common law." The 1354 statute amended the guarantee of Chapter 29, adding that "no man, of whatever estate of condition he may be, shall be put out of his land or tenements, nor be taken or imprisoned, or disinherited, without being brought to answer by due process of the law." If further specified that "law of the land" meant trial by jury.[19]

The British Bill of Rights

Unfortunately for the British people, their right to trial by jury began to break down in the 16th century. King Henry VIII declared himself supreme ruler of Great Britain, and a central part of his plan to retain that ultimate power was the suppression and intimidation of the courts. He utilized the Star Chamber, which had evolved from the King's Council during his father's reign. Initially instituted as a special court for those too powerful to be held accountable in the country's common and civil courts, the Star Chamber became a political weapon to bring actions against those who challenged the crown. Its court sessions were held in secret, with no indictments, no juries, no witnesses and no appeals. Often individuals were charged, convicted and sentenced without ever being told of their crimes. In its 1975 opinion in *Farretta v. California*, the U. S. Supreme Court wrote, "The Star Chamber has, for centuries, symbolized disregard of basic individual rights."[20]

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[17] McSweeney, *supra* note 8, at 139-146.

[18] *Id.* at 149-151.

[19] *Id.* at 154-155.

[20] Farretta v. California, 422 U.S. 806 (1975).

The Star Chamber continued under the Stuart kings and queens into the 17th century. Although the English Civil War overthrew the monarchy in 1649, the abuses of the Star Chamber and other limits on trial by jury continued under Oliver Cromwell. After Cromwell died in 1658, British Parliament restored the monarchy, and Charles II was crowned king in 1660. The truce between the crown and Parliament was short lived. Charles II suspended the laws passed by Parliament and dissolved the body repeatedly when it convened, and further infringed on the liberties guaranteed in the Magna Carta.

Charles II died in 1685 without producing an heir, and Catholic James II ascended to the throne. After James and his second wife, Mary of Modena, gave birth to a son, Protestant members of Parliament feared that Great Britain would again become a Catholic monarchy beholden to Rome. In the Glorious Revolution of 1688, the Protestants overthrew James II with the aid of William of Orange of the Netherlands, who was married to James' Protestant daughter Mary. Parliament offered the British throne to William and Mary to rule jointly as William III and Mary II, but, after nearly 200 years of abuses, wanted assurance that the rights guaranteed to them in the Magna Carta--including trial by jury--would not be taken from them again. Before William and Mary could be crowned, they had to sign the British Bill of Rights. It was signed in 1689, and they ascended to the throne.

The American Colonial Era

In the 1600s British subjects, whose rights were threatened at home, sailed for America. As Roger Roots noted, "the British Crown's various efforts to deprive British subjects' right to jury trial between the fifteenth and seventeenth centuries may even have caused the colonization of North America by embittered Englishmen during that period."[21] The First Charter of Virginia guaranteed to the colonists and their posterity all of the "liberties, franchises and immunities" of the British subjects, including trial by jury. The Massachusetts Body of Liberties, enacted December 10, 1641, was the first colonial charter to expressly guarantee the right to trial by jury in both civil and criminal cases.[22]

Other colonies followed suit. Among the subsequent charters was William Penn's 1676 Fundamental Laws of West New Jersey. After his arrests and trials in Britain because of his Quaker faith and preaching, Penn knew firsthand about the importance of protecting the right to trial by jury. Indeed, it was a criminal case against Penn that led to the landmark *Bushell* decision. Jurors, including William Bushell, refused to convict Penn of all charges even after ordered to do so by the judge. The jurors were fined and imprisoned. Bushell petitioned the Court of Common Pleas for a writ of *habeas corpus*. In its opinion the Court wrote, "The jury must be independently and indisputably responsible for its verdict free from any threats of the court."[23] The *Bushell* decision ensured the independence of juries. In his charter for West New Jersey, Penn wrote, "No Proprietor, freeholder or inhabitant of the said Province of West New Jersey, shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises, upon any account whatsoever, without a due tryal, and Judgment passed by twelve good and lawful men of his neighborhood first had."[24]

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[21] Roger Roots, "The Rise and Fall of the American Jury." 8 SETON HALL CIR. REV. 1-3 (2011)

[22] MASSACHUSETTS BODY OF LIBERTIES (1641) available at https://history.hanover.edu/texts/masslib.html

[23] Case of the Imprisonment of Edward Bushell, for alleged Misconduct at a Juryman: 22 Charles II A.D. 1670 [Vaughan's Reports, 135]. http://www.constitution.org/trials/bushell/bushell.htm

[24] CHARTER OR FUNDAMENTAL LAWS OF WEST NEW JERSEY, AGREED UPON - 1676, Chapter XVII (1676), available at http://avalon.law.yale.edu/17th_century/nj05.asp

With right to trial by jury enshrined in the colonial charters and reaffirmed for British subjects in the 1689 Bill of Rights, John Peter Zenger was tried before a jury of his peers in New York and found not guilty.

The *Zenger* decision was not the only major challenge to British authority in the decades prior to the American Revolution. American juries also refused to convict colonists who were charged for violating the British Navigation Acts of 1651. The Navigation Acts were a series of laws to restrict both trade and which ships could be used to ship goods within the British Empire, including to and from the colonies. Colonials were required to export raw materials and products to Britain and other British territories using only British ships; colonial ships could not be used. Likewise, goods from Britain could be shipped to the colonies only on British ships. The Acts also prohibited colonies from trading directly with foreign countries. This ensured that Britain would continue to profit substantially from colonial trade.

While most colonists followed the law outlined in the Navigation Acts for nearly 80 years, by the 18th century American business owners and sea captains soon challenge the acts by using their own colonial ships. They also began trading with foreign countries and territories directly. The number of colonials who violated the law increased substantially after the passage of the Molasses Act for 1733. Extensive smuggling ensued. When caught by British authorities, the colonials were arrested and tried in American colonial courts for violating the acts. Colonial juries, which did not fear judicial retribution thanks to *Bushell*, refused to convict and nullified these laws.

As a result, the Crown began denying colonials their right to trial by jury. In an attempt to limit challenges to British authority and quell calls for American independence, Britain and its colonial governors set up special courts in several colonies that did not use juries. Colonials no longer had the right to be tried by a jury of their peers--and it became a focal point for revolutionaries.
In 1751, the South Carolina General Assembly declared that "We are so firmly of the opinion that any person who shall endeavor to deprive us of so glorious a privilege as trials by jury is an enemy to the people of this province."[25]

This reached a fevered point with the Stamp Act in 1765. The act was intended to increase Great Britain's wealth and replenish its coffers after the Seven Years War at the expense of the colonies and American businessmen. Parliament believed that it was justified since Britain had also borne the cost of the French and Indian War in North America. The Act was a direct tax on colonists that required all printed materials to be produced on paper embossed with a revenue stamp. It affected everything from legal documents to newspapers to playing cards. It also eliminated jury trials for those arrested for violating the act. British admiralty courts, where there was a judge and no jury, were given jurisdiction.
Opposition was immediate. John Adams wrote, "[T]he most grievous innovation of all is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there."[26] Colonists met in New York City in October 1765 as the Stamp Act Congress to oppose the act and draft a formal response to Parliament. While remembered more for "taxation without representation, that Congress also wrote that "trial by jury is the inherent and invaluable right of every British subject in these colonies."[27] The Stamp Act was repealed in March 1766.

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[25] SOUTH CAROLINA JURY TRIAL FOUNDATION, A HISTORICAL NOTE ON TRIAL BY JURY (1991).

[26] JACK N. RACKROVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 303 (1996).

[27] RESOLUTIONS OF THE STAMP ACT CONGRESS, Oct. 19, 1765,http://avalon.law.yale.edu/18th_century/resolu65.asp

The Period of Revolution

Revolutionary fervor grew, and Britain attempted to quash it by denying colonials the rights guaranteed in the British Bill of Rights. Efforts again included limiting trial by jury. In 1774, Parliament passed several laws that were later identified as the "Intolerable Acts." Among them were acts that eliminated existing colonial laws like the Massachusetts Jury Selection Law that provided jury selection procedures. As a result, jury selection was taken from colonials and handed to the royal judges. The Court could manipulate colonial juries, including stacking them with Tories, American colonists who supported the Crown and would convict those who violated the King's laws.[28]

In 1774 the First Continental Congress assembled in Philadelphia. The Congress resolved that the American colonists were entitled to "the great and estimable privilege of being tried by a jury of their peers in the vicinage."[29] The Congress also authored the Bill of Rights Letters to the British and the Colonists, an open letter to the people both in America and Great Britain. Believed to be written for the Congress by John Jay, who would later become the first chief justice of the U. S. Supreme Court, it stated, "Know then that we claim all the benefits secured to the subject by the English Constitution, and particularly the inestimable right of trial by jury."[30]

In 1775, it became a focal point of the American Revolution. In the Declaration of Causes and Necessity of Taking Up Arms, the Continental Congress cited the denial of "the accustomed and inestimable privilege of trial by jury, in cases of both life and property." In 1776, in our Declaration of Independence, the charges against King George III included, "Depriving us in many cases, the benefits of trial by jury." With that document, America's founding fathers made trial by jury a right for which they pledged "[their] lives, [their] fortunes, and [their] sacred honor."

After the Declaration of Independence was signed, each colony had to write a new state constitution. These constitutions were based on the principles and rights outlined in the Magna Carta and the British Bill of Rights, as well as the interpretation of British common law by jurists such as Thomas Coke and William Blackstone. In his *Commentaries on the Laws of England*, Blackstone wrote, "The trial by jury ever has been, and I trust ever will be, looked upon as the glory of English law," and he called trial by jury the "bulwark of our liberties."[31] The leaders of the new United States of America viewed trial by jury, including trial by jury in civil cases, as a fundamental right that must be preserved in their state constitutions. Indeed, trial by jury was the only right guaranteed in all 13 new constitutions. This fact was cited by Justice Rehnquist in his *Parklane* dissent. "After war had broken out, all of the 13 newly formed States restored the institution of civil jury trial to its prior prominence; 10 expressly guaranteed the right in their state constitutions and the three others recognized it by statute or by common practice.

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[28] GREAT BRITAIN: PARLIAMENT. 1774 MASSACHUSETTS GOVERNMENT ACT (May 20, 1774), http://avalon.law.yale.edu/18th_century/mass_gov_act.asp

[29] DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (Oct. 14, 1774), http://avalon.law.yale.edu/18th_century/resolves.asp

[30] FIRST CONTINENTAL CONGRESS. ADDRESS TO THE PEOPLE OF GREAT BRITAIN (Oct. 21, 1774), https://en.wikisource.org/wiki/Address_to_the_People_of_Great_Britain

[31] 2 BLACKSTONE, COMMENTARIES, at *379.

Indeed, "'the right to trial by jury was probably the only one universally secured by the first American state constitutions.'"[32]

In his June 1776 Virginia Declaration of Rights, George Mason wrote that "in all capital or criminal prosecutions a man has a right . . . to a speedy trial by an impartial jury of twelve men in his vicinage." He preserved the right in the Virginia constitution he wrote later that year. Section 11 of the Bill of Rights of the Virginia Constitution reads, "[I]n controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred." The Constitution of North Carolina, approved December 14, 1776, states, "[I]n all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and invaluable." The New York State Constitution, drafted by John Jay, Robert Livingston and Gouvernor Morris and approved April 20, 1777, reads, "And this convention doth further ordain, determine and declare, in name and by authority of the people of this state, that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever." Similar language was used in all the other state constitutions as well as the charter for the Northwest Territories."[33]

The Constitution Controversy

After our victory in the American Revolution, the United States' first constitution, the Articles of Confederation, was deemed inadequate for the new nation. A convention was called in Philadelphia in 1787 to draft a new one.

After months of heated debate, a draft was presented to the convention on September 12. The draft allowed trial by jury in criminal cases, but not in civil cases. Elbridge Gerry of Massachusetts cited the omission. "The jury is adapted to the investigation of the truth beyond any other system the world can produce. A tribunal without juries would be a Star Chamber in civil cases." Gerry's position was affirmed and seconded by George Mason, who argued that the document needed a Bill of Rights to guarantee both freedom of the press and trial by jury. Delegates attempted to amend the constitution to include jury trials in civil cases. Opponents to the change argued that it was unnecessary since the right was preserved in the state constitutions. The amendment failed on September 15. The new constitution was signed on September 17, 1787, but it had to be ratified by the states.[34]

The document's failure to include trial by jury in civil cases nearly led to its defeat. Opposition to the proposed constitution organized quickly. "It [was] clear that even before the delegates had left Philadelphia, plans were underway to attack the proposed Constitution on the ground that it failed to contain a guarantee of civil jury trial in the new federal courts.[35]

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[32] LEONARD WILLIAMS LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960) *cited in* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

[33] Copies of the original state constitutions are available at *The Original State Constitutions,* WORLDSERVICE.ORG, http://www.wordservice.org/State%20Constitutions/usa1000.htm (last visited May 11, 2017)

[34] THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587, 634, 640 (Max Farrand ed. 1787).

[35] ROBERT A. RUTLAND, GEORGE MASON: RELUCTANT STATESMAN 91 (LSU Press 1961). 91 *cited* in *Parklane* 439 U.S. 322 (Rehnquist, J., dissenting)

As the states debated ratification, the political leaders split into two groups--the Federalists and the Anti-Federalists. The Federalists, led by men like Alexander Hamilton and James Madison, championed a strong, centralized government. The Anti-Federalists, whose members included George Mason, Patrick Henry and Samuel Adams, feared that a strong national government would overpower the rights of the states and citizens and advocated for a Bill of Rights. Despite their philosophical differences on many issues, there was one area on which they agreed--the right to trial by jury.

Hamilton did not include trial by jury in civil cases in the U. S. Constitution because he believed that existing state statutory and common law varied too greatly from one to the next to be included in the federal constitution. As outlined in Federalist Paper No. 83, the longest of the Federalist papers, Hamilton argued that the federal constitution did not abolish the right and that drafters believed that it would be better defined in statute by the individual states. Despite this difference of opinion with the Anti-Federalists, he wrote, "The friends and adversaries of the plan of the Convention, if they agree on nothing else, concur at least in the value they set upon trial by jury; or if there is any difference between them in consists in this: the former regard it as a safeguard of liberty; the latter represent it as the very palladium of free government."[36] Hamilton's sentiments were echoed by other Federalists like Pennsylvania lawyer John Dickenson who wrote, "Trial by jury is the cornerstone of our liberty. It is our birthright; who is in opposition to the genius of America shall dare to attempt its subversion?" Madison stated that "trial by jury is essential to secure the liberty of the people as any one of the pre-existent rights of nature."

Likewise, the Anti-Federalists supported trial by jury as fervently as Hamilton and the Federalists. Patrick Henry wrote, "Trial by jury is the best appendage of freedom. I hope that we shall never be induced to part with that excellent mode of trial.[37] Fellow Virginian Richard Henry Lee stated, "The right to trial by jury is a fundamental right of a free and enlightened people and an essential part of free government." Lee also stressed the importance of jury trials for both civil and criminal cases, writing, "Trial by jury in civil cases and trial by jury in criminal cases stand on the same footing: they are the common rights of Americans."

The Bill of Rights

While five states ratified the United States Constitution quickly, others--led by Massachusetts and Virginia--refused to ratify it unless the document was amended to include a Bill of Rights. John Adams and John Hancock brokered the Massachusetts Compromise in February 1788. Under the compromise the state delegates approved the constitution, but the state would lobby Congress to amend the document if it became law. Other states followed Massachusetts' lead and passed the document with provisions that it be amended to include a Bill of Rights.

Amendments guaranteeing the right to trial by jury in both criminal and civil cases was central to the proposed Bill of Rights the states wanted. As Roger Roots noted, "'Juries were at the heart of the Bill of Rights' in 1791. Indeed, as Yale Law Professor Akhil Amar recounts, the entire debate at the Philadelphia convention of the necessity of a bill of rights 'was triggered when George Mason [mentioned] . . . that no provision was yet made for juries in civil cases.' Jury trial was so important to the ratification of the Constitution that five of six states that advanced amendments during their ratifying conventions included two or more jury-related proposals."[38]

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[36] THE FEDERALIST NO. 48 (Alexander Hamilton) http://avalon.law.yale.edu/18th_century/fed83.asp.

[37] JONATHAN ELLIOT, ELLIOT'S DEBATES 324, 544 (1941)

[38] Roots, *supra* note 21, at 2.

The Constitution was ratified and became law on March 4, 1789.

After the first United States Congress was seated at Federal Hall in New York City, its members began work on the Bill of Rights. James Madison, who headed the Virginia delegation, drafted the initial legislation. Based largely on George Mason's 1776 Virginia Bill of Rights, it outlined the first ten amendments to the Constitution. The proposed language for the amendment guaranteeing trial by jury in civil cases read, "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."[39]

The draft Bill of Rights was passed by Congress on September 25, 1789. On December 15, 1791, Virginia became the eleventh state to ratify the constitutional amendments, and the Bill of Rights became law.

In the Bill of Rights, the 1st Amendment guarantees, among other liberties, freedom of the press --the spark that ignited the American Revolution with the trial of John Peter Zenger. The 6th Amendment outlines the right to a speedy, impartial jury trial in criminal cases--the right which ensured that Zenger had a fair trial in front of a jury of his peers. The 7th Amendment preserves the right to jury trial in civil cases and reads: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, according to the rules of common law."

Conclusion

Trial by jury in civil cases is central to American democracy and the rights of the American people. In his 1833 *Commentaries on the Constitution*, U. S. Supreme Court Justice Joseph Story wrote, "The inestimable privilege of trial by jury in civil cases is conceded by all to be essential to political and civil liberty."[40] That opinion was echoed by noted by French political scientist and historian Alexis de Tocqueville in *Democracy in Action*: "The civil jury is the most effective form of sovereignty of the people. It defies the aggressions of time and man. During the 16th century, the civil jury did in reality save the liberties of England."

The 7th Amendment is of paramount importance to the rights and liberties we enjoy as Americans, and are a critical part of Democratic government. The 7th Amendment guarantees the rights of average citizens to challenge the most wealthy, the most powerful and the government itself in our courtrooms and have equal standing. It can even be argued that the Bill of Rights and the additional rights enshrined there exist largely due to the fact that the right to trial by jury in civil cases was excluded from the original draft U. S. Constitution. It is a tremendous role for both the amendment and its history that have been largely forgotten in 21st century America.

It is the responsibility of every American to protect his or her 7th Amendment right to trial by jury. As U. S. Supreme Court Justice Hugo Black wrote in 1939, "It is essential that the right of trial by jury be scrupulously safeguarded as the bulwark of civil liberty. Our duty to preserve the 7th Amendment is a matter of high constitutional importance."

Beth A. White is the executive director of the West Virginia Association for Justice. For more than a decade, she has studied and written on the history of trial by jury and the Seventh Amendment, lecturing on the subject extensively to both state and national audiences.

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[39] 1ST ANNALS OF CONGRESS 435 (1789)

[40] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1762 (1833).

For Additional Reading

The Palladium of Justice: Origins of Trial by Jury by Leonard W. Levy

History of Trial by Jury by William Forsyth

“The Historic Origin of Trial by Jury Part I” by Robert Moschizer in *University of Pennsylvania Law Review and American Law Register*, Vol. 70, Number 1 (November 1921)

“The Historic Origin of Trial by Jury Part II” by Robert Moschizer in *University of Pennsylvania Law Review and American Law Register*, Vol. 70, Number 2 (January 1922)

We the Jury: The Jury System and the Ideal of Democracy by Jeffrey Abramson

"Magna Carta and the Right to Trial by Jury" by Thomas McSweeney in *Magna Carta and the Rule of Law* edited by Randy Holland (2014)

"The Growth of Trial by Jury in England" by J. E. R. Stephens in Harvard Law Review Vol. 151 (1896)

The Road from Runnymede: Magna Carta and Constitutionalism in America by A. E. Dick Howard

“Restoring the Civil Jury’s Role in the Structure of Our Government” by Sheldon Whitehouse, *William and Mary Law Review*, Vol. 55, Issue 3 (2014)

Please provide your feedback regarding this session.

A FORGOTTEN HISTORY: TRIAL BY JURY AND THE AMERICAN REVOLUTION

Beth A. White – Executive Director,
West Virginia Association for Justice

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COURTROOM TECHNOLOGY FOR APPELLATE COURTS

Speakers: Frederic I. Lederer and Martin E. Gruen

Fredric I. Lederer is Chancellor Professor of Law and Director of the Center for Legal & Court Technology (CLCT) at William & Mary Law School. Professor Lederer received a B.S. from what is now NYU's Tandon School of Engineering, a J.D. from Columbia University School of Law, and an LL.M. from the University of Virginia. He was a Fulbright-Hayes Research Scholar at the Max Planck Institut fur auslandisches und internationales Strafrecht, in Freiburg, Germany. Professor Lederer's areas of specialization include the legal impact of the Artificial Intelligence ecosystem, legal technology, evidence, technology-augmented trial practice, electronic discovery and data seizures, criminal procedure, military law, and legal skills. He is the author or co-author of twelve books, numerous articles, and two law related education television series. He is a former prosecutor, defense attorney, trial judge, and law reform expert. As Founder and Director of CLCT, Professor Lederer is responsible for the McGlothlin Courtroom, the world's most technologically advanced trial and appellate courtroom, and the Court Affiliates, an organization of federal, state, and foreign courts. With the CLCT staff, Professor Lederer conducts legal and empirical courtroom technology research and with Martin Gruen provides courtroom and hearing room design consulting to courts and agencies throughout the world. A center for research into the likely consequences of Artificial Intelligence and its connected technologies on law, the legal systems, and the courts, CLCT provides related educational programming to judges, lawyers, and court managers.

Martin Gruen is the Deputy Director Emeritus for CLCT and the Managing Member of Martin E. Gruen Consulting, LLC. He brings over forty years of experience in providing court technology systems to the legal community. Initially concentrating in the areas of sound reinforcement and audio recording, Mr. Gruen has now emerged as a national expert in court-related high-technology legal uses. As founder and president of Applied Legal Technologies, Mr. Gruen designed many of the nation's state-of-the-art court technology installations and has served as a consultant to several major legal technology manufacturers.

Please provide your feedback regarding this session.

COURTROOM TECHNOLOGY
FOR APPELLATE COURTS

Frederic I. Lederer and Martin E. Gruen - Center for Legal & Court Technology, William & Mary Law School

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UPDATING COURTROOM TECHNOLOGY TO ENABLE HYBRID ORAL ARGUMENTS AND LESSONS LEARNED RETURNING TO THE NEW NORMAL

Speakers: Polly Brock, Jenny Kitchings, and Tristen Worthen

Polly Brock is the Clerk of Court/Court Executive for the Colorado Court of Appeals. She has been with that court since 1996. She received the Bachelor of Science degree with a major in business administration from the University of Colorado in 1996 and received her the Juris Doctor degree from the University of Colorado School of Law in 1992. Polly has worked in several positions for the Court of Appeals, including Deputy District Administrator. She was a staff attorney for the Colorado Court of Appeals specializing in appellate motions and jurisdiction for over 10 years. She is a graduate of the Colorado Judicial Executive Leadership Development Program (2015) and the Colorado Institute for Faculty Excellence in Judicial Education (2017). Polly has served on numerous NCACC committees and was the host of the 2016 NCACC annual meeting in Denver.

Jenny Abbott Kitchings received a Bachelor of Arts from Converse College with a major in Modern Languages, including Spanish, Italian, and French. She went on to graduate from the University of South Carolina School of Law with a Juris Doctor and from the top-ranked Moore School of Business with an International Master of Business Administration.

Upon graduation, Jenny came to work in the judicial system as a law clerk for the Honorable Daniel F. Pieper, then a circuit judge. She transitioned to private practice upon Judge Pieper's election to the Court of Appeals. She later returned to the court system as a law clerk at the Court of Appeals, until her appointment as Clerk of Court on January 25, 2012.

Jenny and her husband, Craig, are lucky enough to be the parents of two wonderful daughters.

Tristen Worthen is the Court Administrator/Clerk for the Court of Appeals, Division III located in Spokane, Washington. Prior to her appointment in July 2021, she has served in the court system for almost 32 years, including elected Clerk of Douglas County Clerk's Office, Court Administrator for the City of Chelan Municipal Court and various deputy clerk positions in the municipal and superior court levels of Washington State.

During her 32 years, she has served on many committees, including Court Education Committee; she served in one capacity or another on both the District and Municipal Court Management Association Executive Board and Washington State Association for County Clerk's Executive Board. She currently sits on the Court of Appeals Executive Board, Court Management Council, and two committees (Programs and Technology) for the National Conference of Appellate Court Clerks. Her motto – get involved to stay informed.

Tristen holds a B.A in Public Administration. She is an avid quilter, knitter and general fiber crafter. She is a mother of two grown men and currently resides in Cheney, Washington with her husband and Border Collie, Bo.

Updating Courtroom Technology to Enable Hybrid Oral Arguments and Lessons Learned Returning to the New Normal

Monday, August 1, 2022 – 4:00 p.m.

Panel Materials

South Carolina Court of Appeals

Webex Oral Arguments Best Practices

Rev. 9/1/20

Introduction

This guide will help you with your upcoming Webex remote oral argument in the South Carolina Court of Appeals. Please note this guide is in addition to the Court's regular oral argument protocols and should be reviewed prior to your argument.

Learn about Webex

The Court uses Cisco Webex for remote oral argument sessions. Google Chrome is recommended for the best user experience. After clicking on the provided hyperlink, enter your name and email address and click the "JOIN NOW" button. Please do not click "Join by browser" if you are arguing a case. Please also take note of the call-in number and access code on the landing page. If your network connection experiences issues, mute your computer connection audio and microphone, then dial in.

If you have never used Webex before, the first time you join a Webex Event or Meeting, you will be prompted to download the installer file to install the desktop app on your computer. If you decide not to download the installer, you can still join the meeting using the web app instead. You do not need to install anything using the web app, and it launches in your web browser. It is also recommended, if possible, you download the Cisco Webex application onto a smart phone or other device that connects to a data plan as a backup. This is because, if there are internet interruptions, a smart device might be a better solution for you.

The Cisco Webex logo looks like: If you are not familiar with Webex, we recommend you review instructions from Cisco. The Cisco website contains a lot of instructions and videos. We recommend the following:

Get-Started-with-Cisco-Webex-Meetings-for-Attendees
Join-a-Webex-Meeting-from-an-Email-Invitation
Choose-Your-Audio-and-Video-Settings-Before-You-Join-a-Webex-Meeting-or-Event
Cisco-Webex-Meetings-Video-Tutorials
Test-Your-Webex

There are numerous tips on the internet to help you be effective during a video oral argument. Try this one, for example: How to Look Better on Video Calls.

Prepare Your Environment

- **Turn off all other applications on your computer.**

  To maintain a strong connection, it is very helpful to close out of all other applications on your computer, such as browsers and your email/calendar. This will also prevent any applications from inadvertently making sounds during the argument (such as email chimes).

- **If available, use a wired Ethernet connection to the internet instead of WIFI.**

  Connectivity to the internet is paramount to a seamless virtual meeting. Check your surroundings and utilize a direct Ethernet connection to the internet instead of using a WIFI or cellular internet connection.

- **Lighting**

  - **Sit Facing a Light Source**
    Sitting with your back to a window or bright light source reduces the video's quality by creating a harsh silhouette effect. Whenever possible, sit facing a window, a desk lamp, or another light source so that your face is illuminated and clearly visible.

  - **Create a Three-Point Lighting Setup if You're in an Interior Room**
    Think of a clock: if you're facing noon, try to position light sources at 11 and 2. Adding an overhead light rounds out a great three-point lighting setup — the go-to lighting kit for portrait photographers and videographers.

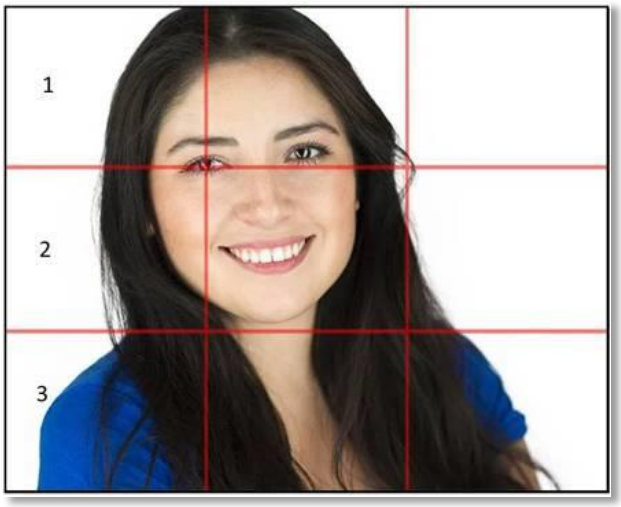
  - **Optimize Natural Light Sources if You're in a Room with Windows**
    Natural daylight renders more accurate colors. If possible, setting up your conferencing system in a room with a lot of window light, unless it is behind you, helps to create a well-lit, professional setting.

  - **Use Soft Directional Light**
    Avoid using bare bulbs in your video conference room lighting. A lampshade or a diffuser will reduce harsh shadows and soften the lighting in the room. Contrary to popular belief, the closer a light source is to a subject, the softer the shadows will play on that subject: if a lamp is too harsh, bring it closer to you. This may help make your face clearer in the video.

  - **Use the Right Amount of Light**
    It is important that there is plenty of light in the room to get maximum clarity. However, it is possible to have too much light. If your window is too bright, lower the blinds or move away from the window to avoid overexposure. If a light source, such as a lamp, is too bright, move it away from you or dim it with a shade. If possible, use multiple light sources pointed at your face to fill in shadows and to make the overall room lighting as even as possible.

- **Camera**

  Locate your device's camera and make sure the camera is uncovered for the oral argument. In other words, please, remove stickers, Post-Its, or sliders from covering the lens during the entire argument. Position the camera as close to eye level as possible rather than tilting your screen. Consider propping your device on books to elevate it. Make sure your head and shoulders are visible on-camera. Remember the Rule of Thirds. Position yourself to ensure your hairline and forehead are the top 1/3 of the display. Closer is better.



- **Audio & Video**
  - We recommend use of a headset with microphone. If you have a headset, plug it in to your device **prior to logging in to the Webex oral argument.** If you do not plug the headset in before joining the argument, you may have to log out and log back in before the other participants will be able to hear you.
  - Configure and test your audio and video prior to joining the oral argument or once you have joined in. Click the Connect audio and video icon, select your audio playback device and microphone, and then click **Connect Audio and Video**.
  - Before each event, copy down the **audio information** to a location you can reference quickly just in case you have technical difficulties and need to can call back into the event using your cell phone. Check your calendar, as Webex may automatically create a calendar event with this information.
  - Locate the **Mute** button/icon and familiarize yourself with how to turn it on and off. During the argument you will keep the Mute button on unless you need to speak.

Testing Prior to Oral Argument

- If you have already participated in a Court of Appeals Webex oral argument and will be joining from the same location using the same equipment, you need not attend another test.
- If you would like to test on your own to check connectivity, video, and audio, there is a link from the virtual courtroom page that permits testing any time.

Event status: Started

Date and time: Thursday, July 31, 2025 9:00 am
Eastern Daylight Time (New York, GMT-04:00)
Change time zone

Duration: 8 hours

Description: *If prompted for a password, it is* **sccourts**
Call in number for audio only United States Toll **+1-408-418-9388**
Call in Access code: **129 829 8102 #**
Call in Attendee ID number is issued when you **JOIN**
You can test your Webex connection here anytime: TEST YOUR WEBEX
SCJB User Guide: Court of Appeals Webex Guidelines

- If you are counsel on the case but are not the attorney planning to make the argument, you need not attend the test.
- You need not test at the same time as opposing counsel.

During the Webex Oral Arguments

Panelists

The judges, clerk of court, and the attorneys making arguments are the only members of the Webex who are allowed to speak and stream video. All participants for oral argument join in the same way. Be aware when you sign on the judges may also be signed on, which means they can see and hear everything happening in the virtual courtroom.

Attendees

Attendees may watch and listen to the Webex Event but have no ability to talk, stream video, or share content. Attendees are not able to see the names of other attendees signed in to the courtroom.

Webex Event Views

- We recommend that you change your view from Active Speaker to Grid. Here are instructions: Switching View in Webex.
- The Clerk of Court will display the timer. You will also see the three judges and all other attorneys who will be arguing.

Oral Argument Etiquette

1. Stay muted until your turn to argue is recognized by the presiding judge. If you do not mute yourself, we will mute you. This is necessary to prevent feedback to record a clear argument.
2. If you are reading something, please try to stay facing forward and near the mic. We have found in practice that, when we have audio problems, it is when a person turns and reads from something to the side.
3. Due to the nature of virtual oral argument, we are not following our usual protocol of standing when the judges enter the room. You may remain seated throughout the argument if you prefer. If you choose to stand, we recommend that you test out your setup ahead of the argument.

Oral Argument Expectations

This oral argument is as real and as formal as if counsel were arguing in the Court of Appeals courtroom. We expect counsel to dress professionally.

Stay Calm

We plan for the unexpected — and that is why we will do a test run with all counsel before the argument.

- If you suddenly lose connection or if you have issues with your audio, we may ask you to log out and to log back in. Don't panic, we will walk you through the issues. The timer will be paused if any audio or visual problems arise.
- If your bandwidth gets stretched, the first thing Webex will do is to limit your video. If you turn off your video, you often will regain sight of the rest of the

conference participants. The audio portion is the most critical.

- If you have concerns about bandwidth usage during the argument, try to reduce usage during the argument, such as streaming video on another device simultaneously. We strongly recommend use of a wired internet connection instead of wifi.

The South Carolina Court of Appeals

[[COAClerk]]
CLERK

[[COADeputyClerk]]
CHIEF DEPUTY CLERK

[[COAPOBoxAddress]]
[[COAPhysicalAddress]]
TELEPHONE: [[COATelephone]]
FAX: [[COAFax]]
[[SCCourtsURL]]

[[Current Date Long]]

[[DesignatedParty]]

Re: [[Case Title]]
Appellate Case No. [[Case Number]]

Dear Counsel:

This appeal will be argued on [[Next Scheduled Hearing Date]] at [[Next Scheduled Hearing Start Time]] in Courtroom I. The following oral argument times have been allocated:

Appellant:	10 minutes
Respondent:	10 minutes
Appellant in reply:	5 minutes

Arguments frequently begin before the time set. Please ARRIVE 15 MINUTES prior to your scheduled argument time.

In recognition of the threat posed by the COVID-19 pandemic, we ask counsel to be mindful of the following policies and precautions:

1. Only the lawyers arguing the case will be permitted to attend oral argument. All other persons may view the oral argument via the virtual courtroom, which is accessible at https://scjudicial.webex.com/scjudicial/onstage/g.php?MTID=eb51ad7011021ff736d1c8051d8718920.
2. Face coverings are required at all times while in the Courthouse. You may remove your mask only when at the podium making arguments before the Court.

3. Please maintain social distancing, defined as keeping a distance of at least 6 feet from others, at all times while in the Courthouse.
4. Counsel will be asked to sit in assigned spots. Please stay in your seat until you are called to argue. We understand the need to exchange pleasantries, but ask that you keep your seat and remain masked when speaking with others.
5. Hand sanitizer is available in the courtroom, and we ask that counsel use it liberally as you enter or leave the courtroom and/or restrooms.
6. If you arrive before the argument before yours has ended, please wait in Courtroom II until your case is called, while maintaining social distance. Upon conclusion of your argument, please exit the Courthouse as expeditiously as possible. Do not gather to talk until you have left the building.

The Court requests a signed acknowledgement verifying receipt of notification of the date and time set for oral argument. You must sign and date the acknowledgement below, then return to the following address:

V. Claire Allen, Chief Deputy Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

We are looking forward to resuming normalcy, including in-person oral arguments, as the pandemic draws to a close. We regret the continued restrictions and hope you understand our goal is to keep everyone safe while efficiently deciding your case.

Very truly yours,

CLERK

Acknowledgement received in Appellate Case No. [[Case Number]].

Signature: _____ Date: _____

Print Name: _____

Exhibit A. Scope of Work

Purpose

AV technology systems were installed during the new building construction of the Ralph L. Carr Colorado Judicial Center in 2012. AV technology in the Court of Appeals, Supreme Court, and Supreme Court Conference Room, has since become dated and has reached obsolesce in its ability to integrate and function with new and emerging technology challenges. The Judicial Department's goal is to replace all AV equipment/systems in the Court of Appeals Courtrooms, Supreme Court courtroom, and Supreme Court Conference Room so the systems can fulfill the most modern requirements (requirements identified below). The Department's leadership team has met to survey and identify new and emerging technology needs. The Judicial Department requires all work design, installation, integration, testing, commissioning and acceptance to be completed by August 31, 2022.

The Courtrooms:

The Supreme Court Room C4203 – The Supreme Court is located on the fourth floor of the Ralph L. Carr Colorado Judicial Center. There are (7) seven seats on the Supreme Court's bench. There are (2) existing television locations with custom lift mounts.

The Court of Appeals Room C1203 - The Court of Appeals is located on the first floor of the Ralph L. Carr Colorado Judicial Center. There are (3) three seats on the Court of Appeal's bench. There are (2) existing television locations with custom lift mounts.

The Court of Appeals Room C3203 - The Court of Appeals is located on the third floor of the Ralph L. Carr Colorado Judicial Center. There are (3) seats on the Court of Appeal's bench. There are no existing television locations.

The Supreme Court Conference Room:

The Supreme Court Conference Room C4244– The Supreme Court Conference Room is located on the fourth floor of the Ralph L. Carr Colorado Judicial Center. The Supreme Court Conference Room is a large meeting space with movable tables and (2) ceiling projection systems.

The Control Room / Shell Space:

An existing room on the first floor of the Ralph Carr Justice Center – This room may be used as a centralized AV distribution room should the vendor's design require one.

Request for Proposal (Respondent Must Provide all Four Quotes)

1. The Department is seeking an AV bid proposal price for complete AV technology consultation, site analysis, design, engineering, comprehensive AV narrative, and AV bid package preparation of the Supreme Court and (2) Court of Appeals Courtrooms.

2. The Department is seeking an add alternate bid proposal price for AV technology consultation, site analysis, design, engineering, comprehensive AV narrative, and AV bid package preparation of the Conference Room C4244.

3. The Department is seeking an add alternate bid proposal price for complete turnkey installation and integration of Proposal 1. – Supreme Court and the 2 Court of Appeals Courtrooms. Integration includes: AV construction management/coordination, AV project management, AV equipment, AV installation/integration, AV control and Graphical User Interface (GUI) software programming, Audio Digital Sound Processor (DSP) programming/calibration/Equalizer (EQ), commissioning, additional services, testing, and end-user training.

4. The Department is seeking an add alternate bid proposal price for complete turnkey installation and integration of Proposal 2. – t Conference Room C4244. Integration includes: AV construction management/coordination, AV project management, AV equipment, AV installation/integration, AV control and GUI software programming, Audio DSP programming/calibration/EQ, commissioning, additional services, testing, and end-user training.

Scope of Work Definitions

Design – Design requirements must include:

a. A meeting with the Departments-IT staff to determine technology needs, technology requirements, and typical usage scenarios.

b. Provide a detailed technology survey to gather current and future requirements.

c. Provide extensive on-site survey/analysis of existing technology and infrastructure.

d. Provide acoustical analysis and design. Note, only existing conduit and cable pathways and raceways may be utilized.

e. Prepare a detailed conceptual AV/IT technology drawing and spec sheet submittal.

f. Prepare a complete AV/IT control system GUI specification and submittal.

g. Prepare an acoustical sim/modeling analysis of the Supreme Court, Court of Appeals, and Supreme Court Conference Room spaces to provide a high-quality sound reinforcement design concept and equipment specification.

Engineering – Engineering requirements must include:

a. Provide a detailed AV/IT construction drawing set for the integration of the SCAO approved design.

b. Provide speaker rigging, audio Real Time Analyzer (RTA) simulation, and any custom mounting detail drawings, rack elevation drawings, plate/panel detail drawings, and detailed SOW narrative.

Bid Package Preparation – Bid package preparation requirements must include:

a. AV equipment bill of materials, engineered AV drawings, additional services, and bid management.

b. The SCAO staff will conduct AV vendor interviews prior to bid-selection and award.

Installation & Integration – Bid Add-Alternate – Integration requirements include:

a. AV installation labor, AV project management, AV/IT control system programming and GUI layout files, Audio DSP programming and integration.

b. Provide engineered field drawing-sets, wire pull-lists, complete RTA/EQ analysis, as-built documentation.

c. Provide a complete as-built drawing record set for ongoing support and maintenance.

d. Provide additional services.

e. Provide full system testing, demonstration, commissioning and extensive end-user training.

Additional Services –Additional Services include, but are not limited to:

a. Scheduled site visits, preventative maintenance and support.

b. Additional site visits, preventative maintenance and support.

c. Emergency on-call support site visits. (See Sample Contract Agreement Section 9: Warranties)

AV System Requirements - Courtrooms:

1. **The new AV systems must fully accommodate remote and in-person proceedings.** The Courts shall have the ability to accommodate remote participants on both large (Content Delivery Networks (CDN), cloud, archive, streaming) and small (videoconferencing through invitation to attorneys, witnesses, etc.) in any participant scale or combination. The Courts shall each have the ability to independently stream and manage live courtroom proceedings to available content delivery networks (CDN) and cloud content networks for the purposes of public rights access. The remote proceeding shall have the ability to easily incorporate content sharing and capture of video evidence in various flexible configurations and scenarios.

   The AV streaming video equipment shall be Epiphan Pearl2 AIO Live Video Encoder or SCAO approved, exact equivalent.

2. **Ease of use.** The Court has limited staff for operating the technology across the three (3) courtrooms. The AV technology layout and controls must be manageable, intuitive and functional as the capabilities of the AV system grow. The project will require extensive technology consultation with the court technology support staff and a committee of users to ensure that the controls are intuitive, and that the AV system is reliable in a multitude of courtroom scenarios. The existing control console locations are all accessible to the public, so careful consideration must be made as to the layout and security of the courtroom's controls.

3. **Support** After installation, all systems must be capable of support by Court Judicial IT staff. Careful consideration must be given to existing statewide Department AV equipment standards, maintenance practices, support practices, warranty, reliability, and supply chain. Remote support of networkable AV equipment via the existing Department statewide network is required. An existing WAN may be utilized. Cloud based management tools should be considered, and the possibility of an integrated technology management suite.

4. **Videoconference Cameras** – The existing P/T/Z camera locations are well placed and provide multiple camera "scenes" in each of the courtrooms. The courtrooms each have three (3) existing robotic, ceiling mounted cameras with zoom lenses, which shall be replaced with modern equivalent cameras with SDI and at least 30x optical zoom. The ceiling P/T/Z camera's may be a particularly challenging part of this project based on existing infrastructure limitations, distance limitations, and aesthetic concerns. The successful bidder would work to assess and recommend a workable solution to overcome distance and existing infrastructure limitations. The successful bidder must also provide a camera system that has fully integrated soft button GUI and hard button P/T/Z controls, to provide smooth and responsive control in a live production setting.

   The videoconference P/T/Z cameras shall be SDI, IP, pan/tilt/zoom models, with 30x or greater optical zoom and comprehensive RS-232/422 remote-control capability. The videoconference cameras shall be Panasonic, Canon, Vaddio, or approved equivalent.

5. **Video Displays –** Provide HDMI output connections at the benches, lectern and attorney tables. Low profile desktop computer monitors that could be deployed as needed and then removed and stored. Displays are existing in the Supreme Court and the First Floor Court of Appeals, in custom millwork locations for display to the gallery participants. These displays shall be replaced, and the articulating lift mechanisms shall be refurbished. The third floor Court of Appeals has no existing displays. The AV respondent shall provide a workable display solution for the third floor Court of Appeals courtroom.

The desktop monitors shall be owner provided KYY Model K3 15.6" Portable Display w/ HDMI input or approved exact equivalent. The gallery displays shall be Samsung or Sharp w/ RS-232 control or approved equivalent.

6. **Video Presentation System –** An integrated digital video matrix system and or digital network video production system shall be provided to produce and present video content from inputs at the lectern, operator desk, and attorney tables - to a remote audience via WebEx, streaming equipment, as well as to the court's multiple video displays at the bench, lectern and gallery. An integrated multi-window video processor shall be provided to allow for simultaneous, flexible, multi-window, video presentation of source content, closed captioning overlay, and software speaker timers.

   The Video Presentation System shall be Crestron Digital Media or Crestron NVX or approved exact equivalent. The multi-window video processor shall be Barco, BlackMagic, RGB Spectrum, or approved equivalent.

7. **Closed Captioning –** The ability to display closed captioning information to the court facing video displays. The captioning information should be able to be displayed flexibly in its own video window and/or video overlay.
8. **Speaker Timers – Onscreen integration –** The ability to integrate existing "DSan" hardware speaker timers, with timers and/or a software solution that can be duplicated on the Courtroom displays, videoconference feeds, etc. The captioning information should be able to be displayed flexibly in its own video window and/or video overlay.

9. **Lighting Control –** New control system programming shall maintain existing control system lighting controls.

10. **Audio System –** The audio system shall provide for the complex needs of the courtroom space and proceedings including, but not limited to amplification of all participants to all participants, assisted listening through both headset and telecoil, audio feeds to in-person media, 4 channel digital recording, teleconference, videoconference, and streaming.

11. **Supreme Court Gallery Speakers –** The speakers that are built into the gallery seating sections in the Court spaces are not ideal and there is a desire to replace the existing distributed speaker system with a point source or slim vertical array speaker system. The aesthetics of the Supreme Court speakers must be carefully considered. The AV respondent will provide speaker analysis, design, engineering, and rigging for the Supreme Court and Court of Appeals Courtrooms.

    The Supreme Court Gallery Speakers shall be K-Array Line Array or approved exact equivalent. The Court of Appeals Speaker shall be K-Array, Tannoy, Atlas, JBL, QSC or approved equivalents.

12. **Training** – The new AV technology systems and associated capabilities will require a thoughtful approach to training, including but not limited to, written user guides/manuals, and instruction cheat sheets for typical scenarios. In-person trainings shall be provided for each courtroom, at no less than four (4) four separate three (3) hour training sessions with all key personnel, Department IT Staff, Judges and clerks. Training sessions should be coordinated and scheduled around availability of the participants.

AV System Requirements – Supreme Court Conference Room:

1. **Flexibility** – Flexibility is needed to accommodate a variety of furniture and seating patterns to allow for different microphone placements and camera angles. The ability to "re-zone" the layout/configuration of the space as needed. This conference room is often configured "in the round" with participants facing each other.

2. **Ease of use.** The Court does not have a dedicated staff member for operating the technology in the Supreme Court Conference Room. Therefore, the AV technology layout and controls must be manageable, intuitive and functional for the prescribed users. The project will require extensive technology consultation with Department IT support staff to ensure that the controls are intuitive, and that the AV system is reliable in a multitude of meeting scenarios.

3. **Support** All systems must be capable of support by Department IT staff. Careful consideration must be given to existing statewide Department AV equipment standards, maintenance practices, support practices, warranty, reliability, and supply chain. Remote support of networkable AV equipment via the existing Department statewide network is required. An existing WAN may be utilized. Cloud based management tools should be considered, and the possibility of an integrated technology management suite.

4. **Video Presentation System –** An integrated digital video matrix system and or digital network video production system shall be provided to present video from inputs at the lectern, meeting tables, remote audience via WebEx, as well as to the conference room video displays.

   The Video Presentation System shall be Crestron Digital Media or Crestron NVX or approved exact equivalent.

5. **Videoconferencing - High-Quality Remote Audio/Video Engagement** – The Supreme Court Conference Room shall have the ability to accommodate up to 50/50 remote/in-person participants. The Conference Room is frequently used at full capacity, with every available seat at the table occupied, and with additional overflow chairs around the perimeter of the meeting tables. There is a desire for technical flexibility in the Supreme Court Conference Room, as well as for the highest quality of "telepresence," and engagement with the remote participants. Critical aspects of high-quality remote engagement include:

   a. **Camera Sight Lines** - The P/T/Z conference cameras must align with the participant's eye line, whenever possible. It is critical for this application to avoid obscure and disengaged views of the meeting participants. The camera locations shall be carefully considered, along with required pan, tilt, (optical) zoom capability to provide quality camera views and typical camera presets.

   b. **Camera Tracking / Camera Preset Automation** – The large size of the Supreme Court Conference Room and multitude of seated table and seated overflow participants, requires a sophisticated camera tracking and/or camera automation system. The camera tracking system shall consist of multiple strategically located P/T/Z cameras, to capture seated participants in tight "head shot" views. The camera tracking system should also consist of wide-room-view P/T/Z cameras, to provide alternate and transitional scenes. The camera tracking and automation system shall be designed for maximum reliability, consistency, and intuitive operation in a multitude of scenarios. The cameras and camera tracking systems shall have the ability to be re-zoned for alternate room orientations and configurations. Multiple approaches for camera automation will be considered and assessed.

   c. **Display Sight Lines** – The display(s) in the Supreme Court Conference room must be carefully coordinated to directly couple with an associated P/T/Z camera(s). This coupled camera/display approach allows for increased telepresence engagement, as the local participants are always readily seen by the P/T/Z camera as they view the remote participants on the associated display.

   d. **Immersive Audio –** The large size of the Supreme Court Conference Room and multitude of seated table and seated overflow participants, and technology configurations, requires a sophisticated multi-zone, multi-dimensional audio system. The audio system shall have the capability to call and recall different audio

scenes/presets/zones – to accommodate changes in cardinal room orientation and to provide directionality and imaging for local participants in all configurations. A flexible method of intelligible microphone capture of the seated table, and seated overflow participants shall be provided.

6. **Assessment of Existing Projection Display Configuration** – There is a desire to remove (2) existing automated ceiling lifts and move to fixed mount solutions. In addition, the existing 2-screen projection displays (located at opposite ends) of the conference room, are not ideal for high-quality remote engagement. The contract holder shall work with a committee of Department stakeholders to find solutions with adequate viewing size and viewing angle for all participants.

7. **Audio System –** The audio system shall provide for the complex presentation needs of the space including, but not limited to amplification of far-end participants and presentational content, assisted listening, teleconference, and videoconference. An intelligent microphone tracking system shall be considered for integration with the P/T/Z cameras, for reliable tracking of all meeting participants.

8. **Training** – The new AV technology systems and associated capabilities will require a thoughtful approach to training, including but not limited to, written user guides/manuals, and instruction cheat sheets for typical scenarios. Live trainings shall be provided for each courtroom, at no less than four (4) four separate three (3) hour training sessions with all key personnel, Judicial Staff, Judges, Clerks, and the AV System Operator. Training sessions should be coordinated and scheduled around availability of the participants.

Tristen Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

April 13, 2022

Re: Court of Appeals No.
County No.

Counsel:

The above-referenced case has been set for oral argument on **Tuesday, June 7, 2022** and is subject to call tentatively at **9:00 a.m.** The panel assigned consists of Judges Laurel H. Siddoway, Robert E. Lawrence-Berrey and Rebecca L. Pennell. Oral argument is limited to fifteen (15) minutes for appellant(s) and fifteen minutes for respondent(s).

The 9:00 a.m. time noted above is strictly a placeholder time. The Court requests the case participants meet and confer about whether you will be:

1) both appearing in person at the courthouse,
2) both appear remotely via Zoom,
3) or a hybrid approach with some participants appearing in person and others appearing remotely via Zoom.

A joint response is now due to be filed within 10 days or not later than May 3, 2022. **If no response is filed by the due date, the court will set the oral argument for strictly remote appearance.** If the parties disagree regarding the hearing method to be used by the court, each party shall file an explanation (not to exceed 200 words) with the court within 10 days of this notice.

The oral argument will be live streamed by TVW for interested parties and non-participants. The video link can be obtained at **http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.virtualcourtproceedings** Please note that only the counsel presenting oral argument will be invited into the Zoom oral argument meeting, but others, along with the public, will be able to watch the oral argument live on TVW. Audio recordings of all oral arguments are posted on the court website following the hearings.

Complete docket details for June 6-10, 2022 are available on the State of Washington website at **www.courts.wa.gov/appellate_trial_courts/appellateDockets**. Your copy of the Court's opinion will be mailed to you after it is filed in the Clerk's office. Opinions are also available at **www.courts.wa.gov/opinions/**.

A finalized setting notice will be forwarded at a later date following receipt of the joint response addressing the appearance type requested.

Sincerely,

Tristen Worthen
Clerk/Administrator

TW:sd

NOTE: Your attention is directed to Title 14 and Rule 18.1 of the Rules of Appellate Procedure regarding Costs, Attorneys Fees and Expenses on Appeal.

Links:

Washington State COA 3

Live hearing – 6/7/22: Division 3 Court of Appeals - TVW

Hybrid – 4/27/22: Division 3 Court of Appeals - TVW

Please provide your feedback regarding this session.

Updating Courtroom Technology to Enable Hybrid Oral Arguments and Lessons Learned Returning to the New Normal

Polly Brock – Clerk, Colorado Court of Appeals
Jenny Kitchings – Clerk, South Carolina Court of Appeals
Tristen Worthen – Clerk, Washington Court of Appeals: Div. III

https://forms.office.com/g/90tCWTuR0J

NCSC/COSCA RAPID RESPONSE TEAM AND WHAT WAS LEARNED FROM COVID-19 PANDEMIC

Speakers: John Doerner and Nora Sydow

John Doerner, Principal Court Management Consultant, joined the National Center for State Courts in 2007, bringing a broad range of experience in judicial administration as well as appellate courts. He has directed over 100 consulting projects in both trial and appellate courts in 42 states and U. S. Territories. Before joining NCSC, he served as Clerk of Court & Court Administrator for the Colorado Court of Appeals. Prior to that appointment, Mr. Doerner was the Manager of Operations Support for the Colorado Judicial Branch. John was awarded a bachelor's degree in business administration by the College of St. Francis (Joliet, Illinois) in 1975. He also earned a Master of Business Administration degree from the University of Colorado at Denver in 1987 and is licensed as a Certified Public Accountant by the State of Colorado.

Nora Sydow is a Principal Court Management Consultant at the National Center for State Courts (NCSC). She works on variety of projects improving court organization, process and operations, with special attention to those involving children and families.

Highlights of NCSC Projects:

Project lead, Judicial Engagement Team, a partnership between NCSC and Casey Family Programs to improve outcomes for children and families and safely reduce the number of children in foster care through improved judicial practice.

Project lead, technical assistance project improving continuance rate and concurrent planning in dependency cases in the Rhode Island Family Court,

Consultant, National Resource Center for Legal and Judicial Issues and the National Resource Center for Child Welfare Data & Technology

Project lead, technical assistance project on education performance measures, Arizona Court Improvement Program and Pima County Superior Court

Project lead, technical assistance project on education performance measures, Mecklenburg County and the North Carolina Court Improvement Program

Project lead, technical assistance project for the Arkansas Court Improvement Program on performance measures and improving caseflow management in child abuse and neglect cases

Project staff, evaluation of the Colorado dependency court performance measures, with special emphasis on data analysis and presentation

Project staff, Judicial Commissions on the Protection of Children initiative

Developed curriculum for Institute for Court Management course, Fundamental Issues of Caseflow Management: Child Abuse and Neglect Cases

Prior to joining NCSC, Ms. Sydow worked as a college instructor in a criminal justice program and has also served as a Court Appointed Special Advocate (CASA) for the Marion County Circuit Court in Fairmont, West Virginia. Ms. Sydow received her J.D. from the West Virginia University College of Law and dual B.S. degrees from Old Dominion University in political science and criminal justice. She is a Fellow of the Institute for Court Management.

NCSC/CCJ-COSCA Rapid Response Team and What Was Learned from Covid-19 Pandemic

AUGUST 2, 2022

NORA SYDOW JOHN DOERNER

NCSC

1

- RRT launched in March 2020
- 6 Working Groups formed in April 2020
  - Civil
  - Criminal
  - Children, Families & Elders
  - Technology
  - Courts Funding and Communication
  - Appellate

RRT Background

2

RRT Webinars and Briefs

Over 50 webinars since March 2020

- Recorded and available at https://vimeo.com/statecourts

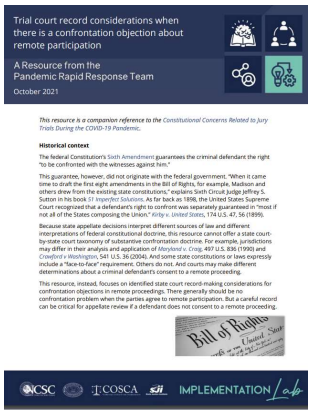
Over 130 "Issue Brief" deliverables produced to-date

- Can be searched and accessed at https://www.ncsc.org/newsroom/public-health-emergency/pandemic-and-the-courts-resources

3

Issue Briefs

Trial court record considerations when there is a confrontation clause objection about remote participation (Oct. 2021)



https://www.ncsc.org/__data/assets/pdf_file/0015/70107/Confrontation-clause-remote-participation.pdf

4

Policy Guidance

COSCA/CCJ Supported Principles for Post-Pandemic Court Technology

1. Ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies.

2. Focus on the user experience.

3. Prioritize court-user driven technology.

4. Embrace flexibility and willingness to adapt.

5. Adopt remote-first (or at least remote-friendly) planning, where practicable, to move court processes forward.

6. Take an open, data-driven, and transparent approach to implementing and maintaining court processes and supporting technologies.

https://ccj.ncsc.org/__data/assets/pdf_file/0019/51193/Resolution-2-In-Support-of-the-Guiding-Principles-for-Post-Pandemic-Court-Technology-.pdf

5

RRT Appellate Workgroup

Membership

- Chief Justices, IAC Justices, Appellate Clerks, State Court Administrators

Resources – 7 Deliverables

- Appellate Court pandemic response
- Case Conferencing Process/Satisfaction
- Remote argument guidance
- Appellate Staffing/Functional Adaptations
- Returning to workplace planning
- Reopening the Appellate Courthouse
- Reopening the Appellate Courthouse (Statistical Report)

6

RRT Appellate Workgroup Deliverables

Appellate Court Response to the Pandemic and Reopening (Dec. 2021)

https://www.ncsc.org/__data/assets/pdf_file/0022/72094/Reopening-the-Appellate-Courthouse.pdf

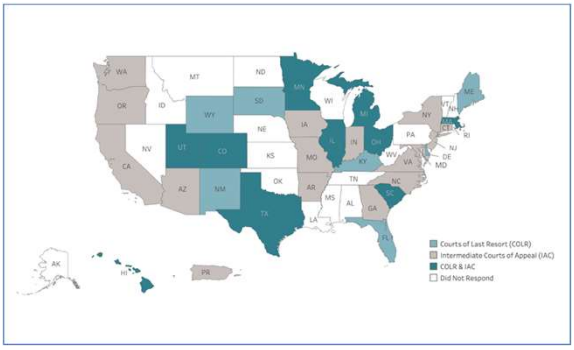
NCSC National Center for State Courts

7

RRT Appellate Workgroup Deliverables

Appellate Courts Responding to the Reopening Survey

- 32 States & Territories
- 17 Courts of last Resort
- 43 Intermediate Appellate Courts



NCSC National Center for State Courts

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RRT Appellate Workgroup Deliverables

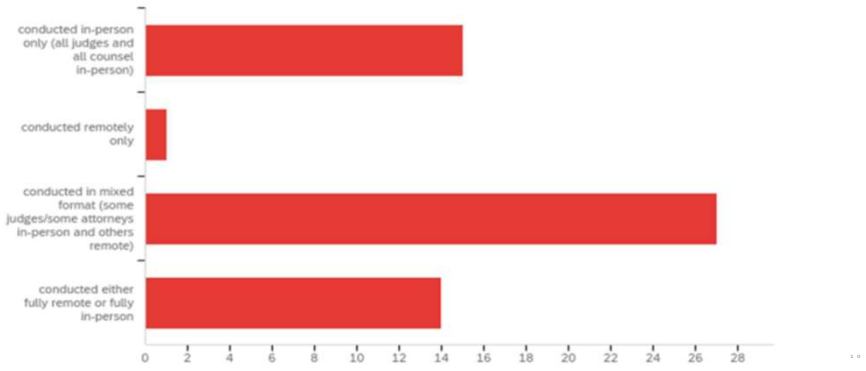
"The survey that produced the data presented here was administered during October 2021. The significant unknowns, including the possible effects of the Omicron variant (as well as any future variants that may appear on the scene) and wide differences of opinion in how best to deal with the pandemic, may render the data either more or less accurate as time passes."

9

RRT Appellate Workgroup Deliverables

Excerpt from the Statistical Report -

Q14 - Future oral arguments are expected to be:



10

RRT's 2021 Implementation Labs

- Virtual & Hybrid Hearings
- Case Management
- Jury
- Remote Work
- Juvenile Justice Diversion
- SRL
- Eviction Diversion
- Language Access
- Online Dispute Resolution
- Domestic Violence
- Remote Supervision and Pre-Trial

NCSC National Center for State Courts

11

RRT's 2022 Focus Areas

Remote & Hybrid Proceedings & Court Services

Backlog and Case Management

Workforce
- Recruitment & Retention
- Remote Work & Team Staffing Models
- Morale and Well-Being
- Workload models

Court Space
- Changing needs for staff
- Changing needs for records

12

Lessons learned in the Appellate Courts?

What issues are you currently facing?

Suggested areas for future research and projects?

Future Efforts for Appellate Courts

13

CONTACT INFORMATION

John Doerner, Principal Court Management Consultant, NCSC
jdoerner@ncsc.org

Nora Sydow, Principal Court Management Consultant, NCSC
nsydow@ncsc.org

www.ncsc.org

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Please provide your feedback regarding this session.

NCSC/COSCA Rapid Response Team and What Was Learned from the COVID-19 Pandemic

John Doerner and Nora Sydow – National Center for State Courts

https://forms.office.com/g/8qfpuBV9pm

NAVIGATING A CHANGING JUDICIAL SOCIETY

Speaker: Edwin T. Bell

Edwin T. Bell currently serves as the Director of Racial Justice, Equity and Inclusion for the National Center for State Courts (NCSC), bringing nearly 25 years of justice system experience into his current role. Prior to joining the NCSC, Mr. Bell operated in various capacities in his home state of Georgia, most recently serving as the Deputy Court Administrator for the Superior Court of the Stone Mountain Judicial Circuit. His previous experiences include serving as the Clerk of Court for the largest Juvenile Court in Georgia, as well as other professional roles, including stints at the Administrative Office of the Courts, the Criminal Justice Coordinating Council, and the State Board of Pardons and Paroles. Mr. Bell received a Bachelor of Science degree in criminal justice from Georgia State University and a Master of Business Administration from Clayton State University. He is a Fellow of the Institute for Court Management and holds a certificate in judicial administration from Michigan State University.

BLUEPRINT

for Racial Justice

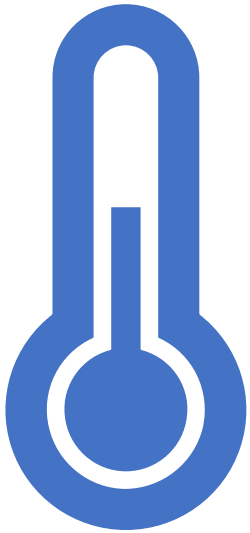
NCSC
National Center for State Courts

Blueprint for Racial Justice: Navigating the Changing Landscape of Judicial Society

Edwin T. Bell

Director of Racial Justice, Equity and Inclusion

National Center for State Courts



TEMPERATURE CHECK

"Twenty years from now, you will be more disappointed by the things you didn't do than those you did. So, throw off the bowlines. Sail away from safe harbor. Catch the wind in your sails. Explore. Dream. Discover."

- Mark Twain, American author

Changing Judicial Societal Norms

"To examine what systemic change is needed to make equality under the law an enduring reality for all so that justice is not only fair to all but also is recognized by all to be fair"

Conference of Chief Justices/Conference of State Court Administrators

Resolution 1

July 2020

Leaders leading the Lions of Judicial Society

Chief Justice Paul A. Suttell (Chair) – Rhode Island

Laurie K. Dudgeon - Kentucky

Chief Justice Richard A. Robinson - Connecticut

Nancy Cozine - Oregon

Chief Judge Anna Blackburne-Rigsby – Washington, D.C.

David K. Byers - Arizona

Chief Justice Martha L. Walters - Oregon

Tonnya Kennedy Kohn – South Carolina

Partner Organizations

- CCJ – Conference of Chief Justices
- COSCA – Conference of State Court Administrators
- NCSC – National Center for State Courts
- AJA – American Judges Association
- NBA – National Bar Association Judicial Division
- DEI Collaborative
- International Association of LGTBQ+ Judges
- NAPBA - National Asian Pacific Bar Association Judicial Council
- NABA - Native American Bar Association
- NHBA - National Hispanic Bar Association
- NAALJ – National Association of Administrative Law Judiciary
- NACM – National Association for Court Management
- ABA – American Bar Association Judicial Division
- NAPCO – National Association for Presiding Judges and Court Executive Officers
- NCBE – National Conference of Bar Examiners
- NCREFC – National Consortium on Racial and Ethnic Fairness in the Courts
- NAWJ – National Association of Women Judges
- NJC – National Judicial College
- NCJFCJ – National Council and Family and Juvenile Court Judges
- AJEI – Appellate Judges Education Institute

Navigating Change: Blueprint target areas

Fairness and Awareness

Systemic Change

Improving Diversity of the Bench, Bar and Workforce

Communication and Implementation

Fairness and Awareness

Develop tools for raising awareness of racial justice challenges in the courts

Awareness training (unconscious bias)

Exposure and education (personal and institutional)

Data standards and suggested reports

Problem identification (Organizational Assessment Tool/racial justice assessment tools etc.)

Assessment (policy, rules, processes)

Shared Language Guide

OAT Organizational Assessment Tool

GATHER INFORMATION

ANALYZE DATA

MOVE FORWARD

Systemic Change

Warrants	Jury selection/service	Plea bargaining
Bail	Fines and fees; failure to pay	Expungement
Sentencing	Evidence-based practices/race-based data	Driver's license suspension

WEBINARS rule the world

GUIDING PRINCIPLES

1. Systemic change should be truly systemic
2. Systemic change should be transparent
3. Systemic change should be intentional, purposeful, and dynamic
4. Systemic change should be sustainable
5. Systemic change should be stakeholder and community-inclusive
6. Systemic change should be tailored to the community
7. Systemic change should be informed by data and evaluated

Increasing the Diversity of the Bench, Bar and Court Workforce

- Strategic Planning Guide (Delaware)
- Quasi-Judicial Appointments

  (sitting by designation/order, judicial officers, pro-tem, magistrates, referees, commissioners etc.)
- National intern project
- National extern programs for law clerks
- Pipeline projects
- Recruitment efforts

CORA

Court Opportunity Recruitment for All

Internships | Externships | Clerkships

Communication and Implementation

- Community Engagement
- Communications Plan and Hotline
- Links to studies
- State DEI Commissions
- DEI Officers Group

- Resource Center
- Webinars
- Newsletters
- Speakers’ bureau
- Technical assistance

Watch, Read, Listen

National Convening of Court DEI Professionals

Where: ATL

When: November 10 – 11, 2022

What does the future hold?

Edwin T. Bell
ebell@ncsc.org
757-259-1547

Please provide your feedback regarding this session.

NAVIGATING A CHANGING JUDICIAL SOCIETY

Edwin Bell – National Center for State Courts

https://forms.office.com/g/Z7kA6aru93

COURT STATISTICS PROJECT DASHBOARD

Speakers: Sarah Gibson and Allison Trochesset

Sarah Gibson, M.A., is a Data Scientist at the National Center for State Courts. Sarah has been with the National Center for 6years working on various projects focused on large national data collection efforts, data governance, and strategic foresight. Her recent work includes the development of the CSP STAT Tableau dashboards, providing a comprehensive view of trial and appellate caseloads. Sarah received both her B.S. in Sociology and M.A. in Applied Sociology from Old Dominion University and received a Graduate Certificate in Data Analytics from George Mason University.

Allison Trochesset, Ph.D., is Court Research Associate at the National Center for State Courts. She earned her Ph.D. in Political Science & International Affairs from the University of Georgia where her dissertation research analyzed judicial decision making in state courts of last resort. Before attending graduate school, Dr. Trochesset worked as a Federal Background Investigator and volunteered as a Court Appointed Special Advocate (C.A.S.A.). Dr. Trochesset is skilled in quantitative and qualitative research methods, including natural language processing, textual analysis, and network analysis. Since joining the National Center in 2019, she has applied her analytical skills to a diverse portfolio of projects including, national data collection efforts, judicial workload assessments, effective criminal case management, problem solving court performance measures, etc. As a member of the Court Statistics Project, Dr. Trochesset managed the redesign of State Court Organization. She also serves as a research advisor for NCSC's Institute for Court Management Fellows Program.

Please provide your feedback regarding this session.

COURT STATISTICS PROJECT DASHBOARD

Sarah Gibson & Allison Trochesset
National Center for State Courts

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CURRENT AND FUTURE TRENDS AFFECTING APPELLATE COURTS

Speakers: Paul Embley and Katie Wilson

Paul Embley is the Chief Information Officer of the Nevada Supreme Court, Administrative Office of the Courts. He began his career in Silicon Valley working for the "who's who" of high tech (along with several of the "who's no longer"). After 25 years in the for-profit sector, Paul shifted to the public sector to work on integrated justice. He has gleaned broad product lifecycle expertise from diverse and challenging projects in US states and territories, Australia, many EU nations, and several emerging democracies including Haiti, Jamaica, and Nigeria. He has lead justice-related IT assessments and technology initiatives ranging from child welfare and terrorist watchlist to online dispute resolution. He continues to follow potential disrupters such as blockchain and machine learning/data science, looking for ways those disrupters might be used advantageously in courts and with justice partners. He is currently involved in both day-to-day and strategic initiatives for the Nevada courts.

Katie Wilson is the Director - Applications with the Indiana Office of Court Technology, a division of the Indiana Supreme Court, Office of Judicial Administration. Katie leads a team tasked to develop, manage, and enhance applications for the Indiana Supreme Court and its administrative agencies. Katie and her team assist with business process review, project management, system analysis, and data analytics for the agencies and customers they support. Katie has a B.S. from Purdue University and an M.B.A. from Indiana University.

Please provide your feedback regarding this session.

Current and Future Trends Affecting Appellate Courts

Paul Embley – Chief Information Officer, Nevada Supreme Court
Katie Wilson – Appellate Applications Director, Indiana Supreme Court

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INCREASED INFORMATION/CYBER SECURITY RISKS IN APPELLATE COURTS

Speaker: Barbara Holmes

Barbara Holmes joined the NCSC Technology Division as Principal Court Management Consultant in January 2017. She is a certified cybersecurity professional (CISSP) and a certified data privacy solutions engineer (CDPSE). With over 25 years of experience working in the Information Technology Department of the Administrative Office of Pennsylvania Courts, Barb most recently served as the Assistant Director of Information Technology. She was responsible for the design and implementation of statewide case management systems, and for managing enterprise analysis, database and data exchange. Barb was involved in the design, testing and development of data exchanges, including the data exchange used for emergency protection orders. Barb also played a pivotal role in business process analysis and joint application design/development with end-users as well as technical activities such as database design, data mapping, and message/exchange development.

Barb served as Interim CIO for the judiciary in West Virginia and First Judicial District Pennsylvania (Philadelphia) and IT Infrastructure Manager in Vermont. She was active in remediating a ransomware attack in Philadelphia. She has performed information security risk assessments in various locations.

Barb was the first recipient of the national Court Technology Innovation Award offered by the Court Technology Officers Consortium (CITOC) for the development and use of Customer Relationship Management (CRM) tools in court settings, principally for tracking the PA Interpreter Certification process and Language Access Program encounters. She has been a presenter at the National Center for State Courts Technology Conference and is active in CITOC. In addition, Barb has authored many Court Technology Experience Bulletins and has regularly presented to statewide organizations.

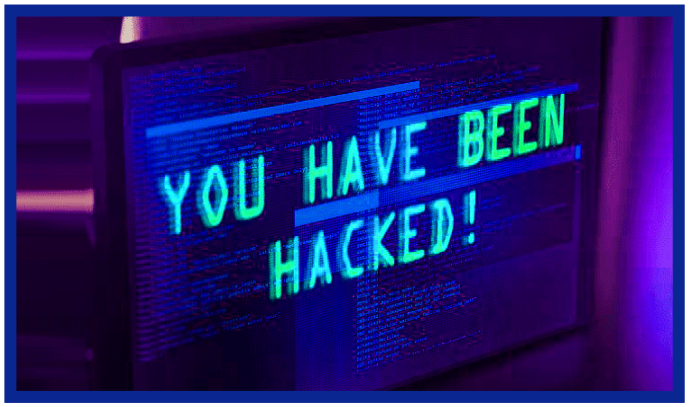
Active on many standards committees, Barb was also a member of a Capability Maturity Model (CMM) Software Engineering Process Group to implement quality process improvement in software development for a healthcare company.

Information and Cybersecurity in Appellate Courts

What is InfoSec

InfoSec defines the universe of all types of security that surround information and information systems including:

- Physical security of data and systems
- Cybersecurity
- Data, document and information exfiltration (improper release or sharing)



Information Security “So What?”

- Appellate courts are particularly vulnerable to InfoSec incidents:
  - Sensitive information about deliberations
  - Election decisions/determinations
  - Sensitive case data – PII and financial
  - Important outcomes that may have financial implications

Court-related Incidents

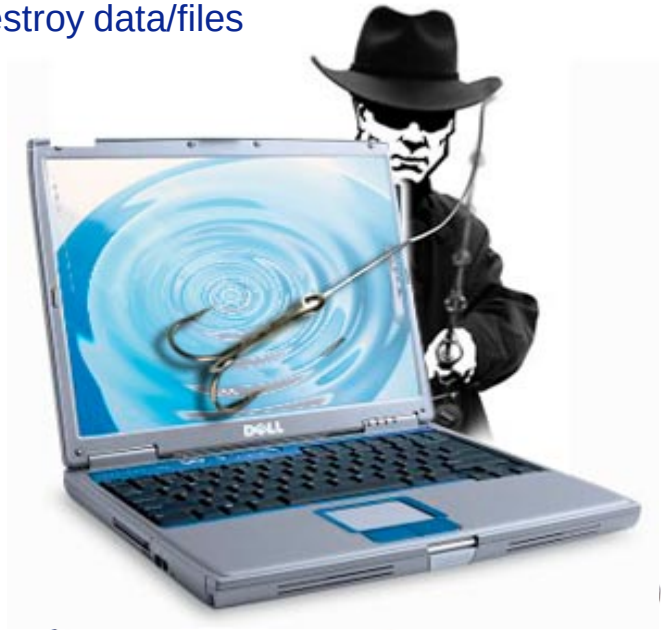
Phishing

An attempt to convince you to do or say something that allows the actor to obtain information or infiltrate a system.

Initiated through:
- ✓ Email or text
- ✓ Hyperlinks in any kind of media
- ✓ Phone calls

Allows the actor to:
- ✓ Obtain private or sensitive information
- ✓ Obtain unauthorized access/user credentials
- ✓ Obtain money through an unauthorized transaction
- ✓ Corrupt and destroy data/files

Common Examples:
The Fake Invoice Scam
Email Account Upgrade Scam
Advance-fee Scam
Google Docs Scam
PayPal Scam
Message From HR Scam
Dropbox Scam
Free Gift Scam



Examples - Phishing

Receipt from National Center for State Courts (NCSC)

Receipt #1750-3289

AMOUNT PAID	DATE PAID	PAYMENT METHOD
$99.00	April 18, 2022	AMERICAN EXPRESS - 7000

SUMMARY

Order by nses247@gmail.com	$99.00
Amount charged	**$99.00**

National Center for State Courts (NCSC) contributed **1% of your purchase** to remove CO_2 from the atmosphere.

If you have any questions, contact us at atcheson-austin1960@outlook.com or call at +1 800-616-6164.

Something wrong with the email? View it in your browser.

You're receiving this email because you made a purchase at National Center for State Courts (NCSC), which partners with Stripe to provide invoicing and payment processing.

Examples - Phishing

Urgent Document
Outlook item

From: William Weisenberg <WWeisenberg@ohiobar.org>
Sent: Wednesday, September 16, 2020 9:41 AM
Subject: Proposal

[WARNING] This email originated outside the NCSC email system. DO

FYI

Best,
Bill

Sent from my iPhone

Examples - Phishing

From: Burton, Pam <pburton@ncsc.org>
Sent: Tuesday, July 14, 2020 12:23 PM
Subject: File Received: NCSC

1 Encrypted Message Received

You have received a secure message from **pburton@ncsc.org**

Please follow the link below to read your message securely.

Read Message

Social Engineering

Obtaining information through social media, location sharing or conversations either in person or though phone, text, etc.

Initiated through:

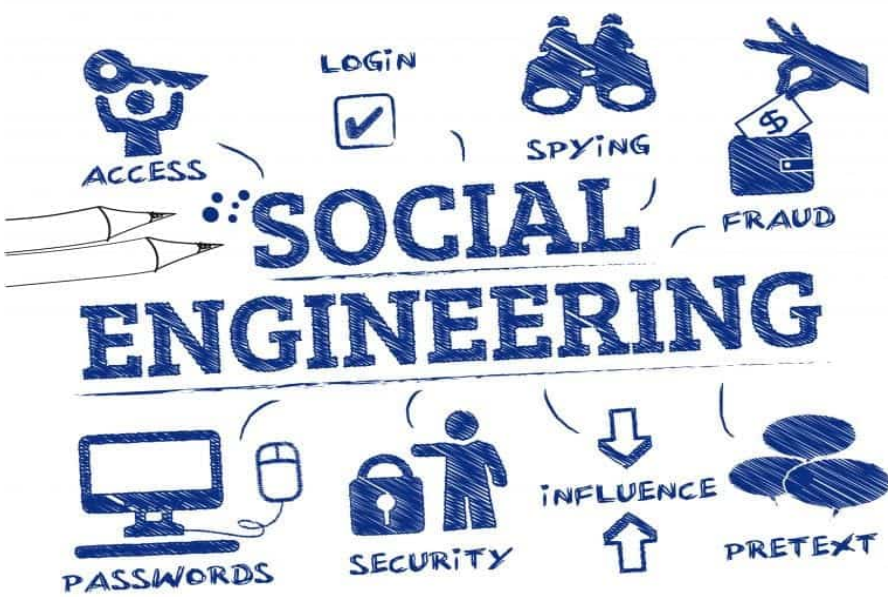
- ✓ Phishing
- ✓ Phone inquiry
- ✓ Tailgating
- ✓ Insider ill intent
- ✓ Swatting (reporting crime that doesn't exist – bomb threat, armed intruder, violent incident)

Allows the actor to:

- ✓ Obtain private or sensitive information
- ✓ Obtain unauthorized access/user credentials
- ✓ Obtain money through an unauthorized transaction

Common Examples:

Fraudulent call pretending to be an authority (bank, security specialist)
Shoulder surfing
Insider shares sensitive data intentionally or unintentionally



Examples – Social Engineering

STAFFORD COUNTY, VA — A swatting incident occurred in Stafford County on Tuesday evening, according to a report from the Stafford County Sheriff's Office.

Swatting is a phenomenon that originated among online gamers. It involves falsely reporting a serious or violent crime in an effort to draw a large police response against an unsuspecting person.

Stafford County's Emergency Communication Center received a call at 8:40 p.m. on Tuesday, Jan. 11. The caller described a shooting at a home in the Park Ridge subdivision, police said.

When deputies arrived on the scene, they were able to determine that the report was false. Now, authorities in Stafford County are working to identify possible suspects who may have made the false report.

The sheriff's office said that the suspect could face charges of identity theft and falsely summoning law enforcement.

Patch Reporting -
Posted Thu, Jan 13, 2022 at 11:50 am ET

Examples – Social Engineering

- Fake data request that involves life or death emergency and cannot wait a court order
- Fake subpoena that requests court or government data
- Fake invoice that requests payment
- Promise of payment or other reward for information/location (quid pro quo)
- Urgent voice mail (Vishing) – social security scam, IRS

Physical Security Incidents

Use the physical devices/environment of the organization to infect, damage and/or compromise the IT systems.

Initiated through:

- ✓ USB Storage Devices
- ✓ CD/DVD
- ✓ Unlocked and available IT devices – servers, workstations, laptops
- ✓ Public kiosks that are not locked down
- ✓ Internet of Things (IOT)
- ✓ Fire or water damage

Allows the actor to:

- ✓ Install randsomware or other malware
- ✓ Modify an information system
- ✓ Potentially dismantle the network
- ✓ Make important IT assets unavailable or unuseable

Common Examples:

USB picked up in a parking lot
CD/DVD placed in a server
Malicious employee damages server or software

Elements of Physical Security

Examples – Physical Security Incidents

Veteran's Administration (VA) Massive Data Breach

- Personal identifying information on about 26.5 million U.S. military veterans was stolen from the residence of a Department of Veterans Affairs data analyst who took the material home in violation of VA security policies.[9] The data stolen included names, Social Security numbers and dates of birth of the veterans. Inside sources have reportedly claimed that the data are from the VA Benefits Administration branch. If so, such data would also likely contain ratings and entitlements as well. Such information would typically also contain the amounts of VA disability deposits and the account numbers and routing numbers of banks into which such deposits are to be made. 26.5 million information technology records of the most vulnerable among us, lost to a physical security breach.

The Compelling Case for Unifying IT and Physical Security

By Thomas L. Norman, CPP/PSP on November 20, 2017, Security Industry Association

Examples – Physical Security Incidents

DDOS Attack Using 25,513 IP Video Cameras from 105 countries

- Just when you thought it was safe to go back into the water, researchers from the security firm Sucuri discovered that in a very unique attack, 25,513 internet-connected IP security video cameras (physical security devices) have been connected into a massive denial-of-service botnet used in a “proof of concept” distributed denial of service (DDOS) attack against a jewelry store site. The source article indicated that this massive botnet was generating nearly 50,000 HTTP requests per second. However, Jason Thacker of White Badger Group, LLC, a leading cybersecurity consulting group, states that it is more likely that these were not HTTP requests, which would require running malware on the cameras, but rather simply HTTP/RTSP streams, which could run from unmodified cameras. The attack continued for days and researchers found that the botnet had leveraged only Internet of Things (IoT) CCTV devices from 105 countries.

The Compelling Case for Unifying IT and Physical Security

By Thomas L. Norman, CPP/PSP on November 20, 2017, Security Industry Association

Examples – Physical Security Incidents

Facility access through unprotected Video IP Cameras

At an overseas facility that had switched out all of its exterior analog security video cameras for IP cameras, I noticed that bare IT cables were attached to a wall in a publicly accessible parking structure (one could simply walk into the structure). Following the cables, I discovered that the cable was an un-conduited connection to a small consumer-grade digital switch contained within an electrical panel near the parking gate.

Sniffing the connection, we realized that unencrypted traffic on all of these systems flowed through the digital switch. This parking space provided unhindered access to the security system IP network including the video servers and access control system servers. In other words, using information readily available on the internet, this security system could be hacked into while sitting in a car in the public parking structure, providing the hacker with the ability to remotely unlock vehicle gates and doors, bypass alarms, guide the intruder through the facility and into the most restricted areas of the facility, and after having left, he could overwrite the video with looped video showing no intrusion during the time period of the intrusion.

The Compelling Case for Unifying IT and Physical Security

By Thomas L. Norman, CPP/PSP on November 20, 2017, Security Industry Association

Supply Chain Security Incidents

Use the companies, software and services used in the business to introduce threat.

Initiated through:

- ✓ Software suppliers
- ✓ IT service providers
- ✓ IT network, database and cloud services

Allows the actor to:

- ✓ Install randsomware or other malware
- ✓ Modify an information system
- ✓ Potentially dismantle the network
- ✓ Make important IT assets unavailable or unusable

Common Examples:

Zero Day vulnerabilities

Backdoors included in the product

Examples – Supplier Security Incidents

Microsoft 2021 Vulnerability

- On Tuesday, March 2, 2021, Microsoft released an out of band patch to address multiple remote code execution (RCE) vulnerabilities in Microsoft Exchange.
- Four of these vulnerabilities have been connected to attacks by a nation state threat group known as HAFNIUM dating back to at least January 6, 2021.
  HAFNIUM was able to chain together several of these vulnerabilities to exploit vulnerable Exchange Servers in their attacks to access full mailboxes of interest.

Solarwinds 2021 Vulnerability

- A year ago today, the security firm FireEye made an announcement that was as surprising as it was alarming. Sophisticated hackers had slipped into the company network carefully tailoring their attack to evade the company's defenses. It was a thread that would unspool into what is now known as the Solarwinds Hack, a Russian espionage campaign that resulted in the compromise of countless victims.
- In this case, it meant that Russian intelligence had potential access to as many as 18,000 SolarWinds customers.
- The malware was in the software starting in 2019 or perhaps before.

Solutions

- Staff training
- Information Governance
- IT Risk Assessment
- More….

Please provide your feedback regarding this session.

INCREASED INFORMATION/CYBER SECURITY RISKS IN APPELLATE COURTS

Barbara Holmes – National Center for State Courts

https://forms.office.com/g/mF4Tj2Bi1q

A CONVERSATION WITH
UNITED STATES SUPREME COURT CLERK SCOTT HARRIS

Scott S. Harris has served as the Twentieth Clerk of the Supreme Court of the United States since September 1, 2013. Prior to his appointment as Clerk, he served as the Supreme Court's Legal Counsel for 11 years. In that role he managed the Court's Legal Office, which provides support to the Justices on a variety of case-related issues and legal services for the Court as an institution.

Before joining the Court in 2002, Mr. Harris was an Assistant United States Attorney in Washington, D.C., representing federal agencies and officials in civil litigation in federal courts. He was previously an associate at the law firm then known as Wiley, Rein & Fielding, and he also served as a law clerk to the Honorable Paul V. Niemeyer of the United States Court of Appeals for the Fourth Circuit.

Mr. Harris earned his B. S. from Yale University in 1988, and his J.D. from the University of Virginia School of Law in 1993.

Please provide your feedback regarding this session.

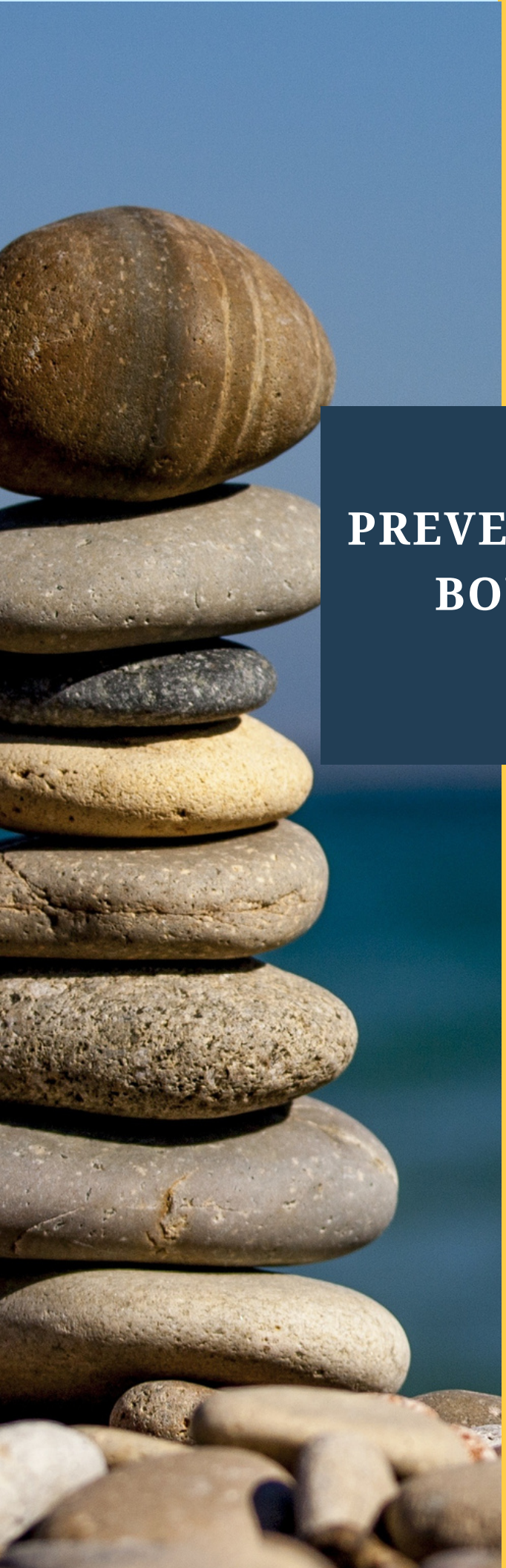
A Conversation with United States Supreme Court Clerk Scott Harris

https://forms.office.com/g/9Mf8B41K7S

PREVENTING BURNOUT, SETTING BOUNDARIES, AND CREATING WORK-LIFE HARMONY

Speaker: Danielle M. Hall

Danielle Hall has served as the Executive Director for the Kansas Lawyers Assistance Program since December 2019. In addition to overseeing the daily operations, she administers a variety of programs for lawyers and law students who need assistance due to a substance abuse, mental health, or law practice management related issue. Prior to her appointment, she served as a Deputy Disciplinary Administrator for the State of Kansas where she investigated and prosecuted attorney disciplinary cases and served as a coordinator for the Attorney Diversion Program. Danielle regularly teaches continuing legal education on many topics including lawyer well-being, mental health and substance abuse, ethics, and law practice management and technology use in the law office. She currently serves as the Policy Chair for the Institute for Well-Being in Law and serves on the executive committee of the Kansas Lawyer Well-Being Task Force. She is President of the Women Attorneys Association of Topeka, Co-Chair of the Minority Women in the Profession Committee for the Kansas Women Attorneys Association, and a member of the Kansas Bar Association Board of Governors. She is also an active member in the ABA Law Practice Division, having served on several committees and is a regular columnist for the ABA Law Practice Magazine. Danielle received a B.A. degree in Political Science in 2006 and a J.D. in 2009, both from Washburn University in Topeka, Kansas.



PREVENTING BURNOUT, SETTING BOUNDARIES, AND CREATING WORK-LIFE HARMONY

Danielle M. Hall, Executive Director
Kansas Lawyers Assistance Program

Burnout is a serious problem. Over-whelming workloads, limited re-sources, bad work habits and un-healthy workplace culture can lead to an increased risk of burnout. Some of us, however, have become so accustomed to being stressed and burned out that we might not even realize how much we're suffering and maintaining a healthy work-life balance may seem unrealistic. This paper looks at the difference between stress and burnout so individuals may better understand what they are potentially experiencing and offers practical recommendations on how to implement healthy stress coping strategies and boundaries to prevent burnout and increase one's work-life balance.

Burnout, Stress, and Work-Life Balance

Burnout vs. Stress

The term burnout has become so familiar that it's common to hear people casually say, "Oh, I'm so burned out," when they're merely referring to a bad day or a bad week. But for those who truly are burned out, it is much more than a bad day or a bad week. It's a problem that significantly interferes with one's health, happiness, and overall quality of life.

Stress, on the other hand is a general feeling of emotional or physical tension. It is a normal reaction in the body. In fact, the body is designed to experience stress and react to it. Stress can even be a positive at times. For example, if you have something significant you are working on and you are approaching the deadline, a stress response might help the body work harder and stay awake longer. Some go as far as saying stress can even be good for us in small doses. When stress, however, continues without periods of relief, that is when it can be dangerous and lead to other emotional and physical concerns. Stress exists on a continuum, and it's important to know your place on it as you get more work, finish projects, set meetings, and generally go about your day. If not, chronic workplace stress can lead you down a path to burnout. Here are some of the key differences between stress and burnout:

Stress	Burnout
Characterized by over engagement	Characterized by disengagement
Emotions are reactive	Emotions are blunted
Produces urgency and hyperactivity	Produces helplessness and hopelessness
Loss of energy	Loss of motivation, ideals, and hope
Leads to anxiety disorders	Leads to detachment and depression
Primary damage is physical	Primary damage is emotional
May kill you prematurely	May make life seem not worth living

Knowing the difference between stress and burnout can be extremely helpful when determining how to respond to what you are experiencing and determining whether you are to the point in your journey where professional help is needed.

Causes and Symptoms of Burnout

The term "burnout" was coined in the 1970s by the American psychologist Herbert Freudenberger. He used it to describe the consequences of severe stress and high ideals in helping professions. Helping professionals include fields such as medicine, nursing, psychotherapy, psychological counseling, social work, education, legal and other direct-service roles. These types of jobs often involve intense, interpersonal interactions that occur repeatedly throughout the workday. Often, given the nature of their job they are constantly extending

themselves outward in the service of assisting others. As a result, those in helping profession find themselves at high-risk for burnout.

At its core, burnout is a state of emotional, mental, and physical exhaustion caused by excessive and prolonged stress. It can negatively affect both your work and your life. As the stress continues, you begin to lose the interest or motivation that led you to take on a certain role in the first place.

There are many contributing factors that can lead to burnout. Work-related causes of burnout can include:

- Feeling like you have little or no control over your work
- Lack of recognition or rewards for good work
- Unclear or overly demanding job expectations
- Doing work that's monotonous or unchallenging
- Working in a chaotic or high-pressure environment

Burnout is a gradual process, however, that occurs over an extended period. It doesn't happen overnight, but it can creep up on you if you're not paying attention to the warning signs. The signs and symptoms of burnout are subtle at first, but they get more pronounced as time goes on. Here are some of the signs and symptoms to watch out for:

Physical signs and symptoms of burnout:

- Feeling tired and drained most of the time
- Lowered immunity, feeling sick a lot
- Frequent headaches (migraines), back pain, muscle aches
- Change in appetite or sleep habits

Emotional signs and symptoms of burnout:

- Sense of failure and self-doubt
- Feeling helpless, trapped, and defeated
- Detachment, feeling alone in the world
- Loss of motivation
- Increasingly cynical and negative outlook
- Decreased satisfaction and sense of accomplishment

Behavioral signs and symptoms of burnout:

- Withdrawing from responsibilities
- Isolating from others
- Procrastinating, taking longer to get things done
- Using food, drugs, or alcohol to cope
- Taking out frustrations on others
- Skipping work or coming in late and leaving early

As you may have noted, any one of these symptoms can also be something other than burnout. What you are really looking for is a combination of symptoms. Some experts suggest that if you see the big four—cynicism, fatigue, lack of concentration and a feeling of inefficacy, it may be time to seek help.

If you can relate to any of the above warning signs and symptoms and are wondering if you might be suffering from burnout, here is an easy test you can try. The first step is to completely commit to treating yourself to a relaxing, stress-free weekend. Try to sleep in both days. Eat

right. Occupy your time with relaxing activities that you rarely allow yourself to enjoy. Whatever you do, it is important that you fully commit to relaxing. If on Monday morning, you wake up tired and dreading your day, you may be suffering from burnout. The next step is to take more time off, remove all the stressors, and add stress reducers. If after you take a longer vacation—a week or even two weeks—and you are still dreading going into the office and are waking up tired, it is likely time you seek professional help and make significant changes for your well-being.

The key to dealing with stress and preventing burnout out is to implement coping strategies that allow you to effectively handle stress when it comes your way. The following action plan has been adapted from The American Psychological Association:

1. Understand your stress.
2. Identify you stress source.
3. Recognize your stress strategies.
4. Implement health stress management strategies.
5. Make self-care a priority.
6. Ask for support when you need it.

From understanding how you stress and what causes your stress to determining the best coping strategies for you is all a process. Taking the time, however, to evaluate these areas will be key to better managing your stress.

Building your resiliency skills is also imperative to your overall wellness. Additionally, adopting healthy habits and practices are important. Lastly, setting boundaries can help you to achieve a better work-life balance, ultimately reducing your stress.

Work-Life ~~Balance~~ Harmony

Simply put, work-life balance is a state where a person equally prioritizes the demands of one's career and the demands of one's personal life. Obtaining work-life balance is important to help lawyers stay healthy and engaged in their work. Balance, however, can seem misleading at first. In fact, I don't even like the term work-life balance for this reason. Many of us see balance as 50/50 and that just doesn't always seem attainable. I prefer to call it work-life harmony. Balance (or harmony) can mean different things for different people. For some, work is everything. While for others work is good but spending time with family and friends is more important. Some of us want time to focus on activities that bring us enjoyment—such as reading, art, or music. Some of us want more time to focus on our physical health through exercise. Others may just need more time for rest and relaxation. Ultimately, it is important for you to figure out what's important to you before determining what work-life balance means for you.

Depending on where you are professionally, achieving a work-life balance may seem hard and unrealistic, but it is important. If you are teetering and fail to find some level of work-life balance, consequences may follow. Some of these consequences can include:

- **Fatigue** – If you are in a state of constant fatigue, your ability to work productively and think clearly may be reduced over time. Constant fatigue can also affect your ability to competently represent your clients, mistakes can occur, and it makes you at risk for burnout.

- **Lost Time** – If you are struggling to find balance, you might feel as though you have lost time with your loved ones. Maybe you have missed milestones with your children. You might also feel like you have lost time to participate in the activities that bring you enjoyment.

- **Increased Expectations** – Working extra or odd hours may lead to increased expectations or responsibilities. Keep in mind that once you have established a pattern, it is often harder to reverse course.

- **Physical Health Risks** – if you are struggling to find balance, chances are you are feeling stressed. You might also be getting less sleep since there is a direct correlation between stress and sleep. If so, your physical health can certainly be impacted. Studies show that stress and a lack of sleep can lead to conditions such as stroke and heart disease.

- **Mental Health Risks** – Just as with an increased risk to your physical health, a work-life imbalance can also lead to an increased risk to your mental health. Work-life imbalance can lead to stress, burnout, and an increased risk for depression and anxiety.

- **Negative Effects on Relationships** – In addition to feeling like you have lost time with your loved ones, a work-life imbalance can also lead to strains on your personal relationships.

Knowing that work-life balance is important for your overall health and well-being, you might now be thinking how do I *actually* achieve a work-life balance? My suggestion is to first start thinking about this in terms of work-life harmony, rather than balance. For most, 50/50 is not always going to be attainable and when it doesn't happen, we let our perfectionist brains take over and then we get disappointed and feel as though we failed. Then we give up as we start feeling it isn't possible. By thinking about achieving work-life harmony, we allow ourselves some room to breathe. Our schedules will ebb and flow. Some weeks will be better than others, but ideally, we should be in a state of harmony with our work and with our life outside of work. Additionally, identifying what work-life balance (or harmony) looks like for you is important. What it is for me, may be something completely different for you.

After we define what work-life balance looks like, then you start by setting boundaries, which should lead to taking back your calendar and most importantly your time. Once your boundaries are set, you must, however, then stick with them. Otherwise, your boundaries may quickly go out the window. For example, if you set a communication boundary establishing you will not answer emails after 7:00 p.m. on weekdays, but then begin to answer emails after 7:00 p.m. on a few select nights, those few nights can quickly become every night. Expectations will change and the next thing you know you have no boundaries with work. So, keep in mind, setting a boundary and then not enforcing it is the equivalent of having no boundary at all.

Boundaries

The first place to start establishing a work-life balance is to evaluate the boundaries you are currently setting at work and in your other professional relationships. For some of you, this means recognizing that you might not have well defined boundaries at all. To establish your boundaries, you will want to identify two specific categories—boundaries with others and boundaries for yourself.

Establishing Boundaries with Others

We have all heard the common phrase “communication is a key.” Not only does this apply to your personal relationships, but it also applies to professional one’s as well. Just as communication is the foundation for lawyers practicing law, communication is a foundation to the work you do court clerk as well. As the court clerk, keep in mind that you also set policy and procedures, and thereby boundaries for your staff as well. Some key areas to keep in mind include:

- What are the types of communication channels that will be used? Is there a channel that is more appropriate depending on the nature of the communication?
- How often should others expect communication and from whom?
- Who should someone contact if they have questions and is that different depending on the type of question?
- How long will you take to respond if someone contacts you directly?
- What are the office hours for communication? Does this include weekends and holidays?
- How long do you expect for a response from others?

These are just a few examples of the questions that should be addressed. Note, the questions not only establish your and/or your team’s responsibilities with respect to communication, but also the expectations for others.

It is important to establish boundaries for several different reasons, but one important consideration is the way we now operate in society with respect to communication. Communication nowadays is instant. Services and products can also be obtained instantaneously. An individual may expect the same level of response from you and your team as they get from say, Amazon Prime. As a result, discussing communication expectations is an important part of establishing boundaries. You will at least want to consider: 1) the communication methods to be used; and 2) what are the response times a person should expect. Here are a few methods of communication that should be evaluated:

- Phone Calls – When will you accept phone calls? If a phone message is left, how quickly will you return the call? Will you accept phones calls at both the office line and a cell phone?
- Emails – When will you check your email? How quickly will you return an email?
- Text Messages – When will you accept text messages, if at all? How quickly will you return them? Under what circumstances are text messages appropriate?
- Communication Portals – If you use a portal, under what circumstances can an individual expect it to be used?

In addition to looking at your boundaries regarding communication, I also recommend looking at how you set your appointments and meetings. Do you make yourself available anytime an individual wants you? Have you found yourself offering late last-minute after-hours appointments? If so, it sounds like this might be a boundary area to work on.

With respect to appointments, the most important thing is to stick to the schedule that you set. Afterall, it is *your* calendar. It is understandable that you may want to accommodate an individual who is not able to meet with you during normal business hours. Just make sure you are adhering to your schedule, and it doesn’t become a nightly thing. Additionally, when

evaluating your boundaries on appointments, you should consider whether you are willing to accept the random unexpected pop-in. The best practice is to have individuals call and set up a time to meet or select a time from your online appointment calendar. Online appointment calendars can be tailored to not offer appointments within a certain number of hours or days before the appointment. If it is an emergency, of course you can be willing to accommodate, but it is a best practice to have the person call or email first.

Establishing Boundaries for Yourself

Setting your own personal boundaries on how you will use your time is a useful technique for managing the stress associated with work and for giving yourself the opportunity to enjoy a reasonably balanced life. Boundaries will help you preserve time for vacations and activities other than practicing law that are meaningful for you. Boundaries on your time will also give you opportunities during the day to take breaks for reflection and rejuvenation. When setting your boundaries or accessing your current boundaries, here are some questions you should ask yourself:

- How often, and under what circumstances, will you bring work home with you at the end of the day? How often, and under what circumstances, will you work on weekends?
- How often, and under what circumstances, will you stay at the office late? How often and under what circumstance will you come into the office on the weekends?
- How frequently will you check email during the week? Will you check email in the evenings? Will you check email on weekends? When will you not check email?
- How much time do you want to set aside for vacation each year? Are you willing to have individuals and colleagues contact you while you are on vacation? If so, under what circumstances and how? For instance, will you answer email while on vacation? If so, how often.
- Will you block out time on your calendar for important family events? Will you block out time on your calendar for religious and non-religious holidays? Will you block out time on your calendar for things that are important to you? If so, what are those important things?
- Will you give yourself permission to take breaks during the day? If needed, will you give yourself permission to take mental health days?
- Will you block time on your calendar for self-care?

Once you set boundaries around your time, it is important to be willing to communicate those boundaries when needed to manage the expectations of outside individuals and your colleagues consistent with those boundaries. Unless you take affirmative steps to manage your time consistent with the boundaries you want to maintain, others will be more than happy to manage your time for you.

Establishing Boundaries for Your Mental Health

Let’s be honest, no one really wants to be in a situation where they need to turn the courts. We tend to see people on their worst days or when they are going through the toughest of circumstances. This means you might get the brunt of all the negativity. Now, add into the pot the fact that the justice system is adversarial in nature. We are also constantly engaging in analysis problems.

All this coupled together leads to things like compassion fatigue and secondary trauma. It also makes the circumstances ripe for some of the highest rates of depression, anxiety, and substance abuse compared to other industries. Sometimes, we just need a break to take care of ourselves. In addition to taking a vacation—and I mean a real vacation with multiple days away—know that it is beneficial to take mental health days when you need them as well. Do not ignore fatigue, emotional exhaustion, cynicism, or a lack of motivation or ability to focus. These are often symptoms of a larger problem, like burnout. Allowing yourself permission to take mental health days will help prevent long-term burnout and will help you get in tune with your body and brain.

Also, give yourself permission to take time for self-care. Carve out time for things like exercise, reading for enjoyment, or other activities that bring you happiness. Simple things like making sure you give yourself time during the day to eat lunch and time first thing in the morning to get centered will go a long way in your own self-care.

Let perfection go. This will be one of your hardest challenges to setting boundaries for yourself. The sooner you learn that perfection is unrealistic and dangerous, the better and healthier you will be. As type A personalities, perfection is always the goal, but what happens when you fail? You may end up in a vicious cycle of depression, anxiety, burn out, and perfectionism. Allowing yourself permission to let go of perfectionism will break this cycle. This doesn't mean that you aren't going to produce high quality work or that you are going to fail your clients or ignore your ethical responsibilities. Instead, it will allow you to let go of the pressure of being perfect, so that you can perform without a constant internal voice of self-recrimination and shaming that characterizes perfectionism.

Finding More Balance

Here are some additional strategies for preventing burnout and maintaining a good sense of emotional well-being and balance:

- **Start the day differently.** Rather than jumping out of bed as soon as you wake up, spend at least fifteen minutes meditating, writing in your journal, doing yoga, or reading something that inspires you. When you are feeling stressed, simply changing the hand you use to brush your teeth can help you shift your brain thinking. Also, don't answer emails first thing in the morning, otherwise you are going to spend you day being reactive to others, rather than proactive on your tasks. Take the first hour of the day to get organized on work on something on your list of to-dos.

- **Adopt healthy eating, exercising, and sleeping habits.** Proper nutrition, sleep and exercise provides the energy and resilience to deal with the daily demands of a law practice. Getting restorative rest should be a goal.

- **Work on building your resiliency skills.** Resiliency is often described as the ability to respond to stress in a healthy, adaptive way that allows you to achieve your personal goals at minimal psychological and physical cost. The key building blocks to building your resiliency are thinking flexibly about challenges and framing adversity in an accurate way and building high quality connections with others to have a support system. The first step towards building resiliency is to start cross examining your own thinking and to start building your self-efficacy. So, when you feel negative thoughts starting to creep in, look for measurable and specific evidence to support the accuracy of your thoughts. Also, start capitalizing those smalls wins throughout the day.

- **Take a daily break from technology.** Completely disconnect from technology when you get home (or after business hours). Put away your laptop, turn off your smartphone and stop checking email.

- **Nourish your creative side.** Creativity is a powerful antidote to burnout. Try something new, start a fun project, or resume a favorite hobby. Choose activities that have nothing to do with work. As explained above, these activities in particular help nourish the limbic brain, which provides greater emotional resilience.

- **Align your values.** A reason that some lawyers experience burnout is that their core values are not aligned with their own behaviors. This problem reflects an internal psychological conflict, whereas at other times it is a conflict between the lawyer's values and those of the organization at which he or she works. Check whether there is a serious conflict between your values and your work and seek more meaning in your work. Remind yourself of the good you do.

- **Build awareness of your stress, your feelings, and your triggers.** Learn to recognize the signs that you are being pushed to the edge, whether they are headaches, anger, irritability, or something else. Try to identify precisely what is stressing you, especially if there is a chronic mismatch between demands and your resources. Are there activities you can cut? Can you hire someone to help you or delegate something?

- **Cross examine your own thinking.** Seek to quickly understand where you have a measure of control, influence, or leverage in the situation instead of wasting your time and energy on things they can't control. Look for measurable and specific evidence to support the accuracy of their thoughts. Look for the middle ground to diffuse black-and-white or all-or-nothing thinking styles. Think about what you would tell a friend in the same situation.

On the next few pages, you will find a few activities that you can complete to increase your well-being, handle stress, and determine where you may fall on the burnout scale.

Stress Control Activity:

- Consider any example of a difficult situation or event that is or has been on your mind.
- Mark two columns on your paper; in the first list all the things that matter about the situation that you have control over. This is not about the things you can do, or things you can try to influence. I will suggest that you cannot control anything that anyone else does says thinks believes, wants or choses.
- In the second column, list all the things that matter in the situation that you do not have control over.
- Now focus your time and energy on only the things in the what you can't control column.

What I can control	What I can't control

Values Activity

- Identify five values that are most important to you from the list provided below.
- Identify one way that you express/honor each value at work.
- Identify one way that you express/honor each value outside of work.
- On a scale from 1-10 (1 being not at all and 10 being as meaningfully as possible) ask yourself how well you are expressing/honoring each value in your life.
- Identify at least one new way you can commit to expressing/honoring each of your top values in the coming month.
- On a notecard, write a note to yourself as if it is one month later. Congratulate yourself for expressing/honoring each of your values over the past month. Be sure to reflect on how you now feel differently after satisfying your commitment.
- Keep your postcard in a special spot for motivation and self-accountability.

Sample Values

1. Accomplishment
2. Accuracy
3. Acknowledgement
4. Adventure
5. Authenticity
6. Balance
7. Beauty
8. Boldness
9. Calm
10. Challenge
11. Collaboration
12. Community
13. Compassion
14. Comradeship
15. Confidence
16. Connectedness
17. Contentment
18. Contribution
19. Cooperation
20. Courage
21. Creativity
22. Curiosity
23. Determination
24. Directness
25. Discovery
26. Ease
27. Effortlessness
28. Empowerment
29. Enthusiasm
30. Environment
31. Excellence
32. Fairness
33. Flexibility
34. Focus
35. Forgiveness
36. Freedom
37. Friendship
38. Fun
39. Generosity
40. Gentleness
41. Growth
42. Happiness
43. Harmony
44. Health
45. Helpfulness
46. Honesty
47. Honor
48. Humor
49. Idealism
50. Independence
51. Innovation
52. Integrity
53. Intuition
54. Joy
55. Kindness
56. Learning
57. Listening
58. Love
59. Loyalty
60. Optimism
61. Orderliness
62. Participation
63. Partnership
64. Passion
65. Patience
66. Peace
67. Presence
68. Productivity
69. Recognition
70. Respect
71. Resourcefulness
72. Romance
73. Safety
74. Self-Esteem
75. Service
76. Simplicity
77. Spaciousness
78. Spirituality
79. Spontaneity
80. Strength
81. Tact
82. Thankfulness
83. Tolerance
84. Tradition
85. Trust
86. Understanding
87. Unity
88. Vitality
89. Wisdom

My five values:

1.

2.

3.

4.

5.

How I will honor my values the next 30 days at home and at work:

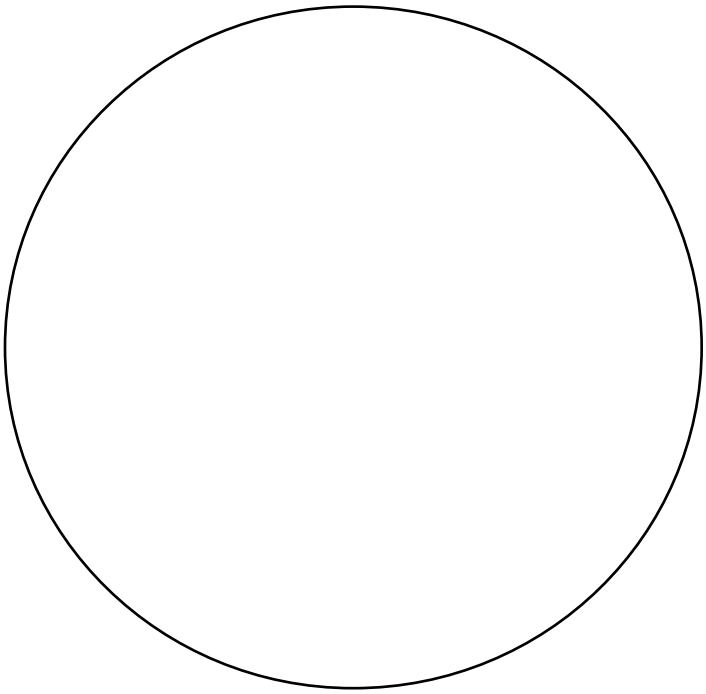
Mindfulness activity in times of stress:

This quick activity will allow you to slow your brain down in times of stress by tuning into your senses. Spend at least one minute on each:

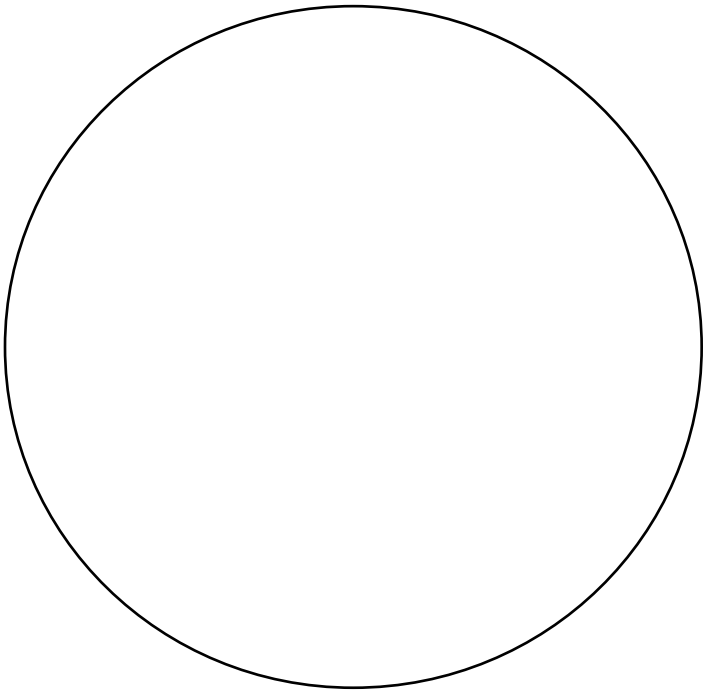
1. What can you see?
2. What can you hear?
3. What can you taste?
4. What can you smell?
5. What can you feel?

How Do You Want to Spend Your Time? Part One

In the space below, draw a pie chart showing the percent of time you spend on yourself, your job, and your relationships during your waking hours every week.



Are you happy with the arrangement you drew above? If you could change anything, what would it be? Draw your ideal time breakdown in the pie chart below.



How Do You Want to Spend Your Time? Part Two

Write down your answers to the following questions:

1. What about your current time breakdown works for you? What doesn't work?

2. How is your ideal breakdown different from your current one? Why is it better?

3. What are some things you can do to help achieve this ideal breakdown?

4. How would giving up on perfection help? In what area of your life would it have the most impact?

5. Is there anything you can ask for at home or at work that will help? If so, how will you do this?

PROFESSIONAL QUALITY OF LIFE SCALE (PROQOL)

COMPASSION SATISFACTION AND COMPASSION FATIGUE (PROQOL) VERSION 5 (2009)

When you *[help]* people you have direct contact with their lives. As you may have found, your compassion for those you *[help]* can affect you in positive and negative ways. Below are some-questions about your experiences, both positive and negative, as a *[helper]*. Consider each of the following questions about you and your current work situation. Select the number that honestly reflects how frequently you experienced these things in the *last 30 days*.

1=Never 2=Rarely 3=Sometimes 4=Often 5=Very Often

_____ 1. I am happy.
_____ 2. I am preoccupied with more than one person I *[help]*.
_____ 3. I get satisfaction from being able to *[help]* people.
_____ 4. I feel connected to others.
_____ 5. I jump or am startled by unexpected sounds.
_____ 6. I feel invigorated after working with those I *[help]*.
_____ 7. I find it difficult to separate my personal life from my life as a *[helper]*.
_____ 8. I am not as productive at work because I am losing sleep over traumatic experiences of a person I *[help]*.
_____ 9. I think that I might have been affected by the traumatic stress of those I *[help]*.
_____ 10. I feel trapped by my job as a *[helper]*.
_____ 11. Because of my *[helping]*, I have felt "on edge" about various things.
_____ 12. I like my work as a *[helper]*.
_____ 13. I feel depressed because of the traumatic experiences of the people I *[help]*.
_____ 14. I feel as though I am experiencing the trauma of someone I have *[helped]*.
_____ 15. I have beliefs that sustain me.
_____ 16. I am pleased with how I am able to keep up with *[helping]* techniques and protocols.
_____ 17. I am the person I always wanted to be.
_____ 18. My work makes me feel satisfied.
_____ 19. I feel worn out because of my work as a *[helper]*.
_____ 20. I have happy thoughts and feelings about those I *[help]* and how I could help them.
_____ 21. I feel overwhelmed because my case [work] load seems endless.
_____ 22. I believe I can make a difference through my work.
_____ 23. I avoid certain activities or situations because they remind me of frightening experiences of the people I *[help]*.
_____ 24. I am proud of what I can do to *[help]*.
_____ 25. As a result of my *[helping]*, I have intrusive, frightening thoughts.
_____ 26. I feel "bogged down" by the system.
_____ 27. I have thoughts that I am a "success" as a *[helper]*.
_____ 28. I can't recall important parts of my work with trauma victims.
_____ 29. I am a very caring person.
_____ 30. I am happy that I chose to do this work.

YOUR SCORES ON THE PROQOL: PROFESSIONAL QUALITY OF LIFE SCREENING

Based on your responses, place your personal scores below. If you have any concerns, you should discuss them with a physical or mental health care professional.

Compassion Satisfaction _____

Compassion satisfaction is about the pleasure you derive from being able to do your work well. For example, you may feel like it is a pleasure to help others through your work. You may feel positively about your colleagues or your ability to contribute to the work setting or even the greater good of society. Higher scores on this scale represent a greater satisfaction related to your ability to be an effective caregiver in your job.

If you are in the higher range, you probably derive a good deal of professional satisfaction from your position. If your scores are below 23, you may either find problems with your job, or there may be some other reason—for example, you might derive your satisfaction from activities other than your job. (Alpha scale reliability 0.88)

Burnout_____

Most people have an intuitive idea of what burnout is. From the research perspective, burnout is one of the elements of Compassion Fatigue (CF). It is associated with feelings of hopelessness and difficulties in dealing with work or in doing your job effectively. These negative feelings usually have a gradual onset. They can reflect the feeling that your efforts make no difference, or they can be associated with a very high workload or a non-supportive work environment. Higher scores on this scale mean that you are at higher risk for burnout.

If your score is below 23, this probably reflects positive feelings about your ability to be effective in your work. If you score above 41, you may wish to think about what at work makes you feel like you are not effective in your position. Your score may reflect your mood; perhaps you were having a "bad day" or are in need of some time off. If the high score persists or if it is reflective of other worries, it may be a cause for concern. (Alpha scale reliability 0.75)

Secondary Traumatic Stress_____

The second component of Compassion Fatigue (CF) is secondary traumatic stress (STS). It is about your work related, secondary exposure to extremely or traumatically stressful events. Developing problems due to exposure to other's trauma is somewhat rare but does happen to many people who care for those who have experienced extremely or traumatically stressful events. For example, you may repeatedly hear stories about the traumatic things that happen to other people, commonly called Vicarious Traumatization. If your work puts you directly in the path of danger, for example, field work in a war or area of civil violence, this is not secondary exposure; your exposure is primary. However, if you are exposed to others' traumatic events as a result of your work, for example, as a therapist or an emergency worker, this is secondary exposure. The symptoms of STS are usually rapid in onset and associated with a particular event. They may include being afraid, having difficulty sleeping, having images of the upsetting event pop into your mind, or avoiding things that remind you of the event.

If your score is above 41, you may want to take some time to think about what at work may be frightening to you or if there is some other reason for the elevated score. While higher scores do not mean that you do have a problem, they are an indication that you may want to examine how you feel about your work and your work environment. You may wish to discuss this with your supervisor, a colleague, or a health care professional. (Alpha scale reliability 0.81)

WHAT IS MY SCORE AND WHAT DOES IT MEAN?

In this section, you will score your test so you understand the interpretation for you. To find your score on **each section,** total the questions listed on the left and then find your score in the table on the right of the section.

Compassion Satisfaction Scale

Copy your rating on each of these questions on to this table and add them up. When you have added then up you can find your score on the table to the right.

3. _____
6. _____
12. _____
16. _____
18. _____
20. _____
22. _____
24. _____
27. _____
30. _____

Total: _____

The sum of my Compassion Satisfaction questions is	And my Compassion Satisfaction level is
22 or less	Low
Between 23 and 41	Moderate
42 or more	High

Burnout Scale

On the burnout scale you will need to take an extra step. Starred items are "reverse scored." If you scored the item 1, write a 5 beside it. The reason we ask you to reverse the scores is because scientifically the measure works better when these questions are asked in a positive way though they can tell us more about their negative form. For example, question 1. "I am happy" tells us more about the effects of helping when you are *not* happy so you reverse the score

You Wrote	Change to
	5
2	4
3	3
4	2
5	1

*1. _____ = _____
*4. _____ = _____
8. _____
10. _____
*15. _____ = _____
*17. _____ = _____
19. _____
21. _____
26. _____
*29. _____ = _____

Total: _____

The sum of my Burnout Questions is	And my Burnout level is
22 or less	Low
Between 23 and 41	Moderate
42 or more	High

Secondary Traumatic Stress Scale

Just like you did on Compassion Satisfaction, copy your rating on each of these questions on to this table and add them up. When you have added then up you can find your score on the table to the right.

2. _____
5. _____
7. _____
9. _____
11. _____
13. _____
14. _____
23. _____
25. _____
28. _____

Total: _____

The sum of my Secondary Trauma questions is	And my Secondary Traumatic Stress level is
22 or less	Low
Between 23 and 41	Moderate
42 or more	High

Please provide your feedback regarding this session.

PREVENTING BURNOUT, SETTING BOUNDARIES, AND CREATING WORK-LIFE HARMONY

Danielle M. Hall – Executive Director,
Kansas Lawyers Assistance Program

https://forms.office.com/g/8F8dXmD8ed

ETHICS AND THE ROLE OUR EMOTIONS PLAY IN MEETING OUR OBLIGATIONS

Speaker: Danielle M. Hall

Danielle Hall has served as the Executive Director for the Kansas Lawyers Assistance Program since December 2019. In addition to overseeing the daily operations, she administers a variety of programs for lawyers and law students who need assistance due to a substance abuse, mental health, or law practice management related issue. Prior to her appointment, she served as a Deputy Disciplinary Administrator for the State of Kansas where she investigated and prosecuted attorney disciplinary cases and served as a coordinator for the Attorney Diversion Program. Danielle regularly teaches continuing legal education on many topics including lawyer well-being, mental health and substance abuse, ethics, and law practice management and technology use in the law office. She currently serves as the Policy Chair for the Institute for Well-Being in Law and serves on the executive committee of the Kansas Lawyer Well-Being Task Force. She is President of the Women Attorneys Association of Topeka, Co-Chair of the Minority Women in the Profession Committee for the Kansas Women Attorneys Association, and a member of the Kansas Bar Association Board of Governors. She is also an active member in the ABA Law Practice Division, having served on several committees and is a regular columnist for the ABA Law Practice Magazine. Danielle received a B.A. degree in Political Science in 2006 and a J.D. in 2009, both from Washburn University in Topeka, Kansas.

AUGUST 2022

Ethics and the Role Our Emotions Play in Meeting Our Obligations

DANIELLE M. HALL

Kansas Lawyers Assistance Program

What are emotions and feelings?

According to the American Psychological Association, emotions are defined as "a complex reaction pattern, involving experiential, behavioral and physiological elements." Essentially, emotions are how individuals deal with matters or situations they find personally significant. Emotions are often confused with feelings, but the terms are not interchangeable. Emotional experiences have three components: a subjective experience, a physiological response, and a behavioral or expressive response. Feelings, on the other hand, arise from an emotional experience, and may be influenced by memories, beliefs, and other factors. Here is a chart to help illustrate the difference:

Emotions	Feelings
Emotions are associated with bodily reactions that are activated through neurotransmitters and hormones released by the brain.	Feelings are the conscious experience of emotional reactions.
Emotions are physical and instinctive, instantly prompting bodily reactions to threat, reward, and everything in between.	Feelings are sparked by emotions and shaped by personal experiences, beliefs, memories, and thoughts linked to that particular emotion.

Theories and hypotheses about emotions date back centuries. Based upon research conducted in 1960's and 1970's by emotional psychologist Paul Ekman, six basic emotions were identified. They could be interpreted through facial expressions and were universally experienced by all human cultures. The basic emotions included happiness, sadness, fear, anger, surprise, and disgust. Ekman expanded the list in 1999 to also include embarrassment, excitement, contempt, shame, pride, satisfaction, and amusement, though those additions have not been widely adapted. Recent research has even suggested there might be as many as 27 distinct categories of human emotion. Most experts in the field, however, focus on Ekman's original 6.

In 1980, psychologist Robert Plutchik put forth a wheel of emotions that worked like a color wheel. He theorized emotions can be combined to form different feelings, much like colors can be mixed to create other shades. According to this theory, the more basic emotions act like building blocks. More complex—sometimes classified as mixed emotions—are blendings of these more basic emotions. For example, basic emotions such as joy and trust can be combined to create love.

So, what cause emotions? That is a good question. Emotions occur in response to stimulus, whether is it actual, imagined, or re-lived. Stimulus can include:

- a physical event;
- a social interaction;
- remembering or imaging an event; and
- talking about, thinking about, or physically reenacting a past emotional experience.

Here is an example: You are enjoying a nice day walking in the woods on a trail. You see a bear that has spotted you. This event is a stimulus that can lead to an emotion. For many, that basic emotion is likely fear. Of course, when you experience the emotion, your fight or flight response

kicks in and you react. Your limbic system takes over. The limbic system is one of the most dominant parts of the brain and plays a vital role in behavioral and emotional response. This means that basic emotions—such as fear—are a part of this system.

Our fight our flight response is triggered when we feel a strong emotion like fear. Unfortunately, most of us prefer to focus on our logical thinking and ignore our emotions. Our emotions, however, serve a purpose.

Our basic emotions such as fear, anger, or disgust are vital messengers. They trigger our need for self-preservation and safety. These signals evolved into our flight or fight response and enable us with actions to run, to fight, or sometimes freeze. For most of us, however, the fight or flight response is not about escaping dangerous predators as it was once used in its primitive form. Instead, it is likely triggered by a subtle concern or a complex situation. This could be internal threats that manifest in the form of worries. It could also be a social interaction that trigger our emotions and causes our bodies to react. Ultimately, the fight or flight response is the automatic physiological reaction to an event that is perceived as stressful or frightening to you.

This flight or fight response can bleed over into your work activities. When you are perceiving or experiencing stress, your emotions kick in and then you respond. This can affect how to you respond to others, how you respond to projects, and how you cope with the stress that may come with your job.

How do our emotions relate to our ethical obligations?

Individuals, whether a court clerk, lawyer or judge, often find themselves applying ethical standards during times of high stress and emotion. As a result, responding ethically to a situation, is not just a question of knowing the rules or intending to behave in an appropriate manner, but also requires consideration of one's emotional response to the situation. Research shows that emotions can influence how we communicate and can influence our decision making. Emotions can also affect our abilities—both positively and negatively—to assess risk, understand what standards are appropriate to apply in a given situation, and affect how we handle fallout from own choices. Those that work in all faucets of the legal profession experience and manage—or maybe don't manage—emotions in many different contexts during their workday, but we are often taught to be suspicious of emotions and instead focus on logic and reason.

Lawyers are taught through Rule 1.1 of the American Bar Association's Model Rules of Professional Conduct that, "competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Similarly, Cannon III(G) of the National Conference of Appellate Court Clerks Code of Professional Conduct states that a member should, "maintain professional competence in judicial administration." If you look at other cannons, such as the paralegals and judges' rules, there are similar references to competence. Admittedly, nowhere within these rules does it explicitly state that legal professionals should have training in intrapersonal and interpersonal skills. These skills, including training on understanding emotions, however, are necessary for one to display competence in their role. Having these skills allows one to respond appropriately to the needs of those that they represent, help, manage, lead, or assist. It also helps to further develop an understanding of those different from oneself, as phycological competence and cultural competence can intersect.

To take it step further, Cannon III of the NCACC code states, “A member should be patient, dignified and courteous to litigants, lawyers, and others with whom he or she deals in an official capacity, and should require similar conduct by staff and others subject to their direction and control.” With this cannon in mind, managing emotions is especially important in situations when we are under pressure. Remember, no one wants to be in a situation where they have had to turn to the courts, as a result those in the legal profession often interact with members of the public at a difficult time in their life. How we respond to others has an impact on the perception of the overall legal process.

Lastly, most codes of the conduct governing those in the legal profession all refer to the duty to act with diligence. Poor time management and procrastination particularly impact the duty of diligence. Simply put, procrastination is the avoidance of work or necessary tasks by focusing on more satisfying activities. Science explains procrastination as the fight that is sparked between two parts of the brain—the limbic system and prefrontal cortex—when it’s faced with an unpleasant activity or assignment.

The limbic system is one of the oldest and most dominant portions of the brain. As I mentioned above, it is set up to perform your basic survival instincts and plays a role in your desire to flee from an unpleasant task by directing you to opt for the more pleasing alternative. The prefrontal cortex, on the other hand, is a newer and weaker portion of the brain. It allows you to integrate information and make decisions. It is located immediately behind the forehead, but there is nothing automatic about its function, unlike the limbic system. This is your internal planner, and you must kick it into gear. As a result, as soon as you are not consciously engaged in task, the limbic system takes over. And, when the limbic system wins, you put off what needs to be done today for tomorrow. Because the limbic system is much stronger, it often wins the battle and procrastination ensues.

Procrastination is a direct result of your fight or flight response, as the brain is protecting us from negative emotions. Dr. Tim Pychyl, professor of psychology and member of the Procrastination Research Group at Carleton University in Ottawa goes as far as to say in a recent New York Times article, “procrastination is an emotional regulation problem, not a time management problem.” Often, when we are avoiding a particular task or circumstance, it is not the task or circumstance we are avoiding. Instead, it is the emotions and feelings that are associated with our thoughts about that task we are trying to avoid.

We see negative consequences when procrastination becomes chronic. One of the most negative impacts chronic procrastination can lead to is missing deadlines. Failing to submit something on time or waiting until the last minute to make a decision can have dire consequences in both your professional and personal lives.

Understanding our emotions, however, to regulate how we respond—whether it is to a person in a difficult situation or a task we are avoiding—can help us better meet our ethical obligations. It just so happens, both understanding emotions and regulating a response are key concepts of Emotional Intelligence.

What is Emotional Intelligence?

As described by Dr. Travis Bradberry and Dr. Jean Greaves in their book Emotional Intelligence 2.0, Emotional Intelligence (EQ or EI) is your ability to recognize and understand emotions in yourself and others, and your ability to use this awareness to manage your behavior and relationships.

The functions of our emotions have been a subject that has long been debated, discussed, and theorized about, dating back to the ancient romans. The first formal definition and experimental measure of emotional intelligence, however, came about in 1990 in an article published by Yale researchers Jack Mayer and Peter Salovey.

Jack Mayer and Peter Salovey were friends. Salovey studied emotions and behavior, while Mayer studied the link between emotions and thoughts. One evening, during the 1988 presidential election, the two watched Senator Gary Hart, the democratic front runner, have a meltdown when confronted by media. Photos had been released just prior to the presidential debate, showing he had an affair on a boat, of all things, named Monkey Business. The senator was seen as someone who was intelligent, photogenic, popular, and having a good chance of winning. It is said one of them asked the other, "How can someone so smart do something so stupid?" The two wondered if there were certain measurable skills that involve using emotions intelligently that people have or don't have, independent on how smart they were. The startling conclusion of their research was that it was the use of both emotion and cognition combined that resulted in the most sophisticated information processing and decision making.

Based upon their research, Mayer and Salovey suggested those who have high emotional intelligence ultimately have 4 basic abilities:

1. The ability to perceive and correctly express their emotions and other's emotions.
2. The ability to use emotions in a way that facilitates thought.
3. The ability to understand emotions, emotional language, and emotional signals.
4. The ability to manage and regulate their emotions and behavior to achieve goals.

Since Mayer and Salovey's groundbreaking article, Daniel Goleman popularized the concept of emotional intelligence his book *Emotional Intelligence: Why it Can Matter More than IQ*, which was published 5 years later in 1995. His original theory mapped emotional intelligence into five key domains:

1. Knowing your emotions
2. Managing emotions
3. Motivating oneself
4. Recognizing emotions in others
5. Handling relationships

Goleman also divided emotional intelligence into competence categories: personal and social competence. Our personal competencies reflect how we manage ourselves while our social competencies reflect how we handle relationships with others. Here is a breakdown of the two categories:

Personal Competence	Social Competence
How we manage ourselves	How we handle relationships with others
Self-Awareness • Emotional awareness • Accurate self-assessment • Self-confidence Self-Regulation • Self-control • Trustworthiness • Conscientiousness • Adaptability • Innovation Motivation • Achievement drive • Commitment • Initiative • Optimism	Empathy • Understanding others • Developing others • Service orientation • Leveraging diversity • Political awareness Social Skills • Influence • Communication • Conflict management • Leadership • Change catalyst • Building bonds • Collaboration and cooperation • Team capabilities

Based on 'Working with Emotional Intelligence' Daniel Goleman.

Why is Emotional Intelligence important?

Research has suggested those with high emotional intelligence tend to communicate better, reduce their anxiety and stress, defuse conflicts, improve relationships, empathize with others, and effectively overcome life's challenges. Additionally, people who display higher levels of emotional intelligence tend to be more confident, more motivated, more committed to the purpose of their organization. Numerous studies have also linked emotional intelligence to critical life success factors, such as better effectiveness, relationships, wellbeing and quality of life.

Despite the lack of focus, emotional intelligence should be more valued in the workplace for several reasons, but there are two that stick out: 1) EQ is linked to higher job satisfaction; and 2) it is also associated with job performance. Additionally, using emotional intelligence in the workplace can improve decision making, social interactions, and the ability for one to handle work related stress. If you are interested in learning more about emotional intelligence in the workplace, read Positive Psychology's article at: https://positivepsychology.com/emotional-intelligence-workplace/.

How do we improve our Emotional Intelligence?

The good news is that you can improve your emotional intelligence. It is both learnable and measurable. There is also no correlation between your IQ and EQ. Some people have high IQ's and low EQ and vice versa. Some people score high on both scales, and some do not. Regardless, there are thing you can do to improve your emotional intelligence.

When developing your emotional intelligence skills, a good place to focus is on the 4 basic abilities pinpointed by Mayer and Salovey. Here as some recommendations on how you can improve in each area:

- Correctly identify and accurately label emotions – This includes the skill of identifying one's own emotions and other's emotions. Start by trying to identify what you're actually feeling. Work to build your emotional vocabulary and even chart your own emotions. Something like micro-expression training can also be helpful in recognizing how facial expressions can display emotion in others.
- Understand emotions- This includes the ability to understand how emotions transition from one state to another, as well as recognizing what causes emotions. Try watching movies and television on silent to identify emotions without the words. Attempt to be attune to others' feelings and practice active listening when you are talking with others. Additionally, if you don't know what someone is feeling, then just ask so you can learn.
- Use emotions to regulate thought – This focuses on one's ability to access their own emotions and to switch emotional gears. Try identifying the right mood for a particular task you are trying complete, and then try getting into the necessary mood. You can use things music, breathing, memories, nature, exercise to get yourself into the right mood.
- Regulate your own behavior and emotions – This last area includes the ability to manage relationships and confront and solve emotionally charged problems and situations. Work to accept your own emotions and thoughts. Watch for physical signs that indicate you are feeling a certain way. Change your self-talk from negative to positive. Practice mindfulness when responding to others in a difficult situation or while under stress and try rehearsing your response first.

Emotional intelligence is being incorporated more and more into training and professional development programs across many professions, including the legal profession. There are also online training courses one can take, as well as articles and books one can read to learn more about emotional intelligence and how to improve.

For more recommendations on improving your emotional intelligence, read the following article from Positive Psychology: https://positivepsychology.com/emotional-intelligence-eq/

Additional Resources

Self-Assessments:

- Emotional Intelligence Test (2019). Psychology Today. https://www.psychologytoday.com/au/tests/personality/emotional-intelligence-test
- Test your E.I: Free EQ quiz (2018). Institute for Health and Human Potential. https://www.ihhp.com/free-eq-quiz/
- How Emotionally Intelligent are You? Boosting Your People Skills (2019). Mind Tools. https://www.mindtools.com/pages/article/ei-quiz.htm
- Emotional Intelligence Test (2019). Psych Tests. https://testyourself.psychtests.com/testid/3979
- How Emotionally Intelligent Are You? (2017). My Frameworks. https://myframeworks.org/testmyeq/

Books:

- Emotional Intelligence: Why It Can Matter More Than IQ by Daniel Goleman
- Emotional Intelligence 2.0 by Dr. Travis Bradberry & Dr. Jean Greaves
- The Emotionally Intelligent Leader by Daniel Goleman
- Permission to Feel by Marc Brackett
- Beyond Smart: Lawyering with Emotional Intelligence by Ronda Muir
- The Best Lawyer You Can Be: A Guide to Physical, Mental, Emotional and Spiritual Wellness
- Soft Skills for the Effective Lawyer by Randall Kiser

Videos:

- Six steps to improve your emotional intelligence, Ramona Hacker https://www.ted.com/talks/ramona_hacker_6_steps_to_improve_your_emotional_intelligence?language=en
- The Art of Managing Emotions, Daniel Goleman https://www.youtube.com/watch?v=FKjj1tNcbtM&t=1s
- For more videos, see this list: https://positivepsychology.com/emotional-intelligence-ted-talks/

Apps

- Moodflow
- The Mood Meter
- Stop, Breathe & Think: Meditation and Mindfulness

Emotional Wheels

- Plutchik's Wheel of Emotions - https://www.6seconds.org/2022/03/13/plutchik-wheel-emotions/
- Downloadable Feelings Wheel, Calm Blog - https://blog.calm.com/blog/the-feelings-wheel

Please provide your feedback regarding this session.

ETHICS AND THE ROLE OUR EMOTIONS PLAY IN MEETING OUR OBLIGATIONS

Danielle M. Hall – Executive Director,
Kansas Lawyers Assistance Program

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WHAT'S BUGGING YOU?

Facilitator: Gregory Hilton

Gregory Hilton was appointed by the Court of Special Appeals in August 2013 as its fourth clerk following the retirement of Leslie Gradet.

Previously, Chief Deputy Clerk (2009 – 2013), and Staff Attorney (2009). During his tenure with the Court, Greg has been responsible for the implementation of a comprehensive electronic case management and e-filing system in the Court of Special Appeals.

Greg is a frequent presenter at appellate practice CLEs and bar association events. An active participant at Rule's Committee meetings, Greg provides insight into the operation of the Maryland Rules and their practical effects.

Formerly the law clerk to the Honorable C. Philip Nichols, Jr., Associate Judge, Circuit Court for Prince George's County (1995-1996 Term), Greg was in private general litigation practice from 1996 to 2007.

Prior to attending law school, Greg was on active duty in the United States Navy where he served as a deck officer on a cruiser. Throughout his legal career he has been a Reserve Naval Officer. He recently retired with the rank of Captain. In 2007, Greg was recalled to active duty in Afghanistan and was awarded the Bronze Star Medal. In his final military assignment, Greg served as a Military Emergency Preparedness Liaison Officer in support of the Maryland Emergency Management Agency and the Maryland National Guard.

Greg and Kathleen have been married for 27 years and have two children Elizabeth (26) and Jack (18). He holds a Bachelor of Arts Degree from the College of the Holy Cross (1987), a Juris Doctorate from the Columbus School of Law, Catholic University of America (1995), and a Master of Arts in Strategic Studies from the Naval War College (2011).

While Greg has been an infrequent participant in the NCACC since joining before the Charleston conference, he is now actively participating in the by-laws and strategic planning committees. He will serve as the NCACC president in 2022-2023.

Please provide your feedback regarding this session.

WHAT'S BUGGING YOU?

Facilitator: Greg Hilton – Clerk,
Maryland Court of Special Appeals

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AWARDS LUNCHEON

Speaker: Mary C. McQueen

Mary McQueen has led NCSC as its president since August 2004. As president, she also coordinates major national initiatives for the Conference of Chief Justices. McQueen served as Washington's state court administrator from 1987 to 2004 and as director of Judicial Services for the Washington State Office of the Administrator for the Courts from 1979 to1987. In 1995, she was elected president of the Conference of State Court Administrators, and she was chair of the Lawyer's Committee of the American Bar Association's Judicial Division. She has won numerous awards, including the American Judicature Society's Herbert Harley Award, the NCSC Innovation in Jury Management Award, and the John Marshall Award, presented by the ABA's Judicial Division in recognition of her contributions to the improvement of the administration of justice, judicial independence, justice reform and public awareness. McQueen also received the ABA Judicial Division's Lawyers Conference 2016 Robert B. Yegge Award for Outstanding Contribution in the Field of Judicial Administration. She has served on numerous ABA committees and task forces and serves as secretary general of the International Organization on Judicial Training, consisting of 80 nations. She is a member of the Washington and U.S. Supreme Court bars. She earned a Bachelor of Arts degree from the University of Georgia and a Juris Doctor degree from Seattle University Law School.

Please provide your feedback regarding this session.

AWARDS LUNCHEON

Speaker: Mary McQueen
President, National Center for State Courts

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