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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

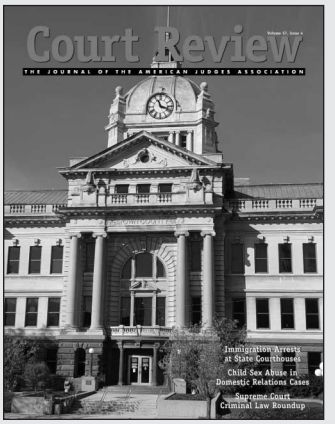
THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 57, Issue 4 2021

EDITOR'S NOTE

In this issue, we bring you our annual round up of criminal law and procedure cases issued by the United States Supreme Court. Prof. Eve Primus and her co-author Lily Sawyer-Kaplan provide an informative and thoughtful review of the developments from the Supreme Court's last term on issues like search, flight, tribal authority, and the shadow docket. If you handle any cases in the criminal arena, you will want to keep their summary nearby even after you have read it.

In another timely article, Prof. James Gingerich updates us on developments in the field of making immigration-related arrests at courthouses. You will know that this became a major point of contention around courthouses, particularly state courthouses, over the last few years. Prof. Gingerich provides a thorough and engaging review of the recent history and the serious implications of targeting people for arrest as they exercise rights of access to the courts. Prof. Gingerich also examines for us the latest developments at the national level to address these issues.



For those of us that handle domestic relations cases in the trial court, did you ever notice how frequently we consider allegations of child abuse that would take a criminal trial several days to examine and we handle them in domestic relations hearings along with conducting a full financial accounting in only a couple of hours? Judge Mike McHenry examines some of the issues presented by the way we litigate child sex abuse claims in domestic relations cases. Judge McHenry discusses some of the problems raised by therapist testimony in these cases and the problematic logical fallacies often argued in such cases. Any judge that examines evidence to draw inferences will find Judge McHenry's article an enlightening cautionary tale even if you are not specifically considering a claim of child sex abuse.

Coincidentally, our Thoughts from Canada column in this issue is closely related to the foundational issue of evidentiary inferences addressed in Judge McHenry's article. In his column, Judge Gorman provides a look at truly fascinating case law in Canada addressing the danger of allowing social stereotypes to invade a factfinder's inferences disguised as "common knowledge." While Judge Gorman's column is always interesting, this one is particularly informative to any judicial officer in any jurisdiction. The warnings from Canada's appellate courts about how we approach the drawing of inferences from evidence that Judge Gorman discusses have universal application.

Our ethics columnist, Cynthia Gray of the National Center on State Courts provides us excellent insights on the dangers of *ex parte* communications and identifies some situations we may not consider without her highlighting them for us. Of course, we also bring you a message from our new president of the AJA, the Resource Page, and the crossword. The hardworking team at *Court Review* hope you find this issue informative and thought provoking.

—David Prince

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 222 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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On the cover: The Brown County, Wisconsin Courthouse. We usually tell you the architect and other building specifics but the proud plaque in the place of honor at this courthouse tells a different story. This courthouse hosted the first stockholders meeting of the Green Bay Football Corp., the Green Bay Packers, in 1923. It also hosted the trial by an injured fan in 1933 whose verdict forced the team into receivership.

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President's Column

A NEW YEAR: NEW CHALLENGES, ABUNDANT OPPORTUNITIES

Yvette M. Alexander

Greetings my fellow jurists and *Court Review* readers,

I am overjoyed to begin my term serving as the 60th president of the American Judges Association. It is the rich history of this Association that humbles and makes me feel honored to lead at this challenging juncture in our journey. I view it as a privilege to be given the opportunity and responsibility to protect and preserve our legacy. I stand on the shoulders of 59 other AJA presidents who have guided this Association thus far, five of which hail from my great state of Louisiana: Judge G. Randall Whitmeyer, Judge Oliver S. Delery, Judge James F. McKay III, Judge Toni M. Higginbotham, and Judge John Conery. Realizing that the success of the American Judges Association is the result of the tireless efforts of so many others, I salute them for their tenacity and leadership. Their leadership is a model for us all. Our accomplishments of yesterday can only be sustained by the vigilance of today; therefore, we must all labor incessantly to sustain our beloved AJA.

Starting from when I joined the AJA in 1995, this journey has been an amazing one. I have had the opportunity to witness the growth and development of this great Association. The challenges we face as a judiciary are still ever present but we are equipped not only to overcome the challenges but also to soar while doing so and emerge stronger than ever. The AJA in 1995 mirrored the judiciary, which was predominantly white and predominantly male, and now the AJA continues to mirror the judiciary with our membership being more diverse and inclusive. With this in mind I am confident the future of the American Judges Association is bright. Two of the goals and objectives of this Association are to provide and promote education for the judiciary and the public and to improve the effective administration of justice.

The years of 2020 and 2021 have proven that we are stronger together and no matter the challenge we can adjust and make the best out of any situation. I applaud Judge Peter Sferrazza for his devoted service as our President for those two years. Thank you for displaying such resilience, grit, and commitment. He took the helm of this Association and marched forward despite COVID. He didn't blink when asked to serve two terms, one of which was in a total virtual world and entirely under pandemic protocols. Instead he led with passion, like a true leader does. Thank you Judge Sferrazza for making the adjustments and assuring that the AJA would not only survive but thrive through this pandemic. Although COVID is still a force to be reckoned with, we must remain hypervigilant and ready to pivot in so many ways to achieve our American Judges Association goals and objectives. Through hard work and dedication, we will achieve these goals.

We were all disappointed in October by not being able to have our in-person 2021 Annual Conference in New Orleans, Louisiana. COVID and Hurricane Ida were the sole contributors to the executive committee's decision to have a virtual annual conference. To protect the safety and wellbeing of our membership, we had no other option except to have a virtual conference. Despite not being able to gather in person for the second year in a row, we were still able to provide excellent educational sessions to our members and also handle the business of this Association through a virtual conference. The educational programs covered subjects from Self-Care to Digital Proceedings, from Judicial Independence to Judicial Security, from Evidence and the Future of Justice to the Mind of the Batterer. As always, Dean Chemerinsky's United States Supreme Court Update was excellent. No stone was left unturned. We emerged from that virtual conference with new and innovative ideas and tools to use daily in our courtrooms as we dispense justice during these most challenging times. Thank you to Judge George Grasso, Justice Bob Torres, and the entire educational committee for stepping up and making the necessary adjustments to ensure a well-balanced and exemplary virtual education program and conference.

Now we look forward to getting together in person at our midyear conference in beautiful Napa Valley, California. The dates are April 26 and 27, 2022. The educational sessions promise to be exhilarating and enlightening. Mark your calendars now, you don't want to miss it!

The American Judges Association works untiringly to preserve the independency of the judiciary. Judges must be free to do their jobs without fear of repercussions or sanctions. We are an independent branch of government and should be treated as such always. This country is currently addressing very important issues of race, voter rights, and redistricting. Our role, as judges, concerning these issues will play out in the courtroom. Most importantly as judges our job is to ensure that everyone is treated equally under the law, and the scales of justice are not tilted. A job we all conscientiously perform. The best judges are the ones who really try to achieve justice, realizing that justice is not a destination but instead a journey. According to Socrates, "Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially." I tend to agree. I continue to strive to exemplify an unwavering commitment to justice and fundamental fairness, and I will serve as your president with the same goals in mind.

As the voice of the judiciary, our strength is in our membership. I do not intend to do this alone. We must all give of our time, talents and treasures. We must all work together for the betterment of this incredible Association, our cities, our states, our nation, and this world. Despite COVID and the adversity it has brought to us, we still have many blessings in our lives and many things for which to be thankful. We should focus more on our blessings and those things for which we are thankful. My dad would always tell us "What doesn't kill you will make you stronger." I am truly stronger today! I look forward to our continued progress as the voice of the judiciary. Thank you all for the service you give every day and the incredible work you do in the name of justice! It is my honor to serve as your 60th president.

Recent Changes in Federal Policy Will Decrease Immigration Arrests at State and Local Courthouses

James D. Gingerich

Changes in the policies and procedures of the U.S. Department of Homeland Security (DHS) and the Immigration and Customs Enforcement Agency (ICE) enacted in early 2017 increased the number of enforcement actions by federal immigration officers in state and local courthouses across the U.S.[1] Many court leaders expressed concerns about the negative impacts of the arrests on the public's access to justice. Several state supreme court chief justices wrote letters expressing their concerns in letters to federal immigration officials. The Conference of Chief Justices established a special workgroup to study and document the incidents and their impacts on the courts and created a mechanism and process for communication between state court leaders and ICE officials. While ICE eventually adopted a new courthouse enforcement policy, incidents in and around courthouses continued.[2] Lawsuits challenging the policies were filed in multiple federal courts. Some states revised court rules and enacted laws to ban immigration arrests in courthouses. The closing of almost all courthouses in the U.S. in 2020 due to the pandemic brought a practical end to the conflict, although efforts to challenge the policies continued.

In 2021, President Biden issued executive orders repealing several of the policies enacted by the previous administration. DHS and ICE have now released new policies involving immigration enforcement priorities generally and courthouse enforcement actions specifically.[3] The new policies recognize the importance of the courthouse and the public's access to justice as a "core principle" and will likely cause a marked decrease in the level of ICE activity and arrests in and around state and local courthouses in the future.

IMMIGRATION LAW BACKGROUND RELEVANT TO COURTHOUSE ARRESTS

While not expressly mentioned in the U.S. Constitution,[4] the regulation of immigration is now clearly understood as a federal responsibility and within the power of the U.S. Congress. Congress adopted the first immigration legislation in 1790.[5] In the late nineteenth century, the U.S. Supreme Court made clear that states had limited power to regulate immigration while the powers of Congress and the federal government were broad.[6] This principle was reaffirmed in 2012 when, in *Arizona v. US*, the Supreme Court struck down several immigration statutes enacted in Arizona, declaring the federal government's primacy over the regulation of immigration.[7]

Federal immigration laws are found primarily in Title 8 of the United States Code.[8] Significant revisions of the law last occurred in 1996 when the process for expelling non-citizens was restructured, eliminating the former "exclusion" and "deportation" hearings and substituting them with a procedure now defined as "removal."[9]

The immigration removal system is a *civil*—not a criminal—process. There is often confusion about the civil nature of the process since many of the legal grounds to support the removal of an individual involve proof of conviction of a state or federal crime. "Improper entry" is defined as a federal criminal offense under 8 U.S.C. § 1325; however, the crime occurs only at the time of entry and does not "continue." Since it is not a continuing crime, individuals can only be prosecuted for illegal entry if apprehended at the time of entry.[10] Thus, a non-citizen's mere presence in the country without legal authority—whether having entered without authority or entered with authority and

AUTHOR'S NOTE: This article would not have been possible without the research assistance and wise advice of Zoya Miller.

Footnotes

1. *See* Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 27, 2017) (directing "executive departments and agencies . . . to employ all lawful means to enforce the immigration laws of the United States).
2. U.S. Immigration and Customs Enforcement, Directive Number 11072.1, *Civil Immigration Enforcement Actions Inside Courthouses,* Jan. 10, 2018.
3. *See* Exec. Order No.13993, 86 Fed. Reg. 7051 (Jan. 25, 2021); *see also* Tae Johnson & Troy Miller, *Memorandum: Civil Immigration Enforcement Actions in or near Courthouses*, U.S. DEP'T OF HOMELAND SEC. (Apr. 27, 2021).
4. U.S. CONST. art. I, § 8. (granting Congress the power to establish "uniform rules of naturalization").
5. An Act to establish an uniform Rule of Naturalization, 1 Stat. 103 (1790).
6. *See, e.g.*, Smith v. Turner, 48 U.S. 283, 463-64 (1849) ("[T]he power . . . to prohibit the immigration of foreigners to other States . . . is not a police power, nor necessary for the preservation of the health, the morals, or the domestic peace of the States who claim to exercise it."); Ping v. United States, 130 U.S. 581 (1889) (establishing that Congress has the power to exclude or deport immigrants from the United States for any reason).
7. 567 U.S. 387 (2012).
8. *See* 8 U.S.C. §§ 1101-1537 (2006 & Supp. V. 2011).
9. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. A, § 304, 1996 U.S.C.C.A.N. (110 Stat.) 3009-546 [hereinafter Illegal Immigration Act].
10. United States v. Rincon-Jiminez, 595 F.2d 1192, 1193 (9th Cir. 1979); United States v. Pruitt, 719 F.2d 975, 978 (9th Cir. 1983).

remained after the authority expired—is not a crime but rather a civil immigration violation.[11]

Federal immigration officials have broad authority to make arrests.[12] Under 8 U.S.C. § 1357(5)(B), agents can interrogate and arrest individuals where reasonable grounds exist to believe the individual is in violation of immigration law. It provides that an immigration officer may arrest and detain an alien who is subject to removal upon issuance of a "Warrant for Arrest of Alien."[13] These warrants are purely administrative and do not require approval by a judge or magistrate. Therefore, they do not have the same authority as judicial arrest warrants.[14]

The primary federal agency responsible for immigration enforcement is DHS, created by Congress in 2002.[15] Two DHS agencies have responsibility for immigration enforcement and removal.[16] ICE is responsible for enforcement within the interior of the U.S. and Customs and Border Protection (CBP) along U.S. borders and points of entry.[17] The U.S. Attorney General and the Department of Justice (DOJ) also play a role.[18] The nation's immigration judges and courts and the Board of Immigration Appeals are located within DOJ.[19] Federal district and circuit courts are also involved, having jurisdiction to hear criminal prosecutions and appeals involving illegal entry and illegal reentry.[20] These two crimes make up a significant percentage of the criminal caseload of federal district courts.[21]

THE 2017 POLICY CHANGES AND IMPACTS ON COURTHOUSE INTERACTIONS

President Trump signed and released three Executive Orders in 2017 that changed the scope and enforcement of federal immigration policies. The most impactful revision on the increase in arrest activities in and around court facilities was a change in the enforcement priorities utilized by DHS and ICE in targeting those aliens subject to removal.[22] The federal government has long recognized that the number of unauthorized aliens in the U.S. is far greater than the system's capacity to identify and initiate removal proceedings against all of them.[23] In addition, there has been a tacit recognition of the economic and other benefits that many of the individuals bring to the communities in which they work and reside.[24] While all presidential administrations have balanced these interests in different ways, each has adopted immigration enforcement policies that have established some system of priority for enforcement activities.[25]

"President Trump signed ... three Executive Orders ... that changed ... enforcement of federal immigration policy."

During the Obama administration, DHS adopted such a priority system.[26] In the first priority were aliens suspected of terrorism, those apprehended at the border, and those who had been convicted of a felony.[27] In the second priority were those convicted of three or more misdemeanors or of a "significant" misdemeanor, such as domestic violence.[28] The third priority included anyone who had received a recent order of removal.[29] Following President Trump's 2017 Executive Order, DHS Secretary Kelly immediately adopted a new policy that rescinded the previous priority system and greatly expanded the scope of immigration enforcement.[30] It provided:

> Department personnel shall faithfully execute the immigration laws of the United States against *all* removable aliens. Except as specifically noted above, the Department no longer will exempt classes or categories of removable aliens from potential enforcement, . . . Department personnel should

11. *See* Illegal Immigration Act, *supra* note 9.
12. *See* 8 U.S.C. § 1357.
13. *Id.*
14. Cong. Rsch. Serv., *Immigration Arrests in the Interior of the United States: A Primer*, (updated Jun. 3, 2021), https://fas.org/sgp/crs/homesec/LSB10362.pdf.
15. Immigration and Ethnic History Society, *Immigration History: Homeland Security Act*, Uni. Of Texas at Austin, Dep't of History (2002), https://immigrationhistory.org/item/homeland-security-act/.
16. *Id.*
17. *Immigration Enforcement Along U.S. Borders and at Ports of Entry: Federal, State, and Local Efforts*, PEW Rsch. (Feb. 6, 2016), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/02/immigration-enforcement-along-us-borders-and-at-ports-of-entry.
18. *See generally* Exec. Office for Immigr. Rev., *About the Office*, U.S. Dep't of Justice (updated Feb. 3, 2021), https://www.justice.gov/eoir/about-office.
19. *Id.*
20. *Fact Sheet: Immigration Courts*, Nat'l Immigr. Forum (Aug. 7, 2018), https://immigrationforum.org/article/fact-sheet-immigration-courts/.
21. In 2020 criminal filings in U.S. District Courts rose by 11% over the previous year and constituted 36% of all criminal filings—the most of any of the criminal case types. Drug offenses followed, making up 27% of all filings. *See Federal Judicial Caseload Statistics 2020*, Admin. Off. of the U.S. Courts (2020), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020.
22. *Supra* note 1.
23. *See generally* Daniel Costa, *Overloaded Immigration Courts: With Too Few Judges, Hundreds of Thousands of Immigrants Wait Nearly Two Years for a Hearing*, Econ. Pol'y Inst. (Jul. 24, 2014), https://www.epi.org/publication/immigration-court-caseload-sky-rocketing/.
24. *See, e.g.*, Luis A. Aguilar, *The Important Role of Immigrants in Our Economy*, U.S. Sec. and Exch. Comm'n (May 18, 2013), https://www.sec.gov/news/speech/2013-spch051813laahtm.
25. *See generally The End of Immigration Enforcement Priorities Under the Trump Administration*, Am. Immigr. Council (Mar. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf.
26. *See* John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, U.S. Dep't of Homeland Sec. (Jun. 20, 2010), https://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf.
27. *Id.* at 2.
28. *Id.*
29. *Id.*
30. Memorandum From DHS Secretary John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest*, DHS Pub. Library (Feb. 20, 2017); *see* Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017).

"This made the local court facility a perfect site for immigration enforcement officers."

prioritize removable aliens who (1) have been convicted of any criminal offense; (2) *have been charged with any criminal offense that has not been resolved*; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful in connection with any official matter before a government agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.[31]

ICE previously focused its apprehension efforts on local jails and detention facilities because those who were in state custody likely matched the profile of individuals set out in the agency's enforcement priority policy—those who had been "convicted." The new enforcement policy included individuals who had only been "charged" and were therefore unlikely to be in state custody. The obvious location at which to seek individuals who have been charged with an offense is at the local courthouse. The availability of public court dockets, many of which could be viewed online, simplified the search for targeted individuals and made it possible to ascertain that they would be in a specific location at a specific time. This made the local court facility a preferred site for immigration enforcement officers. It is likely that this revision and expansion of enforcement priorities was the primary reason for the increase in the frequency of immigration enforcement activities at many state and local court facilities.

THE FEARED IMPACT ON COURTS AND THE DHS RESPONSE

The elimination of enforcement priorities was only one of many changes in immigration policy that resulted from the 2017 Executive Orders. Immigration policy became one of the most contested, divisive, and politically charged issues during the Trump presidency. While state court judges and administrators have no responsibility or direct interest in the policy choices and goals surrounding federal immigration issues, the impact of these choices upon court facilities and the public's access to justice *are* central to the primary responsibility of state court leaders. For this reason, court officials in many states expressed concerns and requested that immigration officials refrain from conducting enforcement actions in and around court facilities. Five of the nation's Chief Justices wrote to federal officials asking that such enforcement actions be limited.[32] New Jersey Chief Justice Stuart Rabner described the potential impacts upon courts in his state:

> A true system of justice must have the public's confidence. When individuals fear that they will be arrested for a civil immigration violation if they set foot in the courthouse, serious consequences are likely to follow. Witnesses to violent crime may decide to stay away from court and remain silent. Victims of domestic violence may choose not to testify against their attackers. Children and families in need of court assistance may likewise avoid the courthouse. And defendants in state criminal matters may simply not appear.[33]

Similar comments were expressed by former Chief Justice Mary Fairhurst of Washington:

> When people are afraid to access our courts, it undermines our fundamental mission . . . . Our ability to function relies on individuals who voluntarily appear to participate and cooperate in the process of justice. When people are afraid to appear for court hearings, out of fear of apprehension by immigration officials, their ability to access justice is compromised. Their absence curtails the capacity of our judges, clerks and court personnel to function effectively.[34]

Several court leaders and court-related organizations suggested a change to the DHS policy on "sensitive locations." Through administrative regulations, DHS had self-imposed limitations on where arrests should take place, recognizing that some locations are so "sensitive" as to make enforcement activities in these locations inappropriate.[35] The policy, in place since 2011, defines sensitive locations as schools, hospitals, places of worship, public ceremonies such as weddings and funerals, and the site of public demonstrations.[36] The underlying rationale for the policy is a recognition that immigration enforcement actions at these locations might deter individuals from attending and/or participating in activities deemed as basic and fundamental—education, health, religion, and the exercise of First Amendment rights.[37] The

31. Memorandum from DHS Secretary John Kelley, *Enforcement of the Immigration Laws to Serve the National Interests,* DHS PUB. LIBRARY (Feb 20, 2017). (emphasis added).
32. Letters have been written by California Chief Justice Cantil-Sakauye, former Washington Chief Justice Fairhurst, former Oregon Chief Justice Balmer, New Jersey Chief Justice Rabner, and former Connecticut Chief Justice Rogers. *Improving Relationships with ICE: Resource Center*, NAT'L CENT. STATE COURTS, https://www.ncsc.org/topics/courthouse-facilities/improving-relationships-with-ice/ice.
33. Letter from Stuart Rabner, Chief Justice, Supreme Court of New Jersey, to John F. Kelly, Sec. of Homeland Sec., U.S. Dep't of Homeland Sec. (Apr. 19, 2017), https://www.ncsc.org/__data/assets/pdf_file/0018/11925/nj-letter.pdf.
34. Letter from Mary Fairhurst, Chief Justice, Supreme Court of Washington, to John F. Kelly, Sec. of Homeland Security, U.S. Dep't of Homeland Sec. (Mar. 22, 2017), https://www.ncsc.org/__data/assets/pdf_file/0022/11938/wa-letter.pdf.
35. *See* Memorandum from John Morton, Director, U.S. Immigr. and Customs Enf't, *Enforcement Actions at or Focused on Sensitive Locations*, (Oct. 24, 2011), https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf.
36. *Id.* at 2.
37. Sarah Rogerson, *Sovereign Resistance to Federal Immigration Enforcement in State Courthouses*, 32 GEO. IMMIGR. L.J. 275, 283-86 (2018) (detailing the origins of the *"Sensitive Locations Memo"*)

policy does not completely bar enforcement activities in these locations but creates a presumption against enforcement actions in these locations, absent a showing of exigent circumstances and requiring prior agency approval.[38] While the policy has never included courthouses the increase in courthouse arrests led to calls for the expansion of the policy to include court facilities and/or proceedings.[39] The members of the CCJ committee raised the issue with federal officials, but the response, communicated in a letter sent in June 2017 from acting ICE Director Thomas Homan to NCSC President Mary McQueen, indicated that the agency was not willing to change the policy.[40] In August 2017, the House of Delegates of the American Bar Association adopted a resolution requesting that the courthouse be included as a sensitive location, calling upon Congress to adopt such a policy through legislation.[41]

On January 10, 2018, ICE did, however, adopt the agency's first public Directive regarding courthouse enforcement policies.[42] Before the Directive, the existence and content of agency policy guidance about the subject was confidential. ICE developed and released the Directive, in part, as a response to concerns communicated by members of the Conference of Chief Justices. It begins by stating that ICE has clear responsibility for the enforcement of federal immigration law, and carrying out that responsibility requires enforcement actions in court facilities.[43] It also notes that because entrances to courthouses require security screening, courthouse locations offer a safer and more secure option for ICE enforcement actions.[44] Even so, the Directive does restrict some courthouse activities.[45] First, it narrows the scope of enforcement actions to those against specific, targeted individuals with criminal convictions or who are gang members, national security threats, or have been ordered to be removed from the country.[46] Second, it provides that when courthouse enforcement actions against priority targets are underway, and other non-citizens (such as family members, friends, or witnesses) are encountered, only the target will be subject to arrest.[47] Third, it advises agents to avoid actions in areas of the courthouse that are dedicated to non-criminal proceedings, such as juvenile, family, and small-claims proceedings, and, to the extent possible, to only undertake actions in non-public areas. Finally, it directs that actions should be taken in collaboration with courthouse security staff.[48]

While the Directive responded to some of the concerns raised by court leaders, the number and frequency of courthouse arrests continued to grow, becoming one of many controversial issues that were a part of politically charged disagreements and disputes between state and local officials regarding federal immigration law and enforcement policies across the country. Attempts to limit federal access to state and local courthouses thus became the subject of litigation, state legislative activity, and changes in court rules.

"[T]he number and frequency of courthouse arrests continued to grow ..."

LITIGATION AND THE COMMON-LAW "PRIVILEGE"

Litigation against ICE was one of the methods used to challenge immigration arrests in and around courthouses. While several constitutional and statutory arguments have been asserted in support of the claims, the common-law privilege against civil arrest has been central to the litigation.[49] The privilege has existed for over five hundred years but was largely forgotten during the last century as a result of the adoption of modern rules and methods of processing civil litigation.[50] The purpose of the privilege was twofold: to protect individuals traveling to and from the court to participate in court proceedings and the actual building and the surrounding areas of the courthouse.[51] Courts invoked the privilege to protect an individual's access to justice and provide a safe and secure location for the resolution of disputes.[52] In the midst of the controversy over immigration arrests at local courthouses, an article published in the *Yale Law Journal Forum* first promoted the idea of applying this common-law privilege to civil immigration arrests.[53] The argument soon became the primary basis for federal court litigation in four states seeking to restrain ICE from making arrests and undertaking related enforcement actions in and around state and local courthouses.

In *Ryan v. U.S. Immigr. & Customs Enf't*, Middlesex County District Attorney Marian Ryan and Suffolk County District Attorney Rachael Rollins, along with other civil-rights lawyers in the Boston area, sued ICE and DHS in federal court, alleging that arresting undocumented immigrants at courthouses violates the common-law privilege against civil courthouse arrests.[54] In addition, the plaintiffs argued that ICE's practices violated the Tenth Amendment and the Right of Access to the Courts under

38. *Id.* at 1. ("ICE's enforcement activities in these same courthouses are wholly consistent with longstanding law enforcement practices, nationwide.").
39. *See ABA House Urges Congress Add Courthouses to "Sensitive Locations" to ICE Guidelines*, American Bar Ass'n (Aug. 18, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba_house_urges_cong/.
40. Letter from Thomas D. Homan, Director, U.S. Immigr. and Customs Enf't. to Mary C. McQueen, President, National Center for State Courts. (Jun. 5, 2017) (on file with the National Center for State Courts).
41. *Supra* note 39.
42. *See* U.S. Immigration & Customs Enf't. Directive No. 11072.1, Civil Immigration Enforcement Actions Inside Courthouses (Jan. 10, 2018), https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf.
43. *Id.* at 1.
44. *Id.*
45. *Id.* at 1-2.
46. *Id.* at 1.
47. *Id.*
48. *Supra* note 42, at 2.
49. *See infra* notes accompanying text at 54-80.
50. *Infra* note 54, at 439.
51. *Id.*
52. *Id.*
53. Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 Yale L.J. F.410(2017).
54. Complaint at 9-15, *Ryan et al v. U.S. Immigration and Customs Enforcement et al*, 974 F.3d 9 (Apr. 29, 2019) (No. 1:19-CV-1103).

"It alleged that courthouse arrests ... interfere with ... rights of access to state courts."

the First, Fifth, and Fourteenth Amendments.[55]

In June of 2019, the federal court granted a preliminary injunction prohibiting ICE from making arrests at Massachusetts courthouses, finding that the plaintiffs had standing to sue and a probability of success in their suit on their common-law privilege claim.[56] ICE appealed, and in September of 2020, the First Circuit overturned the district court's preliminary injunction, holding that ICE had the authority to conduct civil arrests.[57] It reasoned that Congress had not stated an intent to prohibit courthouse arrests in the Immigration and Nationality Act (INA), and the plaintiffs could not prove ICE had no statutory authority to conduct arrests.[58] Following the Biden administration's policy revisions regarding courthouse arrests, the court placed the case on hold until 2022.[59] Subsequently, the plaintiffs decided to drop the lawsuit, reasoning that their claims are now moot under the new federal guidance.[60]

In *The State of N.Y. & Eric Gonzalez v. United States Immigration & Customs Enf't*, a New York state prosecutor and Kings County District prosecutor sought to invalidate ICE Directive No. 11072 (the Trump administration courthouse arrest policy) on September 25, 2019.[61] These prosecutors argued that the Directive violated the common-law privilege against civil arrests at courthouses, exceeding the authority granted to ICE under the INA, and was arbitrary and capricious.[62] On the same date, in *Doe v. United States Immigration & Customs Enf't*, Plaintiffs John Doe and Organizational Plaintiffs The Door, Make the Road New York, New York Immigration Coalition, Sanctuary for Families, and the Urban Justice Center sued ICE, DHS, and several other federal officials for violations of the APA and the First, Fifth, and Sixth Amendment.[63] On June 10, 2020, the United States District Court in the Southern District of New York held that the Directive exceeded ICE's authority under the INA and violated the common-law privilege against civil courthouse arrests.[64] It also held that the adoption of the policy, in general, was arbitrary and capricious.[65] As a result, the court barred ICE from conducting civil arrests at New York State courthouses.[66]

Other cases, such as *Mathurin v. Barr*, have cited to *State of N.Y. v. U.S. Immigration & Customs Enf't*, and *Ryan*. In *Mathurin*, the case differed from these two cases in that Mathurin's case was a habeas corpus petition challenging the legality of his detention.

On December 17, 2019, the State of Washington in *Washington v. United States Dep't of Homeland Sec.* brought an action against DHS, ICE, and CBP to challenge civil courthouse arrests in Washington State in the United States District Court for the Western District of Washington.[67] It alleged that courthouse arrests violate the APA and interfere with constitutional and statutory rights of access to state courts.[68] The State requested a motion for a preliminary injunction, to which the Court denied without prejudice, subject to refiling upon the Courts resuming non-emergency operations after the COVID-19 pandemic.[69] The Court set the bench trial for June 7, 2021.[70]

In February of 2021, the defendants requested additional time to "evaluate whether any new immigration enforcement priorities may be issued that may impact the case."[71] In June of 2021, the plaintiffs and defendants produced a Joint Status Report, requesting the court continue to stay the matter at hand and citing to the new DHS interim guidance pertaining to civil courthouse arrests of undocumented immigrants.[72] The parties agreed to await DHS's final guidance to determine whether a new scheduling order should be issued or if the matter should be dismissed.[73] The court extended the deadline for another Joint Status Report until October 18, 2021.[74]

In *Velazquez-Hernandez v. United States Immigration & Customs Enf't*, a group of plaintiffs, all individuals charged in the Southern District of California with illegal entry into the United States, sought a temporary restraining order to prevent civil arrests at courthouses, arguing that these arrests violate the Administrative Procedure Act (APA).[75] The court reasoned that the plaintiffs are likely to succeed on the merits since the INA includes a "common-law privilege against civil arrest at the courthouse."[76] In November of 2020, the court granted a fourteen-day restraining

55. *Id.* at 42-46.
56. Ryan v. U.S. Immigr. & Customs Enf't, 974 F.3d 9, 15 (1st Cir. 2020).
57. *Id.* at 33.
58. *Id.*
59. Order Denying Petition for Rehearing, *Ryan, et al v. ICE, et al,* 974 GF.3d 9 (May 18, 2021) (No. 19-1838).
60. Motion to Dismiss Appeal as Moot, *Ryan, et al v. ICE, et al,* 974 GF.3d 9 (May 18, 2021) (No. 19-1838).
61. 466 F. Supp. 3d 439, 443–44 (S.D.N.Y. 2020).
62. *Id.*
63. 490 F. Supp. 3d 672 (S.D.N.Y. 2020).
64. *Id.* at 447.
65. *Id.* at 449.
66. *Id.* at 449-50.
67. 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2043 TSZ).
68. *Id.*
69. Plaintiff's motion for a preliminary injunction, dkt 135, *Washington v. United States Dep't of Homeland Sec.* 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2034 TSZ).
70. Washington v. United States Dep't of Homeland Sec. 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2034 TSZ).
71. Defendants' Motion to Stay, dkt 142, *Washington v. United States Dep't of Homeland Sec.* 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2034 TSZ).
72. Joint Status Report at 1, dkt 149, *Washington v. United States Dep't of Homeland Sec.* 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2034 TSZ).
73. *Id.* at 2.
74. Defendants' Motion to Stay, dkt 142, *Washington v. United States Dep't of Homeland Sec.* 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2034 TSZ).
75. 500 F. Supp. 3d 1132, 1137 (S.D. Cal. 2020). The Plaintiffs stated that the APA was violated because the directive was arbitrary and capricious, violated the common-law rule against civil courthouse arrests, Plaintiffs' rights of access to the court under the First, Fifth, and Sixth Amendments, the Sixth Amendment right to present a defense, the Immigration and Nationality Act, and the Fourth Amendment. *Id.*
76. *Id.* at 1141.

order, ordering the parties to attempt resolving the matters.[77]

Following this ruling in *Velasquez-Hernandez*, other litigation in California included requests to require that ICE halt courthouse arrests of undocumented immigrants In *United States v. Oregel-Orozco* and *United States v. Fernandez*, the defendants, both awaiting trial on the charge of attempted improper entry by an alien, asked the court to bar immigration arrests at the courthouse where the trials were taking place, fearing being arrested at the courthouse even if he was acquitted at trial. In *Fernandez*, the Court dismissed the case for lack of jurisdiction.[78] In *Oregel-Orozco*, the defendant argued that courtroom immigration arrests violate a common-law privilege against civil arrests at courthouses and his right to a fair criminal trial.[79] Though the plaintiff's motions to bar courthouse arrests were denied, the court stated that the defendant could pursue relief in a separate civil action.[80]

BANS ON COURTHOUSE ARRESTS—COURT RULES AND STATE LEGISLATION

Several state legislatures have also considered and enacted statutory limitations on activities by federal immigration officers in and around state and local courthouses.[81] In addition, the Oregon Supreme Court and New York Office of Court Administration have adopted rules that similarly restrict the activity in court facilities in their states.[82]

In January 2020, California became the first state to adopt legislation prohibiting civil arrest in courthouses, and its law is the narrowest.[83] It prohibits a civil arrest "in a courthouse," protecting individuals who are "attending a court proceeding or having legal business."[84] The Colorado legislature followed in March 2020, expanding the limitation to any "person . . . *present* at a courthouse *or on its environs"* and also prohibiting the arrest of a person "*while going to, attending, or coming from a court proceeding.*[85] In April 2020, the State of Washington enacted a more far-reaching statute that dealt with activities beyond civil arrests at courthouses.[86] It prohibited courts from inquiring about or collecting information about an individual's immigration status or sharing court information with federal immigration officials. It also required courts to develop forms and collect data about any law enforcement actions that take place in and around courthouses.[87] Like Colorado's law, its civil-arrest prohibitions extend to any person in or traveling to or from a courthouse in connection with a judicial proceeding or other business with the court.[88] In New York, Governor Andrew Cuomo signed the "Protect our Courts Act" in December 2020.[89] "It limits state law enforcement agencies and state public bodies in the performance of certain actions, such as collecting and sharing immigration-related information, using state resources in aid of federal immigration authorities, or entering into agreements with federal immigration agencies."[90] It also prohibits the civil arrest of anyone who is inside a court facility and also of individuals and their family or household members who are parties or witnesses whenever they are going to, remaining at, or returning from a court proceeding. [91] Most recently, in July 2021, the Oregon legislature adopted limitations on federal immigration activities in the state, including civil arrests in courthouses.[92] Like the New York and Washington laws, it prohibits the civil arrest of anyone in or around the courthouse and also protects parties, witnesses, and their family or household members when traveling to and from the courthouse.[93]

"State courts in at least two states ... limit arrest activities in court facilities."

State courts in at least two states have also revised court rules to limit arrest activities in court facilities.[94] In 2019 the Oregon Supreme Court adopted revisions to the Uniform Trial Court Rules, providing that "no person may be subject to civil arrest without a judicial warrant or judicial order when the individual is in a courthouse or within the environs of a courthouse."[95] In 2017, the Chief Administrative Judge of the New York Unified Court System issued a Memorandum applicable to all courts in New York prohibiting arrests of any kind inside a courtroom and requiring all law enforcement officers to first notify court security officers before undertaking enforcement activities inside a courthouse.[96] In 2019 a revised Directive was issued prohibiting any arrests by federal immigration authorities inside a New York courthouse absent an arrest warrant signed by a federal judge or magistrate.[97]

THE NEW ICE MEMORANDUM ON COURTHOUSE ARRESTS

Changes in immigration policies enacted in 2021 by the Biden administration will greatly reduce the number of immigration arrests and enforcement actions in and around state and local court facilities and have, at least for now, lessened the need for

77. *Id.* at 1148.
78. 2020 U.S. Dist. LEXIS 172085 at *1 (S.D. Cal. Sep. 18, 2020) (No. 19-mj-24594-AGS.); 2020 U.S. Dist. LEXIS 201959, at *1-2 (S.D. Cal. Oct. 29. 2020) (No. 20mj20456-MSB-JLS).
79. *Id.*
80. *Id.* at *3.
81. *See infra* notes accompanying text at 83-93.
82. *See infra* notes accompanying text at 94-97.
83. *See* Cal. Civ. Code § 43.54 (2020).
84. Cal. Civ. Code § 43.54(a) (2020).
85. Colo. Rev. Stat. § 13-1-403 (2020) (emphasis added).
86. *See* Wash. Sess. Laws 2020, ch. 37.
87. *See* Wash. Legis. Serv. Ch. 17 (S.H.B. 2567) (West 2020).
88. Wash. Legis. Serv. Ch. 37, § 3(a) (S.H.B. 2567) (West 2020).
89. Wash. Legis. Serv. Ch. 37, § 3(b) (S.H.B. 2567) (West 2020).
90. *See* Wash. Legis. Serv. Ch. 17 (S.H.B. 2567) (West 2020).
91. Wash. Legis. Serv. Ch. 37 § 5(1) (S.H.B. 2567) (West 2020).
92. *See* H.B. 3265, 2021 Leg., 81st Sess. (Ga. 2021) (enacted).
93. H.B. 3265, 2021 Leg., 81st Sess., § 3 (Ga. 2021) (enacted).
94. *See* Or. Uni. Trial. Ct. R. § 3.190 (2021); *see also infra* notes 96-97.
95. Or. Uni. Trial. Ct. R. § 3.190(1) (2021).
96. Memorandum from N.Y. State Unified Ct. Sys., Office of the Chief Administrative Judge, *Policy and Protocol Governing Activities in Courthouses by Law Enforcement Agencies* (Apr. 26, 2017), available at https://www.ncsc.org/__data/assets/pdf_file/0023/14189/nys-courthouse-activity-by-leas.pdf.
97. Directive from N.Y. Unified Court Sys., Office of the Chief Administrative Judge, *Protocol Governing Activities in Courthouses by Law Enforcement Agencies* (Apr. 17, 2019), available at https://www.immigrantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdf.

"The new policy begins by establishing a 'core principle' ... —the importance of the courthouse and access to justice."

the statutory changes, court rule revisions, and litigation discussed previously.

On January 20, 2021, President Biden issued Executive Order 13993, repealing most of the Executive Orders that the previous administration had issued and announced a new set of immigration-related priorities.[98] One of the changes involved the adoption of a priority system for future immigration enforcement.[99] Similar to policies that had been in place during prior administrations, the new policy dedicates agency enforcement efforts and resources toward (1) non-citizens suspected of engaging in terrorism or espionage, (2) non-citizens apprehended at the border while attempting unlawful entry, and (3) non-citizens who have been convicted of an aggravated felony or an offense involving participation in a gang.[100] This shift in enforcement priorities will have a dramatic impact on the need for ICE to focus the location of enforcement actions in courthouses. No longer are those who are only *charged* with crimes and who are thus often easily found in a court facility the targets of routine ICE enforcement actions. Individuals who have been convicted of aggravated felonies, are not incarcerated, and appear in a courthouse for sentencing or post-conviction matters could still be targets of enforcement. In most cases, however, this policy shift will move the location of ICE enforcement actions from courthouses to probation agencies and jails.

In addition to revision of the enforcement priority policy, on April 27, 2021, Tae Johnson, Acting Director of ICE, and Troy Miller, Acting Director of CBP, issued a new memorandum providing guidance to their agencies on enforcement actions in or near courthouses.[101] The Memorandum revoked ICE Directive 11072.1 ("Civil Immigration Enforcement Inside Courthouses") that had been issued during the previous administration.[102] It then outlined a new policy that severely curtails courthouse enforcement actions in ways that are responsive to many of the specific concerns that had been raised by the workgroup and individual members of the Conference of Chief Justices.[103]

The new policy begins by establishing a "core principle" that guides the spirit and interpretation of the policy—the importance of the courthouse and access to justice.[104]

> The courthouse is a place where the law is interpreted, applied, and justice is to be done. As law enforcement officers and public servants, we have a special responsibility to ensure that access to the courthouse—and therefore access to justice, safety for crime victims, and equal protection under the law—is preserved.[105]

Noting that enforcing immigration law remains an important federal interest that may sometimes require activity in or near court facilities, the new policy requires that the activities "be executed in or near a courthouse so as not to unnecessarily impinge upon the core principle of preserving access to justice."[106] The policy also expands the scope of the previous order, including "the entrance and exit of a courthouse, and in adjoining or related areas such as an adjacent parking lot or transportation point,"[107] in addition to the inside of the courthouse.

Using the core principle as an initial presumption, the policy further limits courthouse arrest activities to target only those involved in 1) a national security threat, 2) an imminent risk of death, violence, or harm to any person, 3) hot pursuit of an individual who poses a threat to public safety, or 4) an imminent risk of destruction of evidence material to a criminal case.[108] When the policy allows courthouse arrest activity, it must be undertaken in a non-public area of the courthouse outside of public view and conducted in collaboration with courthouse security personnel.[109] The timing of the arrest is also limited so that it takes place only at the conclusion of the judicial proceeding in which the arrestee is involved.[110]

The Memorandum is temporary and will be replaced after the DHS Secretary issues his final guidance.[111] On August 11, 2021, Rhode Island Chief Justice Paul A. Suttell, President of the Conference of Chief Justices, and Minnesota State Court Administrator Jeff Shorba, President of the Conference of State Court Administrators, submitted a letter to ICE and CBP in support of the new policy and, specifically, its adoption of the Core Principle.[112]

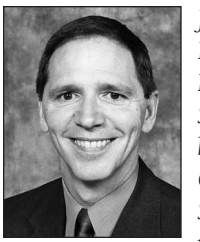
> While there have been and remain differences in the legal and policy perspectives among the members of the Conferences and between some members of the Conferences and ICE and DHS, there is a shared recognition that 1) the regulation and enforcement of immigration policy is a constitutional responsibility of the federal government and that 2) state court systems have a constitutional obligation to support the rule of law, preserve access to justice, and provide a safe, fair and open forum for the resolution of disputes. For this reason, we welcome and support the

98. Exec. Order No.13993, 86 Fed. Reg. 7051 (Jan. 25, 2021).
99. *Id.*
100. *See* Law Enforc. Immigr. Task Force, *Comparison of the Obama, Trump, and Biden Administration Immigration Enforcement Priorities* (Apr. 22, 2021), https://leitf.org/wp-content/uploads/2021/04/Enforcement-Priorities-Memo.pdf.
101. Tae Johnson & Troy Miller, *Memorandum: Civil Immigration Enforcement Actions in or near Courthouses*, U.S. Dep't of Homeland Sec. (Apr. 27, 2021).
102. *See supra* note 42.
103. *Supra* note 101.
104. *Id.* at 1.
105. *Id.*
106. *Id.*
107. *Id.* at 2.
108. *Id.*
109. *See supra* note 101, at 3.
110. *Id.*
111. *Id.*
112. Letter from Paul A. Suttell & Jeff Shorba, Presidents, Conference of Chief Justices & Conference of State Court Administrators, to Tae Johnson, Acting Director, U.S. Immigr. & Customs Enf't & Troy Miller, Acting Commissioner, U.S. Immigri. & Customs Enf't (Aug 11, 2021) (on file with the National Center for State Courts).

adoption of the "Core Principle" outlined in the Memorandum, recognizing the importance of the courthouse and the public's access to justice as the foundation from which limited civil immigration enforcement actions in and around a courthouse are to be evaluated. The Memorandum's balance between important state and federal interests "so as not to unnecessarily impinge upon the core principle of preserving access to justice" provides appropriate recognition of the state courts' most important obligations and responsibilities.[113]

CONCLUSION

The last significant change in the nation's immigration laws occurred during the Presidency of Ronald Reagan. The inability of Congress to agree on changes to federal immigration law and procedures has resulted in the President assuming a greater responsibility for immigration policy through the use of executive orders. The nature and scope of the policies implemented through executive order have also grown. While this extension of presidential powers has allowed for timelier federal responses to significant national and world events, changes in immigration patterns, and other evolving challenges, it has also produced major shifts in immigration policies, goals, and objectives with each changing administration. These shifts in policy every four years have created their own problems and challenges. While action by Congress could create greater stability and consistency, the prospect of new federal legislation is unlikely. The 2021 policy changes related to arrests in state and local courthouses are responsive to many of the concerns raised by court leaders and are consistent with the goals and objectives contained in state legislation and court rules adopted in many states. These policies, however, are only in place via executive order and agency memoranda and could be easily changed in the future.

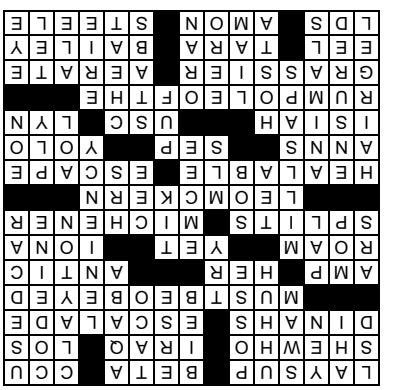


J.D. Gingerich is the Director of the State Courts Partnership, a collaboration between the UALR Bowen School of Law and the National Center for State Courts. As a part of his work with the NCSC, he provides support for several committees of the Conference of Chief Justices and Conference of State Court Administrators, including a special workgroup appointed to review concerns and provide recommendations regarding interactions between federal immigration officials and the state courts.

113. *Id.*

Answers to Crossword

from page 231



Litigating Child Sex Abuse in Domestic Relations Cases

Mike McHenry

IN RULING ON PARENTING TIME DISPUTES COURTS ARE SOMETIMES CALLED UPON TO MAKE FINDINGS REGARDING WHETHER A PARENT HAS ABUSED A CHILD, INCLUDING SEXUAL ABUSE.

Sometimes these abuse allegations are handled in criminal court, and if a conviction enters then the matter is considered resolved. However, if the accused parent is acquitted, or if the prosecuting authority feels the evidence is inadequate to justify a criminal prosecution, then the obligation to assess the allegation's merits falls to the domestic relations court, where busy dockets and inexperienced practitioners can present a challenge for the judge.

In these circumstances, it is understandable that attorneys and judges alike would seek some authoritative guidance from an expert. Frequently such guidance is sought from psychologists or licensed clinical social workers. Many legal practitioners believe therapists, particularly those experienced at counseling sexually abused children, are qualified to guide the court in weighing the merits of a child sex abuse allegation. But is this true? It depends on what we mean by "guide."

By analyzing the state of the science in this area, this article is intended to disabuse legal practitioners of the notion that psychologists have a unique ability to determine whether a child was sexually abused. Be warned: the field of forensic psychology itself is split on this issue, and the various camps are deeply entrenched. However, a scientific consensus has yet to emerge which is strong enough to meet the *Daubert*[1] standard of admissibility. By analyzing how to think about this type of expert testimony, this article might provide some consolation to those litigants and psychologists who deeply believe their opinion is bullet-proof and who fervently desire to advocate for the child from the witness stand.

Before surveying the science in this area, let's begin by laying out some foundational knowledge about the investigation of child-sex-abuse claims.

HOW CHILD PROTECTIVE SERVICES CATEGORIZES ABUSE CLAIMS

The primary mission of any child protective services agency (CPS) is to investigate claims of child abuse. In this writer's jurisdiction, CPS reports that two-thirds of reported child sex abuse allegations are not criminally prosecuted by the state because the evidence is insufficient. Therefore, it is no surprise that many unadjudicated allegations of child sex abuse first appear in the court system in a domestic relations case. CPS typically classifies their investigations as *Substantiated, Inconclusive,* or *Unfounded*. However, it is important to understand that CPS's opinion is not legally dispositive—it is merely the basis for that agency's prosecutorial decision. Although many litigants accept CPS's opinion as conclusive, no litigant is legally required to do so in a civil matter.

HOW FORENSIC PSYCHOLOGISTS CATEGORIZE ABUSE CLAIMS

Forensic Psychologists categorize abuse claims according to the type of evidence that supports the claim. Abuse claims are divided between those with *hard evidence*, such as physical injury resulting in a medical diagnosis of abuse, a credible third-party eyewitness, a confession, digital images of the act, or DNA from a sex assault nurse examination, and those with *soft evidence*, such as the child's statements and/or behavior. Obviously, those cases with hard evidence are usually criminally prosecuted and pose no unique issues for the court. However, it is the soft cases that CPS usually deems inconclusive or unfounded and that the judicial system sees for the first time in domestic relations court.

TYPES OF CHILD VICTIMS

For our purposes, child victims can be divided into three types: (i) infants, distinguished by the fact that they are pre-linguistic and do not make statements; (ii) school age children, that is, children who are old enough to articulate their experiences but lack meaningful sexual knowledge—they are unlikely to lie about sex but are highly prone to suggestion; and (iii) post-pubescent teens —they are highly articulate, have sexual knowledge, and are much less prone to suggestion, but they understand human motivations enough to be able to form ulterior motives for the claim of abuse.

A COMMON PROXY FOR ABUSE: RELATIONSHIP DYNAMICS

As domestic relations practitioners know, some parent-child relationships are plagued by animosity, discomfort, and emotional distance. This can be so even when no abuse has occurred. If a weakly supported abuse claim is thrown into the mix, the troubled parent-child relationship can become a proxy basis on which parenting time disputes are decided, allowing court-appointed investigators and the court itself to sometimes avoid making findings regarding the abuse allegation. However, a lack of an apparently troubled relationship is not a reliable reverse-proxy. Many children *accommodate* the abuse out of guilt or fear of losing or harming the abusing parent.

A FREQUENT ARGUMENT FROM THE ACCUSED PARENT

In those cases where the prosecuting authority has refused to

Footnotes

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993).

file criminal charges and the abuse allegation is raised in domestic relations court, the accused parent sometimes argues: *"If the DA and CPS are comfortable with me having custody of my child, then divorce court should certainly feel comfortable."* However, it is important to keep in mind that a decision to not file criminal charges (or a dependency and neglect action) is not synonymous with the DA or CPS "being comfortable." Prosecutors have an ethical obligation to only prosecute those cases in which they have sufficient evidence to meet their burden of proof, a burden very different from that in a domestic relations case.

COUNTERCLAIMS OF ALIENATION ARE COMMON

The psychological literature warns about the possibility of parental alienation when the claim of abuse appears unfounded and arises in the context of a custody battle. Alienation is a real phenomenon in some families, and some parents are not above hurling unfounded claims of sexual abuse. A parent who would fabricate a sex abuse allegation without sufficient evidence is worthy of concern by the court regarding that parent's ability to act in the child's best interests.

THE MOST DIFFICULT TYPE OF PARENTING TIME DISPUTE

One of the most difficult issues a domestic relations court can face is a parenting time dispute in which one parent accuses the other of having sexually abused the child and

(i) the child is a young, school-aged child;
(ii) the claim is supported only by statements and behavior of the child;
(iii) the parent-child relationship appears untroubled;
(iv) the abuse allegation pre-dates the custody battle; and
(v) no prosecution by the DA or CPS has occurred.

WHY WOULD A PARENT PRESS THE ABUSE CLAIM IF THE DA & CPS WON'T PROSECUTE?

A parent could rationally choose to press the abuse allegation in domestic relations court because either (i) the accusing parent genuinely believes they are protecting the child, or (ii) because the accusing parent wants an advantage in the custody hearing, or (iii) because the burden of proof is lower in domestic relations court than it is in criminal court, or (iv) because the accusing parent may have newly discovered evidence not previously considered by authorities.

THE MOST COMMON TYPES OF NEW EVIDENCE

The accusing parent may have heard new statements made by the child that support the claim of abuse and which were not considered by the DA or CPS at the time the allegation was reported to authorities. Or the accusing parent may have taken the child to a therapist who opines "the child is telling the truth; father is guilty; the abuse happened." Frequently, the therapist becomes the accusing parent's star witness in a hearing to determine parenting time.

THE PERFECT STORM

Judges need to recognize that this factual scenario presents a high risk of injustice, because (i) many domestic relations practitioners are inexperienced in litigating sexual abuse cases, (ii) soft-evidence cases involving young school age children are the most challenging type of case, (iii) the admissibility of expert testimony by a therapist on a forensic matter is highly questionable, and (iv) when the preponderance standard of proof is applied to a credibility match between accuser and accused, expert testimony can easily tip the scales, particularly if the judge is unschooled in the state of forensic science in this area.

"Which outcome is worse—an abusive parent wins shared custody of the child, or an innocent parent loses custody ...?"

WHICH IS WORSE?

Which outcome is worse—an abusive parent wins shared custody of the child, or an innocent parent loses custody due to a false allegation? Judges must keep in mind that unlike criminal law, the civil burden and standard of proof do not give the benefit of the doubt to the accused. Child safety typically trumps doubts.

FACT PATTERN

It will be instructive to discuss the science of forensic psychology in the context of a fact pattern. Assume the following facts:

- Parents separate and share the child in a 50/50 parenting time arrangement; the child is five years of age.
- Upon the child's return from Father's house, Mother notices the child playing sexually. (There is no need to specify the particular behavior.)
- Mother interrogates the child:
  Q: "Where did you learn that?"
  A: "At Daddy's."
- Mother presses the child for details but only gets ambiguous statements in return.
- Mother notes redness on the child's genitals.
- Mother contacts CPS.
- CPS investigates—Father denies.
- Investigation results in "Unfounded."
- Mother takes child to a therapist who concludes the child was sexually abused by Father.
- Mother wants full custody and endorses the therapist as an expert witness.

Is this a soft case? Note that we have three types of evidence: (1) physical evidence in the form of skin redness, (2) the child's statement "at Daddy's," and (3) the child's behavior—sexual play. This means we are interested in three topics: Medical Diagnostics, Lie Detection, and Behavioral Diagnostics. If we assume the redness is minor and could have been caused by any common skin irritant, then yes, this is a soft case.

WHAT BEHAVIORS ARE MOST LIKELY TO BE SEEN AS CORROBORATIVE OF ABUSE?

The following behaviors are sometimes associated with abuse:

- Sexual play
- Depression
- Regressive behaviors, such as nightmares, bedwetting,

"[A]nxious and obsessive interrogation will taint the investigation ..."

or a drop in school grades
- Protective behaviors, such as not wanting to get undressed, only wearing bulky clothes, or locking bedroom doors.

These behaviors alone are almost never sufficient to begin an investigation. However, when the evidence is sufficient to begin an investigation, law enforcement starts by preserving evidence. In a soft case this means preserving the child's statements and memory. The first step is to take the child to a children's advocacy center (CAC) where a forensic interviewer will conduct a structured, non-leading interview with the child, which is videotaped. This interview is designed to avoid suggestion, and multiple interviews are highly discouraged, because the risk of suggestion is too great with young children.

WAS MOTHER WRONG TO PRESS FOR DETAILS?

Of course, any parent would be alarmed at the prospect of abuse, and superficial inquiry is to be expected; however, anxious and obsessive interrogation will taint the investigation, because young children are highly suggestible.

HOW THIS CASE TYPICALLY GOES IN MANY COURTROOMS

Some parties accept a decision by the DA not to file criminal charges as conclusive; others do not. For settlement negotiations in the domestic relations matter, Father hires a polygrapher who finds Father is telling the truth. Mother doesn't trust Father's polygrapher, because polygraphs are unreliable and inadmissible. Mother endorses the child's therapist. The therapist's testimony goes un-scrutinized under *Daubert*, because many domestic relations practitioners are unfamiliar with such litigation. The court either avoids the abuse issue by relying on troubled relationship dynamics and Mother wins, or the court gives custody to Mother because the therapist's opinion carries the day.

But what would happen if the court asked a few questions? Here are three questions the court should be asking itself:

1) Is sexual play in a 5 year old evidence of sexual abuse?
2) By what standard did the therapist form an opinion?
3) What is the proper scope of testimony by a therapist in a forensic setting, that is, in a hearing designed to determine whether the allegation is true?

IS SEXUAL PLAY EVIDENCE OF ABUSE?

How do you answer such a question? By intuition? By personal experience? By psycho-social-behavioral data? Judges are regularly confronted with having to form judgments based exclusively on the evidence presented in the case, but they are not expected to leave their common sense at the door. What is common sense here? Is it reliable? Or do we need an expert? Certainly, sexual play is *relevant*, but how *probative*, that is, how *diagnostic* is it?

Expert testimony regarding psycho-social behavioral statistics would be very helpful. Note there are several analytical questions to ask here:

(a) What percentage of kids out of the overall population have been abused?
(b) In the population of kids who have been abused, what percentage play sexually?
(c) In the population of kids who have not been abused, what percentage play sexually?
(d) What is the likelihood that a random child who plays sexually was abused?

These questions are asked in the field of Behavioral Diagnostics. It is the final question that we need the answer to, but it cannot be answered without answering the first three questions. Note that judicial fact finders intuitively ask similar questions but with less precision. Judicial fact finders are trying to assess the probative value of human behavior by using their life experience as a guide, otherwise known as common sense.

It turns out that if we look at the latest data and make assumptions which maximize the chance of confirming Mother's intuition, an assumption that a child who plays sexually has been abused will be wrong almost 50% of the time. (See inset.)[2] Sexual play is not very probative evidence—it is close to flipping a coin. Further, science has been unable to find any behavioral trait that is reliably diagnostic of abuse.[3]

SCIENTIFIC RESEARCH ON LIE DETECTION

Science has sought the holy grail of lie detection for a long time. Research has been done on polygraphs, statement analysis, voice stress analysis, MRI studies of the brain, body language analysis, artificial intelligence techniques, and professional clinical judgment. None have passed the *Daubert* standard for admissibility in court with the exception of one type of polygraph result being admissible in New Mexico. However, most state and federal courts have either banned the use of polygraphs due to their unreliability, or they have severely restricted their use.[4]

So why do some attorneys and judges believe psychologists can detect lies in children regarding abuse? The American Psychological Association proudly proclaims on its website:

> [R]esearch has consistently shown that people's ability to detect lies is no more accurate than chance, or flipping a coin. This finding holds across all types of people—stu-

2. *See*, Mark Wolraich et al., *Chapter 25: Sexuality,* in DEVELOPMENTAL-BEHAVIORAL PEDIATRICS: EVIDENCE & PRACTICE (2008); *See also,* William Bernet, *American Academy of Child & Adolescent Psychiatry: Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 423 (1997).
3. Wolraich, *supra* note 2; Bernet, *supra* note 2; Steve Herman, *Chapter 11: Forensic Child Sexual Abuse Evaluations*, *in* THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS: A COMPREHENSIVE GUIDE TO ASSESSMENT AND TESTIMONY (Kathryn Kuenhle. & Mary Connell eds., 2009).
4. U.S. v. Scheffer, 523 U.S. 303 (1998).

dents, psychologists, judges, job interviewers and law enforcement personnel.[5]

Science has not been able to validate clinical judgment for the detection of lies or status as a sex assault victim.[6] To date, studies show error rates in clinical judgment to be around 50%.

> The publication of Hershkowitz et. al.'s (2007) study may eventually prove to be a defining historical moment for research on forensic evaluations of allegations of Child Sex Abuse. . . . It is unlikely that a diagnostic procedure with a false positive error rate that is approximately 50% would be considered admissible under the Daubert standard, or under any other reasonable legal standard.[7]

THE DSM DOES NOT RECOGNIZE "VICTIM" AS A DISORDER

The Diagnostic and Statistical Manual of Mental Disorders does not recognize victimhood as a disorder, so what exactly is Mother's therapist diagnosing? The nearest recognized disorder is Post Traumatic Stress Disorder (PTSD). However, a PTSD diagnosis is a therapeutic aid, rather than a tool for the detection of sexual abuse. It does not reliably prove the nature of the stressor. Diagnosing someone with PTSD necessarily assumes there was a traumatic event. When that traumatic event cannot be verified objectively, the diagnostician must depend exclusively on the patient's claim that it occurred. Unless the clinician is a reliable lie detector or has the resources to conduct a full forensic investigation, they do not know what caused the trauma. The DSM specifically states, "nonclinical decision-makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the causes of the individual's mental disorder or its associated impairments."[8]

Yet, there is ongoing debate among forensic psychologists about the role of clinical judgment in detecting child sex abuse.[9]

THE SCIENTIFIC DISPUTE REGARDING CLINICAL JUDGMENT

So, if no behavioral trait is diagnostic, and if no lie detection technique is admissible, is it even possible to reliably decide a soft case? Yes, sometimes, under certain facts. It depends on (a) the age of the child, (b) the degree of detail in the child's statement, (c) whether the child's statement betrays sexual knowledge atypical of the child's age, and (d) the likelihood the child's statement is untainted by alienation, coaching, or suggestive questioning by parents, therapists, or others.

Picture a situation where a young child testifies in a manner that betrays probative and atypical sexual knowledge. A fact-finder's finding of abuse may be reliable, because atypical sexual knowledge in a child has a limited number of possible sources—abuse, suggestion, porn, or prostitution. If an investigation can reliably rule out suggestion, porn, and prostitution, then abuse is common enough to be reliably ruled in—*not* because psychologists are good lie detectors, but on a purely *statistical* basis. This means the expert's focus must be on analyzing the integrity and thoroughness of the investigation. This means the expert must be knowledgeable about the known frequency of sexual abuse of children and of false reports of sexual abuse. The debate about the efficacy of clinical judgment involves asking whether the objective probability of identifying a child's source of sexual knowledge can be high enough to meet forensic standards even if this probability cannot be precisely quantified.

"Science has not been able to validate clinical judgment for the detection of lies ..."

BY WHAT STANDARD DID MOTHER'S THERAPIST FORM AN OPINION?

The ethical canons for psychologists highly discourage them from performing the dual roles of therapist and forensic investigator in the same case.[10] Therapists help patients heal. They take an *instrumentalist* approach to their work, which means they prioritize healing over determining causation. Their focus is on making the patient whole—not on scientifically determining etiology. Therapists build rapport with their client through empathy; therefore, they typically do not show skepticism or critically confront the client. In contrast, the primary purpose of most forensic investigations is to ascertain etiology, that is, to determine what caused a patient's symptoms. The patient is not the forensic investigator's client. The skeptical and critical eye of a detective is needed to do the job.[11]

Forensic investigations require knowledge of professionally recognized practice parameters.[12] These parameters require knowledge of sociological data regarding the rate of false reports of sexual abuse, the diagnosticity of behavioral traits, suggestibility in children, how to spot false confessions, and all other aspects of conducting a forensic investigation. Therapists do not typically work by these standards.

A therapeutic diagnosis is a working hypothesis developed pursuant to psychological criteria. Its purpose is to decide the best course of treatment in the future. The therapist asks *What is the best path forward for achieving health?* Whereas a forensic diagnosis is developed pursuant to legal criteria. Its purpose is to decide what occurred in the past. The forensic investigator asks *What is the historical truth?*

5. Laura Zimmeramn, *Deception Detection,* 47(3) MONITOR on PSYCHOL., 46 (March 2016) citing Charles F. Bond Jr. & Bella Depaulo, *Accuracy of Deception Judgement*, 10(3) PERSONALITY & SOC. PSYCHOL. REV. 214 (Aug. 2006).
6. Herman, *supra* note 3.
7. *Id.*
8. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at 25 (5th ed., 2013).
9. SEE, CONTESTED ISSUES IN THE EVALUATION OF CHILD SEXUAL ABUSE: A RESPONSE TO QUESTIONS RAISED IN KUEHNLE AND CONNELL'S EDITED COLLECTION (Kathleen Coulborn Faller & Mark D. Everson eds., 2014).
10. *See*, American Psychological Association, *Specialty Guidelines for Forensic Psychology*, 68(1) AM, PSYCHOL. 7 (Jan. 2013) § 4.02.01 Therapeutic-Forensic Role Conflicts & 4.02.02 Expert Testimony by Practitioners Providing Therapeutic Services.
11. *See generally*, American Psychological Association, *Specialty Guidelines for Forensic Psychology*, 68(1) AM, PSYCHOL. 7 (Jan. 2013).
12. Wolraich, *supra* note 2.

"[T]here is a big difference between providing therapy and conducting a forensic investigation."

THERAPEUTIC AND FORENSIC DIAGNOSES ARE BOTH DIFFERENTIAL DIAGNOSES

Case law recognizes the methodology of differential diagnosis, that is, the process of systematically ruling in and ruling out possible causes of a patient's symptoms. This is also known as *deduction by the process of elimination*. Recall Sherlock Holmes. Both therapeutic and forensic diagnoses are formed by the process of differential diagnosis, thus both are admissible. However, there is a big difference between providing therapy and conducting a forensic investigation. The court may consider this difference when deciding the proper weight to give the testimony.

All of this results in a crucial difference in the type of testimony each is allowed to give. A therapist is allowed to testify to the historical facts of treatment, but they may not comment on etiology. As stated in *Irreconcilable Conflict Between Therapeutic and Forensic Roles*:

> Psychologists may appropriately testify as treating experts regarding the facts of treatment, e.g. the care provided, the clinical diagnosis, the patient's response, and the prognosis. These matters, presented in the manner of descriptive "occurrences" and not psycho-legal opinions, do not raise issues of judgment, foundation, or historical truth. . . . [However] therapists do not ordinarily have the requisite database to testify appropriately about psycho-legal issues of causation, i.e. the relationship of a specific act to a claimant's current condition.[13]

The court cannot assume that clinicians will police themselves or that the adversarial process will always place a sufficient check on out-of-bounds testimony. The judge is ultimately responsible for the integrity of the proceedings, and this type of expert testimony may be one of the few situations where some degree of proactivity on the part of the court is appropriate.

SHOULD THE THERAPIST TESTIFY IN THE CUSTODY HEARING?

The question of whether a therapist should be allowed to testify on a forensic matter has three components, only two of which can be answered by the court:

(i) Is the therapist conflicted by acting in a dual capacity? This question must be answered by the therapist pursuant to the ethical canons in the field of psychology.

(ii) Is the therapist qualified? This question is answered by the court. If the therapist intends to opine on a forensic issue, i.e., whether father is guilty of sexually abusing the child, then the court typically assesses the therapist's credentials and familiarity with forensic practice standards, not therapeutic practice standards. The court is primarily looking for whether the therapist shows fidelity to the profound distinction between being a loyal, supportive healer versus being an independent investigator loyal only to the scientific method.

(iii) Does the therapist's methodology comport with Daubert in each relevant field?

For example:

(i) Did the therapist use leading questions when interviewing the child?
(ii) How many times did the therapist discuss the sexual abuse allegations with the child?
(iii) How thorough was the therapist's differential diagnosis, that is, did the therapist consider all other possible sources of the child's sexual knowledge?
(iv) Did the therapist do a full forensic investigation, for example, did the therapist interview witnesses, review police reports and medical records, and interview the accused?
(v) Is the therapist acting as a lie detector?
(vi) Does the therapist have psycho-social behavioral statistics or are they simply offering their own subjective opinion wrapped in the aura of professional expertise?
(vii) Did the therapist use a psychometric instrument? If so, has the instrument been validated for determining causation?

As of the date of this article, clinical judgment has not been validated for determining whether a child has been sexually abused in soft evidence cases.[14] Therefore, it appears a proponent of such testimony is unlikely to prevail at a *Daubert* hearing.

WHY ARE THERAPISTS SOMETIMES WILLING TO TESTIFY OUTSIDE THE BOUNDS OF THEIR EXPERTISE?

As stated in the article cited above, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*:

> "The temptation to use therapists as forensic experts falls on fertile ground because clinical psychology and psychiatry graduate students often do not receive adequate training in forensic ethics. . . When these clinicians eventually testify in court, they see themselves as benignly telling the court about their patients and perhaps even benevolently testifying on behalf of their patients. Therapists are not typically trained to know that the rules of procedure, rules of evidence, and the standard of proof is different for courtroom testimony than for clinical practice."

13. Stuart A. Greenburg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28(1) PROF. PSYCHOL. RES. & PRAC. 50 (1997).

14. Herman, *supra* note 3.

CONCLUSION

Some therapists view their therapeutic function as including advocacy for their client. Some may be under the misimpression that their clinical methodology is sufficient for forensic settings. And some may simply believe the court will accept their individual, subjective opinion. However, as the gatekeeper of expert testimony, the trial judge must make sure all expert opinion has a sufficient evidentiary foundation and a reliable methodology. To properly litigate a *Daubert* motion in this area, attorneys and judges may need to acquaint themselves with the debate within forensic psychology about the proper role of clinical judgment.

Mike McHenry has been a trial court judge handling criminal, civil, and domestic relations cases since 2011 in the state of Colorado. Before that he was a criminal defense attorney for the Colorado Public Defenders Office for nineteen years. In both capacities he has litigated Daubert *hearings involving psychologists.*

IS SEXUAL PLAY DIAGNOSTIC? CONVINCE YOURSELF:

Given a random sample of 100 kids: Assume 15% have been abused. (The actual number is not precisely known, but 15% is thought to be a high estimate. See website for National Center for Victims of Crime.) This means you have 15 abused and 85 non-abused kids. Statisticians would word this as "the base rate of abuse is 15%."

In order to attempt to confirm Mother's intuition, assume a high prevalence of sexual play in the abused population, say 50%. (Anything over 50% would start to become diagnostic. Science has yet to find any behavior which is diagnostic of abuse, therefore the percentage can be no higher than fifty.) This means .5 x 15 = 7.5 kids in our sample of 100 play sexually. Statisticians would word this as "the base rate of sexual play among the abused population is 50%."

Again, in order to attempt to confirm Mother's intuition, assume a low prevalence of sexual play in the non-abused population, say 7%. (Pediatricians report that some children play sexually even without having been abused.) This means .07 x 85 = 6 non-abused kids in our sample of 100 play sexually. Statisticians would word this as "the base rate of sexual play among the non-abused population is 7%."

Thus, 7.5 + 6 = 13.5 kids out of the 100 play sexually, that is, the base rate of sexual play in the sampled population is 13.5%.

Under these assumptions, what are the odds that a child who plays sexually has been abused? « This is what the court needs to know. From here, the calculation is easy:

7.5 out of 13.5 = 56% of those who play sexually have been abused, 6 out of 13.5 = 44% of those who play sexually have not been abused.

If you assume a child who plays sexually has been abused, you will be wrong 44% of the time, and yet these numbers were chosen to maximize the chance of confirming Mother's intuition. This is not very probative evidence. It is close to flipping a coin. Your intuition may have deceived you because you failed to appreciate how population sizes and base rates should inform your judgment. An error rate around 50% will likely not pass the Daubert standard for any type of expert.

Homes, History, and Shadows:

Select Criminal Law and Procedure Cases From The Supreme Court's 2020-21 Term

Eve Brensike Primus & Lily Sawyer-Kaplan

LOOK BACK

The death of Justice Ruth Bader Ginsburg in September 2020 and the appointment of Justice Amy Coney Barrett to replace her solidified a 6-3 majority on the Court for Republican appointees and is already affecting how the Court approaches and decides its criminal law and procedure cases. Justice Ginsburg, a strong advocate for equality and fair treatment, generally construed criminal statutes narrowly and stressed the importance of defendants' procedural rights. Justice Barrett is an originalist who will look to history to seek answers on the scope of criminal procedure amendments. The combined appointments of Justice Gorsuch and Justice Barrett mean that litigants will need to focus more on historical analyses when arguing in front of the Court if they hope to garner a majority.

Although that interpretive method will often benefit the government in criminal cases, Justice Barrett—much like Justice Scalia for whom she clerked—will be a staunch advocate of Fourth Amendment protection in the home, as her votes in *Caniglia v. Strom*[1] and *Lange v. California*[2] this Term reflect. And she will focus on the text and structure when interpreting criminal statutes, as she did in *Van Buren v. United States*[3]—the only criminal case that she authored this Term in which she interpreted the Computer Fraud and Abuse Act of 1986 in a way that limited criminal liability.

In the Eighth Amendment context, Justice Ginsburg voted with the 5-4 majorities in *Roper v. Simmons*[4] and *Miller v. Alabama*[5] to restrict the availability of capital punishment and life without parole for juveniles, and she joined Justice Breyer's dissent in *Glossip v. Gross*[6] when he argued for the unconstitutionality of the death penalty. Justice Barrett, on the other hand, joined the majority in *Jones v. Mississippi*[7] this Term to scale back *Miller*'s protections for children and voted with the majority in multiple per curiam cases this Term that reversed habeas grants of relief in death penalty cases.[8]

In addition to the change in Court personnel, this year has also been marked by controversy about the Court's procedures.[9] The Supreme Court typically grants certiorari, receives full briefing, has oral arguments, and delivers signed opinions in 60-70 cases as part of its merits review process. The Court also decides cases as part of its "shadow docket,"[10] where there is not full briefing and the decisions are issued summarily, often through brief, unsigned orders that have little explanation and leave lower courts in the dark about how to apply precedent going forward. Although the shadow docket has always existed, there has been a serious uptick in the extent to which the justices are using it to issue significant decisions without the daylight that comes with the traditional merits review process. The Court has been particularly active in using the shadow docket in capital cases and has also used it this year to send signals to lower courts about qualified immunity and excessive force doctrine.

FOURTH AMENDMENT

The Court considered four Fourth Amendment cases this Term, two of which addressed when police may enter a home without a warrant (*Caniglia v. Strom* and *Lange v. California*). The Court also addressed when an officer's application of physical force to a person's body constitutes a seizure (*Torres v. Madrid*) and whether tribal officers acting on a reservation have the power to detain and search non-tribal members suspected of unlawful conduct (*United States v. Cooley*).

WARRANTLESS HOME ENTRIES

In both *Caniglia v. Strom* and *Lange v. California,* the Court rejected police attempts to expand their power to enter homes without warrants, emphasizing that an individual's Fourth Amendment protections are at their zenith in the home both as a matter of precedent and history. First, in *Caniglia v. Strom*,[11] the Court held that there is no community-caretaking exception to the warrant requirement that permits warrantless police entry into a person's home.

Edward Caniglia's wife requested a welfare check on her husband when she could not reach him the day after he retrieved his gun and asked her to shoot him with it. Mr. Caniglia was on the porch when the police arrived, and they convinced him to go to the hospital on the condition that they would not remove his two handguns. Then, having misinformed Mrs. Caniglia about her husband's wishes, the officers entered the home and seized the guns. Mr. Caniglia sued the officers under 42 U.S.C. § 1983.

Footnotes

1. 141 S. Ct. 1596 (2021).
2. 141 S. Ct. 2011 (2021).
3. 141 S. Ct. 1648 (2021).
4. 543 U.S. 551 (2005).
5. 567 U.S. 460 (2012).
6. 576 U.S. 863 (2015).
7. 141 S. Ct. 1307 (2021).
8. *See, e.g.*, Shinn v. Kayer, 141 S. Ct. 517 (2021); Mays v. Hines, 141 S. Ct. 1145 (2021); Dunn v. Reeves, 141 S. Ct. 2405 (2021).
9. *See, e.g.*, Tierney Sneed, *Senate Judiciary Committee to Hold Hearing on Supreme Court's Abortion Ruling and "Shadow Docket,"* CNN (Sept. 3, 2021), https://www.cnn.com/2021/09/03/politics/senate-judiciary-hearing-supreme-court-shadow-docket/index.html; Charlie Savage, *Texas Abortion Case Highlights Concern Over Supreme Court's "Shadow Docket,"* N.Y. Times (Sept. 2, 2021), https://www.nytimes.com/2021/09/02/us/politics/supreme-court-shadow-docket-texas-abortion.html.
10. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 3-5 (2015).
11. 141 S. Ct. 1596 (2021).

The First Circuit affirmed the District Court's grant of summary judgment to the officers, holding that the officers' removal of Mr. Caniglia and his firearms from the home fell within the "community caretaking" exception to the Fourth Amendment's warrant requirement — an exception previously discussed in passing in *Cady v. Dombrowski*[12] in the context of a search of an impounded car found on a public highway.

The Court unanimously reversed. Justice Thomas wrote the opinion, noting that the Fourth Amendment at its "'very core'" protects homes against unreasonable government intrusion.[13] Turning to *Cady*, he emphasized that *Cady* involved a warrantless search of a disabled car and the opinion "repeatedly stressed" that there is "a constitutional difference" between cars and homes.[14] Cars "can become disabled or involved in … accident[s] on public highways," which require police to "perform noncriminal 'community caretaking functions' such as providing aid to motorists."[15] The same is not true of homes, and *Cady* did not provide police with an "open-ended license to perform [civic tasks] anywhere."[16]

Chief Justice Roberts, joined by Justice Breyer, wrote a brief concurring opinion to remind courts that *Brigham City v. Stewart*[17] still permits officers to enter a home without a warrant to assist individuals facing serious violence or injury when it is objectively reasonable to do so. Justice Kavanaugh also wrote separately to assert that police could rely on the exigent circumstances exception to the warrant requirement to enter a home if they were reasonably trying to prevent a suicide or help a potentially injured elderly person. Justice Alito also concurred to note the limits of the majority's decision and express his view that the Fourth Amendment rules might be different in some non-criminal-law-enforcement contexts. He emphasized that the Court was not addressing when police could conduct a search or seizure to prevent a person from committing suicide, to seize guns to prevent infliction of harm on innocents, or to determine if an elderly resident was incapacitated and in urgent need of medical attention.

In the end, *Caniglia* raised more questions than it answered. There is no community-caretaking exception to the warrant requirement that will permit police to enter the home, but the scope of the emergency aid and exigency exceptions to the warrant requirement remain unclear. Lower courts will have to address the scope of those exceptions as they arise.

The Supreme Court addressed one aspect of the exigent circumstances exception in *Lange v. California*,[18] when it held that there is no *per se* hot-pursuit exception to the warrant requirement that permits police to follow a person suspected of a misdemeanor into his home. Instead, when a fleeing individual is suspected of a misdemeanor, the court must determine case by case whether exigent circumstances justify a warrantless police entry into the home.

"In the end, *Caniglia* raised more questions than it answered."

Arthur Lange was honking his horn and playing loud music while driving. As he approached his house, a California police officer attempted to stop him for a civil noise infraction. Mr. Lange, who claimed that he did not see the officer, drove up his driveway and into his attached garage—an area considered the "curtilage" of the home for Fourth Amendment purposes.[19] Claiming that he was in hot pursuit of Mr. Lange for having committed the misdemeanor offense of failing to comply with a police signal, the officer followed him into the garage and confronted Mr. Lange who immediately appeared to be intoxicated. Mr. Lange was charged with driving under the influence of alcohol and moved to suppress all evidence of his intoxication as tainted by an illegal entry into his home without a warrant. The trial court denied the motion to suppress and the California Court of Appeals affirmed, adopting a blanket rule that there are always exigent circumstances that permit police to enter a home without a warrant when they are in hot pursuit of a fleeing individual suspected of a misdemeanor. The Supreme Court reversed.

Justice Kagan delivered the majority opinion, joined in full by Justices Breyer, Sotomayor, Gorsuch, Kavanaugh, and Barrett and in part by Justice Thomas. The majority began with a discussion of the exigent circumstances exception to the warrant requirement, which "applies when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.'"[20] She emphasized the sanctity of the home and noted that the gravity of the underlying offense being investigated is an important factor to be considered in the exigency analysis, citing the Court's prior decision in *Welsh v. Wisconsin*[21] in which the Court had refused to sanction police reliance on exigent circumstances to justify a warrantless home entry for a nonjailable DUI offense.

The majority distinguished *United States v. Santana*,[22] which permitted the police to pursue a fleeing felon into her home without a warrant. While refusing to say whether there is a categorical hot-pursuit exception for fleeing felons, the majority emphasized that people suspected of committing misdemeanors are different from those suspected of committing felonies, because misdemeanors tend to involve "less violent and less dangerous crimes."[23] As a result, "'there is reason to question whether a compelling law enforcement need is present,' so it is 'particularly appropriate' to 'hesitat[e] in finding exigent circumstances'" in misdemeanor cases.[24] The majority recognized that where the totality of the circumstances demonstrated an exigency — such as imminent harm to others, a threat to the

12. 413 U.S. 433, 441 (1973).
13. *Caniglia*, 141 S. Ct. at 1599 (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013)).
14. *Id.* (quoting *Cady*, 413 U.S. at 439).
15. *Id.* at 1660 (quoting *Cady*, 413 U.S. at 441).
16. *Id.*
17. 547 U.S. 398 (2006).
18. 141 S. Ct. 2011 (2021).
19. *See, e.g.*, United States v. Dunn, 480 U.S. 294 (1987) (defining the "curtilage" for Fourth Amendment purposes).
20. *Lange*, 141 S. Ct. at 2017 (quoting Kentucky v. King, 563 U.S. 452, 460 (2011) (internal quotation marks omitted)).
21. 466 U.S. 740 (1984).
22. 427 U.S. 38 (1976).
23. *Lange*, 141 S. Ct. at 2020.
24. *Id.* (quoting *Welsh*, 466 U.S. at 750).

"For most misdemeanors, 'flight alone was not enough.'"

officer himself, destruction of evidence, or escape from the home — the police will be able to act without waiting for a warrant. But courts must complete case-by-case analyses, even if "in many, if not most, cases" an exigency will exist that permits a warrantless home entry.[25]

In the part of the opinion joined by Justice Thomas the majority looked to the common law at the time of the founding and noted that it "afforded strong home protection from government intrusion."[26] While there was a common-law exception for hot pursuit of fleeing felons, the list of felony crimes was much smaller (mostly capital offenses). For most misdemeanors, "flight alone was not enough."[27]

Justice Thomas filed a separate concurring opinion in which he identified certain categorical exceptions in the common-law history where warrantless entry into a home was typically permitted when government officials pursued a fleeing misdemeanant. These included situations where a person was (a) arrested for a misdemeanor and then escaped, (b) suspected of committing an affray offense, (c) suspected of committing an offense that could become a felony if the victim died (pre-felonies), and (d) alleged to have committed a breach-of-the-peace offense. Justice Thomas would preserve these historical exceptions and permit *per se* entry into the home when in hot pursuit of an alleged misdemeanant who fell in one of these categories. For other misdemeanor offenses, he agreed with the majority that history did not support a categorical rule. Finally, restating his opposition to the exclusionary rule, Justice Thomas, now joined by Justice Kavanaugh, argued that courts should not suppress evidence in any cases involving unlawful entry.

Chief Justice Roberts, joined by Justice Alito, wrote a separate opinion in support of California's *per se* rule. He argued that hot pursuit itself generates an exigency sufficient to justify a warrantless home entry, because every case involving flight is one in which there is a risk that the suspect will escape, resort to violence, or destroy evidence. He expressed concern that the majority's case-by-case approach will lead to "absurd" and "dangerous" results and will fail to provide clear guidance to police who need to make split-second determinations.[28] In the Chief Justice's view, alternative safeguards exist to protect the privacy of the home. For example, police entry into the home would have to be reasonable in manner and limited to apprehending the suspect. And the warrantless hot-pursuit exception would only apply if there was a true hot pursuit where the suspect knew that an officer wanted him to stop, and he fled into the home to thwart an otherwise proper arrest. The Chief ultimately concurred, agreeing to vacate and remand Mr. Lange's case for consideration of whether there was a true hot pursuit on the facts.

Justice Kavanaugh wrote a separate concurrence to express his view that there was no real difference between the majority opinion and Chief Justice Roberts's concurrence. Because cases of fleeing misdemeanor suspects will "almost always *also*" involve other exigent circumstances, an officer will typically be able to enter the home without a warrant.[29]

While *Lange* rejected a *per se* warrant exception for hot pursuit of fleeing misdemeanants, the opinion leaves open the question of whether a *per se* exception exists for all fleeing felons. We will have to see how lower courts resolve that question going forward.

DEFINING A SEIZURE

In *Torres v. Madrid*,[30] the Court held that an officer "seizes" a person under the Fourth Amendment when the officer uses physical force on the person's body in a way that objectively manifests an intent to restrain even if the person does not submit and is not otherwise subdued by the officer's use of force. Two New Mexico State police officers went to an apartment complex to execute an arrest warrant for a woman accused of white-collar crimes when they saw Roxanne Torres in the parking lot. Although the officers knew that Ms. Torres was not the subject of the warrant, they approached her as she was getting into her car. One of the officers tried to open the car door and Ms. Torres, believing that the officers were carjackers, sped away. The officers fired thirteen bullets at her car, shooting her twice in the back and temporarily paralyzing her left arm. She continued to flee, and police did not apprehend her until the next day when they located her at a hospital. Ms. Torres sued the New Mexico State police officers for damages under 42 U.S.C. § 1983, alleging that they used excessive force that violated the Fourth Amendment when they shot her. The federal district court granted summary judgment to the officers and the Tenth Circuit Court of Appeals affirmed, holding that, under Circuit precedent,[31] she was not "seized" under the Fourth Amendment when the officers shot her, because the officer's actions would have to terminate her movements to constitute a seizure.

Chief Justice Roberts, joined by Justices Breyer, Sotomayor, Kagan, and Kavanaugh, reversed the Tenth Circuit's ruling in a 5-3 decision.[32] The majority started with precedent, noting that, in *California v. Hodari D.*,[33] the Court had interpreted the word "seizure" in the Fourth Amendment by consulting the common law definition of arrest, which required "*either* physical force … *or*, where that is absent, *submission* to the assertion of authority."[34] Looking independently at the history, the Court majority agreed that "the common law considered the application of force to the body of a person with intent to restrain to be an arrest, no matter whether the arrestee escaped."[35] The majority described how English and early American courts regularly held that "[t]he touching of a person—frequently called a laying of hands—was enough" to constitute a seizure even

25. *Id.* at 2021.
26. *Id.* at 2022.
27. *Id.* at 2024.
28. *Id.* at 2028 (Roberts, J., concurring in judgment).
29. *Id.* at 2025 (Kavanaugh, J., concurring).
30. 141 S. Ct. 989 (2021).
31. *See* Brooks v. Gaenzle, 614 F.3d 1213, 1223 (10th Cir. 2010).
32. Justice Barrett did not participate in the consideration of this case.
33. 499 U.S. 621, 626 (1991).
34. *Torres,* 141 S. Ct. at 995 (quoting *Hodari D.*, 499 U.S. at 626).
35. *Id.* at 995.

without any resulting custody or control.[36] Noting that the Fourth Amendment focuses on "'the privacy and security of individuals,' not the particular manner of 'arbitrary invasion[] by governmental officials,'"[37] the majority saw "no basis for drawing an artificial line between grasping with a hand and other means of applying physical force to effect an arrest"— such as using a weapon to shoot a person.[38] As long as officers apply physical force to a person's body with intent to restrain, there is a seizure even if the person does not submit and is not subdued.

The Court emphasized that its holding will not transform every physical contact between a government official and a member of the public into a Fourth Amendment seizure, because a seizure still requires "the use of force *with intent to restrain*."[39] Accidental force or force intentionally applied for another purpose will not count. And the intent requirement is analyzed objectively: the question is "whether the challenged conduct objectively manifests an intent to restrain."[40] The subjective motivations of the police and subjective perceptions of the suspect do not control.

The majority also noted that a seizure by force without submission lasts only as long as the application of force. Under this interpretation, many seizures by force that do not result in capture will be brief or fleeting, which could affect the extent of a damages remedy or what evidence should be excluded as a fruit of any illegal seizure. On remand, Ms. Torres will still need to establish the unreasonableness of the officers' actions, argue that their actions warrant damages, and get past qualified immunity barriers to recovery.

Justice Gorsuch, joined by Justices Thomas and Alito, dissented. In their view, "the Fourth Amendment's text, its history, and our precedent all confirm that 'seizing' something doesn't mean touching it; it means taking possession."[41] As a textual matter, the dissent emphasized that "seizure" must have the same meaning when applied to persons, houses, papers, and effects, and criticized the majority for imposing a different definition for physical force used on "people."[42] The dissent interpreted the history and commentaries as requiring physical possession for an arrest and criticized the majority for improperly focusing on "obscure" and "specialized" civil debt collection cases for its "mere touch" rule, noting that these "long-abandoned civil debt collection practices" should not be injected into the criminal law.[43] As for *Hodari D.*, the dissent dismissed the relevant language as dicta and cited language from *Brower v. County of Inyo*[44] to support its view that a seizure only occurs "'when there is a governmental termination of freedom of movement through means intentionally applied.'"[45]

Although the Court's *Torres* decision provides lower courts with a rule that physical force intentionally applied to restrain a suspect will be a seizure, what constitutes physical force will be a subject of dispute in lower courts. The dissenters raised questions about officers who pepper spray a suspect, detonate a flash-bang grenade that damages someone's ears, or shine a laser and damage an individual's eyes with the intent to stop them, but the majority refused on opine on those "matters not presented here."[46]

"[A] seizure by force without submission lasts only as long as the application of force."

TRIBAL POLICE POWER AND THE FOURTH AMENDMENT

In *United States v. Cooley*,[47] the Court held that tribal police officers have the authority to detain and search non-Indians suspected of violating state or federal law on public highways that run through reservations. An officer in the Crow Police Department stopped to help a parked truck on the side of a road that runs through the reservation. Joshua Cooley, the driver who was not a tribal member, appeared intoxicated and the tribal officer saw two semiautomatic rifles in the car. The officer detained Mr. Cooley and searched the car, finding methamphetamine. The district court suppressed the evidence obtained during the stop, holding that tribal police lacked the authority to investigate state or federal law violations on reservation land. The Ninth Circuit Court of Appeals affirmed, noting that tribal officers could only stop and search individuals on reservation land if the state or federal law violation was "apparent" and they determined that the suspect was not a member of a tribe.[48]

The Supreme Court unanimously reversed. Justice Breyer, writing for the Court, recognized that *Montana v. United States*[49] had established a general rule that tribes do not retain inherent governmental powers over non-Indians' conduct on reservations. But *Montana* also recognized a health and welfare exception under which "a tribe retains inherent sovereign authority to address 'conduct [that] threatens or has some direct effect on ... the health or welfare of the tribe.'"[50] According to the Court, "[t]o deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats."[51]

36. *Id.* at 996.
37. *Id.* at 998 (quoting Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967)).
38. *Id.* at 997.
39. *Id.* at 998.
40. *Id.*
41. *Id.* at 1006 (Gorsuch, J., dissenting).
42. *Id.* at 1014 (Gorsuch, J., dissenting).
43. *Id.* at 1011–12 (Gorsuch, J., dissenting).
44. 489 U.S. 593, 597 (1989).
45. *Torres*, 141 S. Ct. at 1014 (Gorsuch, J., dissenting) (quoting *Brower*, 489 U.S. at 597).
46. *Id.* at 998 (Gorsuch, J., dissenting).
47. 141 S. Ct. 1638 (2021).
48. *Id.*
49. 450 U.S. 544 (1981).
50. *Id.* at 1641 (quoting *Montana*, 450 U.S. at 566).
51. *Id.* at 1643.

"In *Jones* ..., the Supreme Court drastically limited the impact of its prior decisions in *Miller* ... and *Montgomery* ...."

EIGHTH AMENDMENT

In *Jones v. Mississippi*,[52] the Supreme Court drastically limited the impact of its prior decisions in *Miller v. Alabama*[53] and *Montgomery v. Louisiana*.[54] *Miller* had held that the Eighth Amendment prohibition against Cruel and Unusual Punishment forbids the mandatory imposition of life-without-parole (LWOP) sentences for juveniles convicted of murder and further held that only juveniles who were permanently incorrigible could constitutionally receive LWOP sentences. *Montgomery* built on *Miller*, holding that *Miller* announced a substantive rule of criminal procedure that applied retroactively to all individuals then-serving LWOP sentences for crimes committed as children. The *Jones* Court retreated from *Miller* and *Montgomery*, holding that a sentencer need not make a separate factual finding that a juvenile is permanently incorrigible before sentencing that juvenile to LWOP for murder. Nor must the sentencer make any on-the-record statements that implicitly establish permanent incorrigibility. Instead, according to the Court, the Eighth Amendment is satisfied as long as the sentencer has discretion to impose a sentence less than LWOP.

The case arose after a Mississippi judge imposed a mandatory LWOP sentence on Brett Jones for murdering his grandfather when he was fifteen years old. At Mr. Jones's post-*Miller* resentencing, the judge reimposed the LWOP sentence without making any findings related to his permanent incorrigibility. Mr. Jones appealed, arguing that *Miller* and *Montgomery* required the sentencing judge to make a separate factual finding of permanent incorrigibility. The Supreme Court, in a 6-3 decision, disagreed.

Justice Kavanaugh's majority opinion, which was joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett, highlighted language in *Montgomery* stating that "*Miller* did not impose a formal factfinding requirement" to argue that precedent foreclosed any such requirement.[55] In response to Mr. Jones's attempts to analogize to Eighth Amendment cases prohibiting the death penalty for individuals deemed intellectually disabled[56] and legally insane[57] where findings are required, the majority noted that those cases involve eligibility criteria that must be met before an individual can be sentenced to death. In contrast, the majority stated, *Miller* only "required that a sentencer consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence."[58]

The majority also rejected Mr. Jones's alternative argument that a sentencer must provide an on-the-record explanation to illustrate an "implicit finding" of permanent incorrigibility, noting that an explanation would not be necessary to ensure consideration of youth, that neither *Miller* nor the Court's death penalty precedents required such an explanation, and that historical and contemporary sentencing practices did not support it.

Justice Thomas concurred, agreeing that the Eighth Amendment does not mandate an additional sentencing procedure or factual findings. But he argued that the majority should have overruled *Montgomery*. Justice Thomas reasoned that *Miller* announced a purely procedural rule, and not a substantive or watershed one; as such, *Miller* could not apply retroactively. Justice Thomas wrote that the majority overruled *Montgomery* "in substance but not in name."[59] Under *Montgomery*'s reasoning, *Miller*'s substantive rule created a categorical exemption for young people capable of rehabilitation and factual findings would be necessary to determine whether children fall into that class. Justice Thomas would rather reject *Montgomery*, as in his view, it contradicts the principle that the legislature should decide who should receive particular punishments.

Justice Sotomayor, joined by Justices Breyer and Kagan, dissented, arguing that the majority "guts" *Miller* and *Montgomery*.[60] She accused the majority of selectively quoting dicta from *Montgomery* and cited the *Montgomery* Court's recognition that, "'[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.'"[61] *Miller*, she argued, drew on the Supreme Court's death penalty cases involving "categorical bans"[62] and set a substantive limit on sentencing that requires a factual eligibility finding. The dissenters agreed with Justice Thomas that the majority decision was inconsistent with *Montgomery* and lamented the practical effects that would flow from the Court's decision. They noted that, although *Miller* made it clear that LWOP would rarely be appropriate for juveniles, states like Mississippi that do not require factual findings of permanent incorrigibility continue to impose LWOP with alarming frequency. Justice Sotomayor also emphasized that such sentences are disproportionately imposed on people of color, noting that 72 percent of children sentenced to LWOP after *Miller* have been Black. Because the Mississippi sentencing court never asked if "Jones [was] one of the rare juveniles whose crimes reflect irreparable corruption," the dissenters would find that his sentence violated the Eighth Amendment.[63]

RETROACTIVITY

Last Term, in *Ramos v. Louisiana*,[64] the Court incorporated the right to a unanimous jury verdict against the states and held that Oregon's and Louisiana's rules that permitted non-unanimous jury verdicts violated the Sixth Amendment. In *Edwards v. Vannoy*,[65] the Supreme Court held that *Ramos* did not apply

52. 141 S. Ct. 1307 (2021).
53. 567 U.S. 460 (2012).
54. 577 U.S. 190 (2016).
55. *Jones*, 141 S. Ct. at 211.
56. Atkins v. Virginia, 536 U.S. 304 (2002).
57. Ford v. Wainwright, 477 U.S. 399 (1986).
58. *Jones*, 141 S. Ct. at 1316.
59. *Id.* at 1327 (Thomas, J., concurring in the judgment).
60. *Id.* at 1328 (Sotomayor, J., dissenting).
61. *Id.* (Sotomayor, J., dissenting) (quoting Montgomery v. Louisiana, 577 U.S. 190, 208 (2016)).
62. *Id.* at 1332 (Sotomayor, J., dissenting).
63. *Id.* at 1340 (Sotomayor, J., dissenting).
64. 140 S. Ct. 1390 (2020).
65. 141 S. Ct. 1547 (2021).

retroactively to criminal defendants whose convictions were final at the time of the decision.

Justice Kavanaugh wrote for a 6-3 majority, joined by Chief Justice Roberts, and Justices Thomas, Alito, Gorsuch, and Barrett. He first explained that, under *Teague v. Lane*,[66] there is a presumption that newly-recognized constitutional rules will not be applied retroactively to defendants whose convictions are final, meaning that they have completed their direct appeals and are at the state or federal postconviction stages. This presumption exists, he explained, to promote the criminal system's interests in finality.

In *Teague*, the Court articulated two exceptions—situations where a new rule of criminal procedure would be applied retroactively even to defendants whose convictions were already final. First, a new substantive constitutional rule applies retroactively if it either (a) provides that the conduct for which the defendant was prosecuted is constitutionally protected or (b) prohibits a certain category of punishment for a class of defendants based on their status or offense.[67] The majority noted that *Ramos* was not a substantive ruling but a procedural one, so this exception did not apply.

Second, the Court recognized in *Teague* that a new procedural constitutional rule would apply retroactively if it was deemed to be a watershed rule of criminal procedure that was necessary to prevent "an impermissibly large risk of an inaccurate conviction"[68] and "alters 'our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'"[69] Justice Kavanaugh explained that the Supreme Court described this exception as "extremely narrow" when it was created, noted that *Gideon v. Wainwright*[70] is the only prior case that would have qualified under the exception, and emphasized that "it is 'unlikely' that any such procedural rules 'have yet to emerge.'"[71] In fact, Justice Kavanaugh noted, "in the 32 years since *Teague* … the Court has *never* found that any new procedural rule actually satisfies that purported exception."[72] Because the exception "has been theoretical, not real," the *Edwards* majority declared it "moribund" and held that "[n]ew procedural rules do not apply retroactively on federal collateral review."[73] As the majority put it, "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts."[74] Because Thedrick Edwards's case was at the federal habeas review stage when *Ramos* was decided, he was not entitled to the benefit of the *Ramos* decision and his convictions for armed robbery, kidnapping, and rape would stand even though he was convicted by a non-unanimous Louisiana jury.

Although the majority overturned *Teague*'s watershed exception, the retroactive effect of new substantive rules remains good law and the Court emphasized that states were still free to give broader retroactive effect to its procedural decisions in state postconviction processes.

"[T]he Court emphasized that states were still free to give broader retroactive effect to its procedural decisions in state postconviction processes."

Justice Gorsuch, joined by Justice Thomas, concurred to offer his views about the proper, narrow focus of habeas review as a historical matter. He emphasized that federal habeas review was originally created to test the legitimacy of pretrial executive detentions and not to re-adjudicate criminal convictions. Only if a convicting court acted without jurisdiction would habeas review be permissible after a conviction. In his view, *Teague*'s "watershed" exception conflicted with the original purpose and operation of the habeas review system, so he joined the majority's decision overruling it.

Justice Thomas, joined by Justice Gorsuch, also wrote a separate concurrence. Although he agreed with the majority's decision to eliminate *Teague*'s "watershed" procedural exception, he thought there were independent grounds to reject Edwards's claim under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The Louisiana courts rejected Edwards's argument that he was entitled to a unanimous jury verdict under then-existing, pre-*Ramos* precedent. Because that state court decision was not contrary to and did not involve an unreasonable application of clearly established federal law at the time, Justice Thomas would have held that AEDPA independently precluded relief.

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. She criticized the majority for failing to respect precedent and overturning *Teague*'s procedural, watershed exception without going through the *stare decisis* factors. On the merits, she believed that *Ramos* was a watershed decision, worthy of retroactive application, because it overturned a prior rule on fundamental fairness grounds, was grounded in historical importance central to the Framers and bedrock in the "Nation's constitutional traditions,"[75] and centered racial justice concerns, as the non-unanimous jury rule operated "'as an engine of discrimination against [B]lack defendants.'"[76]

THE SHADOW DOCKET

HABEAS CORPUS: INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIMS IN CAPITAL CASES

The Supreme Court summarily reversed three different federal circuit courts of appeal decisions granting federal habeas relief to capital petitioners on the basis of ineffective-assistance-of-trial-

66. 489 U.S. 288 (1989).
67. *See, e.g.*, Montgomery v. Louisiana, 577 U.S. 190 (2016); Welch v. United States, 136 S. Ct. 1257 (2016); Penry v. Lynaugh, 492 U.S. 302 (1989).
68. Whorton v. Bockting, 549 U.S. 406, 418 (2007).
69. *Edwards*, 141 S. Ct. at 1557 (citing *Whorton*, 549 U.S. at 417-18).
70. 372 U.S. 335 (1963).
71. *Edwards*, 141 S. Ct. at 1555 (quoting *Whorton*, 549 U.S. at 417-18 and citing Gideon v. Wainwright, 372 U.S. 335 (1963)).
72. *Id.* at 1555.
73. *Id.* at 1561–62.
74. *Id.* at 1560.
75. *Id.* at 1576 (Kagan, J., dissenting).
76. *Id.* at 1578 (Kagan, J., dissenting) (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1400–01 (2020) (Kavanaugh, J., concurring in part)).

"[I]n each case, the Supreme Court chastised the lower federal court ..."

counsel claims. Each case was decided as part of the shadow docket in a per curiam summary disposition and, in each case, the Supreme Court chastised the lower federal court for failing to afford the state court decisions the proper amount of deference under the Antiterrorism and Effective Death Penalty Act (AEDPA).

First, in *Shinn v. Kayer*,[77] the Court reversed the Ninth Circuit Court of Appeals's decision to grant habeas relief to George Kayer. Mr. Kayer had been convicted of first-degree murder and sentenced to death for murdering an acquaintance as part of a robbery. In state postconviction proceedings, Mr. Kayer alleged his trial counsel were constitutionally ineffective for failing to investigate and present proper mitigation evidence. The state court rejected his claim after a hearing, holding that (a) counsels' performance was not deficient because Mr. Kayer had not cooperated with his team's efforts to gather more mitigating evidence, and (b) there was no prejudice in any event. On habeas, the Ninth Circuit granted Mr. Kayer relief in a divided opinion. The Supreme Court, in a 6-3 per curiam decision, reversed.[78]

The Court highlighted the high standard of deference required by *Strickland v. Washington*[79] to strategic decisions by trial counsel and noted the additional hurdles a state prisoner faces on federal habeas review when the state court had already adjudicated his claims. Under AEDPA, the state court decision must "be contrary to or involve an unreasonable application of clearly established Federal law" before a habeas petitioner is entitled to relief.[80] The Court accused the Ninth Circuit of analyzing the issues *de novo*, instead of asking if the state court's decision was "so obviously wrong as to be 'beyond any possibility for fair-minded disagreement."[81] Examining the state court's prejudice determination, the Court determined the new mitigation evidence offered at the post-conviction phase would not have created a substantial likelihood of a different outcome. Mr. Kayer had pointed to Arizona cases with similar aggravating and mitigating factors where defendants had obtained relief, but the Court noted that other published state court decisions should not inform the prejudice inquiry because capital sentencing is individualized. Because a fairminded jurist could have shared the Arizona court's views in evaluating the aggravating and mitigating factors, the Court deemed habeas relief inappropriate.

Second, in *Mays v. Hines*,[82] the Court issued an 8-1 per curiam decision reversing the Sixth Circuit Court of Appeals's grant of habeas relief to Anthony Hines.[83] Mr. Hines had been convicted of homicide and sentenced to death for murdering a hotel employee. In state postconviction proceedings, Mr. Hines alleged that his trial attorney was constitutionally ineffective, because the attorney failed to present evidence that would undermine the testimony of Kenneth Jones (the man who had discovered the employee's body) and had failed to argue that Jones may have been the killer. The Tennessee postconviction court found no prejudice. On federal habeas, the Sixth Circuit Court of Appeals disagreed in a divided opinion.

The Supreme Court reversed, criticizing the Sixth Circuit for not sufficiently considering the substantial evidence of Hines's guilt. As in *Kayer*, the Court accused the Sixth Circuit of conducting *de novo* review instead of following AEDPA's instruction that the state court's judgment should not be disturbed unless an error was "'beyond any possibility for fairminded disagreement.'"[84]

Finally, in *Dunn v. Reeves*,[85] the Court summarily reversed the Eleventh Circuit's grant of relief in a capital case. Matthew Reeves had been convicted of homicide and sentenced to death for shooting and killing a man in order to steal his wallet. He sought postconviction relief on the theory that his attorney was constitutionally ineffective, because he should have hired an expert to develop sentencing-phase mitigation evidence to document Mr. Reeves's intellectual disability. The Alabama postconviction court denied relief, noting that Mr. Reeves had failed to prove he was intellectually disabled and rejecting his claim that counsel should have hired an expert. The state court stressed the deference that *Strickland* shows to reasonable, strategic decisions and noted that the record was silent as to counsels' reasons for their decisions because Mr. Reeves failed to call trial counsel to testify at the state court hearing. The Eleventh Circuit granted federal habeas relief, because it interpreted the Alabama court as imposing a *per se* bar on relief when a petitioner does not question trial counsel or otherwise present testimony about the reasons for their actions.

The Supreme Court reversed, criticizing the Eleventh Circuit for mischaracterizing the Alabama court's decision. The Court did not think the Alabama court was imposing a *per se* rule. Instead, the majority thought the state court simply determined that the facts did not warrant relief and that decision was entitled to deference under AEDPA.

Justice Breyer dissented without opinion, and Justice Sotomayor wrote a dissenting opinion that Justice Kagan joined. Justice Sotomayor believed that Alabama had adopted a *per se* rule in direction violation of *Strickland*'s instruction to objectively determine if counsels' performance was deficient considering "all the circumstances of the case."[86] She criticized the Court majority for "putting words in the state court's mouth that the state court never uttered and which are flatly inconsistent with what the state court did say."[87] She then went further, indicting the majority for continuing a "troubling trend in which this Court strains to reverse summarily any grants of relief to those facing

77. 141 S. Ct. 517 (2021).
78. Justices Breyer, Sotomayor, and Kagan dissented without issuing an opinion.
79. 466 U.S. 668 (1984).
80. 28 U.S.C. § 2254(d).
81. *Kayer*, 141 S. Ct. at 523 (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).
82. 141 S. Ct. 1145 (2021).
83. Justice Sotomayor dissented without issuing an opinion.
84. *Mays,* 141 S. Ct. at 1146 (quoting *Kayer*, 141 S. Ct. at 520).
85. 141 S. Ct. 2405 (2021).
86. *Id.* at 2418 (Sotomayor, J., dissenting) (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)).
87. *Id.* at 2419 (Sotomayor, J., dissenting).

execution."[88] She accused the majority of using the shadow docket to turn AEDPA deference "into a rule that federal habeas relief is never available to those facing execution."[89]

HABEAS CORPUS CUSTODY

In *Alaska v. Wright*,[90] the Court issued a unanimous per curiam opinion to inform lower courts that a state conviction that later serves as a predicate for a federal conviction does not render an individual "in custody pursuant to the judgment of a State court" under 28 U.S.C. § 2254(a). Sean Wright was convicted in 2009 of sexual abuse of a minor. After serving his full state-court sentence, he was released and subsequently charged with failure to register under the federal Sex Offender Notification and Registration Act. At that point, Mr. Wright petitioned for federal habeas relief, alleging constitutional defects in his 2009 Alaska convictions. The federal district court denied the motion on the ground that Mr. Wright was no longer in custody pursuant to the state court judgment. The Court of Appeals reversed, finding that Mr. Wright was in custody on his federal conviction for failing to register and noting that the state convictions provided the necessary predicate for the federal conviction.

The Supreme Court summarily reversed, citing its prior decision in *Maleng v. Cook*,[91] which established that "a habeas petitioner does not remain 'in custody' under a conviction 'after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes."[92] The Court vacated and remanded the case, limiting the decision to only the question of custody on the original state court conviction.

QUALIFIED IMMUNITY

Although the Supreme Court did not directly address calls to eliminate or significantly curtail qualified immunity this Term, the Court used its shadow docket to summarily reverse a couple of qualified immunity grants. First, in *Taylor v. Riojas*,[93] the Court reversed the Fifth Circuit Court of Appeals's grant of qualified immunity in a per curiam opinion, emphasizing that an individual alleging that his prison conditions violated the Eighth Amendment's ban on Cruel and Unusual Punishment does not need a prior factually similar case if any reasonable officer would know that the conditions were illegal. Trent Taylor alleged that correctional officers confined him for four days in a cell covered in "massive amounts of feces: all over the floor, the ceiling, the windows, the walls, and even packed inside the water faucet."[94] Then, prison officials moved him to a second, frigidly cold cell for two additional full days, where the only toilet was a clogged drain in the floor, and Taylor was left to sleep in sewage as the cell lacked a bunk. According to seven members of the Court,[95] "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[96]

"[T]he Court used its shadow docket to summarily reverse a couple of qualified immunity grants."

The Court sent another message to the Fifth Circuit Court of Appeals when it summarily reversed a grant of qualified immunity in *McCoy v. Alamu*.[97] Prince McCoy, a Texas prisoner with asthma, alleged that correctional officer Alamu got angry when another incarcerated person threw liquids on Alamu, and Alamu then took his anger out on Mr. McCoy by pepper-spraying him for no reason.[98] Even though there was no Supreme Court case directly on point, the Court remanded the case to be reconsidered in light of *Taylor*. Through *Taylor* and *McCoy*, the Court has revived its instruction to lower courts in *Hope v. Pelzer*[99] that a prior decision on the same facts is unnecessary when a violation is particularly obvious.[100] These decisions may suggest that the Court is willing to review qualified immunity grants more rigorously and send a signal to lower courts to be more careful when relying on the doctrine going forward.

EXCESSIVE FORCE

Body camera and cell phone footage documenting instances of police use of force against communities of color, and Black communities in particular, has become ubiquitous. Calls to end qualified immunity, abolish police, and hold police forces accountable have increased.[101] And although the Supreme Court did not grant certiorari to revisit or clarify any aspects of its excessive force jurisprudence, it did use the shadow docket this Term to summarily vacate an Eighth Circuit Court of Appeals grant of summary judgment to officers who were alleged to have used excessive force.[102] Nicholas Gilbert was arrested for trespassing and failing to appear in court for a traffic ticket. At the St. Louis police station, the officers saw Mr. Gilbert attempt suicide, and in response, the officers entered his cell and handcuffed him behind his back as he struggled. He continued resisting the officers, who shackled his legs, forced him face-down on the floor, and pressed down on his shoulders, biceps,

88. *Id.* at 2420 (Sotomayor, J., dissenting).
89. *Id.* at 2421 (Sotomayor, J., dissenting).
90. 141 S. Ct. 1467 (2021).
91. 490 U.S. 488 (1989).
92. *Wright*, 141 S. Ct. at 1468 (quoting *Maleng*, 490 U.S. at 492).
93. 141 S. Ct. 52 (2020).
94. *Id.* at 53.
95. Justice Barrett did not take part in consideration of this case, and Justice Thomas dissented without writing an opinion.
96. *Id.* (citing Hope v. Pelzer, 536 U.S. 730, 741 (2002)).
97. 141 S. Ct. 1364 (2021) (Mem.).
98. McCoy v. Alamu, 950 F.3d 226, 229 (5th Cir. 2020).
99. 536 U.S. 730 (2002).
100. *See, e.g.*, Joanna Schwartz, *The Supreme Court Is Giving Lower Courts a Subtle Hint to Rein in Police Misconduct*, ATLANTIC (Mar. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/03/the-supreme-courts-message-on-police-misconduct-is-changing/618193/.
101. *See, e.g.*, Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition.
102. Lombardo v. St. Louis, 141 S. Ct. 2239 (2021).

"The Supreme Court interpreted three federal criminal statutes this Term."

legs, back, and torso. He tried to raise his chest to breath and told the officers, "It hurts. Stop."[103] The officers continued to use the restraint for fifteen minutes. Gilbert suffocated and died as a result. His parents sued, alleging the officers used excessive force, and the Eighth Circuit affirmed the district court's grant of summary judgment to the officers. In *Lombardo v. St. Louis*,[104] the Court summarily reversed, suggesting that the Eighth Circuit may have improperly held that the use of a prone restraint is *per se* constitutional when an individual seems to resist the officers. The Court remanded the case for the lower court to apply the excessive force test outlined in *Kingsley v. Hendrickson*.[105] Although the Court did not decide whether the force used was excessive, it emphasized that there was evidence in the record, including in St. Louis training and police guidance, which warned officers to remove an individual from the prone position once handcuffed because of the high risk of suffocation.[106]

STATUTORY INTERPRETATION

The Supreme Court interpreted three federal criminal statutes this Term. In each case, it narrowed the scope of criminal liability.

THE ARMED CAREER CRIMINAL ACT (ACCA)

Borden v. United States[107] held that felony convictions requiring only a *mens rea* of recklessness are not "violent felonies" under the ACCA and, as such, cannot be used as predicate offenses to trigger application of the ACCA's 15-year minimum sentence for persons found guilty of illegally possessing a gun after having been convicted of three or more violent felonies.[108] Charles Borden pled guilty to a felon-in-possession charge, and the prosecution sought an ACCA sentencing enhancement. Because one of his prior convictions was for reckless aggravated assault, Mr. Borden argued that his reckless offense did not satisfy the ACCA's definition of a violent felony as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another."[109] The Supreme Court, in a 5-4 decision, agreed.

Justice Kagan wrote a plurality opinion, joined by Justices Breyer, Sotomayor, and Gorsuch. She interpreted the phrase "against another" in the ACCA's definition of a violent felony as incorporating a *mens rea* requirement of intentional action directed at another individual. Looking at the text as a whole, the plurality explained that the phrase "use of force" denotes volitional conduct, and "the pairing of volitional action with the word 'against' supports that word's oppositional, or targeted, definition."[110] Therefore, the clause incorporates knowing and purposeful actions, but does not cover reckless ones. A person who acts recklessly has not explicitly directed force at another.

The plurality emphasized that its decision was consistent with its prior holding in *Leocal v. Ashcroft*.[111] In *Leocal*, the Court interpreted the federal definition of a "crime of violence" in 18 U.S.C. § 16(a) as excluding offenses requiring only a negligent *mens rea*. In doing so, the Court emphasized that § 16(a) defined a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" and held that the use of the phrase "against the person or property of another," when coupled with "use" of force, imposed a *mens rea* requirement.[112] The *Borden* plurality emphasized that the definition of a "violent felony" in the ACCA has almost identical language and should be interpreted in a consistent way.

The plurality also distinguished its prior decision in *Voisine v. United States*[113] in which it interpreted a federal statute barring individuals who had been convicted of misdemeanor crimes of domestic violence from possessing firearms and held that offenses predicated on reckless conduct could qualify as misdemeanor crimes of domestic violence. The plurality explained that the statute at issue in *Voisine* defined a "misdemeanor crime of domestic violence" as a misdemeanor committed by a person in a specified domestic relationship with the victim that "has, as an element, the use or attempted use of physical force."[114] Because that statute did not incorporate the "against" language in the ACCA and in § 16(a), it did not incorporate a *mens rea* requirement. "Use" only demanded volition and was indifferent to mental state.

The plurality then explained that its holding was consistent with the ACCA's purpose, which was to impose heightened penalties on individuals who illegally possess guns and pose "an uncommon danger" due to their past "'purposeful, violent, and aggressive'" crimes.[115] The plurality highlighted the kinds of ordinary crimes—such as reckless crimes resulting from unsafe driving—that would trigger a 15-year mandatory minimum were it to hold that recklessness sufficed, and argued that inclusion of these crimes as predicates would not serve the statute's aims.

Justice Thomas concurred in the judgment but based his decision on independent reasoning. He interpreted the "use of physical force" language in the ACCA's definition of "violent

103. *Id.* at 2240.
104. *Id.*
105. 576 U.S. 389, 397 (2015) (emphasizing that the Court must ask whether the officers' actions were "objectively reasonable" in light of the facts and circumstances confronting them, including "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting").
106. Justices Alito, Thomas, and Gorsuch dissented from the summary disposition arguing that the Court should have scheduled full briefing and argument on the question.
107. 141 S. Ct. 1817 (2021).
108. 18 U.S.C. § 924(e).
109. *Id.*
110. *Borden*, 141 S. Ct. at 1826.
111. 543 U.S. 1 (2004).
112. *Id.* (quoting the statute and discussing the *Leocal* Court's reasoning).
113. 136 S. Ct. 2272 (2016).
114. *Borden*, 141 S. Ct. at 1825 (quoting 18 U.S.C. § 921(a)(33)(A)).
115. *Borden*, 141 S. Ct. at 1830 (quoting Begay v. United States, 553 U.S. 137, 145 (2008)).

felony" as "well-understood" to apply "only to intentional acts designed to cause harm."[116] As a result, he did not believe that reckless crimes could serve as predicates under the elements clause definition of violent felonies. But he parted ways with the plurality on whether Mr. Borden was an armed career criminal under the statute. He would have held that Mr. Borden's prior conviction was a predicate offense under the residual clause in the ACCA, which further categorized prior felonies as violent if they "involve[] conduct that presents a serious potential risk of physical injury to another."[117] But the Supreme Court invalidated the ACCA's residual clause on vagueness grounds in *Johnson v. United States*.[118] Despite his disagreement with *Johnson*, Justice Thomas concurred in the judgment to avoid confusion and division in the lower courts about the proper interpretation of the ACCA's elements clause.

Justice Kavanaugh, joined by Chief Justice Roberts, Justice Alito, and Justice Barrett, dissented, arguing first that the phrase "against the person of another" is a term of art that traditionally distinguishes offenses against the person from offenses against property and has nothing to do with *mens rea*. Second, the dissenters argued that the ordinary meaning of "use of force against the person of another" includes a reckless *mens rea*, because criminal laws typically impose criminal liability for a reckless *mens rea*; there is a thin line between acting recklessly and knowingly; the Model Penal Code treats recklessness as the default mental state; and the ACCA did not explicitly exclude reckless offenses. Third, the dissenters disagreed with the plurality's interpretation of precedent, arguing that the statute in *Voisine* addressed conduct that was "against" a domestic relation, but the Court still held that a person there could recklessly use force. Addressing *Leocal*, the dissenters wrote that the line between recklessness and negligence "is much more salient."[119] While reckless behavior is volitional, "[a]ccidents or negligence do not involve the *use of force* because such conduct is not volitional."[120] Finally, the dissenters critiqued the plurality's context and purpose argument, emphasizing the potential dangerousness of individuals who have three prior reckless felonies.

Both the plurality and the dissent noted that this case did not decide whether crimes with a *mens rea* of extreme recklessness fall under the ACCA violent felony provision, so that is one question that lower courts will have to address going forward.

THE COMPUTER FRAUD AND ABUSE ACT OF 1986 (CFAA)

The CFAA makes it a crime to "intentionally access[] a computer without authorization" or to "exceed [one's] authorized access" and thereby obtain computer information.[121] It defines the phrase "exceeds authorized access" to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[122] In *Van Buren v. United States*,[123] the Supreme Court limited criminal liability under the "exceeds authorized access" clause by interpreting it to apply only when an individual "accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him."[124] It does not apply when individuals access folders that they have permission to access with the intent to use the material for improper purposes.

"[T]he statutory language applies to information that one is not permitted to obtain but obtains through authorized computer access."

Nathan Van Buren, a former police sergeant, used his access to the police department's license plate database to look up and obtain information for a friend even though he was only permitted to use the computer for work reasons. He was subsequently prosecuted and convicted under 18 U.S.C. § 1030(a)(2). Justice Barrett reversed the conviction in a 6-3 majority decision, joined by Justices Breyer, Sotomayor, Kagan, Gorsuch, and Kavanaugh. Looking first to the text of the statute, the majority focused on the phrase "entitled *so* to obtain," noting that the use of the word "so" referred back to "whether one has the right, 'in the same manner as has been stated,' to obtain the relevant information."[125] Because the manner previously stated in the statute is "via a computer [one] is authorized to access," the statutory language applies to information that one is not permitted to obtain but obtains through authorized computer access.[126] The majority noted that this interpretation also makes sense of the statute's structure. Subsection (a)(2) first protects computer systems against outside hackers by making it a crime to "access[] a computer without authorization."[127] It then protects against inside hackers by making it a crime for authorized users to go into unauthorized areas of the computer. According to the majority, "liability under both clauses stems from a gates-up-or-down inquiry—one either can or cannot access a computer system, and one either can or cannot access certain areas within the system."[128] Finally, the majority warned that a broader, purpose-based view of criminal liability under the CFAA "would attach criminal penalties to a breathtaking amount of commonplace computer activity,"[129] including minor workplace misconduct such as checking a personal email account or browsing the news when not permitted to do so.

Justice Thomas, joined by Chief Justice Roberts and Justice Alito, dissented, arguing that the text, ordinary principles of

116. *Id.* at 1835 (Thomas, J., concurring in judgment) (quoting *Voisine*, 136 S. Ct. at 2279, 2290 (Thomas, J., dissenting)). Justice Thomas had dissented in *Voisine* for this reason.
117. *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)).
118. 576 U.S. 591 (2015).
119. *Borden*, 141 S. Ct. at 1852 (Kavanaugh, J., dissenting).
120. *Id.*
121. 18 U.S.C. § 1030(a)(2).
122. 18 U.S.C. § 1030(e)(6).
123. 141 S. Ct. 1648 (2021).
124. *Id.* at 1652.
125. *Id.* at 1654 (quoting BLACK'S LAW DICTIONARY 1246 (5th ed. 1979)).
126. *Id.* at 1654.
127. 18 U.S.C. § 1030(e)(6).
128. *Van Buren*, 141 S. Ct. at 1659–60.
129. *Id.* at 1661.

"Van Buren adopts a trespass-based approach to the CFAA."

property law, and the statutory history support an interpretation of the statute that applies it to individuals who obtain computer information for a prohibited purpose. Rather than focus on the word "so" in the statute, the dissenters focused on the word "entitled" and noted that entitlements are necessarily circumstance-specific. Even under the majority's "gates-up-or-down" approach, Justice Thomas argued, "discerning whether the gates are up or down requires considering the circumstances that cause the gates to move."[130] As for policy arguments about the statute criminalizing too much behavior, Justice Thomas argued that that other provisions, such as *mens rea* requirements, would have narrowed its potential scope.

Van Buren adopts a trespass-based approach to the CFAA, focusing lower courts on whether an individual bypassed a gate that they were not permitted to bypass. But it never defines what constitutes an impermissible "gate." In a footnote, the majority avoided addressing whether the inquiry turns on technological, "code-based" limitations or on contract and policy-based ones.[131] Lower courts will have to determine when someone has bypassed a closed gate.

THE FIRST STEP ACT OF 2018

In *Terry v. United States*,[132] the Court held that the First Step Act of 2018, which made the Fair Sentencing Act's sentencing reductions retroactive, only applied to individuals sentenced pursuant to mandatory minimums. Justice Thomas wrote the majority opinion, joined by all except Justice Sotomayor who concurred in part and in the judgment.

Justice Thomas began with the history of the criminal laws that Congress passed in the 1980s, which applied mandatory minimum penalties to many drug offenses and created a sentencing disparity of 100:1 between powder and crack cocaine. Under those laws, possession of five grams of crack or 500 grams of powder triggered a five-year mandatory minimum and possession of 50 grams of crack or five kilograms of powder triggered a 10-year mandatory minimum. Possession with the intent to distribute an unspecified amount of crack or powder cocaine did not carry a mandatory minimum penalty. Tarahrick Terry was convicted of possession with intent to distribute. Because he had two prior drug offenses as a teenager, he was sentenced as a "career offender" under the Sentencing Guidelines and given 188 months in prison.

In 2010 Congress passed the Fair Sentencing Act,[133] which lowered the powder/crack disparity to 18:1 and increased the quantity thresholds for mandatory minimums. The Sentencing Commission altered its sentencing recommendations to reflect this change, but individuals sentenced to mandatory minimums before 2010 could not obtain sentences below those mandatory minimums. In 2018 Congress passed the First Step Act[134] to rectify this problem and made the Fair Sentencing Act's changes retroactive to prisoners sentenced before 2010.

But Mr. Terry was not sentenced to a mandatory minimum sentence, and the Supreme Court interpreted the First Step Act as not applying to his case. As Justice Thomas explained, the First Step Act defined "a covered offense" under the Act as a "'violation of a Federal criminal statute, the statutory penalties for which were modified by certain provisions in the Fair Sentencing Act."[135] The Court found that the Fair Sentencing Act did not modify the statutory penalties for Terry's offense because the possession-with-intent-to-distribute offense was not modified by the 2010 Act. According to the Court, the goal of the Fair Sentencing Act was to address cocaine-sentencing disparities. Because Mr. Terry's offense had never attached different sentences to crack and powder offenses, it did not qualify.

All nine justices agreed that Terry's offense was not covered by the text of the statute, but Justice Sotomayor concurred to emphasize the racial bias that animated the 100:1 ratio and to implore Congress to adopt a legislative fix that would permit resentencing for individuals like Mr. Terry whose sentences were likely affected by the existence of the 100:1 ratio even if they were not given mandatory minimums.

PLAIN ERROR

In *Rehaif v. United States*,[136] the Supreme Court interpreted the felon-in-possession-of-a-firearm crime in 18 U.S.C. § 922(g) as requiring the Government to prove not only that the defendant knew that he possessed a firearm, but also that he knew that he had been convicted of a felony at the time of possession. In the consolidated cases of *United States v. Gary* and *United States v. Greer*,[137] the Court held that a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not know that he was a felon.

At Gregory Greer's felon-in-possession trial, the judge did not instruct the jury that it must find that Mr. Greer knew of his felon status when he possessed the firearm. And Michael Gary pled guilty at trial to two counts under § 922(g) after a plea colloquy in which the judge never advised him that, if he went to trial, the jury would have to find beyond a reasonable doubt that he knew about his felony status. Neither Mr. Greer nor Mr. Gary objected at trial to these errors, because *Rehaif* was decided after their trial proceedings while their cases were on appeal. On appeal, they both argued that their convictions should be vacated, because the government failed to prove that they knew about their status as felons.

Justice Kavanaugh, writing for everyone except Justice Sotomayor, rejected the petitioners' claims, noting that, because they had not objected and preserved their *Rehaif* claims, they were subject only to plain-error review. Although there were clear *Rehaif* errors in both cases, the majority found that neither Mr.

130. *Id.* at 1666 (Thomas, J., dissenting).
131. *Id.* at 1659 n.9.
132. 141 S. Ct. 1858 (2021).
133. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).
134. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).
135. *Terry*, 141 S. Ct. at 1862 (quoting § 404(a), 132 Stat. 5222).
136. 139 S. Ct. 2191 (2019).
137. 141 S. Ct. 2090 (2021).

Greer nor Mr. Gary had shown that the error affected substantial rights, because neither of them demonstrated that there was a "reasonable probability" that the results of their proceedings would have been different.[138] Justice Kavanaugh emphasized that "the defendant faces an uphill climb in trying to satisfy the substantial rights prong," because "[i]f a person is a felon, he ordinarily knows he is a felon."[139]

Justice Sotomayor concurred in *Greer* and dissented in *Gary*. She agreed that Mr. Greer could not show that trial error affected his substantial rights, but she would have remanded Mr. Gary's case to give him a chance to make that showing since the lower court had erroneously held that he was automatically entitled to relief and did not therefore make an individualized determination.

MILITARY PROSECUTIONS

In the consolidated cases of *United States v. Briggs* and *United States v. Collins*,[140] the Supreme Court held that there is no statute of limitations for filing rape charges under Article 120(a) in the Uniform Code of Military Justice (UCMJ). The Court of Appeals for the Armed Forces (CAAF) had held that the five-year statute of limitations in the UCMJ that typically applies to non-capital offenses[141] should apply to rape offenses, because rape is a non-capital offense under the Supreme Court's precedent. Justice Alito, writing for a unanimous eight-member Court, disagreed.[142]

The majority began by explaining that Article 120(a) in the UCMJ stated that rape was "punishable by death" and Article 43(a) further provided that an offense "punishable by death" could be tried and punished "at any time without limitation." The majority recognized that it had held in *Coker v. Georgia*[143] that the Eighth Amendment prohibits capital punishment for a rape offense, but the justices did not think *Coker* should affect the statute of limitations provisions in the UCMJ. First, the Court felt that the most "natural referent for a statute of limitations provision within the UCMJ is other law in the UCMJ itself," and the UCMJ had made it clear that rape offenses would not have a statute of limitations.[144] Second, the Court noted that it is unclear whether *Coker* applies to military prosecutions, so any interpretation of "punishable by death" that incorporated the Supreme Court's Eighth Amendment jurisprudence would make the statute of limitations for rape unclear and subject to evolving standards. Finally, the Court opined that legislators were likely aware of "the difficulty of assembling evidence and putting together a [rape] prosecution" when they crafted the laws.[145] Because "the ends served by statutes of limitations differ sharply from those served by … the Eighth Amendment,"[146] the Court thought it unlikely that the lawmakers would tie the statute of limitations to the Court's Eighth Amendment jurisprudence.[147]

"The majority began by explaining that Article 120(a) in the UCMJ stated that rape was 'punishable by death'…"

IMMIGRATION

In *Pereida v. Wilkinson*,[148] the Supreme Court held that nonpermanent immigrants seeking relief from a lawful removal order bear the burden of demonstrating under the Immigration and Nationality Act (INA) that they have not been convicted of a "crime involving moral turpitude."[149] The Court further held that if an individual has been convicted of a divisible crime with multiple subsections that criminalize conduct for different reasons and some of the subsections involve moral turpitude and others do not, that person bears the burden of producing evidence that he was convicted under a subsection that does not involve moral turpitude.

When the government brought removal proceedings against Clemente Pereida for entering the country unlawfully, Mr. Pereida sought to establish that he was eligible for discretionary relief under the INA. Mr. Pereida had a conviction for attempted criminal impersonation in Nebraska—a divisible crime with four subsections, each of which criminalized different behavior. Nothing in the record showed under which subsection Mr. Pereida had been convicted. Some subsections involved crimes of moral turpitude, while at least one did not. In a 5-3 decision,[150] Justice Gorsuch, joined by Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh, held that Mr. Pereida had failed to carry his burden to demonstrate his eligibility for discretionary relief because he did not present evidence showing that he was convicted under a subsection of the Nebraska law that was not a crime of moral turpitude.

The majority started with the text of the INA, which states that "[a]n alien applying for relief or protection from removal has the burden of proof to establish" that he "satisfies the applicable eligibility requirements" and "merits a favorable exercise of discretion."[151] One of the eligibility requirements is that the applicant "has not been convicted" of a crime involving moral turpitude, so the majority read the statute as putting a burden on Mr. Pereida. Because Mr. Pereida presented no evidence that he was convicted under a subsection of the Nebraska criminal impersonation statute that did not involve moral turpitude, the majority felt he had not carried his burden.

138. *Id.* at 2097 (quoting Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904–05 (2018)).
139. *Id.* at 2097.
140. 141 S. Ct. 467 (2020).
141. *See* 10 U.S.C. § 843(b)(1).
142. Justice Barrett did not participate in consideration of the case.
143. 433 U.S. 584 (1977).
144. *Briggs*, 141 S. Ct. at 470.
145. *Id.* at 473.
146. *Id.*
147. Justice Gorsuch wrote a brief separate concurrence to highlight his view that the Supreme Court lacked jurisdiction to hear appeals directly from the CAAF, but he agreed with the Court's decision on the merits.
148. 141 S. Ct. 754 (2021).
149. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i), 1229b(b)(1)(C).
150. Justice Barrett did not participate in consideration of this case.
151. 8 U.S.C. § 1229a(C)(4)(A).

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented, arguing that this case "has little or nothing to do with burdens of proof."[152] Under the categorical approach that the Court takes when interpreting the INA, it does not look at the facts underlying the conviction and ask if they involve moral turpitude. Instead, the court looks to the elements of the offense of conviction and asks if the crime necessarily involves moral turpitude. And in cases involving divisible crimes, the Court adopts a modified categorical approach under which the judge looks to a limited set of court records—charging papers, jury instructions, and plea agreements or plea colloquy records—to see if they indicate which subsection the individual was convicted of violating. In this case, those records did not indicate under which subsection Mr. Pereida was convicted. Because at least one subsection did not involve a crime of moral turpitude, the dissenters argued that the categorical approach meant that Mr. Pereida was not necessarily convicted of a crime involving moral turpitude and was therefore eligible for discretionary relief.

The majority responded that, when an individual is "convicted under a divisible statute containing some crimes that qualify as crimes of moral turpitude, the alien must prove that his actual, historical offense of conviction isn't among them" and noted that the individual can present evidence beyond mere charging papers and plea colloquy records to satisfy that burden.[153] In this respect, the majority noted, the INA is different from the ACCA where the categorical approach is limited to certain documents to protect a defendant's Sixth Amendment rights. In response to arguments that its approach will cause practical difficulties due to the unavailability of many court records and the difficulty that noncitizens have in getting access to court records, the majority responded that "[i]t is hardly this Court's place to pick and choose among competing policy arguments like these along the way to selecting whatever outcome seems to us most congenial, efficient, or fair."[154]

It remains to be seen if the Court will further abandon the categorical approach in future immigration cases. For now, an immigration judge's discretion to grant relief from deportation to long-time immigrants who have family in this country will be eliminated in some cases where evidence about the nature of an underlying conviction is missing or unavailable.

LOOK AHEAD

The 2021–22 Term will address a broad range of criminal law and procedure issues. In addition to high-profile cases involving the scope of the Second Amendment right to bear arms[155] and consideration of the First Circuit Court of Appeals's reversal of Dzhokhar Tsarnaev's death sentence for his involvement in the Boston Marathon bombing,[156] the Court will also address some important Sixth Amendment issues. In *Hemphill v. New York*,[157] the Justices will determine whether and when a defendant can "open the door" to evidence that would otherwise be barred by the Confrontation Clause. The Justices' approach to the Confrontation Clause has been quite fractured since its decision in *Crawford v. Washington*,[158] and this will be the first opportunity that some of the newest Justices will have to weigh in with their views.

Additionally, the Court will decide a habeas case that has important implications for the Sixth Amendment right to effective assistance of trial counsel. In *Shinn v. Ramirez*,[159] the Court will decide whether habeas petitioners whose first real opportunity to present an ineffective-assistance-of-trial-counsel claim is in federal court will be able to present new evidence to support their claims.

And, of course, it remains to be seen how active the Court's shadow docket will be in the coming year and whether it will continue to use that docket to send signals to the lower courts about AEDPA deference, excessive force, and qualified immunity. It should be an interesting term.

Eve Brensike Primus is the Yale Kamisar Collegiate Professor of Law at the University of Michigan Law School where she teaches criminal law/procedure, evidence, and habeas corpus.

Lily Sawyer-Kaplan is a J.D. candidate at the University of Michigan Law School in the class of 2022. Following graduation, she will be clerking in the Ninth Circuit Court of Appeals during the 2022-23 term and the U.S. District Court for the District of Columbia in the 2023-24 term.

152. *Pereida*, 141 S. Ct. at 767 (Breyer, J., dissenting).
153. *Id.* at 763.
154. *Id.* at 766.
155. New York State Rifle & Pistol Association Inc. v. Bruen, No. 20-843.
156. United States v. Tsarnaev, No. 20-443.
157. Hemphill v. New York, No. 20-637.
158. 541 U.S. 36 (2004).
159. Shinn v. Ramirez, No. 20-1009.

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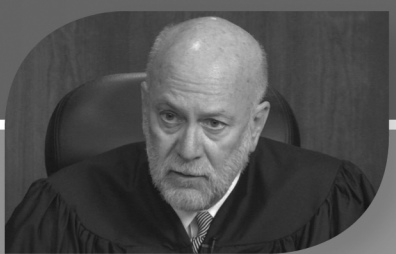

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Resisting *Ex Parte* Temptation

Cynthia Gray

The Model Code of Judicial Conduct provides: "A judge shall not initiate, permit, or consider *ex parte* communications . . . concerning a pending or impending matter."[1] Despite the Latin term, the prohibition is pretty straightforward, based in a common-sense understanding of fair play that gives all litigants the same opportunities to persuade the decision maker, with no private earwigging. The concept is so fundamental that a judge's impartiality may be questioned, and their decision may be reversed, based on *ex parte* communications.

The simplicity of the rule notwithstanding, judges violate it and are sanctioned for those communications every year. Moreover, while the prototype for an *ex parte* communication may be someone accosting a judge at a gas station or in the courthouse—and those scenarios do happen[2]—in numerous cases, it is the judge who starts the conversation.[3]

Those judges may be forgetting the breadth of the proscription on *ex parte* communications, which reflects the significance of the principles involved. For example, the rule does not include the term "merits" and forbids judges from initiating and permitting *ex parte* communications, not just considering them. Thus, the prohibition is not limited to conversations about the substance of a case and includes seemingly innocuous exchanges that judges may feel will not affect their decisions. The ban continues even after a case is no longer pending before a judge "through any appellate process until final disposition."[4] As a corollary to the *ex parte* rule, judges cannot independently investigate the facts in a case, including on-line and through social media.[5]

Further, a judge's motivation for having a tête-à-tête about a case is irrelevant. All *ex parte* communications are proscribed even if the judge does not intend to be unfair or is not acting out of bias but is just trying to facilitate proceedings, for example.

In a West Virginia case,[6] the judge called the president of a corporate party to explain the case's background and status and to encourage him to attend the next hearing because the corporation's attorney was inexperienced. However, the president interpreted the call as an attempt by the judge to get the corporation to change its litigation strategy.

In the discipline proceeding, the judge argued that it is a common practice for judges to contact parties to speed things along. Rejecting that excuse, the Supreme Court of Appeals warned that,

Footnotes

1. Model Code of Jud. Conduct r. 2.9(A) (Am. Bar Ass'n 2007).
2. In the Matter of James P. Curran, State Comm'n on Jud. Conduct (Nov. 14, 2017), https://tinyurl.com/3zhe9xsr (after arraigning a defendant and entering an order of protection, a judge was approached by a man at a gas station and received an anonymous voicemail message alleging that the defendant had violated the order of protection; the judge did not disclose the communications and relied on the information in the proceedings); Public Admonition of Huizenga, Ind. Comm'n on Jud. Qualifications (June 22, 2009) https://tinyurl.com/2337wpu2 (a judge assumed the role of the prosecutor to negotiate a resolution in a case after a defendant approached the judge in his office about tickets she had received).
3. *See, e.g.*, *In re* Cummings, 292 P.3d 187 (Alaska 2013) (while alone in the courtroom with an assistant district attorney and a clerk, a judge advised the attorney to read the court of appeals' memorandum opinions issued that day "because they involved matters [he] was currently litigating"); Public Admonishment of Caskey, Cal. Comm'n on Jud. Performance (July 6, 1998), https://tinyurl.com/2py77xw4 (a judge sent an *ex parte* email to an attorney appearing in a juvenile dependency case before him soliciting advice on how to handle the matter); Inquiry Concerning Mills, Ca. Comm'n on Jud. Performance (August 28, 2018), https://tinyurl.com/379y9xak (as the jury in a driving-under-the-influence case was deliberating, a judge said to the deputy district attorney, "Do you want to know what I would have done?" and talked to him *ex parte* about an argument countering a defense theory); *In re* Filip, 923 N.W.2d 282 (Mich. 2019) (a judge sent *ex parte* emails to prosecutors citing cases relevant to issues in two cases over which he was presiding); Commission on Judicial Performance v. Bozeman, 302 So.3d 1217 (Miss. 2020) (in a civil case, a judge called another judge about the testimony given at an initial hearing and called a friend who was a mechanic to ask about the parties' arguments); In the Matter of Reagan, Neb. Comm'n on Jud. Qualifications (June 2, 2003), https://tinyurl.com/ pxhrhjcf (after the court of appeals reversed an order entered by a judge denying a defendant's request for post-conviction relief, the judge telephoned the assistant attorney general assigned to the case to express his concern about the decision and sent a letter to the assistant attorney general, without copying the defendant's counsel, elaborating on his concerns); Disciplinary Counsel v. Stuard, 901 N.E.2d 788 (Ohio 2009) (in *ex parte* communications, a judge gave his notes to the prosecution with instructions to draft the sentencing order in a capital murder case); Public Admonition of Zander and Order of Additional Education, Tex. State Comm'n on Jud. Conduct (August 12, 2021), https://tinyurl.com/45zt3d4b (after learning that the county attorney wanted to dismiss a traffic matter, a judge called the law enforcement officer who issued the citation and asked if he wanted the case dismissed; when the office said that he did not, the judge directed his clerk to tell the county attorney, "The Judge just thought you would want to defend the officer."); Judicial Inquiry and Review Commission v. Shull, 651 S.E.2d 648 (Va. 2007) (during a recess in a hearing regarding a protective order, a judge placed an *ex parte* call to the hospital where the petitioner alleged she had been treated); *In re* Starcher, 456 S.E.2d 202 (West Virginia 1995) (a judge called an assistant prosecuting attorney to advise them to have some supporters present in the courtroom during closing argument in an ongoing sexual assault trial, to use the term "serial rapist" frequently, and to be more emotional before the jury).
4. Model Code of Jud. Conduct, terminology, pending (Am. Bar Ass'n 2007).
5. Model Code of Jud. Conduct r. 2.9(C) cmt. 6 (Am. Bar Ass'n 2007).
6. *In re* Kaufman, 416 S.E.2d 480 (W. Va. 1992).

regardless how well-intentioned a judge may be, the "one-sided nature of *ex parte* communications raises questions about motivations and impartiality that can never be resolved to everyone's satisfaction," as evidenced in that case.[7]

Further, the code's general-appearance-of-impropriety standard[8] means that a one-on-one chat that looks like an *ex parte* communication is inappropriate even if there is in fact no actual conversation about a case. A discipline decision from California illustrates what the appearance of *ex parte* communications can look like.[9] A judge admitted that he often visited with two attorneys in his chambers on days when they were appearing before him, but he denied that they discussed cases pending before him, and the California Supreme Court agreed that had not been proven. Nevertheless, the Court concluded that the judge's practice created the appearance of *ex parte* communications, still violating the code of judicial conduct.[10]

EXCEPTIONS DO NOT SWALLOW THE RULE

Some violations probably can be traced to judges mistakenly exaggerating the exceptions to the rule, which are narrow, limited to specific circumstances, and often temporary.

For example, there is an exception that allows a judge to obtain the advice of an expert—but only in writing, only an expert in the law, only if the judge gives the parties prior notice of the expert and the subject of the advice, and only if the judge provides "a reasonable opportunity to object and respond to the notice and to the advice received."[11] A judge may consult *ex parte* with other judges and with court staff and officials who help the judge with adjudicative duties, but only if the judge avoids "receiving factual information that is not part of the record" and avoids "abrogate[ing] the responsibility" to make their own decision.[12] There is an exception for separate settlement conferences but only "with the consent of the parties."[13]

Ex parte communications "authorized by law" are permitted by the rule,[14] but "law" does not include custom, and the authorization must be express and the law strictly followed to prevent abuse. For example, an Indiana court rule allows a judge to grant an emergency *ex parte* request for a temporary restraining order without notice to the other party but only if the petitioner shows that waiting to hear from the other party will result in immediate and irreparable harm, certifies in writing that they tried to give notice, and explains why notice should not be required. If the judge grants *ex parte* relief without "meticulous attention" to those requirements, the judge violates the code and can be disciplined for that failure.[15]

The exception most susceptible to an inappropriately broad interpretation may be the one "for scheduling, administrative, or emergency purposes."[16] After only a quick read or based on memory, a judge may not recall that the exception has many prerequisites and applies only if circumstances necessitate that other parties be left out, only if the communication is not about substantive matters, only if "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage," and only until the judge promptly notifies the excluded parties of the substance of the exchange and gives them an opportunity to respond.

A federal judicial discipline decision rejected a judge's reliance on the administrative exception to excuse his frequent *ex parte* contacts with the U.S. Attorney's Office in his district about criminal matters.[17] Having worked in that office for 24 years, the judge was friendly with many people there and communicated with them about warrant requests, draft plea agreements, jury instructions, docketing issues, and scheduling matters without including defense counsel. He also criticized individual Assistant U.S. Attorneys *ex parte*. For example, in an email to a paralegal in the office, the judge complained that one of the prosecutors in the case on trial before him was "entirely inexperienced" and was repeating "the bull***t" from the defendant's testimony and turning a "slam-dunk" case into a "60-40" one for the defendant.[18] After a misunderstanding in a pretrial conference in a second case, he reassured an Assistant U.S. Attorney in an *ex parte* email: "You're doing fine. Let's get this thing done." The judge also occasionally communicated *ex parte* with the office after the case was no longer before him, for example, congratulating federal prosecutors when they prevailed on appeal in cases over which he had presided.

Most of the communications were by email, but some were in person or over the phone. In the discipline proceeding, the special investigative committee appointed by the chief judge noted that there was no evidence that the *ex parte* communications affected any of the judge's rulings, benefited any party, or, with a few exceptions, were on the merits of the cases.

The judge "admitted that some of his communications were flatly inappropriate and others were unwise." However, he initially argued that the exchanges about scheduling and other minor or ministerial matters were not "objectionable," were allowed "'for the efficient operation of the court,'" and were part of the courthouse "culture."

7. *Id.* at 485. The Court publicly admonished the judge.
8. Model Code of Jud. Conduct Canon 1 (Am. Bar Ass'n 2007).
9. Kennick v. Commission on Judicial Performance, 787 P.2d 591 (Cal. 1990).
10. *Id.* at 609–10. The Court removed the judge for this and other misconduct.
11. Model Code of Jud. Conduct r. 2.9(A)(2) (Am. Bar Ass'n 2007).
12. Model Code of Jud. Conduct r. 2.9(A)(3) (Am. Bar Ass'n 2007).
13. Model Code of Jud. Conduct r. 2.9(A)(4) (Am. Bar Ass'n 2007).
14. Model Code of Jud. Conduct r. 2.9(A)(5) (Am. Bar Ass'n 2007).
15. Indiana Advisory Opinion 2001-1, Ind. Comm'n on Jud. Qualifications, https://tinyurl.com/yert5hnd (last visited Oct. 20, 2021). *See*, e.g., *In re* Jacobi, 715 N.E.2d 873 (Ind. 1999) (judge was suspended for three days without pay for granting an *ex parte* temporary restraining order in a dispute between several municipalities about a board appointment even though the petitioner had not filed the required certifications); Public Admonition of Johnston, Ind. Comm'n on Jud. Qualifications (July 5, 2012) https://tinyurl.com/ rnvxbrxa (judge was publicly admonished for granting an *ex parte* motion for change of custody filed by maternal grandparents without ensuring that the father had been given notice or that there was an emergency).
16. Model Code of Jud. Conduct r. 2.9(A)(1) (Am. Bar Ass'n 2007).
17. *In re* Bruce, U.S. Ct. of Appeals for the 7th Cir.: Special Comm. (May 14, 2019) https://tinyurl.com/c9tkd43m.
18. The defense motion for a new trial based on the judge's *ex parte* communications in that case was granted. United States v. Nixon, 480 F. Supp. 3d 859 (C.D. Ill. 2020).

Noting that the code allows *ex parte* communications for scheduling "when circumstances require it," the special committee emphasized that, "'when circumstances require it' is key. As Judge Bruce now concedes, the majority of his *ex parte* communications did not 'require' the exclusion of defense counsel; they were often a matter of simple convenience, happenstance, and habit." Noting that the judge had not explained why he could not have included defense counsel in his "routine scheduling and ministerial discussions" with the prosecution, the committee stated that the communications violated the code even if the practice was attributable to courthouse culture.[19]

The discipline cases illustrate how easy it is for a judge to slip into *ex parte* communications. Judges must remain mindful that every communication about a case that does not include all interested parties or their attorneys is presumptively prohibited and that assumption can only be rebutted by careful analysis.

Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncscjudicialethicsblog.org), writes and edits the Judicial Conduct Reporter*, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.*

19. Based on the special committee report, the Judicial Council publicly admonished the judge and ordered that no matters involving the U.S. Attorney's Office be assigned to him for several months, that he watch a training video, and that he read excerpts of the Code of Conduct for U.S. Judges.

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The Avoidance of Stereotypical Reasoning in Rendering Judgment

Wayne K. Gorman

Canadian trial judges have been encouraged to rely upon "reason, common sense and life experience" in making credibility assessments (see *R. v. Delmas*, 2020 ABCA 152, para. 31, *aff'd* 2020 SCC 39). However, a number of recent Canadian Court of Appeal decisions have concluded that this use of common sense has, at times, caused Canadian trial judges to stray into stereotypical reasoning, rendering their credibility-based judgments invalid. In very succinct terms, the Nova Scotia Court of Appeal recently indicated that "[r]eliance on a stereotype in assessment of credibility is impermissible and an error of law" (see *R. v. Stanton*, 2021 NSCA 57, para. 84).

WHAT IS STEREOTYPICAL REASONING?

The British Columbia Court of Appeal has suggested that it involves a trial judge drawing "an adverse inference about a witness's credibility based on stereotypes, generalizations, or assumptions about how individuals would behave in a particular circumstance that are not (a) grounded in the evidence, or (b) so uncontroversial that they could properly be the subject of judicial notice" (see *R. v. Greif*, 2021 BCCA 187, para. 60).

In *R. v. Roth*, 2020 BCCA 240, it was indicated that although trial judges "are entitled to rely on their human experience in assessing the plausibility of a witness's testimony, they must avoid speculative reasoning that invokes 'common sense' assumptions not grounded in the evidence." When "inferences reflect conjecture and speculation, based on stereotypical reasoning, a generalization about a particular role or type of individual, unfounded assumptions or otherwise, it amounts to legal error" (paras. 65 and 73).

In this column, I intend to review a number recent Canadian Court of Appeal decisions in an to attempt to determine when the use of "common sense" by Canadian trial judges, in making credibility assessments, has strayed in to stereotypical reasoning. I will offer some suggestions to avoid this occurring. I intend to start with assessing the nature of the problem in Canada.

THE NATURE OF THE PROBLEM

It has been pointed out that credibility assessments "tainted by improper speculation or stereotypical reasoning have been particularly problematic in the context of sexual offences. Triers of fact must be aware 'there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave'. Reliance on myths, stereotypes, or unfounded inferences to ground credibility assessments is an error, whether it is applied against a complainant or an accused" (*Greif*, para. 61).

In *R. v. Chen*, 2020 BCCA 329, the British Columbia Court of Appeal noted that "the use of a common-sense approach to assessing credibility in sexual assault cases is fraught with danger. This is because so-called 'common sense' can mask reliance on stereotypical assumptions and pre-conceived views about how victims of sexual assault can be expected to behave.… Although the law has sought for decades to eradicate such myths and stereotypes, they are remarkably persistent, pervasive, and invidious. In consequence, when instructing juries on how to assess the credibility of a sexual assault complainant, a judge must provide clear limiting instructions to guard against the use of impermissible reasoning based on discredited myths and stereotypes and thus ensure a fair trial" (para. 23).

The Alberta Court of Appeal has suggested that "myth- and stereotype-based" thinking "continues to linger in the legal landscape like a fungus" (see *R. v. AE*, 2021 ABCA 172, para. 153).

THE NATURE OF THE UNDERLYING MYTHS

In *Chen*, the Court of Appeal set out some of the "myths and stereotypes" about victims of sexual assault in the following manner (para. 24):

> I will not review the many myths and stereotypes about victims of sexual assault and their expected behaviour that are subtly woven into the fabric of "common sense" in our society. For present purposes, it is sufficient to note they include the notion that sexual assault victims can reasonably be expected to resist or cry out during an attack, avoid their attacker thereafter and manifest signs of the trauma they endured for all to see and understand. However, it has long been recognized that, in reality, there is "no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" and stereotypical assumptions to the contrary have been soundly rejected as a proper basis upon which to draw inferences.…

Similarly, in *R. v. JC*, 2021 ONCA 131, it was pointed out that "it is a myth or stereotype that a complainant would avoid their assailant or change their behaviour towards their assailant after being sexually assaulted, and it is an error to employ such reasoning.… Similarly, it is a stereotype that women would not behave in a sexually aggressive manner, or that men would be interested in sex. Reasoning that is based on such inferences is not permitted" (para. 66).

The Court of Appeal indicated in *JC* that "factual findings, including determinations of credibility, cannot be based on stereotypical inferences about human behaviour… Pursuant to this rule, it is an error of law to rely on stereotypes or erroneous common-sense assumptions about how a sexual offence complainant is expected to act, to either bolster or compromise their credibility" (para. 63).

RECOGNIZING THE ERROR

Sometimes recognizing the use of stereotypical reasoning by a trial judge is easy. In *R. v. Lacombe*, 2019 ONCA 938, for instance, the trial judge drew a negative inference in relation to the complainant's credibility, in part, because she was "dressed in a loose-fitting pajama top with no bra, shorty pants, PJ pants, and no underwear" (*see* para. 17 of the Court of Appeal's decision). Similarly, in *JC*, the Court of Appeal indicated that the trial judge erred by relying "on the stereotypical view that victims of sexual aggression are likely to immediately report the acts, and conversely, to conclude that the lack of immediate reporting reflects either absence of assaultive or non-consensual behaviour" (para. 41). Finally, in *R. v. A.R.H.D.*, 2018 SCC 6, the trial judge, in acquitting the accused, indicated that "[a]s a matter of logic and common sense, one would expect that a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change of behaviour such as avoiding the perpetrator." In setting aside the acquittal, the Supreme Court of Canada said that the trial judge "judged the complainant's credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law" (para. 2).

However, determining whether a trial judge has strayed into stereotypical reasoning is not always obvious. In *R. v. Steele*, 2021 ONCA 186, Justice van Rensburg pointed out that it can at times be difficult to distinguish "between prohibited lines of reasoning and reasonable, context-specific inferences drawn by a trial judge in assessing credibility in sexual assault cases" (para. 52).

One manner in which trial judges can seek to avoid improper reasoning is to consider appellate judgments in which such an error is said to have occurred. Thus, a closer look at *Lacombe* is useful, because it illustrates some easily avoided errors.

R. V. LACOMBE

In *Lacombe*, the accused was charged with two counts of sexual assault. The complainant and the respondent were tenants in an adult assisted care residence for persons with disabilities. Each resident had their own room. The complainant alleged that the respondent sexually assaulted her on two consecutive days. The primary issue at trial was whether the complainant consented to the sexual touching that occurred.

THE TRIAL

The accused was acquitted. In acquitting the accused, the trial judge indicated that he was troubled by the reliability of the complainant's evidence. In the course of his reasons, the trial judge made the following comments concerning her evidence:

> While not determinative it is significant that the next night April the 19th, [the complainant] was dressed in a loose pyjama top with no bra, shorty pants, PJ pants, and no underwear, and was quite prepared to go down the hallway and out onto the fire escape and smoke cigarettes with Richard Lacombe.

The Crown appealed from the acquittal. It argued that the "trial judge's analysis was tainted by reliance on discredited stereotypical assumptions and biases about how victims of sexual assault behave" (*see* para. 21).

THE COURT OF APPEAL

The appeal was allowed and a new trial ordered. The Ontario Court of Appeal noted that the "Supreme Court has repeatedly held that myths and stereotypes about sexual assault victims have no place in a rational and just system of law. Relying on myths and stereotypes to assess the credibility of complainants jeopardizes the court's truth-finding function" (para. 31). The Court of Appeal concluded that the trial judge had relied on improper stereotypes in a number of ways.

THE COMPLAINANT'S CLOTHES

The Court of Appeal concluded that the trial judge's comments concerning the complainant's clothing, illustrated "discredited reasoning" (paras 36, 38 and 39):

> The trial judge stated that it was significant that the complainant "presented herself to Richard Lacombe dressed in a loose-fitting pyjama top with no bra and underwear." He again referenced her clothing as being significant when addressing the second encounter the following evening, when he stated that it was significant that the complainant "was dressed in a loose pyjama top with no bra, shorty pants, PJ pants, and no underwear." The trial judge did not explain how the complainant's dress could have been significant.
>
> The stereotypical assumption that "if a woman is not modestly dressed, she is deemed to consent" no longer finds a place in Canadian law…
>
> Dress does not signify consent, nor does it justify assaultive behavior. As such, it had no place in the trial judge's assessment of the complainant's credibility and reliability. The trial judge's attribution of significance to this factor impermissibly adopted discredited reasoning.

ABSENCE OF IMMEDIATE REPORTING

In acquitting the accused, the trial judge noted "that at the time of the first incident, the complainant did not report the assault to friends, staff, or the police" (*see* para. 40).

The Court of Appeal indicated that the "myth that a sexual assault complainant is less credible if she does not immediately complain is one of the 'more notorious examples of the speculation that in the past has passed for truth in this difficult area of human behaviour and the law'.… It is unacceptable to rely, as the trial judge did here, on the stereotypical view that victims of sexual aggression are likely to immediately report the acts, and conversely, to conclude that the lack of immediate reporting reflects either absence of assaultive or non-consensual behaviour" (para. 41).

The Ontario Court of Appeal held that there "is no rule as to how victims of sexual assault are apt to behave.… The trial judge's reference to the fact that the complainant remained reflects that he was comparing her conduct to conduct he expected of a sexual assault complainant without giving any consideration to her evidence of fear" (para. 45).

CONCLUSION IN LACOMBE

The Court of Appeal concluded that a new trial was required (para. 62):

> The trial judge's assessment of the complainant's credibility played a prominent role in determining both whether he would believe the respondent and whether he was left with a reasonable doubt as to his guilt. The trial judge's closing reference to *Nimchuk* reflects that he acquitted the respondent because he was unable to say what happened following his assessment of the conflicting testimony. However, his assessment of the entirety of the evidence was fatally flawed by the approach he took to the complainant's evidence. The verdict would not necessarily have been the same in the absence of the trial judge's legal errors.

AN APPLICATION OF THESE PRINCIPLES TO THE EVIDENCE PROVIDED BY THE ACCUSED

It has been noted that the type of error that occurred in *Lacombe* can occur whether the witness is a complainant or the accused (*see Roth*, paras 70-73). Thus, assessing an accused person's evidence on the basis of stereotypical reasoning also constitutes an error. The decision in *JC* illustrates this point. It also provides an interesting analysis as to how evidence capable of leading to stereotypical reasoning may still be admissible.

R. V. JC

In *JC*, the accused was convicted of the offence of sexual assault. The trial judge concluded that the accused engaged in unwanted sexual activity with the complainant (HD) on several occasions, though the accused had testified that he had specifically asked HD if she was consenting before any sexual activity took place. The trial judge rejected this evidence, concluding that the accused's testimony was "too perfect, too mechanical, too rehearsed, and too politically correct to be believed" (*see* paras 4 and 50).

The accused appealed from conviction. He argued that the trial judge erred in "impermissibly [using] stereotype to reject [his] testimony about his practice of expressly seeking HD's consent before engaging in specific sexual acts with her" (para. 4).

THE CONCLUSION IN JC

The Ontario Court of Appeal concluded that the trial judge's reasons for "rejecting JC's testimony on obtaining consent, contravenes both the rule against ungrounded common-sense assumptions, and the rule against stereotypical inferences" (para. 95). In ordering a new trial, the Court of Appeal described these errors in the following manner (paras 96 and 97):

> The trial judge committed the first error—invoking an ungrounded common-sense assumption—by concluding that JC's testimony is "not in accord with common sense and experience about how sexual encounters unfold." This is a bald generalization about how people behave. It is not derived from anything particular to the case, or any evidence before the trial judge on how all sexual encounters unfold.
>
> The trial judge committed the second error of relying on stereotypical reasoning when he rejected JC's claimed conduct as "too perfect, too mechanical, too rehearsed, and too politically correct." The trial judge was invoking a stereotype that people engaged in sexual activity simply do not achieve the "politically correct" ideal of expressly discussing consent to progressive sexual acts. This is a generalization because it purports to be a universal truth and it is prejudicial because it presupposes that no-one would be this careful about consent.

However, the Court of Appeal took the time in *JC* to point out that there is no "absolute bar on using human experience of human behaviour to draw inferences from the evidence.… Properly understood, the rule against ungrounded common-sense assumptions does not bar using human experience about human behaviour to interpret evidence. It prohibits judges from using 'common-sense' or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour" (para. 61).

Thus, the question becomes: when does the use of evidence that could support an impermissible stereotype become appropriate?

THE PERMISSIBLE USE OF EVIDENCE THAT COULD SUPPORT AN IMPERMISSIBLE STEREOTYPE

In *JC*, the Court of Appeal indicated that "the rule against stereotypical inferences does not bar all inferences relating to behaviour that are based on human experience. It only prohibits inferences that are based on stereotype or 'prejudicial generalizations.'" The Court held that though "this rule prohibits certain inferences from being drawn; it does not prohibit the admission or use of certain kinds of evidence" for proper purposes (paras 69 and 70):

> …it is not an error to admit and rely upon evidence that could support an impermissible stereotype, if that evidence otherwise has relevance and is not being used to invoke an impermissible stereotype: *Roth*, at paras. 130-38. For example, in *R. v. Kiss*, 2018 ONCA 184, paras 101-02, evidence that the complainant did not scream for help was admitted, not to support the impermissible stereotypical inference that her failure to do so undermined the credibility of her claim that she was not consenting, but for the permissible purpose of contradicting her testimony that she had screamed to attract attention.
>
> By the same token, it is not an error to arrive at a factual conclusion that may logically reflect a stereotype where that factual conclusion is not drawn from a stereotypical inference but is, instead, based on the evidence. For example, although it is a stereotype that men are interested in sex, it was not an error to infer that the accused male was interested in sex at the time of the alleged assault where that inference was based on evidence.…Similarly, in *R. v. F.B.P.*, 2019 ONCA 157, the trial judge was found not to have erred in finding it implausible that the complainant would consent to spontaneous sex on a balcony, potentially in full view of others, because that inference did not rest in stereotypes about the sexual behaviour of women. The inference

was based on evidence about the ongoing sexual disinterest the complainant had shown in the accused, and the ready availability of a private bedroom.

Similarly, in *Greif*, the British Columbia Court of Appeal suggested that "[w]hile avoiding reliance on myths and stereotypes is essential to the pursuit of a more just criminal justice system, it is not the case that evidence capable of being relied upon to support a stereotypical assumption is necessarily being used for that purpose. Where the evidence is adduced to support a permissible inference, it is not an error for a trier of fact to rely on that evidence in assessing a witness's credibility" (para. 62).[1]

In my view, these two Courts of Appeal are attempting to draw a distinction between stereotypical inferences and acceptable inferences based upon human experience or common sense. They suggest that evidence upon which a stereotypical approach could be based may be admissible if it is not used in such a manner. Of course, it must be relevant in the specific circumstances of the case and there must be an evidentiary basis for the inference. What must be avoided is what the Ontario Court of Appeal refers to as "untethered generalization about human behaviour" (*see JC*, para. 62).

Having said this, there must be certain inferences that will always be legally unacceptable. For instance, at one time the doctrine of "recent compliant" was used in this country to undermine a complainant's evidence in sexual assault trials on the now discredited theory that women who have been sexually assaulted would immediately complain about it (or raise a "hue and cry"). Surely, such an inference is not acceptable based upon such evidence being used for other than stereotypical reasoning.[2]

The Ontario Court of Appeal points out in *JC* that that "there is no bar on relying upon common-sense or human experience to identify inferences that arise from the evidence. Were that the case, circumstantial evidence would not be admissible since, by definition, the relevance of circumstantial evidence depends upon using human experience as a bridge between the evidence and the inference drawn" (para. 59). It is "ungrounded common-sense assumptions" that are prohibited (para. 61):

> Properly understood, the rule against ungrounded common-sense assumptions does not bar using human experience about human behaviour to interpret evidence. It prohibits judges from using "common-sense" or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour.

Professor Dufraimont, in a case comment (*see* Criminal Law E-Letter 319, National Judicial Institute, July 16, 2021), describes this approach as a "dual analytical structure." She suggests that these Court of Appeal decisions call "for limits on trial judges' use of common sense and generalizations about human behavior" but do not seek "to eliminate all common-sense reasoning and behavioural generalizations, which remain acceptable if they find adequate support in the evidence or in judicial notice" (p. 16).

R. V. STEELE AND THE DIFFICULTY OF DRAWING A DISTINCTION BETWEEN PROPER COMMON-SENSE INFERENCES AND STEREOTYPICAL THINKING

The difficulty that can arise in drawing a distinction between impermissible and permissible generalizations about human behavior is illustrated by the Ontario Court of Appeal's decision in *Steele*.

In *Steele*, the accused was charged with the offence of sexual assault. The evidence at the trial indicated that while the accused and the complainant (AV) were walking to the accused's residence, they stopped at an abandoned trailer. The complainant testified that acts of forced sexual intercourse took place inside the trailer. The accused testified that acts of consensual sexual intercourse occurred. After the incident, the complainant received a telephone call from her father. She told him she was on her way home. She did not mention having been sexually assaulted.

At trial, the accused was acquitted. In entering the acquittal, the trial judge made the following statements concerning the complaint's decision to enter the trailer and the telephone conversation she had with her father:

Footnotes

1. One suggested solution is to view myths and stereotypes about sexual offences as being "prohibited inferences." In this scenario, evidence that is "solely relevant to support a prohibited inference has no legitimate probative value and is inadmissible" (*see* Lisa Dufraimont, *Myth, Inference and Evidence in Sexual Assault Trials* (2019), 44 QUEEN'S L.J. 316, at pages 331 and 346). In some instances, this has occurred (see, for instance, section 276 of the *Criminal Code of Canada*, R.S.C. 1985, which prohibits the questioning of a complainant, without leave, about prior sexual activity in sexual offence trials). Another solution is to have counsel explicitly indicate, particularly in sexual assault trials, the "specific purpose" for leading evidence, which may have a stereotypical reasoning element (*see* R. v. Goldfinch, 2019 SCC 38, para. 119).

2. In *R. v. J.M.*, 2021 ONCA 150, the Ontario Court of Appeal considered this point and stated (para. 28):

> Canadian law has adopted several rules concerning the admissibility of evidence and the use of proven facts when assessing the credibility of a complainant in a sexual assault prosecution. For example: rules relating to evidence of recent complaint have been abrogated (*Criminal Code*, s. 275); a complainant's delay in disclosure, standing alone, can never give rise to an adverse inference against his or her credibility as there is no inviolable rule on how those who are the victims of trauma like a sexual assault will behave (*R. v. D. (D)*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65); evidence of sexual reputation is not admissible for the purpose of challenging or supporting the credibility of a complainant (*Criminal Code*, s. 277); and evidence that a complainant has engaged in sexual activity is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge or is less worthy of belief (*Criminal Code*, s. 276(1)).

> In my view, A.V.'s decision to walk T.J. partway home, for no discernable reason, followed by her decision to enter the trailer with [him] especially at that late hour, is inconsistent with her testimony that she did not like T.J. Her refusal or inability to provide the court with a reason for entering the trailer with T.J. detracts from her credibility.
>
> In my view, A.V.'s response to her father does not appear to be the response of someone who has just been sexually assaulted and has been kept in the trailer against her wishes. It is more consistent with the response of someone who is attempting to conceal her activities and whereabouts from her parents.

The Crown appealed from the acquittal, arguing that the acquittal was based on improper stereotypical thinking.

The appeal was allowed and a new trial ordered. A majority of the Ontario Court of Appeal concluded that the trial judge "applied irrelevant stereotypical views about the behaviour of sexual assault victims under the guise of a common-sense approach to credibility assessment. He did this twice: first when considering A.V.'s evidence about why she went into the trailer; second when discussing her call with her parents" (para. 20).

THE TRAILER COMMENT

A majority of the Court of Appeal indicated that the "implication in the trial judge's reasons is that consent can be inferred from the complainant's entry into the trailer. This is wrong in law" (paras 23-24):

> In the emphasized text above, the trial judge went beyond assessing credibility and made an inference about consent because he could not imagine another reason to enter the trailer other than to have consensual sex. It was open to the trial judge to hold that the complainant's inability to answer impacted her credibility, but he went further. In so doing, he relied on stereotypes and assumptions—that a woman would not enter a building at night with a man unless she wanted sex—to conclude that the complainant wanted to have sex.
>
> It may be that a person's reasons for entering a premise—whether a trailer or a hotel room—may have relevance to a credibility assessment. I recognize the subtlety. But stereotypical assumptions are often couched as credibility assessments. Significantly, this was not the trial judge's only use of stereotypical reasoning. His use of the evidence concerning the phone call significantly crosses the line into impermissible reasoning and compounds my concern about his use of the complainant's reasons for entering the trailer.

TELEPHONE CONVERSATION WITH HER FATHER

The majority indicated that these "comments emphasized above reflect the use of an impermissible assumption.… Here the trial judge specifically found that A.V.'s conversation with her father 'does not appear to be the response of someone who has just been sexually assaulted.' This is a classic example of an assumption made by a trial judge as to what a victim of an assault would do" (paras 30 and 33).

CONCURRING OPINION

Justice van Rensburg agreed that a new trial should be ordered, but concluded that:

> [T]he trial judge's treatment of the evidence about why A.V. and the respondent entered the trailer was a proper, and in the circumstances of this case necessary, part of his overall assessment of the evidence. The trailer was where the sexual contact took place and the evidence of A.V. and T.J. about what happened before, during, and after they entered the trailer was relevant to the issue of consent.…I therefore disagree with my colleague's conclusion that the trial judge invoked impermissible myths and stereotypes in his analysis to infer consent from A.V.'s entry into the trailer based on assumptions that a woman would not enter a building at night with a man unless she wanted sex (paras. 62 and 71).

These differing opinions at the Court of Appeal level illustrate that it can at times be difficult to distinguish between conclusions reached as a result of stereotypical reasoning as compared to conclusions reached based upon the application of common sense or human experience. How then can a trial judge adopt a correct approach?

WHAT IS THE PROPER APPROACH FOR TRIAL JUDGES?

I would suggest that the proper approach is for trial judges to ensure that their conclusions are "drawn from the evidence in the record, rather than an unsupported assumption or generalization about how an individual would be expected to behave" (*Greif*, para. 65). Thus, in *R. v. Quartey*, 2018 SCC 59, the Supreme Court of Canada, in rejecting an attack upon a trial judge's reasons, indicated that the trial judge did not "err by applying generalizations and stereotypes in rejecting the appellant's evidence. We agree with the majority at the Court of Appeal that the trial judge's statements in this regard were directed to the appellant's own evidence and to the believability of the appellant's claims about how he responded to the specific circumstances of this case, and not to some stereotypical understanding of how men in those circumstances would conduct themselves" (p. 1).

Similarly, in *R. v. Pastro*, 2021 BCCA 149, it was argued on appeal that the trial judge had engaged in stereotypical reasoning in concluding that the accused's evidence that the seventeen-year-old complainant had consented to sexual activity with him (he was forty-nine years of age) was "unbelievable" because of their differences in age. In upholding the conviction for sexual assault, the British Court of Appeal indicated that that the trial judge had not engaged in any stereotypical reasoning or "perceived universal truths about human behaviour" because there was a factual foundation for this finding: the complainant described the accused's sexual advances as "creepy" and "disgusting" (paras 66-67).

Professor Lisa Dufraimont, in a comment on *Pastro* (*see* Criminal Law E-Letter 319, National Judicial Institute, July 16, 2021) suggests that the Court of Appeal's reference to "perceived universal truths about human behaviour" indicates "that a trial judge would clearly be prohibited from reasoning that no 17-year-old

woman would ever be interested in sexual activity with a 49-year old man" (p. 17). Interestingly, Professor Dufraimont also points out what was left undecided in *Pastro* (pp. 17-18):

> What seems less clear in *Pastro* is whether a trial judge would be entitled to put any reliance on the proposition that sexual attentions directed at teenaged girls by middle-aged men are sometimes, even often, received as unwelcome and inappropriate. Arguably, this proposition could be a proper subject for judicial notice, in the sense that it might be accepted as true, based on human experience, by well-informed members of the community.…On the other hand, some passages in *Pastro* could be taken to suggest that trial judges are bound to confine their reasoning to factors specific to the immediate parties in the particular factual circumstances: see, for example, Fitch J.A.'s references to a "context-specific assessment" of the evidence of "this 17-year-old female" in the passage quoted above from *Pastro*, para. 67. Ultimately, it remains uncertain how much trial judges can rely on the lessons of human experience in drawing inferences from circumstantial evidence in sexual assault cases.

GUIDELINES

There are some general guidelines that can be suggested. First of all, these issues have been considered predominantly in sexual offence trials. Trial judges must therefore in such cases:

- avoid broad generalizations;
- refrain from conclusions based upon the expected behavior of sexual assault complainants, rather than the actions of the specific complainant;
- do not generally place any weight on delayed disclosure or lack of a complaint having been made to the police by the complainant;
- understand that the failure of the complainant to avoid the accused afterward is usually irrelevant;
- do not accept arguments based upon there having been an "implied consent";
- do not equate lack of physical resistance with consent (which in Canadian law is subjective);
- do not equate a lack of emotional reaction as an indication of consent;
- do not accept a consent argument based upon the complainant's sexual history or what he or she was wearing; and
- do not equate past consent to sexual activity as evidence of present consent.

CONCLUSION

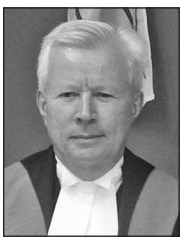
I use the words "generally" and "usually" purposely because there is often no bright-line rule that causes witness assessment based upon experience and common sense to stray into stereotypical reasoning.

As we have seen, this problem is particularly acute in Canada in sexual assault trials. However, trial judges can avoid prohibited lines of reasoning in such trials by avoiding basing credibility assessments based upon what we feel a complainant should or should not have done as compared to what they did. As pointed out in *Steele*, concerns arise "when the trier of fact draws inferences based on generalizations about human behaviour; it is in this process that drawing a common-sense inference may mask stereotypical or discriminatory reasoning" (para. 56).

The British Columbia Court of Appeal indicated in *Pastro* that trial judges must refrain from making findings of credibility based upon "a subjective assessment of what a hypothetical complainant or accused might reasonably be expected to do in the circumstances, but on what the evidence establishes the complainant and accused did or did not do in the context of the case being tried" (*see* para. 42). The Court of Appeal also indicated that trial judges "risk falling into reversible error if they make credibility determinations by relying on assumptions about the type of behaviour that would 'normally' be expected of a person without engaging with the evidence, including the context in which contentious events arose" This is "dangerous because it does not account for the unpredictable, surprising, and out of character ways in which human beings sometimes do behave" (*see* paras 43-45).

Thus, trial judges must acknowledge that their experience as to how people act is not always calibrated to assess how those who have been sexually assaulted might react. Professor Dufraimont points out that a trial judge must be careful not "to draw conclusions" from his or her personal experience "about what behaviours are 'commonplace' among victims of sexual abuse" (*see* Criminal Law E-Letter 316, National Judicial Institute, May 14, 2021, at p. 20).

One final comment. Written reasons are not yet required in sexual offence trials in Canada, but they can be an invaluable tool in avoiding stereotypical reasoning. It has been pointed out that nothing "better exposes any fallacies in your ideas than reading them in cold type" (*see* J.O. Wilson, *A Book for Judges*, Canadian Judicial Council, 1980, at p. 80). As Judge Posner has put it: "The judge by not writing, will be spared a painful confrontation with the inadequacy of the reasoning that supports his decision" (*see* Judge Richard Posner, *Judges Writing Styles (and Do They Matter)*, 62 U. CHI. L. REV. 1421, 1448 (1995)).



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up Is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges' Journal. *Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.*

Judicial education plays an important role in enhancing the professionalism of the judiciary and promoting the rule of law. This following list includes information about the International Organization for Judicial Training and judicial education providers in the United States.

INTERNATIONAL ORGANIZATION FOR JUDICIAL TRAINING
The International Organization for Judicial Training (IOJT) was established in 2002 in order to promote the rule of law by supporting the work of judicial education institutions around the world. The organization convenes biannual conferences hosted by judicial training centers of different countries. These conferences provide an opportunity for judges and judicial educators to discuss strategies for establishing and developing training centers, designing effective curricula, developing faculty capacity, and improving teaching methodology. The IOJT website includes links to materials from past conferences as well as its journal: Judicial Education and Training. http://www.iojt.org

FEDERAL JUDICIAL CENTER: EDUCATION AND RESEARCH FOR THE U.S. FEDERAL COURTS
An overview of the Federal Judicial Center, including its organization, history, and mission. For translated versions of this document, see Translated Briefing Materials under the Resources menu.
https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf

NATIONAL ASSOCIATION OF STATE JUDICIAL EDUCATORS
The National Association of State Judicial Educators (NASJE) is a non-profit organization that strives to improve the justice system through judicial branch education. http://nasje.org

NATIONAL JUDICIAL COLLEGE
The National Judicial College provides judicial education and professional development for judges within the United States as well as for judges from other countries. https://www.judges.org

NATIONAL CENTER FOR STATE COURTS
The mission of National Center for State Courts (NCSC) is to improve the administration of justice through leadership and service to state courts, and courts around the world. https://www.ncsc.org

THE JUDICIAL EDUCATION REFERENCE, INFORMATION AND TECHNICAL TRANSFER PROJECT
The Judicial Education Reference, Information and Technical Transfer (JERITT) Project is the national clearinghouse for information on continuing judicial branch education for judges and other judicial officers, administrators and managers, and judicial branch educators. This site includes links to judicial education centers serving the United States state court systems. https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf

COUNCIL FOR COURT EXCELLENCE
Working primarily in Washington, D.C., courts, the Council is attempting to create an accessible, fast-moving justice system. The Council for Court Excellence works to achieve this through education of the citizenry on the justice system and by advocating reforms. http://www.courtexcellence.org

NATIONAL CENTER FOR JUSTICE AND THE RULE OF LAW
Working through the University of Mississippi School of Law, the National Center for Justice and the Rule of Law attempts to ensure fairness in the U.S. criminal justice system. It uses projects, conferences, and education, and it produces publications that study the criminal justice system. It seeks to highlight issues of justice and rule of law and discuss methods to address related problems. https://olemiss.edu/depts/ncjrl/Administration/about_mission.html

THE FEDERAL JUDICIARY CHANNEL ON YOUTUBE
This link will bring you to streaming video productions developed by the Federal Judicial Center, the Administrative Office of the United States Courts, and the United States Sentencing Commission. The videos cover a range of topics including analysis of U.S. Supreme Court decisions, discussion of sentencing law, and information about the U.S. judiciary. https://www.youtube.com/user/uscourts?feature=watch

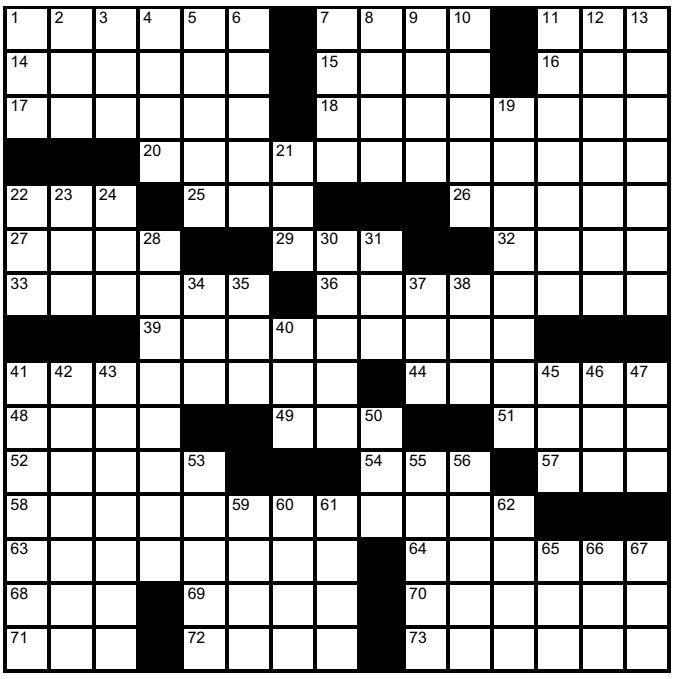
AMERICAN JUDGES ASSOCIATION: PROCEDURAL FAIRNESS INTERVIEWS

The American Judges Association (AJA) conducted interviews about procedural fairness with nine national leaders on issues involving judges and the courts. The interviews, done by Kansas Court of Appeals Judge and past AJA president Steve Leben, cover the elements of procedural fairness for courts and judges, how judges can improve fairness skills, and how the public reacts to courts and judges. The interviews were done in August 2014; job titles are shown as of the date of the interviews.

Visit http://proceduralfairnessguide.org/interviews/ to watch the interviews.

A COUPLE OF LEGAL TALES by Judge Vic Fleming © 2021

The subject of this puzzle's theme was created by British writer and barrister John Mortimer.



Across

1 Intentionally hits a golf ball short of the green
7 Alpha's follower
11 Hosp. area
14 With 20-Across, Hilda to Horace
15 Baghdad's nation
16 ___ Angeles
17 Singers Shore and Washington
18 Cadillac SUV
20 See 14-Across
22 Guitarist's booster
25 Pronoun for a boat
26 Bit of foolishness
27 Drift
29 Up to now
32 New Rochelle, New York, college
33 Divides evenly
36 James who wrote "Hawaii" and "Alaska"
39 Horace's portrayer
41 Open to being cured
44 Break loose
48 Coulter and Curry
49 Labor Day mo.
51 Texter's "carpe diem"
52 NBA Hall-of-Famer Thomas
54 Golden State sch.
57 Reagan aide Nofziger
58 With 70-Across, Horace ... and title of a classic BBC series
63 Having more Zoysia
64 Add bubbles to
68 Slippery fish
69 Golden retriever in David Rosenfelt's Andy Carpenter novels
70 See 58-Across
71 The Mormons, short
72 Egyptian deity
73 Old TV detective Remington

Down

1 One may trip on it
2 Tuna type, on menus
3 Asian capital?
4 Did the backstroke, e.g.
5 "For sure!"
6 Deputized group
7 Canadian singer Justin's nickname, with "the"
8 Gaelic language
9 Dish you might sprinkle cheese on
10 Gulf between Saudi Arabia and Egypt
11 ___ Moore (Lone Ranger portrayer)
12 Cough medicine ingredient
13 Auto buyer's option
19 Judge's compassion
21 "Don't give up!"
22 "___ Gratis Artis" (MGM motto)
23 Implement for floor- cleaning
24 Buddy
28 Jackson, Mississippi college
30 Roast host
31 "___ Tok"
34 Lipton product
35 Loudly weep
37 Dee preceder
38 Day's divs.
40 Realtor's initialism
41 Salon stylist's goo
42 Made certain
43 Lions and tigers
45 Email pioneer
46 Tissue layer
47 Near eternity
50 Sta-___ fabric softener
53 Garden plant with showy leaves
55 Guesses
56 Break the rules
59 "Gun Shy" actor Neeson
60 Architect Saarinen
61 Algeria's Gulf of ___
62 Pennsylvania port or lake
65 Pub draught
66 ___ Aviv
67 Hurricane center

Judge Fleming is a widely published cruciverbalist. Send questions and comments to judgevic@gmail.com.

Solution is on page 199.

The Resource Page

BOOKS FOR JUDGES

Prof. Vicki Lawrence MacDougall of Oklahoma assembled a stellar team of authors to create *Negligence: Purpose, Elements, and Evidence The Role of Foreseeability in the Law of Each State*. Foreseeability has, and always will be, a foundational concept in negligence law. However, the recent publication of the Restatement (Third) of Torts has brought the concept to the front lines of trial and appellate courtroom debates across the country. The new Restatement proposes the elimination of foreseeability from the duty and proximate cause analyses. This proposes results in a variety of analytical and practical problems in tort cases, creating a host of potential conflicts with law and precedent in most states that have followed the Restatement principles in the past. Under Prof. Lawrence MacDougall's skillful guidance, this group of authors minimize the impulse to pontificate and, instead, give the blackletter law of each state on the role of foreseeability—for those states already struggling with the issues raised by the new proposal and those states yet to face them. The book is well organized and gives an introductory primer of torts. The book also provides a good organization for the judge or lawyer wanting to know the foreseeability history in a particular state whether that be the state handling your case or the states to which your state often looks for guidance. If you handle civil cases, the foreseeability issue is coming to you in the near future. This book will provide you with the essential tools to tackle the challenge.

Prof. Shauna Shapiro of Santa Clara University focuses her research on mindfulness and mindfulness-based cognitive therapy. She is a popular speaker on the judicial conference circuit. Prof. Shapiro has an excellent book on mindfulness called *Good Morning, I Love You*. Prof. Shapiro acknowledges that the practice that gave her this title seemed hokey even to her, but she goes on to explain how she overcame her self-conscious discomfort with the practice to discover how it can really help individuals. If you are like me, the research on many mindfulness practices is persuasive but many of the trainings can have too much of a "butterflies and rainbows" with a dash of "crystals" to embrace. Prof. Shapiro embraces this aspect of mindfulness and is all the more persuasive and informative for doing so. If you are looking for a different angle on mindfulness that might work for you, consider Prof. Shapiro's work.

IMPLICIT BIAS RESOURCE

With support from the State Justice Institute and the National Center for State Courts, NCSC prepared an updated resource for the court community to summarize the current state of the continually maturing science on implicit bias as of March 2021. This report replaces NCSC's 2012 report, *Helping Courts Address Implicit Bias: Resources for Education.*

The Evolving Science on Implicit Bias: An Updated Resource for the State Court Community defines commonly used terms originating from the science of implicit bias; explains how the concept of implicit bias fits into broader conversations underway across the country about equity and fairness; and summarizes what is currently known from research in the psychological and brain sciences, including implicit bias interventions generally found to be effective and ineffective. This report concludes with some implications of this knowledge for state court leaders and other court practitioners who seek to better understand and address the reproduction and perpetuation of systemic biases through this lens.

The full report is available for download at https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911.

HOW ARE COURTS DOING?

Our old friends at the Institute for the Advancement of the American Legal System (IAALS) have been hard at work as usual to provide us with new insights and resources. Together with their partner The Hague Institute for Innovation of Law (HiiL), IAALS recently released their report "Justice Needs and Satisfaction in the United States of America 2021, Legal Problems in Daily Life." IAALS and HiiL launched a nationwide study on access to justice in the United States. They launched this study in 2019, just before the pandemic. Their study reveals that our traditional focus on those with low income as the heart of the access-to-justice problems in the United States is too narrow. The access-to-justice problem in the United States extends far beyond those of low income. In this report, IAALS and HiiL assess the legal needs across income levels. They conducted the first nationwide survey of such an ambitious scope. They present some startling results and provide data informed analysis of the issues. This is a must-read for anyone serious about understanding and addressing access-to-justice issues. You can access the report at https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf

LET'S KEEP TALKING

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Have comments or suggestions for ***Court Review?***

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PHOTOGRAPHERS!

LET'S SEE YOUR COURTHOUSE!

Court Review shows a courthouse on the cover of every issue. We welcome submissions from our members and readers, so please send a photo of your courthouse any time - we hope to use them all!

Image files must be of resolution and dimensions sufficient to print 9" x 12" at 300 dpi. Files may be saved in uncompressed JPG or TIF formats. Do not send large files by email, file transfer instructions and other technical information can be discussed by contacting us at:

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