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Tables of Contents

Volume 8 • Number 1 • 2018

Thurgood Marshall and (and versus) John W. Davis
by Ross E. Davies 1

• Journal of In-Chambers Practice •

Introduction: "The Circuit Justice Is a Very Important Person": Did In-Chambers Concerns Help Derail a Supreme Court Nominee's Confirmation?
by Ira Brad Matetsky 9

Gray v. Kelly, Warden, 5 Rapp no. 13 (2011), 5 Rapp no. 13 (2011)
by John G. Roberts, Jr. 16

Maryland v. King, 5 Rapp no. 14 (2012)
by John G. Roberts, Jr. 19

Hobby Lobby Stores, Inc. v. Kathleen Sebelius, Secretary of Health and Human Services et al., 5 Rapp no. 15 (2012)
by Sonia Sotomayor 23

Teva Pharmaceuticals USA, Inc. et al. v. Sandoz, Inc. et al., 5 Rapp no. 16 (2014)
by John G. Roberts, Jr. 27

• Journal of Legal Metrics •

Numeracy for Energy and Environmental Lawyers
by Robert A. James 33

Appellate Review IV: October Term 2013 – The Prodigal Sums Return
by Joshua Cumby 65

• ALMANAC EXCERPTS •

This year's *Almanac Excerpts* consists of more than mere excerpts –
it is the entire "Ethereal Version" of the 2018 *Green Bag Almanac & Reader*!

Preface: What the Founders Missed About Whist
by Ross E. Davies 81

The Year 2017 in Grammar, Language, and Writing
by Bryan A. Garner 89

The Year in Law
by Gregory F. Jacob, Rakesh Kilaru, Kristi Gallegos & Brian Quinn 103

A Year in the Life of the Supreme Court
by Tony Mauro 134

Founders Whist
by Gregory F. Jacob 141

Hoyle's Games Improved (1790)
by Charles Jones 152

Exemplary Law Books of 2016: Five Recommendations
by Susan Phillips Read 251

Exemplary Law Books of 2016: Five Recommendations
by Cedric Merlin Powell 258

The [Founders] Whist Score Book (1881)
by C.C. Shelley 268

Credits 278

OPENING REMARKS

THURGOOD MARSHALL AND (AND VERSUS) JOHN W. DAVIS

Ross E. Davies[†]

The undated letter (obviously sent in late 1963) reproduced on the next page is a form letter (also obviously) sent by West Publishing Company to federal judges, announcing the company's annual distribution of snazzy appointment books[1] – just a little courtesy to foster good relations between the law publisher and the producers of some of the most valuable publishable law.[2] But it probably meant a bit more to the recipient of that particular letter, Judge Thurgood Marshall of the U.S. Court of Appeals for the Second Circuit. He must have smiled – perhaps nostalgically, perhaps grimly, perhaps both – when he read it. Here's why.

The letter begins with an announcement: "This year our special appointment book is dedicated to Honorable John W. Davis." It then goes on to touch on a few of Davis's accomplishments. Google him if you have an hour to spare. He lived a long time (1873-1955) and had a heck of a career.

Marshall already knew about Davis. Indeed, for lawyers of Marshall's generation, Davis was a courtroom celebrity and role model. In the early 1930s, when Marshall was a law student at Howard University, he sometimes skipped class to watch Davis argue cases at the U.S. Supreme Court. According to Marshall, Davis was an "unbelievable" lawyer, from whom he

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[†] Professor of law, Antonin Scalia Law School at GMU; editor-in-chief, the *Green Bag*.

[1] Wayne A. Davies to Hon. Thurgood Marshall (n.d.), Box 7, Papers of Thurgood Marshall, Library of Congress, Manuscript Division (hereafter, "*Marshall Papers*").

[2] *Cf.* Wayne A. Davies to Hon. Thurgood Marshall (Nov. 9, 1961), *Marshall Papers* ("Your appointment as Judge of the U.S. Court of Appeals places you with the other Federal Judges in the position of a contributing editor to the Federal Reporter System, of which we are the publishers.").

WEST PUBLISHING COMPANY
SAINT PAUL 2, MINNESOTA

WAYNE A. DAVIES
EXECUTIVE VICE PRESIDENT
EDITORIAL COUNSEL

Hon. Thurgood Marshall
Judge, U. S. Court of Appeals
501 West 123 St.
New York 27, New York

Dear Judge Marshall:

Under separate cover I am pleased to send our 1964 Executive Record and Travel Guide to you. This year our special appointment book is dedicated to Honorable John W. Davis.

John W. Davis, born in Clarksburg, West Virginia on April 13, 1873, died in Charleston, South Carolina, March 24, 1955, in the sixtieth year following his admission to the Bar. His legal career embraced some seventeen years as an active country lawyer, twice as many as head of a law firm in New York City, and between the two periods a decade of public service.

He also served the profession as President of The Association of the Bar of the City of New York and of the American Bar Association. He personally argued in the United States Supreme Court a total of about 140 cases, over and above the scores in which he appeared on the brief. His Supreme Court appearances culminated in two great arguments made in his eightieth year- the United States Steel case and the school segregation case.

We take this occasion to express to you and your staff our appreciation of the co-operation and assistance you have given us in the publication of your opinions, and extend to you our best wishes of the Season.

With esteem, I remain-

Yours very truly,
WEST PUBLISHING COMPANY
Wayne Davies
Executive Vice President

WAD:bc

"learned most of my stuff."[3] Thirty-or-so years later, the letter from West Publishing Company ("West" for short from now on) might have prompted nostalgic memories of those good old days in Washington when Marshall could attend Supreme Court sessions in its small courtroom in the U.S. Capitol to watch Davis, or grim memories of those bad old days when he was attending law school in Washington because he could not attend his hometown, no-blacks-allowed law school at the University of Maryland. (Later in the 1930s, Marshall would lead the fight to correct that defect.[4])

In the early 1950s, Marshall would again see Davis at the Supreme Court. By then, though, they were opposing counsel, and Marshall trounced Davis in *Briggs v. Elliott*, the South Carolina case decided with *Brown v. Board of Education* and the other school desegregation cases. Ten-or-so years later, the letter from West might have prompted nostalgic memories of those good old days when Marshall won the greatest of all civil rights courtroom victories, or grim memories (and current awareness) of the massive resistance that followed *Brown* and was continuing when the letter arrived. Indeed, the fact that West was celebrating what it called in the letter Davis's "great argument[] made . . . [in] the school desegregation case"[5] must have been chilling. Here was the leading publisher of American law, manifestly confident that it could profitably remind judges of the work Davis did in *Briggs* when, among other things, he told the Court,

> I am reminded – and I hope it won't be treated as a reflection on anybody – of Aesop's fable of the dog and the meat: The dog, with a fine piece of meat in his mouth, crossed a bridge and saw the shadow in the stream and plunged for it and lost both substance and shadow. Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?[6]

---

[3] Juan Williams, *Thurgood Marshall: American Revolutionary* 214 (1998); *see also* William H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* 514 (1973) ("As Marshall finished, Julia Davis turned to his wife and congratulated her on his performance. 'So you are the daughter of Judge Davis,' Mrs. Marshall exclaimed. 'My husband admires him so much.'"); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 Colum. L. Rev. 835, 863 (1982) ("For many years after, John W. Davis was warmly regarded by the NAACP for the power of his argument in *Guinn* [*v. United States*, 238 U.S. 347 (1915)]," the case in which the Supreme Court struck down Oklahoma's "grandfather clause" as an infringement of the right to vote guaranteed by the 15th Amendment.).

[4] *Pearson v. Murray*, 182 A. 590, 594 (Ct. App. Md. 1936).

[5] Davies to Marshall, *Marshall Papers*, note 1 above.

[6] Transcript of Oral Argument, *Briggs v. Elliott* (Dec. 7, 1953) at 44, *reprinted in* 49A *Landmark Briefs*

Was it careful drafting or carelessness that generated a letter characterizing Davis's argument – but not the case in which he argued – as "great"?[7] It is too late to find out, I suspect. Either way, though, it would have been nice if the West executive who signed the letter (Executive V.P. and Editorial Counsel Wayne A. Davies[8]) had at least noticed the name on that copy of the letter and scribbled in the margin some sort of acknowledgment that Davis had lost – at the hands of the addressee – "the school desegregation case."[9] Even better, Davies could have added, "Thank goodness!" But it was 1963. Schools from Boston to Richmond to Cleveland to San Francisco were still (and would long remain) racially segregated,[10] Martin Luther King was writing a letter in a Birmingham jail,[11] the KKK was active in the bombing-with-impunity business,[12] and the Supreme Court itself was the very model of racial segregation – nine white judges who hired only white law clerks[13] – and so on. In such an atmosphere, why wouldn't West have felt that sending a letter to American judges, celebrating a lawyer's argument in favor of segregation, was no problem?[14]

Between the hero-worshipping in the early '30s and the Goliath-felling in *Briggs*, Marshall met and chatted with Davis face-to-face on at least one occasion, and not at the Court. While preparing for the first round of *Briggs* arguments, he lunched with Davis. Marshall biographer Juan Williams

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and Arguments of the Supreme Court of the United States: Constitutional Law 492 (1975) (Philip B. Kurland and Gerhard Casper, eds.).

[7] According to one expert on West, careful attention to every detail was and is the essence of the company's editorial-reportorial culture. *See* Bob Berring, *Ring Dang Doo*, 1 Green Bag 2d 3, 4 (1997).

[8] The author of this little article is not aware of any family connection with the signer of the letter.

[9] *See* Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* at 186 (1994).

[10] *See, e.g., Morgan v. Hennigan*, 379 F.Supp. 410 (D. Mass. 1974); *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974); *Bradley v. School Board of City of Richmond*, 317 F.Supp. 555 (E.D. Va. 1970); *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979); *Johnson v. San Francisco Unified School District*, 339 F.Supp. 1315 (N.D. Cal. 1971), *vacated and remanded on other grounds*, 500 F.2d 349 (9th Cir. 1974).

[11] Taunya Lovell Banks, *The Unfinished Journey – Education, Equality, and Martin Luther King, Jr. Revisited*, 58 Vill. L. Rev. 471 (2013).

[12] Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 Santa Clara L. Rev. 721 (2016).

[13] Justice Felix Frankfurter, who hired William T. Coleman in 1948, had retired in 1962. Chief Justice Earl Warren would not re-cross the Court's clerical color line until 1967, when he hired Tyrone Brown. *See* Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* 22 (2006).

[14] *Cf.* Dennis J. Hutchinson, *A Century of Social Reform: The Judicial Role*, 4 Green Bag 2d 157, 166-68 (2001); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* pt. 1 (1991).


Thurgood Marshall (left) and John W. Davis. Photographs courtesy of the Library of Congress, reproduction numbers LCDIGppmsc01271 and LCDIGhec21517.

describes the reaction of Marshall's colleagues at the National Association for the Advancement of Colored People:

> [W]hy, some asked, was he going out of his way to sit down and break bread with an old segregationist like Davis?
>
> "John Davis was the enemy," said [NAACP staffer June] Shagaloff. "He was everything that we were fighting. How could Mr. Marshall go to lunch with him?" When Shagaloff and some other NAACP staffers confronted him about it, Marshall explained, "We're both attorneys, we're both civil. It's very important to have a civil relationship with your opponent."[15]

Which is not to say that Marshall had any illusions about the man he was dining with, or any respect for Davis's stance on segregation, or any hesitation about pushing back against Davis and the interests he represented, but, rather, it is to say that Marshall valued and practiced lawyerly civility, even when the stakes were at their highest, differences at their deepest, and offense might most easily be taken.

[15] Williams, *Thurgood Marshall: American Revolutionary* at 215.

Thus, when the closing moments of Davis's first oral argument in *Briggs* included some oddly trimmed and juxtaposed quotes from the writings of W.E.B. DuBois that inaccurately portrayed DuBois as a supporter of segregated schools,[16] Marshall's response moments later in the opening of his argument was restrained. He took an early opportunity (during an exchange with Justice Felix Frankfurter about the writings of Gunnar Myrdal) to caution the Court that, "when you take judicial notice [of someone's writings], "we have to read the matter, and not take portions out of context."[17] We may never know whether Marshall's subtle rebuttal was effective, nor whether a blunt and angry denunciation of Davis's legerdemain would have been more or less effective. But we do know, from a remark Marshall made later, how he felt at the time: "Here was the Devil quoting phony Scripture."[18] We also know who won the case.

• • •

Did any of what I've talked about here occur to Marshall when he saw that letter from West back in 1963? Who knows? I certainly don't. What I do know is that I have done some digging in Marshall's papers at the Library of Congress and, as best I can tell, during his years on the bench Marshall: (1) engaged in a good deal of correspondence with West, mostly about the mundane details of making sure the company accurately reported his judicial opinions; (2) he (or someone in his office) routinely filed carbon copies of letters he sent to West, including thank-you notes and other replies relating to small revisions of his opinions and to law books West sent or offered to send him; and (3) the 1963 letter discussed in this article is the only letter from West about its annual "special appointment book" distributions that Marshall bothered to keep, and there is no carbon copy of a thank-you note or other reply filed with it.

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[16] *See* Transcript of Oral Argument, *Briggs v. Elliott* (afternoon of Dec. 10, 1952) at 9, *reprinted in* 49 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 338 (1975) (Philip B. Kurland and Gerhard Casper, eds.) (hereafter, "*Briggs Argument*"); Richard Kluger, *Simple Justice* 574 (1975; pbk. ed. 1977); *see also id.* at 546; Harbaugh, *Lawyer's Lawyer*, note 3 above, at 500.

[17] *Briggs Argument* at 341.

[18] Carl T. Rowan, *Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall* 200 (1993); *see also id.* at xv-xvi.

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• Articles •

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by Ira Brad Matetsky 9

• Rapp's Reports •

Gray v. Kelly, Warden, 5 Rapp no. 13 (2011)
by John G. Roberts, Jr. 16

Maryland v. King, 5 Rapp no. 14 (2012)
by John G. Roberts, Jr. 19

Hobby Lobby Stores, Inc. v. Kathleen Sebelius, Secretary of Health and Human Services et al., 5 Rapp no. 15 (2012)
by Sonia Sotomayor 23

Teva Pharmaceuticals USA, Inc. et al. v. Sandoz, Inc. et al., 5 Rapp no. 16 (2014)
by John G. Roberts, Jr. 27

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INTRODUCTION

"THE CIRCUIT JUSTICE IS A VERY IMPORTANT PERSON"

DID IN-CHAMBERS CONCERNS HELP DERAIL A SUPREME COURT NOMINEE'S CONFIRMATION?

Ira Brad Matetsky[†]

This *Journal of In-Chambers Practice* focuses on opinions and orders that Justices of the Supreme Court of the United States issue in their individual capacity, or "in chambers." It has now been four years since any Justice issued an in-chambers opinion,[1] although the Court's recent *per curiam* opinion in *Benisek v. Lamone*[2] cited not one but two of them.

The fact that a Justice can act on certain matters individually, rather than as one-ninth of the Court as a whole, ordinarily receives little attention outside the Court, some of its Bar, and readers of its *Journal*. In at least one instance, however, the significance of the Justices' in-chambers authority was used strategically, as part of an ultimately successful effort to defeat a nomination to the Supreme Court.

In 1969, Justice Abe Fortas resigned. To succeed him, President Richard Nixon nominated Clement Haynsworth, a Judge of the U.S. Court of

[†] Partner, Ganfer Shore Leeds & Zauderer, LLP, New York, N.Y.

[1] The Justices' four most recent in-chambers opinions, issued between 2011 and 2014, are reprinted in the *Rapp's Reports* section of this issue.

[2] 138 S.Ct. 1942 (2018) (citing *Lucas v. Townsend*, 486 U.S. 1301, 3 Rapp 1284 (1988) (Kennedy, J., in chambers); *Fishman v. Schaffer*, 429 U.S. 1325, 2 Rapp 721 (1976) (Marshall, J. in chambers)). *See* Tony Mauro, *In-Chambers Supreme Court Opinions Get Rare Nod in Gerrymandering Ruling*, https://www.law.com/nationallawjournal/2018/06/20/in-chambers-supreme-court-opinions-get-rare-nod-in-gerrymandering-ruling (June 20, 2018).

Appeals for the Fourth Circuit, but the Senate rejected the nomination by a 55-45 vote.[3] Nixon then nominated Judge G. Harrold Carswell, of the Fifth Circuit, but the Senate rejected Carswell as well.[4] Nixon's third nominee, Judge Harry Blackmun of the Eighth Circuit, was confirmed and went on to serve for a quarter-century from 1970 to 1994.

The consensus today appears to be that Haynsworth was at least a respectable, if flawed, nominee for the Supreme Court but that Carswell was wholly unqualified. To the extent Carswell's nomination is remembered, it is largely for Senator Roman Hruska's inept attempt to defend Carswell against accusations that he was a "mediocre" judge. Hruska told a radio interviewer, "even if [Carswell] were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there."[5] At least one commentator has opined that "[m]ore than any other single thing, this statement killed Carswell's nomination."[6]

But while Carswell's nomination was pending in 1970, it was by no means clear that it would be rejected. Many of the Republican senators who had voted against Haynsworth were reluctant to go against the President's choice a second time, while some Southern Democrats who had opposed Haynsworth did not want to oppose a second straight Southern nominee. Ultimately, a confluence of revelations about Carswell's background and judicial performance, adroit parliamentary maneuvering by Carswell's senatorial opponents led by Birch Bayh of Indiana, and a series of missteps by Carswell's senatorial supporters led to the nomination's defeat by a 51-45 vote.

The Carswell nomination's fate was unclear just a few days before the final floor vote was to take place on April 8, 1970. A key senator who had not announced a position on the nomination was Margaret Chase Smith, Republican of Maine. Smith often kept her positions on upcoming votes to herself until the roll-call, and was known to resent overt efforts to influ-

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[3] *See generally* JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT (1991).

[4] *See* RICHARD HARRIS, DECISION (1971). Harris's reporting first appeared in *The New Yorker* for December 5 and 12, 1970.

[5] FRANK, *supra* note 3, at 112; HARRIS, *supra* note 4, at 110.

[6] FRANK at 112; *see also* HARRIS at 110.

ence her decisions.[7] Those who wished to influence her vote needed to do so more subtly.

Surprisingly, one attempt to persuade Smith to oppose Carswell cited Carswell's potential in-chambers duties if he were confirmed:

> Toward the end of the contest, [young lawyer Gary Burns] Sellers . . . happened to mention to Bayh's staff that if Carswell was confirmed he would be the justice who oversaw the First Circuit, which took in Maine, and would have jurisdiction over stays of execution, contested federal actions in the region, and other local affairs that would be of concern to a politician with both local and national responsibilities. Sellers was asked for a memorandum on this, and when it arrived Bayh's press officer, [Bill] Wise, telephoned the Boston office of the A.P., where the news was rejected by the acting night editor, who told him that it was "a Washington story," and then the Boston *Globe*, where the assistant managing editor was very interested – and rather put out that his staff hadn't thought of it. Wise dictated the information in Sellers' memorandum, and a story on it appeared on the first page of the next day's edition. That was said to have impressed Mrs. Smith, who had been unaware that Carswell would have such an effect on her domain if he reached the Court.[8]

In an oral history interview, the *Boston Globe* reporter, Thomas Oliphant, recalled this story's being pitched to him:

> [The fate of the Carswell nomination] was in doubt into the final weekend. One of the last votes to go against Carswell was Margaret Chase Smith, who was still in the Senate. . . . [T]hey were working right through the weekend, and they came to me on the Friday, OK? The story they were offering was that because of the vacancy, because of the way the Court was, the District [*sic*] Justice for the [United States Court of Appeals for the] First Circuit would be whoever filled that opening, which meant New England. So that meant that Carswell would be the Circuit Justice for the First Circuit, meaning New England [*laughs*]. And they wanted her to read that in her Sunday paper.[9]

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[7] HARRIS at 118-19, 181-82.

[8] *Id.* at 182.

[9] Thomas Oliphant oral history, Miller Center, U. of Virginia, Mar. 14, 2007, *available at* https://millercenter.org/the-presidency/presidential-oral-histories/thomas-oliphant-oral-history-3142007-washington. In the oral history, Oliphant thought it might have been one of two aides to

Oliphant's article, titled "Carswell Could Be Judge for New England Circuit," appeared on the *Boston Globe*'s front page on Sunday, April 5, 1970.[10] Its opening paragraph declared that if confirmed, Carswell "could end up being a vital link in the appeals process for the citizens of Maine, Rhode Island, Massachusetts, New Hampshire, and Puerto Rico."[11] The article provided a primer on the Circuit Justice's role:

> This is so because of a little-understood function of Supreme Court justices, which places them in the role of circuit justices, each getting first crack at cases coming up from lower jurisdictions in 10 sections of the country.
>
> In effect, in his role of circuit justice, a Supreme Court justice has the power to grant or deny temporary relief to petitioners pending final resolution of a case by the whole court.[12]

For example, Oliphant speculated that Carswell "could be the justice making the first decision on the Vietnam War Act adopted in Massachusetts last week,"[13] and that if a stay were denied in such a case, the soldier-appellant "'could be in Vietnam and get killed before the final phase of the appeals process was completed.'"[14] In addition, Oliphant reported that "[t]wo important civil rights cases decided in the 1960s show the important position the circuit justice occupies in the appeal process"[15] – a 1964 case in which Justice Hugo Black refused to stay an order enforcing the recently enacted Civil Rights Act,[16] and a 1970 case in which Justice Thurgood Marshall stayed an order requiring legislative redistricting in Indiana.[17]

Senator Edward Kennedy who contacted him with this story lead, but Oliphant's and Harris's contemporaneous reporting does not support this.

[10] Thomas Oliphant, "Carswell Could Be Judge for New England Circuit," BOSTON GLOBE, Apr. 5, 1970, at 1.

[11] *Id.*

[12] *Id.*

[13] *Id.* On April 1, 1970, Massachusetts had adopted legislation challenging the Nixon Administration's authority to conduct the Vietnam War without congressional approval and providing that servicemen from Massachusetts could not be involuntarily deployed in an undeclared war. *See Massachusetts v. Laird*, 400 U.S. 886 (1970) (refusing by a 6-3 vote to allow Massachusetts to file an original bill of complaint in the Supreme Court to test the validity of this law).

[14] Oliphant, *supra* note 10, at 21 (quoting an unnamed Bayh aide).

[15] *Id.*

[16] *Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 1 Rapp 351 (1964) (Black, J., in chambers); *see also Katzenbach v. McClung*, 85 S. Ct. 6, 1 Rapp 354 (1964) (Black, J., in chambers).

[17] *See Whitcomb v. Chavis*, 396 U.S. 1055 (1970) (granting stay application presented to Marshall, J., and referred to the full Court); Robert P. Mooney, *Court Delays Use of Remap*, INDIANAPOLIS STAR,

While Oliphant's article initially reported only that Carswell "could" be allotted to the First Circuit if confirmed, it cited aides to Bayh as asserting that "Judge Carswell would almost certainly be assigned to the First Circuit . . . because no Supreme Court Justice is assigned to it now."[18] This was not actually true: Justice William Brennan had been assigned to the First Circuit, in addition to his home Third Circuit, following Fortas's resignation in 1969. However, Fortas had previously served the First Circuit and Brennan's may have been perceived as a temporary, fill-in assignment until the Court was back at full strength.[19]

While the Oliphant article reportedly "impressed" Senator Smith,[20] no one knows how much it may have contributed to her vote on Carswell's nomination three days later. There were plenty of other concerns about Carswell; for example, around the same time, Smith also expressed concerns about a report that Carswell had given misleading testimony about his role in incorporating a segregated golf club.[21] When the time came, Smith voted against Carswell's confirmation. During the roll-call, her vote "brought a roar of approval from the galleries and more applause, for her vote made twelve Republicans opposed – the number necessary to defeat the nomination."[22] Smith never gave specific reasons for her vote against Carswell, either before or after she cast it.

Whether Carswell would in fact have been assigned as Circuit Justice for the First Circuit if he had been confirmed to the Court is another unknowable. When Blackmun was confirmed two months later to what would have been Carswell's seat, he was allotted not to the First Circuit but to the Eighth Circuit, where he had sat on the Court of Appeals before his elevation. Brennan, who had been allotted to the First Circuit upon Fortas's resignation, retained that assignment after Blackmun joined the Court. Indeed, Brennan remained the Circuit Justice for both the First and Third Circuits until he retired from the Court in 1990. Blackmun took his assignment to the Eighth Circuit over from Justice Byron White, who had

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Feb. 7, 1970 (reporting that Marshall had granted a stay in this case).

[18] Oliphant, *supra* note 10, at 1, 21.

[19] For listings of Circuit Justice assignments, see LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM, table 5-4 (6th ed. 2015), or the Federal Judicial Center website at https://www.fjc.gov/history/courts/supreme-court-united-states-circuit-allotments

[20] HARRIS, *supra* note 4, at 182.

[21] *Id.* at 183.

[22] *Id.* at 201.

been Circuit Justice for that circuit since his appointment in 1962.

What is clear is that Carswell would not have been assigned in 1970 to the Fifth Circuit, which since 1937 had been the domain of Justice Hugo Black. Quite possibly Carswell would have been assigned to the Eighth Circuit, even though he was geographically unconnected with that circuit. This would have relieved White from his doubled-up responsibility for both the Eighth Circuit and his home Tenth Circuit. White's double load in serving both the Eighth and Tenth Circuits was more burdensome than Brennan's in serving both the First and Third Circuits, because the First Circuit was the smallest in the country. Despite all this, it is possible that Carswell would have been slotted in to fill the First Circuit seat in 1970 – but even then, it would probably have been a short-lived assignment, as Carswell could have been reallotted to his home Fifth Circuit when Black left the Court the following year.

But in any event, at one critical moment in 1970s, the breadth of the Circuit Justice's responsibilities made front-page news in a major city. As Oliphant's article concluded: "In short, the circuit justice is a very important person.'"[23]

[23] Oliphant, *supra* note 10, at 21 (quoting an unnamed Bayh aide).

RAPP'S REPORTS

VOLUME 5

IN THE JOURNAL OF IN-CHAMBERS PRACTICE

5 Rapp no. 13 (2011)

GRAY *V.* KELLY, WARDEN

HEADNOTE

by Ira Brad Matetsky

Source: *United States Reports*, via U.S. Supreme Court website

Opinion by: John G. Roberts, Jr. (noted in source).

Opinion date: August 25, 2011 (noted in source).

Citation: Gray v. Kelly, 564 U.S. 1301, 5 Rapp no. 13 (2011) (Roberts, C.J., in chambers), 2 J. In-Chambers Practice 16 (2018).

Additional information: The headnote to this case in the *United States Reports* states:

> Gray's application to stay a Federal District Court order setting a federal habeas briefing schedule pending this Court's disposition of his petition for a writ of certiorari to the Virginia Supreme Court is denied. The familiar standard for securing a stay of a judgment subject to this Court's review is inapplicable here because Gray is not seeking to stay the Virginia Supreme Court's judgment. Nor does this Court's "supervisory authority" over the District Court, which implicates an even more daunting standard, entitle Gray to relief. See *Ehrlichman* v. *Sirica,* 419 U. S. 1310, 1311–1312 (Burger, C. J., in chambers).

OPINION

GRAY *v.* KELLY, WARDEN

ON APPLICATION FOR STAY

No. 11A210 (11-5545). Decided August 24, 2011.

CHIEF JUSTICE ROBERTS, Circuit Justice.

Ricky Gray was convicted of five counts of capital murder in Virginia. He was sentenced to death on two of the counts and life imprisonment on the remaining three. After his convictions and sentences were affirmed on direct appeal, Gray filed a petition for state postconviction relief. The Virginia Supreme Court granted the petition in part, ordering vacatur of one

of the convictions for which Gray was sentenced to life imprisonment. *Gray* v. *Warden of Sussex I State Prison,* 281 Va. 303, 304, 707 S. E. 2d 275, 280–281 (2011). But the court denied relief in all other respects, *ibid.,* and the Commonwealth of Virginia set a date of execution of June 16, 2011. Meanwhile, Gray applied for appointment of counsel in the United States District Court for the Eastern District of Virginia, where he planned to file a petition for a writ of habeas corpus under 28 U. S. C. § 2254. On June 14, 2011, the District Court appointed counsel for Gray and stayed the execution of his death sentence for 90 days pursuant to § 2251(a)(3). In a separate order issued the same day, the District Court set a briefing schedule requiring Gray to file his federal habeas petition within 45 days, no later than July 29. In a subsequent order on June 29, the District Court extended Gray's deadline for filing a habeas petition to August 29.

On July 25, Gray filed with this Court a petition for a writ of certiorari, seeking review of the decision of the Virginia Supreme Court. He claimed that the procedures followed by that court in adjudicating his postconviction claims violated his federal constitutional rights to due process and equal protection of the laws. Gray then asked the District Court to stay its June 29 scheduling order pending this Court's disposition of his petition for certiorari to the Virginia Supreme Court. After the District Court denied the request, Gray did not seek a stay from the Court of Appeals for the Fourth Circuit, but rather filed an application for a stay with me as Circuit Justice.

Gray's application accompanies his petition for certiorari to the Virginia Supreme Court, but does not seek a stay of that court's judgment. Nor does his application seek a stay of his date of execution, which has not been reset. His application instead requests only a stay of the District Court's order requiring him to file a federal habeas petition by August 29.[*]

Although Gray's application invokes the familiar standard for securing a stay of a judgment subject to this Court's review, see Application for Stay 4 (citing *Barefoot* v. *Estelle,* 463 U. S. 880, 895 (1983)), that standard is inap-

[*] Gray's application specifically requests a stay of the District Court's June 29 scheduling order. Application for Stay 14. That order *extended* the deadline for filing a federal habeas petition to August 29. A stay of that order would therefore serve only to restore the original deadline of July 29. The substance of Gray's application makes clear, however, that the relief he actually seeks is a stay of the District Court's briefing schedule in its entirety until this Court acts on his petition for a writ of certiorari to the Virginia Supreme Court.

plicable here because Gray does not seek a stay of such a judgment. Gray's request that this Court exercise its "supervisory authority" over the District Court, Reply to Opposition to Application for Stay 2, implicates a standard even more daunting than that applicable to a stay of a judgment subject to this Court's review. See *Ehrlichman* v. *Sirica,* 419 U. S. 1310, 1311–1312 (1974) (Burger, C. J., in chambers). Gray clearly has not established his entitlement to relief from the District Court's scheduling order. The application for a stay is denied.

It is so ordered.

5 Rapp no. 14 (2012)

MARYLAND *V.* KING

HEADNOTE

by Ira Brad Matetsky

Source: *United States Reports*, via U.S. Supreme Court website

Opinion by: John G. Roberts, Jr. (noted in source).

Opinion date: July 30, 2012 (noted in source).

Citation: Maryland v. King, 567 U.S. 1301, 5 Rapp no. 14 (2012) (Roberts, C.J., in chambers), 2 J. In-Chambers Practice 19 (2018).

Additional information: The headnote to this case in the *United States Reports* states:

> The State of Maryland's application to stay the judgment of the Maryland Court of Appeals — overturning the first-degree rape conviction of Alonzo Jay King, Jr., on the ground that the collection of his DNA pursuant to the State's DNA Collection Act violated the Fourth Amendment — is granted. Because that judgment conflicts with the decisions of other courts upholding similar statutes and implicates an important law enforcement practice in approximately half the States and the Federal Government, there is "a reasonable probability" that this Court will grant certiorari. *Conkright* v. *Frommert*, 556 U. S. 1401, 1402. Given the considered analysis of courts on the other side of the split, there is also "a fair prospect" that this Court will reverse that decision. *Ibid.* Finally, there is a "likelihood" that Maryland will suffer "irreparable harm," *ibid.*, if it is unable to give effect to a statute "enacted by representatives of its people," *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U. S. 1345, 1351. There is also ongoing and concrete harm to Maryland's law enforcement and public safety interests resulting from the State's not being allowed to employ a duly enacted statute for investigating unsolved crimes

OPINION

MARYLAND *v.* KING

ON APPLICATION FOR STAY

No. 12A48. Decided July 30, 2012.

CHIEF JUSTICE ROBERTS, Circuit Justice.

Maryland's DNA Collection Act, Md. Pub. Saf. Code Ann. § 2–501 *et seq.* (Lexis 2011), authorizes law enforcement officials to collect DNA samples from individuals charged with but not yet convicted of certain crimes, mainly violent crimes and first-degree burglary. In 2009, police arrested Alonzo Jay King, Jr., for first-degree assault. When personnel at the booking facility collected his DNA, they found it matched DNA evidence from a rape committed in 2003. Relying on the match, the State charged and successfully convicted King of, among other things, first-degree rape. A divided Maryland Court of Appeals overturned King's conviction, holding the collection of his DNA violated the Fourth Amendment because his expectation of privacy outweighed the State's interests. 425 Md. 550, 42 A. 3d 549 (2012). Maryland now applies for a stay of that judgment pending this Court's disposition of its petition for a writ of certiorari.

To warrant that relief, Maryland must demonstrate (1) "a reasonable probability" that this Court will grant certiorari, (2) "a fair prospect" that the Court will then reverse the decision below, and (3) "a likelihood that irreparable harm [will] result from the denial of a stay." *Conkright* v. *Frommert*, 556 U. S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (internal quotation marks omitted).

To begin, there is a reasonable probability this Court will grant certiorari. Maryland's decision conflicts with decisions of the U. S. Courts of Appeals for the Third and Ninth Circuits as well as the Virginia Supreme Court, which have upheld statutes similar to Maryland's DNA Collection Act. See *United States* v. *Mitchell*, 652 F. 3d 387 (CA3 2011), cert. denied, 565 U. S. 1275 (2012); *Haskell* v. *Harris*, 669 F. 3d 1049 (CA9 2012), reh'g en banc granted, 686 F. 3d 1121 (2012); *Anderson* v. *Commonwealth*, 274 Va. 469, 650 S. E. 2d 702 (2007), cert. denied, 553 U. S. 1054 (2008); see also *Mario W.* v. *Kaipio*, 230 Ariz. 122, 281 P. 3d 476 (2012)

(holding that seizure of a juvenile's buccal cells does not violate the Fourth Amendment but that extracting a DNA profile before the juvenile is convicted does).

The split implicates an important feature of day-to-day law enforcement practice in approximately half the States and the Federal Government. Reply to Memorandum in Opposition 3; see 114 Stat. 2728, as amended, 42 U. S. C. § 14135a(a) (1)(A) (authorizing the Attorney General to "collect DNA samples from individuals who are arrested, facing charges, or convicted"). Indeed, the decision below has direct effects beyond Maryland: Because the DNA samples Maryland collects may otherwise be eligible for the Federal Bureau of Investigation's national DNA database, the decision renders the database less effective for other States and the Federal Government. These factors make it reasonably probable that the Court will grant certiorari to resolve the split on the question presented. In addition, given the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision below.

Finally, the decision below subjects Maryland to ongoing irreparable harm. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U. S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Here there is, in addition, an ongoing and concrete harm to Maryland's law enforcement and public safety interests. According to Maryland, from 2009 — the year Maryland began collecting samples from arrestees — to 2011, "matches from arrestee swabs [from Maryland] have resulted in 58 criminal prosecutions." Application 16. Collecting DNA from individuals arrested for violent felonies provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population. Crimes for which DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries. That Maryland may not employ a duly enacted statute to help prevent these injuries constitutes irreparable harm.

King responds that Maryland's eight-week delay in applying for a stay undermines its allegation of irreparable harm. In addition, he points out that of the 10,666 samples Maryland seized last year, only 4,327 of them were eligible for entry into the federal database and only 19 led to an arrest (of which fewer than half led to a conviction). Memorandum in Oppo-

sition 11. These are sound points. Nonetheless, in the absence of a stay, Maryland would be disabled from employing a valuable law enforcement tool for several months — a tool used widely throughout the country and one that has been upheld by two Courts of Appeals and another state high court.

Accordingly, the judgment and mandate below are hereby stayed pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

It is so ordered.

5 Rapp no. 15 (2012)

HOBBY LOBBY STORES, INC. *V.* KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES ET AL.

HEADNOTE

by Ira Brad Matetsky

Source: U.S. Supreme Court website

Opinion by: Sonia Sotomayor. (noted in source).

Opinion date: December 26, 2012 (noted in source).

Citation: Hobby Lobby Stores, Inc. v. Sebelius, 568 U.S. 1401, 5 Rapp no. 15 (2012) (Sotomayor, in chambers), 2 J. In-Chambers Practice 23 (2018).

Additional information: The headnote to this case in the *United States Reports* states:

> Applicant corporations' request for an injunction pending appeal barring the enforcement of Health Resources Services Administration guidelines issued pursuant to § 1001(5) of the Patient Protection and Affordable Care Act is denied. They contend that requiring group health plans such as theirs to cover "approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," 77 Fed. Reg. 8725, is contrary to their religious beliefs and thus violates both the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act of 1993. Because an injunction pending appeal "'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,'" *Respect Maine PAC* v. *McKee,* 562 U. S. 996, it may be issued by a Circuit Justice only when it is "[n]ecessary or appropriate in aid of [this Court's] jurisdiction" and "the legal rights at issue are indisputably clear," *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n*, 542 U. S. 1305, 1306. Applicants have failed to satisfy that demanding standard here.

OPINION

HOBBY LOBBY STORES, INC., ET AL. *v.* KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON APPLICATION FOR INJUNCTION

No. 12A644. Decided December 26, 2012.

JUSTICE SOTOMAYOR, Circuit Justice.

This is an application for an injunction pending appellate review filed with me as Circuit Justice for the Tenth Circuit. The applicants are two closely held for-profit corporations, Hobby Lobby Stores, Inc. (Hobby Lobby) and Mardel, Inc. (Mardel), and five family members who indirectly own and control those corporations. Hobby Lobby is an arts and crafts retail chain store, with more than 13,000 employees in over 500 stores nationwide. Mardel is a chain of Christian-themed bookstores, with 372 full-time employees in 35 stores. Employees of the two corporations and their families receive health insurance from the corporations' self-insured group health plans.

Under §1001(5) of the Patient Protection and Affordable Care Act, 124 Stat. 131, 42 U. S. C. §300gg–13(a), nongrandfathered group health plans must cover certain preventive health services without cost-sharing, including various preventive services for women as provided in guidelines issued by the Health Resources Services Administration (HRSA), a component of the Department of Health and Human Services. As relevant here, HRSA's guidelines for women's preventive services require coverage for "all Food and Drug Administration . . . approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity as prescribed by a provider." 77 Fed. Reg.8725 (Feb. 15, 2012) (internal quotation marks omitted).

The applicants filed an action in Federal District Court for declaratory and injunctive relief under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb *et seq.* They allege that under the HRSA guidelines, Hobby Lobby and Mardel will be required, contrary to the applicants' religious beliefs, to provide insurance coverage for certain drugs and devices that

the applicants believe can cause abortions. The applicants simultaneously filed a motion for a preliminary injunction to prevent enforcement of the contraception-coverage requirement, which is scheduled to take effect with respect to the employee insurance plans of Hobby Lobby and Mardel on January 1, 2013. The District Court for the Western District of Oklahoma denied the motion for a preliminary injunction, and the Court of Appeals for the Tenth Circuit denied the applicants' motion for an injunction pending resolution of the appeal.

The only source of authority for this Court to issue an injunction is the All Writs Act, 28 U. S. C. §1651(a). "We have consistently stated, and our own Rules so require, that such power is to be used sparingly." *Turner Broadcasting System, Inc.* v. *FCC*, 507 U. S. 1301, 1303 (1993) (Rehnquist, C. J., in chambers); see this Court's Rule 20.1("Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. §1651(a) is not a matter of right, but of discretion sparingly exercised"). Unlike a stay of an appeals court decision pursuant to 28 U. S. C. §2101(f), a request for an injunction pending appeal "'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Maine PAC* v. *McKee*, 562 U. S. 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers)). Accordingly, a Circuit Justice may issue an injunction only when it is "[n]ecessary or appropriate in aid of our jurisdiction" and "the legal rights at issue are indisputably clear." *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n*, 542 U. S. 1305, 1306 (2004) (Rehnquist, C. J., in chambers) (internal quotation marks omitted).

Applicants do not satisfy the demanding standard for the extraordinary relief they seek. First, whatever the ultimate merits of the applicants' claims, their entitlement to relief is not "indisputably clear." *Lux* v. *Rodrigues*, 561 U. S. 1036, 1037 (2010) (ROBERTS, C. J., in chambers) (internal quotation marks omitted). This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion. Cf. *United States* v. *Lee*, 455 U. S. 252 (1982) (rejecting free exercise claim brought by individual Amish employer who argued that paying Social Security taxes for his employees interfered with his exercise

of religion). Moreover, the applicants correctly recognize that lower courts have diverged on whether to grant temporary injunctive relief to similarly situated plaintiffs raising similar claims, Application for Injunction Pending Appellate Review 25–26, and no court has issued a final decision granting permanent relief with respect to such claims. Second, while the applicants allege they will face irreparable harm if they are forced to choose between complying with the contraception-coverage requirement and paying significant fines, they cannot show that an injunction is necessary or appropriate to aid our jurisdiction. Even without an injunction pending appeal, the applicants may continue their challenge to the regulations in the lower courts. Following a final judgment, they may, if necessary, file a petition for a writ of certiorari in this Court.

For the foregoing reasons, the application for an injunction pending appellate review is denied.

It is so ordered

5 Rapp no. 16 (2014)

TEVA PHARMACEUTICALS USA, INC. ET AL. *V.* SANDOZ, INC. ET AL.

HEADNOTE

by Ira Brad Matetsky

Source: U.S. Supreme Court website

Opinion by: John G. Roberts, Jr. (noted in source).

Opinion date: April 18, 2014 (noted in source).

Citation: Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc., 572 U.S. ___, 134 S. Ct. 1621, 5 Rapp no. 16 (2014) (Roberts, C.J., in chambers), 2 J. In-Chambers Practice 27 (2018).

Additional information: Teva Pharmaceuticals petitioned for certiorari to review a Federal Circuit decision in a patent case. After the Supreme Court granted the petition, Teva moved for a stay of the Federal Circuit's decision. Despite the grant of certiorari, Chief Justice Roberts denied the motion. Although Teva had "of course" established that certiorari was likely to be granted and had also shown a fair prospect of success on the merits, it had not demonstrated a likelihood of irreparable harm from the denial of a stay, because it could recover damages if it ultimately prevailed on the merits.

OPINION

No. 13A1003 (13–854)

TEVA PHARMACEUTICALS USA, INC., ET AL.
v. SANDOZ, INC., ET AL.

ON APPLICATION TO RECALL AND STAY MANDATE

[April 18, 2014]

CHIEF JUSTICE ROBERTS, Circuit Justice.

The application to recall and stay the mandate of the United States Court of Appeals for the Federal Circuit, see 723 F. 3d 1363 (2013), is denied. To obtain such relief, applicant Teva Pharmaceuticals USA, Inc., must demonstrate (1) a "reasonable probability" that this Court will grant certiorari, (2) a "fair prospect" that the Court will reverse the decision below, and (3) a "likelihood that irreparable harm [will] result from the denial of a stay." *Maryland* v. *King*, 567 U. S. 1301, 1302 (2012) (ROBERTS, C. J., in chambers) (internal quotation marks omitted). Teva has of course satisfied the first requirement, and has also shown a fair prospect of success on the merits. I am not convinced, however, that it has shown a likelihood of irreparable harm from denial of a stay. Respondents acknowledge that, should Teva prevail in this Court and its patent be held valid, Teva will be able to recover damages from respondents for past patent infringement. See Brief in Opposition 25–28. Given the availability of that remedy, the extraordinary relief that Teva seeks is unwarranted.

It is so ordered.

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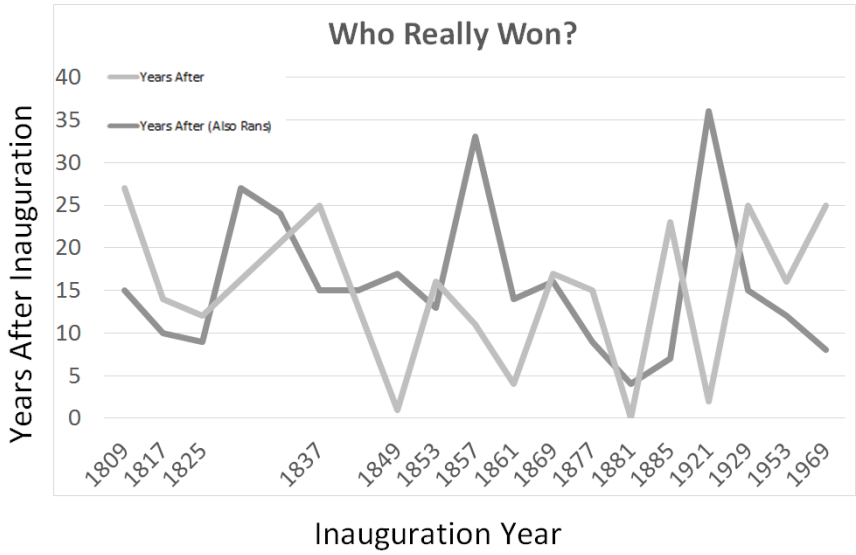

Journal of Legal Metrics

About the cover

By Adam Aft. Our graph enclosed with this issue, entitled "Who Really Won," is meant to be a brief exploration of the trade-off between winning the U.S. presidential election and living out one's remaining years in Emersonian quiet. It turns out that this difference is about a year. To be exact, the life expectancy for a president is about 14.56 years after the president's first inauguration, and 15.74 years after the would-be inauguration date for the also-rans.

A quick note on how we arrived at our conclusion, which we admit up front is susceptible to the same outcome as a fomager crafting a fine alpine cheese. We started with all of the presidents and the also-rans. For the also-rans, we used the metric provided by the leading scholar in LESLIE H. SOUTHWICK, PRESIDENTIAL ALSO-RANS AND RUNNING MATES, 1788 through 1996 (2 ed. 2008). We then eliminated all of the living presidents and all of the presidents that did not first come into office in an election (for which there is no also-ran). Finally, we eliminated all of the presidents where there was no also-ran (e.g., because the also-ran from that election later became president). We then took the remaining data set and compared the length of life for each president from the date of each president's first inauguration to the president's death. We then took the corresponding also-ran and looked from the same date (the date of the first inauguration for the corresponding president) to the also-ran's death. – Eds.

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CONTENTS

Volume 5 • Number 1 • 2018

Numeracy for Energy and Environmental Lawyers
by Robert A. James 33

Appellate Review IV: October Term 2013 – The Prodigal Sums Return
by Joshua Cumby 65

NUMERACY FOR ENERGY AND ENVIRONMENTAL LAWYERS

Robert A. James[†]

As a beginning lawyer long ago, armed only with a Bachelor of Arts undergraduate degree, I entered the energy field technically illiterate. I have sought over the years to remedy that shortcoming. My subject today is numeracy as one component of energy literacy. Literacy, of course, would require a much broader-based understanding—not only of numbers, but also of the environmental implications, the science, the technology, the economics, and the politics behind them. I do not profess to command that literacy. But we all have to start somewhere. Numbers are a pretty good place to begin, and an arena that we attorneys usually enter challenged.

Only a few years back, I reviewed a proposed contract for a suburban California solar project. The recitals said that the capacity of the project was so many megawatts. Then, a clause buried deep within said that the capacity of the project was so many megawatt-hours. This is far from unusual.

The project was moving very fast. We don't always feel comfortable raising our hand to ask the meaning of some acronym new to us, or why sometimes the MW has a little "t" next to it while sometimes the MW has a little "e" next to it. We're reluctant to slow down hard-charging partners, executives, and bankers for inquiries like that. So we leave those questions unanswered, and nurse them year after year. The condition worsens as a more senior lawyer, when you will *never* want to reveal your ignorance to *anyone*.

But this time I was so bold as to raise the question, only to receive the immediate blunt answer that the recital referred to capacity in terms of *power,* while the clause referred to capacity in terms of *energy*. Embarrassed

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[†] Partner, Pillsbury Winthrop Shaw Pittman LLP, San Francisco and Houston. A.B., Stanford University; J.D., Yale Law School. Based on speeches given to the Colloquium on Environmental and Natural Resources Law and Policy at Stanford Law School on January 25 and November 17, 2017.

to ask anything further, especially about words so common as energy and power, I left the contract as is.

This article provides some resources that cut through that kind of embarrassment, as it can be read in seclusion (by flashlight if you prefer). The goal is to help us all think as informed lawyers and citizens about the quantitative aspects of energy and environmental issues.

Facts and Contexts

It has been a tough time for facts recently. And I'm not only talking about our political climate. I'm talking about the way in which we derive information in bites.

We see a sentence in some document online that is helpful to our position. It confirms what we already think is the case, or it is helpful for something that we're newly trying to establish. So we copy, paste and use that fact. Alternatively, we see a sentence in isolation that is adverse to us. So we take that sentence in isolation and try to attack it, perhaps by attacking the source (or funder of the source) rather than its content. I'm suggesting the first thing to do with a fact, before using it or warding it off, is to understand it—to appreciate it in a nest of concentric circles. First, what is the quantity that's being expressed? Second, what is the proposition saying the world is like today? And third, what follows from the proposition—how does it explain the past or predict the future and fit with other knowledge that you have or can establish, to provide an overall context?

Robust appreciation of facts is difficult in politics, in literature, in sports, in all sorts of areas that we research. We're forever working with bites. I've often found that after I extract a sentence as evidence (or at least evidence of what the author thinks), I go back to the full document and realize there were some nuances. Those nuances don't get captured when we just pull a sentence off of a screenshot, as opposed to reading and digesting a whole piece or an entire exchange of articles.

Living by the sound bite, however, is particularly or distinctively an issue for energy and environmental facts. I'm going to cite two reasons it's challenging by referencing two icons of culture. One is the Tower of Babel described in chapter eleven of the book of Genesis, where the Almighty confounds the builders by causing them to speak in many different languages. The other is a scene from that 1980s cinematic classic, *Ghostbusters*.

The Tower of Babel

The Tower of Babel is an enduring feature of the complicated world in which we live. Saul Griffith, a prominent inventor and environmental advocate, was proud of the fact that he brought his developed-world rate of consumption of energy way, way down. He hung his laundry out to dry outdoors. He biked to work. Most significantly, instead of flying around by jet to various conferences on global warming, he attended by Skype. He did everything he conceivably could to lower his usage. He naturally wanted to show audiences how he or anyone could do so. He reported, with tongue planted firmly in cheek, that when he described his energy use for different audiences, he had to use a bewildering number of units as shown on Figure 1.

FIGURE 1: HOW COULD PEOPLE POSSIBLY BE CONFUSED?[1]

After conservation	*Measured by*	*Before conservation*
2255 watts	Engineers	14437 watts
2255 joules/second	Physicists	14437 joules/second
194 megajoules (MJ)/day	"the French"	1.15 gigajoules (GJ)/day
54 kilo watt-hours (kWh)/day	Electricity people	321 kWh/day
184 kilo British thermal units (Btu)/day	Air conditioning people	1 million Btu (MMBtu)/day
46 kilo-kilocalories (Kcal)/day	Weight Watchers	276 kilo-Kcal/day
184 pico quadrillion BTU (Quad)/day	U.S. Department of Energy	1 nano Quad/day
1.5 gallons (gal) of gasoline/day	Local service station	9 gal gasoline/day
0.0045 metric tonnes of oil equivalent (TOE)/day	ExxonMobil	0.025 TOE/day
3 horsepower (hp)	My grandfather	18 hp
5.4 metric tonnes (0.0000054 Megatonnes) of CO_2/day	Environmentalists	32.1 metric tonnes of CO_2/day
2.2 billion carbon atoms/nanosecond	Chemists	14 billion carbon atoms/nanosecond

[1] Adapted from *Saul Griffith: Climate Change Recalculated* (The Long Now Foundation 2009).

Griffith started by saying that he had brought his energy rate down from 14,000 watts to 2,000 watts. A physicist, however, might run the same calculations in joules per second. (The French in particular continue to express large quantities of energy output in joules.) Here, a single individual's consumption is stated in gigajoules—billions of joules—each and every day. If you're talking to people who price electricity output, the watts or joules won't register. Instead they might want to know about kilowatt-hours over some quantity of time. If you're talking to those who price natural gas, or the fuel inputs of electricity, it might be in terms of British thermal units or Btus. Chemists might be interested in calories, nutritionists in thousands of calories (kilocalories, or food Calories). If you're talking to petroleum companies, you might speak of the equivalent amount of gasoline or oil; to old-timers or auto enthusiasts, perhaps horsepower.

These entries, in each of the left-hand and right-hand columns, are referring to and measuring *the same thing*. Note that I haven't even mentioned the metric system (Système International, or SI) versus United States or imperial measures. Some of these measures *divide* by time (Btu/day); others *multiply* by time (kilowatt-hour); others simultaneously *multiply and divide* by time (kilowatt-hour/day); and others display *no time unit at all* (watt, horsepower). What is going on?

In addition to different units for the *same* concept, different parts of the industry measure and value *different* concepts. A good example is the trade in liquefied natural gas or LNG. Natural gas is one of the principal fossil fuels, and a favored fossil fuel these days. If the production and destination are in the same region, you can transport it by pipeline. But if you're moving it between continents, you do so by producing the gas in the upstream, bringing it to a coast where you liquefy it by bringing it down to 260 degrees below zero Fahrenheit (−168° C), transporting the liquid in special vessels to another country, gasifying it by reheating back into a gaseous state, and selling and using it in the destination.

FIGURE 2: LNG VALUE CHAIN MEASURES[2]

Activity	*Dimension measured*	*Unit of measurement*
Natural gas exploration	Volume of gas	Trillion cubic feet (Tcf) or cubic meters (Tcm or Tm^3)
Natural gas production and transportation	Volume of gas per day, at "standardized" pressure and temperature	Million (MM) standard cubic feet or cubic meters per day (MMScf/day)
Liquefied natural gas (LNG) liquefaction	Mass of liquid per year (adjusted for shutdowns) or per hour (unadjusted)	Million metric tonnes per annum (MMTPA) or metric tonnes per hour (tph)
LNG storage and transportation	Volume of liquid	Cubic meters (m^3)
LNG regasification, or economics anywhere along value chain when comparing with alternative fuels	Thermal energy content, sometimes of gas and sometimes of liquid	British thermal units (Btu), or therms (100,000 Btu), or million Btu (MMBtu)

On the exploration side, the reservoir engineers are concerned with volumes. They express the quantities in a field in terms of trillions of cubic feet in the United States (or cubic meters elsewhere). They'll talk about the rate of production or transportation of gas as being standard cubic feet per day (scf/day), and storage of gas in standard cubic feet. ("Standard" and the little letter "s" refer to a given pressure and temperature.)

When the gas arrives at the liquefaction plant, the plant engineers don't speak in terms of volume of a gas. What they care most about is the mass of the resulting liquid product that can fit through their vessels and pipes. You've gone from a volume measure of cubic feet or meters, to the processing capacity of an LNG plant in some number of metric tonnes per year, including time for turnarounds, or a rate of so many metric tonnes per hour.[3] It's no longer a daily rate as in the upstream, it's annual or hourly; even the time period is different.

You next get the LNG onto a vessel, where the captain doesn't care about a volume of gas, or a mass of liquid, or a mass per year or per hour.

[2] *See* SAEID MOKHATAB, JOHN Y. MAK, JALEEL V. VALAPPIL & DAVID A. WOOD, HANDBOOK OF LIQUEFIED NATURAL GAS (2014).

[3] I spell "metric tonnes" thus to help me distinguish that measure (1000 kilograms of mass) from the "short ton" (2000 pounds of weight) used in the U.S. coal industry or "long ton" (2240 pounds) used in some U.S. and U.K. applications. Not everyone does.

The captain cares about volume of liquid, and specifically how many cubic meters of the LNG can be carried.

Then you get to the destination country, or anywhere on this value chain if you're concerned with the economics of the LNG. What is primarily evaluated in those cases is not gas volume of gas, liquid mass, or liquid volume; instead, it's the heating value. Heating value stems from what the gas will be used for—how much thermal energy it is capable of delivering in an application like electricity generation. And so the gas or LNG might be priced in Btus.

There is no escaping the unfinished Tower of Babel in this situation. All of these participants, your clients or counterparties, are concerned with distinct aspects of the energy source or use. No matter how many times the lawyer conducting due diligence reviews tries to turn the pages of documents and ignore the fact that the product in question is described with different units in different tables, there's a reason that these differences persist. The Tower of Babel metaphor is not going away.

"Because Science"

What about *Ghostbusters,* this other icon of culture I mentioned? That one's a little bit more difficult to explain. When I first got ready to talk at classes at Berkeley and Stanford on energy law, I thought I was a complete fraud because I had never taken an energy law class. So I decided to buy a best-selling authority, *Energy Law in a Nutshell.* I figured that since students probably would have this book by the time of final exams, I ought to take it in. When I opened it up, I saw that there was a chapter called "Energy Policy," and a section called "Energy Facts." And I thought "This is terrific, my job is done, I found what I need." Then I read the following: There are "two laws of thermodynamics which play important roles in energy policy. The First Law of Thermodynamics is *conservation*—energy changes form but does not dissipate. Indeed, that is Einstein's famous equation $E=M^2$."[4]

I have some concerns with this statement. First, the First Law of Thermodynamics was coined in 1850, so it predates Albert Einstein.

[4] JOSEPH P. TOUMAIN & RICHARD D. CUDAHY, ENERGY LAW IN A NUTSHELL 53 (2d ed. 2011) (emphasis in original).

Next, the First Law's statement that energy does not dissipate isn't as useful in energy policy as one might think; we tend to be more concerned with *useful* energy, which, according to the *Second* Law of Thermodynamics, *does* tend to dissipate. Third, the reference to Einstein leads the general reader unnecessarily into nuances concerning mass-energy equivalence, energy-matter conservation and the "rest energy of mass." Our sun loses four million tons of mass each second through nuclear fusion, and the applicable energy-matter conservation principles are as complex as any tax regulations. The fourth problem with "Einstein's famous equation $E=M^2$" is that the equation is actually $E=mc^2$. As the holder of a Bachelor of Arts degree, I wouldn't know what to do with the equation in a law practice. But I *do* know that if there was one equation with which we were all supposed to escape childhood, it was $E=mc^2$. (What truly gives me pause is that *Energy Law in a Nutshell* is in its second edition. This page has been looked at by thousands of law students, including students with advanced science degrees, and no one has apparently objected to it.)

But all those concerns are mere quibbles. My real complaint is this: how many more times do you think use is made of the First Law, or $E=M^2$ for that matter, in this energy book? Not many. This is someone saying, "*this is an important subject, darn it, because science*."

You might think this phenomenon is confined to law books, but it recurs elsewhere. I have an excellent university press book on California energy, the preface to which is written by a true hero of renewable energy and energy conservation, Art Rosenfeld. He was a professor of physics at UC Berkeley who spoke early on about the importance of conservation, and how we can increase gross domestic product (GDP) faster than energy consumption. He reports in the preface that by going around his office at Cal and turning off lights on the weekend, he saved "the equivalent of 5 gallons of natural gas." By doing the same throughout the building, he saved "100 gallons of fossil fuel."[5]

I suppose we could figure out what he was trying to communicate. "100 gallons of fossil fuel"? Fossil fuel includes chunks of coal, barrels of crude oil, tanks of natural gas—this is like saying "3.5 bags of shopping mall items." "5 gallons of natural gas"? A gallon is a liquid measure, while natural gas is a gas. I don't think a five-gallon jug of natural gas, at room

[5] PETER ASMUS, INTRODUCTION TO ENERGY IN CALIFORNIA xi (2009) (Preface by Art Rosenfeld).

pressure, would be very much; that seems like a cow burp. More importantly, though, this distinguished physics professor is not attempting to convey information to the reader about a numerical quantity like five or a hundred. He's telling you to "*turn the lights off, darn it, because science*."

There is unfortunately considerable use of numbers of this type. David MacKay, the chief science adviser for the UK Department of Energy and Climate Change, observed that all too often, people select numbers "to sound big and score points in arguments, rather than to aid thoughtful discussion."[6] Hence my citation to the *Ghostbusters* scene where Dr. Peter Venkman, the so-called expert in parapsychology, is asking intrusive questions of a woman who's been visited by a spectre, and her supervisor questions whether they are really relevant. Dr. Venkman looks at him rather coldly and says *"Back off, man, I'm a scientist."*

This use of numbers is what we should want to avoid. We should steer clear of conversations where people are flashing numbers or equations without conveying quantitative knowledge to the intended audience.

"Two examples and a three-part strategy"

Here are a couple of sample facts for purposes of this article. First is a release from the Energy Information Administration (EIA), part of the United States Department of Energy (DOE), pointing out that 80% of the electrical generating capacity of the United States retired in a given year, 2015, was coal-fired. Of 18 gigawatts (GW) of generating facility capacity that were retired in 2015, 14 GW were coal.[7] If you were writing a brief or paper, you can imagine grabbing that article, or more likely just that sound bite, and saying that the mix of power fuel sources is moving away from coal.

Second is a page on the website of the Center for Climate and Energy Solutions (C2ES).[8] The page is focused on carbon capture and storage (CCS), the ability to take CO_2 emissions from coal-fired or natural gas-fired power plants before they enter the atmosphere, and sequester

[6] David MacKay, *Think Big on Renewables Scale*, THE GUARDIAN , Apr. 29, 2009, https://www.theguardian.com/environment/cif-green/2009/apr/29/renewable-energy-david-mackay.

[7] U.S. Energy Information Administration, *Coal made up more than 80% of retired electricity generating capacity in 2015* (Mar. 8, 2016), https://www.eia.gov/todayinenergy/detail.php?id=25272#.

[8] CENTER FOR CLIMATE AND ENERGY SOLUTIONS, *Carbon Capture*, https://www.c2es.org/content/carbon-capture.

them—that is, deposit them in deep underground reservoirs or recirculate them through use in enhanced oil recovery. The Center states that this technology can capture up to 90% of this category of emissions. It tallies 12 active projects around the world, and 22 more on the drawing boards. Finally, it reports an estimate that this technique can achieve 14% of the emissions reduction necessary to keep the worldwide temperature rise below the fabled 2 degrees Celsius. Again, if you were writing a brief or paper, perhaps you'd grab this sound bite and say that CCS will play a vital role. I will return to these two examples in discussing some of the other points.

What follows is a numeracy strategy divided into three tasks.[9] The first task, distasteful as it may be for many lawyers, is to grapple with these numbers. You can't get away from these quantities or from understanding what they do. The Tower of Babel fragments loom over us all.

- With which dimension is your sentence concerned? Understand what aspect of an energy source is being described, like the multiple concepts sized up in the LNG value chain. An LNG plant engineer, a vessel captain, and a gas marketer might be looking at different aspects.

- In which unit is the dimension being measured? If you have documents from both Europe and the U.S., or from both the solar industry and the oil industry, you can imagine they might well use different units to describe the same thing, Tower of Babel fashion. Such units need to be, and can be, compared.

- What's the order of magnitude? Million, billion, trillion—for most of us, these are simply rhyming words that we can't understand without some frame of reference.

The second task is to look at what I'm calling the static context. The sentence containing a number or numbers often must be assessed at a point in time. Is it describing a relative share like a percentage, or an absolute amount? Is it making a comparison of one source or use with other sources or uses, or does it need to be so compared? If a time period or

[9] A very helpful general guide to numeracy is JANE E. MILLER, THE CHICAGO GUIDE TO WRITING ABOUT NUMBERS (2d ed. 2015), particularly her "Seven Basic Principles" (pp. 13-36).

country is described, what do the experiences of other time periods and countries look like?

The third task is to look at what I refer to as the dynamic context. This sentence has now been evaluated as of a moment in time, but what should we do with it? Are we meant to predict the future with it? If so, how could this proposition stand up or fail over time? What types of changes, limits, risks, or opportunities might arise that could make it a better or worse prediction?

We should understand the quantity, evaluate the static context, and assess the dynamic context. Then and only then should we make judgments as to how to use a fact, or how to combat it, and what to look for in the way of further facts.

Energy Concepts

The first step in number-grappling is to wrestle with the physical dimension. A common experience for a beginning energy lawyer is coming home to your first Thanksgiving dinner as an adult, and some relative of yours saying "That's very nice, dear. What is energy?" Well, how would *you* define energy to someone? Many of us progress through our careers from graduation to retirement without thinking about fundamentals.

The concept, like so many, goes all the way back to Aristotle. Energy (*energeia*), he defines rather metaphysically, is the potential of a thing to actualize into its completed state.[10] Until the nineteenth century, the word isn't used much more precisely. David Hume complained that natural philosophers used "energy" just as a way of describing something that is unusually intense—to say that one object is more "energetic" than another. By the time we come to your high school classes, you may dimly recall that energy was crisply defined as the "capacity for doing work." And you might think that since this definition was in one of your big textbooks, it represents an advancement over Aristotle.

Let's get some plain thinking from a graduate of Far Rockaway High School in Queens, New York, Dr. Richard Feynman, Nobel Prize winner in physics. Feynman confessed our limited understanding:

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[10] *See* ARISTOTLE, METAPHYSICS, Book IX, 1047a; Joe Sachs, *Aristotle: Motion and Its Place in Nature*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, http://www.iep.utm.edu/aris-mot/.

> In physics today, we have no knowledge of what energy is. We do not have a picture that energy comes in little blobs of a definite amount. It is not that way. However, there are formulas for calculating some numerical quantity, and when we add it all together it gives "28"—always the same number. It is an abstract thing in that it does not tell us the mechanism or the *reasons* for the various formulas.[11]

Here is the First Law in action. There is a menagerie of interactions in a system, and in principle you can measure all of them at a moment in time and add them up in the same dimension and unit. If there is then a change in the system, and you measure them all at a second moment in time, you're going to wind up with the same bottom-line number. We may not have a unified understanding of all the associated events—from massive solar electromagnetic flares, to moving a block up a ramp as you did in high-school physics problem sets, to electrons jumping off solar panels, to subatomic nuclear interactions of matter particles. What we do know is that each time you add the energy measurements before and after a change, they sum to the same number. It is a "black box" variety of knowledge, where we know more about the total than we do about many of the components. That opacity should give us a little bit of humility when we use the term "energy."[12]

What we really measure are forms of energy, each of which represents *the capacity to change a system*. So your textbook is right, energy is indeed "the capacity for doing work," but only if you define "work" in a very arcane way: Work is a process that produces a change—which can be a change of location, of speed, temperature, composition—in a system, not just in an object itself.[13] If I were Aristotle, I would be demanding my teacher grant me partial credit for my original answer.

A bucket of water lying on the ground represents what looks like a pretty low state of energy. But if you imagine that suddenly a sinkhole appears next to that bucket of water, so that it's perched on the edge of a

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[11] RICHARD FEYNMAN, THE FEYNMAN LECTURES ON PHYSICS 4-1 (1963) (emphasis in original). Feynman provides a colorful thought experiment based on the hidden children's blocks of Dennis the Menace.

[12] *See* JENNIFER COOPERSMITH, ENERGY: THE SUBTLE CONCEPT (2010), and her lucid discussion of Carnot, Joule, Clausius, Maxwell, and Feynman.

[13] See the deceptively titled VACLAV SMIL, ENERGY: A BEGINNER'S GUIDE (2d ed. 2017). *See also* VACLAV SMIL, ENERGY AND CIVILIZATION (2017).

distance, we have a system that has potential energy. If that water falls, it generates kinetic energy, which in turn can be converted into electric energy. We lawyers don't work with total energy so much as we deal with different forms. We loosely talk about "energy generation," but what we mean is that an electrical form of energy is being generated, having been converted from some other form.

FIGURE 3: CONVERSION OF ENERGY FORMS (LAWYERS' EDITION)

From: To:	*Potential gravitational*	*Kinetic*	*Electric*	*Thermal*	*Chemical*	*Electromagnetic radiation*	*Nuclear*
Electromagnetic radiation			Electromagnetic radiation	Thermal radiation			
Chemical				Boiling, Dissociation	Reactions	Photosynthesis	Ionization
Thermal (conduction, convection, radiation)		Friction	Resistance heating	Heat exchange	Combustion (rapid oxidation)	Solar absorption	Fission, Fusion
Kinetic	Falling object systems (water) $[mv^2/2]$	Gears	Motors	Thermal expansion, Internal combustion	Metabolism, Muscles		Radioactivity
Electric		Turbine generators			Fuel cells, Batteries	Solar cells	
Nuclear							
Potential gravitational		Elevated object systems $[mgh]$					

You may faintly remember from your textbook this kind of chart, in which one form of energy is converted into a different form. I've reduced and simplified that chart so it has most relation to another important unit: lawyer-hours. These are the forms of energy that might show up in a law practice.

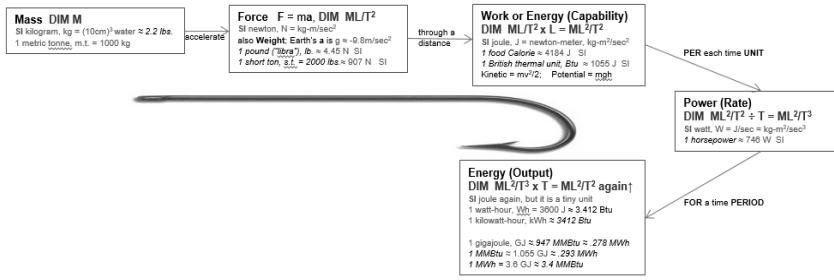
You can see that, in my example, the potential gravitational energy of that bucket of water perched on a ledge could be converted into kinetic energy as a falling object system. You can pass that kinetic energy through a turbine generator and generate electric energy. You can then pass that electric energy through a toaster and get heat and a little light. And of

course, each of these stages can involve some efficiency losses, usually conversion to some uncaptured and dissipated amount of thermal energy.[14]

I struggled with the dimensions and units I had heard throughout my energy law career. I've already confessed to you my struggle with Energy and Power, Capacity and Output, Watts and Watt-hours. Eventually, I developed the metaphor of a fish hook.

The feature of a fish hook I use is that if you go a certain distance from the eyelet, you find two parts that serve very different purposes—one is the shaft and the other is the barb, connected by a curve. They are the same distance along the hook, yet somehow related. This shape is what I found helpful in trying to understand the terms that energy business people use in our transactions.

FIGURE 4: THE ENERGY FISH HOOK



I arranged the physical concepts in that hook shape. Mass and force I will leave to the reader; you may dimly recall them from high school. What I'm interested in here is the curve starting with energy, curling to power, and swinging to energy output. (I warn you, I am going to employ multiplication and division.)

In capital letters in Figure 4, I show that whether you're in a metric system or the U.S. system, and whether you're using units used for chemistry or physics or engineering, there is a dimension (DIM) that is unchanging. Whether you measure a length using meters or feet, there is just one dimension, length, which I'm calling L. In the box where *energy* is meas-

[14] That is why measures of power in fossil-fuel, nuclear or geothermal applications refer sometimes to the thermal energy of the input (MWt) and other times to the electrical energy of the output (MWe).

ured, the dimension is mass times length squared, divided by time squared (DIM ML^2/T^2). All of the different units that are used to talk about energy have that dimension—whether you're using joules, calories, Btus, or anything else. (The joule, for example, is one kilogram times (meters squared) divided by (seconds squared).) If you work out all the equations for kinetic energy ($mv^2/2$), potential energy (mgh), and yes, even nuclear energy (mc^2), amazingly they all share the dimension ML^2/T^2.

The next concept is how rapidly energy is being processed. That's where we get to the *power* term—energy per a time unit. When you calculate miles per hour, you divide miles by hours, right? It's the same drill here: energy divided by time. The dimension of *power* winds up being mass times length squared divided by time *cubed* (DIM ML^2/T^3). All units that define power, including both the watt and the horsepower, share that dimension.

The last fish hook concept is what output results when power, the energy per unit of time, operates for some length of time—thus, power for a time period. We just *divided* energy by time to get the power. Now we *multiply* the power by some unit of time. What is our new dimension? Lo and behold, just like my fish hook analogy, we have swung around to the same dimension as that of our original energy measurement (DIM ML^2/T^2).

I compare this, hardly scientifically, to the difference between a high school yearbook and a high school reunion. In a high school yearbook you might see classmates who are voted as being "most likely to be a millionaire," "most likely to see the world," "most likely to have love affairs." Your classmates can vote, based on the capability of students to do those things. Then you all come to the reunion ten, fifteen, twenty years later, and ask "Well, how much money was generated? How many passport stamps were there? How many broken hearts?" You use the same units that you were talking about for *capability* in talking about the *output*. You're measuring different things and you're looking at them in a different way, but the dimension is the same.

In principle, you could curl backwards and use the joule to define the output (and, as Saul Griffith reported, the French often do just that). For big business transactions, you'll see that joules are tiny, so larger base units are often adopted. This is where you will find the watt-hour and various multiples—the kilowatt-hour, the gigawatt-hour, and so forth.

Now my difficulty with the concept of "capacity" was laid bare. Capacity can refer to energy, as the capacity to do work or the accumulated production or consumption of the capacity to do work. But capacity can also refer to power, as the capacity to convert one form of energy into another useful form at a particular rate of output per unit of time. In renewable energy projects, for example, a "capacity factor" identifies how much of a generation project's maximum or "nameplate" capacity of power is actually used in expected applications.

I had trouble seeing how "capacity" could apply to a rate as well as an output. I read a lot of advice online trying to explain it, including long blog postings. There was one short post in the middle of the wordy explanations that said, in its entirety, "it was a mistake to name the watt." I thought about that little comment over time, and I realized it was very insightful. The watt is defined as being the joule-per-second. So the unit that *doesn't* have a time in its name, the watt, is the time-dependent rate. The unit that *does* have a time in its name, the watt-hour, is *not* time-dependent—that is a quantity of energy output that's produced.

It's as if, instead of using "miles per hour," we had defined the mile-per-hour to be the "James," in honor of Rob James, energy lawyer. Then we would say that our car operates at a speed of 60 Jameses. Instead of having 400 miles' worth of gas in your tank (energy capability, sort of), traveling 60 miles an hour for 2 hours, and going a distance of 120 miles, we would travel at a speed of 60 Jameses to go a distance of 120 James-hours.[15] If we had kept everything in joules, I think we would all be better off.

Of Queens, Whales and Watts

The joule, the calorie, the Btu, and the watt-hour are all used to measure the same thing, whether energy capability or energy output. How do you ever operate with all of them? Lawyers will often see several of these units used at the same time on different pages of the documents they review on a single project. Here is a nontraditional way of visualizing the connections among these units.

[15] A parallel confusion arises with the length measures of "light-years" and parallax-seconds or "parsecs," with words reminding us of time prominently displayed in the names of the units. Generations of filmgoers are pondering Han Solo's boast about making the Kessel Run in less than 12 parsecs.

FIGURE 5: THE BRITISH THRONE UNIT HAS A THOUSAND JEWELS

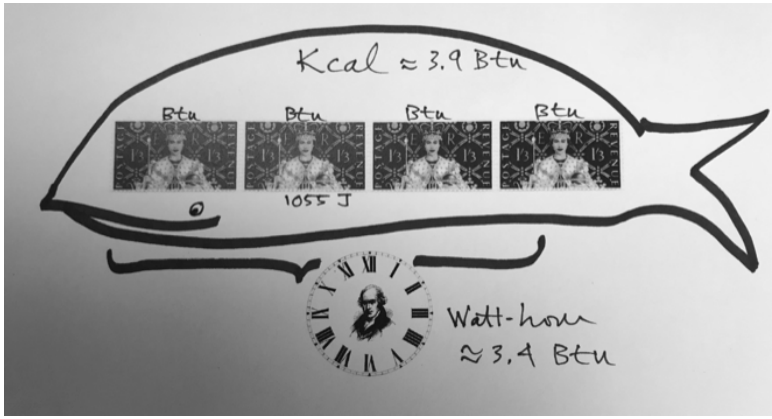
1 Btu ≈ 1055 J

When I think British, I can't think of anything more British than Queen Elizabeth II. The Queen is resplendent in her dazzling crown, her brilliant necklace and other accoutrements of state, all bedecked with gems. You can imagine that she is sitting in an elaborate chair that itself is encrusted with diamonds and sapphires. By herself, she's just a queen; by itself, it's just a chair. But together they are a "British throne unit." This British throne unit has precious stones all over. This is my way of remembering that the British throne unit has a thousand "jewels" (1 Btu ≈ 1055 J).

If you are groaning right now, you are welcome. I rather like that pun. But I defy you to forget this: *The British throne unit has a thousand jewels*.

Of course, if you had four British throne units, you'd have 4,000 jewels. Why do I throw out four, by random events? Well, four Btus is about the size of a food calorie (1 Kcal ≈ 3.9 Btu ≈ 4184 J), the big Calorie that we use in nutrition and physical fitness. In my next image I needed to have something that could swallow multiple monarchs that reminds me of food. I came up with a whale as being the symbol of a food calorie. You can see that four Queen Elizabeths slide comfortably down inside its intestinal tract.[16]

FIGURE 6: FOUR ENERGY UNITS



[16] Students have pointed out to me that whales, in the wild, are not reginavores. In conditions of captivity and stress, and given the opportunity, who knows what they might do?

As a rule of thumb for a food calorie, I give you the great contribution of American cuisine to the world of pastries—the Pop-Tart. (I told you I was dealing in icons of culture.) An individual Pop-Tart has about 200 food calories. So an individual Pop-Tart has about 200 whales (200 Kcal), about 800 Queen Elizabeths (793 Btu), or over 800,000 jewels (836,800 J). That gives you some frame of reference as to these numbers and how quickly they would add up if you were working on a transaction of any scale. That is why we see prefixes like *giga-* and *tera-* in our work.

The final unit I'll wedge in here is the watt-hour. At the bottom of my image you'll see James Watt, the improver of the steam engine. He's inside a clock to indicate that what we measure here is not watts—the watt, remember, is the joule per second—but the result of operating at a joule per second, for an hour. Let's see, sixty seconds times sixty minutes … carry the three … this winds up being exactly 3600 joules. So you can display all of these units in one image and see at once the relationships among the food calorie, the Btu, the watt-hour, and the joule.

What we lawyers can take away from this are three lessons.

- Number 1: Btus, food calories, and watt-hours are on the same order of magnitude. If you have a number in one of these three units, we can compare it fairly directly to the other two units. If you want to remember that the watt-hour and the food calorie are about three (3.4) or four (3.9) times as big as the Btu—God bless you, that will be very helpful.

- Number 2: What is comparable to the other energy units is not the watt, but the watt-hour.

- Number 3: The most important thing to remember is that at industrial scale, the joule is a deeply silly unit. It is way too small by itself to be used in any kind of adult transaction.

You will see other conversions in my Appendix table. An excellent table in a more traditional equation format is published by the American Physical Society.[17] Conversion tables are a tired literary genre; the rows of numbers and equivalents march down the page like dusty terracotta tomb war-

[17] AMERICAN PHYSICAL SOCIETY, *Energy Units*, https://www.aps.org/policy/reports/popa-reports/energy/units.cfm.

riors. I think it's more memorable to visualize the main ones. I challenge you to unsee my images. They're haunting my dreams, I can tell you.

Zillions, and "Howbigizza"

We come to orders of magnitude. This is where I say you have to suspend your belief in your ability to do things. You cannot look over a Washington, D.C. crowd and say "That's a million people," or "a million and a half people." (Present company addressed.)

A hundred, you can get your hands on. But if you've ever tried to look through an address list for an alumni event, a thousand is a lot. It's very difficult, I think, even to consider that many. When you get up to millions, billions, and trillions, they are indeed rhyming words more than quantities you can directly comprehend. Your intuitions are unreliable. A million seconds ago? You can kind of conceive that; that was last week (11 days). A billion seconds ago, though, most law students had not been born (32 years). And a trillion seconds ago, your ancestor might have been going out on a date with a Neanderthal, which may explain some things (32,000 years). Trebled orders of magnitude, leaping a thousand times at a step, are hard to fathom. The number that routinely shows up in energy policy discussions is a Quad—one quadrillion British thermal units, a thousand trillion. Any time you have a quadrillion of anything, it is strong evidence that the base unit was too tiny to begin with. The EIA will make statements like "the United States consumed 97 Quads in 2016." Nobody can intuit what that means.[18] It might as well be a zillion for many of us.

What you need, as an energy or environmental lawyer, is to have some rules of thumb—know the scales of phenomena that are important in your area of practice that give you some sense of very large (or very small) quantities. That's why I compiled a few measures that I picked up over the years, which I nickname "howbigizza."

- *How big is a power plant?* A large wind turbine, operating at maximum speed in a great location, might produce at up to one megawatt. (Remember that a megawatt is a power rate, a million joules per second.) A huge power plant might be capable of pro-

[18] In the same vein is HEWITT CRANE, EDWIN KINDERMAN & RIPULDAMAN MALHOTRA, A CUBIC MILE OF OIL (2010) (world consumed the equivalent of three cubic miles of oil in 2009).

ducing up to 1,000 megawatts, or a gigawatt; that might be enough power, at a typical load, to power a very large metropolitan area. By visualizing large wind turbines and large power plants, we can visualize a megawatt and a gigawatt.

A conventional plant powered by fossil fuel is typically in the 300 to 600 MW range. Individual trains, including cogeneration units, are often in the 49 to 100 MW range. Wind farms and solar arrays range widely from residential projects of 5 kW to industrial-scale projects in the hundreds of MW, although the nameplate capacity of renewable projects may differ significantly from the actual power rate based on when the sun is shining or the wind blowing (measured by a "capacity factor."). A nuclear power plant can be several GW, and the power of the Three Gorges hydroelectric complex in China is reportedly over 22 GW.[19]

- *How big is an oil refinery?* When I started in the oil business, you could have told me about an oil refinery that had 30,000 barrels per day of capacity. Every single day it was processing 30,000 barrels of crude. That's over a million gallons, or close to five million liters. That sounds like a huge number. But as I kept working in that area, I learned that a 30,000 barrel facility is relatively tiny. In the industry, a refinery of that size would be referred to as a "teapot."

A major oil refinery is usually in the six digits of processing capacity in barrels per day. The biggest refineries in Los Angeles are 200,000 to 300,000, on the Gulf of Mexico there are a few that run up to 600,000, and in Asia and Venezuela there are a few that are really complexes of multiple refineries running up to nearly a million or more.[20]

- *How big is a kilowatt-hour?* Rules of thumb can be used for energy output, not just processing or power rates. If your project involves the kilowatt-hour, think about leaving your high-functioning big-screen TV set on all day, or your air conditioning on for half the afternoon. Attach the numbers you're using to real-world objects or events you know.

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[19] *See* William Pentland, *World's 39 Largest Electric Power Plants*, FORBES, https://www.forbes.com/sites/williampentland/2013/08/26/worlds-39-largest-electric-power-plants/#67ee488758da.
[20] *See* HYDROCARBONS TECHNOLOGY, *Top 10 Large Oil Refineries*, https://www.hydrocarbons-technology.com/features/feature-top-ten-largest-oil-refineries-world/ (last vis. July 6, 2018).

- *How big is a coal train?* A locomotive set may haul 120 cars each carrying 120 short tons, for a total transport load of 15,000 short tons.[21]

- *How big is an oil or LNG tanker?* Oil tankers can range in capacity from 200,000 to 2 million barrels, with some outliers. A single LNG tanker might carry 145,000 cubic meters of LNG, equivalent to 60,000 metric tonnes of LNG, or 3 billion cubic feet of regasified natural gas.[22]

Here is a light-hearted example combining dimensions, units and orders of magnitude. The display of the popular Peloton exercise bicycle shows the rider's "output" in watts but the "total output" in kilojoules.[23] Usually we expect "something" and "total something" to be in the same units, but here the terms are not only in different units, they are measuring different concepts—"output" is power but "total output" is energy. It seems more natural to describe the total output from operating at a rate of so many watts to be in watt-hours, the end of the fish hook, not curling backwards around the fish hook to joules. Then again, "Peloton" conveys a French vibe, and being able to claim a scientific-sounding result of "836.8 kilojoules" in the health club may produce something of a *Ghostbusters* impressive effect. Just remind the braggart that 836.8 kilojoules … is a Pop-Tart.

More seriously, I note that being able to convert between units allows you to participate better in policy discussions. More for color than for comprehension, consider the two graphics in Figure 7; they are hard to read in print, but the originals are each a web-click away. The one on the left with the stripes is from the *BP Statistical Review of World Energy*. BP, being an oil company, takes all forms of energy production and converts it into what? It converts it into oil. So here you have the oddity of these lines corresponding to nuclear, wind, solar and geothermal energy being converted into how much oil they represent. BP is a great source for world-

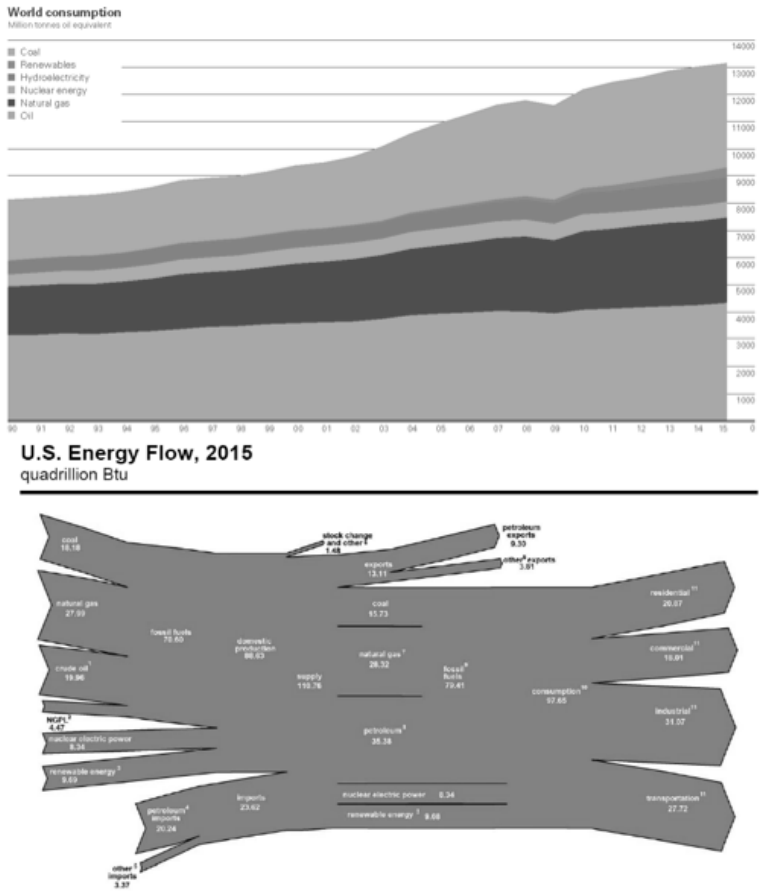
[21] COLORADO UNIT COAL TRAINS, *Unit Coal Train Frequently Asked Questions*, http://www.mattsplace.com/trains/coal/coaltrain_basics.htm.

[22] U.S. ENERGY INFORMATION ADMINISTRATION, *Oil tanker sizes range from general purpose to ultra-large crude carriers on AFRA scale* (Sept. 16, 2014), https://www.eia.gov/todayinenergy/detail.php?id=17991); MOKHATAB, et al., *supra* note 2, at 507. Most LNG market participants carry conversion charts, such as the 40-page *Natural Gas Conversion Pocketbook* of the International Gas Union (2012) or the shorter conversion chart of Poten & Partners, that help them navigate the different units and dimensions that arise in their business.

[23] PELOTON, *Track Your Performance*, https://onepeloton.com/classes#/track-your-performance.

wide production and consumption, year by year for many decades. It adds the sources to produce a number of metric tonnes of oil equivalent. You can't easily read it, but it's over 13 billion tonnes in 2015.[24]

FIGURE 7: AN ENERGY ROSETTA STONE



1 TOE ≈ 40 MMBtu

[24] BP PLC, *BP Statistical Review of World Energy* (June 2016), https://www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2016/bp-statistical-review-of-world-energy-2016-full-report.pdf.

The second graphic comes from the EIA, part of the DOE, which has inherited the responsibility to deal with the Federal Power Act and civilian atomic energy uses. Its focus is electricity, and fuel sources for electricity are typically valued for their heating content, and sold by the Btu. Here you have the opposite oddity of energy sources that are not used for heating, let's say petroleum that's going into making plastics, being converted into Btu. The EIA's chart shows that about 97 quadrillion Btus were consumed in 2015 in the United States.[25]

Before today, you might gawk at these two charts and throw your hands up. How would anyone deal with such radically different units? My answer today is yes, you can. You can use Rosetta stones, like the one in the lower left-hand corner of the Appendix. You'll see there's a magic equation that says a metric tonne of oil equivalent is about 40 million Btu.[26]

If you make that conversion, in either direction, suddenly the two charts make sense. You can estimate that there are about 530 Quad Btu produced worldwide, according to the BP chart, and you are told that the United States is consuming 97 Quad Btu, according to the DOE chart. If you start to play with those, you can see the idea that the United States might be using or producing 18% of world energy starts to make sense.[27] You can get these pieces of data to communicate with each other, instead of turning the pages and saying "It's hopeless; different people have built their own data sets for only their own purposes."

The Static Context

I bet you're happy we are now out of the numbers part of this presentation. Let me move on to the contexts, and first the static context. We should try to detect what the author is trying to establish. Whether the source is an institute singing the virtues of carbon capture and storage, or

[25] U.S. ENERGY INFORMATION ADMINISTRATION, *Annual Energy Review* (Sept. 2012), https://www.eia.gov/totalenergy/data/annual/diagram1.php (showing an earlier version).

[26] Here's a quick detour. You'll see some charts that say that this conversion is "39.68 million Btu." That requires some heroic assumptions or else is false precision. Oil quality and density, gravity as it's called for liquids, vary widely; the amount of heat content that would be equivalent to a tonne of Arabian versus California versus North Sea crude oil would be significantly different. Any time that someone reports an aggregate or average number like "39.68," I would be distrustful. I've reduced my conversion here to one significant digit, namely a four.

[27] The math is 13.25 billion TOE × 40 million Btu/TOE = 530 Quad (a billion times a million is a quadrillion!). And 97 for the U.S. divided by 530 for the world is 18.3%.

a government agency citing the rapid retirement of coal-fired power generation, what is the source trying to achieve? View statements in that light. Extending good faith to all sources, we should not judge them entirely on each factual statement; their entire argument and body of work deserve consideration. They may volunteer or concede other facts that help to provide a full picture. Then again, people don't introduce facts without a reason. There's probably a reason that of all the facts in all the world, someone decided to present this particular fact to you. Ponder why that is.

If someone gives you a relative number, like "80% of all retired energy capacity in a year was coal-fired," ask for the absolute number. How much coal-generating capacity was out there in the first place? If someone tells you that renewable electricity generation rose by 15% last year, ask "Increased from what to what?" What is the absolute figure or figures?

Flipping it around the other way, I suggest that if someone gives you an absolute number, ask for the relative proportions. If someone tells you that twelve CCS projects are under way, ask how much of a contribution would twelve CCS plants make to reduction of emissions from coal-fired generating plants. What percentage of total carbon emissions from the coal life-cycle does this represent? In short, *if someone gives you a relative, ask for the absolute. If someone gives you an absolute, ask for the relative.*

If someone gives you a number for the year 2015, that's great; it's good to know what that number is. Ask how that compares to what was happening in other years. If someone tells you that United States coal-fired generating capacity was being retired at an 80% clip, ask what was happening elsewhere. If 14 gigawatts of coal-fired generating capacity was being retired in the United States, it would be relevant if we were told "India's coal consumption grew fastest in the world in 2014."[28] Has there merely been a shift in the places where coal is being deployed, rather than a retreat on a global scale?

If the statement applies to one source, ask what is happening at the same time to other sources. Renewable production of electricity went up in 2015. But so did electricity generated from natural gas. Renewable

[28] THE HINDU BUSINESS LINE, *India's coal consumption grew fastest in the world in 2014: BP* (June 10, 2015), https://www.thehindubusinessline.com/news/indias-coal-consumption-grew-fastest-in-the-world-in-2014-bp/article7302198.ece.

power generation went up by 15% in 2015, while gas generation went up only 2%. The natural gas base is so large, however, that more gas generating capacity was added (0.48% of world energy production) than wind, solar, and geothermal capacity combined (0.40% of world energy production).[29] A benchwarmer can be the most improved player on your team, year after year, and still not yet be a starter.

The Dynamic Context

When I say dynamic context, I'm talking about how a quantitative sentence is supposed to influence your thinking about the future. If renewable electricity generation rose 15% in 2015, what does that imply for 2020? Does that statistic mean that over a period of a few years there's going to be a complete displacement of other generation sources by the one whose 2015 growth outstripped that of the others?

What could happen to that one-year snapshot? There are economic issues of supply, demand, and interest rates. There are regulatory issues like coal safety regulations. There could be changes in technology, like the prospects for efficient large-scale energy storage. People had discounted U.S. natural gas production in the 1990s—a lot of us were working on projects to import gas to the United States. Then hydraulic fracturing was deployed on a large scale, based on separate technologies that had been developed since the 1940s, and now we're working on projects to export gas from the United States.

There could be new crises or shortages. Or there could be a resolution of existing conflicts. Overhanging the price of oil for some time was the anticipation that production from Iran would enter world markets through settlement of a long impasse. Might there be changes in the existence or the handling of externalities? Could growth rates be affected by new taxes or regulations, to address either positive or negative side-effects? Could there be changes in subsidies or penalties, or in tax incentives?

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[29] *See* BP PLC, *BP Statistical Review of World Energy* at 4-5 (June 2016), https://www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2016/bp-statistical-review-of-world-energy-2016-full-report.pdf. Eventually, consistent and compound growth in wind and solar generation may predominate, with renewables power growth exceeding natural gas power growth in 2017. *See* BP PLC, *BP Statistical Review of World Energy* (June 2017), https://www.bp.com/content/dam/bp/en/corporate/pdf/energy-economics/statistical-review-2017/bp-statistical-review-of-world-energy-2017-full-report.pdf.

There could be limits to growth rates. The price per unit of output is dropping rapidly for solar panels and wind turbines, but there are land use, tax policy and energy storage headwinds that should give us pause before we infinitely extrapolate on an exponential growth curve for renewable projects

What other resources are needed to make this energy source successful? Much of the wind and solar power generation has been achieved in the places that are easiest to develop. While distributed generation is gaining in popularity, many proposed utility-scale projects would be located further away from population centers, in places that may pose greater environmental issues (dealing with endangered species, for example). Transmission will also be a limiting factor. The oil industry has endeavored to finance and build a Keystone XL pipeline and a Dakota Access Pipeline, traversing parts of the country that are neither reaping royalty income nor benefitting from consumption. The product travels underneath or near rivers and reservations, causing the landowner and neighbor concerns about which we hear. On the electricity side, if you are facing the prospect of a high-voltage tower crossing your land, it doesn't matter much to you whether it's carrying "green electrons" from a windfarm or "brown electrons" from a coal-burning plant.

In general, if you have digested the fact that something was true at present, proceed to look at the dynamic context. How is a fact about today relevant to a policy or economic decision for tomorrow?

The Biggest Statistics of Them All

Let's apply this strategy to some interesting and sometimes jarring facts.

The most significant facts of all, which should be known to everyone who is interested in energy and environmental issues, relate to world population and resources today and say twenty years from today. (Pick a shorter or longer time horizon if you like.) I am embarrassed that I did not have a good grip on these three sets of numbers before researching them for this presentation.

- *How many people will be here on Earth?* There are about 7.5 billion of us in 2017. How many people are expected to be here twenty years from now? Estimates vary, but one that assumes ongoing

improvements in women's rights and education is 8.8 billion—about a 17% increase, way down from prior growth rates but still a lot more people in absolute terms.[30] You may believe a different estimate based on different assumptions.

- *How much wealth will those people share?* GDP is a controversial measure of wealth let alone happiness, but it is a statistic readily available to us. World GDP in 2016 was about $75 trillion (US GDP being $18 trillion of that).[31] If we expect the billions of people living in the developing world to attain the higher levels of health, nutrition and living standard of the developed world, what would world GDP need to be twenty years from now? You can see that GDP would need to rise much faster than population. Would it double or triple, to $150 or $200 trillion? Or do you envision scenarios of $100 trillion, in which the developed world radically cuts back while the developing world perhaps is content with less of an improvement?

- *What energy is needed to accommodate those people and that wealth?* As noted above, world energy usage right now is about 530 Quads. We certainly can't expect production to rise as quickly as GDP—thanks to Professor Rosenfeld's work, we know that we can conserve, and that we can use energy much more efficiently per incremental unit of GDP than we have done in the past. But to power the developing world, energy production would need to rise, and rise faster than the population growth. What output do you think would be needed? Maybe 750 Quad? But how would you do that if your policies suggest the reduction or cessation of fossil fuel production, which currently is over 500 Quad? Can you generate and transport, say, 750 Quad of renewable energy to the population by the year 2037?

I could add other resources or constraints to this list (cubic meters or acre-feet of potable water; tons of atmospheric carbon; numbers of spe-

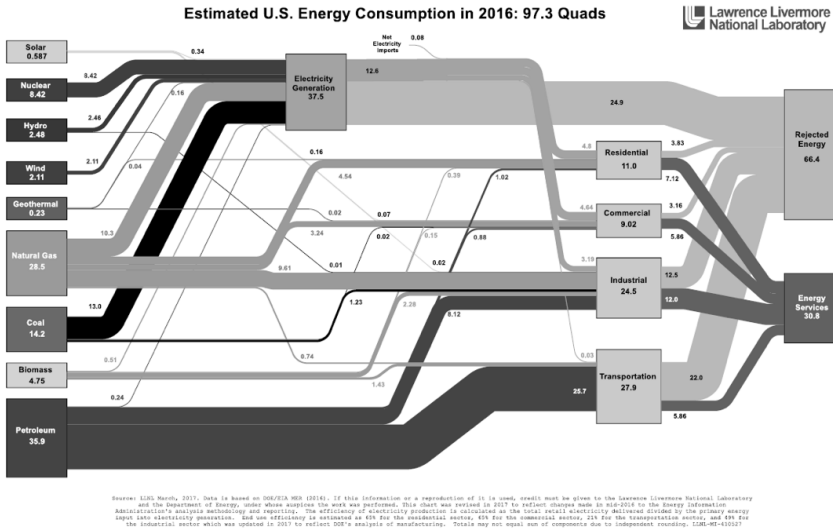
[30] UNITED NATIONS, WORLD POPULATION TO 2300 (2004), http://www.un.org/esa/population/publications/longrange2/WorldPop2300final.pdf.
[31] U.S. CENTRAL INTELLIGENCE AGENCY, CIA WORLD FACTBOOK (2016), https://www.cia.gov/library/publications/download/download-2016/index.html.

cies) but you get the idea. If you have a vision for our energy and environmental future, please think of those 1.3 billion additional people, imagine the calls by 6 billion people in developing economies for greater resources, and consider the ways to produce those hundreds and hundreds of quadrillions of Btus. See if your vision still holds in that broader frame.

Other Applications

When analyzing sources, we should consider the energy used for all applications, not just those for electricity generation. Take a look at Figure 8, the annual U.S. energy consumption flow chart published by the Lawrence Livermore National Laboratory and the DOE.

FIGURE 8: U.S. ENERGY FLOWS[32]



When people talk about renewable generation increasing 15% in 2015, they typically focus on the use of renewable sources for power generation. But that is just one stream of energy use, albeit an increasingly important

[32] Originally obtained from Lawrence Livermore National Laboratory's website, https://flowcharts.llnl.gov/. The 2017 version is currently available (as of July 8, 2018) at https://flowcharts.llnl.gov/content/assets/images/energy/us/Energy_US_2017.png.

one. That stream is represented in the box titled "Electricity Generation 37.5" atop the figure. That is 37.5 Quads, out of the 97 Quad U.S. total. We still live in a world that does not only have electricity; it has ships, and airplanes, and food that is produced using nitrogen fertilizers derived from natural gas. It's a world with concrete made with cement calcined at extremely high temperatures. There are ways to use electricity for these purposes, including fuel cells and other emerging techniques, and more are coming; but they're clearly not the ones in predominant use today. When people talk about renewable sources displacing other sources, remember the "37.5" box and all the other boxes capturing how we presently use energy for other applications.

Granting equal time, though, I acknowledge carbon capture faces steep challenges in scaling to large-scale application. The twelve active and 22 proposed CCS plants cited by the Center for Climate and Energy Solutions will only recover megatonnes of CO2, whereas the world output of CO2 is in gigatonnes. Some contend that a majority of the depleted oil and gas and saline reservoirs of the world would be needed to sequester our industrial CO2.[33]

These comments about renewables and CCS are not made to denigrate the efforts of all of us engaged in their evaluation and development. Along with efficiency gains and adaptation, a decarbonized energy system is our future. But how quickly that future arrives—whether during our careers or those of our children or grandchildren—will depend more on the emergence of new technology than on political decisions to encourage development of favored existing technologies. That outlook is based not on ideology but on taking a candid approach to these numbers.

As I was preparing for these presentations, I encountered two New York Times headlines. One read: "China Aims to Spend At Least $360 Billion on Renewable Energy by 2020" (Jan. 5, 2017). Applying my framework, I wondered how much money China was going to be spending in this same time period on coal and coal-fired generation. I wondered what investments other countries were making. I wondered whether this 2017-2020 time period was unusual. In short, I asked myself whether

[33] Berend Smit, Ah-Hyung Alissa Park & Greeshma Gadikota, *The Grand Challenges in Carbon Capture, Utilization, and Storage,* 2 Frontiers in Energy Research 55 (2014), https://www.frontiersin.org/articles/10.3389/fenrg.2014.00055/full.

$360 billion was or wasn't a remarkable number. Sure enough, just a few months later another headline on a story by another reporter showed up in the same newspaper: "Why China Wants to Lead on Climate, but Clings to Coal (for Now)" (Nov. 15, 2017). It reported that coal use and coal-sourced carbon emissions in China actually rose in 2017. Both these articles are truthful. But knowing more about the entire picture is useful. These two reporters should have lunch together more often.

The Path of Efficiency and Technology

I don't want to end this article on too much of a downer, so I want to emphasize the importance and promise of efficiency and technology. Since the first oil shock of the 1970s, the contributions of demand reduction and innovation have exceeded the contribution of new energy sources. If we had today the same vehicle fleet economy standards that were in effect in 1973 and the same efficiency levels in factories, offices and homes, our energy consumption would be much higher.[34]

The Livermore chart in Figure 8 shows, in the light gray, the waste heat (back to the *Second* Law of Thermodynamics) dissipated in various uses. You'll see that efficiency in the home, the office, and the factory is fairly high. Where you see the largest inefficiencies are in the generation of electricity and in transportation—in how little of the fuel's energy content turns the generators and propels the vehicles forward. There are great fortunes, business transactions and billable hours to be created in these areas of potential efficiency gains. These could outstrip, if you look on the other side of the chart, the current renewable energy contributions. Projects that involve combined-cycle generation, co-generation, and other efficient techniques are highly valued.

The path of efficiency and technology is also the path to a more egalitarian distribution of energy. Countries with emerging economies have the benefit of being able to leap immediately to light-emitting diode (LED) illumination and other more efficient techniques. New technologies will spur great environmental and economic gains—more so than government restraints on industrial output, and more so than on shifting subsidies and penalties between existing fossil and existing renewable sources and processes.

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[34] *See* JAMES L. SWEENEY, ENERGY EFFICIENCY (2016).

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My plea is to understand numerical propositions before you use them or fight them. Know your energy concepts. Know their dimensions. Don't trust yourself on orders of magnitude. Instead, find yourself rules of thumb. Don't be intimidated by the fact that your measurement is in a different unit than someone else's measurement. There are ways to convert from one unit to another, whether you remember the British throne unit or not. Know how one dimension or unit relates to others. Know how you could make a Btu relate to a volume to a mass. The links in any value chain have to talk at least to their adjacent links; as a lawyer for any of those links, you should be able to speak their language as well.

Moving from the numbers to the proposition itself, I ask that we consider the static structural context. If someone gives you a relative number, like a percentage, ask for the absolute number. If someone gives you an absolute, ask for the relative. Ask: What's so special about 2015? What's so special about the United States? What's so special about power generation? What's so special about any one source or use, one country, or one year, if that is the single data-point that is offered to you?

Then consider the dynamic context. Say: "Okay, now I appreciate your snapshot. *What follows*?" What does it mean for the future? How can its inherent prediction be affected by macroeconomic conditions, politics, interdependent decisions, other actors, or other essential resources?

Numbers are only one piece of energy literacy. But we have to start somewhere, and numbers are where we lawyers have the most ground to make up.[35] We tend to be intimidated by our lack of scientific background and by the pace of energy projects. Attorneys who demonstrate that they can work with quantities help themselves as well as the parties. We can make these charts, graphs and numbers not only speak but sing to each other. We can harmonize their voices. Our colleagues and clients will appreciate it.

One parting request: Kindly expect your own factual statements to stand up to this same level of scrutiny. When *you* use a quantity, please imagine that there is somebody out there in your audience who enjoys complete energy numeracy and utter energy literacy.

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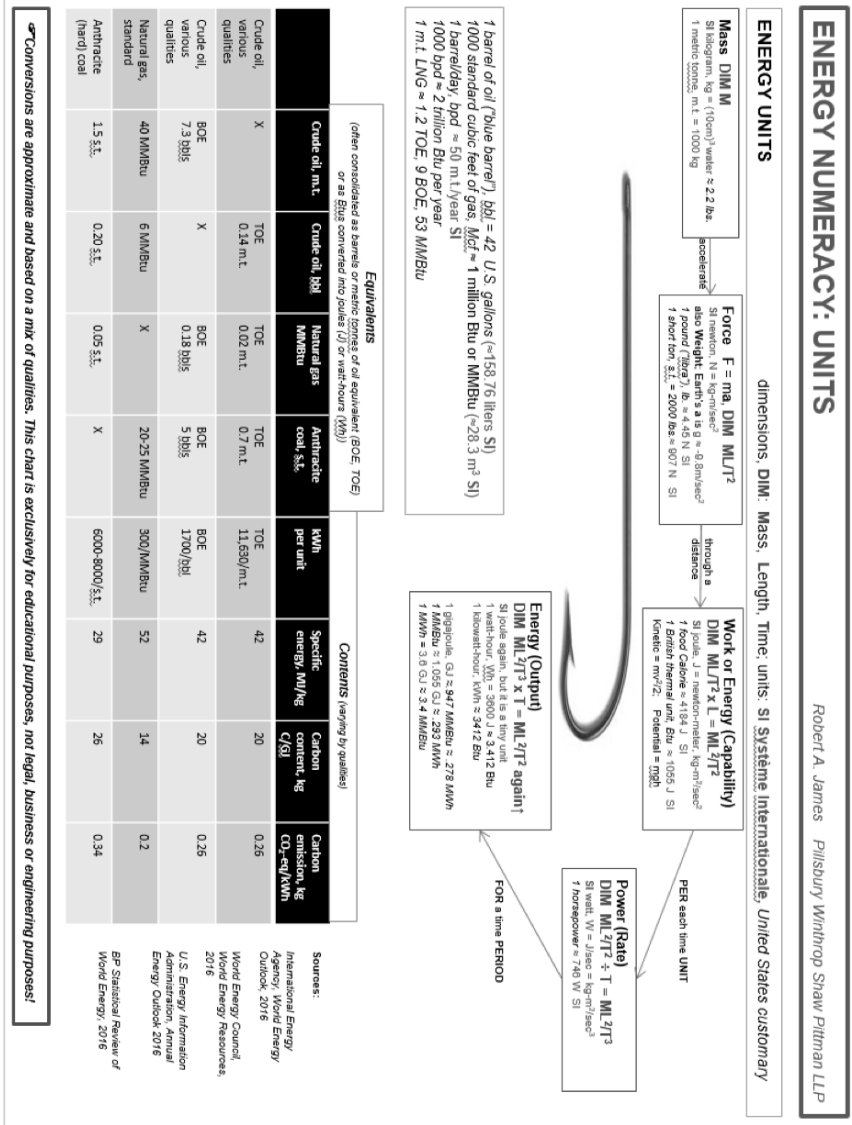
[35] *See* Carole Silver & Louis Rocconi, *Learning From and About the Numbers,* 5 J. OF LAW (4 J. LEGAL METRICS) 53, 55 (2015) ("[I]t is not unusual for law students to explain their decision to attend law school as related to an aversion to numbers.")

APPENDIX: ENERGY NUMERACY CHART



# # #

APPELLATE REVIEW IV

OCTOBER TERM 2013 – THE PRODIGAL SUMS RETURN

Joshua Cumby[†]

Five years ago, we embraced a new perspective on the performance of the federal courts of appeals in the Supreme Court of the United States. Rather than counting up the usual numbers of lower court affirmances, reversals, and vacations—what we call the "primary review" affirmance rate—we devised a system for counting up tacit approvals and disapprovals of those courts' decisions in cases where the Supreme Court reviews and resolves "circuit splits."

For example, imagine the Court grants cert to resolve a disagreement among the federal courts of appeals on a certain question. Further imagine that the court on direct review is the Fourth Circuit; that the circuit split also involves the Third Circuit (which agrees with the Fourth Circuit on the question presented) and the Second Circuit (which does not); and that the Supreme Court reverses the Fourth Circuit. Only the Fourth Circuit's reversal counts toward the primary review affirmance rate. But our metric counts a loss for the Fourth Circuit, as well as a loss for the Third Circuit and a win for the Second Circuit. This is the "parallel review" affirmance rate.

The parallel review affirmance rate offers a better set of data because it generally involves both winners and losers, as in our example, thereby expanding the sample size and mitigating the Supreme Court's "decided propensity" to grant review in cases where it intends to reverse the lower court.[1] This metric also has the virtue of comparing federal courts of ap-

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[†] Senior editor, the Journal of Legal Metrics.

[1] *See* Thomas Baker, *The Eleventh Circuit's First Decade Contribution to the Law of the Nation*, 1981-1991, 19 NOVA. L. REV. 323, 327 (1994) ("The 'decided propensity' of the Supreme Court, statistically speaking, is to grant a writ of certiorari in cases it intends to reverse."). *See also* Appendix B, below (indicating that the Supreme Court affirmed the federal courts of appeals (excluding the U.S. Court of Appeals for the Federal Circuit) in only 27% of cases in the October 2013 term).

peals' performance on the same legal questions with the same degree of difficulty, as demonstrated by the courts' disagreement. If all reversals are not created equal (and we do not think they are), our metric humbly aspires to level the playing field by adopting a different, marginally improved standard for deciding who wins and who loses. It's not perfect, but it works (or at least it's workable).

We're pleased to offer this, the latest installment in our Appellate Review series for your education and amusement. We apologize for the delay and look forward to bringing forth future installments at more regular intervals.[2] Thanks for reading and stay tuned.

I. The Rules

In the course of compiling statistics for previous installments in this series,[3] and with a little help from our friends,[4] we've refined our method and restate it here succinctly:

> 1. Because we limit the term "circuit split" to conflicts between federal appellate courts or "inter-circuit" splits, "intra-circuit" splits and disagreements between lower federal and state courts don't count.[5] For similar reasons, opinions reviewing state or federal district court decisions aren't counted.[6]
>
> 2. Because its jurisdiction is statutorily distinct, opinions reviewing decisions by the U.S. Court of Appeals for the Federal Circuit also aren't counted.[7]

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[2] *See* Sue Morales, *We're putting the band back together!*, YOUTUBE (May 21, 2013), https://www.youtube.com/watch?v=24hB9Phwnnw.

[3] *See* Tom Cummins & Adam Aft, *Appellate Review*, 2 J.L. (1 J. Legal Metrics) 59 (2012) ("Appellate Review I"); Tom Cummins & Adam Aft, *Appellate Review II – October Term 2011*, 3 J.L. (2 J. Legal Metrics) 37 (2013); Tom Cummins, Adam Aft & Joshua Cumby, *Appellate Review III – October Term 2012 and Counting*, 4 J.L. (3 J. Legal Metrics) 385 (2014) ("Appellate Review III").

[4] *See* Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 4 J.L. (3 J. LEGAL METRICS) 361 (2014).

[5] Nor do disagreements between Article III courts and Article I tribunals. *See, e.g.*, Lawson v. FMR LLC, 134 S. Ct. 1158, 1165 (granting cert "to resolve the division of opinion" between the First Circuit and the Department of Labor's Administrative Review Board).

[6] *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014) (reviewing the decision of a three-judge panel of the United States District Court for the District of Columbia).

[7] Excluding the Federal Circuit also avoids any unfair comparison of apples and apparatuses. *See* n.15, below.

> 3. To be counted, the circuit split must be identified within the four corners of an opinion (including majority opinions, concurrences, and dissents), which must also resolve the circuit split so that we can confidently count winners and losers.[8]

The reasons for these rules are explained in greater detail elsewhere.[9] And if we change or add to them, you'll be hearing about it soon.

II. The Results

Applying our rules to the Supreme Court's work in October 2013, we count 18 circuit splits. *See* Appendix A. That's a slightly different tally than the Supreme Court Database, which counts 21.[10] But the Database includes six circuit splits that we don't count (for various reasons, some explained below)[11] and doesn't include five other circuit splits: three that we count[12] and two that we don't.[13]

And this year's winner? It's the Fourth Circuit, with six wins and only one loss, an 86% parallel review affirmance rate. Close behind the Fightin' Fourth and tied for second place are the Tenth and First Circuits, with five wins and one loss each, an 83% affirmance rate. And the Sixth Circuit takes third place with eight wins, two losses, and an 80% affirmance rate.

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[8] Or at least count winners and losers with some confidence. *See* Part II ("The Results"), below.

[9] *See* Appellate Review III, 4 J.L. (3 J. Legal Metrics) 385, 388-92 (2014).

[10] *The Supreme Court Database*, scdb.wustl.edu (last visited July 10, 2017).

[11] Alice Corp. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014) (granting cert to review an *en banc* decision of the U.S. Court of Appeals for the Federal Circuit); Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014); Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014); Rosemond v. United States, 134 S. Ct. 1240 (2014); Unite Here Local 355 v. Mulhall, 134 S. Ct. 594 (2013) (dismissing the writ of certiorari as improvidently granted). *See also* Part III ("The Remarkable"), below.

[12] *See* Appendix A (including Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (consolidated with Conestoga Wood Specialties Corp. v. Burwell, No. 13-356); Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014); Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014)).

[13] Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014); CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014). *See also* Part III ("The Remarkable"), below.

October Term 2013 Parallel Review Affirmance Rates					
Rank	**Circuit**	**Wins**	**Losses**	**AB**	**Rate**
1	4th	6	1	7	86%
2	10th	5	1	6	83%
3	1st	5	1	6	83%
4	6th	8	2	10	80%
5	8th	3	1	4	75%
6	7th	6	2	8	75%
7	2nd	6	3	9	67%
8	3rd	4	3	7	57%
9	DC	1	1	2	50%
10	11th	4	4	8	50%
11	9th	3	8	11	27%
12	5th	0	8	8	0%

Looking back over the last four years, we see that this isn't the first year the Fourth Circuit has run away with the title.[14] But we also see that it's been a two-way tug-o-war with the Tenacious Tenth, which took the prize in OT2010 and OT2012, followed closely in both terms by the Fearsome First, which, again, tied with the Tenth Circuit for second place this year.

[14] The presentation of historical data is a new feature of the Appellate Review and one that we hope will prove more useful as we collect even more data. It comes with a couple of caveats, however. First, we altered our method in Appellate Review III, so while we continue to compare apples to apples, the way we pick them has changed (but note that we continue to carefully avoid cherry picking). *See* Appellate Review III, 4 J.L. (3 J. Legal Metrics) 385, 388-92 (2014) (Part II, "The Method"), 388 ("[T]he metric compares the courts' performance on the same legal questions. Apples-to-apples, as they say."). Second, our sample size is still very small. For example, the Supreme Court has been sitting for more than two centuries but we've only counted circuit splits for four years. So stay tuned.

Historic Parallel Review Affirmance Rates by Rank[15]								
Rank	OT2010		OT2011		OT2012		OT2013	
	Circuit	Rate	Circuit	Rate	Circuit	Rate	Circuit	Rate
1	10th	100%	4th	78%	10th	88%	4th	86%
2	1st	86%	11th	56%	1st	80%	10th	83%
3	5th	79%	DC	50%	7th	67%	1st	83%
4	3rd	78%	6th	50%	2nd	64%	6th	80%
5	4th	67%	9th	44%	5th	60%	8th	75%
6	7th	62%	2nd	40%	4th	57%	7th	75%
7	2nd	60%	3rd	40%	8th	40%	2nd	67%
8	9th	60%	10th	38%	11th	40%	3rd	57%
9	6th	50%	7th	36%	DC	40%	DC	50%
10	8th	50%	1st	33%	3rd	36%	11th	50%
11	11th	45%	5th	33%	6th	33%	9th	27%
12	DC	33%	8th	25%	9th	18%	5th	0%

Indeed, the Tenth and First circuits are the only courts to appear at the top of the rankings in three of the last four terms. And the Fourth Circuit is the only court to place in the top half of the rankings (that is, ranks 1 through 6) in every one of those terms.

Historic Parallel Review Affirmance Rates by Circuit[16]								
Circuit	OT2010		OT2011		OT2012		OT2013	
	Rate	Rank	Rate	Rank	Rate	Rank	Rate	Rank
1st	86%	2	33%	10	80%	2	83%	3
2nd	60%	7	40%	6	64%	4	67%	7
3rd	78%	4	40%	7	36%	10	57%	8
4th	67%	5	78%	1	57%	6	86%	1
5th	79%	3	33%	11	60%	5	0%	12
6th	50%	9	50%	4	33%	11	80%	4
7th	62%	6	36%	9	67%	3	75%	6
8th	50%	10	25%	12	40%	7	75%	5
9th	60%	8	44%	5	18%	12	27%	11
10th	100%	1	38%	8	88%	1	83%	2
11th	45%	11	56%	2	40%	8	50%	10
DC	33%	12	50%	3	40%	9	50%	9

Given the sample size, this probably doesn't mean all that much. But we'll be keeping an eye on the home teams from Boston, Richmond, and Denver, and you probably should, too.

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[15] *See* Appellate Review I, 2 J.L. (1 J. LEGAL METRICS) 59, 69 (2012); Appellate Review II, 3 J.L. (2 J. LEGAL METRICS) 37, 40 (2013); Appellate Review III, 4 J.L. (3 J. LEGAL METRICS) 385, 394 (2014).
[16] Id.

III. The Remarkable (or The Remainders)

A few cases from OT2013 deserve special attention, either because they involve circuit splits and we don't include them in our stats or because we do include them and reasonable minds might disagree about how we count the winners and losers (the disagreement of reasonable minds is one of the Appellate Review's reasons for being, after all). So here we present some thumbnail sketches to explain some of our decisions.

A. Ray Haluch, Halliburton, and *Waldburger*

In *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, the First Circuit held that unresolved claims for attorney's fees based on a contract (rather than a statute) prevent judgments on the merits from becoming "final decisions" under 28 U.S.C. § 1291.[17] The Supreme Court granted cert **"**to resolve a conflict in the Courts of Appeals over whether and when an unresolved issue of attorney's fees based on a contract prevents a judgment on the merits from being final."[18] Justice Kennedy's opinion for a unanimous court lists those conflicting Courts of Appeals as the Second, Seventh, and Ninth on one side and the Third, Fourth, Fifth, Eighth, and Eleventh on the other.[19] But the opinion does not tell us what side wins and what side loses (that is, what side sides with the First Circuit, the only clear loser here). You have to go outside the four corners of the opinion to know that, and that's against the rules.[20]

Similarly, the Court granted review in two other cases for the express purpose of resolving circuit splits, but the Court's decisions aren't counted here because they either don't tell us which circuits disagree or don't tell us which are winners and losers, as in *Ray Haluch*. In *Halliburton Co. v. Erica P. John Fund, Inc.*, the Court granted cert "to resolve a conflict among the Circuits over whether securities fraud defendants may attempt to rebut the *Basic* [*Inc. v. Levinson*, 485 U.S. 224 (1988)] presumption at the class certification stage with evidence of a lack of price impact."[21] But

[17] 134 S. Ct. 773, 778 (2014).
[18] Id. at 778-79.
[19] Id. at 779.
[20] *See* Part I ("The Rules"), above. If you peek at the opinions cited by Justice Kennedy, you'll see that the Second, Seventh, and Ninth circuits win, and the Third, Fourth, Fifth, Eighth, and Eleventh fall with the First.
[21] 134 S. Ct. 2398, 2407 (2014).

Chief Justice Roberts's opinion doesn't identify the warring circuits, and neither do Justice Ginsburg's or Justice Thomas's concurrences.[22] And in *CTS Corp. v. Waldburger*, Justice Kennedy's plurality identifies circuit courts on either side of a split (the Fifth and Ninth), but doesn't identify which court is on the winning or losing side (all we know is that the Fourth Circuit's judgment was reversed).[23]

B. Dudenhoeffer and *Scialabba*

Other opinions didn't make it into this term's circuit split count for different reasons. In *Fifth Third Bancorp v. Dudenhoeffer*, the Court granted cert "[i]n light of differences among the Courts of Appeals as to the nature of the presumption of prudence applicable to fiduciaries" of employee stock ownership plans (ESOPs) under the Employee Retirement Income Security Act (ERISA).[24] The courts of appeals (including the Second and Sixth) agreed that a presumption of prudence applied to ESOP fiduciaries, but split on when to apply it.[25] The Supreme Court, however, held that "no such presumption applies."[26] Although circuit splits with no winners (or only losers) usually count under the rules, because the lower courts' disagreement is ultimately irrelevant given the Court's holding, there are no winners or losers here for our purposes because there is no circuit split.[27]

A similarly complex case yields a different result. In *Scialabba v. Cuellar de Osorio*, the Court granted cert "to resolve a Circuit split on the meaning

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[22] A peek at the cert petition reveals that the Second and Third circuits are on the winning side. Like other extrinsic evidence, *see, e.g.*, n.21, above, cert petitions violate our four corners rule, *see* Part I ("The Rules"), above. But unlike other extrinsic evidence, cert petitions are also particularly susceptible to advocacy bias because a circuit split is one of only a few "compelling" reasons for granting review. *See* SUP. CT. R. 10(A). Even without the four corners rule, then, we'd be wary of using cert petitions to identify circuit splits.

[23] *See* 134 S. Ct. 2175, 2182, 2189 (2014). *See also* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1263 (2014) (Roberts, C.J., writing for a majority of eight justices) (noting that in the decision below, the Tenth Circuit "acknowledged division among lower courts," but failing to identify which lower courts). Another peek at the cert petition in *CTS* reveals the Fifth Circuit as the winner and the Ninth Circuit as a loser (together with the Fourth Circuit, the decision maker below). But you know how we feel about cert petitions now. *See* n.23, above.

[24] 134 S. Ct. 2459, 2463-65 (2014).

[25] Id. at 2465.

[26] Id. at 2463.

[27] We suspect that this is why the Supreme Court Database didn't code this case as involving a circuit split. *See* n.14, above, and accompanying text.

of [8 U.S.C.] § 1153(h)(3)."[28] That provision concerns the appropriate categorization of immigrant visa petition beneficiaries who were minors when the petitions were filed but "aged out" (that is, turned 21) before the immigration process was complete.[29] The district court and a panel of the Ninth Circuit found Section 1153(h)(3) ambiguous and deferred to the Board of Immigration Appeals' (BIA) interpretation.[30] But the Ninth Circuit, sitting *en banc*, reversed, finding that the statute was unambiguous and that the BIA's interpretation was not entitled to deference.[31]

Justice Kagan's opinion identifies the Fifth Circuit's agreement with the decision of the Ninth Circuit below; that is, that the statute was unambiguous and that the BIA's interpretation was wrong.[32] The Second Circuit previously found that the statute was unambiguous, too; it also determined that the BIA's interpretation was not entitled to deference but was nevertheless correct and compelled by Congress's clearly expressed intent.[33] Five justices (Chief Justice Roberts and justices Kagan, Kennedy, Ginsburg, and Scalia) agreed that the statute was ambiguous and that the BIA's interpretation was reasonable and thus entitled to deference under *Chevron*.[34] The Court's decision, then, is contrary to all three circuits' findings on the ambiguity of the statute, but only contrary to the Ninth and Fifth circuits' findings on the merits insofar as a plurality of the Court agreed only that the BIA's decision was "reasonable" and did not go so far as to decide whether the BIA's decision was also "correct," as the Second Circuit had. Still, we chalk this one up as a loss for the Ninth, Fifth, and Second circuits (and a win for no one) because, unlike *Dudenhoeffer*, there was a genuine circuit split on all issues (ambiguity and deference) and the Court resolved all issues as to all circuits involved.

C. Rosemond

Finally, a hard(er) case. In *Rosemond v. United States*, the Court granted cert "to resolve the Circuit conflict over what it takes to aid and abet" an

[28] 134 S. Ct. 2191, 2202 (2014).
[29] Id. at 2201-02.
[30] Id. at 2202.
[31] Id.
[32] Id. at 2202 n.9.
[33] Id.
[34] Id. at 2213, 2214 (Roberts, C.J., concurring). *See also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

offense under 18 U.S.C. § 924(c), which prohibits the use or carrying of a firearm "during and in relation to any crime of violence or drug trafficking crime."[35] Over the defendant's objection, the district court instructed the jury that it could convict if it found that the defendant knew his cohort used a firearm in the drug trafficking crime and that the defendant knowingly and actively participated in the drug trafficking crime.[36] Although the Tenth Circuit acknowledged the decisions of "other Circuits"—the First, Eighth, and Ninth—"that a defendant aids and abets a § 924(c) offense only if he intentionally takes some action to facilitate or encourage his cohort's use of the firearm," it nevertheless adhered to circuit precedent, "which it thought consonant with the District Court's instructions."[37]

The Court held that to prove its case under § 924(c), the government must show "that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission."[38] That standard is contrary to the Tenth Circuit's decision below and those of the First, Eighth, and Ninth circuits it acknowledged. But later in Justice Kagan's opinion she writes that "several Courts of Appeals have similarly held—addressing a fact pattern much like this one—that the unarmed driver of a getaway car had the requisite intent to aid and abet armed bank robbery if he 'knew' that his confederates would use weapons in carrying out the crime."[39] And those "several Courts of Appeals," Justice Kagan tells us, include the Eighth and Ninth circuits, whose precedents' the Tenth Circuit acknowledged but whose holdings seem to be inconsistent on the question presented.[40] For that reason, we also acknowledge the existence of a circuit split here, but don't count it in our stat pack because we can't know from the Court's opinion itself who the losers are (it doesn't appear that there are any winners here).

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[35] 134 S. Ct. 1240, 1243–45 (2014).
[36] Id. at 1244.
[37] Id. (internal quotations and citation omitted).
[38] Id. at 1243; *see also* id. at 1249 ("An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun.").
[39] Id. at 1249.
[40] Id.

Conclusion

In the next installment in our Appellate Review series, we'll be looking at decisions from the October 2014 term, Justice Antonin Scalia's last full term and the end of an important era in the history of the Supreme Court. We'll then be counting up circuit splits and tabulating parallel affirmance rates for the 81 decisions from the October 2015 term, more than half of which were decided by an eight-justice Court. Then on to the October 2016 term where, again, more than 50% of the cases were considered and decided by an incomplete Court. What these numbers mean for the performance of the federal courts of appeals under our standard we don't yet know. But we look forward to finding out and sharing those findings with you.

APPENDIX A

October Term 2013 Circuit Splits						
	Caption	**Cite**	**Split**	**Winners**	**Losers**	**Vote**
1	*Burwell v. Hobby Lobby Stores, Inc.*	134 S. Ct. 2751	1 to 1	10	3	5-4
2	*Loughrin v. United States*	134 S. Ct. 2384	2 to 3	6, 10	1, 2, 3	9-0
3	*Lane v. Franks*	134 S. Ct. 2369	2 to 1	3, 7	11	9-0
4	*United States v. Clarke*	134 S. Ct. 2361	4 to 2	1, 3, 7, 9	5, 11	9-0
5	*Abramski v. United States*	134 S. Ct. 2259	3 to 1	4, 6, 11	5	5-4
6	*Clark v. Rameker*	134 S. Ct. 2242	1 to 1	7	5	9-0
7	*Scialabba v. Cuellar de Osorio*	134 S. Ct. 2191	0 to 3	0	2, 5, 9	5-4
8	*Petrella v. Metro-Goldwyn-Mayer, Inc.*	134 S. Ct. 1962	5 to 1	2, 4, 6, 10, 11	9	6-3
9	*Robers v. United States*	134 S. Ct. 1854	1 to 1	7	9	9-0
10	*Paroline v. United States*	134 S. Ct. 1710	10 to 1	1, 2, 4, 6, 7, 8, 9, 10, 11, DC	5	5-4

11	*United States v. Castleman*	134 S. Ct. 1405	1 to 2	1	6, 9	9-0
12	*United States v. Quality Stores, Inc.*	134 S. Ct. 1395	2 to 1	3, 8	6	8-0
13	*Lexmark Int'l, Inc. v. Static Control Components, Inc.*	134 S. Ct. 1377	2 to 7	2, 6	3, 5, 7, 8, 9, 10, 11	9-0
14	*Lozano v. Montoya Alvarez*	134 S. Ct. 1224	2 to 2	1, 2	9, 11	9-0
15	*Kaley v. United States*	134 S. Ct. 1090	4 to 4	4, 6, 10, 11	2, 7, 9, DC	6-3
16	*Mississippi ex rel. Hood v. AU Optronics Corp.*	134 S. Ct. 736	3 to 1	4, 7, 9	5	9-0
17	*Heimeshoff v. Hartford Life & Accident Ins. Co.*	134 S. Ct. 604	2 to 2	2, 6	4, 9	9-0
18	*United States v. Woods*	134 S. Ct. 557	6 to 1	1, 2, 3, 4, 6, 8	5	9-0

APPENDIX B

October Term 2013 Primary Review Affirmance Rates					
Rank	**Circuit**	**Wins**	**Losses**	**AB**	**Rate**
1	7th	3	0	3	100%
2	2nd	3	2	5	60%
3	4th	1	1	2	50%
4	10th	2	2	4	50%
5	11th	1	1	2	50%
6	DC	1	2	3	33%
7	6th	2	9	11	18%
8	5th	1	6	7	14%
9	9th	1	11	12	8%
10	1st	0	3	3	0%
11	3rd	0	2	2	0%
12	8th	0	2	2	0%
TOTAL		**15**	**41**	**56**	**27%**

# # #

"The afternoon here are very short and tea very soon summons us all together. As soon as that is removed the table is coverd with mathamatical instruments and Books and you hear nothing till nine oclock but of Theorem and problems . . . which Mr. A is teaching to his son; after which we are often called upon to relieve their brains by a game of whist."

Abigail Adams to Royall Tyler
(Jan. 4, 1785)

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This year's *Almanac Excerpts* consists of more than mere excerpts –
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From the Year Just Passed

2018

Edited by

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&
Cattleya M. Concepcion

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Contents

Preface: What the Founders Missed About Whist, by Ross E. Davies..... 81

Reader
of Exemplary Legal Writing 2017

Judicial Opinions for the Court

David J. Barron
O'Connor v. Oakhurst Dairy, 851 F.3d 69 (1st Cir. 2017)..... Westlaw

Elena Kagan
Goodyear Tire & Rubber Co. v. Haeger, 137 S.Ct 1178 (2017)..... Westlaw

Richard A. Posner
Pinno v. Wachtendorf, 845 F.3d 328 (7th Cir. 2017)..... Westlaw

O. Rogeriee Thompson
U.S. v. Zimny, 846 F.3d 458 (1st Cir. 2017)..... Westlaw

Don Willett
BankDirect Capital Finance, LLC v. Plasma Fab, LLC,
519 S.W.3d 76 (Tex. 2017)..... Westlaw

Judicial Opinions Concurring or Dissenting

Andre M. Davis
G.G. v. Gloucester County School Board, 853 F.3d 729 (4th Cir. 2017)..... Westlaw

Raymond Kethledge
Wayside Church v. Van Buren County, 847 F.3d 812 (6th Cir. 2017)..... Westlaw

Clarence Thomas
Leonard v. Texas, 137 S.Ct. 847 (2017)..... Westlaw

Charles R. Wilson
U.S. v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017) (en banc)..... Westlaw

Diane P. Wood
Dassey v. Dittmann, 877 F.3d 297 (7th Cir. 2017) (en banc)..... Westlaw

Books

Cedric Merlin Powell, *Five Recommendations*..... 258

Susan Phillips Read, *Five Recommendations*..... 251

Tweets

Kim Krawiec, @KimKrawiec (Nov. 5, 2017)..... Twitter
Leah Litman, @LeahLitman (Apr. 3, 2017)..... Twitter
NU Law Review, @NULRev (Mar. 29, 2017)..... Twitter

Kannon Shanmugam, @KannonShanmugam (Dec. 4, 2017) ..... Twitter
Stanford Law Review, @StanLRev (Mar. 29, 2017) ..... Twitter
Sara Warf, @SaraBWarf (Oct. 31, 2017) ..... Twitter
Adam White, @adamjwhitedc (Dec. 5, 2017) ..... Twitter
Justice Don Willett, @JusticeWillett (June 29, 2017) ..... Twitter
Del Williams, @delwilliams (Dec. 4, 2017) ..... Twitter

Almanac

of Useful & Entertaining Tidbits

Last Year

The Year 2017 in Grammar, Language, and Writing, by Bryan A. Garner 89
The Year in Law, by Gregory F. Jacob, Rakesh Kilaru, Kristi Gallegos, and Brian Quinn 103
A Year in the Life of the Supreme Court, by Tony Mauro 134

This Year

January 249
February 250
March 254
April 255
May 256
June 257
July 262
August 263
September 264
October 265
November 266
December 267

Whist

Founders Whist, by Gregory F. Jacob 141
Hoyle's Games Improved (1790), by Charles Jones 152
The [Founders] Whist Score Book (1881), by C.C. Shelley 268
Credits 278

♠ ♥ ♦ ♣

Preface

What the Founders Missed About Whist

This is the 13th *Green Bag Almanac & Reader*. For an explanation of why we at the *Green Bag* think the world is a better place with the *Almanac & Reader* than without it, read the "Preface" to the 2006 edition. It is available on our website (www.greenbag.org).

I. Exemplary Legal Writing

Our 2017 Honorees, and Non-Honorees

As promised, this time around we kept the process we adopted last year for selecting our "Exemplary Legal Writing" honorees. Basically, that meant that anyone could nominate in any of the announced categories —

- judicial opinions
- briefs filed in a state or federal appellate court
- law review articles published in 1992
- tweets
- regulations issued by a state or federal agency

— and then a secret panel of knowledgeable and noble voters selected honorees from a ballot of the nominees.[1]

We were (as usual) blessed with many nominations of fine writing by judges. Indeed, there were enough exemplary judicial opinions in 2017 to fill a whole book, even a whole *Almanac & Reader*, just with honorees in that category. We also received a good crop of tweets. We'd planned to include works in other categories — briefs, regulations, old law review articles — but for reasons that will become clear in a moment, this year we're printing only tweets and judicial opinions.

Unfortunately and amusingly, the ballot we sent to our secret panel of knowledgeable and noble voters did not include nominees in the "law review articles published in 1992" category because we did not receive any nominations in that category. (Was 1992 an especially bad year for law review articles with intellectual or rhetorical staying power?) That does not, however, mean that we didn't receive any nominations of law review articles. We received quite a few nominations (mostly by the authors) of articles published in 2016 or 2017. And, in what may have been a prank, or a clumsy effort at stuffing our ballot box, or perhaps some sort of sociological experiment, we received many nominations of works by a professor at a prominent Midwestern law school. The nominations came from many different account names, but all had the same domain name. Alas, none of the professor's nominated articles were published in 1992.

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[1] *See Preface*, 2017 Green Bag Alm. 1 *et seq.*

The ballot lacked nominees in the "briefs filed in a state or federal appellate court" for a different reason. In last year's *Almanac & Reader* we gently jawboned against self-promotion. Maybe that gentleness was why every brief nominated for this year's *Almanac & Reader* was submitted by a lawyer whose name was on the brief or who worked for a lawyer whose name was on the brief. So, now we are being less gentle about the jawboning: If the *Green Bag* ever goes into the business of knowingly facilitating self-promotion by writers or publishers, we will retain our high-toned professionalism (of course), but we will also charge for the service.[2]

Nobody nominated any "regulations issued by a state or federal agency." We did hear from a few readers who said they enjoyed the joke. We were not joking.

In any event, we were happy to be rich in excellent nominees in two categories. We sent a ballot with those categories to each of our secret panelists. Most of them voted, and then we tallied. We think the results are exemplary. We hope you get some joy and inspiration from reading them.

Alas, not everything that our panelists selected made it into this volume. As we learned last year, some honorees do not reply to our polite (we hope) and persistent (we know) pursuit of permission to republish their exemplary work. We view those non-responses as both (a) disappointing denials of permission to publish and (b) healthy reminders of the *Green Bag*'s insignificance in the eyes of at least some (and maybe more than some) VIPs. This year, silences from the authors of four tweets were our reminders. Sorry about that.

Amazingly, Not Much Tinkering for 2018

We still like our new system. To us, it does not yet feel corrupt or unfair. But then, we still feel that we are honest and diligent and fair-minded, and that the voters on our secret panel are too. We might be wrong about some of that. You will, of course, judge for yourself, and we will carry on as best we can.

So, over the course of the next year we will select exemplary legal writing from 2018 for publication in the 2019 *Almanac & Reader* using pretty much the same system we used for the year just passed. We will also continue to recruit knowledgeable, thoughtful, good-spirited, and sometimes nicely cranky people to do the choosing. They will continue to make their choices from ballots provided by the *Green Bag*.

And that brings us to the only substantial change: nominations. For 2018 — meaning starting now — anyone can nominate anything published in 2018 in any of the categories we intend to honor in the 2019 *Almanac & Reader*. We have dropped one category (old law review articles) and added another (ALJ opinions). To nominate something (this is the only way to do it), please send an email to editors@greenbag.org with this information in the body of the message:

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[2] *See, e.g., Welcome to the entry site for The Pulitzer Prizes in Journalism!*, entrysite.pulitzer.org ("Entry fee: $50 per entry - paid by credit card only (MasterCard, Visa, American Express and Discover).").

- full name(s) of the author(s)
- full title of the work
- full citation or a working hyperlink
- full name of the nominator
- working email address for the nominator

If you send us less than all of that, then you are giving us a research assignment that we will not do. Instead we will delete your message.

And here are the categories for 2018:

- judicial opinions
- briefs filed in a state or federal appellate court
- administrative law judge opinions
- tweets
- regulations issued by a state or federal agency

Our respectable authorities (whose number now seems quite likely to grow next year) will continue to recommend good books. Let the nominating begin!

II. Founders Whist

This year we are filling some of our pages with whist. It is a card game that was popular among people who lived in what is now the easternmost part of the United States of America, back when the States were just getting around to Uniting.

First, we have an article by Gregory F. Jacob — the *Green Bag*'s resident expert on parlor games — about the history of whist (with special attention to play by the framers of the U.S. Constitution) and how to play (with special attention to keeping it simple and fun).[3] Second, we have the chapter on whist from the 1790 edition of that perennial recreational authority, *Hoyle's Games*.[4] And third, for some of our extravagant readers, we have little boxes of whist equipment made to our own designs, including decks of cards with which to play and sets of markers with which to keep score.[5]

Our whist playing cards (decks of 52 cards, plus two jokers) are designed to reflect the title of Jacob's article, "Founders Whist." They illustrate our view of what the Founders should have done to their own whist cards — that is, what they

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[3] *See* pages 141-151 below.

[4] *See* pages 152-248 below.

[5] We may be getting carried away. Last year we published two versions of the 2017 *Almanac & Reader*. One — the "Material Version" — appeared in a purely ink-on-paper format. The other — the "Ethereal Version" — combined ink-on-paper and electrons-on-internet formats. This year we are doing the same thing with the 2018 *Almanac & Reader*. In addition, we are sending some copies of the 2018 "Material Version" in boxes that also contain whist equipment. We're calling them the "Players Edition."

would have done if they had applied to whist the same constructive, creative, revolutionary spirit they applied to the Constitution of a new national government.

In the 18th century, conventional decks of playing cards consisted (as they do today) of four suits of 13 cards, each with cards for 2 through 10, three royals (a king, a queen, and a knave that is now a jack), and an ace. Players on both sides of the Atlantic played with cards with the same designs and often from the same manufacturers.

But why, having recently fought a long and bloody war of independence to free themselves from monarchy, would the leaders (or, for that matter, the foot soldiers) of that revolution carry on playing their favorite game with cards portraying monarchy? Imagine yourself as George Washington or John Adams or James Madison, playing whist with some of your Founding Friends in late-18th-century Boston or Philadelphia or Richmond. Most of the most powerful cards in your hand would have been kings and queens. Wouldn't it have occurred to you that a more suitable deck would instead feature the rulers of your own new world?

Then there was the obvious parallel: three "honors" cards (king, queen, and knave) in each standard suit and three branches in the new national government. Why would you not make the simple substitutions? Replace the king with Congress (from Article I of the new U.S. Constitution), the queen with the President (Article II), and the knave with the Judiciary (Article III). Such a re-design would have the added benefit of permitting players to re-order card ranks to fit their own readings of the Constitution or their own partisan preferences of the moment (or maybe both, if the two happened to happily align). It was a free country, after all.[6]

Finally, there was the truly revolutionary parallel. In whist, the only card that was ever more powerful than a royal was the fourth "honor" — the ace. But because no one on earth was (at least officially) more powerful than the royals, the ace did not symbolize any kind of human being or human institution. It was an abstract "A" or single image of its suit. In the new nation forming in part of eastern North America, however, there were human beings (organized or semi-organized in a massive institution or collection of institutions) more powerful than any royal or any branch of the new American government. They were "We the People" — by whose authority and with whose consent the new Constitution became the law of the land, and waters, of the United States of America. Symbolized by a "W" instead of an "A," they were obviously both more powerful and better than an ace.

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[6] A re-ordering option might, however, complicate things. For example, would authority to re-order rest with the dealer, and if so, would other players be entitled to notice and an opportunity to be heard before the dealer issued a final judgment on the matter? Or would re-orderings be decided by a vote of the players, and if so, would the dealer have the authority to limit the franchise in arbitrary, perhaps even unjust or otherwise evil, ways? And so on.

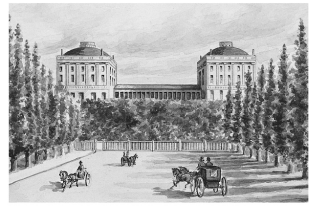
W ♣ W ♣

W

We the People . . .
do ordain and establish
this Constitution for the
United States of America.

W ♣ W ♣

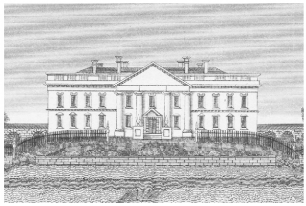
C ♣ C ♣



Article I
All legislative Powers
herein granted shall be
vested in a **Congress** . . .

C ♣ C ♣

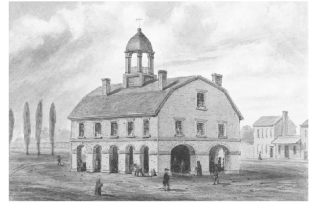
P ♣ P ♣



Article II
The executive Power
shall be vested
in a **President** . . .

P ♣ P ♣

J ♣ J ♣



Article III
The **judicial** Power . . .
shall be vested in one
supreme Court . . .

J ♣ J ♣

If all this did not occur to George Washington or any of the other whist-playing Founders, it should have. And if it did occur, they should have acted on the thought. We have. The most powerful cards in our Founders Whist decks are not the ace (A), king (K), queen (Q), and jack (J). They are We the People (W), Congress (C), the President (P), and the Judiciary (J).

We've chosen to illustrate our replacements for the old royal honors not with pictures of individuals who served in Congress, the Presidency, or the Judiciary, but instead with pictures of the buildings in which those individuals served the people who put them in office. (For a few samples, see the next page.) The idea is to emphasize that We the People were then (and are now) subject to the rule of law — not the whims of high and mighty members of famous families — just like the agents selected by the people to enact, enforce, or adjudicate the law on their (and our) behalf.

We know that the use of architectural imagery on playing cards is not unprecedented.[7] We even know that the use of architectural imagery of the workplaces of Congress, the President, and the Judiciary on playing cards is not unprecedented. (For samples from a deck made by the U.S. Playing Card Company in 1909, see the next page.) And it may be that someone, once upon a time — maybe even during the Founding — made playing cards on which the primary Constitutional authority and its three great national subsidiaries replaced the traditional ace and royals, as we have done for Founders Whist. We have searched, in our own fumbling, stumbling way, and so far we've found nothing.[8] If you know about (or, even better, have) anything along these lines, please do let us know. Regardless, we like our whist cards, and what they stand for. If you get a chance to play with them, we hope you will find grounds to concur.

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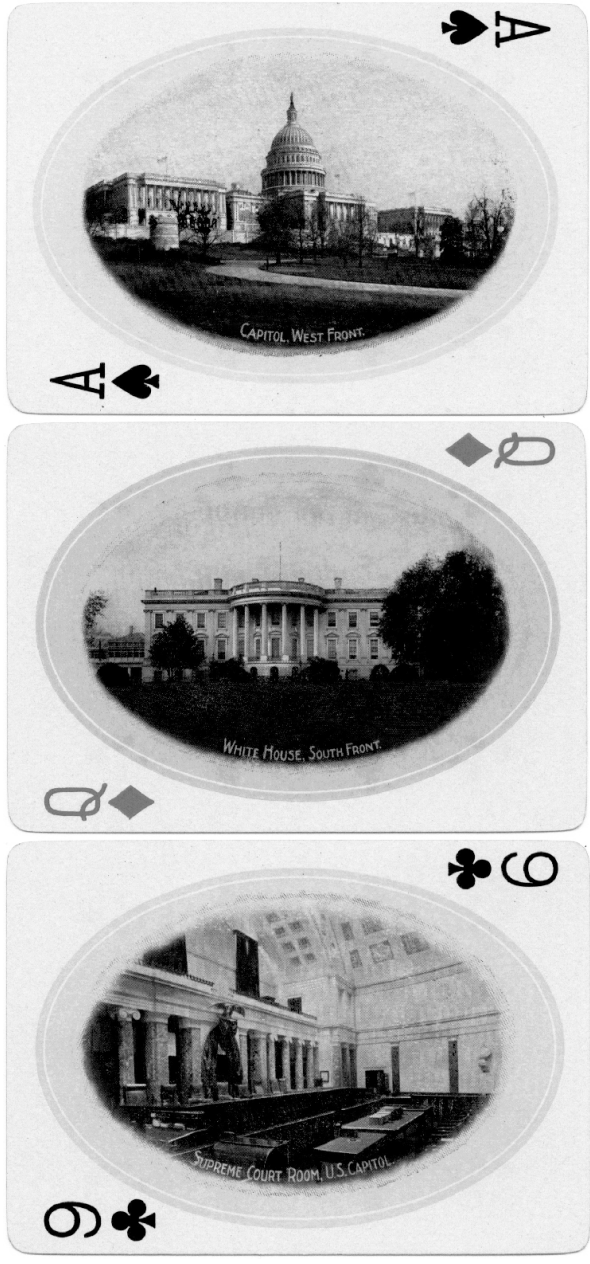
[7] A caution: It might be not entirely unfair to say that when a law professor uses the word "unprecedented" it sometimes means that either (a) they haven't done the research that would turn up inconvenient precedents or (b) they have done the research but would prefer that you believe that what they have written is more innovatively clever than it really is.

[8] We did find a metaphorical revolutionary removal of the royals in France. *Whist*, The Times [of London], Nov. 12, 1791, at 2:

> The Parisian Democrats have effected a Revolution which JOHN BULL with all his attachment to "can ye one" will look on with horror:— in short KING, QUEEN, as well as KNAVE, are kicked out of doors; and the game — deprived of its HONOURS, reduced in its points to six, and thus curtailed of its fair proportions,— is termed *Rationale*. The ARISTOCRATES — forsaking not the KING and QUEEN in their distress,— support the old system; deeming it more *rational* to win with HONOURS, than by TRICKS!


CAPITOL, WEST FRONT.
WHITE HOUSE, SOUTH FRONT.
SUPREME COURT ROOM, U.S. CAPITOL.

III. Other Business

Our Goals

Our goals remain the same, year after year. We seek to present a fine, even inspiring, sampler of a year's worth of exemplary legal writing — and to accompany that fine work with a useful and entertaining potpourri of distracting oddments. Like the law itself, the 2017 exemplars in this volume are wide-ranging in subject, form, and style. With any luck we'll deliver some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate.

Our Thanks

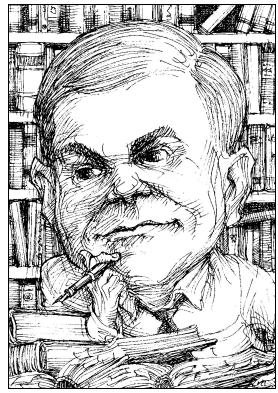
We always end up owing thanks to many good people for more acts of kindness than we can recall. And so we must begin by thanking and apologizing to all those who deserve to be mentioned here but aren't. We cannot, however, forget that we owe big debts of gratitude to the generous, anonymous friends of the *Green Bag* who selected the exemplary writing honored here; to O'Melveny & Myers LLP (especially Nadine Bynum and Greg Jacob); to the Scalia Law School; to Chase Grange for excellent research; and to the unprecedented Ira Brad Matetsky, who never fails to make any work he touches better.

Finally, the *Green Bag* thanks you, our readers. Your continuing kind remarks about the *Almanac & Reader* are inspiring.

Ross E. Davies
January 31, 2018

♠ ♥ ♦ ♣

> Neither will you profit so much as you might reasonably expect, from the study of those authors, who have written professedly on the art of war. This is like learning the game of Whist by reading Hoyle. I have been witness to the mischievous effects of it.
>
> *George Washington to John Parke Custis (June 18, 1776), in Letters from General Washington to Several of His Friends 21 (1777)*



Bryan A. Garner†

The Year 2017

in Grammar, Language, and Writing

January

A school employee in Maryland was fired for correcting a student's spelling on Twitter. The student had tweeted to suggest that the Frederick County public schools should be closed "tammarow." The district's media-services coordinator, Katie Nash, responded: "But then how would you learn to spell 'tomorrow'? :)" Apparently, this wasn't Nash's first such interaction with a student: disapproving of the tone of an earlier tweet, her supervisor had already directed her to stop tweeting. Hence for this tweet she was fired, despite her response's garnering thousands of retweets and likes — and spawning two hashtags: #Katiefrom-FCPS and #freekatie. • The *Guardian* (U.K.) reported that Australia's *Macquarie Dictionary* named *fake news* its word of the year for 2016, defining the term as either "disinformation and hoaxes published on websites for political purposes or to drive web traffic" or "the incorrect information being passed along by social media." The choice jibed with picks of other dictionaries for 2016, including Oxford Dictionaries' *post-truth* and Merriam-Webster's *surreal*. • BBC.com postulated that identifying "untranslatable emotions" might lead to a richer and fuller emotional life. Tim Lomas, lecturer at the University of East London,

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† Bryan A. Garner is the author of dozens of books about words and their uses, including *Garner's Modern English Usage* (Oxford, 4th ed. 2016). He is editor in chief of *Black's Law Dictionary* (West, 10th ed. 2014) and the author of the chapter on grammar and usage in the *Chicago Manual of Style* (Chicago, 16th ed. 2010). He coauthored two books with Justice Antonin Scalia: *Making Your Case* (2008) and *Reading Law* (2012).

started the Positive Lexicography Project to capture foreign "emotion words" having no English equivalent. He claimed that by incorporating these feelings more consciously into our mental lives, we might draw on long-ignored fleeting sensations. Lomas was inspired by the idea after hearing a talk on the Finnish concept of *sisu*, which is a sort of "extraordinary determination in the face of adversity." According to Lomas, the ideas expressed by *grit*, *perseverance*, and *resilience* don't completely evoke the full sense of the Finnish term. He made no mention of *backbone*, *courage*, *daring*, *dauntlessness*, *doggedness*, *doughtiness*, *endurance*, *fortitude*, *grittiness*, *gumption*, *guts*, *gutsiness*, *hardihood*, *heart*, *indefatigability*, *intestinal fortitude*, *intrepidity*, *mettle*, *moral fiber*, *moxie*, *nerve*, *persistence*, *pertinacity*, *pluck*, *pluckiness*, *resolve*, *spirit*, *spunk*, *stamina*, *staunchness*, *stoutheartedness*, *tenacity*, or *tirelessness*, much less *toughness*. What temerariousness (or *sisu*) those Finns must have! • The *Telegraph* (U.K.) reported that the British Medical Association now advises dropping the term *expectant mother* and using *pregnant person* instead, the stated purpose being to include intersex and transgender people capable of becoming pregnant. About the time when this advice became public, a person who had been born female but later in life legally declared male was found to be pregnant. • A study published in *Social Psychology and Personality Science* concluded that Americans are highly inclined to correlate swearing with integrity. In three separate studies, researchers found a consistent positive relationship between profanity and honesty, probably because swearing is thought to reflect a speaker's true feelings. In other words, people perceive that speakers who don't filter their language likewise don't filter their true views. Damn.

February

The Department of Education was ridiculed on Twitter for a typo in a tweet apologizing for an earlier typo. The original error came when the department attributed a quotation to "W.E.B. DeBois." (The sociologist and civil-rights activist's name is spelled "Du Bois" — with a *u*, not an *e*, followed by a space.) The misspelling earned the department hundreds of mocking responses. Then, in a tweet correcting the error, the department wrote: "Post updated — our deepest apologizes for the earlier typo." After receiving renewed waves of scorn for using *apologizes* in place of *apologies*, the department quietly corrected the new error — without further comment. • Continuing the Trump administration's spelling woes, the 45th president's official inauguration poster, offered for sale on the Library of Congress's website, was marred by a prominent typo. The poster featured a quotation from President Trump's inauguration speech, reading: "No dream is too big, no challenge is to [sic] great. Nothing we want for the future is beyond our reach." Even more cringe-worthy was the description on the poster's product page: "Printed in the USA, this print captures the essence of Donald Trump's campaign for the presidency of the United States." Of course,

social-media users were quick to pounce on the poster's error. • A Stanford University study published in *Psychological Science* found that an infant's ability to understand rule-based grammar is learned with time and practice — with a significant enhancement occurring around the age of 24 months. Acknowledging that the lack of data on language development in toddlers has led to experts' differing views, Stanford Associate Professor Michael Frank used a new statistical approach to learn more about how children acquire grammar. • The *Times Educational Supplement* (U.K.) reported that elementary-school teachers in the U.K. lack basic skills in spelling, punctuation, and grammar. Most graduates entering teaching today, when pupils themselves, were taught to value creativity over fundamental skills. They had no grammar courses while training to become teachers. In 2016, 72% of teacher-hiring officers reported having seen a "deterioration" in the quality of teacher applicants' language skills since the previous year. Schools were reportedly trying to develop literacy toolkits to address staff members' weaknesses in spelling, punctuation, and grammar because "teaching is a job lived in the spotlight," and teachers are especially "subject to judgment."

March

The *New York Times* reported that $10 million hinged on a serial comma — or rather the absence of one — in a statute concerning overtime pay for dairy-delivery drivers. A Maine law requiring overtime exempted the "canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of . . . perishable foods." Without a serial comma after *shipment*, it's unclear what the legislature intended to exclude: the *distribution* of perishable goods or the *packing for distribution* of those goods. Delivery drivers distribute but don't pack. The First Circuit held that the lack of the serial comma created enough ambiguity to rule for the drivers. Unfortunately, the *Maine Legislative Drafting Manual* specifically prescribes not using serial commas. The lack of one in this case could cost the employer millions. • Then there was the $150 million typo. That's how much an Amazon employee's single error cost Internet retailers, according to the *Wall Street Journal*. A programmer for the Amazon Web Services system mistyped a command that was intended to deactivate just a few servers. The typo sent the command "cascading" through the system, deactivating innumerable servers and causing widespread disruption of the Internet. More than half the top 100 online retailers reported that their website performance slowed by 20% or more. Though correcting the error took a mere three hours, the temporary inability to conduct business cost S&P 500 companies an estimated $150 million. • The Associated Press announced a significant change to its style manual: writers may use *they*, *them*, and *their* as gender-neutral singular pronouns. But the change is not without restrictions. The *AP Stylebook* still recommends using an alternative wording or a person's family name whenever

possible. But when the awkwardness of avoiding the singular *they* outweighs the benefits, the writer should note that it applies to a person who prefers a gender-neutral pronoun. Many praised the change — but not all. A *they*-preferring journalist who identifies as "nonbinary" observed that the *AP Stylebook* still offers ways to "unpronoun" people when a writer feels the singular *they* is grammatically incorrect. • Under the new inclusive-speech mandate of Cardiff Metropolitan University in Wales, the Beatles would have had to sing about the "Tax Officer," not the "Taxman." The university ordered lecturers and students to make their speech more inclusive by substituting approved alternatives to common words. In particular, terms using the word *man* were banned, so that *sportsmanship* becomes *fairness*, *workmanlike* becomes *efficient*, and *mankind* becomes *humanity*. Many female-specific words, such as *headmistress*, *Mrs.*, and *Miss* were also declared offensive. Mobility-impaired people are not *wheelchair-bound*, which is "patronising and pitying," but "empowered" as *wheelchair users*. Students and teachers who fail to abide by the inclusive-language policy are subject to discipline under the university's bullying and harassment policies. No disobedient teachers have yet claimed to be linguistically bullied or harassed by the university.

April

The BBC at last discovered the identity of the so-called "Banksy of Punctuation," a vigilante grammarian who had been righting punctuational wrongs on the streets of Bristol for over a decade. Although the news agency declined to reveal the man's identity, it sent reporters on a nighttime ride-along with the anonymous avenger (a mild-mannered engineer by day) as he performed his surreptitious editorial services. The story aired as a documentary entitled *The Apostrophiser*, named for the long-handled tool the man devised to add missing apostrophes or to cover up unnecessary ones on otherwise unreachable signs. In the documentary, the man defended his work on moral grounds, deflecting charges of vandalism: "It's more of a crime to have the apostrophes wrong," he said. • Perhaps that man should visit the Mother Country's mint: the Bank of England sent punctuation-conscious Britons into a tizzy when it issued its newly designed £5 note. Featuring a likeness of Winston Churchill, the bill includes the wartime prime minister's famous statement, "I have nothing to offer but blood, toil, tears and sweat." But the quotation appears with neither quotation marks nor a full stop (as Brits call the terminal period). The note's designers apparently thought this presentation to be more "aesthetically pleasing," but the National Literacy Trust deemed it grammatically incorrect. Citizens outraged by the missing punctuation said that it looked as if the currency were speaking, not Churchill. Also noting the lack of an Oxford comma after *tears*, Dr. Tara Stubbs, a University of Oxford lecturer, called the omissions "condescending": "I find efforts to dumb down like this just irritating." Others, however, have sug-

gested that Churchill himself might truly have been more irritated that he wasn't chosen instead for the £20 note. • United Airlines unwittingly popularized the euphemism *reaccommodate* after a paying passenger was beaten and dragged off a sold-out flight to make a seat available. The bloodied would-be passenger was reaccommodated (rebooked) on a later flight. *Time* magazine quoted the linguist Ben Zimmer, who explained the public's negative and derisive response to the term: "It's all about context. There's this enormous disconnect between people's eyewitness views of a man being pummeled, versus this antiseptic corporate-speak that came out in the apology," which "conveyed a robotic lack of human emotion." • Merriam-Webster came to the definitional aid of Ivanka Trump, who upon admitting not knowing the meaning of *complicit*, added: "If being complicit is wanting to . . . be a force for good and to make a positive impact, then I'm complicit." Apparently other people were also baffled, as #complicit quickly topped the list of trending hashtags. In a tweet, Merriam-Webster provided a link to the term's definition in its online dictionary: "helping to commit a crime or do wrong in some way. ex. He was complicit in the coverup." Since Ivanka's use of the redefinitional stratagem, rhetoricians have been scampering to find a rhetorical term for deflecting a criminal charge by reframing the crucial accusatory word with a positive sense in the *if*-clause of a hypothetical syllogism.

May

President Trump's tweets frequently made news in 2017, but none topped his tweet just after midnight on May 31: "Despite the constant negative press covfefe." And so began the *covfefe* firestorm. The tweet was deleted about six hours later, but not before social media pullulated with semantic wonderment. Even Merriam-Webster couldn't help with this one, as it tweeted: "Wakes up. Checks Twitter. Uh… Lookups fo… Regrets checking Twitter. Goes back to bed." Trump finally weighed back in as well: "Who can figure out the true meaning of 'covfefe'???" he wrote. "Enjoy!" • The University of California at Berkeley announced that David Peterson, who created the two languages High Valyrian and Dothraki for the HBO hit show *Game of Thrones*, as well as dozens of languages for other television shows and films, would be teaching a six-week course during the summer at his alma mater. Students in the class — titled The Linguistics of *Game of Thrones* and the Art of Language Invention — will learn how to create their own languages. • The *Independent* (U.K.) reported on a study revealing that only 1 in 5 people could read and comprehend the financial jargon used throughout the Bank of England's report on inflation. So the bank's staff has been studying how to simplify business writing by reading books by Dr. Seuss. The bank's former deputy governor opined that financial professionals typically write in a desiccated, clinical style that fails to tell stories clearly and therefore doesn't engage readers. On using Dr. Seuss as inspiration, he said: "It's

not about dumbing down. The people who really know their stuff can explain things in simple and accessible language." Complicated things, like disliking green eggs and ham. • Elsewhere, efforts to improve writing met with jeering recalcitrance. Bloomberg reported that the World Bank's chief economist, Paul Romer, stepped down as head of its research arm after staff objected to his demands for clearer, shorter writing. Romer's efforts toward literary amelioration came after a 2015 study by Stanford University's Literary Lab describing World Bank publications as "another language . . . codified, self-referential, and detached from everyday language." Among other tips, Romer told bank staff to use active voice and referred them to a blog post in which he'd written about using mathematical theory and diagrams to clarify written prose. (No Dr. Seuss here.) Because the Stanford study noted that World Bank writers typically link long chains of nouns with *and*, producing mind-numbing lists, Romer had decided to reject all reports in which *and* made up more than 2.6% of the text. But one of the study's authors doubted that this measure would improve the clarity of World Bank communications: "It will take much more than a few fewer 'ands.'" N.B.: *and* makes up 25% of the words in *green eggs and ham*.

June

In Germany, two spelling errors temporarily shut down the country's largest music festival. On a list of employees who would be working at Germany's Rock am Ring festival, two men's names were misspelled, leading police to mistake them for Islamist radicals. Fearing the worst on the concert's opening day, police asked organizers to evacuate the 87,000 festival attendees. "At the time, the situation seemed very serious," said Rhineland-Palatinate Chief of Police Johannes Kunz. "We couldn't rule out that an attack was being prepared." After a brief period of detention and interrogation, the two innocent stagehands were released from custody. The festival resumed the next morning. • After three straight years of ties, the 90th Scripps National Spelling Bee declared a single champion — this after the Bee had added a tiebreaking procedure (which proved unnecessary). At the conclusion of nearly 20 rounds, Ananya Vinay, 12, from Fresno, California, outlasted Rohan Rajeev, 14, from Edmond, Oklahoma. After Rajeev misspelled *marram* (a beach grass), Vinay correctly spelled *marocain* (a dress fabric made with a warp of silk or rayon and a filling of other yarns) for the championship title. Also at the Bee, Edith Fuller made history as the youngest competitor ever — at just six years of age. • Douglas Heaven's review in *New Scientist* explores the new book by Vyvyan Evans: *The Emoji Code: The Linguistics Behind Smiley Faces and Scaredy Cats* (Picador, 2017), in which Evans argues that the emoji is the first truly global form of communication. A cognitive linguist studying emojis, Evans explored everything from the nature of communication to the evolutionary origins of language to how meaning occurs in the human mind. Evans wrote that far from being a fad, emojis reflect "fundamental

elements of communication, and in turn this all shines a light on what it means to be human." When people argue that emojis are taking literacy in the wrong direction, Evans responds: "This view is nothing more than ill-informed cultural elitism. . . . To assert that emoji [he used the flat plural] will make us poorer communicators is like saying that using facial expressions in conversation makes your ideas more difficult to understand. The idea is nonsensical." • U.S. Supreme Court Justice Neil Gorsuch wrote his first opinion for the Court, opening with alliteration: "Disruptive dinnertime calls, downright deceit, and more besides drew Congress's eye to the debt collection industry." In that one line, he described the problems that the Fair Debt Collection Practices Act addresses. Gorsuch's writing style was praised by many as showing his "famed flair" and for being "lively," "accessible," and "jargon free." • If you overheard someone saying he had a *rum cully* and was going to *heave the booth* unless a *nubbing cheat* was about, what would you do? An article published in *Atlas Obscura* explains that the slang used by English criminals became widely known to the general public — and preserved for future study — through the work of lexicographers. From the 16th to 19th centuries, the language called "thieves' cant" was collected and published to warn, inform, and entertain the general public. As for that talk you overheard, a glossary for thieves' cant would tell you that the speaker was planning to rob a mansion unless an informant told the authorities first.

July

Using new computational techniques, forensic linguists at Aston University claimed to have settled a 153-year-old debate over the authorship of one of the English language's most famous letters. The so-called Bixby letter, reportedly written in 1864 by Abraham Lincoln to inform one Lydia Bixby that her sons had been killed in the Civil War, has become famous as one of the best-written letters in the English language. Yet historians have long questioned whether the letter was in fact written by Lincoln or by his secretary, John Hay. Using n-gram tracing, which involves computer analysis of linguistic forms characteristic of a particular author, researchers were able to determine with 90% certainty that the letter was in fact written by Hay. The linguists said they hoped to use the same techniques to solve an even greater historical mystery — the authorship of letters attributed to Jack the Ripper. • The *Telegraph* (U.K.) reported that teachers were upset with the "punctuation police" who marked down their students' SATs for incorrectly drawn commas and semicolons. The controversy arose after children were penalized for marking semicolons too high on the line or failing to draw apostrophes with a sufficient curve. James Bowen, assessment expert at the National Association of Head-teachers and probably no friend of the Banksy of Punctuation (see April), spoke volubly: "Where children have quite clearly demonstrated they know what the correct answer and appropriate punctuation is, they should be awarded the mark. Markers' having to fret about the angle of

the line in a piece of punctuation or the exact space between a word and the piece of punctuation show that we have lost a sense of perspective when it comes to these tests and questions the very purpose of a spelling and grammar test in the first place." The Department for Education countered that the tests ensure that children have mastered the basics of literacy and numeracy, using and forming punctuation correctly. • *Science Daily* reported on a new study showing that language development begins in utero. Researchers from the University of Kansas Department of Linguistics used noninvasive sensing technology to show that fetuses can distinguish between English speech and Japanese speech. Utako Minai, linguistics professor and team leader, had a bilingual speaker make two recordings, one each in English and Japanese, to be played in succession to a fetus. Using a magnetocardiogram, which was fitted over the mother's abdomen to detect tiny magnetic fields that surround electrical currents from the maternal and fetal bodies, the researchers found that fetal heart rates changed when fetuses were exposed to the rhythmically distinct Japanese language after a passage of English, while heart rates remained stable in response to a second passage in English. Said Minai: "Even before they are born, fetuses are tuning their ears to the language they are going to acquire." • The Associated Press reported that more frequent pauses and . . . um . . . filler words in a person's speech could signal early stages of cognitive impairment. In a study at the University of Wisconsin, researchers found that certain verbal skills are affected before or at the same time as memory problems become detectable. If confirmed by more study, the findings could be useful in developing an easy and inexpensive test for distinguishing normal age-related lapses in memory from disease-related mental decline. • The BBC reported on ways in which language reveals a speaker's personality. In particular, extroverts and introverts use language differently, whether in speaking or writing. Introverts more often use specific or quantifiable terms, articles, and hedge words. By contrast, extroverts are more often abstract and loose, reflecting more interest in spontaneity and less concern with the accuracy of what they say. Other traits also come through. Liberal-minded speakers use more words pertaining to the senses. Unsurprisingly, speakers suffering high anxiety use angsty words more often. And conscientious speakers use more words relating to work and achievement. Certain words may even indicate personality traits. For example, the limited use of swear words was said to indicate agreeability. What the hell.

August

To *e* or not to *e*? This monumental question sprang forth at the University of Southern California. As part of its new USC Village development, the school unveiled a 20-foot-tall statue of Hecuba, queen of Troy. Adorning the statue's base were a few choice words about the queen from *Hamlet*, with an attribution to "Shakespear's *Hamlet*." Students from crosstown rival UCLA immediately

took to Twitter to ridicule the spelling with taunts: "USC. The only place in America that can unveil a statue as the centerpiece of a $700 million project and manage to misspell Shakespeare." Unabashed, USC issued a statement: "Over the centuries his surname has been spelled 20 different ways. USC chose an older spelling because of the ancient feel of the statue, even though it is not the most common form." In the absence of a footnote on the statue itself, most passersby are likely to be either baffled (if literate) or oblivious (if not). • According to a headline in the *Boston Globe*, "Trump is making lexicography great again." Lexicographers at Oxford University Press have found more than 50 Trump-associated words and phrases that have sprouted in American society, including *yuge*, *Trumpertantrum*, and *Trumptastrophe* — not to mention *covfefe*. Katherine Martin, head of dictionaries at Oxford University Press, with her team in New York, is deciding which words will be added to the dictionary. According to Martin, other presidents have had memorable words and phrases associated with them — such as *misunderestimate*, which George W. Bush uttered, and "I didn't inhale," which Bill Clinton said when he was a candidate asked about his past marijuana use. But President Trump is unique because he is "expressing himself more often in an unmediated manner." Martin's favorite examples of the Trump effect: the lowercase *trump* is now rarely used in its common senses because of its presidential connotations, and *bigly*, first used in the 15th century, has been revived. (Trump's *bigly*, however, might actually have been a poorly enunciated *big league*.) "In 2008, we categorized [*bigly*] as now rarely used, and the latest use of [*bigly*] was from 1927," Martin said. "And then, all of a sudden, it just soared in usage." • A BBC.com article highlighting the importance of good spelling also raised the ever-growing issues with spell-checkers. According to Anne Trubek, an expert in new writing technologies and founder of Belt Publishing in Ohio, a long-term comparison of errors in essays by U.S. university students found that although spelling errors used to be among the most common mistakes, now the most common errors are in word-choice. Trubek explains: "Spell-check, as most of us know, sometimes corrects spelling to a different word from what was intended; if the writing is not later proofread, this computer-created error goes unnoticed." Autocorrection probably also accounts for a recent official White House press statement calling for *peach* in the Middle East. But surely the more likely comestible is peas in the Middle East. • *Reader's Digest* revisited the well-known mnemonic ditty for spelling: "*i* before *e* except after *c* — or when sounded like *A* as in *neighbor* and *weigh*." Brandon Cunningham, a doctoral candidate studying statistics at the University of Warwick, put the mnemonic to the test. He examined 350,000 English words containing an adjoining *i* and *e*. About 75% of the time, *i* came before *e*, whether or not following *c*. Even when there was a *c* and the combination didn't produce an *A* sound, the *ie* combination was found in words such as *scientist*, *fancier*, and *glacier*. What to say in response? Ask neither a weird deity nor a foreign poltergeist.

September

Toy- and game-maker Mattel released an Australian edition of Scrabble, believed to be the first country-specific version of the wildly popular game. Developed in consultation with the Australian Scrabble Players' Association, the game's new dictionary includes 250 Aussie slang terms, including such classic Australianisms as *Gday* (= "Good day"), *barbie* (= barbecue), *strewth* (= an expression of surprise or dismay), and *stonkered* (= completely exhausted). Also included are terms used more broadly in the English-speaking world, such as *moolah* (= money) and *footy* (= football — or "soccer" to Americans). Perhaps the most significant change, however, is that the new words earn players bonus points. Crikey! • What would Samuel Johnson have thought about his Google Doodle? To honor Johnson's 308th birthday on September 18, Google created a Doodle illustrating Johnson's definition of the word *lexicographer*. Google's homepage featured an animated sequence of Johnson inside his *Dictionary of the English Language* (1755) in search of a definition: "A writer of dictionaries; a harmless drudge that busies himself in tracing the original and detailing the signification of words." Google recognized that "Johnson's dictionary was more than just a word list: his work provided a vast understanding of the 18th century's language and culture and guaranteed him a place in literary history." • *Cosmopolitan* described a neologism coined by the astronomer and physics professor Nicole Gugliucci on Twitter: *hepeating* occurs "when a woman suggests an idea and it's ignored, but then a guy says same thing and everyone loves it." The tweet drew 65,000 retweets and 200,000 likes over two days. The term has already been added to the *Macmillan Dictionary* and is being considered for others. Gugliucci explained that the term emerged from a discussion with other women who had experienced the phenomenon in various industries. • The *Herald* (Scotland) reported several findings of a project called Spoken British National Corpus 2014, which had studied usage among British speakers from the 1990s on. One outstanding finding was that split infinitives trebled in use and became more widely accepted as a speech norm, even though some schools persist in teaching (erroneously) against them. The study also found that Americanisms appear with greater frequency in British English, while Briticisms are in decline. For example, the American *awesome* has pretty much displaced the British *marvellous*, which turned up 155 times per million words in the 1990s but now appears only twice per million. Other endangered British words include *fortnight*, *cheerio*, and even *marmalade*. But more Brits are starting sentences with *Like*, as their American counterparts do. Now *that's* pure argle-bargle.

October

Struggling to master a new language? It turns out that the solution might be a little liquid courage. A study published in the *Journal of Psychopharmacology* stud-

ied 50 German speakers who had recently learned Dutch. Some were given alcohol equivalent to a pint of beer while others received a placebo beverage. After drinking, the participants were asked to speak with each other in Dutch. Those conversations were recorded and later reviewed by native Dutch speakers. Participants who had drunk alcohol before the experiment were rated higher in their Dutch fluency — particularly pronunciation. The study's authors attributed this improved performance to alcohol's dampening effect on inhibitions. But they also noted that only moderate tippling was necessary: increased crapulence was found not to increase fluency. • Talbots, the women's clothier, used National Dictionary Day, October 16, to take a stand against a definition of *lady* as "a woman of refinement and gentle manners." In a video addressed to Merriam-Webster, the retailer called out the dictionary for its "old-fashioned" definition that essentially hadn't changed in over 200 years, suggesting instead: "confident; unapologetic; perfectly imperfect; a woman who is always herself." Talbots even commissioned a recent study by Wakefield Research, which found that nearly 65% of women don't agree with the current definition. This goes hand in hand with the brand's new campaign: "Because I'm a Lady." Deborah Cavanagh, SVP of marketing for Talbots, explained: "We set out to bring light and dimension to the ongoing conversation of what it means to be a lady today. As a brand, we are challenging perceptions and social conventions, and illuminating universal themes and truths that connect with all women." She withheld comment on the ineptitude of the Talbots "definition," in which the first three "synonyms" of the noun *lady* are in fact adjectives. • The *ABA Journal* reported that emojis and emoticons are turning up in more and more lawsuits, with courts increasingly asked to interpret their meaning. Precise senses are unavailable: clear dictionary definitions are difficult to produce in part because an emoji's or emoticon's meaning is particularly context-sensitive. Various cultural and technical factors also raise problems. For example, although a raised thumb means "good" or "okay" to an American, it represents a highly offensive expletive to a Brazilian. Compounding the confusion, an emoji's appearance may vary by operating system, device, or software program. For example, an emoji that is universally coded to be a "grinning face with smiling eyes" is often described when viewed on Google as "blissfully happy." But when viewed on Apple, people described it as "ready to fight." • Although a language's vocabulary is often thought to change more rapidly than its grammar, a study published by the Max Planck Institute for the Science of Human History concluded that this phenomenon is hardly universal. Researchers created a detailed database of the grammatical structures and lexicons of 81 Pacific languages and analyzed them to determine how quickly different aspects of the languages had changed. They found that the forces causing grammatical changes are different from those causing vocabulary changes. Surprisingly, contact with speakers of unrelated languages had substantial, relatively rapid effects on grammar, but words themselves changed or were adopted more slowly, if at all.

November

Collins Dictionary named *fake news* its word of the year for 2017, confirming a trend noticed the previous year by Australia's *Macquarie Dictionary*, which chose the same term as its word of the year for 2016 (see January). According to the Collins lexicographers, who monitor the 4.5-billion-word Collins corpus, the term's use continued to skyrocket after Macquarie made its choice, increasing 365% during 2017. Both dictionaries cited the campaign and election of Donald Trump in the word's ascent. President Trump uses the term often and has even claimed to have invented it (which *Collins Dictionary* called either fake news or false etymology). • As reported in the *Independent* (U.K.), Kazakhstan, a multilingual country with 117 spoken languages, has adopted a new alphabet: an expanded version of the Roman alphabet was said to be replacing the Russian Cyrillic script. The old Cyrillic script for Kazakh has 42 symbols (33 derived from the Russian alphabet plus 9 for additional Kazakh sounds). With just 26 letters in the Roman alphabet, the new Kazakh script will use an apostrophe-like diacritical mark to increase the number of letters to 32. Although Russian remains the dominant language, Kazakh has reportedly gained prestige. Schools were set to begin to introduce the new alphabet in 2018. • As reported on Earthsky.org, a new study suggests that humans and songbirds have common biological hardwiring that shapes how they produce and perceive sounds. In a series of experiments, researchers found that young zebra finches are intrinsically biased to learn to produce certain sound patterns over others. • On the website TheBookseller.com, Graham Sharpe, founder of the William Hill Sports Book of the Year award, blogged about the increasing frequency of elementary misspellings in published books. Describing the errors as "a crime against books themselves, their readers, and their authors," he noted that for several years, publishing houses have been dismissing well-respected editors. He said that the 131 books he reviewed for this year's award contained "many more evident grammatical and spelling errors than in any other year." • The *Dallas Morning News* reported on airlines' contracts of carriage and how easily misunderstood they are. Analyzing the contracts of 11 domestic airlines, the U.S. Government Accountability Office found that the overall length ranged from 17 to 74 pages, with an average of 20,000 words. They require a college graduate's reading ability for any hope of comprehension. They also obscure information about passenger rights by resorting to esoteric references to international treaties. A member of the FAA's Aviation Rulemaking Advisory Committee said that airline contracts of carriage can be summed up in this way: the airlines "can do whatever they want, whenever they want. They'll try to do what their ticket says, but don't hold them to anything."

December

Youthquake, defined as "a significant cultural, political, or social change arising from the actions or influence of young people," was selected by Oxford Dictionaries as its word of the year for 2017. Coined in the 1960s by *Vogue* editor Diana Vreeland to describe how British youth were changing fashion and music around the world, the word enjoyed a fourfold increase in usage in the last year. Casper Grathwohl, president of Oxford Dictionaries, explained: "We chose *youthquake* based on its evidence and linguistic interest. At a time when our language is reflecting our deepening unrest and exhausted nerves, it is a rare political word that sounds a hopeful note." Among the runners-up were *broflake*, *Milkshake Duck*, and *kompromat*. • Merriam-Webster also chose a term with cultural, political, and social implications: *feminism*. Generating 70% more searches than the previous year, *feminism* became the most looked-up word in its online dictionary. Newfound interest in the term was attributed to the Women's March on Washington in January, the popularity of TV shows and movies with strong feminist themes, and the recent #MeToo movement that has seen women coming forward with their stories of sexual harassment and assault. The dictionary recorded two definitions for the word: (1) "the theory of the political, economic, and social equality of the sexes," and (2) "organized activity on behalf of women's rights and interests." Also in the running for Merriam-Webster was *complicit*, which was chosen as Dictionary.com's word of the year for 2017. • *Der Spiegel* (Germany) reported that a German court ordered Amazon to stop misspelling *Birkenstock*. When Internet shoppers searched for "Brikenstock," "Birkenstok," "Bierkenstock," and other variations, a link to Amazon.de would be the first result listed. Because the misspellings are often linked to counterfeit footwear offered by private sellers in online open marketplaces, the German sandal-maker Birken-stock sought the injunction to prevent Amazon from using the misspellings as keywords through GoogleAdwords. • The *Washington Post* reported that the Trump administration had coerced the Centers for Disease Control (CDC) to ban seven words and phrases in its reports: *fetus*, *transgender*, *vulnerable*, *entitlement*, *diversity*, *evidence-based*, and *science-based*. But the *New York Times* reported that rather than an absolute ban, the directive was described by a few CDC officials as a move to avoid using the words in hopes of increasing the chances of securing Republican approval of the CDC's 2019 budget. The CDC's director denied that any words or phrases had been "banned" but didn't deny that their use would be avoided. Apparently, no science-based or evidence-based studies were planned on the diversity of entitlements available to vulnerable transgender fetuses.

Anniversaries

250 years: **Joseph Priestley publishes *The History and Present State of Electricity*.** 200 years: **Georg Wilhelm Friedrich Hegel's classic *Encyclopedia of the Philosophical Sciences* is published. • Henry David Thoreau (1817-1862), the American essayist, poet, and philosopher, is born. • George Henry Lewes (1817-1878) is born; he would become a prolific literary critic and author of the underappreciated classic *The Principles of Success in Literature*, published in 1891, 13 years after his death. • Jane Austen (1775-1817) dies; her first novel (*Northanger Abbey*), written in 1803, and her last (*Persuasion*) are published in late 1817, six months after her death.** 150 years: **Luigi Pirandello (1867-1936), the Italian writer and dramatist, is born. • Laura Ingalls Wilder (1867-1957), the novelist, is born. • Thomas Bulfinch (1796-1897), expert writer on mythology, dies.** 100 years: **T.S. Eliot's chapbook *Prufrock and Other Observations* is published. • Anthony Burgess (1917-1993), author of *A Clockwork Orange*, is born; toward the end of his life, he would write a popular but important book on linguistics, *A Mouthful of Air* (1992). • Thomas Ernest Hulme (1883-1917), the literary critic, dies; his underappreciated *Notes on Language and Style* would be published eight years after his death.** 50 years: **André Maurois (1885-1967), the polymathic French writer whose works included *The Art of Writing* (1960), dies. • Martin Luther King's fourth and final book, *Where Do We Go from Here: Chaos or Community?*, is published; he would be assassinated the following April.**

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The Year in Law

2016-2017

November 2016

Nov. 4: Bridget Anne Kelly and Bill Baroni are convicted in the "Bridgegate trial," which centered on allegations that several of Governor Chris Christie's top lieutenants abused their power by punishing political rivals.

Nov. 6: FBI Director James Comey sends a letter to Congress indicating that there is no evidence supporting criminal charges against presidential candidate Hillary Clinton. Comey had reopened the investigation into Clinton's handling of classified information based on a recently-discovered set of emails.

Nov. 8: Donald Trump is elected President of the United States • *See* The Year in Law 2015-2016 (2017 Green Bag Almanac & Reader 31) for additional details about the 2016 elections.

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Nov. 10: Judge Gonzalo Curiel of the U.S. District Court for the Southern District of California tells the litigants in a class action fraud lawsuit against Trump University that they would be wise to settle, in part based on Donald Trump's recent election as President of the United States • Federal prosecutors indict former Representative Aaron Schock for using House and campaign funds to support his lavish lifestyle — which included trips and private planes to box seats for Chicago Bears football games.

Nov. 11: IMDb files a lawsuit in the U.S. District Court for the Northern District of California challenging a new California law requiring the website to conceal the birth dates of actors listed on the site who request removal of such information.

Nov. 15: In response to a question about whether she is "apprehensive" regarding the election of President Donald Trump, Justice Sonia Sotomayor says, "[w]e can't afford for a president to fail."

Nov. 18: Fantasy sports companies DraftKings and Fan- Duel announce that they will merge to cut legal bills and advertising spending, after spending years competing for customers. • The Dean of Concord Law School of Kaplan University, an online law school, announces that the school is seeking permission to have its graduates take the bar exam in Arizona, New Mexico, and Connecticut. All of the states have rules prohibiting the school's graduates from taking their bar exams.

Nov. 23: Judge Amos Mazzant of the U.S. District Court for the Eastern District of Texas issues a nationwide injunction against the U.S. Department of Labor's overtime rule, which required overtime pay for millions of workers by raising the salary threshold under which workers are guaranteed pay for extra hours worked. • President Barack Obama pardons Tater and Tot, the final two turkeys spared on Thanksgiving during his Presidency.

Nov. 29: Australian Prime Minister Malcolm Turnbull announces that Susan Kiefel will be the next Chief Justice of the High Court of Australia — the first time in history a woman has been selected for that position. • The New York City Council introduces a bill that would permit judges to review a defendant's ability to pay before assigning bail.

Nov. 30: Senator Ted Cruz of Texas and Representative Mark Meadows of North Carolina introduce a bill to repeal all limits on campaign contributions in federal elections. • The Supreme Court of India rules that all movie halls must play the national anthem before screening films.

December 2016

Dec. 1: Richard C. Reid, a terrorist who tried to light a bomb in his shoe on a flight from Paris to Miami shortly after the terrorist attacks on September 11, 2001, asks a federal judge in Boston to declare him bankrupt after he repeatedly failed to pay the $250,000 fine that was part of his life sentence.

Dec. 5: The United Kingdom's Supreme Court begins its four-day hearing of an appeal from a lower court decision holding that Members of Parliament must vote to trigger "Brexit." The individual who brought the suit seeks to delay the implementation of the UK's departure from the European Union. • Judge Steven O'Neill of the Montgomery County, Pennsylvania Court of Common Pleas concludes that the prosecutors in Bill Cosby's criminal sexual assault trial can introduce testimony the entertainer gave during a civil case in 2005.

Dec. 6: New York State Senator Brad Hoylman introduces the Tax Returns Uniformly Made Public (TRUMP) Act, which would require presidential and vice presidential candidates to disclose their income tax returns going back five years as a condition of appearing on the ballot in New York. • The U.S. Court of Appeals for the Seventh Circuit rules that track and field athletes at the University of Pennsylvania are not employees for purposes of the Fair Labor Standards Act.

Dec. 8: The Arkansas Supreme Court holds that gays and lesbians who are married but not biologically related to their children do not have a constitutional right to have their names included on the children's birth certificates. The Arkansas law at issue requires the name of a birth mother's male spouse to appear on a birth certificate regardless whether the spouse is the biological father of the child, but the Arkansas court interpreted it not to require the inclusion of a birth mother's female spouse. • Two Democratic presidential electors in Colorado file a lawsuit challenging the constitutionality of state laws requiring electors to vote for whoever won the popular vote in the state.

Dec. 9: Justice Jeffrey Sunshine of the Brooklyn Supreme Court rules that a woman cannot serve her husband with a summons for divorce through Facebook.

Dec. 12: Donald J. Tobias, a lawyer in Manhattan, files a libel lawsuit against a Google user named "Mia Arce" who posted a review of his legal practice that stated, "It was horrible," along with a one-star rating. Tobias claims that the review and rating is tarnishing his professional reputation and seeks to have the court identify the author. Reports of his lawsuit spark additional Google reviews, including: "Never worked with him but saw how he spends his time trying to uncover anonymous reviewers in order to sue them for libel. I would give 0 stars if I could." • Judge Paul Diamond of the U.S. District Court for the Eastern District of Pennsylvania rejects Presidential candidate Jill Stein's request for a recount based on alleged hacking of the state's voting machines, concluding that Stein's allegations "border[] on the irrational."

Dec. 15: The U.S. Court of Appeals for the Fourth Circuit issues its opinion in *Liverman v. City of Petersburg*, holding that a local police department in Virginia unconstitutionally shielded itself from public scrutiny when it imposed a restrictive social media policy on its officers. The policy sought "to prohibit the dissemination of any information on social media that would tend to discredit or reflect unfavorably upon" the police department, and the court held that the department

had failed to present sufficient justification for "such sweeping restrictions on officers' freedom to debate matters of public concern." • A jury awards $2.54 billion in royalties to Merck in the biggest patent infringement verdict in history. The verdict represented 10% of the sales of Gilead's infringing Hepatitis C drugs.

Dec. 20: Two recipients of cost-sharing reduction payments under the Affordable Care Act file a motion to intervene in *House v. Burwell*, a lawsuit by the House of Representatives claiming that Congress never appropriated funds to reimburse insurers for those payments. The filing claims that the Obama Administration had vigorously litigated the legality of the payments, but asserts that the Trump Administration is unlikely to represent the intervenors' interests. • President Obama announces a ban on oil and gas drilling in federal waters in the Atlantic and Arctic Oceans, just weeks before Donald Trump takes office. The announcement relies on the Outer Continental Shelf Act, which was enacted in the 1950s.

Dec. 22: The results of the July administration of the California bar examination reveal that graduates of ABA-approved schools are passing the test at only a 54% rate — down from 60% the previous year. • IKEA agrees to pay $50 million to three families whose children were killed when their dressers toppled over. The company had previously recalled at least 29 million dressers and announced it would stop selling some of its popular products. • The North Carolina legislature fails to repeal a law restricting transgender people's use of public restrooms, despite convening a special legislative session for that purpose.

Dec. 23: A class of former students at the Charlotte School of Law files a lawsuit against the school, alleging that it made false and misleading representations and omissions about the school's compliance with ABA accreditation standards.

Dec. 28: Burke Ramsey, the brother of JonBenet Ramsey, files a second defamation lawsuit against CBS for advancing the theory that he killed his younger sister. The lawsuit seeks $750 million in damages.

Dec. 30: The *Wall Street Journal* releases an investigation reflecting that police officers often are not suspended or terminated despite committing crimes or infractions that disqualify many other employees — such as barbers and childcare providers — from obtaining state certification to seek new employment. The study traced outcomes for 3,458 police officers.

Dec. 31: Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas issues a nationwide injunction against the portions of the Department of Health and Human Services' nondiscrimination rule that prohibit discrimination on the basis of gender identity or abortion.

January 2017

Jan. 3: The nomination of Judge Merrick Garland to fill the vacancy on the U.S. Supreme Court formally expires, clearing the way for Donald Trump to select his own nominee once he takes office as President.

Jan. 4: Sandy Hafer, a resident of California, files a class action lawsuit against Nestle SA for allegedly — and "recklessly" — underfilling boxes of Raisinets candy. The suit claims that Nestle packages the candy in opaque boxes but then fills the boxes only 60% of the way. • A study by the National Association for Law Placement indicates that women and minorities have made small increases in their presence in the legal profession, with growth of less than one percent on most relevant metrics. • Martha Minow, the Dean of Harvard Law School, announces that she will step down at the end of the academic year to return to teaching full-time.

Jan. 5: President Obama publishes an article in the *Harvard Law Review* titled "The President's Role in Advancing Criminal Justice Reform," discussing his efforts to push for meaningful change in the criminal justice system during his Presidency.

Jan. 10: A jury in Charleston, S.C. sentences Dylann Roof to death. Roof previously had been convicted of 33 charges, including nine murder charges, for perpetrating a massacre at the Emanuel AME church in June 2015.

Jan. 11: Federal prosecutors announce charges against six Volkswagen executives for their roles in the company's emissions-cheating scandal on the same day that the company pleads guilty to charges of conspiracy to commit wire fraud and to violate the Clean Air Act.

Jan. 14: Members of the European Parliament vote to propose granting legal status to robots, warning that new legislation may be needed to ensure that machines can be held responsible for any "acts or omissions."

Jan. 18: The U.S. Court of Appeals for the Seventh Circuit issues its opinion in *Ezell v. City of Chicago*, holding that a series of city regulations violate the Second Amendment by limiting the areas where shooting ranges can operate and forbidding individuals under 18 from entering shooting ranges.

Jan. 19: President Obama announces that he is commuting the sentences of 330 federal prisoners, bringing the total number of commutations during his Administration to 1,715 prisoners.

Jan. 20: President Trump issues an Executive Order requiring federal agencies to repeal two existing regulations for every new regulation they issue. • Paramount and CBS Studios settle a lawsuit with Alec Peters and his production company over a Star Trek fan film they produced. The film, titled *Axanar*, obtained substantial funding via Kickstarter, and involved more professional production than typical fan films. As part of the settlement, Peters agrees to substantially alter the final version of the film prior to any release. • Judge Andrew Hanen of the U.S. District Court for the Southern District of Texas announces he will be withdrawing his order requiring thousands of Department of Justice lawyers to attend ethics training based on alleged misrepresentations. Judge Hanen announces that the misstatements were inadvertent and that further eth-

ical training is not needed.

Jan. 22: Citizens for Responsibility and Ethics in Washington announces that it will be filing a lawsuit alleging that President Trump is violating the Foreign Emoluments Clause by allowing his hotels and other businesses to accept payments from foreign governments.

Jan. 25: In a series of tweets, President Trump announces that he will be asking for an investigation into claims of widespread voter fraud during the November presidential election.

Jan. 26: Several senior managers at the State Department resign six days into the Trump Administration, creating a number of vacancies in critical roles.

Jan. 27: President Trump signs his first Executive Order on immigration, banning citizens of Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen from entering the country for 90 days. The order immediately prompts protests at airports.

Jan. 28: Judge Ann M. Donnelly of the U.S. District Court for the Eastern District of New York holds that President Trump's Executive Order on immigration violates the Constitution's Due Process and Equal Protection Clauses (see previous entry).

Jan. 29: Judge Allison D. Burroughs of the U.S. District Court for the District of Massachusetts issues a temporary restraining order against President Trump's Executive Order on immigration, holding that the government cannot "detain or remove" individuals who arrived legally from the target countries (see previous entry).

Jan. 30: President Trump fires acting Attorney General Sally Yates — who had served as the Deputy Attorney General in the Obama Administration — after she declines to defend his Executive Order on immigration. • The SEC files fraud charges in Manhattan federal court against two New York men who ran a Ponzi scheme centered on tickets to the popular musical "Hamilton." The defendants allegedly solicited $81 million from at least 125 investors, claiming they had a deal with a producer of the show to obtain thousands of tickets and re-sell them for a profit in the secondary ticket market.

Jan. 31: President Trump announces that he will be nominating Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to the vacancy on the U.S. Supreme Court.

February 2017

Feb. 1: Rapper Curtis James Jackson III, also known as 50 Cent, sues Reed Smith for $32 million dollars, claiming that its lawyers mishandled a lawsuit and left him facing a $7 million damages award. Jackson claims that the law firm mishandled pretrial preparations in a suit filed by a woman who claimed he violated her privacy by posting a sex tape on his website. • A jury in Texas issues a $500 million verdict against Oculus VR, a company acquired by Facebook, find-

ing that Oculus's head violated a nondisclosure agreement, and that Oculus committed false designation and copyright infringement on intellectual property owned by ZeniMax. The jury rejects any liability for Facebook, which acquired Oculus for $2 billion in 2014, as well as claims that Oculus had stolen trade secrets. • Frito-Lay announces that it has created a "Party Safe" Tostitos chip bag that contains a sensor that will detect alcohol on a person's breath and provide a warning if he or she is too drunk to drive.

Feb. 3: Authorities in Middletown, Ohio use data from Ross Compton's pacemaker to conclude that he actually burned his own house down. The authorities had been investigating the fire, which Compton claimed occurred when he was sleeping. Law enforcement obtained a warrant for data from Compton's pacemaker, which showed that he was active at the time the fire broke out. Compton was subsequently indicted for aggravated arson and insurance fraud.

Feb. 4: Judge James Robart of the U.S. District Court for the Western District of Washington issues a nationwide injunction against President Trump's Executive Order on immigration. In response, President Trump posts a series of tweets criticizing the judge, including one that states, "What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into U.S.?" (see Jan. 30 entry).

Feb. 7: The U.S. Court of Appeals for the Ninth Circuit hears oral argument in a challenge to President Trump's Executive Order on immigration. A district judge in Washington had previously issued a nationwide injunction against the order (see previous entry). Over 137,000 individuals watch the argument via the Ninth Circuit's livestream feed. • Alumni of the Charlotte School of Law submit a letter requesting the resignations of the President and Dean of the law school based on claimed misadministration and failure to comply with mandates from the ABA and the Department of Education (see Dec. 23 entry).

Feb. 9: The U.S. Court of Appeals for the Ninth Circuit upholds an injunction against President Trump's Executive Order on immigration (see Feb. 7 entry). • Washington, D.C. attorney Charles Cooper withdraws from consideration to be President Trump's nominee for Solicitor General after intense speculation that his nomination was imminent. • Kellyanne Conway, Senior Advisor to President Trump, controversially promotes Ivanka Trump's apparel brand on a TV appearance, prompting complaints that Conway has violated federal laws prohibiting federal employees from using their public office to endorse commercial products.

Feb. 14: Aetna and Humana announce that they are terminating their $37 billion merger deal. Hours later, Cigna breaks off its planned $54 billion takeover by Anthem, and sues to collect a termination fee and additional damages. A week earlier, a federal judge in Washington, D.C. had blocked Anthem's acquisition, concluding that it would violate the antitrust laws. • A French business-

man sues Uber after his use of the ridesharing application leads his wife to discover that he is having an extramarital affair. The businessman seeks $48 million in damages.

Feb. 16: The U.S. Court of Appeals for the Second Circuit affirms the dismissal of a lawsuit brought by several 1960s bands against Sirius XM for the company's rebroadcast of their recordings. Sirius's victory reduced the value of a settlement it had previously entered into, which included a reduction in the amounts the company would have to pay if it won decisions in certain pending cases. • The Department of Justice urges the U.S. Court of Appeals for the Ninth Circuit not to rehear its ruling suspending President Trump's Executive Order on immigration, stating that the President will soon release a new directive (see Feb. 9 entry). • President Trump nominates R. Alexander Acosta, the Dean of the Florida International University College of Law, to lead the Department of Labor. Trump's first nominee, Andy Puzder, withdrew from consideration.

Feb. 17: A federal judge in Chicago denies a motion by McDonald's to dismiss a disability discrimination suit filed by a blind man challenging the company's policy of excluding pedestrians from drive-thru windows. The suit seeks to require McDonald's to create an alternative way to serve customers without cars.

Feb. 20: A group of 15 professors of legal ethics lodge a formal D.C. Bar complaint against White House Senior Advisor Kellyanne Conway for engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation." • Justice Sotomayor issues a dissent from the Supreme Court's decision not to hear a challenge to the constitutionality of Thomas Arthur's pending execution, suggesting that one of the chemicals used in the injection protocol is the modern equivalent of "a hangman's poorly tied noose or a malfunctioning electric chair." • Stanford Law School's *Journal of Civil Rights and Civil Liberties* publishes a special issue titled, "A Lawyer's Guide to Activism, Resistance, and Change Under Trump." The issue features five articles written by members of the Stanford Law faculty.

Feb. 21: Yale Law School announces that Heather Gerken will be its next dean, replacing Robert Post. Gerken is the first female dean of the law school.

Feb. 22: In a 6-2 opinion issued by Chief Justice John Roberts, the Supreme Court rules in *Buck v. Davis* that a Texas inmate received ineffective assistance of counsel when his defense lawyer elicited testimony from a psychologist suggesting that the inmate was more likely to commit violent crimes in the future because of his race. Justice Clarence Thomas dissents, joined by Justice Samuel Alito, contending that Buck was not prejudiced by his counsel's mistake.

Feb. 27: Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit issues an op-ed criticizing Justice Ruth Bader Ginsburg for improper political commentary. Silberman contends that Ginsburg should not have criticized Donald Trump when he was a Presidential candidate, announced her support for Judge Merrick Garland (President Obama's nominee to the vacancy on

the Supreme Court), or commented on how her colleagues may have ruled in certain cases. • Ben Schreckinger, a reporter with *Politico*, publishes an article about his attempts to replicate Justice Ginsburg's work-out regimen. The article is titled, "I Did Ruth Bader Ginsburg's Workout. It Nearly Broke Me." • Andy Puz- der, President Trump's first nominee for Secretary of Labor, states in an interview that his nomination was sunk by a "fake news tsunami" spun up by biased journalists.

Feb. 28: University of Michigan football coach Jim Harbaugh takes to Twitter to announce his opposition to reports that the Legal Services Corporation may be defunded in the next round of budget proposals.

March 2017

Mar. 3: Law.com reports that the U.S. Supreme Court has cancelled the aerobic exercise class that Justice Sandra Day O'Connor popularized decades earlier. The class used to take place on the basketball court above the Court's chamber.

Mar. 6: President Trump releases his new "travel ban," designed to replace his first Executive Order on immigration. The new policy excludes Iraq from the list of countries whose citizens were temporarily blocked (see Feb. 9 entry). Hawaii immediately files a lawsuit challenging the new order. • Harvard Law School announces that the family of Justice Antonin Scalia has agreed to donate his papers to the law school's library.

Mar. 7: Amazon agrees to turn over to the authorities recordings from one of its "Echo" devices in the home of a murder suspect in Arkansas, after initially refusing to do so under the First Amendment. The defendant had consented to the release of the recordings. • President Trump nominates Noel Francisco to be the next Solicitor General. Francisco is the first Asian-American nominee for the position.

Mar. 10: Preet Bharara, the U.S. Attorney for the Southern District of New York, announces via Twitter that he has been fired. President Trump had previously asked him to remain in his post. • Attorney General Jeff Sessions asks for the resignation of 45 other U.S. Attorneys appointed by President Obama.

Mar. 15: Judge Derrick Watson of the U.S. District Court for the District of Hawaii issues a nationwide temporary restraining order against President Trump's second "travel ban," concluding it violates the Establishment Clause. In response, President Trump states (among other things) that "we ought to go back to the first one and go all the way, which is what I wanted to do in the first place" (see Mar. 6 entry). • Former Hunton and Williams patent partner Robert Schulman is convicted of insider trading after tipping off his friend and investment adviser about a big pharmaceutical company's plan to acquire one of Schulman's clients.

Mar. 16: Judge Theodore Chuang of the U.S. District Court for the District of Maryland issues an opinion blocking the 90-day ban on immigration for citizens from six Muslim-majority countries contained in President Trump's new travel ban (see Mar. 6 entry).

Mar. 17: Three days after denying en banc rehearing of the decision upholding an injunction against President Trump's Executive Order on immigration (see Feb. 9 entry), the Ninth Circuit releases 51 pages of opinions from five separate judges regarding the court's action.

Mar. 20: Confirmation hearings begin for Neil Gorsuch, President Trump's nominee to fill the vacant seat on the U.S. Supreme Court.

Mar. 21: Judge Edward J. McManus of the U.S. District Court for the Northern District of Iowa passes away at age 97. McManus was the longest-serving incumbent judge in the United States, and the third-longest serving judge in U.S. history.

Mar. 24: The U.S. Court of Appeals for the Second Circuit upholds New York's ban on non-lawyer investment in law firms, concluding that the ban is consistent with the First Amendment. • Arkansas Governor Asa Hutchinson signs a law allowing people with concealed handgun licenses to bring their firearms into college campuses, stadiums, and bars effective Sept. 1, 2017.

Mar. 25: The New York Attorney General's office announces a $30,000 settlement with three health app developers based on allegedly misleading claims about the utility of their apps. The three apps are Cardiio, which measures heart rate; Runtastic, which measures both heart rate and cardiovascular performance under stress; and Matis, which claims to turn any smart phone into a fetal heart monitor.

Mar. 26: Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit issues a concurring opinion in *Christiansen v. Omnicom Group*, urging the court to go en banc to determine whether Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation.

Mar. 27: The Tennessee Attorney General issues a legal opinion stating that a law requiring all license plates in the state to say "In God We Trust" would be constitutionally suspect. The opinion also states that there would be fewer concerns with a scheme permitting citizens to obtain such plates, rather than requiring them to do so. • The American Bar Association puts Arizona Summit Law School on probation, after its bar passage rate drops to 25% for first-time test takers. (The school's graduates had previously enjoyed bar passage rates as high as 97%.)

Mar. 28: General counsel from 185 companies send a letter to Congress urging it to continue funding the Legal Services Corporation, a major provider of civil legal aid to individuals who cannot afford legal assistance (see Feb. 28 entry).

Mar. 29: A North Carolina district judge orders several men to stand in front of the Guilford County courthouse with signs saying, "This is the face of domestic abuse." A week earlier, the men had pleaded guilty to assaulting women.

Mar. 30: Bloomberg reports that 3,700 former students at Trump University — out of around 6,000 potential claimants — have submitted claims on the $25 million dollar settlement of their class action fraud lawsuit (see Nov. 10 entry). • *Huffington Post* reports that the University of Pittsburgh Law School has created a class titled "Crime, Law and Society in 'The Wire,'" which will explore contemporary issues in the criminal justice system by discussing episodes of the critically-acclaimed HBO show. • Judge Derrick Watson of the U.S. District Court for the District of Hawaii converts his temporary restraining order into a preliminary injunction against President Trump's second "travel ban" (see Mar. 15 entry).

Mar. 31: Capitol Hill sources indicate that General Michael Flynn, the former National Security Advisor, will not receive immunity in exchange for testimony before the House and Senate intelligence committees about possible collusion between President Trump's campaign and Russia.

April 2017

Apr. 1: Forty states pass measures to trigger a new constitutional convention, but all contain a provision conditioning the opening of the convention on all proceedings taking place via Twitter. The states explain that their decision is based on a desire to "cut out the middleman," because everything they do will end up on social media anyway.[1]

Apr. 4: In a 5-1 decision, the New York Court of Appeals rules that Facebook cannot appeal a judge's decision to issue search warrants in a criminal case, even if the company believes that the warrants are unconstitutional. • The en banc U.S. Court of Appeals for the Seventh Circuit issues its decision in *Hively v. Ivy Tech Community College*, concluding that discrimination on the basis of sexual orientation violates the prohibition on discrimination on the basis of sex contained in Title VII of the Civil Rights of 1964. The opinion is the first appellate court ruling of its kind. • Senate Majority Leader Mitch McConnell of Kentucky begins the procedures required to eliminate the possibility of a filibuster against Supreme Court nominee Neil Gorsuch. While under Democratic control, the Senate had previously eliminated the filibuster for lower court nominees and certain Executive Branch appointees.

Apr. 6: Twitter files a lawsuit in federal court seeking to block an order by the U.S. government demanding that the social media platform reveal the identity of user @ALT_uscis, who claims to be a federal immigration employee critical of President Trump's immigration policies.

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[1] April Fools!

Apr. 7: The U.S. Senate votes 54-45 to confirm Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit as Associate Justice (see Jan. 31 and Apr. 4 entries).

Apr. 10: Neil Gorsuch is sworn in as the 113th Justice of the U.S. Supreme Court, finally filling the vacancy created by the death of Justice Scalia.

Apr. 12: *Rolling Stone* magazine, journalist Jill Erdely, and former University of Virginia associate dean Nicole Eramo announce that they have settled Eramo's lawsuit based on a since-retracted story about sexual assault on UVA's campus. A jury had previously awarded Eramo $3 million dollars, and the settlement occurred while the case was on appeal.

Apr. 13: Judge Sheila Abdus-Salaam, the first African-American woman appointed to the New York Court of Appeals, is found dead in the Hudson River a day after she was first reported missing.

Apr. 14: The Department of Justice files a motion to withdraw from litigation over North Carolina's law nullifying local LGBTQ nondiscrimination ordinances and barring state branches of government from regulating access to multiple occupancy restrooms, showers, or changing facilities.

Apr. 17: The Consumer Financial Protection Bureau files its first lawsuit against a law firm, claiming that the debt collection law firm falsely told consumers that attorneys had reviewed their debts. • In his first day as an Associate Justice of the U.S. Supreme Court, Neil Gorsuch apologizes to an advocate for taking up a lot of time with his questions during oral argument in *Perry v. Merit Systems Protection Board*. Gorsuch would later write a dissenting opinion in the case.

Apr. 18: A nonprofit restaurant group and an event planner join the lawsuit claiming that President Trump is violating the Constitution's Foreign Emoluments Clause by accepting payments from foreign governments at his hotels and restaurants. The lawsuit was originally filed by Citizens for Responsibility and Ethics in Washington (see Jan. 22 entry). The lawsuit is ultimately dismissed in December on standing grounds.

Apr. 19: Judge Kiyo Matsumoto of the U.S. District Court for the Eastern District of New York rules that former pharmaceutical executive Martin Shkreli will receive a separate trial from his former attorney, concluding that trying the two together would impair Shkreli's right to a fair trial. Judge Matsumoto also rules that Shkreli's trial should take place first. • Fox News terminates Bill O'Reilly based on allegations of sexual harassment. The network agrees to pay O'Reilly $25 million as part of his severance.

Apr. 20: Chadbourne & Parke LLP votes Kerrie Campbell out of the partnership while her lawsuit against the firm for gender discrimination remains pending. • Representative Jeb Hensarling introduces a 600-page bill to fundamentally restructure the Consumer Financial Protection Bureau, including by renaming it the "Consumer Law Enforcement Agency," and eliminating the agency's inde-

pendent, single-director structure. • Whittier Law School announces that it will close based on a decision by the Whittier College Board of Trustees — marking the first time a fully-accredited law school has closed its doors.

Apr. 25: Judge William H. Orrick of the U.S. District Court for the Northern District of California issues an order temporarily blocking an Executive Order issued in Jan. 2017 that purported to tie billions of dollars in federal funding to aggressive immigration enforcement by localities.

Apr. 26: President Trump releases his blueprint for a plan to alter the tax code, which proposes to reduce the tax rate on pass-through corporations (such as many large law firms) from 39.6% to 15%. • Ajit Pai, the new chairman of the FCC, announces that he will ask the agency to begin rolling back its "net neutrality" rule, which forbids broadband providers from charging higher fees or providing favorable treatment to particular customers. • Four students at Harvard Law School publish an article in the *Harvard Law Record* asking admissions officials to disclose information collected from applicants about past accusations and convictions for sexual assault, and to publicly comment on how that information is evaluated.

Apr. 27: The *ABA Journal* reports that students at Charlotte School of Law have not received federal loan money for the spring 2017 semester, after the Department of Education announced that it was withdrawing the school's loan money in December. The school claims it will offer institutional loans if no federal money is provided (see Feb. 7 entry). • President Trump states in an interview that he has considered proposals to split up the U.S. Court of Appeals for the Ninth Circuit, because litigants often "shop" for sympathetic judges in that court.

Apr. 28: Richard Lai, the president of the Guam Football Association and a member of FIFA's audit and compliance committee (designed to root out corruption in the sport) pleads guilty to fraud charges after admitting to taking almost $1 million in bribes.

May 2017

May 1: The Eagles sue the owners of "Hotel California," a hotel in Mexico, for trademark infringement in connection with the use of the title of the band's 1976 hit without permission.

May 2: Concert-goers file a class action lawsuit alleging $100 million in damages after Frye Festival, a concert billed as a luxury festival in the Bahamas with deluxe accommodations and gourmet food, actually featured FEMA disaster relief tents and cheese sandwiches and was canceled the morning it was set to begin. • A study shows that a new artificial intelligence algorithm is better at predicting the outcome in Supreme Court cases than legal scholars; the algorithm and the scholars were accurate 70.2% and 66% of the time, respectively.

May 3: Puerto Rico files for a $70 billion debt restructuring in what will be the largest ever restructuring of a local government in history, eclipsing Detroit's previous record of $18 billion in 2013. • Alanis Morissette's former manager is sentenced to six years in prison for filing a false tax return after failing to report nearly $4.8 million in funds he embezzled from the singer and an additional $2 million he embezzled from other clients.

May 9: FBI director James Comey is fired by President Trump while leading a criminal investigation into whether President Trump's advisors colluded with Russian officials to interfere in the 2016 presidential election. President Trump cites Comey's handling of the investigation into Hillary Clinton's use of a private email server while Secretary of State as the reason for the firing.

May 15: The Supreme Court denies certiorari of the U.S. Court of Appeals for the Fourth Circuit's decision finding a North Carolina voter ID law unconstitutional. • The first man to be prosecuted under the Hate Crimes Prevention Act for targeting a transgender victim receives a 49-year sentence in the stabbing and beating death of Mercedes Williamson, a 17-year old trans-gender girl he previously dated.

May 17: The Department of Justice appoints former FBI Director Robert Mueller as Special Counsel in the investigation into possible ties between Russian officials and President Trump's campaign. The appointment is made by Deputy Attorney General Rod Rosenstein, because of Attorney General Jeff Sessions' March 2, 2017 recusal from matters related to the Department's Russia investigation.

May 18: Former Fox News Chairman and CEO Roger Ailes dies at age 77. Ailes had resigned from Fox News after Gretchen Carlson filed a suit in 2016 alleging that Ailes fired her for refusing his sexual advances.

May 19: After reviewing 40 different claims, a Minnesota probate judge rules that Prince's six siblings will split the estate of the renowned musician who died in April 2016. Several other claimants appeal the decision.

May 22: Michael Flynn, former National Security Advisor to President Trump, invokes his Fifth Amendment right against self-incrimination in response to a Senate subpoena in which he is asked to produce a list of any contacts he had with Russian officials between June 16, 2015 and January 20, 2017 (see Mar. 31 entry). • The Supreme Court rules in *TC Heartland LLC v. Kraft Foods* that "residence" for purposes of the patent venue statute is the defendant's state of incorporation, making the practice of patent trolling, where a company purchases a patent for the purpose of demanding royalties and suing, less desirable because plaintiffs in such cases can no longer forum shop. A disproportionate number of such cases had been filed in the Eastern District of Texas. • Labor Secretary Alexander Acosta publishes an op-ed in the *Wall Street Journal* announcing that the Labor Department would allow portions of the controversial

"Fiduciary Rule" to go into effect, stating that the agency could find "no principled legal basis" to further delay the rule's effective date while considering modifying or repealing it. Acosta states that the Department's ongoing process under the Administrative Procedure Act "is not red tape. It is what ensures that agency heads do not act on whims, but rather only after considering the views of all Americans."

May 23: Target agrees to an $18.5 million settlement in a multi-state enforcement action in connection with a 2013 data breach in which hackers were able to access personal information, including credit card numbers, for an estimated 60 million customers.

May 24: The NBA announces that the 2019 All-Star Game will be played in Charlotte, North Carolina following the replacement of House Bill 2 ("HB2"), which, in part, required transgender individuals to use the public restroom that corresponds with the sex on their birth certificates. The league previously relocated the 2017 All-Star game from North Carolina after HB2 was passed in March of 2016.

May 25: A man is arrested at Comicon in Phoenix for trying to enter the event dressed in body armor with multiple guns and a knife. Police say he had also threatened authorities on social media before his arrest. • The U.S. Court of Appeals for the Ninth Circuit upholds San Francisco's ban on public nudity as constitutional. The 2012 ordinance requires anyone engaging in public nudity to first acquire a parade permit.

May 30: The U.S. Court of Appeals for the Seventh Circuit upholds a lower court's order enjoining a Wisconsin school from disciplining a transgender high school student for using the bathroom that corresponds with his gender identity or from preventing him from doing so.

May 31: Ross Ulbricht, founder of dark net marketplace Silk Road, loses an appeal of his life sentence before the U.S. Court of Appeals for the Second Circuit. Ulbricht was convicted in 2015 on drug trafficking and money laundering conspiracy charges based on activities Silk Road facilitated.

June 2017

June 1: President Trump announces that the United States will leave the Paris climate agreement, making it the only country in the world that is not a party to the agreement. • The U.S. Supreme Court summarily reverses a decision of the Supreme Court of Arkansas holding that the state need not include the name of a birth mother's lesbian spouse on a birth certificate, even though state law requires inclusion of a birth mother's male spouse regardless his relationship to the child. The Court concludes that this "differential treatment infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage'" (see Dec. 8 entry).

June 5: The Supreme Court rules 8-0 in *Honeycutt v. United States* that civil forfeiture pursuant to Section 853(a)(1) of the Comprehensive Forfeiture Act of 1984 is limited to property that defendant himself actually acquired as a result of his crime.

June 12: The Supreme Court rules 9-0 in *Sandoz Inc. v. Amgen Inc.* that a drug company manufacturing a generic drug that is "biosimilar" to a brand-name drug may give the manufacturer of the brand-name drug the required 180-day notice of its intent to commercially market the drug prior to receiving licensure from the FDA, allowing the generic makers to take their product to market sooner. • Justice Gorsuch issues his first opinion as an Associate Justice of the U.S. Supreme Court in *Henson v. Santander Consumer USA, Inc.* In a unanimous opinion, the Court holds that the Fair Debt Collection Practices Act does not count as a "debt collector" someone who attempts to collect a purchased and owned debt — as opposed to someone who collects debts owed to another.

June 13: *Rolling Stone* magazine settles a defamation suit with the University of Virginia's Phi Kappa Psi fraternity chapter for $1.65 million based on a 2014 article it published about a rape and beating that allegedly took place at the Phi Kappa Psi house, which was unsubstantiated when published and was later discredited (see Apr. 12 entry).

June 14: In a 97-2 vote, the Senate passes an amendment imposing new sanctions on Russia after finding that Russia meddled in the 2016 presidential election.

June 16: President Trump reinstates some travel and business restrictions with Cuba, reversing portions of former President Obama's Cuba policy. • Amazon agrees to buy Whole Foods for $13.4 billion.

June 17: The sexual assault trial against Bill Cosby ends in a mistrial on the sixth day of deliberations after the Pennsylvania jury is unable to come to a unanimous decision.

June 19: The Supreme Court rules in *Matal v. Tam* that the disparagement clause of the Lanham Act, which prohibits trademarks that could "disparage persons, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute" violates the Free Speech Clause of the First Amendment. At issue was denial of a trademark application filed by Asian-American band, The Slants. • The FTC sues to block the merger of DraftKings and FanDuel, which, it argues, would give the combined entity control of over 90% of the paid daily fantasy sports contest market in the United States (see Nov. 18 entry). • The Supreme Court rules in *Packingham v. North Carolina* that a North Carolina statute banning registered sex offenders from using social media violates the Free Speech Clause of the First Amendment. • In *Ziglar v. Abbasi*, the Supreme Court dismisses claims against high-ranking Justice Department officials by six individuals who were detained in the wake of the 9/11 terrorist attacks, and who they claim they were held for extended periods under harsh conditions. The Court holds that the officials were entitled to qualified immunity. • Louisiana becomes

the first state to bar public universities from asking applicants about their criminal histories, with the exception of convictions for stalking, rape, or sexual battery.

June 20: U.S. Customs and Border Protection ("CBP") Acting Commissioner Kevin McAleenan issues a statement explaining that while CBP agents may search electronic devices upon a person's arrival in the U.S., the search is limited to information that is "physically resident on an electronic device transported by an international traveler" and does not extend to information found "solely on remote servers."

June 22: Brendan Dassey of the Netflix show "Making a Murderer" is ordered released following the U.S. Court of Appeals for the Seventh Circuit's decision upholding a lower court's ruling that Dassey's confession to the rape and murder of Teresa Halbach was coerced.

June 26: The Supreme Court issues a per curiam opinion in *Trump v. International Refugee Assistance Project*, the case from Hawaii involving a challenge to President Trump's second travel ban. The court grants the government's petitions for certiorari in the cases, and vacates the injunctions issued by the lower court only to the extent they prevent enforcement of the travel ban against "foreign nationals who lack any bona fide relationship to a person or entity in the United States" (see Mar. 30 entry) • The Court also issues its opinion in *Trinity Lutheran Church of Columbia, Inc. v Comer*, holding that the Missouri Department of Natural Resources violated the First Amendment rights of Trinity Lutheran Church when the state denied the church a grant to permit its preschool and daycare center to obtain rubber playground surfaces. Chief Justice Roberts writes the majority opinion, Justice Stephen Breyer concurs only in the judgment, and Justices Sotomayor and Ginsburg dissent.

June 27: The European Union fines Google €2.4 billion ($2.7 billion) after regulators rule that the company unfairly promotes its own shopping comparison services by including them at the top of search results, denying consumers "a genuine choice."

June 29: A federal judge issues a preliminary injunction blocking a new California law that was approved by voters last year that would have exposed individuals possessing ammunition magazines that hold ten or more bullets to fines and criminal penalties. • Paul McCartney and Sony/ATV enter into a confidential settlement of McCartney's copyright suit to regain the rights to many songs in the Beatles music catalog.

July 2017

July 1: Norman Dorsen, former president of the ACLU, dies at 86 due to complications from a stroke.

July 2: President Trump tweets an edited video that portrays him attacking a man with a CNN logo for a head in a wrestling venue, including the hashtags

#FraudNewsCNN and #FNN.

July 5: Hobby Lobby agrees to pay $3 million for its part in illegally importing several ancient clay cuneiform tablets it purchased from sellers in the United Arab Emirates and Israel. The company also agreed to forfeit the artifacts, which were mislabeled as "samples" and misstated the countries of origin. • A judge orders Martin Shkreli, the former CEO of Turing Pharmaceuticals, to stop speaking about his case in and around the courthouse where he is standing trial for federal securities fraud in connection with the mismanagement of two hedge funds. Shkreli came into the spotlight after he raised the price for Daraprim, a HIV/AIDS drug, from $13.50 per pill to $750.

July 7: Fox News host Charles Payne is suspended after a female political analyst accuses him of sexual harassment, claiming she was barred from appearing on Fox after she ended a years-long affair with Payne. • The U.S. Court of Appeals for the Third Circuit rules that a private individual's engagement in recording of police officers performing their duties in public is protected by the First Amendment right of "access to information."

July 10: California Governor Jerry Brown signs a bill, unanimously passed by the California Legislature, which requires a criminal defendant who is represented by a court-appointed attorney to reimburse the court for legal services if (and only if) convicted.

July 12: Representative Brad Sherman introduces an Article of Impeachment against President Trump, citing obstruction of justice and "high crimes and misdemeanors," based on President Trump's firing of FBI Director James Comey during the investigation into Russia's interference in the 2016 presidential election (see May 9 entry).

July 14: A Brazilian court dismisses the case against American swimmer Ryan Lochte, who was charged with filing a false report after telling NBC that he and other swimmers were robbed at gunpoint by men with police badges. The crime carried a possible 18-month prison sentence.

July 17: A Texas police officer is indicted on a murder charge and four counts of aggravated assault after the officer fired his rifle into a vehicle full of teenagers, killing 15-year-old Jordan Edwards. The officer claimed the car was reversing toward him at the time he fired, but body camera footage showed he fired into the vehicle as it was heading away from him.

July 19: U.S. Senator John McCain of Arizona is diagnosed with brain cancer after undergoing a minor procedure to remove a blood clot above his left eye. • President Trump tells the *New York Times* that "[Attorney Gen-eral] Sessions should have never recused himself [from the Russia investigation], and if he was going to recuse himself, he should have told me before he took the job and I would have picked somebody else." He went on to state that the recusal was "extremely unfair — and that's a mild word — to the President."

July 20: O.J. Simpson is granted parole by the Nevada Parole Board. Simpson was serving time for a 2007 armed robbery and kidnapping in which he and five others confronted two men at gunpoint at a Las Vegas hotel over sports memorabilia items that Simpson claimed the men had stolen from him.

July 21: White House Press Secretary Sean Spicer resigns after President Trump names Anthony Scaramucci as White House Communications Director. Spicer had filled both roles during much of his tenure with the President.

July 23: A truck driver faces one count of transporting illegal immigrants after ten people died of asphyxiation and heat stroke while spending about 12 hours in the back of his un-air-conditioned tractor trailer. The law allows enhanced penalties, up to life imprisonment or the death penalty, for the crime.

July 25: Attorney General Jeff Sessions announces a plan to make certain federal grant programs for cities and states conditional on the jurisdictions allowing immigration officials into detention facilities and giving such officials 48-hours' notice before releasing an inmate who is wanted by the officials. • The U.S. Court of Appeals for the D.C. Circuit rules that a law requiring applicants for concealed carry permits in the District of Columbia to show "proper reason" to carry a gun violates the Second Amendment.

July 26: New York Governor Andrew Cuomo directs the Governor's Traffic Safety Committee to review new "textalyzer" technology, which would allow officers to quickly check a cell phone and determine whether it was in use before an accident. The device can indicate whether a driver was texting, emailing, or browsing the web prior to a crash without accessing personal material on the device, but civil liberties groups worry that the technology raises privacy concerns. • President Trump announces that transgender individuals will be barred from serving in the U.S. military, citing "tremendous medical cost and disruption."

July 27: Honolulu passes a "Distracted Walking Law" that makes it the first major city in the United States to fine pedestrians for, among other things, texting while crossing the street. Violators will be fined between $15 and $99 per violation.

July 28: In a 49-51 vote, the U.S. Senate rejects a measure that would have repealed large portions of the Affordable Care Act; Republican Senators Collins, Murkowski, and McCain break ranks to vote against the measure.

July 31: Anthony Scaramucci is removed from his role as White House Communications Director after an interview with the *New Yorker* in which he publicly accuses Chief of Staff Reince Priebus of leaking information about him to the media.

August 2017

Aug. 1: The U.S. Senate confirms Christopher Wray as Director of the FBI, replacing James Comey. • Commentator Rod Wheeler sues Fox News, alleging that reporter Malia Zimmerman fabricated quotes from Wheeler pertaining to

the death of Democratic National Committee staffer Seth Rich. • The Department of Homeland Security announces its intention to forgo environmental and other reviews to replace a portion of the border wall in San Diego, California. • In *DFC Global Corp. v. Muirfield Value Partners, L.P.*, the Delaware Supreme Court emphasizes the preeminence of market valuations in shareholder appraisal actions.

Aug. 2: In an internal announcement to its Civil Rights Division, the Department of Justice indicates its intention to investigate and sue universities over affirmative action policies perceived to discriminate against white applicants. • In *Congregation Jeshuat Israel v. Congregation Shearith Israel*, the U.S. Court of Appeals for the First Circuit holds that a New York synagogue — Congregation Shearith Israel — is the rightful owner of the nation's oldest synagogue in Newport, Rhode Island.

Aug. 3: Senators Thom Tillis of North Carolina and Chris Coons of Delaware introduce legislation permitting any special counsel at the Department of Justice to challenge his or her removal in court, a move widely interpreted as an attempt to shield Special Counsel Robert Mueller from interference by President Trump. • Michelle Carter, who sent hundreds of texts to her boyfriend urging him to commit suicide and was convicted of involuntary manslaughter, is sentenced to 15 months in jail. • The Public Information Office of the U.S. Supreme Court announces that the Court will open an electronic filing system on Nov. 13, 2017.

Aug. 4: "Pharma bro" Martin Shkreli, the former CEO of Turing Pharmaceuticals, is convicted of two counts of securities fraud and one count of conspiracy to commit securities fraud (see Apr. 19 entry). • A group of Yemenis and Iranians selected for green cards sue the U.S. State Department in the U.S. District Court for the District of Columbia for failing to process their visa applications after the U.S. Supreme Court partially reinstated President Trump's travel ban. • The U.S. Court of Appeals for the D.C. Circuit vacates the murder conviction of former Blackwater security contractor Nicholas Slatten, and orders a new trial to determine Slatten's role in the 2007 massacre of unarmed civilians in a Baghdad traffic circle. • The U.S. Court of Appeals for the Sixth Circuit affirms the convictions of Matthew King, a lawyer who emulated money laundering techniques demonstrated by a TV character, Saul Goodman, in the hit show *Breaking Bad*. • The U.S. Court of Appeals for the Third Circuit holds that secular anti-abortion groups are not exempt from the Affordable Care Act's requirement that health insurers cover contraception. • The U.S. Court of Appeals for the Seventh Circuit vacates a panel opinion and judgment overturning Brendan Dassey's murder conviction and grants state prosecutors' motion for rehearing *en banc* in *Dassey v. Dittman*, a case highlighted in the popular documentary *Making a Murderer* (see June 22 entry).

Aug. 7: The Department of Justice announces the resumption of its work to create federal standards to guide the permissible testimony and scientific reports of federal forensic experts. • Joaquin "El Chapo" Guzman, the accused leader of the Sinaloa drug cartel, moves to dismiss the U.S. government's case in the U.S. District Court for the Eastern District of New York, arguing that his extradition to the United States was illegal. • The city of Chicago sues to prevent the Trump Administration from implementing its policy to withhold grants from so-called sanctuary cities that do not permit immigration officers access to local jails. Attorney General Sessions accuses Chicago officials of perpetuating a "culture of lawlessness." • In *Personal Audio, LLC v. Electronic Frontier Foundation*, the U.S. Court of Appeals for the Federal Circuit affirms a ruling of the Patent Trial and Appeal Board, holding that Personal Audio's claims on podcasting technology are unpatentable.

Aug. 9: Five transgender service members sue President Trump, Secretary of Defense James Mattis, and other officials in the U.S. District Court for the District of Columbia to enjoin President Trump's ban on trans- gender military service (see July 26 entry). • Fox News host Eric Bolling sues writer Yashar Ali in New York State Supreme Court, seeking $50 million in damages for defamation over the *Huffington Post* publication of Ali's report accusing Bolling of sending lewd text messages to colleagues. • The U.S. Court of Appeals for the D.C. Circuit holds that Judge Scott Silliman of the Court of Military Commission Review should have recused himself from hearing an interlocutory appeal in the military commission trial of five Guantanamo detainees charged with direct responsibility for the 9/11 attacks, citing Silliman's earlier comments that indicated potential bias.

Aug. 10: Judge Amit Mehta of the U.S. District Court for the District of Columbia orders the State Department to make another attempt to locate Hillary Clinton's missing emails concerning the 2012 attack on the U.S. diplomatic compound in Benghazi, Libya. • Senator Charles Grassley of Iowa announces that he no longer expects an imminent U.S. Supreme Court vacancy, signaling that Justice Anthony Kennedy will not retire in 2017.

Aug. 11: White nationalists march through the University of Virginia campus chanting Nazi and white supremacist slogans. After scuffles with counter-protesters break out, Virginia State Police intervene to break up fighting.

Aug. 12: White nationalists carrying firearms, shields, sticks, and clubs descend on Charlottesville, Virginia for a planned "Unite the Right" rally. After fights break out and chaos erupts, local and state politicians and the Virginia State Police attempt to end the rally. In the aftermath, 20-year-old James Alex Fields, Jr. of Maumee, Ohio drives a car into a crowd of counter-protesters, fatally injuring 32-year-old Heather D. Heyer of Charlottesville.

Aug. 15: Uber settles the U.S. Federal Trade Commission's complaint alleging

that it failed to adequately protect its users' private information, agreeing to independent audits of its privacy program for the next 20 years. • Former Acting Solicitor General Neal Katyal and other lawyers for Arizona death row inmate Abel Daniel Hidalgo file a petition for a writ of certiorari asking the U.S. Supreme Court to take up a constitutional challenge to Arizona's death penalty.

Aug. 18: Maryland state officials remove a statue of former U.S. Supreme Court Chief Justice Roger B. Taney — author of the Court's infamous opinion in *Dred Scott v. Sandford* — from the statehouse lawn in Annapolis, Maryland overnight, citing public safety concerns (see Aug. 12 entry). • Vacating the conviction of a D.C. man for unlawful possession of a firearm, the U.S. Court of Appeals for the D.C. Circuit holds that police officers may not rely upon overly broad assumptions about mobile phone ownership, and the information stored on mobile phones, to support warrants to search criminal suspects' dwellings for such devices.

Aug. 19: Reversing Judge Jed Rakoff of the U.S. District Court for the Southern District of New York, the U.S. Court of Appeals for the Second Circuit holds in *Meyer v. Uber Technologies, Inc.* that Uber's "clickwrap" agreement with users is valid, and sends a plaintiff's price-fixing claim to arbitration.

Aug. 21: The University of Texas at Austin removes three Confederate monuments. Officials say the statues had become symbols of white supremacy and a source of confrontation in the wake of the violence in Charlottesville, Virginia (see Aug. 12 entry). • The U.S. Court of Appeals for the Fifth Circuit holds that Yahoo Inc. must pay $5.5 million to SCA Promotions Inc. after reneging on a contract to pay $1 billion to fans who predicted every winner in the 2014 NCAA March Madness men's basketball tournament.

Aug. 22: Mayor Greg Stanton of Phoenix, Arizona asks President Trump to postpone a local rally in light of the President's widely criticized response blaming "both sides" for racial violence in Charlottesville, Virginia. • Senior Judge A. Wallace Tashima of the U.S. Court of Appeals for the Ninth Circuit, sitting by designation in the U.S. District Court for the District of Arizona, holds that Arizona school officials violated the First and Fourteenth Amendment rights of students when they eliminated a Mexican-American studies course in Tucson public schools.

Aug. 23: The U.S. Court of Appeals for the Second Circuit upholds the conviction of Mathew Martoma, a former portfolio manager at SAC Capital who profited from illicit tips from a Michigan doctor on the progress of a clinical drug trial.

Aug. 24: Senator Jeff Flake of Arizona holds a hearing on his legislative proposal to split up the U.S. Court of Appeals for the Ninth Circuit.

Aug. 25: The U.S. Court of Appeals for the Seventh Circuit reverses certification of a proposed settlement class in *In re Subway Footlong Sandwich Marketing*

and Sales Practice Litigation, agreeing with "professional objector" Theodore Frank that the proposed settlement enriched lawyers without offering any meaningful benefit to the class. The lawsuit alleged that not all "footlong" sandwiches are actually a full foot long, depending on baking conditions.

Aug. 26: President Trump pardons Joe Arpaio, formerly Sheriff of Maricopa County, Arizona. Arpaio was convicted of criminal contempt for violating the terms of a 2011 court order in a racial profiling case.

Aug. 28: Displeased Showtime customers file a class action in Oregon seeking damages for their inability to watch a boxing match between Floyd Mayweather and Conor McGregor in the as-promised 1080p HD resolution. • The American Civil Liberties Union files a lawsuit in the U.S. District Court for the District of Maryland, challenging the Trump Administration's ban on transgender individuals serving in the military (see July 26 entry). • The U.S. Court of Appeals for the Ninth Circuit hears oral argument on the Trump Administration's "travel ban" after Judge Derrick Watson of the U.S. District Court for the District of Hawaii holds that the Administration is too narrowly interpreting the Supreme Court's interim order carving out from the ban's ambit those with a "bona fide relationship" with a U.S. person or entity (see Mar. 6, Mar. 15, Mar. 30, and June 26 entries).

Aug. 29: Illinois officials sue in the U.S. District Court for the Northern District of Illinois, seeking extensive judicial oversight and an independent court-appointed monitor to ensure that Chicago meets benchmarks for the reform of its policing policies. • Judge Jed Rakoff of the U.S. District Court for the Southern District of New York dismisses Sarah Palin's defamation lawsuit against the *New York Times*, holding that Palin — the subject of an editorial that drew links between her PAC's political advertisements and the shooting of U.S. Representative Gabby Giffords in 2011 — does not have a "plausible factual basis" for her claim. • In *Johnson v. Commission on Presidential Debates*, the U.S. Court of Appeals for the D.C. Circuit holds that the Commission on Presidential Debates did not violate the First Amendment or the Sherman Act when it excluded presidential candidates Gary Johnson and Jill Stein from the 2016 presidential debates.

Aug. 30: Judge Orlando Garcia of the U.S. District Court for the Western District of Texas grants a motion for a preliminary injunction blocking most of SB 4, a Texas "sanctuary cities" law which would subject local law enforcement agencies and officers to fines and potential criminal sanctions for failing to honor federal "detainer" requests. • The U.S. Court of Appeals for the Second Circuit holds that Jane Doe, a former West Point cadet who claims she was raped at the U.S. Military Academy, cannot sue senior military administrators in civilian courts for knowingly creating and tolerating a hostile environment toward women.

September 2017

Sept. 1: Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit announces his sudden retirement after a career that spanned over three decades and 3,300 opinions. Posner publicly states that his resignation was sparked by disagreement with his colleagues over the Court's treatment of pro se litigants. • The U.S. Court of Appeals for the Eleventh Circuit reverses an order granting the Alabama Department of Corrections' motion for summary judgment and finding disputed issues of material fact as to the constitutionality of using the sedative Midazolam in executions. • The U.S. Court of Appeals for the Seventh Circuit affirms a district court order dismissing the antitrust and breach of contract claims of rooftop bar owners who sued the Chicago Cubs to prevent construction of a scoreboard that blocked their view of Wrigley Field.

Sept. 5: Attorney General Jeff Sessions announces plans to end the Deferred Action for Childhood Arrivals or "DACA" program, calling it an "unconstitutional exercise of authority" and a "unilateral executive amnesty" that costs Americans jobs. • The U.S. Court of Appeals for the Fifth Circuit stays an injunction preventing Texas from implementing SB5, a voter identification law intended to remedy problems with an earlier Texas voter identification law, SB 14.

Sept. 6: Fifteen states and the District of Columbia sue the Trump Administration in the U.S. District Court for the Eastern District of New York, seeking to halt the termination of the DACA program and enjoin the federal government from using data gathered for the DACA program in immigration enforcement (see previous entry). • Facebook announces its discovery of fake accounts "likely operated out of Russia" that purchased thousands of digital advertisements during the 2016 presidential election directed towards "amplifying divisive social and political messages across the ideological spectrum." • Trial begins in the U.S. District Court for the Western District of Kentucky to determine whether the last remaining abortion clinic in the state can remain open. • The Board of Trustees of the State Bar of California votes to send recommendations on revisions to the California Bar Exam to the California Supreme Court, including proposals to lower the passing score for the first time in three decades.

Sept. 7: The U.S. Court of Appeals for the Ninth Circuit upholds a lower court's ruling blocking the Trump Administration from enforcing a travel ban against the grandparents and extended relatives of people in the United States and refugees recognized by resettlement agencies (see Aug. 28 entry). • In an apparent reversal of his decision to phase out the DACA program, President Trump announces via tweet that DACA beneficiaries "have nothing to worry about — No action!" • The Department of Justice submits an amicus brief in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, asking the Supreme Court to hold that the First Amendment protects "expressive conduct," including the design and creation of a "custom wedding cake."

Sept. 8: The FBI announces an investigation into a Utah police detective's assault and arrest of a nurse who refused to take a blood sample from an unconscious truck driver without a warrant or the driver's consent.

Sept. 11: The Department of Justice asks the Supreme Court to stay the ruling of the U.S. Court of Appeals for the Ninth Circuit blocking the Trump Administration from enforcing a travel ban against refugees recognized by resettlement agencies (see Sept. 7 entry). • Acting in his capacity as Circuit Justice for the U.S. Court of Appeals for the Ninth Circuit, Justice Kennedy grants the Department of Justice's motion for a stay of the Ninth Circuit's "travel ban" decision on an interim basis while the full Supreme Court considers the government's application. • The "monkey selfie" lawsuit pending in the U.S. Court of Appeals for the Ninth Circuit comes to an end after camera owner David J. Slater agrees to donate 25 percent of the revenue associated with a selfie taken by Naruto, an Indonesian crested macaque, to charitable organizations that protect the monkeys.

Sept. 12: The Department of Justice announces that it will not bring charges against Baltimore police officers involved in the 2015 injury and death of Freddie Gray. • After Justice Anthony Kennedy refers the Department of Justice's application for a stay of the U.S. Court of Appeals for the Ninth Circuit's mandate to the full U.S. Supreme Court, the Court stays the order holding that refugees with promises of sponsorship from resettlement agencies are not subject to the Trump Administration's "travel ban." • The Supreme Court stays the order of a three-judge panel of the U.S. District Court for the Western District of Texas requiring Texas to redraw congressional and state legislative districts.

Sept. 13: Judge Kiyo Matsumoto of the U.S. District Court for the Eastern District of New York revokes "Pharma bro" Martin Shkreli's bail after Shkreli offers a $5,000 reward for a strand of Hillary Clinton's hair on Facebook (see Aug. 4 entry).

Sept. 15: Judge Harry Leinenweber of the U.S. District Court for the Northern District of Illinois issues a nationwide injunction blocking Attorney General Jeff Sessions' attempt to deny federal grants to jurisdictions that refuse to cooperate with immigration enforcement agencies (see Aug. 7 entry). • The U.S. Court of Appeals for the Ninth Circuit reverses a lower court ruling striking down California's ban on foie gras, a key component of certain patés, holding that the federal Poultry Products Inspection Act did not preempt California from regulating the way in which certain animals are fed. • The U.S. Court of Appeals for the Seventh Circuit hears oral argument in *Segovia v. United States*, an equal protection challenge that addresses the ability of residents of Guam, Puerto Rico, and the U.S. Virgin Islands to vote absentee in their former state of residence.

Sept. 16: Judge Brian Cogan of the U.S. District Court for the Eastern District of New York rejects the request of accused drug lord Joaquin "El Chapo" Guz-

man to dismiss his case on procedural grounds, holding that Guzman had no legal right to challenge his indictment, to which Mexico did not object (see Aug. 7 entry). • Judge Steven O'Neill of the Montgomery County, Pennsylvania Court of Common Pleas sets an Apr. 2, 2018 date for the retrial of comedian Bill Cosby on sexual assault charges (see June 17 entry).

Sept. 19: The U.S. Senate confirms Noel J. Francisco as Solicitor General (see Mar. 7 entry). • The U.S. Court of Appeals for the Second Circuit reverses an order by the U.S. District Court for the Southern District of New York that dismissed a defamation lawsuit filed by former members of the Phi Kappa Psi fraternity at the University of Virginia, holding that the fraternity members' case sufficiently pleaded that *Rolling Stone* magazine and author Sabrina Erdely's allegedly defamatory statements were "of and concerning" them.

Sept. 24: President Trump, citing national security concerns, signs a new Executive Order imposing travel restrictions on citizens of Iran, Libya, Syria, Yemen, Somalia, Chad, Venezuela, and North Korea, effective Oct. 18, 2017 (see Aug. 28 entry).

Sept. 25: The Supreme Court removes challenges to the Trump Administration's travel restrictions from its oral argument calendar and requests briefing as to whether President Trump's issuance of a superseding Executive Order renders the pending cases moot (see prior entry). • Judge Denise Cote of the U.S. District Court for the Southern District of New York sentences former U.S. Representative and New York mayoral candidate Anthony Weiner to 21 months in federal prison after Weiner pleads guilty to one charge of transferring obscene material to a minor. • In *American Civil Rights Union v. Philadelphia City Commissions*, the U.S. Court of Appeals for the Third Circuit affirms the dismissal of a lawsuit seeking to require Philadelphia to purge incarcerated registered voters convicted of felonies from its voter rolls, holding that the National Voter Registration Act "was intended as a shield to protect the right to vote, not as a sword to pierce it."

Sept. 26: The Department of Justice petitions the U.S. Court of Appeals for the D.C. Circuit for rehearing en banc to review a panel's reversal of the convictions and sentencing of Blackwater employees involved in the massacre of 14 unarmed Iraqi civilians. • The U.S. Court of Appeals for the Fifth Circuit issues a partial stay of a district court injunction preventing Texas from fully implementing a law targeting "sanctuary cities," permitting certain portions of the law to go into effect (see Aug. 30 entry). • The U.S. Court of Appeals for the Second Circuit hears oral argument in *Zarda v. Altitude Express, Inc.*, in which lawyers from the Department of Justice argue that Title VII of the Civil Rights Act of 1964 does not extend protections to workers who face discrimination on the basis of sexual orientation. • U.S. Senate candidate and former Alabama Supreme Court Chief Justice Roy S. Moore defeats U.S. Senator Luther Strange in a special runoff election following the Republican primary election.

Sept. 27: The National Football League asks the U.S. Court of Appeals for the Fifth Circuit for an emergency stay of a district court's order enjoining the League from enforcing Dallas Cowboy Ezekiel Elliott's suspension in connection with an Ohio domestic violence case.

Sept. 28: U.S. Supreme Court Justice Neil Gorsuch draws criticism for delivering a keynote address to the Fund for American Studies at the Trump International Hotel in Washington, DC, a property held through LLCs and a revocable trust by President Trump. • Longtime *Green Bag* editor and former Texas Solicitor General James C. Ho is nominated to serve as a judge on the U.S. Court of Appeals for the Fifth Circuit.

Sept. 29: The Securities and Exchange Commission charges Maksim Zaslavskiy and his two companies, REcoin Group Foundation and DRC World, with defrauding investors and selling unregistered securities in two initial coin offerings, a strategy to raise money by issuing a proprietary cryptocurrency. • The U.S. Court of Appeals for the Fifth Circuit overturns a $663 million judgment against Trinity Industry Inc., the makers of highway guardrail safety systems, holding that Trinity did not defraud the government by certifying its guardrail design and making modifications to that design without informing the federal government.

October 2017

Oct. 1: O.J. Simpson is released from a Nevada prison after serving a nine-year sentence for a conviction relating to an attempted armed robbery in a Las Vegas, Nevada casino (see July 20 entry).

Oct. 2: The U.S. Supreme Court begins the 2017 Term by hearing oral argument in *Ernst & Young LLP v. Morris* and consolidated cases (regarding whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement of clauses requiring employees to arbitrate claims on an individual basis), and *Sessions v. Dimaya* (regarding whether certain provisions of the Immigration and Nationality Act governing removal are unconstitutionally vague). • The U.S. Court of Appeals for the Ninth Circuit holds that immigration judges must consider a detained immigrant's ability to pay when setting bonds in hearings.

Oct. 3: The Supreme Court hears oral argument in *Gill v. Whitford*, a challenge to partisan gerrymandering in drawing maps for legislative districts. • The criminal trial of Ahmed Abu Khatallah, the alleged mastermind of the 2012 attack on the U.S. diplomatic compound in Benghazi, Libya, begins in the U.S. District Court for the District of Columbia. • Vacating a district court's entry of summary judgment for defendant "bare metal" manufacturers, the U.S. Court of Appeals for the Third Circuit holds in *In re Asbestos Products Liability Litigation* that such manufacturers can be held liable for asbestos-related injuries in maritime cases.

Oct. 4: The U.S. Court of Appeals for the First Circuit hears oral argument in *McKee v. Cosby*, in which an actress who accused comedian Bill Cosby of raping her seeks reversal of a district court order dismissing her defamation claims.

Oct. 5: California Governor Jerry Brown signs "sanctuary state" legislation barring local police from asking detainees about their immigration status or coordinating with federal immigration enforcement operations. • Federal lawmakers debate a ban on firearm "bump stocks" in the wake of a deadly mass shooting in Las Vegas, Nevada. • The *New York Times* publishes an exposé on Harvey Weinstein detailing his settlement of at least eight sexual harassment and unwanted physical touching claims over three decades. • The U.S. Court of Appeals for the Federal Circuit vacates a district court's entry of a permanent injunction enjoining sales of Sanofi S.A. and Regeneron Pharmaceuticals Inc.'s cholesterol control drug, Praluent, and orders a new trial after determining that the district judge delivered improper instructions to the jury.

Oct. 6: The U.S. Department of Health and Human Services issues two new rules targeted at eliminating a federal requirement that employers include coverage for contraceptives in their employee health insurance plans. • In policy guidance issued to federal agencies and prosecutors, Attorney General Jeff Sessions details the Department of Justice's position that workers, employers, and other groups may use religious objections to claim broad exemptions from laws punishing discrimination.

Oct. 10: In a one-page order, the Supreme Court vacates a judgment of the U.S. Court of Appeals for the Fourth Circuit and dismisses a challenge to the Trump Administration's Executive Order on travel restrictions as moot, given the expiration of the part of the Executive Order at issue in the case. • The en banc U.S. Court of Appeals for the Ninth Circuit affirms a district court order dismissing a challenge to the County of Alameda's prohibition on firearm sales near residentially-zoned districts, schools and day-care centers, other firearm retailers, and liquor stores.

Oct. 11: Plaintiffs file a Nevada class action against Slide Fire Solutions and other "bump stock" manufacturers, seeking damages for people who witnessed or were injured in the Oct. 1, 2017 mass shooting at a Las Vegas concert. • U.S. Senator Charles Grassley, Chairman of the Senate Committee on the Judiciary, announces that he does not intend to change the "blue slip" procedure for judicial nominees, a tradition that conditions advancement of such nominations on the approval of home-state U.S. senators, regardless of party. • The U.S. Supreme Court hears oral argument in *Jesner v. Arab Bank*, a case testing the limits of corporate liability for human rights violations under the Alien Tort Statute.

Oct. 12: The New York City Police Department opens a criminal investigation into movie mogul Harvey Weinstein after multiple women accuse him of sexual harassment and unwanted touching. • The U.S. Court of Appeals for the Fifth

Circuit vacates a district court's preliminary injunction enjoining the National Football League from enforcing Dallas Cowboy Ezekiel Elliott's suspension, remanding the case to the district court for dismissal and paving the way for the League to immediately implement Elliott's suspension. The Elliott-less Cowboys would lose to the Philadelphia Eagles 37-9 on Nov. 19, as the Eagles steamrolled their way to a 13-3 record and a first Super Bowl Championship.

Oct. 13: After President Trump announces that he will end cost-sharing reduction payments to insurers under the Affordable Care Act, which help lower-income enrollees pay for health care, Democratic attorneys general of 18 states sue the Trump Administration to block the proposed cuts.

Oct. 16: The founders of opposition research firm Fusion GPS refuse to comply with subpoenas issued by the House Intelligence Committee seeking to force the firm to divulge the funders of the "Trump dossier" compiled by former British intelligence officer Christopher Steele during the 2016 election. U.S District Judge Richard Leon will issue an order enforcing the subpoenas in Jan. 2018. • President Trump criticizes Senate Democrats for slowing the pace of judicial confirmations, saying that his nominees are "some of the most qualified people" but are "waiting forever on line . . . it's not right, it's not fair." • During a military hearing at Fort Bragg in North Carolina, U.S. Army Sergeant Bowe Bergdahl pleads guilty to abandoning his post while serving in Afghanistan. • A Southern District of New York jury convicts Ahmad Khan Rahimi of New Jersey on charges associated with his September 2016 planting of two bombs in the Chelsea neighborhood of Manhattan. • Judge William H. Walls of the U.S. District Court for the District of New Jersey denies U.S. Senator Robert Menendez's motion to dismiss criminal bribery charges, holding that the U.S. Supreme Court's decision in *McDonnell v. United States* is not dispositive of the charges at issue in Menendez's case. • The U.S. Supreme Court grants the Department of Justice's petition for a writ of certiorari and agrees to hear *United States v. Microsoft*, a case in which the U.S. Court of Appeals for the Second Circuit held that federal prosecutors could not use a warrant to compel Microsoft to produce data stored overseas.

Oct. 17: Judge Derrick Watson of the U.S. District Court for the District of Hawaii grants the State of Hawaii's motion for a temporary restraining order preventing enforcement of the Trump Administration's third "travel ban," holding that it "plainly discriminates based on nationality in the manner that the Ninth Circuit has found antithetical to . . . the founding principles of this nation." • The Missouri Court of Appeals for the Eastern District vacates a $72 million jury verdict against Johnson & Johnson in a talc products liability case, applying the U.S. Supreme Court's holding in *Bristol-Myers Squibb Co. v. Superior Court of California* to order dismissal of the case for lack of personal jurisdiction.

Oct. 18: The California Supreme Court announces that it will not lower the passing score for the state's bar exam, noting that it is "not persuaded that the relevant information and data developed at this time weigh in favor of departing from the longstanding pass score of 1440."

Oct. 19: The U.S. Court of Appeals for the Fourth Circuit holds that a 40-foot-tall, cross-shaped war memorial on public land in Bladensburg, Maryland has the primary effect of endorsing religion and excessively entangles the government in religion in violation of the Establishment Clause. • The U.S. Court of Appeals for the Second Circuit reverses and remands a district court's order denying the Department of Justice's motion to dismiss hedge fund manager David Ganek's complaint against the Federal Bureau of Investigation, holding that the Bureau had good cause to search the offices of Ganek's Level Global Investors, even if it made false statements in securing a warrant.

Oct. 20: Judge Susan Bolton of the U.S. District Court for the District of Arizona denies ex-Maricopa County Sheriff Joe Arpaio's motion to vacate his criminal contempt conviction, holding that President Trump's pardon of Arpaio spared him from any punishment but did not "erase a judgment of conviction, or its underlying legal and factual findings" (see Aug. 26 entry). • The U.S. Court of Appeals for the D.C. Circuit sets an 11-day deadline for government officials to identify a sponsor to take custody of Jane Doe, an undocumented teenager being held in federal custody in Texas, and bring her to an abortion clinic. • Judge Maren E. Nelson of the Superior Court of California for the County of Los Angeles enters judgment notwithstanding the verdict for Johnson and Johnson, setting aside a $417 million jury verdict and holding that plaintiffs failed to satisfy their burden to demonstrate that talc and talc products cause ovarian cancer. • Japanese software company Emonster k.k. sues Apple in the U.S. District Court for the Northern District of California, alleging that Apple deliberately infringed its trademark in the word "animoji." • Three Texas men are charged with attempted murder after firing a gun in the direction of protesters following white nationalist Richard Spencer's controversial speech at the University of Florida, Gainesville.

Oct. 23: The U.S. Court of Appeals for the Ninth Circuit reverses a district court decision and holds that Montana's limits on the amount of money individuals, political action committees, and political parties may contribute to candidates for state elective office are constitutional and serve a state interest in preventing actual or apparent quid pro quo corruption in politics.

Oct. 24: The U.S. Supreme Court dismisses the last remaining appeal challenging the Trump Administration's "travel ban," vacating a judgment of the U.S. Court of Appeals for the Ninth Circuit as moot, given the expiration of the part of the Executive Order at issue in the case (see Sept. 7 entry). • The Senate votes 51-50 to invoke the Congressional Review Act for the 15th time in 2017, this

time to overturn a July 2017 regulation issued by the Consumer Financial Protection Bureau that sought to restrict the use of arbitration agreements.

Oct. 25: The en banc U.S. Court of Appeals for the D.C. Circuit vacates a panel ruling from the prior week and allows an undocumented teenager in federal government custody to have an abortion immediately (see Oct. 20 entry).

Oct. 27: The Supreme Court of Ohio holds that a state law requiring HIV positive individuals to disclose their diagnosis before engaging in sexual activity with others does not violate the First or Fourteenth Amendments of the U.S. Constitution. • In United States v. Johnson, the en banc U.S. Court of Appeals for the Seventh Circuit affirms a district court's order denying a motion to suppress evidence of a firearm obtained during a police search of a car allegedly parked too close to a cross-walk, prompting three dissenting judges to characterize the majority as "enabling seizures that can be used for 'parking while black.'" • In the wake of the Trump Administration's decision to eliminate a federal requirement that employers include coverage for contraceptives in employee health insurance plans, the University of Notre Dame announces that its employees will no longer receive no-cost coverage for contraception (see Oct. 6 entry).

Oct. 30: A Washington, DC grand jury indicts former Trump Campaign Chairman Paul Manafort and business associate Rick Gates, who plead not guilty to a series of charges including conspiracy against the U.S. • Unsealed court documents reveal that, as part of a cooperation agreement with Special Counsel Robert Mueller, former Trump Campaign adviser George Papadopoulos secretly pleaded guilty to lying to federal agents about his contacts with Russian officials and their proxies.

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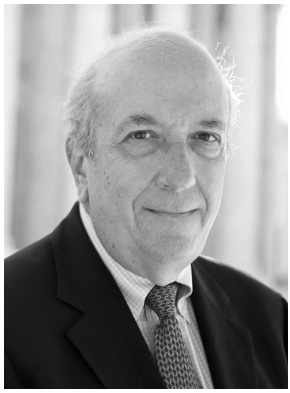
> In a matter of real estate, public policy requires, above that of personal, that a controversy should be at rest, and this for the sake of the improvement of the country, and the interest *reipublicæ ut sit finis litium* . . . . And why judicial tribunals, unless for the sake of the bar, should be disposed, contrary to what the parties themselves intend or expect, at the entering of a rule of reference in ejectment, to put it upon the rubber, as the whist players do, and not upon the game, is what I cannot comprehend.
>
> *Hugh H. Brackenridge (dissenting)*
> *Duer v. Boyd, 1 Serg. & Rawle 202, 214-15 (Pa. 1814) (3d ed. 1872)*



Tony Mauro[†]

A Year in the Life of the Supreme Court

2017

A summary of developments involving the U.S. Supreme Court, most of which are unlikely to be memorialized in the United States Reports.

Without a Hitch, and Mostly Hatless: The inauguration of President Donald Trump on January 20 went smoothly, at least from the justices' perspective. Chief Justice John Roberts Jr. slowly led Trump in reciting the oath of office, then shook Trump's hand and offered a hearty "Congratulations, Mr. President." In 2009, Roberts and then-new President Barack Obama stepped on each other's lines and got some of the words of the oath out of order, prompting a do-over the following day. As for the closely-watched skullcap count: at the beginning, Justice Stephen Breyer was the only member of the court wearing the traditional black head covering. Later, as it began to rain, Justice Anthony Kennedy also donned a similar cap.

Gorsuch Named to Join Court Where He Clerked: On January 31, President Trump announced he would nominate Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to succeed the late Justice Antonin Scalia. Trump made the announcement in a primetime television broadcast from the White House, extolling Gorsuch's "outstanding legal skills" and "brilliant mind." Nom-

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inating Gorsuch added a record fourth former law clerk to the Supreme Court, joining Roberts (who clerked for William Rehnquist), Breyer (Arthur Goldberg), and Elena Kagan (Thurgood Marshall). Gorsuch is the first to work alongside the justice for whom he clerked (Kennedy). After four days of confirmation hearings in March, the Senate confirmed his nomination on April 7 by a 54-45 vote.

Scalia's Papers Head to Harvard Law School: The family of the late Justice Scalia announced March 6 that his extensive papers would be lodged at Harvard Law School, his alma mater. Library officials said certain materials would begin to be made public in 2020, adding that probably for the first time, a justice's digital documents would be included along with several hundred boxes of paper materials. Scalia's widow Maureen and son Eugene were present as the donation was announced at the law school. "Nino and I met as students in Cambridge, when he was at the Law School and I at Radcliffe. Our visits back to Harvard together always felt like a homecoming, particularly in recent years," Maureen Scalia said.

Meet Kagan's Aunt Tessa Dent: Showing that scholarly research about Supreme Court oral arguments has grown to new heights — or depths — Regent University School of Law professor James Duane on March 30 posted a law review article examining a justice's odd pronunciation during a 2015 oral argument in *Lockhart v. United States*, which he happened to attend with his students. He did not name names, but by listening to the oral argument audio, it was clear that he was writing about Justice Kagan. Three times during the argument, she made reference to an antecedent clause in the statute at issue, but pronounced "antecedent" as "an-TESS-a-dent." Duane wrote, "It sounded like the justice was mentioning some relative named Aunt Tessa Dent." It was not Duane's first foray into Supreme Court pronunciation skills. In 2014, he wrote an article revealing the six different ways in which justices pronounce the word "certiorari."

No Rookie Shyness: On April 17, his first day hearing oral arguments at the Supreme Court, Justice Gorsuch asked 22 questions — considerably more than his colleagues asked during their respective debuts. He apologized at one point for taking up too much time, but kept on going, including some sarcastic remarks aimed at advocates that displayed his textualist tendencies. When one lawyer said, "We're not asking this court to break any new ground," Gorsuch's quick reply was. "No, just to continue to make it up." At another point, he asked, "Wouldn't it be a lot easier if we just followed the plain text of the statute? What am I missing?" Chief Justice Roberts began the session by welcoming Gorsuch: "We wish you a long and happy career in our common calling."

Breyer's Cellphone Interruptions: During oral argument on April 25, Justice Breyer's cellphone rang, giving spectators a chance to watch as the justice frantically punched buttons to make the noise stop. A court spokeswoman said, "He doesn't usually bring his phone and he forgot." The episode made it clear that

justices don't have to pass through a metal detector before entering the court chamber, unlike everyone else. After Breyer's faux pas happened a second time, a metal detector was installed for the justices. But was it real? During a public appearance, Justice Ruth Bader Ginsburg revealed that it was only a "replica" of a metal detector, apparently intended as a visual reminder for incoming justices to shed their electronic devices.

When Michelle Wanted Barack to Clerk for Supreme Court: Historian David Garrow's epic biography of Barack Obama's pre-presidential years, titled *Rising Star: The Making of Barack Obama*, published in May, gave new detail to Obama's reluctance about becoming a Supreme Court law clerk. Obama became the first African-American president of the *Harvard Law Review* in 1990. Then as now, that title would have unquestionably paved the way for an appeals court clerkship, followed by a Supreme Court clerkship. Then-D.C. Circuit Judge Abner Mikva, a noted feeder judge, made him an offer, but he refused. According to the book, when Obama's future wife Michelle Robinson heard about it, she told Obama, "You're not going to clerk for them? You're kidding me." Obama's reply was, "No, that's not why I went to law school. If you're going to make change, you're not going to do it as a Supreme Court clerk."

A Case of Mistaken Identity: On May 30, the Supreme Court issued an unusual order: "Due to mistaken identity, the order suspending Christopher Patrick Sullivan of Boston, Massachusetts from the practice of law in this Court, dated May 15, 2017, is vacated and the Rule to Show Cause issued on that date is discharged." There are at least five lawyers named Christopher Sullivan in Boston, and the court picked the wrong one to disbar. The Sullivan who received the disbarment notice alerted the court, which confessed error. It happened again on November 27, when a James Robbins of New York was mistakenly disbarred.

Gorsuch's First Opinion: By tradition, a new justice's first writing assignment is a relatively straightforward case likely to yield a unanimous decision. That is just what happened on June 12, when his opinion for the court in *Henson v. Santander Consumer USA* was handed down. The court was unanimous in the case interpreting the Fair Debt Collection Practices Act. Gorsuch used plain language throughout, as well as a touch of alliteration in the first sentence: "Disruptive dinnertime calls, downright deceit, and more besides drew Congress's eye to the debt collection industry."

Mixed Reviews for Court's Website: The court updated its website on July 28, making it easier to view on mobile devices and paving the way for electronic filing of court documents. There were some glitches, however. When it first popped up, the text was in blue and the background was scarlet. "My eyes are bleeding, this is the worst thing ever," one critic said on Twitter. Soon, the site reverted to black type on a white background.

No Take-down for Taney: In the wake of the violence in Charlottesville in August, public officials were pressured to take down representations of historical figures who fostered slavery. Statues and busts of Roger Taney — Chief Justice from 1836 to 1864 and author of the lead opinion in the infamous *Dred Scott* case (1857) — were removed his native Maryland, but at the Supreme Court, depictions of Taney are still visible. A marble bust of Taney, along with busts of all chief justices through history, is displayed in the Great Hall located in front of the court's chamber. Taney's portrait hangs in the court's oak-paneled east conference room, also accompanied by paintings of other chief justices. The court was mum on the subject.

Museum Gives a Nod to Justice Thomas: When the Smithsonian Institution's National Museum of African American History and Culture opened on the National Mall in September 2016, conservative leaders voiced anger that the only mention in the museum of Justice Clarence Thomas — the second African-American justice in history — was in a display about Anita Hill's claims that he sexually harassed her. With little fanfare, in September 2017 the museum installed a new display that featured both Thomas and Thurgood Marshall, the first black justice. In a December radio interview, the museum's director Lonnie Bunch III said, "It wasn't an omission," adding that the museum is "not a hall of fame. There are stories that are not going to be told." But Bunch said he was inspired to add the new exhibit by Chief Justice Roberts, who also serves as the chancellor of the Smithsonian. Bunche said that at the opening ceremony for the museum, Roberts "talked powerfully about the role the Supreme Court has played" — good and bad — in the lives of African-Americans.

Justices Fortify Their Opposition to Broadcasting Arguments: Four members of Congress urged the Supreme Court to allow live audio access for the argument in October in the high-profile gerrymandering case *Gill v. Whitford*. But in an October 2 letter, counselor to the chief justice Jeffrey Minear said, "the court is unable to accommodate your request." Minear also wrote, "The Chief Justice appreciates and shares your ultimate goal of increasing public transparency and improving public understanding of the Supreme Court." But, Minear added, "I am sure you are, however, familiar with the Justices' concerns surrounding the live broadcast or streaming of oral arguments, which could adversely affect the character and quality of the dialogue between the attorneys and Justices." The letter seemed to foreclose live broadcast and streaming of court proceedings for the foreseeable future.

"RBG Workout" Gives New Meaning to Habeas Corpus: A book published in October by Justice Ginsburg's personal trainer bolstered her oft-repeated assertion that she is not considering retirement anytime soon. The book, titled *The RBG Workout: How She Stays Strong . . . and You Can Too!*, tells the story of Ginsburg's post-cancer drive to regain her strength and stamina through rigorous workouts.

Asked recently to identify the most important person in her life, Ginsburg's reply was "My personal trainer," namely the author, Bryant Johnson. "Any judge should be familiar with the Latin term habeas corpus — literally, you have the body," Johnson wrote in his book. "However, many of them still needed to be reminded that you have a body, and in order for it to take care of you, you have to take care of it."

Better Late Than Never, E-Filing Begins: The Supreme Court, avowedly slow at adopting new technology, launched electronic filing for practitioners on November 13. Common at most other courts, electronic filing was a big step for the court, and it gave the justices a rare chance to boast that they were enhancing transparency by allowing the public to view court documents without cost on the court's website. Early filers said there were few glitches, and it soon became commonplace for the public to download briefs and other court documents with ease. Even Wilson-Epes Printing, which has been printing Supreme Court briefs unelectronically for 76 years, has embraced the new system — probably because the court still wants printed versions of documents that are filed electronically.

Supreme Court Law Clerks, Still Mostly White and Male: Research conducted by *The National Law Journal* and published December 11 found that since 2005 — when the Roberts court began — 85 percent of all law clerks have been white. Only 20 of the 487 clerks hired by justices were African-American, and nine were Hispanic. Twice as many men as women gain entry, even though as of 2016, more than half of all law students are female. The numbers showed near-glacial progress since 1998, when *USA Today* and this reporter undertook the first-ever demographic study of Supreme Court clerks, revealing the dearth of minorities. All nine justices declined requests by the publication to discuss the topic.

"Table for 9" — A Supreme Cookbook: In December, the Supreme Court Historical Society published a book aptly named *Table for 9*, recounting the history of the court's tradition of dining (or lunching) together, and including several recipes. The author is Clare Cushman, the Supreme Court Historical Society's publications director, whose previous books have also chronicled the human side and biographies of justices through history. Included are photos of a teenage Sandra Day (the future Justice O'Connor) eating lunch out in a field with ranch hands at the Lazy B Ranch; Antonin Scalia showing off his hunting prowess; Sonia Sotomayor cooking Chinese food while a student at Yale Law School; Warren Burger eating a formal lunch alone in his chambers; and justices admiring a 28-pound king salmon that Stephen Breyer caught while at an Alaska bar association meeting in 2001.

Year-End Report — Judiciary "Not Immune" to Harassment Concerns: Without mentioning Judge Alex Kozinski by name, Chief Justice Roberts on December

31 decried sexual harassment in the workplace and said the problem warrants "serious attention from all quarters of the judicial branch." Roberts discussed the issue in his annual year-end report, just weeks after Kozinski, former chief judge of the U.S. Court of Appeals for the Ninth Circuit, abruptly retired amidst reports of his unwelcome and sexually charged conversations and physical interactions with women. "Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace," Roberts wrote, "and events in the past few weeks have made clear that the judicial branch is not immune." Roberts spelled out his previously announced plan to assemble a "working group" to examine whether changes are needed in the federal judiciary's codes of conduct and guidance to employees "on issues of confidentiality and reporting of instances of misconduct," as well as "our rules for investigating and processing misconduct complaints."

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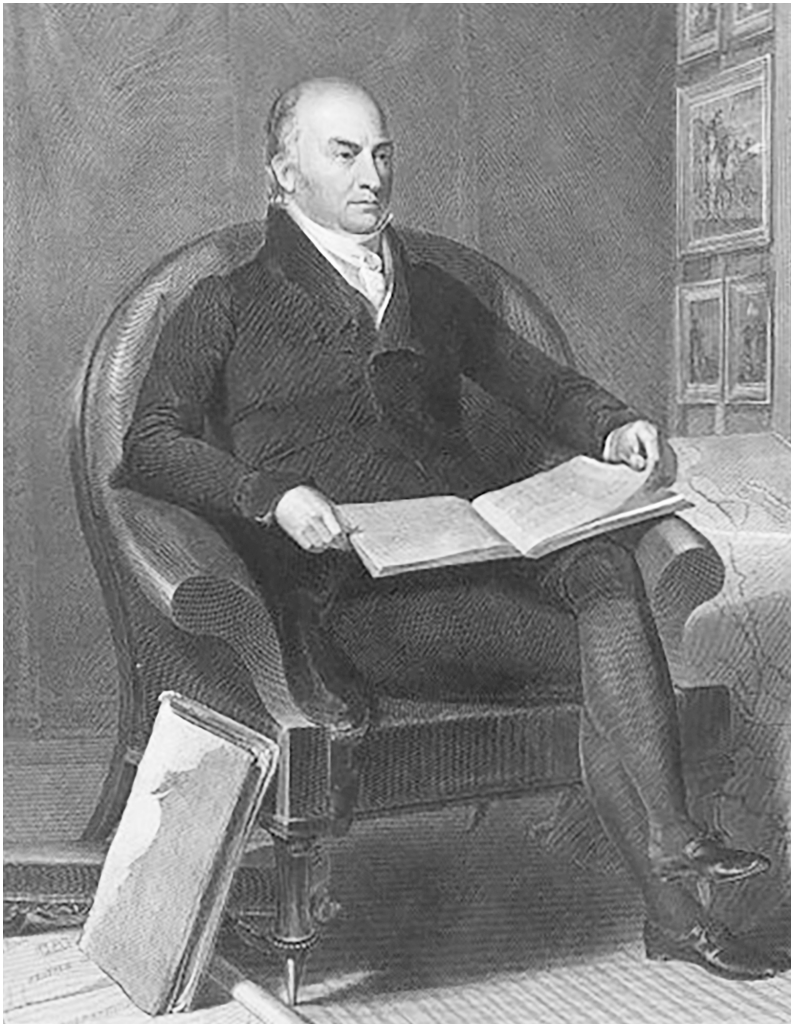

"After tea we adjourned to Bartlett's tavern, where we amused ourselves with cards till 11 at night and then went to supper. The company consisted of Captain Thomas, Mr. Russell, H. Warren, Sever, Vose Lloyd, and me. . . . Cards were again proposed; at three in the morning the travellers retired, and left the other four at whist, where they continued, till an hour after Sun rise."

John Quincy Adams Diary
(Apr. 19, 1787)

Founders Whist

Gregory F. Jacob[†]

"I find you don't really know a man
until you play cards with him."
— Arnold Rothstein[1]

Every high school student learns in civics class that the structural Constitution — separation of powers, federalism, checks and balances, *trias politica* — is part of the core genius bequeathed to us by our Founding Fathers as a bulwark against tyranny and the guarantor of ordered liberty under our republican form of government. And every law student taking a course in constitutional law quickly discerns that our nation's finest legal minds have spent countless hours over the last two centuries poring through ratification debate notes, the *Federalist Papers*, personal correspondence, and just about anything else they can get their hands on in an effort to divine the intended meaning of the 4,543 words of which the adopted Constitution and its preamble are composed.

Why, then, have legal scholars paid so inexplicably little attention to Whist — the game that virtually every Founding Father knew and played, and that must surely have molded their foundational understandings of strategy, signaling effects, and the manner in which opposing powers identify weakness and assert strength in pursuit of a desired objective? The stakes may never have been higher than they were in Philadelphia in the summer of 1787, but it was at their whist tables that the Framers learned how to play for stakes. Nor should it be forgotten that one of the more intolerable sins of the Stamp Act of 1765, which so fanned the early revolutionary flames, was that it had the temerity to tax the colonists' *playing cards*.[2]

Do you want to glean the meaning of the *Federalist Papers*? James Madison played whist on a regular basis while he was preparing for the Constitutional Convention,[3] and Alexander Hamilton frequently attended social functions at

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[1] "All In," *Boardwalk Empire*, Season 4, Episode 4 (air date Sept. 29, 2013).

[2] Stamp Act, 5 Geo. 3, c. 12 § 1 (1765) ("And for and upon every Pack of Playing Cards, and all Dice, which shall be sold or used within the said Colonies and Plantations . . . the sum of One Shilling.").

[3] Alison L. Lacroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 Law & History Review 451, 462 (2010) ("Despite some initial misgivings about the prospect of tinkering with the Republic's foundational document, Madison spent his days and nights (aside from the occasional evening game of whist) searching for answers in the experiences of other confederacies."); Ralph Louis Ketcham, *James Madison: A Biography* at 184-85 (paperback ed. 1990) ("Madison's intense study at Montpelier in 1786, after his sparse breakfasts and before the evening games of whist for half bits, left him as well informed on the workings of confederate governments as any man in America.").

which whist was prominently featured;[4] between them they authored 80 of the 85 *Federalist Papers*. Do you consider yourself an Article II aficionado? Perhaps not as much as you think: Washington,[5] Adams,[6] Jefferson,[7] Madison, Monroe,[8] and John Quincy Adams[9] were all well-versed in whist, and unless you are too, can you assert with confidence that you truly understand the way these formative Presidents thought about the exercise of executive power? Or maybe you care more about keys and kites, and apocryphal debates about whether the turkey or the eagle would better represent our fledgling nation's character? Benjamin Franklin not only played whist, he also printed and sold the playing cards.[10]

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[4] Ron Chernow, *Alexander Hamilton* at 528 (2004) ("The Churches' parties featured whist, loo, and games of chance. A guest at these soirees, Hamilton probably drew the attention of gossips who saw him mooning around Angelica's adoring gaze.").

[5] James McManus, *Cowboys Full: The Story of Poker* at 71 (2009) ("Between 1772 and 1775, George Washington kept detailed records of his whist results. For one of the wealthiest men in Virginia, the biggest loss was £6; his biggest win, £13, came in a game at Annapolis."); Paul Leicester Ford, *The True George Washington* at 198-99 (1896) ("Washington was fond of cards, and in bad weather even records 'at home all day, over cards.' . . . In 1748, when he was sixteen years old, he won two shillings and threepence from his sister-in-law at whist and five shillings at 'Loo' (or, as he sometimes spells it, 'Lue') from his brother, and he seems always to have played for small stakes, which sometimes mounted into fairly sizable sums.").

[6] Letter from Abigail Adams to Royall Tyler, Jan. 4, 1785, *available at* www.masshist.org/publications/apde2/view?id=ADMS-04-06-02-0015 (last viewed Feb. 9, 2018) ("As soon as that is removed the table is coverd with mathamatical instruments and Books and you hear nothing till nine oclock but of Theorem and problems besecting and desecting tangents and Se[quents?] which Mr. A is teaching to his son; after which we are often called upon to relieve their brains by a game of whist.").

[7] We cannot say for certain whether Thomas Jefferson played whist himself, but we do know that he was at least familiar with the game, as he had a copy of *Hoyle's Games* in his library. James Gilreath & Douglas L. Wilson eds., *Thomas Jefferson's Library: A Catalog with the Entries in His Own Order* at 50 (2008) (listing "Hoyle's games" among his collection of books on "History — Natural. Occupations of Man. Technical Arts."); *Catalogue of the Library of Congress* at 99 (1830) (listing "Hoyle's Games, 12mo; London, 1747"). On the other hand, Jefferson's great-granddaughter, Martha Jefferson Trist Burke, recorded in her 1896 catalog of Jefferson's belongings that he owned "1 Silver pencil case made to hold a cedar pencil, & with a 'Whist' marker on it, altho' Mr. Jefferson never learned any game of cards, & did not know one card from another." Burke notes (Jan. 12-13, 1896), at tjrs.monticello.org/sites/default/files/pdf/filekhXOmi (last viewed Feb. 9, 2018). Considering that Burke was only two years old when Jefferson died, it may reasonably be questioned how reliable her information concerning Jefferson's knowledge of card games was.

[8] Harlow Giles Unger, *The Last Founding Father: James Monroe and a Nation's Call to Greatness* at 54 (2009) ("Monroe was an avid player of whist, poker, chess, checkers, and dominoes. Although he did not document his gambling, he proved a consistent winner and [John] Marshall's account books show at least one loss of £19 pounds [about $1,200 today] to Monroe at whist.").

[9] Charles Francis Adams ed., *Memoirs of John Quincy Adams, Comprising Portions of His Diary from 1795 to 1848* at 15 (1874) ("In the evening we played a rubber of whist."); *id.* at 60 ("Mr. Clay and myself played whist with the Intendant's lady and Madame de Crombrugge."); William J. Cooper, *The Lost Founding Father: John Quincy Adams and the Transformation of American Politics* (2017) ("Louisa Adams now kept her distance from political activity. Her husband often played whist, a card game he savored.").

[10] McManus, *supra* n.5, at 71 ("In the capital, Philadelphia, Franklin noted that whist was played

Is Article III more your style? John Marshall was a player.[11] Or perhaps you care more about musical theater, and are simply dying to know (a la *Hamilton*) just what really took place in "the room where it happened"? With Madison, Jefferson, and Hamilton the key players, it's a fair bet it involved a game of whist.

So where can we turn to fill this gaping hole in legal scholarship? The available primary sources indicate that an overwhelming number of key Founding Fathers played whist, but none of those sources say a word about the then-operative rules of the game or how it was played. Further complicating matters, whist is one of those popular games that evolved substantially over time, with numerous variants and spin-offs emerging.[12] If our goal is to add to our knowledge of the inner psychic workings of the Framers, however, then it is *their* game that we must study and understand.

Thankfully, we have Edmund Hoyle to guide the way. You are probably familiar with the phrase "according to Hoyle," typically invoked to denote strict compliance with a definitively established set of rules. You may even have had occasion to resolve some heated gaming dispute by pulling off your shelf a copy of Hoyle's still-popular (and still-evolving) treatise on the definitive rules of games. But you probably did not know that Hoyle actually got his start writing about games with whist, in his *A Short Treatise On The Game Of Whist: Containing The Laws Of The Game And Also Some Rules* (1742).[13]

Born in 1672, Hoyle came to publishing late, at the age of 70.[14] Whist had long been considered a tavern game of "low character" in England, but in the 1730s it gravitated into more reputable circles, and it appears that Hoyle was a master of the game who gave lessons to the well-to-do for money.[15] The 1742 edition of his treatise on whist — which was exclusively devoted to that subject — is thought to have been an "instructional manuscript" that he sold to his students to encapsulate his lessons.[16] Whist's burgeoning popularity created high

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'not for money but for honour . . . the pleasure of beating one another.'"); William Mill Butler, *The Whist Reference Book* (1898) ("As early as 1767, Benjamin Franklin became acquainted with the game in Paris, and he noted the fact in his diary that 'quadrille is out of fashion and English Whist all the mode.'"); William N. Thompson, *Gambling in America: An Encyclopedia of History, Issues, and Society* at 37 (2001).

[11] Albert J. Beveridge, *The Life of John Marshall, Volume One* at 177 (1916) (referencing Marshall's 1783 account book, and noting that "His sociable nature is revealed at the beginning of his career by entries, 'won at Whist 24-1-4' and 'won at Whist 22/'; and again 'At Backgammon 30/-1-10.' Also the reverse entry, 'Lost at Whist 3 14/.'"); Unger, *supra* n.8.

[12] *See, e.g.,* William Pole, *The Evolution of Whist: A Study of the Progressive Changes Which the Game Has Passed Through from its Origin to the Present Time* (1897).

[13] For a detailed account of the copyright battles over the earliest editions of *Hoyle's Games*, *see generally* David Levy, *Pirates, Autographs, and a Bankruptcy:* A Short Treatise on the Game of Whist *by Edmond Hoyle, Gentleman,* 34 Script & Print 133 (2010).

[14] *Id*. at 133.

[15] Pole, *supra* n.12 at 23-25, 35-37.

[16] Levy, *supra* n.13, at 134.

demand for winning tips and techniques, however, inducing Hoyle to sell the copyright to *A Short Treatise* to a publisher in 1743, which then went through numerous editions and title variations before Hoyle's death in 1769. (For simplicity, this essay generically refers to whatever edition of Hoyle's book was most current in a given year as "*Hoyle's*"). By 1748, *Hoyle's* publisher had incorporated into the book additional sets of rules that Hoyle had separately published for other games such as quadrille, piquet, and backgammon, an enlargement that had the effect of familiarly rendering *Hoyle's* a more general treatise on gaming.[17] Through numerous editions that were published well past the time of the Founding, however, whist was always the game that was featured first.[18]

The copyright to *Hoyle's* expired some time between 1770 and 1774,[19] which brings us right up to the Founding era editions. In 1775, a consortium of publishers who held copyrights to a variety of writings on gaming teamed up to hire a lawyer, Charles Jones, to serve as the editor of a substantially expanded work entitled *Hoyle's Games Improved*. Among other additions, the 1775 edition of *Hoyle's Games Improved* supplemented Hoyle's 30-year-old whist text with William Payne's more recent *Maxims for Playing the Game of Whist* (London, 1773).[20] Further editions of the Jones-edited *Hoyle's* were published in 1779, 1786, 1790, and beyond, with each new edition adding rules for more games (the 1790 edition is famously the first to include the rules for "goff or golf"), as well as making various other "revisions and corrections" to the previously published text.[21]

Jones himself died at some point before the 1786 edition was published,[22]

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[17] Louis Hoffman, *Hoyle's Games Modernized*, preface (1909); Catherine Perry Hargrave, *A History of Playing Cards and a Bibliography of Cards and Gaming* at 414-417 (1930); David Levy, *A Descriptive Bibliography of Edmond Hoyle* (last updated Feb. 4, 2018), available at bookson gaming.com/hoyle/bibliography/books/games.1.1.xml (last visited Feb. 9, 2018).

[18] *Id.*

[19] Under the Statute of Anne, copyright protection lasted for 14 years, with an additional 14 years added if (as with Hoyle) the author was still alive when the first 14 years expired. A range of copyright expiration is provided in the main text, however, because the law was unclear as to whether the copyright on Hoyle's whist rules began to run with his initial solo publication of them in 1742, or instead applied to his collected works, which were first published a few years later. For a discussion of the ambiguous copyright issues, *see* David Levy, *When did Hoyle come off copyright?*, (last updated Nov. 18, 2011), at edmond hoyle.blogspot.com/2011/07/when-did-hoyle-come-off-copyright-part.html (last visited Feb. 9,2018).

[20] David Levy, *The most important Hoyle after Hoyle* (July 28, 2011), at edmondhoyle.blogspot.com/2011/07/most-important-hoyle-after-hoyle.html (last visited Feb.9 2018).

[21] David Levy, *Hoyle in the Public Domain (1775)* (July 21, 2011), at edmond hoyle.blogspot.com/2011/07/hoyle-in-public-domain-1775.

html (last visited Feb. 9, 2018); David Levy, *Hoyle's Games Improved, Charles Jones* (1800), (last updated May 5, 2013), *at* edmondhoyle. blogspot.com/2011/11/hoyles-games-improved-charles-jones.html (last visited Feb. 9, 2018).

[22] A December 1785 advertisement that ran in the *General Evening Post* stated that "This day was published, in one volume, 12mo. price 3s. bound in red, a new, enlarged, and corrected edition, of

but the Jones-edited editions of *Hoyle's Games Improved* dominated the marketplace for gaming texts through the mid-1820s,[23] making the 1790 edition a logical place to turn to study and learn whist as it was known to and played by the Founders. The *Green Bag* has accordingly republished the 1790 edition of the whist portion of *Hoyle's Games Improved* as its own separate volume herewith, to which this essay serves as an introduction.

Even a quick skim through the 90-page "Game of Whist" chapter of the 1790 edition of *Hoyle's Games Improved* makes it clear that the book's instruction on whist is perhaps best described as a loosely organized collection of teaching maxims, strategies, and examples, rather than as a coherent and comprehensive explanation of the rules of the game. Hoyle (whose text occupies pp. 3-74) and Payne (pp. 74-90) both assumed that their readers understood the game's basic rules and mechanics. To be sure, snippets of the rules are sprinkled throughout the treatise, and Jones helpfully added his own summary of the game at the front of the chapter as a two-page editor's introduction. To aid the reader in understanding the text, however, I have provided my own summary of the rules of Founders Whist immediately below. I have also included, at the end of this essay, a glossary of whist terms that are likely to be unfamiliar to the modern eye.

Whist Mechanics and Etiquette

Whist is wonderfully simple in its mechanics, yet sufficiently complex in its strategic variability to make it endlessly replayable with enjoyment by even the most experienced of players.

A standard deck of 52 cards is used. Two partnerships of two players each, chosen by some agreed-upon method, vie for tricks, points, games, and frequently Stakes (money). Hoyle suggests that partners be chosen by cutting cards, with the players who cut the two highest cards forming one partnership, and the players who cut the two lowest cards forming the other. For these purposes, Aces are counted as low. The player who cuts the lowest card gets first deal.

Partners sit across the table from one another. The cards are shuffled, cut, and dealt, providing each player exactly 13 cards. According to Hoyle, proper etiquette permits each player to shuffle the cards before they are dealt, with the last two shuffles being performed by the player to the left of the dealer, and then by the dealer herself. Following the dealer's shuffle, the player to the dealer's right cuts the cards, and the dealer then deals. The last card dealt is placed face-up in front of the dealer, and the suit of that card becomes trump. The dealer leaves the face-up card on the table until the first trick is played, then takes it

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the late Charles Jones's Hoyle's Games Improved . . . ." David Levy, *A Descriptive Bibliography of Edmond Hoyle* (last updated July 21, 2016), booksongaming.com/hoyle/bibliography/books/jones.3.xml (last visited Feb. 9, 2018).

[23] *See* Levy, *supra* n. 20.

into her hand. (The dealer thus has the advantage of always being guaranteed at least one trump card).

The player to the left of the dealer leads first. Play then proceeds clockwise, with each player playing one card. Players are required to follow the suit led if possible. If a player has no cards of the suit led, a card in any other suit may be played, including trump. The trick is won by the highest card played of the suit led, or if one or more trump cards have been played, then by the highest trump. Any non-trump cards played on a trick that are not of the suit led count for nothing, and cannot win the trick. (Note, however, that there is often significant strategic value to the selection of such throw-away cards, whether in shorting one's hand of losing cards to allow for future trumping, or in communicating potential future leads to one's partner). Whichever player wins a trick leads next. Table talk signaling the content of any player's hand is strictly forbidden.[24]

Because each player is dealt 13 cards, there are 13 total tricks to be played. The seventh trick taken by a partnership thus represents a majority of the available tricks, and is called the "odd trick." A partnership scores one point toward Game for taking the odd trick, and an additional point toward Game for each trick taken thereafter, to a maximum of six points per hand. After the last trick is played, points are tallied, the cards are gathered up, and the deal passes to the dealer's left. Whichever partnership reaches ten points first wins the game.

On rare occasions, a player may make a misplay in violation of the rules, for which various penalties are prescribed. The most common such misplay is the "revoke," which occurs when a player has the cards to follow suit, but fails to do so. When a revoke is discovered after a trick has been completed, a severe penalty is applied: the revoker's adversaries may, at their option, add three points to their own Game score, or subtract three points from the revoking partnership's Game score, or take three tricks from the revoking party in the hand currently being played. To help avoid the punishing penalty a revoke, the first time a player fails to follow suit, her partner may inquire, "Partner, no [suit led]?" No additional table talk on the point is permitted.

As the Founders played the game, there was an important additional means of scoring points towards Game: holding trump honours (Ace, King, Queen, and Knave). Any time a partnership was dealt three of the four trump honours, it would score two points; if they were dealt all four, it was worth four points.

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[24] Thus, do not seek to emulate Homer and Russell in *The Cosby Show*'s "The Card Game" (Season 2, Episode 23, air date May 8, 1986):

Homer: You know, Russell, this reminds of the days when we used to go down to the baseball diamond.

Russell: Yeah, I remember those days . . . but, sometimes it would rain and we'd have to stay in the clubhouse.

Homer: You know what I'm gonna do? I'm gonna lead with clubs!

Russell: Good play!

The exception to this rule was that a partnership with exactly nine points toward Game was prohibited from scoring honours, and could secure victory only by taking the odd trick. In the rare circumstance that both partnerships reached ten points during the play of a single hand, one by scoring honours and the other by taking tricks, the team that reached ten by taking tricks won the game. Partnerships with exactly eight game points were permitted to take advantage of a special rule dubbed "calling honours" that allowed them to get out ahead of the trick-taking tiebreak: if either partner was dealt two trump honours, that partner was permitted to inquire of the other before the first trick was played (in contravention of the normal prohibition on table talk) "Partner, have you any?" And if that partner answered in the affirmative, and backed it up by revealing the required honours, that partnership immediately scored their honour points and won the game, without any further play of the hand.

The scoring of honours added a significant element of luck to the game (over and beyond the luck already inherent in the uneven distribution of playing strength wrought by the deal of the cards), which in America caused the practice to eventually fall out of favor and be abandoned. The winning game score for whist was also eventually reduced during the 19th century to either five or seven points (called "Short Whist," to distinguish it from the ten-point game of "Long Whist"),[25] which made the game both faster and more intense, but also greatly increased the power of scoring honours where such scoring was still allowed (as it typically was in England). At the time of the Founding, however, game was ten, and honours were often a key part of getting there.

Hoyle and the Science of Whist

Armed with the rules summary above and the glossary below, you should have all you need to start working your way through the whist chapter of *Hoyle's Game Improved* — and with thought, application, and practice, to become a master of Founders Whist. Before you run off to prepare yourself for a gaming rendezvous with Washington, Madison, and Franklin, however, a few words about the content of *Hoyle's* are warranted.

First and foremost, this is not a fast read. The chapter is broken up into sections (*e.g.*, "Twenty-Four Short Rules for Learners," "The Manner of playing Sequences further explained, with many Examples," "Of Playing for the Odd Trick") that themselves each consist of a series of sequentially numbered, succinctly stated pointers, examples, and maxims, most of which are one or two sentences long. Unless your name happens to be Big Blue, you are never going to be able to memorize the 88 pages of default rules of play, their numerous exceptions, the plethora of different scenarios that can arise, and the odds-driven

[25] 8 Frederick A.P. Barnard, ed., *Johnson's (revised) Universal Cyclopaedia* 740 (1886).

optimal means to handle them. Instead, you will need to take some time to work through and internalize the *reasoning* behind the stated rules of thumb (which often is not expressly provided), so that you are prepared to cogently play through the multitude of variations that you will inevitably encounter when you and you partner actually sit down with your adversaries to deal out and play a hand of whist.

Second, my advice is to have fun with it, and not to try to do too much at once. The examples given in *Hoyle's* often read like a stumper bridge column from the Sunday paper, complete with a frenchified challenge question at the end, such as: "*Quere*, How are you to play these Cards to your greatest advantage?"[26] You don't puzzle your way through ten bridge columns in a single day, do you?[27] I'd suggest that you similarly tackle just a handful of Hoyle's examples in one sitting, but take the time to really think them through. You might even consider breaking open a deck of Founders Whist cards and laying the stated scenarios out in front of you, which will better simulate the play of an actual hand, and may make it easier for you to discern and absorb whatever principle Hoyle is using the example to press home.

Third, turning to the science of the game, one of Hoyle's key insights concerning whist is that the best strategy for a given hand often cannot be discerned in isolation, because a single deal of a hand actually represents a game within a larger game, with the ultimate objective being to reach ten game points. Thus, "[a]lways consider the Scores, and play your Hand accordingly." *Hoyle's* at 4(XXIV). That is, the chances that you should logically be willing to take during card play in the hopes of winning an extra trick or two may vary greatly depending on the current game score. For example, "if you find in the Course of Play, that your Adversaries are very strong in any particular Suit, and that your Partner can give you no Assistance in that Suit, in such a Case you are to examine your own, and also your Adversaries Scores; because by keeping one Trump in your Hand to trump such Suit, it may be a Means to save or win a Game." *Hoyle's* at 23(I). Indeed, playing for stakes (as the Founders typically did) actually added yet a third level of strategic calculation, and required paying close attention to each partnership's positioning with respect to the stakes in order to maximize potential winnings (or minimize potential losses). *See, e.g.*, *Hoyle's* at 6(VI).

Fourth, although table talk is strictly forbidden, it is essential to playing

[26] The modern, non-frenchified version of such a challenge question is perhaps exemplified in the movie *Speed* (1994): "Pop quiz, hotshot. There's a bomb on a bus. Once the bus goes 50 miles an hour, the bomb is armed. If it drops below 50, it blows up. What do you do? What do you do?"

[27] Actually, if you were born after 1960, the chances that you have *ever* done a bridge column is pretty small. But for those of you who have, you'll have a significant leg up, as contract bridge evolved from whist.

winning whist that you robustly communicate with your partner. Not by scratching your ear, kicking your partner under the table, or touching one card before playing another — all such means of communicating are of course banned. The cards that you lead, however, or follow suit with, or throw away when unable follow suit, can all convey critical information to your partner about the contents of your hand — especially if both partners are well-versed in the key principles of whist communication. Some such communications are completely obvious. For example, failing to follow suit always communicates a void in the suit led; playing the King of a suit after your partner plays the Ace similarly makes it clear you have no more cards in the suit, as there would otherwise be no reason to play such a high card on a trick already won. Both signal the possibility of future trumping.

Other card-play signals, however, are not always intuitive on their face (although the vast majority of standard whist communications ultimately derive from principles of mathematical odds and logic, rather than mere agreed-upon convention). For example, when a partner gets his first opportunity to freely lead, "he is supposed lead from his best Suit, and finding you deficient in that Suit, and not being strong enough in Trumps, and not daring to force you, he then plays his next best Suit; by which Alteration of Play, it is next to a Demonstration that he is weak in Trumps; But should he persevere, by playing off his first Lead, if he is a good Player, you are to judge him strong in Trumps, and it is a Direction for you to play your Game accordingly." *Hoyle's* at 30-31(III). A great many of the principles and guideline set forth in *Hoyle's* are intended to facilitate this kind of communication, which greatly assists partners in identifying trick-maximizing leads to make to one another.

Of course, your adversaries will also pick up information about your hand by watching this process of communication, and they too will seek to use that information to their advantage. Advanced players thus develop the ability to recognize those rare situations that call upon them to play their cards in a non-standard manner intended to "deceive your Adversaries, [rather] than to inform your Partner" — essentially simultaneously "lying" to adversary and partner alike through the signal sent by a card play in the hope of tricking the adversary into making a mistakes. *See Hoyle's* at 14(IV). But be warned: misidentifying those situations is a sure formula for incurring your deceived partner's wrath, so you must pick your spots for taking such chances carefully.

There is, of course, a great deal more that could be said about the principles that underlie whist, that challenging, multi-faceted card game that so captured the interest and attention of the Founders. But Hoyle and Payne have already said them, and from a far deeper base of knowledge and experience than anything I could hope to muster. I will, however, attempt to get you started off on the right foot by leaving you with one last tip that for some reason is buried at the very back of the whist chapter in *Hoyle's*, but that may prove essential to the

success of your mission to master playing winning whist: "Be careful how you sort your Cards, lest a curious Eye should discover the Number of your Trumps." *Hoyle's* 90(42).

Now, go. Learn the game of the Founders. And emerge with a refreshed understanding of how Washington saved his lurch by taking the odd trick at Trenton; why Madison believed the power of the purse was sure to give Congress the tenace over the executive's sword; what inspired Hamilton to throw off his losing New York City card so that he could trump in on the Bank of the United States; the strategic miscalculation behind Burr's failed attempt to finesse the Presidency out from under Jefferson after the Election of 1800; and the way the Framers perceived the daunting legal and political challenges they faced, and the Constitution they constructed to answer them.

A Glossary to the 1790 edition of Hoyle's Games Improved

(see also *Hoyle*'s at 63-65)

"Elder Hand": The player who has the lead; before the first trick is played, the Elder Hand is always the player to the dealer's left.

Game: Ten points.

"the Point of [#]": A partnership's current point total toward Game, out of the ten possible points.

"the Odd Trick": The seventh trick taken by a Partnership in any deal, which is worth one point.

"Save your lurch": When your adversary is one point away from taking the Game, and you win the odd trick, thus preventing the adversary from scoring.

Rubber: The best of three games, each of which is played to ten points.

"trump out": To lead trump, often for the purpose of pulling your adversaries' trump cards.

"Saw" or "See-Saw": When each partner has one or more trumps, and a void in a non-trump suit in which the other partner still has cards. This allows the partners to trump back and forth by leading to the other partner's void suit.

Tenace: The last player has a "tenace" when he has both the best and the third best remaining cards in a suit, thus ensuring he can win two tricks — by overtaking the second best card if the adversary plays it, or by playing the third best card to win the trick if the adversary does not.

Finesse: When playing second or third hand, and finding that you have in your hand the best and the third best remaining cards of the suit led (or lower-ranked but similarly spaced holdings), choosing to play the third best card rather than the best card, so that you may make an extra trick if the second best card is in the hand of the adversary who has already played.

"force": Make a lead that requires your partner to play trumps.

Renounce: The first time a player does not follow the lead of a particular suit (as in, "He renounced hearts").

Revoke: When a player fails to play the suit led, but had a card of the suit led to play. A revoke results in stiff penalties.

"turned and quitted": When a trick is played out and then collected by the partnership that won it, with the cards turned face-down in the process.

Honours: The Ace, King, Queen, or Knave of Trump.

Quint-Major: The Ace, King, Queen, Knave, and Ten of a suit.

Quart-Major: The Ace, King, Queen, and Knave of a suit.

Quart to a King: The King, Queen, Knave, and Ten of a suit.

Quart to a Queen: The Queen, Knave, Ten, and Nine of a suit.

Tierce-Major: The Ace, King, and Queen of a suit.

State of your Game: The strength of your hand, often including the distribution of your suits.

Slam: When a partnership wins all 13 tricks.

"the Stake": When gambling on the outcome of a whist game, the amount played for.

♠ ♥ ♦ ♣

> Upon [David Hume's] return to Edinburgh, though he found himself much weaker, yet his cheerfulness never abated, and he continued to divert himself, as usual, with correcting his own works for a new edition, with reading books of amusement, with the conversation of his friends; and sometimes in the evening with a party at his favourite game of whist.
>
> *Adam Smith to William Strahan (Nov. 9, 1776), in Letters of David Hume to William Strahan xxxiv, xxxv (1888)*

HOYLE's

GAMES

IMPROVED;

Being PRACTICAL TREATISES on

Whist,	Tennis,
Quadrille,	Quinze,
Piquet,	Hazard,
Chess,	Lansquenet,
Back-Gammon,	Billiards,
Draughts,	AND
Cricket,	Goff or Golf:

In which are contained,

The Method of BETTING at THOSE GAMES upon equal or advantageous Terms;

INCLUDING

The LAWS of each, as settled and agreed to, at BROOKES's, WHITE's, D'AUBIGNY's, the SCAVOIR VIVRE, MILES's, PAYNE's, and other Fashionable Houses &c.

Revised and corrected by CHARLES JONES, Esq.

A NEW EDITION enlarged.

LONDON:

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CONTENTS.

Page

WHIST — — 1
Short Rules for Learners — 3
Some General Rules *to be obſerved by* Beginners 4
Some Particular Rules *to be obſerved* — 11
Particular Games, *and the Manner in which they are to be played* — — 12
Games *to be played, with certain Obſervations whereby you are aſſured that your Partner has no more of the Suit played either by yourſelf or him* 16
Particular Games, *both to endeavour to deceive and diſtreſs your Adverſaries, and to demonſtrate your Game to your Partner* — 17
Particular Games *to be played, by which you run the Riſque of loſing one Trick only to gain three* 18
Particular Games *to be played when your Adverſary turns up an Honour on your Right-hand, with* Directions *how to play when an Honour is turned up on your Left hand* — 20
Caſes *to demonſtrate the Danger of forcing your Partner* — — 21
A Caſe *to demonſtrate the Advantage by a Saw* 22
Variety of Caſes *intermixed with* Calculations, *demonſtrating when it is proper, at ſecond Hand, to put up the King, Queen, Knave or Ten, with one ſmall Card of any Suit,* &c. — 22
Some Directions *for putting up at ſecond Hand, King, Queen, Knave, or Ten of any Suit,* &c. 24
Directions *how to play when an Ace, King, or Queen, are turned up on your Right-hand* 27

The Ten or Nine being turned up on your Right-hand — — p. 30
A Caution *not to part with the Command of your Adverſary's great Suit*, &c. — 32
The Manner of playing Sequences further explained, with many Examples — 35
Additional Caſes — — 41
More additional Caſes — — 47
New Caſes *at* Whiſt — 51
The Laws *of* Whiſt — — 54
A Dictionary *for* Whiſt, *which reſolves almoſt all the critical Caſes that may happen at that* Game; *by way of Queſtion and Anſwer* — 59
An Explanation of the Terms *or* Technical Words *in this Treatiſe* — — 63
An Artificial Memory, *for thoſe who play at the Game of* Whiſt — — 65
Calculations, *which direct with moral Certainty, how to play well any Hand, by ſhewing the Chances of your Partner's having* 1, 2, *or* 3 *certain Cards* 67
An Explanation and Application of the Calculations neceſſary to be underſtood by thoſe who read this Treatiſe — — 68
Some Computations *for laying Wagers* 70
Calculations *for the whole Rubber* 72
Mr. PAYNE'S MAXIMS *for* WHIST 74
Maxims *for the Leader* — ib.
—— *for the ſecond Hand* — 76
—— *for the third Hand* — 78
—— *for the fourth Hand* — 79
Caſes *in which you ſhould return your Partner's Lead immediately* —— 79

Caſes

CONTENTS. v

Cases *in which you should not* —— p. 80
Maxims *in respect to leading Trumps* ib.
——— *when you turn up an Honour* 84
——— *for the Odd Trick* — 85
General Rules — — 86

QUADRILLE —— 90
Short Rules for Learners —— ib.
Rank and Order of the Cards when not Trumps 91
Rank and Order of the Cards when Trumps 92
Rank or Order of false Matadores 93
Calculations and Explanations —— 94
Games to be played in Red calling a King 95
Games to be played in Black calling a King 98
Games to be played in Black sans prendre 100
Games to be played in Red sans prendre 102
Laws *at* Quadrille —— 106
Dictionary *of the Terms used at* Quadrille 109

PIQUET —— —— 112
The Game of Piquet *explained* ib.
Of the Repique, Pique, *and* Capot 113
Of the Carte Blanche —— 114
Of the Point — — 116
Of the Tierces, Quarts, Quints, Sixiemes, Septiemes, *and* Huitiemes — ib.
Mr. HOYLE's General Rules *for playing at* Piquet — — 122
Particular Rules *for playing at* Piquet 127
Some Computations, *directing, with moral Certainty, how to discard well any Hand* 133
An Explanation *and* Application *of the foregoing* Calculations — — 136

Curious

Curious and inſtructive Caſes — p. 141
Some Computations *for laying Wagers* 143
Laws *of the Game of* Piquet — 145

CHESS —— —— 148
Introduction to the Game of Cheſs ib.
Rules and Obſervations for playing at Cheſs 151
Caution about taking a Queen, &c. 153
How to take off a Fork —— ib.
A Caution not to play any of the three Pawns before your King — — 155
How to gain the Move with your King ib.
How to gain the Move with your King only, againſt a King and a Pawn —— ib.
How to ſave a Game againſt a Biſhop and one Pawn with your King only —— ib.
How to prevent your Adverſary from winning a Game by a Stale — — 156
How to force a Stale —— ib.
How to prevent the Loſs of a Piece when you are checked — — ib.
When to gain a good Situation — ib.
Explanations and Applications of ſome of the foregoing Rules *and* Obſervations — ib.
Some general Rules —— 159
Laws *of* Cheſs — — 162

BACK-GAMMON —— 163
Method of playing the Game — ib.
The Chances on two Dice calculated 165
Tables of the Odds — — ib.
Directions for playing the Game, and for carrying home your Men —— 168

Further

CONTENTS. vii

Further Directions when you are to play for a Gammon, or for a ſingle Hit — p. 170
Particular Directions for playing for a Hit 172
Some Obſervations, Hints and Cautions 173
Bearing, *the Men*
how to bear them — 175
how to diſtreſs your Adverſary in bearing his Men —— 177
Blots, *which are beſt to leave* — ib.
Caſes, *to calculate the Odds of ſaving or winning a Gammon* — 178
Critical Caſes *for a Back-Game* — 183
Laws *of* Back-Gammon — 192

DRAUGHTS — — 193
Deſcription of the Draught Table 194
Twenty ſelect Games, by Mr. PAYNE 195
Critical Situations to draw Games 215
Critical Situations to win Games — 217
Situations for Strokes —— 220

GAME OF CRICKET — 227
The Laws, and Rules and Orders of the Game ib.
Of the Ball, Bat, and Stumps — ib.
Of the Bowling and Popping Creaſe ib.
Of the Choice of Innings —— ib.
Of the Bowler and Striker —— 228
Of Single-Wicket Matches — ib.
Of the Umpires — — 229
Of the Betts — — 230

GAME OF TENNIS —— ib.
The Game deſcribed ——— ib.

Particular

Particular Terms explained — p. 231
Tables of the Odds —— 234

GAME OF QUINZE — 236
Deſcription and Rules of the Game ib.

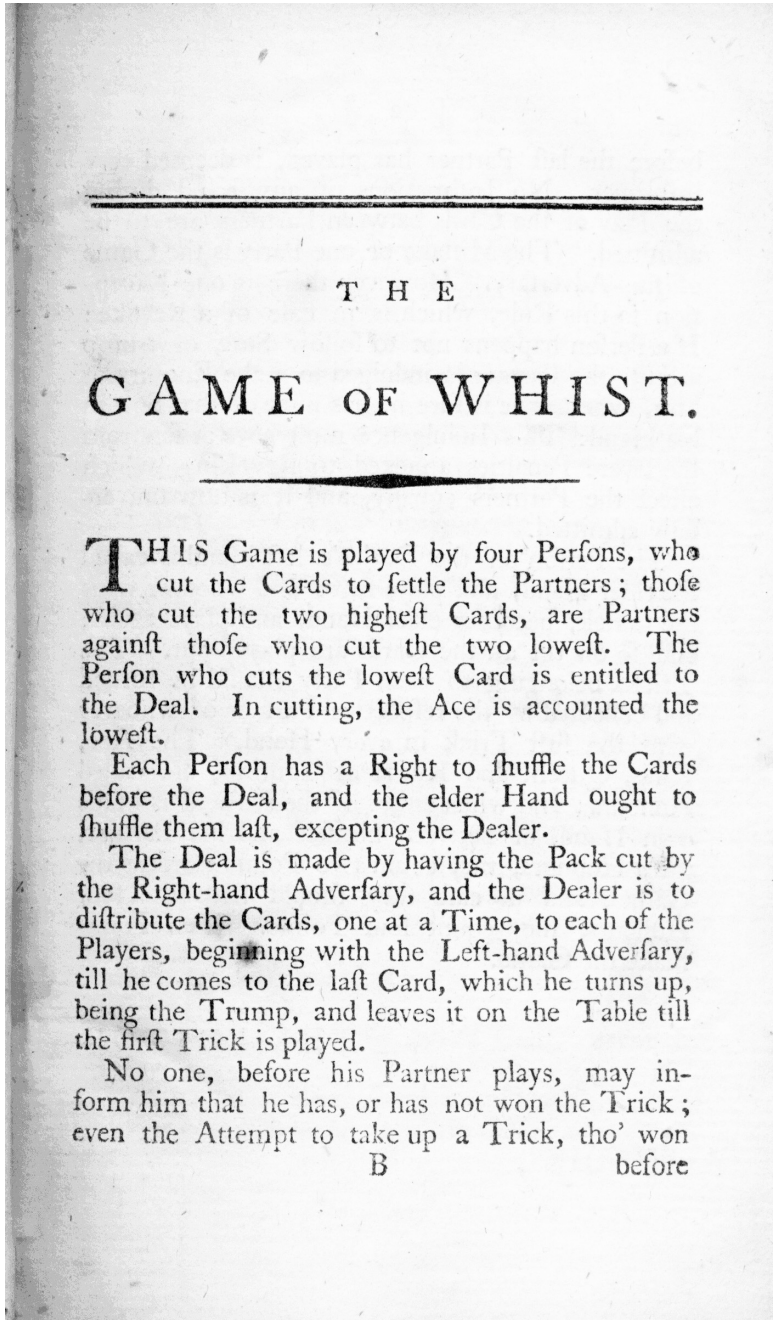
GAME OF HAZARD —— 237
The Game explained —— ib.
Of throwing the Main, Crabs, and Nick ib.
The common Odds to be known before any Perſon attempts to play or bett —— 239
Table of the Odds —— ib.

LANSQUENET —— 241
The Game deſcribed —— ib.
Of the Rejouiſſance Card —— 242

BILLIARDS —— 243
The Game deſcribed —— ib.
The White Winning Game —— 244
The White Loſing Game —— 253
The Red, or Carambole Winning Game 255
The Red, or Carambole Loſing Game 262
Fortification Billiards —— 266
Tables of Odds at Billiards *between even Players* 277
The Odds between unequal Players 279

GOFF OR GOLF —— 288

THE



THE

GAME OF WHIST.

THIS Game is played by four Perſons, who cut the Cards to ſettle the Partners; thoſe who cut the two higheſt Cards, are Partners againſt thoſe who cut the two loweſt. The Perſon who cuts the loweſt Card is entitled to the Deal. In cutting, the Ace is accounted the loweſt.

Each Perſon has a Right to ſhuffle the Cards before the Deal, and the elder Hand ought to ſhuffle them laſt, excepting the Dealer.

The Deal is made by having the Pack cut by the Right-hand Adverſary, and the Dealer is to diſtribute the Cards, one at a Time, to each of the Players, beginning with the Left-hand Adverſary, till he comes to the laſt Card, which he turns up, being the Trump, and leaves it on the Table till the firſt Trick is played.

No one, before his Partner plays, may inform him that he has, or has not won the Trick; even the Attempt to take up a Trick, tho' won

B before

before the laſt Partner has played, is deemed very improper. No Intimations of any Kind during the Play of the Cards between Partners are to be admitted. The Miſtake of one Party is the Game of the Adverſary. However there is one Exception to this Rule, which is in caſe of a Revoke: If a Perſon happens not to follow Suit, or trump a Suit, the Partner is indulged to make Enquiry of him, whether he is ſure he has none of that Suit in his Hand: This Indulgence muſt have ariſen from the ſevere Penalties annexed to Revoking, which affect the Partners equally, and it is now univerſally admitted.

The Perſon on the Dealer's left Hand is called the elder Hand, and plays firſt; and whoever wins the Trick, becomes elder Hand, and plays again; and ſo on till all the Cards are played out. The Tricks belonging to each Party ſhould be turned and collected by the reſpective Partner of whoever wins the firſt Trick in every Hand. The Ace, King, Queen, and Knave of Trumps, are called Honours; and when either of the Parties has in his own Hand, or between himſelf and his Partner, three Honours, they count two Points towards the Game; and in caſe they ſhould have the four Honours, they count four Points. Ten Points make the Game.

THE EDITOR.

MR. HOYLE'S

GAME AT WHIST.

TWENTY-FOUR SHORT RULES *for* LEARNERS.

I. ALWAYS lead from your ſtrong Suit.

II. Lead through an Honour when you have a good Hand.

III. Lead through the ſtrong Suit, and up to the weak.

IV. Lead a Trump if 4 or 5, and you have a good Hand.

V. Sequences are eligible Leads, and begin with the higheſt.

VI. Follow your Partner's Lead, not your Adverſary's.

VII. Do not lead from Ace, Queen.

VIII. Avoid leading an Ace unleſs you have the King.

IX. Never lead a thirteenth Card unleſs Trumps are out.

X. Nor trump a thirteenth Card, except laſt Player.

XI. Play your beſt Card third Hand.

XII. When in Doubt, win the Trick.

 XIII. When

XIII. When you lead ſmall Trumps, begin with the higheſt.

XIV. Do not trump out, when your Partner is likely to trump a Suit.

XV. If you hold only ſmall Trumps, make them when you can.

XVI. Make your Tricks early, and be careful of fineſſing.

XVII. Be ſure to make the odd Trick when in your Power.

XVIII. Never force your Adverſary with your beſt Card, unleſs you have the next beſt.

XIX. If only one Card of any Suit, and but 2 or 3 ſmall Trumps, lead the ſingle Card.

XX. Always keep a commanding Card to bring in your ſtrong Suit.

XXI. In your Partner's Lead, endeavour to keep the Command in his Hand.

XXII. Keep the Card you turn up as long you conveniently can.

XXIII. If your Antagoniſts are 8, and you have no Honour, play your beſt Trump.

XXIV. Always conſider your Score, and play your Hand accordingly.

GENERAL RULES *for* BEGINNERS.

I. WHEN you lead, begin with the beſt Suit in your Hand; if you have a Sequence of King, Queen, and Knave, or Queen, Knave, and Ten, they are ſure Leads, and never fail gaining the Tenace to yourſelf or Partner in other Suits: Begin with the higheſt of the

the Sequence, unleſs you have 5 in Number; in that Caſe, play the loweſt (except in Trumps, when you muſt always play the higheſt) in order to get the Ace or King out of your Partner's or Adverſary's Hand, by which means you make Room for your Suit.

II. If you have 5 of the ſmalleſt Trumps, and not one good Card in the other Suits, trump out; which will have this good Conſequence at leaſt, to make your Partner the laſt Player, and by that Means give him the Tenace.

III. If you have 2 ſmall Trumps only, with Ace and King of two other Suits, and a Deficiency of the fourth Suit, make as many Tricks as you can immediately; and if your Partner refuſes either of your Suits, do not force him, becauſe that may weaken his Game too much.

IV. You need ſeldom return your Partner's Lead immediately, if you have good Suits of your own to play, unleſs it be to endeavour to ſave or win a Game: What is meant by good Suits, is, in caſe you ſhall have Sequences of King, Queen, and Knave, or Queen, Knave, and Ten.

V. If you have each 5 Tricks, and you are aſſured of getting 2 Tricks in your own Hand, do not fail winning them, in Expectation of ſcoring 2 that Deal; becauſe if you loſe the odd Trick, it makes 2 Difference, and you play 2 to 1 againſt yourſelf.

An Exception to the foregoing Rule is, when you ſee a Probability either of ſaving your Lurch

or winning the Game, in either of which Caſes you are to riſk the odd Trick.

VI. When you have a Probability of winning the Game, always riſk a Trick or two, becauſe the Share of the Stake, which your Adverſary has by a new Deal, will amount to more than the Point or two which you riſk by that Deal.

The foregoing Caſe refers to 1, 2, 3, 4, 5, 6, in pages 18, 19, 20.

VII. If your Adverſary is ſix or ſeven Love, and you are to lead, your Buſineſs in that Caſe is to riſk a Trick or two, in Hopes of putting your Game upon an Equality; therefore, admitting you have the Queen or Knave, and 1 other Trump, and no good Cards in other Suits, play out your Queen or Knave of Trumps; by which Means you will ſtrengthen your Partner's Game, if he is ſtrong in Trumps; if he is weak, you do him no Injury.

VIII. If you are four of the Game, you muſt play for an odd Trick, becauſe it ſaves one half of the Stake which you play for; and, in order to win the odd Trick, though you are pretty ſtrong in Trumps, be cautious how you trump out. What is meant by Strength in Trumps, is, in caſe you ſhould have 1 Honour and 3 Trumps.

IX. If you are 9 of the Game, and though very ſtrong in Trumps, if you obſerve your Partner to have a Chance of trumping any of your Adverſary's Suits; in that Caſe do not trump out, but give him an Opportunity of trumping thoſe Suits. If your Game is ſcored 1, 2, or 3, you muſt play the Reverſe; and alſo at 5, 6, or 7; becauſe, in theſe

theſe two laſt recited Caſes, you play for more than 1 Point.

X. If you are laſt Player, and find that the third Hand cannot put on a good Card to his Partner's Lead, admitting you have no good Game of your own to play, return the Lead upon the Adverſary; which gives your Partner the Tenace in that Suit, and often obliges the Adverſary to change Suits, and conſequently gains the Tenace in that new Suit alſo.

XI. If you have Ace, King, and four ſmall Trumps, begin with a ſmall one; becauſe it is an equal Wager that your Partner has a better Trump than the laſt Player: if ſo, you have three Rounds of Trumps; if not, you cannot fetch out all the Trumps.

XII. If you have Ace, King, Knave, and three ſmall Trumps, begin with the King, and then play the Ace (except one of the Adverſaries refuſes Trumps) becauſe the Odds is in your Favour that the Queen falls.

XIII. If you have King, Queen, and four ſmall Trumps, begin with a ſmall one, becauſe the Odds is on your Side that your Partner has an Honour.

XIV. If you have King, Queen, Ten, and three ſmall Trumps, begin with the King, becauſe you have a fair Chance that the Knave falls in the ſecond Round, or you may wait to fineſſe your Ten upon the Return of Trumps from your Partner.

Refers to Caſe 1, 2, 3, in page 21.

XV. If you have Queen, Knave, and four ſmall Trumps, begin with a ſmall one, becauſe the Odds is in your Favour that your Partner has an Honour.

XVI. If you have Queen, Knave, Nine, and three ſmall Trumps, begin with the Queen, becauſe you have a fair Chance that the Ten falls in the ſecond Round; or you may wait to fineſſe the Nine.

Refers to Caſe 1, 2, 3.

XVII. If you have Knave, Ten, and four ſmall Trumps, begin with a ſmall one, for the Reaſons aſſigned in N° 15.

XVIII. If you have Knave, Ten, Eight, and three ſmall Trumps, begin with the Knave, in order to prevent the Nine from making a Trick, and the Odds are in your favour that the three Honours fall in two Rounds.

XIX. If you have ſix Trumps of a lower Denomination, you are to begin with the loweſt, unleſs you ſhould have Ten, Nine, and Eight, and an Honour turns up againſt you; in that Caſe, if you are to play through the Honour, begin with the Ten, which obliges the Adverſary to play his Honour to his Diſadvantage, or leave it in your Partner's Option, whether he will paſs it or not.

XX. If you have Ace, King, and three ſmall Trumps, begin with a ſmall one, for the Reaſons aſſigned in N° 15.

XXI. If you have Ace, King and Knave, and two ſmall Trumps, begin with the King, which, next to a moral Certainty, informs your Partner that

that you have Ace and Knave remaining; and by putting the Lead into your Partner's Hand, he plays you a Trump, upon which you are to fineſſe the Knave, and no ill Conſequence can attend ſuch Play, except the Queen lies behind you ſingle.

Refers to Caſe 1, 2, 3, in page 21.

XXII. If you have King, Queen, and three ſmall Trumps, begin with a ſmall one, for the aſſigned Reaſons in N° 15.

XXIII. If you have King, Queen, Ten, and two ſmall Trumps, begin with the King, for the Reaſons aſſigned in N° 21.

XXIV. If you have the Queen, Knave, and three ſmall Trumps, begin with a ſmall one, for the Reaſons aſſigned in N° 15.

XXV. If you have Queen, Knave, Nine, and two ſmall Trumps, begin with the Queen, for the Reaſons aſſigned in N° 16.

XXVI. If you have Knave, Ten, and three ſmall Trumps, begin with a ſmall one, for the Reaſons aſſigned in N° 15.

XXVII. If you have Knave, Ten, Eight, and two ſmall Trumps, begin with the Knave, becauſe in two Rounds of Trumps it is Odds but that the Nine falls; or, upon the Return of Trumps from your Partner, you may fineſſe the Eight.

XXVIII. If you have five Trumps of a lower Denomination, it is the beſt Play to begin with the loweſt, unleſs you have a Sequence of Ten, Nine, and Eight; in that Caſe begin with the higheſt of the Sequence.

XXIX. If you have Ace, King, and two ſmall Trumps, begin with a ſmall one, for the Reaſons aſſigned in N° 15.

XXX. If you have Ace, King, Knave, and one ſmall Trump, begin with the King, for the Reaſons aſſigned in N° 21.

XXXI. If you have King, Queen, and two ſmall Trumps, begin with a ſmall one, for the Reaſons aſſigned in N° 15.

XXXII. If you have King, Queen, Ten, and one ſmall Trump, begin with the King, and wait for the Return of Trumps from your Partner, when you are to fineſſe your Ten, in order to win the Knave.

XXXIII. If you have Queen, Knave, Nine, and one ſmall Trump, begin with the Queen, in order to prevent the Ten from making a Trick.

XXXIV. If you have Knave, Ten, and two ſmall Trumps, begin with a ſmall one, for the Reaſons aſſigned in N° 15.

XXXV. If you have Knave, Ten, Eight, and one ſmall Trump, begin with the Knave, in order to prevent the Nine from making a Trick.

XXXVI. If you have Ten, Nine, Eight, and one ſmall Trump, begin with the Ten, which leaves it in your Partner's Diſcretion, whether he will paſs it or not.

XXXVII. If you have Ten, and three ſmall Trumps, begin with a ſmall one.

Some

Some PARTICULAR RULES *to be obſerved.*

I. IF you have Ace, King, and four ſmall Trumps, with a good Suit, you muſt play three Rounds of Trumps, otherwiſe you may have your ſtrong Suit trumped.

II. If you have King, Queen, and four ſmall Trumps, with a good Suit, trump out with the King, becauſe when you have the Lead again, you will have three Rounds of Trumps.

III. If you have King, Queen, Ten, and three ſmall Trumps, with a good Suit, trump out with the King, in Expectation of the Knave's falling at the ſecond Round; and do not wait to fineſſe the Ten, for Fear your ſtrong Suit ſhould be trumped.

IV. If you have Queen, Knave, and three ſmall Trumps, with a good Suit, trump out with a ſmall one.

V. If you have the Queen, Knave, Nine, and two ſmall Trumps, with a good Suit, trump out with the Queen, in Expectation of the Ten's falling at the ſecond Round; and do not wait to fineſſe the Nine, but trump out a ſecond Time, for the Reaſon aſſigned in Caſe III. in this Chapter.

VI. If you have Knave, Ten, and three ſmall Trumps, with a good Suit, trump out with a ſmall one.

VII. If you have Knave, Ten, Eight, and two ſmall Trumps, with a good Suit, trump

out with the Knave, in Expectation of the Nine's falling at the ſecond Round.

VIII. If you have Ten, Nine, Eight, and one ſmall Trump, with a good Suit, trump out with the Ten.

PARTICULAR GAMES, *and the Manner in which they are to be played.*

I. SUPPOSE you are elder Hand, and that your Game conſiſts of King, Queen, and Knave of one Suit; Ace, King, Queen, and two ſmall Cards of another Suit; King and Queen of the third Suit, and three ſmall Trumps: *Query*, How is this Hand to be played? You are to begin with the Ace of your beſt Suit (or a Trump) which informs your Partner that you have the Command of that Suit; but you are not to proceed with the King of the ſame Suit, but you muſt play a Trump next; and if you find your Partner has no Strength to ſupport you in Trumps, and that your Adverſary plays to your weak Suit, *viz.* the King and Queen only, in that Caſe play the King of the beſt Suit; and if you obſerve a Probability of either of your Adverſaries being likely to trump that Suit, proceed then and play the King of the Suit of which you have King, Queen, and Knave. If it ſhould ſo happen, that your Adverſaries do not play to your weakeſt Suit, in that Caſe, though apparently your Partner can give you no Aſſiſtance

ance in Trumps, purſue your Scheme of trumping out as often as the Lead comes into your Hand: By which Means, ſuppoſing your Partner to have but two Trumps, and that your Adverſaries have four each, by three Rounds of Trumps, there remain only two Trumps againſt you.

II. *Elder Hand.*

Suppoſe you have Ace, King, Queen, and one ſmall Trump, with a Sequence from the King of five in another Suit, with four other Cards of no Value. Begin with the Queen of Trumps, and purſue the Lead with the Ace, which demonſtrates to your Partner, that you have the King: And as it would be bad Play to purſue Trumps the third Round, till you have firſt gained the Command of your great Suit; by ſtopping thus, it likewiſe informs your Partner that you have the King, and one Trump only remaining; becauſe, if you had Ace, King, Queen, and two Trumps more, and Trumps went round twice, you could receive no Damage by playing the King the third Round. When you lead Sequence, begin with the loweſt, becauſe if your Partner has the Ace he plays it, which makes Room for your Suit. And ſince you have let your Partner into the State of your Game, as ſoon as he has the Lead, if he has a Trump or two remaining, he will play Trumps to you, with a moral Certainty that your King clears your Adverſaries Hands of all their Trumps.

III. *Second Player.*

Suppoſe you have Ace, King, and two ſmall Trumps,

Trumps, with a Quint-Major of another Suit; in the third Suit you have three ſmall Cards, and in the fourth Suit one. Your Adverſary on your Right-hand begins with playing the Ace of your weak Suit, and then proceeds to play the King: In that Caſe, do not trump it, but throw away a loſing Card, and if he proceeds to play the Queen, throw away another loſing Card; and do the like the fourth Time, in Hopes your Partner may trump it, who will in that Caſe play a Trump, or will play to your ſtrong Suit. If Trumps are played, go on with them two Rounds, and then proceed to play your ſtrong Suit; by which Means, if there happens to be four Trumps in one of your Adverſaries Hands, and two in the other, which is nearly the Caſe, your Partner being entitled to have three Trumps out of the nine, conſequently there remain only ſix Trumps between the Adverſaries; your ſtrong Suit forces their beſt Trumps, and you have a probability of making the odd Trick in your Hand only; whereas if you had trumped one of your Adverſaries beſt Cards, you had ſo weakened your Hand, as probably not to make more than five Tricks without your Partner's Help.

IV. Suppoſe you have Ace, Queen, and three ſmall Trumps; Ace, Queen, Ten, and Nine of another Suit; with two ſmall Cards of each of the other Suits: Your Partner leads to your Ace, Queen, Ten, and Nine; and as this game requires rather to deceive your Adverſaries, than to inform your Partner, put up the Nine, which naturally leads the

the Adverſary to play Trumps, if he wins that Card. As ſoon as Trumps are played to you, return them upon your Adverſary, keeping the Command in your own Hand. If your Adverſary, who led Trumps to you, puts up a Trump which your Partner cannot win, if he has no good Suit of his own to play, he will return your Partner's Lead, imagining that Suit lies between his Partner and yours: If this Fineſſe of yours ſhould ſucceed, you will be a great Gainer by it, but ſcarcely poſſible to be a Loſer.

V. Suppoſe you have Ace, King, and three ſmall Trumps, with a Quart from a King, and two ſmall Cards of another Suit, and one ſmall Card to each of the other Suits; your Adverſary leads a Suit of which your Partner has a Quart-Major; your Partner puts up the Knave, and then proceeds to play the Ace: You refuſe to that Suit, by playing your looſe Card; when your Partner plays the King, your Right-hand Adverſary trumps it, ſuppoſe with the Knave or Ten, do not over-trump him, which may probably loſe you two or three Tricks by weakening of your Hand: But if he leads to the Suit of which you have none, trump it, and then play the loweſt of your Sequence, in order to get the Ace either out of your Partner's or Adverſary's Hand; which accompliſhed, as ſoon as you get the Lead, play two Rounds of Trumps, and then proceed to play your ſtrong Suit. Inſtead of your Adverſary's playing to your weak Suit, if he ſhould play Trumps, do you go on with them two Rounds, and then proceed to get the Command of your

your ſtrong Suit. But you will ſeldom find this laſt Method practiſed, except by moderate Players.

Games to be played, with certain Obſervations, whereby you are aſſured that your Partner has no more of the Suit played either by yourſelf or him.

I. SUPPOSE you lead from Queen, Ten, Nine, and two ſmall Cards of any Suit, the ſecond Hand puts on the Knave, your Partner plays the Eight: in this Caſe, you having Queen, Ten, and Nine, it is a Demonſtration, if he plays well, that he can have no more of that Suit. Therefore, by that Diſcovery, you may play your Game accordingly, either by forcing him to trump that Suit, if you are ſtrong in Trumps, or by playing ſome other Suit.

II. Suppoſe you have King, Queen, and Ten of a Suit, and you lead your King, your Partner plays the Knave, this demonſtrates he has no more of that Suit.

III. Suppoſe you have King, Queen, and many more of a Suit, and you begin with the King, in ſome Caſes it is good Play in a Partner, when he has the Ace and one ſmall Card in that Suit only, to win his Partner's King with his Ace; for ſuppoſe he is very ſtrong in Trumps, by taking his Partner's King with the Ace, he trumps out, and after he has cleared the Board of Trumps, he returns his Partner's Lead; and having parted with the Ace of that Suit, he has made Room for his Partner to make that whole Suit, which poſſibly could

could not have been done if he had kept the Command in his Hand.

And ſuppoſing his Partner has no other good Card in his Hand beſides that Suit, he loſes nothing by the Ace's taking of his King; but if it ſhould ſo happen that he has a good Card to bring in that Suit, he gains all the Tricks which he makes in that Suit, by this Method of Play: And as your Partner has taken your King with the Ace, and trumps out upon it, you have Reaſon to judge he has one of that Suit to return you; therefore do not throw away any of that Suit, even to keep a King or Queen guarded.

Particular Games, *both to endeavour to deceive and diſtreſs your Adverſaries, and to demonſtrate your Game to your Partner.*

I. SUPPOSE I play the Ace of a Suit of which I have Ace, King, and three ſmall ones; the laſt Player does not chuſe to trump it, having none of the Suit; if I am not ſtrong enough in Trumps, I muſt not play out the King, but keep the Command of that Suit in my Hand by playing a ſmall one, which I muſt do in order to weaken his Game.

II. If a Suit is led, of which I have none, and a moral Certainty that my Partner has not the beſt of that Suit, in order to deceive the Adverſary, I throw away my ſtrong Suit; but to clear up Doubts to my Partner, when he has the Lead, I throw away my weak Suit. This method of play will generally ſucceed, unleſs you play with very good Players;

Players; and even with them, you will oftener gain than loſe by this Method of Play.

Particular Games *to be played, by which you run the Riſk of loſing one Trick only to gain three.*

I. SUPPOSE Clubs to be Trumps, a Heart is played by your Adverſary; your Partner, having none of that Suit, throws away a Spade; you are then to judge his Hand is compoſed of Trumps and Diamonds; and ſuppoſe you win that Trick, and being too weak in Trumps, you dare not force him; and ſuppoſe you ſhall have King, Knave, and one ſmall Diamond; and further, ſuppoſe your Partner to have Queen and five Diamonds; in that Caſe, by throwing out your King in your firſt Lead, and your Knave in your ſecond, your Partner and you may win five Tricks in that Suit; whereas if you had led a ſmall Diamond, and your Partner's Queen having been won with the Ace, the King and Knave remaining in your Hand, obſtructs the Suit: And though he may have the long Trump, yet by playing a ſmall Diamond, and his long Trump having been forced out of his Hand, you loſe by this Method of Play three Tricks in that Deal.

II. Suppoſe, in the like Caſe of the former, you ſhould have Queen, Ten, and one ſmall Card in your Partner's ſtrong Suit; which is to be diſcovered by the former Example; and ſuppoſe your Partner to have Knave and five ſmall Cards in his ſtrong Suit; you having the Lead are to play your Queen, and

and when you play again, you are to play your Ten; and ſuppoſe him to have the long Trump, by this Method he makes four Tricks in that Suit; but ſhould you play a ſmall one in that Suit, his Knave being gone, and the Queen remaining in your Hand in the ſecond Round of playing that Suit, and the long Trump being forced out of his Hand, the Queen remaining in your Hand obſtructs the Suit, by which Method of Play you loſe three Tricks in that Deal.

III. In the former Examples you have been ſuppoſed to have had the Lead, and by that means have had an Opportunity of throwing out the beſt Cards in your Hand of your Partner's ſtrong Suit, in order to make Room for the whole Suit: we will now ſuppoſe your Partner is to lead, and in the Courſe of Play, it appears to you that your Partner has one great Suit; ſuppoſe Ace, King, and four ſmall ones, and that you have Queen, Ten, Nine, and a very ſmall one of that Suit; when your Partner plays the Ace, you are to play the Nine; when he plays the King, you are to play the Ten; by which Means you ſee, in the third Round, you make your Queen, and having a ſmall one remaining, you do not obſtruct your Partner's great Suit; whereas if you had kept your Queen and Ten, and the Knave had fallen from the Adverſaries, you had loſt two Tricks in that Deal,

IV. Suppoſe in the Courſe of Play, as in the former Caſe, you find your Partner to have one great Suit, and that you have King, Ten, and a ſmall one of that Suit; your Partner leads the Ace; in

in that Caſe play your Ten, and in the ſecond your King: This Method is to prevent a Poſſibility of obſtructing your Partner's great Suit.

V. Suppoſe your Partner has Ace, King, and four ſmall Cards in his great Suit, and that you have Queen, Ten, and a ſmall Card, in that Suit; when he plays his Ace, do you play your Ten, and when he plays his King, do you play your Queen; by which Method of Play you only riſk one Trick to get four.

VI. We will now ſuppoſe you to have five Cards of your Partner's ſtrong Suit, *viz.* Queen, Ten, Nine, Eight, and a ſmall one; and that your Partner has Ace, King, and four ſmall ones; when your Partner plays the Ace, do you Play your Eight; when he plays the King, do you play your Nine; and in the third Round, Nobody having any of that Suit, except your Partner and you, proceed then to play the Queen, and then the Ten: and having a ſmall one remaining, and your Partner two, you thereby gain a Trick, which you could not have done but by playing the high Cards, and by keeping a ſmall one to play to your Partner.

Particular Games *to be played when your Adverſary turns up an Honour on your Right-hand, with* Directions *how to play when an Honour is turned up on your Left-hand.*

I. SUPPOSE the Knave is turned up on your Right-hand, and that you have King, Queen, and Ten; in order to win the Knave, begin

gin to play with your King; by which Method of Play, your Partner may ſuppoſe you to have Queen and Ten remaining, eſpecially if you have a ſecond Lead, and that you do not proceed to your Queen.

II. The Knave being turned up as before, and that you have Ace, Queen, and Ten, by playing your Queen, it anſwers the like Purpoſe of the former Rule.

III. If the Queen is turned up on your Right-hand, and that you have Ace, King, and Knave, by playing your King it anſwers the like Purpoſe of the former Rule.

IV. Suppoſe an Honour is turned up on your Left-hand, and ſuppoſe you ſhould hold no Honour, in that Caſe you are to play Trumps through that Honour; but in caſe you ſhould hold an Honour, (except the Ace) you muſt be cautious how you play Trumps, becauſe, in caſe your Partner holds no Honour, your Adverſary will play your own Game upon you.

A CASE *to demonſtrate the Danger of forcing your Partner.*

SUPPOSE *A* and *B* Partners, and that *A* has a Quint-Major in Trumps, with a Quint-Major, and three ſmall Cards of another Suit, and that *A* has the Lead; and let us ſuppoſe the Adverſaries *C* and *D* to have only five Trumps in either hand: In this Caſe, *A*, having the Lead, wins every Trick.

Suppoſe, on the contrary, *C* has five ſmall Trumps,

Trumps, with a Quint-Major and three ſmall Cards of another Suit, and that *C* has the Lead, who forces *A* to trump firſt, by which Means *A* wins only five Tricks.

A CASE *to demonſtrate the Advantage by a Saw.*

SUPPOSE *A* and *B* Partners, and that *A* has a Quart-Major in Clubs, they being Trumps, another Quart-Major in Hearts, another Quart-Major in Diamonds, and the Ace of Spades: And let us ſuppoſe the Adverſaries *C* and *D* to have the following Cards; *viz.* *C* has four Trumps, eight Hearts, and one Spade; *D* has five Trumps and eight Diamonds; *C* being to lead, plays an Heart, *D* trumps it; *D* plays a Diamond, *C* trumps it; and thus purſuing the Saw, each Partner trumps a Quart-Major of *A*'s, and *C* being to play at the ninth Trick, plays a Spade, which *D* trumps; thus *C* and *D* have won the nine firſt Tricks, and leave *A* with his Quart-Major in Trumps only.

The foregoing *Caſe* ſhews, that whenever you gain the Advantage of eſtabliſhing a Saw, it is your Intereſt to embrace it.

Variety of CASES, *intermixed with* CALCULATIONS, *demonſtrating when it is proper, at ſecond Hand, to put up the King, Queen, Knave, or Ten, with one ſmall Card of any Suit,* &c.

I. SUPPOSE you have four ſmall Trumps, in the three other Suits you have one Trick ſecure

cure in each of them: and ſuppoſe your Partner has no Trump, in that Caſe the remaining nine Trumps muſt be divided between your Adverſaries; ſuppoſe five in one Hand, and four in the other; as often as you have the Lead, play Trumps: And ſuppoſe you ſhould have four Leads, in that Caſe, you ſee your Adverſaries make only five Tricks out of nine Trumps; whereas if you had ſuffered them to make their Trumps ſingle, they might poſſibly have made nine Tricks.

By this Example, you ſee the Neceſſity there is of taking out two Trumps for one upon moſt Occaſions.

Yet there is an Exception to the foregoing Rule: becauſe if you find in the Courſe of Play, that your Adverſaries are very ſtrong in any particular Suit, and that your Partner can give you no Aſſiſtance in that Suit, in ſuch a Caſe you are to examine your own, and alſo your Adverſaries Scores; becauſe by keeping one Trump in your Hand to trump ſuch Suit, it may be either a Means to ſave or win a Game.

II. Suppoſe you have Ace, Queen, and two ſmall Cards of any Suit; your Right-hand Adverſary leads that Suit; in that Caſe, do not put up your Queen, becauſe it is an equal Wager that your Partner has a better Card in that Suit than the third Hand; if ſo, you have the Command of that Suit.

An Exception to the foregoing Rule is, in caſe you want the Lead, then you are to put up your Queen.

III. Never

III. Never chuſe to lead from King, Knave, and one ſmall Card in any Suit, becauſe it is 2 to 1 that your Partner has not the Ace, and alſo 32 to 25, or about 5 to 4, that he has Ace or Queen; and therefore, as you have only about 5 to 4, in your Favour, and as you muſt have four Cards in ſome other Suit, ſuppoſe the Ten to be the higheſt, lead that Suit, becauſe it is an equal Wager that your Partner has a better Card in that Suit than the laſt Player: And if the Ace of the firſt-mentioned Suit lies behind you, which is an equal Wager it ſhould ſo happen, in caſe your Partner has it not; in this Caſe, on your Adverſaries leading this Suit, you probably make two Tricks in it by this Method of Play.

IV. Suppoſe in the Courſe of Play it appears to you, that your Partner and you have four or five Trumps remaining, when your Adverſaries have none, and that you have no winning Card in your Hand, but that you have Reaſon to judge that your Partner has a thirteenth Card, or ſome other winning Card in his Hand; in that Caſe play a ſmall Trump, to put the Lead into his Hand, in order to throw away any loſing Card in your Hand, upon ſuch thirteenth or other good Card.

Some DIRECTIONS *for putting up at ſecond Hand, King, Queen, Knave, or Ten of any Suit*, &c.

I. SUPPOSE you have the King, and one ſmall Card, of any Suit, and that your Right-

Right-hand Adverſary plays that Suit; if he is a good Player, do not put up the King, unleſs you want the Lead, becauſe a good Player ſeldom leads from a Suit of which he has the Ace, but keeps it in his Hand (after the Trumps are played out) to bring in his ſtrong Suit.

II. Suppoſe you have a Queen, and one ſmall Card, of any Suit, and that your Right-hand Adverſary leads that Suit; do not put on your Queen, becauſe, ſuppoſe the Adverſary has led from the Ace and Knave, in that Caſe, upon the Return of that Suit, your Adverſary fineſſes the Knave, which is generally good Play, eſpecially if his Partner has played the King, you thereby make your Queen: but by putting on the Queen, it ſhews your Adverſary that you have no Strength in that Suit, and conſequently puts him upon fineſſing upon your Partner throughout that whole Suit.

III. In the former Examples you have been informed, when it is thought proper to put up the King or Queen at ſecond Hand; you are likewiſe to obſerve, in caſe you ſhould have the Knave or Ten of any Suit, with a ſmall Card of the ſame Suit, it is generally bad play to put up either of them at ſecond Hand, becauſe it is five to two that the third Hand has either Ace, King, or Queen of the Suit led; it therefore follows, that as the Odds againſt you are five to two, and though you ſhould ſucceed ſometimes by this Method of Play, yet in the main you muſt be a Loſer; becauſe it demonſtrates to your Adverſaries that you are weak in that

Suit, and conſequently they fineſſe upon your Partner throughout that whole Suit.

IV. Suppoſe you have Ace, King, and three ſmall Cards of a Suit, your Right-hand Adverſary leads that Suit; upon which you play your Ace, and your Partner plays the Knave. In caſe you are ſtrong in Trumps, you are to return a ſmall one in that Suit, in order to let your Partner trump it: And this Conſequence attends ſuch Play, *viz.* you keep the Command of that Suit in your own Hand, and at the ſame Time it gives your Partner an Intimation that you are ſtrong in Trumps: and therefore he may play his Game accordingly, either in attempting to eſtabliſh a Saw, or by trumping out to you, if he has either Strength in Trumps, or the Command of the other Suits.

V. Suppoſe *A* and *B*'s Game is ſcored 6, the Adverſaries *C* and *D* is ſcored 7, and that 9 Cards are played out, of which *A* and *B* have won 7 Tricks, and ſuppoſe no Honours are reckoned in that Deal; in this Caſe *A* and *B* have won the odd Trick, which puts their Game upon an Equality; and ſuppoſe *A* to have the Lead, and that *A* has two of the ſmalleſt Trumps remaining, with two winning Cards of other Suits; and ſuppoſe *C* and *D* have the two beſt Trumps between them, with two other winning Cards in their Hands; *Quere*, How are you to play this Game? It is 11 to 3 that *C* has not the 2 Trumps; and likewiſe, 11 to 3 that *D* has them not: The Odds being ſo much in *A*'s Favour to win the whole Stake, it is his Intereſt to play a Trump; for ſuppoſe the Stake to be 70*l*

depending,

depending, *A* wins the whole Stake, if he ſucceeds by this Method of Play; but ſhould he play the cloſe Game, by forcing *C* or *D* to trump firſt, he having won the odd Trick already, and being ſure of winning two more in his own Hand; by this Method his Game will be ſcored 9 to 7, which is about 3 to 2, and, therefore, *A*'s Share of the 70*l.* will amount only to 42*l.* and, by this Method, *A* only ſecures 7*l.* Profit; but in the other Caſe, upon Suppoſition that *A* and *B* have 11 to 3 of the Stake depending, as aforeſaid, by playing his Trump, he is entitled to 55*l.* out of the 70*l* depending.

The foregoing Caſe being duly attended to, may be applied to the like Purpoſe in other Parts of the Game.

DIRECTIONS *how to play when an Ace, King, or Queen, are turned up on your Right-hand.*

I. SUPPOSE the Ace is turned up on your Right-hand, and that you have the Ten and Nine of Trumps only, with Ace, King and Queen of another Suit, and eight Cards of no Value, *Quere*, How muſt this Game be played? Begin with the Ace of the Suit of which you have the Ace, King and Queen, which is an information to your Partner that you have the Command of that Suit; then play your Ten of Trumps, becauſe it is 5 to 2 that your Partner has King, Queen, or Knave of Trumps; and though it is about 7 to 2 that your Partner has not two Honours, yet, ſhould he chance to have them, and they prove to

be the King and Knave, in that Caſe, as your Partner will paſs your ten of Trumps, and as it is 13 to 12 againſt the laſt Player for holding the Queen of Trumps, upon Suppoſition your Partner has it not, in that Caſe, when your Partner has the Lead, he plays to your ſtrong Suit, and upon your having the Lead, you are to play the Nine of Trumps, which puts it in your Partner's Power to be almoſt certain of winning the Queen if he lies behind it.

The foregoing Caſe ſhews, that turning up of an Ace againſt you, may be made leſs beneficial to your Adverſaries, provided you play by this Rule.

II. If the King or Queen are turned up on your Right-hand, the like Method of Play may be made uſe of; but you are always to diſtinguiſh the Difference of your Partner's Capacity, becauſe a good Player will make a proper Uſe of ſuch Play, but a bad one ſeldom, if ever.

III. Suppoſe the Adverſary on your Right-hand leads the King of Trumps, and that you ſhould have the Ace and four ſmall Trumps, with a good Suit; in this Caſe it is your Intereſt to paſs the King; and though he ſhould have King, Queen, and Knave of Trumps, with one more, if he is a moderate Player, he will play the ſmall one, imagining that his Partner has the Ace; when he plays the ſmall one, you are to paſs it, becauſe it is an equal Wager that your Partner has a better Trump than the laſt Player; if ſo, and that he happens to be a tolerable Player, he will judge you have a good Reaſon for this Method of Play, and conſequently,

quently, if he has a third Trump remaining, he will play it; if not, he will play his beſt Suit.

IV. *A critical* CASE *to win an odd Trick.*

Suppoſe *A* and *B* Partners againſt *C* and *D*, and ſuppoſe the Game to be Nine all, and ſuppoſe all the Trumps are played out, *A* being the laſt Player, has the Ace and four other ſmall Cards of a Suit in his Hand, and one thirteenth Card remaining: *B* has only two ſmall Cards of *A*'s Suit; *C* has Queen and two other ſmall Cards of that Suit; *D* has King, Knave, and one ſmall Card of the ſame Suit. *A* and *B* have won three Tricks, *C* and *D* have won four Tricks; it therefore follows that *A* is to win four Tricks out of the ſix Cards in his Hand, in order to win the Game. *C* leads this Suit, and *D* puts up to the King; *A* gives him that Trick, *D* returns that Suit; *A* paſſes it, and *C* puts up his Queen: Thus *C* and *D* have won ſix Tricks, and *C* imagining the Ace of that Suit to be in his Partner's Hand, returns it; by which Means *A* wins the four laſt Tricks, and conſequently the Game.

V. Suppoſe you ſhould have the King and five ſmall Trumps, and that your Right-hand Adverſary plays the Queen; in that Caſe do not put on your King, becauſe it is an equal Wager that your Partner has the Ace; and ſuppoſe your Adverſary ſhould have Queen, Knave, Ten, and one ſmall Trump, it is alſo an equal Wager that the Ace lies ſingle, either in your Adverſary's Hand or Partner's; in either of which Caſes it is bad Play to

put on your King; but if the Queen of Trumps is led, and that you ſhould happen to have the King, with two or three Trumps, it is the beſt Play to put on the King, becauſe it is good Play to lead from the Queen and one ſmall Trump only; and in that Caſe ſhould your Partners have the Knave of Trumps, and your Left-hand Adverſary hold the Ace, your neglecting to put on the King is the Loſs of a Trick.

The Ten or Nine being turned up on your Right-hand.

I. SUPPOSE the Ten is turned up on your Right-hand, and that you ſhould have King, Knave, Nine, and two ſmall Trumps, with eight other Cards of no Value, and that it is proper for you to lead Trumps, in that Caſe, begin with the Knave, in order to prevent the Ten from making a Trick; and though it is but about five to four that your Partner holds an Honour, yet if that ſhould fail, by fineſſing your Nine on the Return of Trumps from your Partner, you have the Ten in your Power.

II. The Nine being turned up on your Right-hand, and that you ſhould have Knave, Ten, Eight, and two ſmall Trumps, by leading the Knave it anſwers the like Purpoſe of the former Caſe.

III. You are to make a wide Difference between a Lead of Choice, and a forced Lead of your Partner's; becauſe, in the firſt Caſe, he is ſuppoſed to lead from his beſt Suit, and finding you

you deficient in that Suit, and not being ſtrong enough in Trumps, and not daring to force you, he then plays his next beſt Suit; by which Alteration of Play, it is next to a Demonſtration that he is weak in Trumps: But ſhould he perſevere, by playing off his firſt Lead, if he is a good Player, you are to judge him ſtrong in Trumps, and it is a Direction for you to play your Game accordingly.

IV. There is nothing more pernicious, at the Game of Whiſt, than to change Suits often, becauſe in every new Suit you run the Riſque of giving your Adverſary the Tenace; and therefore, though you lead from a Suit of which you have the Queen, Ten, and three ſmall ones, and your Partner puts up the Nine only, in that Caſe, if you ſhould happen to be weak in Trumps, and that you have no tolerable Suit to lead from, it is your beſt Play to purſue the Lead of that Suit by playing your Queen, which leaves it in your Partner's Option whether he will trump it or not, in caſe he has no more of that Suit; but in your ſecond Lead, in caſe you ſhould happen to have the Queen or Knave of any other Suit, with one Card only of the ſame Suit, it would be better Play to lead from your Queen or Knave of either of theſe Suits, it being 5 to 2 that your Partner has one Honour at leaſt in either of thoſe Suits.

V. If you have Ace, King, and one ſmall Card of any Suit, with four Trumps; if your Right-hand Adverſary leads that Suit, paſs it, becauſe it is an equal Wager that your Partner has a better Card in that Suit than the third Hand; if ſo, you

gain a Trick by it; if otherwiſe, as you have four Trumps, you need not fear to loſe by it, becauſe when Trumps are played, you may be ſuppoſed to have the long Trump.

A CAUTION *not to part with the Command of your Adverſary's great Suit*, &c.

I. IN caſe you are weak in Trumps, and that it does not appear that your Partner is very ſtrong in them, be very cautious how you part with the Command of your Adverſary's great Suit: For ſuppoſe your Adverſary plays a Suit of which you have the King, Queen, and one ſmall Card only, the Adverſary leads the Ace, and upon playing the ſame Suit, you play your Queen, which makes it almoſt certain to your Partner that you have the King; and ſuppoſe your Partner refuſes to that Suit, do not play the King, becauſe if the Leader of that Suit or his Partner have the long Trump, you riſque the loſing of three Tricks to get one.

II. Suppoſe your Partner has ten Cards remaining in his Hand, and that it appears to you that they conſiſt of Trumps and one Suit only; and ſuppoſe you ſhould have King, Ten, and one ſmall Card of his ſtrong Suit, with Queen and two ſmall Trumps; in this Caſe, you are to judge he has five Cards of each Suit, and therefore you ought to play out the King of his ſtrong Suit; and if you win that Trick, your next Play is to throw out the Queen of Trumps; if that likewiſe comes home, proceed to play Trumps: This Method of Play may be

be made uſe of at any Score of the Game, except at 4 and 9.

III. *The* TRUMP *turned up to be remembered.*

It is ſo neceſſary that the Trump turned up ſhould be known and remembered, both by the Dealer and his Partner, that we think it proper to obſerve, that the Dealer ſhould always ſo place that Card, as to be certain of having Recourſe to it: For ſuppoſe it to be only a 5, and that the Dealer has two more, *viz.* the 6 and 9, if his Partner trumps out with Ace and King, he ought to play his 6 and 9; becauſe, let us ſuppoſe your Partner to have Ace, King and four ſmall Trumps; in this Caſe, by your Partner's knowing you have the 5 remaining, you may win many Tricks.

IV. Your Right-hand Adverſary leads a Suit of which you have the Ten and two ſmall ones; the third Hand puts up the Knave, your Partner wins it with the King: when your Right-hand Adverſary leads that Suit again, and plays a ſmall one, do you put on your Ten, becauſe it may ſave your Partner's Ace, upon Suppoſition that your Right-hand Adverſary led from the Queen; you will ſeldom fail of Succeſs by this Method of Play.

V. Suppoſe you have the beſt Trump, and that the Adverſary *A* has one Trump only remaining, and that it appears to you that your Adverſary *B* has a great Suit; in this Caſe, though you permit *A* to make his Trump, yet by keeping the Trump in your Hand, you prevent the Adverſary *B* from making his great Suit; whereas, if you had taken out *A*'s Trump, it had made only one Trick Dif-

ference; but by this Method you probably ſave three or four Tricks.

VI. *The following* CASE *happens frequently.*

That you have two Trumps remaining when your Adverſaries have only one, and it appears to you that your Partner has one great Suit; in this Caſe always play a Trump, though you have the worſt, becauſe by removing the Trump out of your Adverſary's Hand, there can be no Obſtruction to your Partner's great Suit.

VII. Suppoſe you ſhould have three Trumps when no Body elſe has any, and that you ſhould have only four Cards of any certain Suit remaining; in this Caſe play a Trump, which ſhews your Partner that you have all the Trumps, and alſo gives you a fair Chance for one of your Adverſaries to throw away one Card of the aforeſaid Suit; by which Means, ſuppoſing that Suit to have been once led, and one thrown away, makes five, and four remaining in your Hand makes nine, there being only four remaining between three Hands, and your Partner having an equal Chance to hold a better Card in that Suit than the laſt Player, it therefore follows that you have an equal Chance to make three Tricks in that Suit, which probably could not have been done but by this Method of Play.

VIII. Suppoſe you have five Trumps, and ſix ſmall Cards of any Suit, and you are to lead; the beſt Play is to lead from the Suit of which you have ſix, becauſe, as you are deficient in two Suits, your Adverſaries will probably trump out, which

which is playing your own Game for you; whereas, had you begun with playing Trumps, they would force you, and consequently destroy your Game.

The Manner of playing SEQUENCES *further explained, with many Examples.*

I. IN Trumps you are to play the highest of your Sequences, unless you should have Ace, King, and Queen; in that Case play the lowest, in order to let your Partner into the State of your Game.

II. In Suits which are not Trumps, if you have a Sequence of King, Queen, and Knave, and two small ones; whether you are strong in Trumps or not, it is the best Play to begin with the Knave, because by getting the Ace out of any Hand, you make Room for the whole Suit.

III. And in case you are strong in Trumps, supposing you should have a Sequence of Queen, Knave, Ten, and two small Cards of any Suit; in that Case you ought to play the highest of your Sequence, because, if either of the Adversaries should trump that Suit in the second Round, by being strong in Trumps, you fetch out their Trumps, and consequently make the Remainder of that Suit.

The like Method may be taken, if you should happen to have a Sequence by Knave, Ten, Nine, and two small Cards of any Suit.

IV. If you have a Sequence of a King, Queen,

Knave, and one ſmall Card of any Suit, whether you are ſtrong in Trumps or otherwiſe, play your King; and do the like by any inferior Sequences, if you have only four in Number.

V. But if you ſhould happen to be weak in Trumps, you muſt always begin with the loweſt of the Sequence, in caſe you ſhould have five in Number; for, ſuppoſe your Partner to have the Ace of that Suit, he then makes it; and where lies the Difference, whether you or your Partner win a Trick? For if you had the Ace and four ſmall Cards of any Suit, and are weak in Trumps, and led from that Suit, if you play well, you ought to play the Ace; if you are very ſtrong in Trumps, you may play your Game as backward as you pleaſe; but if you are weak in Trumps, you muſt play the reverſe.

VI. Let us explain what is meant by being ſtrong or weak in Trumps.

If you have Ace, King, and three ſmall Trumps.

King, Queen, and three ſmall Trumps.

Queen, Knave, and three ſmall Trumps.

Knave, Ten, and three ſmall Trumps.

Queen, and four ſmall Trumps.

Knave, and four ſmall Trumps.

In any of the aforeſaid Caſes, you may be underſtood to be very ſtrong in Trumps, and therefore you may play by the foregoing Rules, being morally aſſured of having the Command in Trumps.

If

If you have two or three ſmall Trumps only, we underſtand you to be weak in them.

VII. What Strength in Trumps entitles you to force your Partner at any Point of the Game?

Ace, and three ſmall Trumps.

King, and three ſmall Trumps.

Queen, and three ſmall Trumps.

Knave, and three ſmall Trumps.

VIII. If, by Accident, either you or the Adverſaries have forced your Partner (though you are weak in Trumps) if he has had the Lead, and does not chuſe to trump out, force him on as often as the Lead comes into your Hand, unleſs you have good Suits of your own to play.

IX. If you ſhould happen to have only two or three ſmall Trumps, and that your Right-hand Adverſary leads a Suit of which you have none, trump it, which is an Information to your Partner that you are weak in Trumps.

X. Suppoſe you have Ace, Knave, and one ſmall Trump, and that your Partner trumps to you, ſuppoſe from the King and three ſmall Trumps, *Quere*, Whether it is the beſt Play to put on the Ace or Knave? and ſuppoſe your Right-hand Adverſary has three Trumps, and that your Left-hand Adverſary has the like Number; in this Caſe, by fineſſing of your Knave, and playing your Ace, if the Queen is on your Right-hand, you win a Trick by it; but if the Queen is on your Left-hand, and you ſhould play the Ace, and then return the Knave, admitting your Left-hand Adverſary put on the Queen, which he ought to do, it is above 2 to 1 that

that one of the Adverſaries has the Ten, and conſequently you gain no Tricks by playing thus.

XI. If your Partner has led from the Ace of Trumps, and ſuppoſe you ſhould have King, Knave, and one ſmall Trump, by putting on your Knave, and returning the King, it anſwers exactly the like Purpoſe of the former Rule.

In other Suits you may practiſe the like Method.

XII. If you are ſtrong in Trumps, and that you have King, Queen, and two or three ſmall Cards in any other Suit, you may lead a ſmall one, it being 5 to 4 that your Partner has an Honour in that Suit: but if you are weak in Trumps, you ought to begin with the King.

XIII. If your Right-hand Adverſary leads a Suit of which you have King, Queen, and two or three ſmall Cards of the ſame Suit, you being ſtrong in Trumps, may paſs it, becauſe it is an equal Wager that your Partner has a better Card in that Suit than the third Hand; if not, by your Strength of Trumps, you need not fear making that Suit.

XIV. If your Right-hand Adverſary leads a Suit of which you have King, Queen, and one ſmall Card, whether in Trumps or not, put on the Queen: Alſo, if you have Queen, Knave, and one ſmall Card, put on the Knave; and if you have Knave, Ten, and one ſmall Card, put on the Ten: by putting up the ſecond beſt, as aforeſaid, your Partner has an Expectation of your having a better Card or Cards in the ſame Suit: and by Recourſe to the Calculations annexed to this Treatiſe, he

he may be able to judge what are the Odds for and againſt him.

XV. If you ſhould have Ace, King, and two ſmall Cards in any Suit, being ſtrong in Trumps; if your Right-hand Adverſary leads that Suit, you may paſs it, becauſe it is an equal Wager that your Partner has a better Card in that Suit than the third Hand; if ſo, you gain a Trick by it; if otherwiſe, you need not fear to make your Ace and King by your Strength in Trumps.

XVI. If you ſhould have the Ace, Nine, Eight, and one ſmall Trump, and that your Partner leads the Ten; in that Caſe paſs it, becauſe, unleſs the three Honours lie behind you, you are ſure of making two Tricks; do the like, if you ſhould have the King, Nine, Eight, and one ſmall Trump; or the Queen, Nine, Eight, and one ſmall Trump.

XVII. In order to deceive your Adverſaries, if your Right-hand Adverſary leads from a Suit of which you have Ace, King, and Queen, or Ace, King, and Knave, put on the Ace: becauſe that encourages the Adverſaries to play that Suit again: And though you deceive your Partner by this Method of Play, you alſo deceive your Adverſaries, which is of greater Conſequence in this Caſe; becauſe, if you had put on the loweſt of the Tierce-Major, or the Knave in the other Suit, your Right-hand Adverſary had made a Diſcovery that the Strength of that Suit was againſt him, and conſequently would have changed Suits.

XVIII. Suppoſe you have Ace, Ten, and one ſmall Card, in any Suit; alſo the Ace, Nine, and one

one ſmall Card of any Suit, *Quere*, Which of theſe Suits ought you to lead from? *Anſwer*, From the Suit of which you have the Ace, Nine, and one ſmall Card; for this Reaſon, it being an equal Wager that your Partner has a better Card in that Suit than the laſt Player; if not, let us then ſuppoſe that your Right-hand Adverſary leads from the King, or Queen, of the Suit of which you have the Ace, Ten, and one ſmall Card; in that Caſe it is an equal Wager that your Partner has a better Card in that Suit than the third Hand; if that happens to be the Caſe, upon the Return of the Suit, you lie Tenace, and conſequently ſtand a fair Chance for three Tricks in that Suit.

XIX. *A* CASE *to demonſtrate the Tenace.*

Let us ſuppoſe *A* and *B* to play at Two-handed Whiſt, and let us ſuppoſe *A* to have the Ace, Queen, Ten, Eight, Six, and Four of Clubs, which, in caſe *B* always leads, are ſix ſure Tricks. Let us ſuppoſe he has the ſame Hand in Spades, which, in caſe *B* always leads, are ſix more ſure Tricks. We ſuppoſe *B* has the Remainder of theſe two Suits.

Let us ſuppoſe *B* to have the ſame Hand in Hearts and Diamonds, as *A* has in Spades and Clubs, and that *A* has the Remainder of the Hearts and Diamonds, which, in caſe *A* always leads, are twelve ſure Tricks alſo to *B*.

The foregoing Caſe ſhews that both Hands are exactly equal; and therefore let one of them name his Trumps, and lead, he wins thirteen Tricks only.

But

But if one names the Trumps, and the other leads, he that names the Trumps ought to win fourteen Tricks.

Thoſe who would attain to the playing of WHIST to Perfection, muſt not be content only with being a Maſter of the Calculations contained in this Treatiſe, and alſo an exact Judge of all the general and particular Caſes in the ſame; but be a very punctual Obſerver of ſuch Cards as are thrown away, both by his Partner and Adverſaries, and at what Time: Whoever attends cloſely to theſe particulars, is the moſt likely to attain his End.

Additional CASES.

I. WHEN it appears to you that the Adverſaries have three or four Trumps remaining, and that neither you nor your Partner have any, never attempt to force one Hand to trump, and to let the other throw away a loſing Card, but rather endeavour to find out a Suit in your Partner's Hand, in caſe you have no Suit in your own; by which Means you prevent them from making their Trumps ſeparate.

II. Suppoſe *A* and *B* are Partners againſt *C* and *D*, and ſuppoſe nine Cards are played out; and alſo ſuppoſe eight Trumps are played out; and further ſuppoſe *A* to have one Trump only, and ſuppoſe his Partner *B* to have the Ace and Queen of Trumps, and ſuppoſe the Adverſaries *C* and *D* to have the King and Knave of Trumps between them. *A* leads his ſmall Trump, *C* plays the Knave

Knave of Trumps, *Quere*, Whether *B* is to play his Ace or Queen of Trumps upon the Knave? becauſe *D* having four Cards in his Hand remaining, and *C* only three, conſequently it is four to three in *B*'s Favour, that the King is in *D*'s Hand: If we reduce the Number of four Cards in a Hand to three, the Odds then is 3 to 2; and if we reduce the Number of three Cards in a Hand to two, the Odds then is 2 to 1 in Favour of *B*'s winning of a Trick, by putting on his Ace of Trumps. By the like Rule you may play all the other Suits.

III. Let us ſuppoſe you have the thirteenth Trump, and alſo the thirteenth Card of any Suit in your Hand, and one loſing Card; and let us ſuppoſe you have only three Cards remaining, *Quere*, Which of theſe Cards are you to play? *Anſwer*, You are to play the loſing Card, becauſe if you play the thirteenth Card firſt, the Adverſaries knowing you to have one Trump remaining, will not paſs your loſing Card, and therefore you play 2 to 1 againſt yourſelf.

IV. Let us ſuppoſe that you have the Ace, King, and three ſmall Cards, in any Suit which has never been played; and let us ſuppoſe that it appears to you that your Partner has the laſt Trump remaining, *Quere*, How are you to play theſe Cards to your greateſt Advantage? *Anſwer*, You are to lead a ſmall Card in that Suit, becauſe it is an equal Wager that your Partner has a better Card in that Suit than the laſt Player; if ſo, and that there are only three Cards in that Suit in any one Hand, it follows that you win five Tricks in that

that Suit; whereas, if you play the Ace and King in that Suit, it is 2 to 1 that your Partner does not hold the Queen, and conſequently, by playing the Ace and King, it is 2 to 1 that you win only two Tricks in that Suit. This Method may be taken in caſe all the Trumps are played out, provided you have good Cards in other Suits to bring in this Suit; and you may obſerve, that you reduce the Odds of 2 to 1 againſt you to an equal Chance by this Method of Play, and probably gain three Tricks by it.

V. If you chuſe to have Trumps played by the Adverſaries, and that your Partner has led a Suit to you, of which you have the Ace, Knave, Ten, Nine, and Eight, or the King, Knave, Ten, Nine, and Eight, you are to play the Eight of either Suit; which probably leads the Adverſary, if he wins that Card, to play Trumps.

VI. Suppoſe you ſhould have a Quart-Major in any Suit, with one or two more of the ſame Suit, and that it is neceſſary to let your Partner know that you have the Command of that Suit; in that Caſe, throw away the Ace of that Suit upon any Suit of which you have none in your Hand, to clear up his Doubts, becauſe the Odds is in your Favour that neither of the Adverſaries have more than three in that Suit: the like Method may be taken if you have a Quart to a King; the Ace being played out, you may throw away the King; alſo, if you ſhould have a Quart to a Queen, (the Ace and King being played out) you may throw away your Queen: All which lets your Partner into the

the State of your Game; and you may play by the like Rule in all inferior Sequences, having the beſt of them in your Hand.

VII. There is ſcarcely any thing more commonly practiſed amongſt moderate Players, in caſe the King is turned up on the Left-hand, and that they have the Queen and one ſmall trump only, to play out their Queen, in Hopes their Partner may win the King if it is put on; not conſidering that it is about 2 to 1 that their Partner has not the Ace; and admitting he has the Ace, they do not conſider that they play two Honours againſt one, and conſequently weaken their Game. The Neceſſity only of playing Trumps ſhould oblige them to play thus.

VIII. *A* CASE *which frequently happens.*

A and *B* are Partners againſt *C* and *D*, and all the Trumps are played out except one, which *C* or *D* has; *A* has three or four winning Cards in his Hand of a Suit already played, with an Ace and one ſmall Card of another Suit: *Quere*, Whether it is *A*'s beſt Play to throw away one of his winning Cards, or the ſmall Card to his Ace-Suit? *Anſwer.* It is his beſt Play to throw away one of his winning Cards; becauſe, if his Right-hand Adverſary plays to his Ace-Suit, he has it in his power to paſs it, and conſequently his Partner *B* has an equal Chance to have a better Card in that Suit than the third Hand; if ſo, and he has any forcing Card, or one of his Partner's Suit to play to, in order to force out the laſt Trump, his Ace remaining in his Hand, brings in his winning Cards; whereas, if *A* had

A had thrown away the ſmall Card to his Ace-Suit, and that his Right-Hand Adverſary had led that Suit, he had been obliged to put on his Ace, and conſequently had loſt ſome Tricks by this Method of Play.

IX. Suppoſe ten Cards have been played out, and ſuppoſe it appears very probable that your Left-hand Adverſary has three Trumps remaining, *viz.* the beſt and two ſmall ones; and ſuppoſe you have two Trumps only, and that your Partner has no Trump; and ſuppoſe your Right-hand Adverſary plays a thirteenth or ſome other winning Card, in that caſe paſs it, by which Means you gain a Trick, becauſe the Left-hand Adverſary muſt trump it.

X. In order to let your Partner into the State of your Game, let us ſuppoſe you to have a Quart-Major in Trumps (or any other four beſt Trumps) if you are obliged to trump a Card, win it with the Ace of Trumps, and then play the Knave, or win it with the higheſt of any other four beſt Trumps, and then play the loweſt, which clears up your Game to your Partner; and, by ſuch a Diſcovery, it may be the means of winning many Tricks: You may practiſe the like Rule in all other Suits.

XI. If your Partner calls at the Point of Eight before his Time, you are to trump to him, whether you are ſtrong in Trumps or Suits, or not; becauſe, as he calls before he is obliged to do ſo, it is a Declaration of his being ſtrong in Trumps.

XII. Sup-

XII. Suppoſe your Right-hand Adverſary turns up the Queen of Clubs; and ſuppoſe, when he has the Lead, he plays the Knave of Clubs; and ſuppoſe you have the Ace, Ten, and one Club more, or the King, Ten, and one ſmall Card; *Quere*, When he leads his Knave, whether you are to win it or not? *Anſwer*, You are not to win it, becauſe it is an equal Wager, when he leads his Knave of Clubs, you not having the King, that your partner has it; alſo, it is an equal Wager, when he leads his Knave of Clubs, you not having the Ace, that your Partner has it, and conſequently you gain a Trick by paſſing it; which cannot be done, if you either put on your King or Ace of Clubs.

XIII. *A* CASE for a Slam. Let us ſuppoſe *A* and *B* Partners againſt *C* and *D*; and let us ſuppoſe *C* to deal; and let us ſuppoſe *A* to have the King, Knave, Nine, and Seven of Clubs, they being Trumps; a Quart-Major in Diamonds, a Tierce-Major in Hearts, and the Ace and King of Spades.

Let us ſuppoſe *B* to have nine Diamonds, two Spades, and two Hearts.

Alſo, Let us ſuppoſe *D* to have the Ace, Queen, Ten, and Eight of Trumps, with nine Spades.

And let *C* have five Trumps and eight hearts.

A is to lead a Trump, which *D* is to win, and *D* is to play a Spade, which his Partner *C* is to trump: *C* is to lead a Trump, which his Partner *D* is to win; when *D* is to lead a Spade, which *C* is to trump: and *C* is to play a Trump, which *D* is

is to win; and *D* having the beſt Trump, is to play it; which done, *D* having ſeven Spades in his Hand, wins them, and conſequently ſlams *A* and *B*.

More Additional CASES.

I. IF your Partner leads the King of a Suit, and that you have none of that Suit, paſs it, by throwing away a loſing Card (unleſs your Right-hand Adverſary has put on the Ace) becauſe, by ſo doing, you make Room for his Suit.

II. Suppoſe your Partner leads the Queen of a Suit, and your Right-hand Adverſary wins it with the Ace, and returns that Suit; in caſe you have none of it, do not trump it, but throw away a loſing Card, which makes Room for your Partner's Suit. An Exception to this Manner of Play is, if you play for an odd Trick, and that you are very weak in Trumps, you may trump it.

III. Suppoſe you have the Ace, King, and one ſmall Card of a Suit, and that your Left-hand Adverſary leads that Suit, and ſuppoſe you ſhould have four ſmall Trumps, and no Suit of Conſequence to lead from; and ſuppoſe your Right-hand Adverſary ſhould put up the Nine, or any lower Card; in this Caſe, win it with the Ace, and return the Lead upon the Adverſary, by playing the ſmall Card of that Suit; who will have Reaſon to judge that the King lies behind him, and conſequently will not put up his Queen if he has it; and therefore you have a fair Probability of winning a Trick by this Method of

of Play, at the ſame Time letting your Partner into the State of your Game.

IV. If your Partner forces you to trump a Card early in the Deal, you are to ſuppoſe him ſtrong in Trumps, except at the Points of 4 or 9; and therefore, if you are ſtrong in Trumps, you may play them.

V. Suppoſe you call at the Point of 8, and your Partner has no Honour; and ſuppoſe you ſhould have the King, Queen, and Ten; the King, Knave, and Ten; or the Queen, Knave, and Ten of Trumps; when Trumps are played, always put on the Ten, which demonſtrates to your Partner that you have two Honours remaining, and ſo he plays his Game accordingly.

VI. Suppoſe your Right-hand Adverſary calls at the Point of 8, and his Partner has no Honour; and ſuppoſe you ſhould have the King, Nine, and one ſmall Trump, or the Queen, Nine, and two ſmall Trumps; when Trumps are played by your Partner, put on the Nine, becauſe it is about 2 to 1 that the Ten is not behind you, and ſo you play your Nine to an Advantage.

VII. If you ſhould happen to lead a Suit of which you have the Ace, King, and two or three more, when you play the Ace, if your Partner plays the Ten or Knave, and ſuppoſe you ſhould have one ſingle Card in your Hand in any other Suit, and two or three ſmall Trumps only; in this Caſe lead the ſingle Card, in order to eſtabliſh a Saw; and this Conſequence attends ſuch Play, *viz.* upon leading that Suit it gives your Partner an equal Chance

Chance of having a better Card in it than the laſt Player; whereas, had he led that Suit to you, which is probable had been his ſtrong Suit, the Adverſaries would have made the Diſcovery of your attempting to eſtabliſh a Saw, they would trump out, and ſo prevent your making your ſmall Trumps: By this Method of Play, your Partner will eaſily judge the Reaſon for your changing of Suits, and ſo play his Game accordingly.

VIII. Suppoſe you have the Ace and Deuce of Trumps, and ſtrong in the three other Suits; if you are to lead, play your Ace, and next your Deuce of Trumps, in order to put the Lead into your Partner's Hand, to take out 2 Trumps for 1; and ſuppoſe the laſt Player wins that Trick, and that he leads a Suit of which you have the Ace, King, and 2 or 3 more, paſs it, becauſe it is an equal Wager that your Partner has a better Card in that Suit than the third Hand; if ſo, he will then have an Opportunity of taking out two Trumps to one; when the Lead comes into your Hand, you are to endeavour to force out one of the two Trumps remaining, upon Suppoſition 11 Trumps are played out, and the Odds is ſtill in your Favour that your Partner has 1 of the 2 Trumps remaining.

IX. Suppoſe 10 Cards are played out, and that you have the King, Ten, and one ſmall Card of any Suit, which has never been led; and ſuppoſe you have won 6 Tricks, and ſuppoſe your Partner leads from that Suit, and that there is neither a Trump or thirteenth Card in any Hand; in this Caſe, unleſs your Right-hand Adverſary puts on ſo

high a Card as obliges you to play your King, do not put it on, becauſe upon the Return of that Suit, you make your King, and conſequently the odd Trick, which makes 2 Difference: if there happens to be only 9 Cards played out, in the like Circumſtance, you are to play by the like Rule. This Method is always to be taken, unleſs the gaining of 2 Tricks gives you a Chance either to ſave your Lurch, or to win or ſave the Game.

X. Suppoſe *A* and *B* Parners againſt *C* and *D*, and let us ſuppoſe *B* has the two laſt Trumps, alſo the Queen, Knave and Nine of another Suit; and let us ſuppoſe *A* has neither the Ace, King, or Ten of that Suit, and *A* is to lead that Suit: *Quere*, What Card is *B* to play, to give him the faireſt Probability of winning a Trick in that Suit? *Anſwer*, *B* is to play the Nine of that Suit, becauſe it is only five to four againſt him that his Left-hand Adverſary holds the Ten; and if he plays either the Queen or Knave, it is about three to one the Ace or King is in his Left-hand Adverſary's Hands, and conſequently he reduces the Odds of three to one againſt him, to five to four only.

XI. Let us vary the foregoing Caſe, and put the King, Knave, and Nine of a Suit into *B*'s Hand, upon Suppoſition that *A* has neither Ace, Queen, or Ten; when *A* leads that Suit, it is exactly equal whether *B* plays his King, Knave, or Nine.

XII. Suppoſe you have Ace, King, and three or four ſmall Cards of a Suit not played, and that it appears to you that your Partner has the laſt Trump; in

in this Caſe, if you are to lead, play a ſmall Card in that Suit, it being an equal Wager that your Partner has a better Card in that Suit than the laſt Player; if ſo, the Probability is in your Favour that you make 5 or 6 Tricks in that Suit; but if you ſhould play out Ace and King of that Suit, it is 2 to 1 that your Partner has not the Queen, and conſequently it is 2 to 1 that you make only two Tricks in that Suit; by which Method of Play you riſque the loſing of 3 or 4 Tricks in that Deal to gain one only.

XIII. If your Partner leads a Suit of which he has the Ace, Queen, Knave, and many more, and leads his Ace, and then plays his Queen; in caſe you have the King, and two ſmall Cards in that Suit, win his Queen with the King; and ſuppoſe you are ſtrong in Trumps, by clearing the Board of Trumps, and having a ſmall Card of your Partner's great Suit, you do not obſtruct his Suit, and conſequently win many Tricks by this Method of Play.

New CASES *at* WHIST.

How to play for an odd Trick.

SUPPOSE you are elder Hand, and that you have the Ace, King, and three ſmall Trumps, with four ſmall Cards of another Suit, three ſmall Cards of the third Suit, and one ſmall Card of the fourth Suit: *Quere*, How are you to play? *Anſwer*, You are to lead the ſingle Card, which, if it is won by the laſt Player, it puts him upon playing

Trumps, or to play to your weak Suits; in which Caſe your Partner and you gain the Tenace.

The like Caſe for an odd Trick, and that your Partner is to lead.

Let us ſuppoſe he plays the Ace of the Suit, of which you have only one, and proceeds to play the King of the ſame Suit, and that your Right-hand Adverſary trumps it with the Queen, Knave, or Ten; do not overtrump him, but throw away a ſmall Card of your weakeſt Suit; the Conſequence of which is obvious, becauſe it leaves your Partner the laſt Player, and ſo gives him the Tenace in your weak Suits.

The like Caſe, upon Suppoſition you want four or five Points, and that you are elder Hand.

In that Caſe play a ſmall Trump, and if your Partner has a better Trump than the laſt Player, and returns the Lead, put on your King of Trumps, and then proceed to play the Suit of which you have four in Number.

Theſe Examples being duly attended to, on all Parts of the Game, muſt be of great Conſequence to the Player; becauſe when he has no good Suit to play, his Partner being the laſt Player gains the Tenace in his weak Suits.

II. *A* and *B* are Partners againſt *C* and *D*, 12 Trumps, are played out, and 7 Cards only remain in each Hand, of which *A* has the laſt Trump, and alſo the Ace, King, and 4 ſmall Cards of a Suit:

Quere,

Quere, Whether *A* ſhould play the Ace and King of that Suit, or a ſmall one?

Anſwer, *A* ought to play a ſmall Card of that Suit becauſe it is an equal Wager that his Partner has a better Card in that Suit than the laſt Player; and in this Caſe, if 4 Cards of that Suit ſhould happen to be in either of the Adverſaries Hands, by this Method of Play, he will be able to make five Tricks in that Suit; which if he played off his Ace and King, he had made only 2 Tricks in that Suit. If neither of the Adverſaries have more than 3 Cards in that Suit, he has an equal Wager to win 6 Tricks in it.

III. Suppoſe *A* and *B* are Partners againſt *C* and *D*, and that eight Trumps are played out, and that *A* has four of thoſe Trumps remaining, *C* having the beſt Trump, and to lead:

Quere, Whether *C* ought to play his Trump or not?

Anſwer, *C* ought not to play his Trump to take out 1 of *A*'s Trumps, becauſe, as he leaves 3 Trumps in *A*'s Hands, in caſe *A*'s Partner has any great Suit to make, by *C*'s keeping the Trump in his Hands, he can prevent him from making that Suit by trumping it.

IV. *A Caſe of Curioſity.*

Suppoſe 3 Hands of Cards, containing 3 Cards in each Hand: let *A* name the Trumps, and let *B* chuſe which hand he pleaſes, *A* having his Choice of either of the other 2 Hands, wins 2 Tricks.

Clubs are to be Trumps.

First Hand, Ace, King, and 6 of Hearts.
Second Hand, Queen and 10 of Hearts, and 10 of Trumps.
Third Hand, 9 of Hearts, and 2 or 3 of Trumps.
The firſt Hand wins of the ſecond.
The ſecond wins of the third.
And the third wins of the firſt.

The LAWS *of* WHIST.

Of Dealing.

I. IF a Card is turned up in Dealing, it is in the Option of the Adverſe Party to call a new Deal; but if either of them have been the Cauſe of turning up ſuch Card, in that Caſe the Dealer has his Option.

II. If a Card is faced in the Deal, they muſt deal again, unleſs it is the laſt Card.

III. Every Perſon ought to ſee that he has 13 Cards dealt; therefore, if any one ſhould happen to have only 12, and does not find it out till ſeveral Tricks are played, and that the reſt of the Players have their right Number, the Deal ſtands good; and alſo the Perſon who plays with 12 Cards, is to be puniſhed for each Revoke, in caſe he has made any; but if any of the reſt of the Players ſhould happen to have 14 Cards, in that Caſe the Deal is loſt.

IV. The Dealer ought to leave in View upon the Table his Trump Card, till it is his Turn to play; and after he has mixed it with his other Cards, Nobody is entitled to demand what Card is turned

turned up, but may aſk what is Trumps: This Conſequence attends ſuch a Law, that the Dealer cannot name a wrong Card, which otherwiſe he might have done.

V. None of the Players ought to take up or look at their Cards, while any Perſon is dealing; and if the Dealer ſhould happen to miſs Deal, in that Caſe he ſhall deal again, unleſs it ariſes from his Partner's Fault, and if a Card is turned up in dealing, no new Deal ſhall be called, unleſs the Partner has been the Cauſe of it.

VI. *A* deals, and inſtead of turning up the Trump, he puts the Trump Card upon the reſt of his Cards, with the face downwards; he is to loſe his Deal.

Of playing out of Turn.

VII. If any Perſon plays out of his Turn, it is in the Option of either of his Adverſaries to call the Card played, at any Time in that Deal, provided it does not make him revoke; or if either of the adverſe Parties is to lead, he may deſire his Partner to name the Suit he chuſes to have him lead; and when a Suit is then named, his Partner muſt play it if he has it.

VIII. *A* and *B* are Partners againſt *C* and *D*; *A* plays the Ten of a Suit, the Adverſary *C* plays the Knave of the ſame Suit, *B* plays a ſmall Card of the ſame Suit; but before *D* plays, his Partner *C* leads a thirteenth or ſome other Card; the Penalty ſhall be in the Option of *A*, or *B*, to oblige *D* to win the Trick if he can.

IX. *A* and *B* are Partners againſt *C* and *D*; *A* leads a Club, his Partner *B* plays before the Adverſary *C*; in this Caſe *D* has a right to play before his Partner *C*, becauſe *B* played out of his Turn.

X. If the Ace, or any other Card of a Suit is led, and it ſhould ſo happen that the laſt Player plays out of his Turn, whether his Partner has any of the Suit led or not, provided you do not make him revoke, he is neither entitled to trump it, nor to win the Trick.

Of Revoking.

XI. If a Revoke happens to be made, the Adverſaries may add 3 to their Score, or take 3 Tricks from the Revoking Party, or take down 3 from their Score; and the revoking Party, provided they are up, notwithſtanding the Penalty, muſt remain at nine: the Revoke takes Place of any other Score of the Game.

XII. If any Perſon revokes, and before the Cards are turned diſcovers it, the adverſe Party may call the higheſt or loweſt Card of the Suit led, or have their Option to call the Card then played, at any Time when it does not cauſe a Revoke.

XIII. No Revoke to be claimed till the Trick is turned and quitted, or the Party who revoked, or his Partner, have played again.

XIV. If any Perſon claims a Revoke, the adverſe Party are not to mix their Cards, upon Forfeiture of the Revoke.

XV. No

XV. No Revoke can be claimed after the Cards are cut for a new Deal.

Of calling Honours.

XVI. If any Perſon calls at any Point of the Game, except 8, either of the adverſe Parties may call a new Deal; and they are at Liberty to conſult each other, whether they will have a new Deal.

XVII. After the Trump Card is turned up, no Perſon muſt remind his Partner to call, on Penalty of loſing a Point.

XVIII. If the Trump Card is turned up, no Honours in the preceding Deal can be ſet up, unleſs they were before claimed.

XIX. If any Perſon calls at the point of 8, and his Partner anſwers, and both the oppoſite Parties have thrown down their Cards, and it appears that the other Side had not two by Honours; in this Caſe they may conſult with one another about it, and are at Liberty to ſtand the Deal or not.

XX. And if any Perſon anſwers when he has not an Honour, the adverſe Party may conſult one another about it, and are at Liberty to ſtand the Deal or not.

XXI. If any Perſon calls at 8, after he has played, it ſhall be in the Option of the Adverſaries to call a new Deal.

Of ſeparating and ſhewing the Cards.

XXII. If any Perſon ſeparates a Card from the

reſt, the adverſe Party may call it, provided he names it, and proves the Separation ; but in caſe he calls a wrong Card, he or his Partner are liable for once to have the higheſt or loweſt Card called in any Suit led during the Deal.

XXIII. If any Perſon throws his Cards upon the Table, with their Faces upwards, upon Suppoſition that he has loſt the Game, the Adverſaries have it in their Power to call any of the Cards when they think proper, provided they do not make the Party revoke, and he is not to take up his Cards again.

XXIV. If any Perſon is ſure of winning every Trick in his Hand, he may ſhew his Cards upon the Table ; but he is then liable to have all his Cards called.

Of omitting to play to a Trick.

XXV. *A* and *B* are Partners againſt *C* and *D* ; *A* leads a Club, *C* plays the Ace of Clubs, *B* plays a Club, and *D*, Partner to *C*, takes up the Trick without playing any Card ; *A*, and the reſt of the Players, play on, till it appears *D* has one Card more than the reſt ; Penalty to be, in the Option of the Adverſaries to call a new Deal.

Reſpecting who played any particular Card.

XXVI. Each Perſon, in playing, ought to lay his Card before him ; after he has done ſo, if either of the adverſe Parties mix their Card with his, his Partner

Partner is entitled to demand each Perſon to lay his Card before him ; but not to enquire who played any particular Card.

A DICTIONARY *for* WHIST,

which reſolves almoſt all the critical Caſes that may happen at that GAME ; *by Way of Queſtion and Anſwer.*

1. HOW to play Trumps to the greateſt Advantage ? Peruſe the Treatiſe of Whiſt, Caſe 11, Page 7, and all the following Caſes under that and the next Head.

2. How to play Sequences when Trumps ?

Anſwer. You are to begin with the higheſt of them.

3. How to play Sequences when they are not Trumps ?

Anſw. If you have 5 in Number, you are to begin with the loweſt ; if 3 or 4 in Number, always play the higheſt.

4. Why do you prefer playing of Sequences rather than other Suits ?

Anſ. Becauſe they are the ſafeſt Lead, and gain the Tenace in other Suits.

5. When ought you to make Tricks early ?

Anſ. When you are weak in Trumps.

6. When ought you not to make Tricks early ?

Anſ. When you are ſtrong in Trumps.

7. When do you play from an Ace-Suit ?

Anſ. You do ſo when you have 3 in Number only in any Suit (Trumps excepted).

8. When don't you play from an Ace-Suit?

Anſ. You ought not to lead from an Ace-Suit, having four or more in Number in any other Suit; becauſe the Ace is an Aſſiſtant to your great Suit, and when Trumps are played out, enables you to make that Suit.

9. When any Card of Conſequence is turned up on your Right or Left Hand, how are you to play in that Caſe? See Caſe 1, Page 25, and Caſe 1, Page 31.

10. Why are you always to play your Hand by your own and Adverſaries Scores?

Anſ. Caſe 6, Page 6. See References in this Caſe.

11. How to know when your Partner has no more of the Suit played? Caſes 1, 2, 3. Page 16.

12. Reaſons for putting on at Second-hand the King, Queen, Knave, Ten, and when not? Caſes 1, 2, 3, Pages 25, 26.

13. Why are you to play the Queen, Knave, or Ten of any Suit, when that Suit is played a ſecond Time, having three in Number only? Caſe 4, Page 34.

14. When ought you to over-trump your Adverſary, and when not?

Anſ. When you are weak in Trumps you ought to over-trump him; but if ſtrong in Trumps, you ought to throw away a loſing Card.

15. Reaſons for not parting with the Command of your Adverſary's ſtrong Suit. Caſe 1, Page 33.

16. If

16. If your Adverſary on your Right-hand leads a Suit of which you have the Ace, King, and Queen, why are you to put on the Ace, preferable to the Queen?

Anſ. Becauſe it deceives the Adverſary, which, in this Caſe, is of more Conſequence to you than to deceive your Partner.

17. To declare your ſtrong Suit, when proper to be done, and when not?

Anſ. When you have only one ſtrong Suit, and you trump out to make that Suit, in that Caſe you ought to declare it; but if you are ſtrong in all Suits there is no Neceſſity of declaring your ſtrongeſt Suit.

18. The Ace turned up on your Right-hand, and that you have the Ten and Nine only of Trumps, why do you play the Ten? Caſe 1. Page 28.

19. Why do you play from a King-Suit preferable to a Queen-Suit, having the like Number of each?

Anſ. Becauſe it is 2 to 1 that the Ace does not lie in your Left-Hand Adverſary's Hands, and it is 5 to 4, if you lead from the Queen-Suit, that the Ace or King lies in his Hands, and that you loſe your Queen, and ſo play to a Diſadvantage.

20. Why do you play from a Queen-Suit preferable to a Knave Suit?

Anſwered, Caſe 19.

21. When you have the four beſt Cards of any Suit, why do you throw away the beſt?

Anſ. To let your Partner into the State of your Game.

22. Your

22. Your Partner's ſtrong Suit, how are you to make the moſt of it?

At Pages 18, 19, 20, are ſix Examples to demonſtrate it.

23. The Queen turned up on your Right-hand, you have the Ace, Ten, and one Trump, or the King, Ten, and one Trump; if the Right-hand Adverſary plays the Knave, *Quere*, how are you to play?

Anſ. You are to paſs it, by which you have an equal Wager of gaining a Trick, and cannot loſe by ſo doing.

24. Four Cards are played out, and Trumps are gone round twice, your Partner not appearing to have any higher Trump than the 8, yet he has three Trumps; when he plays his third Trump, the next Hand puts on the Knave, there being the King only in the Adverſary's Hands, you having the Ace and Queen of Trumps:

Quere, Whether are you to play the Ace or Queen?

Anſ. You are to play the Ace, becauſe it is 9 to 8 that the laſt Player has the King; and if you reduce the Cards to 2 in Number, it then is 2 to 1 in your Favour, by playing the Ace, that the King falls: The like Method may be taken in other Suits, upon the like Occaſions.

EXAMPLE.

Let us ſuppoſe that you have only 2 Cards remaining in your Hands of any Suit, *viz.* the Queen and Ten; and let us ſuppoſe the Knave and Nine of

of the ſame Suit are in your Adverſary's Hands, when your Partner leads that Suit, your Right-hand Adverſary plays the Nine, and has one Card only remaining:

Quere. Whether you ought to play your Queen or Ten?

Anſ. You ought to play your Queen, becauſe it is 2 to 1 that your Left-hand Adverſary has the Knave. And in all Caſes of the like Nature you ought to play by this Rule.

I would know what is the Odds that the Dealer at Whiſt holds four Trumps or more?

Anſ. That he holds four Trumps or more, is 232 to 165, or about a Guinea to 14s. 11d. and almoſt a Farthing.

An Explanation of the TERMS, *or* TECHNICAL WORDS *in this Treatiſe.*

FINESSING, means the endeavouring to gain an advantage by Art and Skill, which conſiſts in this: When a Card is led, and you have the beſt and third beſt Card of that Suit, you judge it beſt to put your third beſt Card upon that Lead, and run the Riſque of your Adverſary's having the ſecond beſt of it; that if he has it not, which is 2 to 1 againſt him, you are then ſure of gaining a Trick.

FORCING, means the obliging your Partner or your Adverſary to trump a Suit, of which he has none. The Caſes mentioned in this Treatiſe will ſhew when it is proper to force either of them.

LONG

LONG TRUMP, means the having one or more Trumps in your Hand, when all the reſt are out.

LOOSE CARD, means a Card in a Hand that is of no Value, and conſequently the propereſt to throw away.

POINTS, Ten of them make a Game; as many as are gained by Tricks or Honours, ſo many Points are ſet up to the Score of the Game.

QUART, in general, is a Sequence of any four Cards immediately following one another in the ſame Suit. *Quart-Major* is therefore a Sequence of Ace, King, Queen, and Knave, in any Suit.

QUINT, in general, is a Sequence of any five Cards immediately following one another in the ſame Suit. *Quint-Major* is therefore a Sequence of Ace, King, Queen, Knave, and Ten, in any Suit.

REVERSE, means only the playing your Hand in a different Manner; that is to ſay, if you are ſtrong in Trumps, you play one way; but if weak in Trumps, you play the *Reverſe*, *viz.* another.

SEE-SAW, is when each Partner trumps a Suit, and they play thoſe Suits to one another to trump.

SCORE, is the Number of Points ſet up, ten of which make a Game.

SLAM, is when either Party win every Trick.

TENACE, is having the firſt and third beſt Cards, and being the laſt Player, and conſequently you catch the Adverſary when that Suit is played: As, for inſtance, in caſe you have Ace and Queen of any Suit, and that your Adverſary leads that Suit, you

you muſt win thoſe two Tricks; and ſo of any other Tenace in inferior Cards.

TERCE, is a Sequence of any three Cards immediately following one another in the ſame Suit. *Terce-Major* is therefore a Sequence of Ace, King, and Queen, in any Suit.

An ARTIFICIAL MEMORY, *for thoſe who play at the Game of* WHIST.

I. PLACE, of every Suit in your Hand, the worſt of it to the Left-hand, and the beſt (in Order) to the Right; and the Trumps in the like Order, always to the Left of all the other Suits.

II. If in the Courſe of Play you find you have the beſt Card remaining in any Suit, put the ſame to the Left of your Trumps.

III. And if you find you have the ſecond beſt Card of any Suit to remember, place it on the Right of your Trumps.

IV. And if you have the third beſt Card of any Suit to remember, place a ſmall Card of that Suit between the Trumps and that third beſt, to the Right of your Trumps.

V. To remember your Partner's firſt Lead, place a ſmall Card of that Suit led in the Midſt of your Trumps, and if you have but one Trump, on the Left of it.

VI. When you deal put the Trump turned up to the Right of all your Trumps, and part with it as

as late as you can, that your Partner may know you have that Trump left, and ſo play accordingly.

VII. *To find where or in what Suit your Adverſaries revoke.*

Suppoſe the two Suits on your Right Hand to repreſent your Adverſaries in the Order they ſit, as to your Right and Left Hand.

When you ſuſpect either of them to have made a Revoke in any Suit, clap a ſmall Card of that Suit amongſt the Cards repreſenting that Adverſary, by which Means you record not only that there may have been a Revoke, but alſo which of them made it, and in what Suit.

If the Suit that repreſents the Adverſary that made the Revoke, happens to be the Suit he revoked in, change that Suit for another, and, as above, put a ſmall Card of the Suit revoked in, in the Middle of that exchanged Suit, and if you have not a Card of that Suit, reverſe a Card of any Suit you have (except Diamonds) and place it there.

VIII. As you have a Way to remember your Partner's firſt Lead, you may alſo record in what Suit either of your Adverſaries made their firſt Lead, by putting the Suit in which they made that Lead, in the place which in your Hand repreſents that Adverſary, at either your Right or Left Hand; and if other Suits were already placed to repreſent them, then exchange them for the Suits in which each of them makes his firſt Lead.

The foregoing Method is to be taken when you find

find it more neceſſary to record your Adverſary's firſt Lead, than to endeavour to find out a Revoke.

CALCULATIONS, *which direct with moral Certainty how to play well any Hand, by ſhewing the Chances of your Partner's having* 1, 2, *or* 3 *certain Cards.*

☞ Read with Attention thoſe marked *N. B.*

For EXAMPLE.

I. Would know what is the Chance of his having one certain Card?

Anſwer.	againſt him.	for him.
That he has it not is, *N. B.*	2 to	1

II. I would know what is the Chance of his having two certain Cards?

Anſwer.	againſt him.	for him.
That he has one of them only, is,	31 to	26
That he has not both of them,	17	2
But that he has one or both, is about 5 to 4, or *N. B.*	25	32

III. I would alſo know what are the Chances of his having 3 certain Cards?

Anſwer.	for him.	againſt him.
That he holds one of them only, is 325 for him to 378 againſt him, or about	6 to	7
That he has not 2 of them only, is 156 for him to 547 againſt him, or about	2	7

That

That he has not all 3 of them, is 22 for him to 681 againſt him, or about	1	31
But that he has 1 or 2 of them, is 481 for him to 222 againſt him, or about	13	6
And that he has 1, 2, or all 3 of them, is about *N. B.*	5	2

An Explanation and Application of the Calculations neceſſary to be underſtood by thoſe who read this Treatiſe.

Firſt CALCULATION.

IT is 2 to 1 that my Partner has not one certain Card.

To apply this Calculation, let us ſuppoſe the Right-hand Adverſary leads a Suit, of which you have the King and one ſmall Card only; you may obſerve, that it is 2 to 1, by putting on your King, that the Left-hand Adverſary cannot win it.

Again, Let us ſuppoſe that you have the King and three ſmall Cards of any Suit, likewiſe the Queen and three ſmall Cards of any Suit, I would know which is the beſt Suit to lead from? *Anſwer*, From the King, becauſe it is 2 to 1 that the Ace does not lie behind you; but it is 5 to 4 that the Ace or King of any Suit lies behind you, and conſequently, by leading from your Queen Suit, you play to a Diſadvantage.

2*d* CALCULATION. It is 5 to 4, at leaſt, that your Partner has one Card out of any 2 certain Cards;

Cards; the like Odds is in Favour of your Right-hand and Left-hand Adverſaries: Therefore, ſuppoſe you have 2 Honours in any Suit, and knowing it is 5 to 4 that your Partner holds one of the other 2 Honours, you do by this Knowledge play your Game to a greater Degree of Certainty.

Again, Let us ſuppoſe that you have the Queen and 1 ſmall Card in any Suit only, and that your Right-hand Adverſary leads that Suit, if you put on your Queen, it 5 to 4 that your Left-hand Adverſary can win it, and therefore you play 5 to 4 to your Diſadvantage.

3d CALCULATION. It is 5 to 2 that your Partner has 1 Card out of any 3 certain Cards.

Therefore, ſuppoſe you have the Knave and 1 ſmall Card dealt you, and that your Right-hand Adverſary leads from that Suit, if you put on the Knave, it is 5 to 2 that your Left-hand Adverſary has either Ace, King, or Queen of the Suit led, and therefore you play 5 to 2 againſt yourſelf; beſides, there is a further Conſideration, by making a Diſcovery to your Right-hand Adverſary, he fineſſes upon your Partner throughout that whole Suit.

And, in order to explain the Neceſſity there is of putting on the loweſt of Sequences in all the Suits led, let us ſuppoſe that your Adverſary led a Suit of which you have the King, Queen, and Knave, or Queen, Knave, and Ten; by putting on your Knave of the ſuit of which you have the King, Queen, and Knave, it gives your Partner an Opportunity of calculating the Odds for and againſt him in that Suit,

Suit, and alſo in all inferior Suits of which you have Sequences.

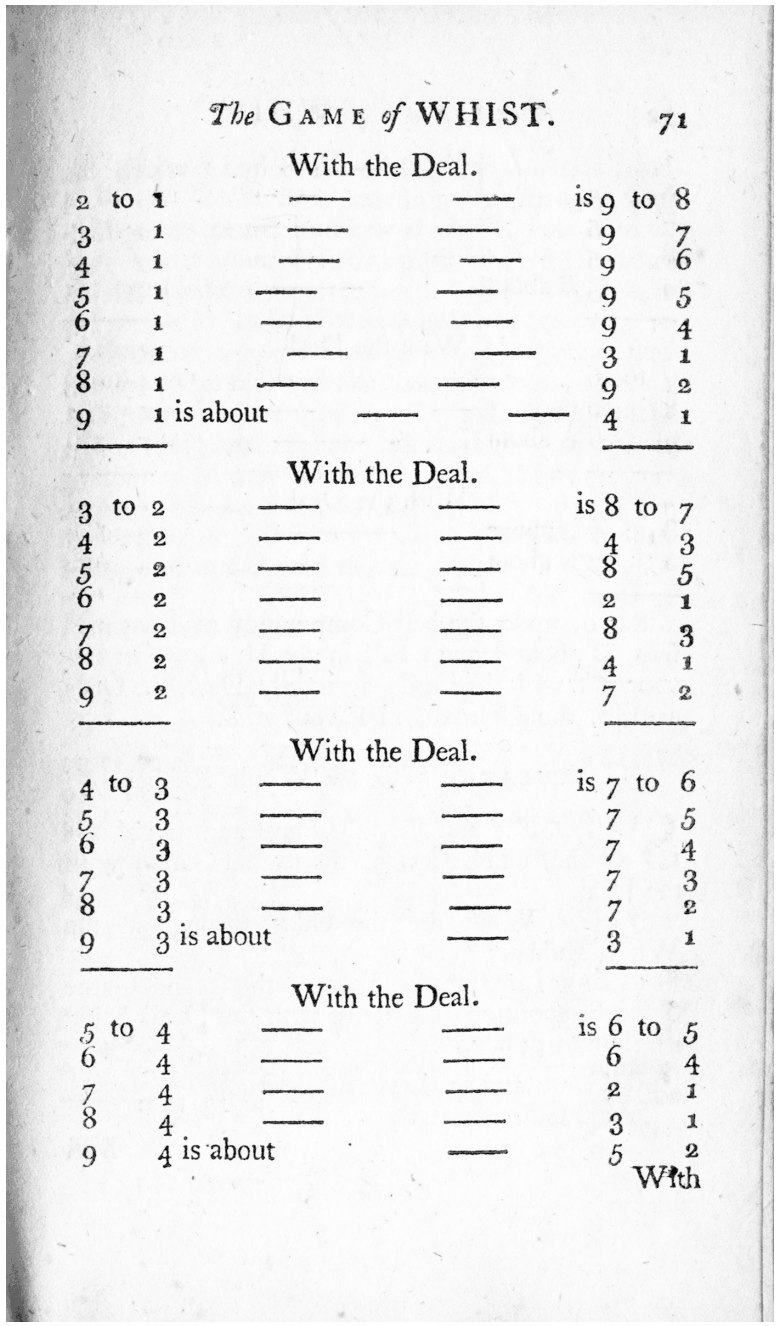
A farther Uſe to be made of the foregoing Calculation: Let us ſuppoſe, that you have the Ace, King, and 2 ſmall Trumps, with a Quint-Major, or 5 other winning Cards in your Hand in any Suit, and that you have played Trumps two Rounds, and that each Perſon followed Trumps; in this Caſe there are 8 Trumps out, and 2 Trumps remaing in your Hand, which make 10, and 3 Trumps which are divided between the remaining 3 Players, of which 3 Trumps, the Odds is 5 to 2 in your Favour than your Partner has 1; and therefore, out of 7 Cards in your Hand, you are entitled to win 5 Tricks.

Some COMPUTATIONS *for laying Wagers.*

With the Deal.

The Deal	is 21 to	20
1 Love	11	10
2	5	4
3	3	2
4	7	4
5 is 2 to 1 of the Game, and 1 of the Lurch	2	1
6	5	2
7	7	2
8	5	1
9 is about	9	2

With



The GAME *of* WHIST. 71

With the Deal.

2	to	1				is	9	to 8
3		1					9	7
4		1					9	6
5		1					9	5
6		1					9	4
7		1					3	1
8		1					9	2
9		1	is about				4	1

With the Deal.

3	to	2				is	8	to 7
4		2					4	3
5		2					8	5
6		2					2	1
7		2					8	3
8		2					4	1
9		2					7	2

With the Deal.

4	to	3				is	7	to 6
5		3					7	5
6		3					7	4
7		3					7	3
8		3					7	2
9		3	is about				3	1

With the Deal.

5	to	4				is	6	to 5
6		4					6	4
7		4					2	1
8		4					3	1
9		4	is about				5	2

With

With the Deal.

6	to	5	——	——	is	5	to 4
7		5	——	——		5	3
8		5	——	——		5	2
9		5	is about	——		2	1

With the Deal.

7	to	6	——	——	is	4	to 3
8		6	——	——		2	1
9		6	is about	——		7	4

With the Deal.

8	to	7	is above	——		3	to 2
9		7	is about	——		12	8

8 to 9, upon the beſt Computation made at preſent, is about 3 and a half in the Hundred, in Favour of 8 with the Deal; againſt the Deal, the Odds are ſtill, though ſmall, in Favour of 8.

CALCULATIONS *for the* Whole Rubber.

SUPPOSE *A* and *B* are at Play, and that *A* is 1 Game, and 8 Love of the ſecond Game, with the Deal.

Quere. What are the Odds throughout the Whole Rubber?

1 Game Love and 9 Love of the ſecond Game (upon Suppoſition of 9 Love with the Deal) being nearly 6 to 1;

Firſt Game and 9 Love of the ſecond Game is nearly } 13 to 1

First

First Game and 8 Love of the second Game is a little more than the former	13 to 1, *&c.*
First Game and 7 Love of the second is nearly	10 to 1
Ditto and 6 Love of the second is nearly	8 to 1
Ditto and 5 Love of the second is nearly	6 to 1
First Game and 4 Love of the second is nearly	5 to 1
Ditto and 3 Love of the second is nearly	$4\frac{1}{2}$ to 1
Ditto and 2 Love of the second is nearly	4 to 1
Ditto and 1 Love of the second is nearly	7 to 2

The above Calculations are made with the Deal.

Againſt the Deal.

SUPPOSE *A* and *B* are at Play, and that *A* is 1 Game, and any Number of Points in the ſecond Deal:

First Game and 9 Love of the second is nearly	11 to 1
Ditto and 8 Love of the second Game (is a little more)	11 to 1
Ditto and 7 Love of the second Game is	9 to 1
Ditto and 6 Love of the second Game is	7 to 1

Ditto and 5 Love of the ſecond Game is	5 to 1
Ditto and 4 Love of the ſecond Game is	$4\frac{1}{2}$ to 1
Ditto and 3 Love of the ſecond Game is	4 to 1
Ditto and 2 Love of the ſecond Game is	7 to 2
Firſt Game and 1 Love of the ſecond is nearly	$6\frac{1}{2}$ to 2

The Uſe which is to be made of the foregoing Calculations, may be made by dividing the Stake, according to the Tables herewith ſet down.

Mr. PAYNE's MAXIMS *for* WHIST.

LEADER.

1, BEGIN with the Suit of which you have moſt in Number. *For when the Trumps are out, you will probably make ſeveral Tricks in it.*

2. If you hold equal Numbers in different Suits, begin with the ſtrongeſt. *Becauſe it is the leaſt liable to injure your Partner.*

3. Sequences are always eligible Leads. *Becauſe they ſupport your Partner's Hand, without injuring your own.*

4. Lead from a King or Queen, rather than from an Ace. *For ſince the Adverſaries will lead from thoſe Suits which you do not, your Ace will do them moſt Harm.*

5. Lead

5. Lead from a King rather than from a Queen, and from a Queen rather than a Knave. *For the ſtronger the Suit, the leſs is your Partner endangered.*

6. Lead not from Ace Queen, or Ace Knave, till it becomes neceſſary. *For if that Suit is led by the Adverſaries, you have a good Chance of making two Tricks in it.*

7. In all Sequences to a Queen, Knave, or Ten, begin with the higheſt. *Becauſe it will frequently diſtreſs your Left-hand Adverſary.*

8. Having Ace, King, and Knave, lead the King. *For if ſtrong in Trumps, you may wait the Return of that Suit, and fineſſe the Knave.*

9. Having Ace, King, and one ſmall Card, lead the ſmall one. *For by this Lead your Partner has a Chance to make the Knave.*

10. Having Ace, King, and two or three ſmall Cards, play Ace and King if weak in Trumps, but a ſmall Card if ſtrong in them. *For when ſtrong in Trumps, you may give your Partner the Chance of making the firſt Trick.*

11. Having King, Queen, and one ſmall Card, play the ſmall one. *For your Partner has an equal Chance to win the Trick; and you need not fear to make King or Queen.*

12. Having King, Queen, and two or three ſmall Cards, lead a ſmall Card if ſtrong in Trumps, and the King, if weak in them. *For Strength in Trumps entitles you to play a backward Game, and to give your Partner the Chance of winning the firſt Trick; but if weak in Trumps, it is neceſſary to ſecure a Trick in that Suit, by leading the King or Queen.*

13. Having an Ace with four ſmall Cards, and no other good Suit; play a ſmall Card if ſtrong in Trumps, and the Ace if weak. *For Strength in Trumps may enable you to make one or two of the ſmall Cards, although your Partner ſhould not be able to ſupport the Lead.*

14. Having King, Knave, and Ten, lead the Ten. *For if your Partner holds the Ace, you have a good Chance of making three Tricks, whether he paſſes the Ten or not.*

15. Having King, Queen, and Ten, lead the King. *For if it falls, upon the Return of that Suit from your Partner, by putting on the Ten you have a Chance of making two Tricks.*

16. Having Queen, Knave, and Nine, lead the Queen. *For upon the Return of that Suit from your Partner, by putting on the Nine you will probably make the Knave.*

SECOND HAND.

1. Having Ace, King, and ſmall ones, play a ſmall Card if ſtrong in Trumps, but the King if weak in them. *For otherwiſe your Ace or King might be trumped in the latter Caſe, and no Hazards ſhould be run with few Trumps but in critical Caſes.*

2. Having Ace, Queen, and ſmall Cards, play a ſmall one. *For upon the Return of that Suit you will probably make two Tricks.*

3. Having Ace, Knave, and ſmall Cards, play a ſmall one. *For upon the Return of that Suit you will probably make two Tricks.*

4. Having

4. Having Ace, Ten, or Nine, with ſmall Cards, play a ſmall one. *For by this Method, you have a Chance of making two Tricks in the Suit.*

5. Having King, Queen, Ten, and ſmall Cards, play the Queen. *For by playing the Ten upon the Return of the Suit, you will probably make two Tricks in it.*

6. Having King, Queen, and ſmall Cards, play a ſmall Card if ſtrong in Trumps, but the Queen if weak in them. *For Strength in Trumps warrants playing a backward Game, and it is always advantageous to keep back your Adverſaries Suit.*

7. If you hold a Sequence to your higheſt Card in the Suit, play the loweſt of it. *For by this Means your Partner is informed of your Strength in that Suit.*

8. Having Queen, Knave, and ſmall ones, play the Knave. *Becauſe you will in great Probability ſecure a Trick in that Suit.*

9. Having Queen, Ten, and ſmall ones, play a ſmall one. *For your Partner has an equal Chance to win the Trick.*

10. Having either Ace, King, Queen, or Knave, with ſmall Cards, play a ſmall one. *For your Partner has an equal Chance to win the Trick.*

11. Having either Ace, King, Queen, or Knave, with one ſmall Card only, play the ſmall one. *For otherwiſe the Adverſary will fineſſe upon you in that Suit.*

12. If a Queen is led, and you hold the King, put it on. *For if your Partner holds the Ace, you do no Harm; and if the King is taken, the Adverſaries have played two Honours to one.*

13. If a Knave is led, and you hold the Queen, put it on. *For at the worſt you bring down two Honours for one.*

14. If a King is led, and you hold Ace, Knave, and ſmall ones, play the Ace. *For it cannot do the Adverſaries a greater Injury.*

THIRD HAND.

1. Having Ace and King, play the Ace, and return the King. *Becauſe you are not to keep the Command of your Partner's ſtrong Suit.*

2. Having Ace and Queen, play the Ace, and return the Queen. *For although it may prove better in ſome Caſes to put on the Queen, yet in general your Partner is beſt ſupported by the Method above.*

3. Having Ace and Knave, play the Ace, and return the Knave. *The Knave is returned in order to ſtrengthen your Partner's Hand.*

4. Having King and Knave, play the King; and if it wins return the Knave. *Becauſe it will ſtrengthen your Partner's Hand.*

5. Always put on the beſt when your Partner leads a ſmall Card. *Becauſe it beſt ſupports your Partner's Hand.*

6. If you hold the Ace and one ſmall Card only, and your Partner leads the King; put on the Ace and return the ſmall one. *For otherwiſe your Ace will be an Obſtruction to his Suit.*

7. If you hold the King and one ſmall Card only, and your Partner leads the Ace; if the Trumps are out it is good Play to put on the King.

For

For by putting on the King, there is no Obſtruction to the Suit.

FOURTH HAND.

1. If a King is led, and you hold Ace, Knave, and a ſmall Card, play the ſmall one. *For ſuppoſing the Queen to follow, you will probably make both Ace and Knave.*

2. When the third Hand is weak in his Partner's Lead, you may often return that Suit to great Advantage. *But this Rule muſt not be applied to Trumps, unleſs you are very ſtrong indeed.*

CASES in which you ſhould return your Partner's Lead immediately.

1. When you win with the Ace, and can return an Honour. *For then it will greatly ſtrengthen his Hand.*

2. When he leads a Trump. *In which Caſe return the beſt remaining in your Hand (unleſs you hold four originally): an Exception to this ariſes if the Lead is through an Honour.*

3. When your Partner has trumped out. *For then it is evident he wants to make his great Suit.*

4. When you have no good Card in any other Suit. *For then you are entirely dependant on your Partner.*

CASES in which you ſhould not return your Partner's Lead immediately.

1. If you win with the King, Queen, or Knave, and have only ſmall Cards remaining. *For the Return of a ſmall Card will more diſtreſs than ſtrengthen your Partner.*

2. If you hold a good Sequence. *For then you may ſhew a ſtrong Suit, and not injure his Hand.*

3. If you have a ſtrong Suit. *Becauſe leading from a ſtrong Suit is a Direction to your Partner, and cannot injure him.*

4. If you have a good Hand. *For in this Caſe you have a Right to conſult your own Hand, and not your Partner's.*

5. If you hold 5 Trumps. *For then you are warranted to play Trumps if you think it right.*

Of LEADING TRUMPS.

1. Lead Trumps from a ſtrong Hand, but never from a weak one. *By which Means you will ſecure your good Cards from being trumped.*

2. Trump not out with a bad Hand, although you hold five ſmall Trumps. *For ſince your Cards are bad, it is only trumping for the Adverſaries good ones.*

3. Having Ace, King, Knave, and three ſmall Trumps, play Ace and King. *For the Probability of the Queen's falling is in your Favour.*

4. Having Ace, King, Knave, and one or two ſmall Trumps, play the King; and wait the Return from

from your Partner to put on the Knave. *This Method is in order to win the Queen, but if you have particular Reaſons to wiſh the Trumps out, play two Rounds of Trumps, and then your ſtrong Suit.*

5. Having Ace, King, and two or three ſmall Trumps, lead a ſmall one. *This Method is with a View to let your Partner win the firſt Trick; but if you have good Reaſon for getting out the Trumps, play three Rounds, or play Ace and King, and then proceed with your ſtrong Suit.*

6. If your Adverſaries are eight, and you hold no Honour, throw off your beſt Trump. *For if your Partner has not two Honours you have loſt the Game, and if he holds two Honours it is moſt advantageous for you to lead a Trump.*

7. Having Ace, Queen, Knave, and ſmall Trumps, play the Knave. *For by this Means only the King can make againſt you.*

8. Having Ace, Queen, Ten, and one or two ſmall Trumps, lead a ſmall one. *For it will give your Partner a Chance to win the Trick, and keep the Command in your own Hand.*

9. Having King, Queen, Ten, and ſmall Trumps, lead the King. *For if the King is loſt, upon the Return of Trumps you may fineſſe the Ten.*

10. Having King, Knave, Ten, and ſmall ones, lead the Knave. *Becauſe it will prevent the Adverſaries from making a ſmall Trump.*

11. Having Queen, Knave, Nine, and ſmall Trumps, lead the Queen. *For if your Partner holds the Ace, you have a good Chance of making the whole Suit.*

 12. Hav-

12. Having Queen, Knave, and two or three ſmall Trumps, lead the Queen. *For if your Partner holds the Ace, you have a good Chance for making the whole Suit.*

13. Having Knave, Ten, Eight, and ſmall Trumps, lead the Knave. *For on the Return of Trumps, you probably may fineſſe the Eight to Advantage.*

14. Having Knave, Ten, and three ſmall Trumps, lead the Knave. *Becauſe it will moſt diſtreſs your Adverſaries, unleſs two Honours are held on your Right-hand; the Odds againſt which is about three to one.*

15. Having only ſmall Trumps, begin with the higheſt. *By this Play you will ſupport your Partner all you can.*

16. Having a Sequence, begin with the higheſt. *By this Means your Partner is beſt inſtructed how to play his Hand, and cannot poſſibly be injured.*

17. If an Honour is turned up on your Left, and the Game much againſt you, lead a Trump the firſt Opportunity. *For your Game being deſperately bad, this Method is the moſt likely to retrieve it.*

18. In all other Caſes it is dangerous leading through an Honour, unleſs you are ſtrong in Trumps, or have a good Hand. *Becauſe all the Advantage of trumping through an Honour, lies in the fineſſing of your Partner.*

19. Suppoſing hereafter it is proper to lead Trumps. If an Honour is turned up on your Left, and you hold only one Honour with a ſmall Trump, throw off the Honour, and next the ſmall one. *Becauſe*

cauſe it will greatly ſtrengthen your Partner's Hand, and cannot hurt your own.

20. If an Honour is turned up on the Left, and you hold a Sequence, lead the higheſt of it. *Becauſe it will prevent the laſt Hand from injuring your Partner.*

21. If a Queen is turned up on the Left, and you hold Ace, King, and a ſmall one, lead the ſmall Trump. *Becauſe you will have a Chance for getting the Queen.*

22. If a Queen is turned up on your Left, and you hold the Knave with ſmall ones, lead the Knave. *For the Knave can be of no Service ſince the Queen is on your Left.*

23. If an Honour is turned up by your Partner, and you are ſtrong in Trumps, lead a ſmall one; but if weak in them, lead the beſt you have. *By this Play the weakeſt Hand will ſupport the ſtrongeſt.*

24. If an Ace is turned up on the Right, and you hold King, Queen, and Knave, lead the Knave. *For it is a ſecure Lead.*

25. If an Ace is turned up on the Right, and you hold King, Queen, and Ten, lead the King; and upon the Return of Trumps play the Ten. *For by this Means you ſhew a great Strength to your Partner, and will probably make two Tricks in them.*

26. If a King is turned up on the Right, and you hold Queen, Knave, and Nine, lead the Knave; and upon the Return of Trumps play the Nine. *Becauſe it may prevent the Ten from making.*

27. If a King is turned up on your Right, and you hold Knave, Ten, and Nine, lead the Nine;

and upon the Return of Trumps play the Ten. *Becauſe this Method will beſt diſcloſe your Strength in Trumps.*

28. If a Queen is turned up on the Right, and you hold Ace, King, and Knave, lead the King; and upon the Return of Trumps play the Knave. *Becauſe you are certain to make the Knave.*

29. If a Queen is turned up on the Right, and you hold Ace, King, and ſmall ones, lead the King; and upon the Return of Trumps you may fineſſe, unleſs the Queen falls. *For otherwiſe the Queen will make a Trick.*

30. If a Knave is turned up on the Right, and you hold King, Queen, and Ten, lead the Queen; and upon the Return of Trumps play the Ten. *For by this Means you will make the Ten.*

31. If a Knave is turned up on the Right, and you hold King, Queen, and ſmall ones, lead the King; and if that comes home, play a ſmall one. *For it is probable your Partner holds the Ace.*

32. If a Knave is turned up on the Right, and you hold King, Queen, and Ten, with two ſmall Cards, lead a ſmall one; and upon the Return of Trumps play the Ten. *For it is five to four that your Partner holds one Honour.*

WHEN YOU TURN UP AN HONOUR.

1. If you turn up an Ace, and hold only one ſmall Trump with it, if either Adverſary leads the King, put on the Ace. *For it can do the Adverſaries no greater Injury.*

2. If

2. If you turn up an Ace, and hold two or three ſmall Trumps with it, and either Adverſary leads the King, put on a ſmall one. *For if you play the Ace, you give up the Command in Trumps.*

3. If you turn up a King, and hold only one ſmall Trump with it, and your Right-hand Adverſary leads a Trump, play the King. *This Caſe is really ſomewhat doubtful, and very good Players think differently.*

4. If you turn up a King, and hold two or three ſmall Trumps with it, if your Right-hand Adver- leads a Trump, play a ſmall one. *It being the beſt Way of ſecuring your King.*

5. If you turn up a Queen or Knave, and hold only ſmall Trumps with it, if your Right-hand Adverſary leads a Trump, put on a ſmall one. *It being the ſecureſt Play.*

6. If you hold a Sequence to the Honour turned up, play it laſt. *By this Means your Partner will be the beſt acquainted with your Strength in Trumps.*

OF PLAYING FOR THE ODD TRICK.

1. Be cautious of trumping out, notwithſtanding you have a good Hand. *For ſince you want the Odd Trick only, it would be abſurd to play a great Game.*

2. Never trump out if your Partner appears likely to trump a Suit. *For it is evidently beſt to let your Partner make his Trumps.*

3. If you are moderately ſtrong in Trumps, it is right to force your Partner. *For by this Means you probably gain a Trick.*

4. Make

4. Make your Tricks early, and be cautious of fineſſing. *That you may not be greatly injured, though you fail of making the Odd Trick.*

5. If you hold a ſingle Card of any Suit, and only two or three ſmall Trumps, lead the ſingle Card. *For it will give you a Chance of making a ſmall Trump.*

GENERAL RULES.

1. Be very cautious how you change Suits, and let no Artifice of the Adverſary induce you to it.

2. Keep a commanding Card to bring in your ſtrong Suit when the Trumps are out, if your Hand will admit of ſuch Pretenſions.

3. Never keep back your Partner's Suit in Trumps, but return them the firſt Opportunity.

4. If you hold a ſtrong Suit, and but few Trumps, rather force your Adverſaries than lead Trumps, unleſs you are ſtrong in the other Suits likewiſe.

5 Be ſure to make the Odd Trick when it is in your Power.

6. Always conſider the Scores, and play your Hand accordingly.

7. In a backward Game, you may often riſque one Trick in order to win two: but in a forward Game you are to be more cautious, unleſs you have a good Probability of getting up.

8. In returning your Partner's Lead, play the beſt you have, when you hold but three originally.

9. Remember what Cards drop from each Hand, how many of each Suit are out, and what is the beſt remaining Card in each.

10. Lead

10. Lead not originally from a Suit of which you have Ace and Queen, Ace and Knave, or King and Knave; if you hold another moderate Suit.

11. If neither of your Adverſaries will lead from the above Suits, you muſt do it yourſelf with a ſmall Card.

12. You are ſtrong in Trumps with five ſmall ones, or three ſmall ones and one Honour.

13. Do not trump a Card when you are ſtrong in Trumps, and the more eſpecially if you hold a ſtrong Suit.

14. If you hold only a few ſmall Trumps, make them if you can.

15. If your Partner refuſes to trump a Suit of which he knows you have not the beſt, lead him your beſt Trump the firſt Opportunity.

16. If your Partner has trumped a Suit, and refuſes to play Trumps, lead him that Suit again.

17. Never force your Partner but when you are ſtrong in Trumps, unleſs you have a Renounce yourſelf, or want only the Odd Trick.

18. If the Adverſaries trump out, and your Partner has a Renounce, give him that Suit when you get the Lead, if you think he has a ſmall Trump left.

19. Lead not from an Ace Suit originally, if you hold four in Number of another Suit.

20. When Trumps are either returned by your Partner, or led by the Adverſaries, you may fineſſe deeply in them; keeping the Command all you can in your own Hand.

21. If you lead the King of any Suit, and make it,

it, you muſt not thence conclude that your Partner holds the Ace.

22. It is ſometimes proper to lead a thirteenth Card, in order to force the Adverſary, and make your Partner laſt Player.

23. If weak in Trumps, make your Tricks ſoon; but when ſtrong in them, you may play a more backward Game.

24. Keep a ſmall Card of your Partner's firſt Lead, if poſſible, in order to return it when the Trumps are out.

25. Never force your Adverſary with your beſt Card of a Suit, unleſs you have the ſecond beſt alſo.

26. In your Partner's Lead, endeavour to keep the Command in his Hand, rather than in your own.

27. If you have a Saw, 'tis generally better to purſue it than to trump out; although you ſhould be ſtrong in Trumps with a good Suit.

28. Keep the Trump you turn up, as long as you properly can.

29. When you hold all the remaining Trumps, play one of them to inform your Partner; and then put the Lead into his Hand.

30. It is better to lead from Ace and Nine, than from Ace and Ten.

31. It is better to lead Trumps through an Ace or King, than through a Queen or Knave.

32. If you are reduced to the laſt Trump, ſome winning Cards, and one loſing Card only, lead the loſing Card.

33. If

33. If only your Partner has Trumps remaining, and he leads a Suit of which you hold none; if you have a good Quart (or Sequence of four) throw away the higheſt of it.

34. If you have an Ace with one ſmall Card of any Suit, and ſeveral winning Cards in other Suits: rather throw away ſome winning Card than that ſmall one.

35. If you hold only one Honour with a ſmall Trump, and wiſh the Trumps out, lead the Honour firſt.

36. If Trumps have been led thrice, and there be two remaining in the Adverſaries Hands, endeavour to force them out.

37. Never play the beſt Card of your Adverſaries Lead at ſecond Hand, unleſs your Partner has none of that Suit.

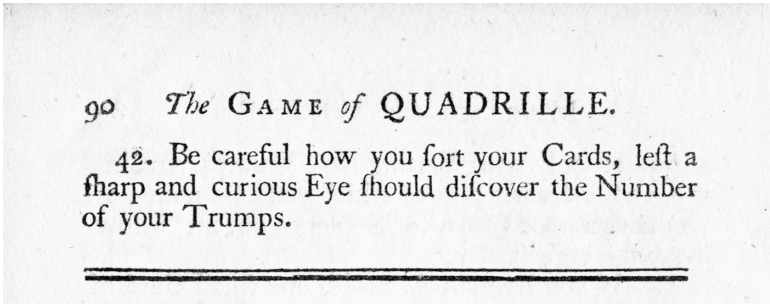
38. If you have four Trumps and the Command of a Suit whereof your Partner has none, lead a ſmall Card in order that he may trump it.

39. If you hold five Trumps with a good Hand, play Trumps, and clear your Adverſaries Hands of them.

40. If you hold the Ace and three ſmall Trumps when the Adverſaries lead them, and have no particular Reaſonſ or ſtopping the Suit, let them quietly make King and Queen, and on the third Round play the Ace.

41. Suppoſing yourſelf Leader with three ſmall Trumps, one ſtrong Suit, one moderate Suit, and a ſingle Card, begin with the ſtrong Suit, and next lead the ſingle Card.

42. Be



90 *The* GAME *of* QUADRILLE.

42. Be careful how you ſort your Cards, leſt a ſharp and curious Eye ſhould diſcover the Number of your Trumps.

[Editors' note: As the table of contents for the 1790 edition of *Hoyle's Games Improved* shows (see pages 153-158 above), after this chapter on whist the book continues with a couple hundred more pages of rules for other games. For our purposes, the pages filled with whist are enough, at least for now.]

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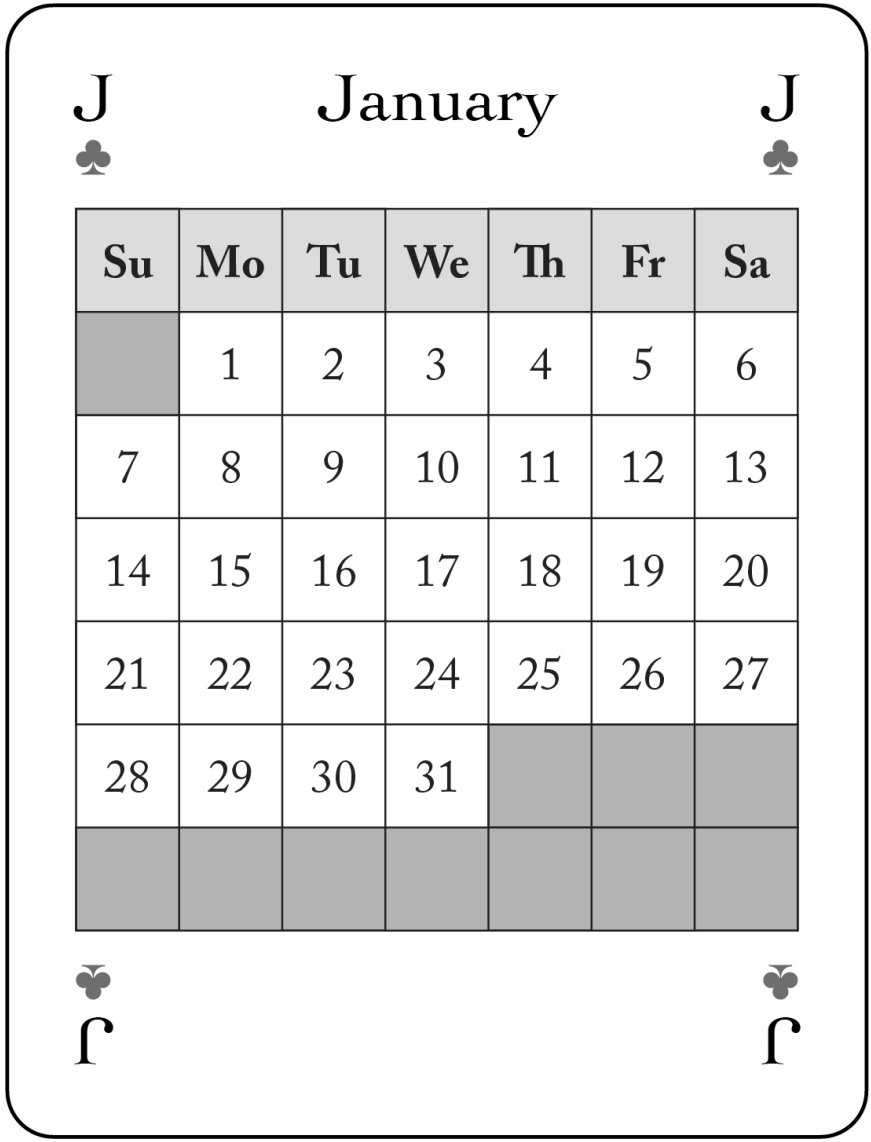
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Five Recommendations

Susan Phillips Read[†]

Floyd Abrams
The Soul of the First Amendment
(Yale University Press 2017)

First Amendment lawyer Floyd Abrams has participated in many of the cases shaping the modern meaning of free speech. From this unique vantage point, he examines the Amendment's history; the greater protection afforded free speech in the United States as compared with England or European nations; the United States Supreme Court's mid-twentieth-century rejection of longstanding English law governing expression; two areas where American law differs significantly from European law — the adoption within the European Union of a legally enforceable "right to be forgotten," which empowers individuals to demand that Google and other search engines delete personal information determined to be "inadequate, irrelevant or no longer relevant," and the body of Supreme Court precedent that affords First Amendment protection for unlimited spending by individuals and corporations in political campaigns; and, in the context of the press and national security, the "inherently . . . contentious" question of "what information should *not* be published by entities that are dedicated to revealing information" (emphasis in original). Abrams' full-throated defense of *Citizens United v Federal Election Commission* is not surprising (he did, after all, represent Senator Mitch McConnell in the Supreme Court), and contrasts sharply with the disapproval expressed by Burt Neuborne in *Madison's Music*, one of my recommended books of 2015.

[†] Of Counsel, Greenberg Traurig, LLP; Associate Judge (ret.), New York Court of Appeals.

Randy J. Kozol
Settled Versus Right: A Theory of Precedent
(Cambridge University Press 2017)

Judges respect precedent when they adhere to the historical view of an issue in order to resolve a current case. This doctrine of *stare decisis* promotes stability, efficiency and predictability; it reflects the principle that the law is neutral and does not depend on the identity of the trial judge or the composition of an appellate court. Of course, precedents are not immutable; they may be outright overruled or subtly chipped away at. Considering various constitutional decisions of the United States Supreme Court, the author explores what he characterizes as the tension inherent in *stare decisis* between leaving the law settled and getting the law right. He attributes disputes among the Justices about whether a precedent is wrong and whether a flawed precedent should be discarded or altered to their good-faith, principled disagreements about the proper method of constitutional interpretation. For the application of *stare decisis* to overcome these interpretive differences rather than simply mirror them, the author suggests an approach that generally ignores substantive effect and instead looks only at the precedent's workability, the accuracy of the precedential decision's factual premises and the reliance the precedent has created over time. Along the way, he discusses related issues, importantly including the determination of a precedent's scope. Whether or not the reader agrees with the author's perspective or his proposed approach to maintaining the durability and impersonality of law which fidelity to precedent is intended to protect, his analysis of a fundamental and complicated principle of constitutional and common law adjudication is comprehensive and thought-provoking.

David M. O'Brien
Justice Robert H. Jackson's
Unpublished Opinion in Brown v Board:
Conflict, Compromise, and Constitutional Interpretation
(University Press of Kansas 2017)

The story of how *Brown v Board of Education* came about has been told many times from many points of view. After a few chapters of stage setting, the author delves into the six drafts of a concurrence prepared by Justice Jackson during the runup to the United States Supreme Court's announcement in May 1954 of its unanimous opinion outlawing segregated public schools. Justice Jackson did not circulate any of these drafts internally to his colleagues or, until the sixth draft, even to his law clerk. Ultimately, he withheld publication in part, the author suggests, in deference to Chief Justice Earl Warren's desire for the Court to present a united front against the controversy that its decision was guaranteed

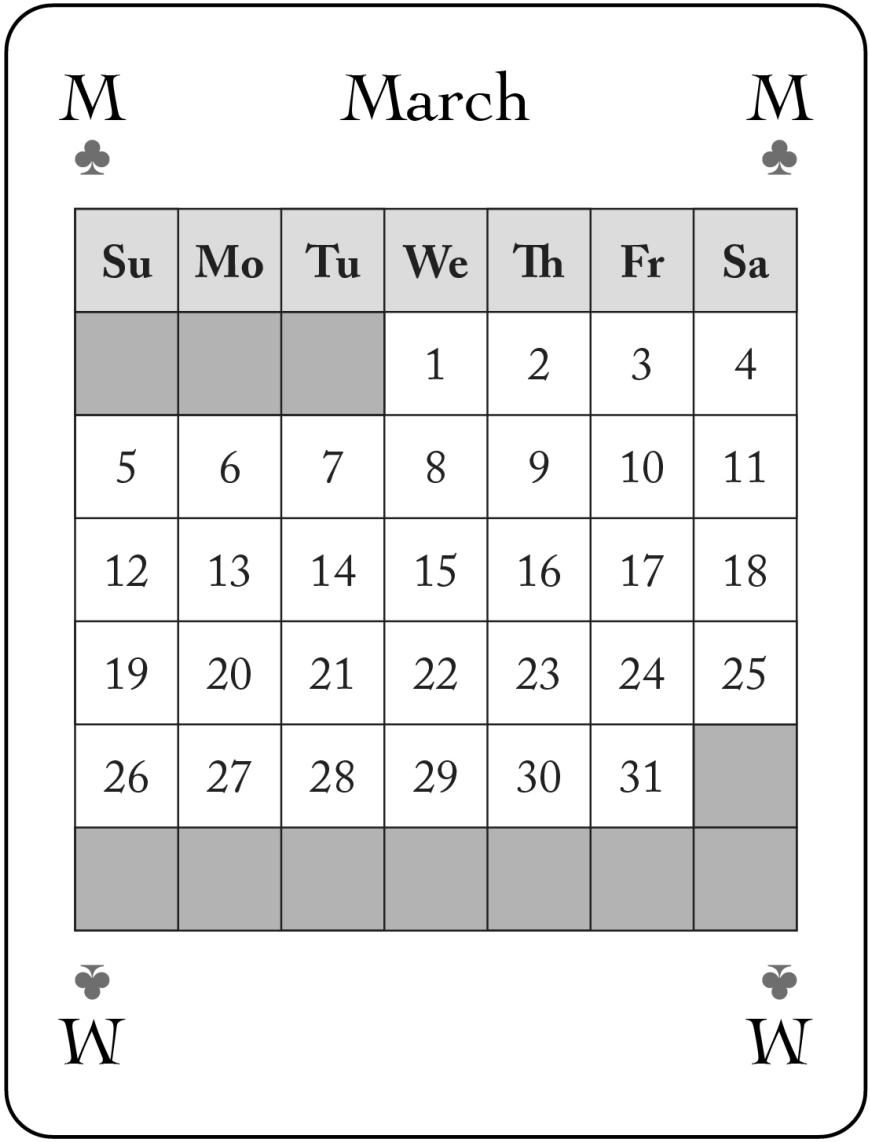
to provoke. So why are such judicial ephemera interesting or meaningful? The author persuasively argues that Justice Jackson's drafts are important because they present the unfiltered thinking and intellectual struggles of one of our nation's most eminent and eloquent jurists about fundamental and still disputed issues of constitutional interpretation.

Antonin Scalia
(eds. Christopher J. Scalia & Edward Whelan)
Scalia Speaks: Reflections on
Law, Faith, and Life Well Lived
(Crown Forum 2017)

This volume consists of speeches culled from the hundreds of addresses delivered by Justice Scalia over the course of his almost 30-year tenure on the United States Supreme Court. He spoke to groups both legal and lay on a wide array of subjects. Whether the topic is the Italian view of the Irish, turkey hunting, the arts, faith and judging, the judicial vocation, interpreting the Constitution, character or William Howard Taft, Justice Scalia's treatment of it conveys his distinctive blend of warmth, wit and zest. This is not a from-cover-to-cover book; it is best savored in small bites, a few sections or chapters at a time, in any order, whenever you are looking for the pleasure to be had from communion with a companionable and first-class legal intellect.

Ilan Wurman
A Debt Against the Living:
An Introduction to Originalism
(Cambridge University Press 2017)

In a letter to James Madison, Thomas Jefferson observed that "the earth belongs to the living, and not to the dead," a passage often cited to support the proposition that judges should not be burdened by the "dead hand of the past" when interpreting the United States Constitution. Madison countered that "the *improvements* made by the dead form a debt against the living, who take the benefit of them. This debt cannot be otherwise discharged than by a proportionate obedience to the will of the Authors of the improvements" (emphasis in original). The author employs this eighteenth-century epistolary exchange as a metaphor for the debate between the modern proponents of a living constitution and originalists. He ultimately comes down squarely on the side of an original-public-meaning method of constitutional interpretation after weighing the critiques of originalism and tackling the vexed question of whether it is possible to reconcile originalism with *Brown v Board of Education*. This book is an excellent introduction to originalism for anyone looking for a sophisticated yet easy-to-follow account of the subject.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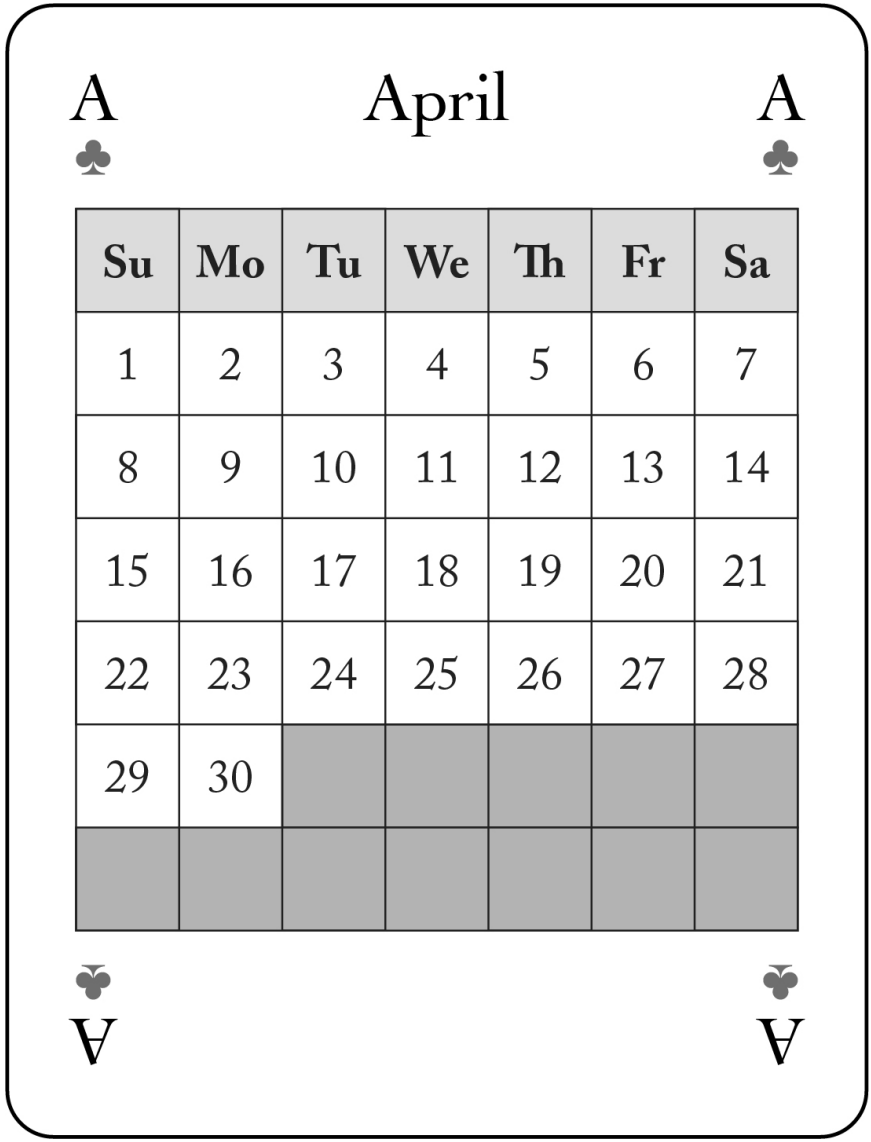
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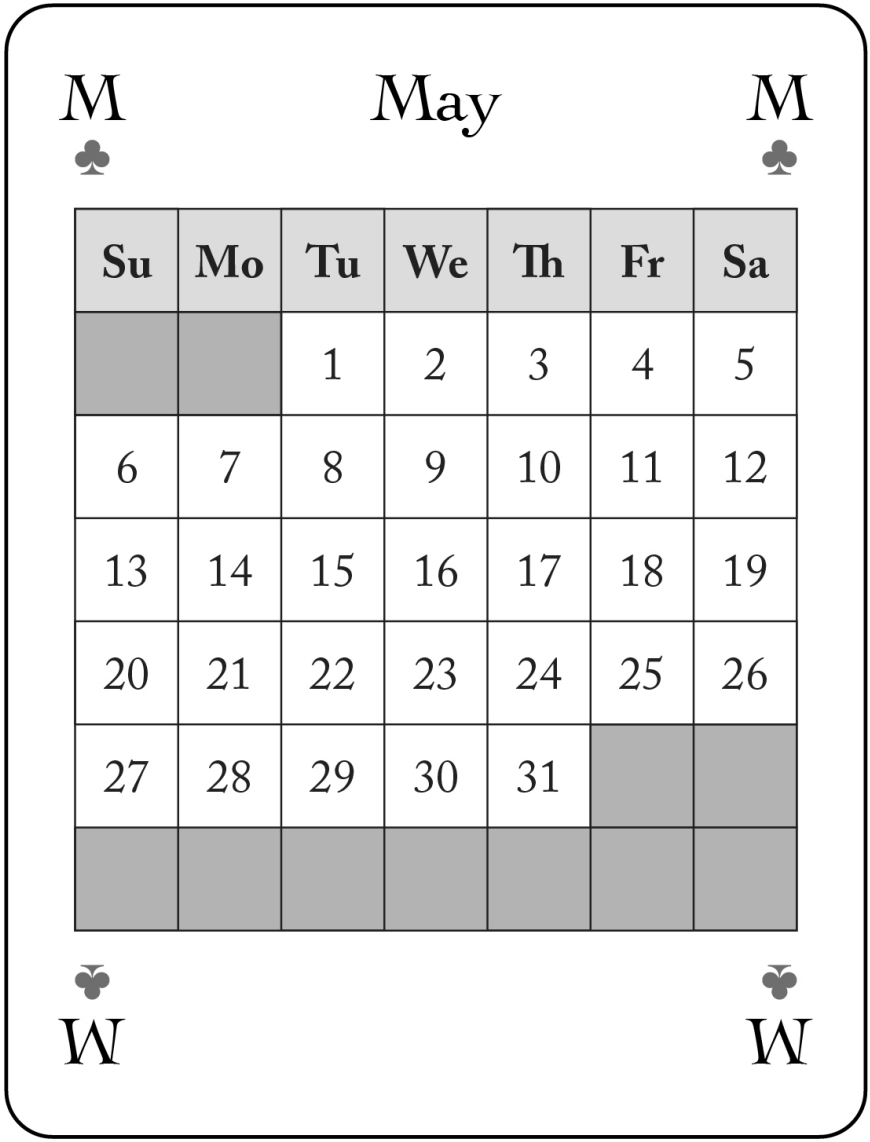
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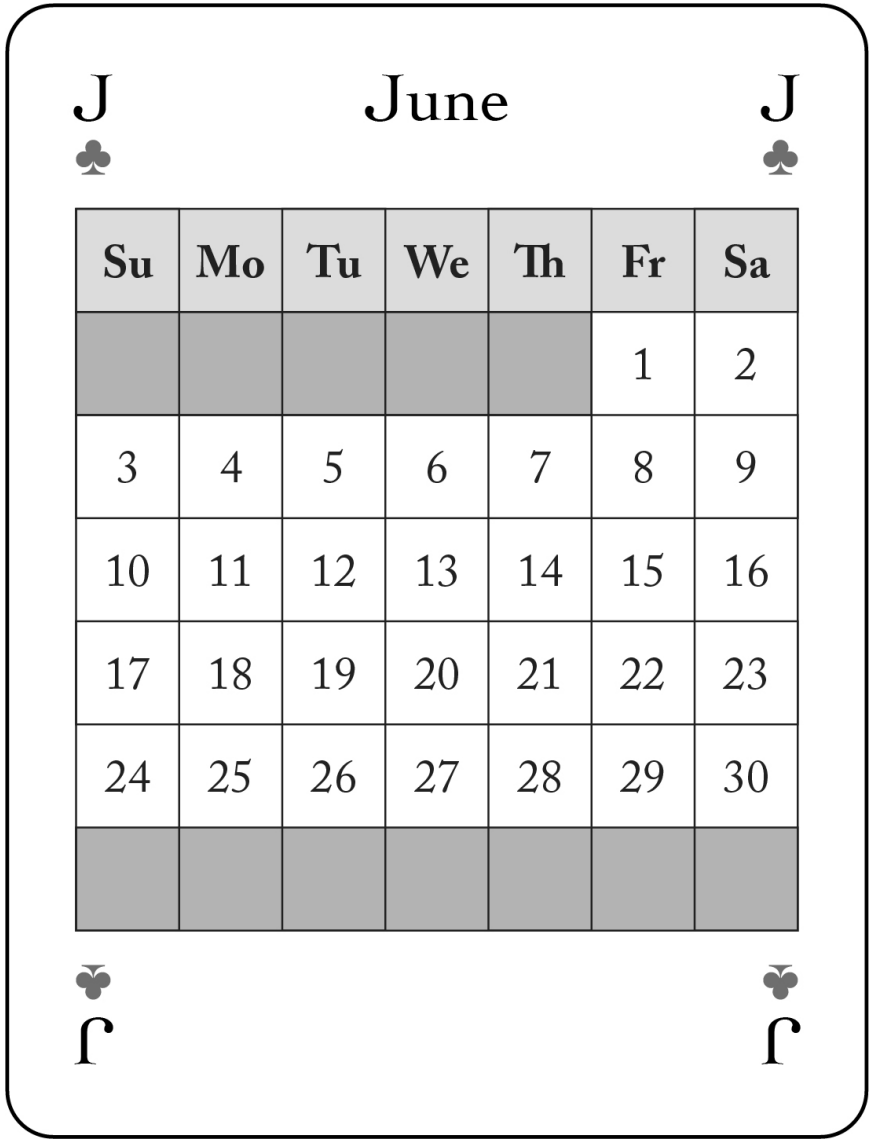
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Five Recommendations

Cedric Merlin Powell[†]

Matthew Desmond
Evicted: Poverty and Profit in the American City
(Penguin Random House 2017)

In a series of evocative, interlocking narratives, Harvard sociologist Matthew Desmond captures the spiral of displacement that is a defining feature of the rental housing market for the poor. Chronicling the lives of eight families in Milwaukee, Desmond explores structural inequality and the relentless drive for profit in a broken housing market. In this perverse marketplace, eviction is a rational vehicle of economic enrichment for landlords. "[T]here is a lot of money to be made off the poor. The 'hood *is* good." Dawson locates economic exploitation as a major driver of poverty so that both landlords and tenants accept extreme inequality as a natural systemic outcome. *Evicted* does not fall into the conceptual trap of theorizing whether race or class is the determining factor in economic displacement; both work in tandem to displace millions of poor tenants across racial lines. Milwaukee is simply a paradigm of how evictions occur across the Nation. "In 2013, 1 in 8 poor renting families nationwide were unable to pay all of their rent, and a similar number thought it was likely they would be evicted soon."

Evicted is compelling because it explores the systemic dimensions of eviction, from the formalized judicial process to "informal evictions" such as paying impoverished tenants to move out or neglecting the rental property so that living conditions become so unbearable that the unit is freed up for another barely

[†] Professor of Law and Interim Associate Dean for Academic Affairs (2017), University of Louisville Brandeis School of Law.

solvent renter. Poor people can always be displaced and replaced in the substandard housing market. There is a profit motive that thrives on poor people's misery. Dawson recounts these stories with raw candor, poignancy, and a discerning empathy for the complexity of the human condition. What must be done, according to Dawson's thesis, is to "significantly expand [] our housing voucher program so that *all* low-income families could benefit from it."

Tressie McMillan Cottom
Lower Ed: The Troubling Rise of
For-Profit Colleges in the New Economy
(The New Press 2017)

Exposing the intricacies of the commodification of education, structural inequality, and the unbridled pursuit of profit at the expense of the economically disadvantaged, Professor Tressie McMillan Cottom offers a comprehensive critique of for-profit colleges in *Lower Ed.* Drawing upon her own experiences as a former recruiter for for-profit colleges and interviews with everyone from students to executives, Cottom posits that Lower Ed is a submarket of higher education which exists because elite Higher Ed does. The American Dream is buttressed by elite institutions and the alluring narrative of "the education gospel," but displaced communities cannot gain access to these institutions so Lower Ed — the conglomeration of for-profit institutions situated in the submarket of higher education — "absorbs all manner of vulnerable groups . . . single mothers, downsized workers, veterans, people of color, and people transitioning from welfare to work." These for-profit institutions are "organized to commodify social inequalities."

Cottom argues that essentially, the new economy demands this commodification because four changes have fundamentally restructured the job market: (i) job mobility where individuals transition to different jobs throughout their careers; (ii) labor flexibility replacing long term contracts with temporary labor being particularly attractive to employers; (iii) there is no expectation of a linear career progression within a specified field; and (iv) workers carry heavier burdens in relation to their personal welfare on the job and, ultimately, in retirement. This means that, for the economically vulnerable, the quest for a good job is a function of acquiring credentials and continuous training, and for-profit colleges are ready made for this futile enterprise in which students amass crushing debt in exchange for diluted degrees. *Lower Ed* is provocative and insightful, it offers a compelling critique of for-profit education and opens a dialogue for substantive reform through education policy.

Paul Butler
Chokehold [Policing Black Men]
(The New Press 2017)

Evoking a figurative and literal chokehold, George-town law professor and former federal prosecutor Paul Butler presents a searing indictment of structural inequality and its disproportionate impact on African-American men and communities of color. The chokehold is the systemic response to African-American men based on a contrived societal presumption of criminality. This presumption is the driving force that is designed to preserve not only law and order, but the racial order. Concluding that the criminal justice system is "broke on purpose," Butler conceptualizes a stranglehold of oppression, a process of "coercing submission that is self-reinforcing." The chokehold explains how American inequality is advanced and maintained through overt and implicit state violence. Conceptualizing the chokehold "through the lens of policing black men," Butler unpacks the unique intersectionality of the Black male experience within the criminal justice system. Since African-American males are presumptively threats to the social order, the chokehold is a legal and societal response to eliminate that threat through mass incarceration, hyper-aggressive race-based policing, and state-compelled subservience.

In a devastating indictment of structural inequality in the criminal justice system, Butler offers strategies on how to survive and evade the grasp of the systemic chokehold; and, more powerfully, on how to radically transform the system so that the death grip of oppression is broken. Translating Butler's compelling insights into an action plan to dismantle the "wretched cycle" of racial subordination should be the objective of elected leaders, policymakers, and criminal justice lawyers.

Angela J. Davis
Policing the Black Man:
Arrest, Prosecution, and Imprisonment
(Pantheon Books 2017)

Bringing together the Nation's leading criminal justice scholars, structural inequality theorists, and Supreme Court practitioners, editor Angela J. Davis, an American University law professor, compiles a collection of essays that comprehensively evaluate how structural inequality disproportionality impacts Black men at every level of the criminal justice system. The disparate impact on Black men can be explained as a unifying feature of structural inequality. This disproportionately is measured at every level of the system from the initial stop — which is a form of racial targeting — to arrest, prosecution, and imprisonment.

The essays collected here illustrate how (i) the law, and its underlying policies, have presumed the criminality of Black males from slavery to the modern

carcereal state; (ii) disparities exist at every stage of the criminal process so that ostensibly neutral decision-making actually reinforces inequality; (iii) there is a socialization process of Black boys through policing policy that targets, harasses, and dehumanizes them as criminals — this is what child advocate and professor Stacey Patton analyzes as the "adultification" of Black youth; (iv) racial profiling is an essential tool in the policing of Black men; and (v) implicit bias is at the core of how the system impacts Black men from encounters with the officer on the street to the awesome discretionary power of the prosecutor. *Policing the Black Man* is an important critique of structural inequality; but, more importantly, it posits a new conceptualization of a restructured criminal justice system actually based on justice.

David M. Dorsen
The Unexpected Scalia:
A Conservative Justice's Liberal Opinions
(Cambridge University Press 2017)

The late Justice Antonin Scalia was an ardent constitutional orginalist and textualist; his interpretive method and analytical approach, to any constitutional issue, was to find applicable meaning from 1789 embodied in the literal text of the Constitution. This formalism ensures that the Court actually interprets the Constitution rather than reinventing it to suit the times. Times may change, but the Constitution is fixed and has a clearly discernible meaning for all times. In *The Unexpected Scalia,* attorney David M. Dorsen deconstructs the formalism of originalism and textualism, uncovering the unexpected Scalia — a conservative justice with liberal opinions. After defining liberalism as a set of unifying themes, Dorsen concludes that 135 out of 867 of Justice Scalia's opinions are fundamentally liberal. He offers analytical distinctions between Justice Scalia's conservative, liberal, and conflicted opinions. Dorsen illustrates how Justice Scalia's doctrinal fidelity to originalism and textualism takes him where this reasoning ultimately leads; thus, while consistency is important, it is not the guiding principle of his conservatism. "Scalia's dedication to originalism, uneven at it may have been, led directly to his liberal constitutional opinions." Not much attention is given to Justice Scalia's race jurisprudence, particularly the anti-subordination principle embodied in the Fourteenth Amendment and affirmative action — this is a unifying theme of liberalism that goes almost unnoticed — but, perhaps, that is because no argument for liberalism can be made here. "History may be against Scalia's . . . orginalist approach to affirmative action." *The Unexpected Scalia* underscores the fallacy of labels in constitutional interpretation.

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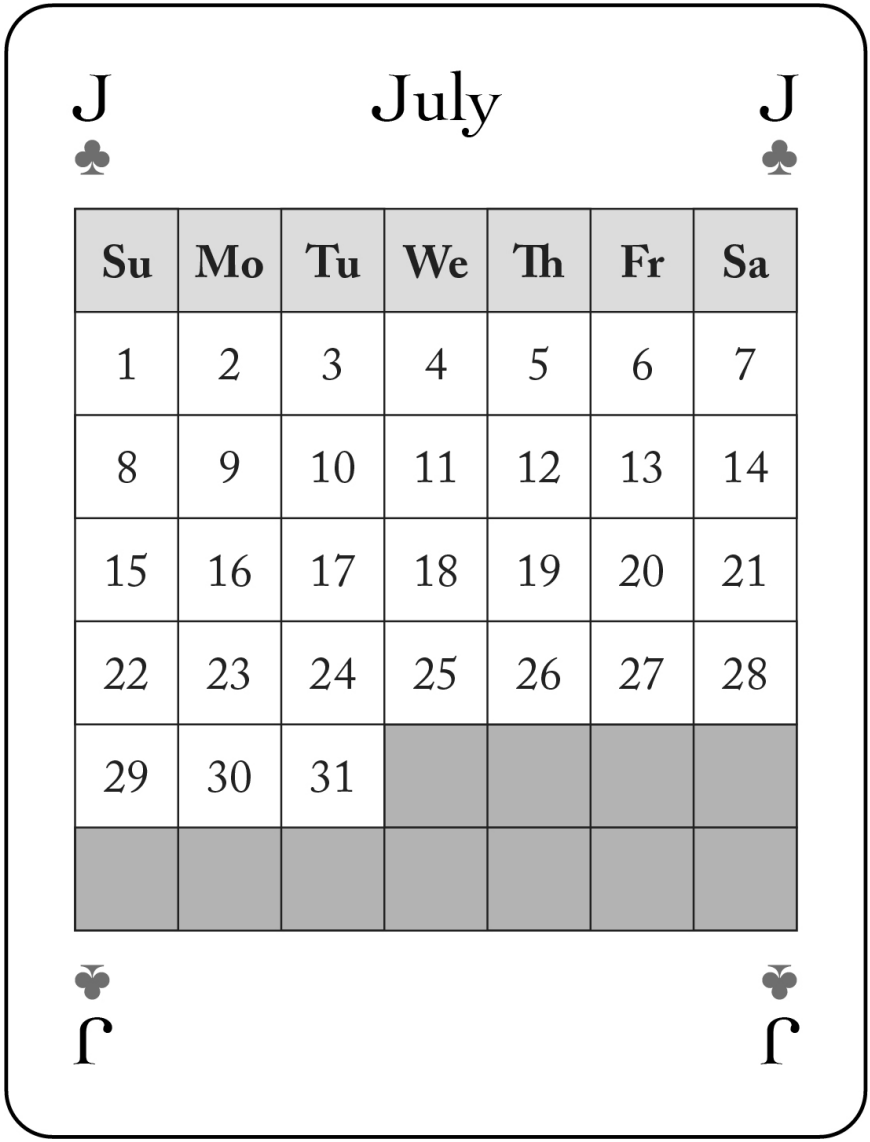
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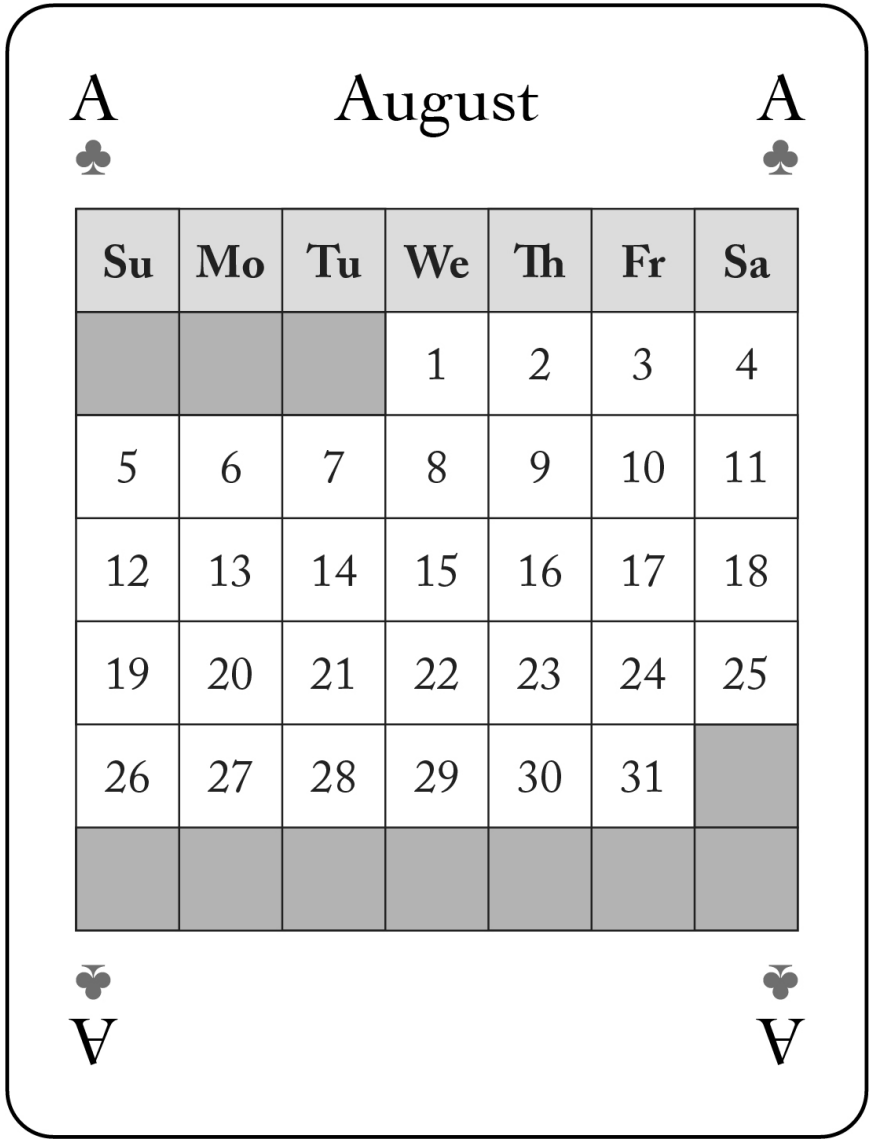
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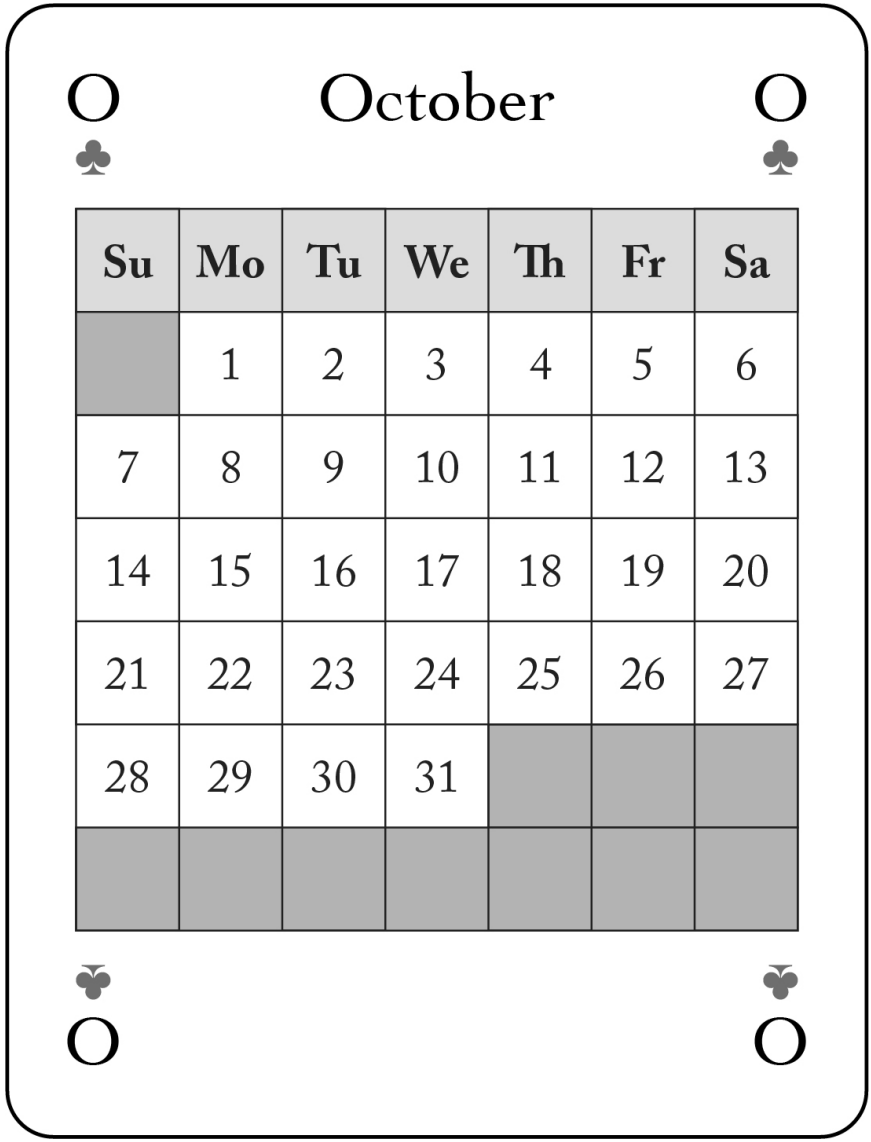

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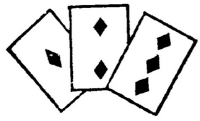

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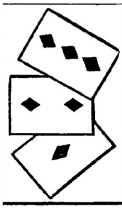
Tailored for Founders Whist Enthusiasts.

C. C. Shelley, Publisher, 10 & 12 College Place, N. Y.



Against

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Initials of Partners	Game 1	Game 2	Game 3	Game 4	Game 5	Total Games Won	Total Games Lost

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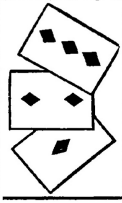

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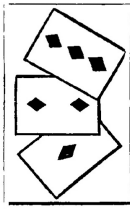

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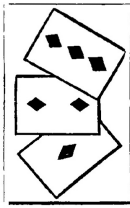

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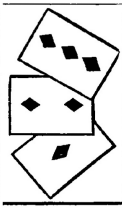

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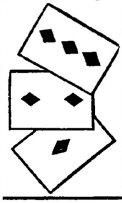

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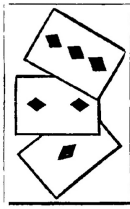

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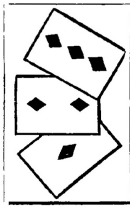

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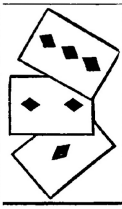

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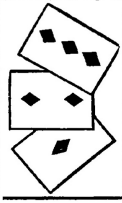

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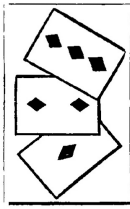

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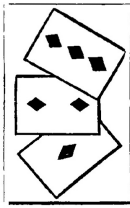

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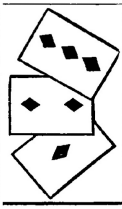

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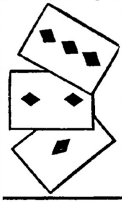

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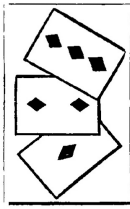

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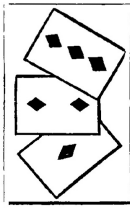

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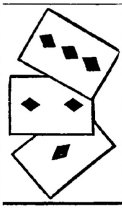

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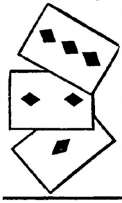

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Frontispiece: *Mrs. John Adams (Abigail Smith)*, New York Public Library Digital Collections, digitalcollections.nypl.org/items/510d47da-ea86-a3d9-e040-e00a18064a99.

Page 87: Playing cards. *Nation's Capitol Souvenir Playing Cards* (The U.S. Playing Card Co. 1909).

Page 134: Photo of Tony Mauro by Diego Radzinschi.

Page 140: *John Quincy Adams*, Library of Congress Prints and Photographs Division, repro. no. LC-DIG-ppmsca-15717.

Pages 152-248: *Hoyle's Games Improved* (1790) (Charles Jones, ed.).

Pages 268-277: Charles C. Shelley, *The Whist Score Book* (1881).

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