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THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

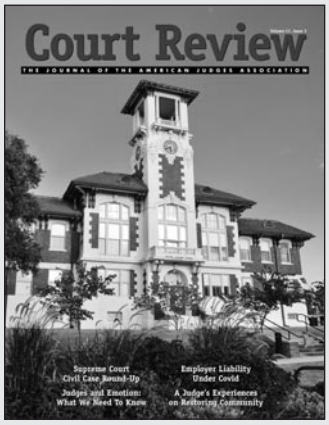
THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 57, Issue 3 2021

EDITOR'S NOTE

Greetings from the Editors of *Court Review*! We are all heading into the last quarter of yet another year of pandemic, and our courts surely feel the brunt of it all. As judges confront the everyday problems of ordinary Americans, the ongoing stress and management challenges are taking its toll. We are always committed to providing valuable content and information to help ease the burden. Congratulations to you for all the hard work amidst an uncertain time.

This issue presents the annual return of our U.S. Supreme Court review of notable civil cases from the 2020 Term ending last June 30. Thomas M. Fisher, Solicitor General of the State of Indiana, and four-time High Court contender, again adroitly outlines a challenging set of civil cases. We all benefit from this formidable round-up and discussion of our current legal landscape.



Have you ever wondered how you are managing your emotions on the bench? A trio of scholars—Sharyn Roach Anleu, Jennifer K. Elek, and Kathy Mack—delve into ABA Canons and real disciplinary cases to discuss data and judicial dos and don'ts in *Judging and Emotion Work*. Part of a project studying U.S. and Australian courts, they construct a unique approach of how judges should be aware of their emotions and be good judges. It allows for judges to have emotion, but to manage emotions skillfully. It is a valuable article for all jurists of any age or experience.

As the pandemic continues, the ramifications will continue to multiply. Among employers, the issues regarding worker safety, vaccine mandates, remote performance, and others are developing and unsettled. The problem for courts is acute considering their obligation to provide access to justice and jury trials and to manage employees. Heather R. Falks, an employment attorney and the ADA administrator for the Indiana Office of Court Administration, expertly tackles this conundrum in *Covid-19 Employer Liability Still Unknown*. It is required reading for all of us who hire, fire, and supervise court staff.

Sometimes we judges become too preoccupied with our everyday pressures and cannot appreciate what we can do outside the courtroom that is just as valuable. Judge George Nicholson believes his experience over a long judicial career has shown that judges are uniquely qualified to calm the storms of social division. In *A Judges's Experiences and Reflections on Restoring Community*, Judge Nicholson presents engaging accounts of judicial community work that has made a difference in tangible ways. Our leadership has improved society, as Judge Nicholson shows.

Finally, we always welcome Judge Wayne Gorman's regular column from the Canadian perspective. This issue completes his 2-part study of social media evidence. After reviewing Canadian common law last issue, Judge Gorman now shows us how the Canada Evidence Act impacts the admission of social media.

Thanks for reading *Court Review*.

—Judge David J. Dreyer

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 151 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, contact Sydney Rohnow at 757-259-1815 or srohnow@ncsc.org

On the cover: Originally constructed as City Hall in 1911 after the Great Fire of 1910 destroyed most of downtown Lake Charles, Louisiana, the building also served as City Court beginning in the 1940's until 1995. Court was held in the City Council Chambers. The Italian Renaissance style building is on the National Register of Historic Buildings. It is now used as an Arts and Cultural Center. Photo by Lindsey Janies. Photo generously provided by Judge John S. Hood in honor of his retirement. This was the first building in which Judge Hood served.

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President's Column

Peter Sferrazza

Dear AJA Members:

Due to the current situation in New Orleans, Louisiana, because of Hurricane Ida and the pandemic, it was determined it was not possible to host the Annual Conference there. Therefore, the Annual Conference will be held virtually on October 4-6, 2021, and be hosted by the National Center for State Courts, as our Secretariat, in Williamsburg, Virginia.

The General Assembly will convene on October 6, 2021, at 9 am CDT. The Board of Governors meeting will follow at 10 am CDT and the new Executive Committee meeting at 11 am CDT. All meetings and education sessions will be held virtually by Zoom. Notices with links to register, join the meetings, and the agenda for the conference will be found on the AJA website. Please note all times listed on the agenda are in Central Time. We apologize if this issue did not reach you in a timely manner.

Our 2022 midyear conference is scheduled for April 26-27, 2022 in Napa, California. Make sure you sign up early because when we originally scheduled this, the rooms were sold out within a short period of time.

Our 2022 annual conference is scheduled for August 28-31, 2022 in Philadelphia, Pennsylvania

The AJA has not been idle during the pandemic. We have produced a number of webinars, held virtual meetings, adopted a strategic plan, and continued to produce this magnificent *Court Review*, thanks to the hard work of our editors and editorial board.

The AJA hosted and recorded the Rx4 Webinar Series consisting of four 75-minute educational webinars for American Judges Association (AJA) members and other interested judges. Recordings of the webinars were preserved and are hosted on the AJA website. Simply click on any of the webinars on our home page, and there will be links to all.

The four topics were selected in acknowledgment of the challenges facing the state courts due to the pandemic, and social unrest related to systemic racial inequality.

Topic One: "Relief" refers to steps courts have taken to respond to suspension of in-person hearings and jury trials, and judges and staff working remotely.

Topic Two: "Recovery" refers to the legal challenges and constitutional issues courts will confront as they attempt to recover from delayed and backlogged cases and respond effectively to the invocation of speedy trial rights by criminal defendants, and other issues. The speaker for this topic was Dean Erwin Chemerinsky, University of California at Berkeley School of Law.

Topic Three: "Reform" refers to institutional and systemic changes that resulted from, and outlived, the immediate impact of the pandemic.

Topic Four: "Racial Justice and the State Courts." This webinar addressed the responsibility of judges and the state courts to take action to address persistent racial inequality, and the negative perceptions of the justice system among communities of color.

Another successful webinar was "The Role of the Judiciary in Preserving Our Constitutional Democracy" This webinar was cosponsored by the National Judicial College. It examined how dozens of judges fulfilled their obligation to rule impartially on the 2020 election challenges and what we as members of the judiciary can do to preserve judicial independence. Berkeley Law Dean Erwin Chemerinsky was our lead panelist. He discussed the cases that were considered by or appealed to the United States Supreme Court relative to the 2020 election.

National Judicial College President Benes Aldana moderated a panel of experts on the challenges filed in four key states.

Nevada Attorney General Aaron Ford, former majority leader of the Nevada State Senate, discussed the cases that were filed in the state of Nevada challenging the 2020 election results.

Professor Neil Kinkopf, former staff member for the U.S. Senate Judiciary committee, gave his perspective on the cases that were filed in the state of Georgia challenging the 2020 election results and the aftermath.

Retired Arizona Chief Justice Scott Bales shared his insight on the Arizona election challenges. Scott Bales served on the Arizona Supreme Court for fourteen years, including as Chief Justice from July 2014 until July 2019.

Attorney Mark Aronchick represented Pennsylvania governments in over 25 cases during the 2020 election cycle, in federal and state courts, at trials and appeals. He is the attorney who took on Rudy Giuliani, when he appeared post-election

AJA sponsored "Digital Evidence & The Evolving Court Record." This webinar examined how COVID transformed the way courts operate with virtual hearings and trials.

In addition, the Executive Committee has adopted a draft strategic plan. The AJA will continue developing this plan throughout the year with working groups, board participation, and further surveys of the membership. We are looking for volunteers to work on implementing the strategic plan. If you are interested, a copy of the draft strategic plan can be viewed on our website.

Thanks again for your continued support.

Civil Cases in the Supreme Court's October Term 2020

Thomas M. Fisher

The Supreme Court's October Term 2020 provided plenty of compelling storylines, principally the appointment of Justice Amy Coney Barrett to replace the late Justice Ruth Bader Ginsburg. Other noteworthy features included telephonic oral arguments (featuring regular participation by Justice Thomas) and high-profile use of the so-called shadow docket for injunctions and stays (most famously in cases seeking to undo presidential election results in various States—and arising post-Term in the challenged Texas abortion statute). With all that excitement, the focus shifted away from the Court's civil docket in argued cases (the subject of this column); indeed, the Court's decision at the end of the term to hear the abortion-rights case *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, seemed to overshadow the usual late June download of blockbuster decisions.

Nonetheless, the Term provided many civil case decisions well worth considering. The latest challenge by many States (including mine) to Obamacare fizzled, but still yielded an instructive discourse on the requirements for Article III standing, as did less noteworthy cases involving claims for nominal damages as a remedy for a free speech violation, and statutory damages as a remedy for being wrongfully identified as a terrorist by a credit-reporting agency. One of many cases pending around the country seeking to hold fossil-fuel companies liable for global climate change provided a decision on appellate jurisdiction sure to stoke the fires of appellate practitioners and professors (including me). Personal jurisdiction doctrine got a plaintiff-friendly refresh, while, from child slave labor to Nazi art theft, it was not a good term for those seeking a federal judicial forum for injuries abroad. In the separation-of-powers arena, the Court continued its recent trend of applying robust scrutiny to Congress's creative administrative schemes yet failed to provide much clarity as to appropriate remedies in such cases.

Religious liberties claimants had a positive Term, with one caveat. In one case, the Court confirmed that successful Religious Freedom Restoration Act plaintiffs may claim damages from individual defendants. In another, it held that a religious foster-care program may not be excluded from government placements just because it will not, for religious reasons, place children with same-sex couples. Still, the Court did not resolve in a more general way whether religious rights or marriage rights prevail when the two collide, and indeed the Court denied certiorari at the end of the Term in a case where it could have provided an answer.

In the free speech context, the Court sided with a student who challenged her school's discipline for off-color—but also off-campus—social media posts. It also sided with charities who feared harassment of supporters if required to disclose donors to the State of California in the name of enabling detection of fraud. And it affirmed Arizona's right to prohibit absentee-ballot harvesting and to require voters to cast ballots in the proper precinct.

The Term also featured a few property-rights cases. Here, the Court ruled against yet another California law, this time one that gave union organizers access to the property of nonconsenting employers for recruiting purposes. And it ruled in favor of a pipeline company that exercised federal eminent domain power against a State.

Finally, in perhaps the most significant case of the Term, the Court ruled that, yes, the NCAA is subject to the Sherman Act. The only NCAA rules directly affected were those prohibiting schools from competing as to educational benefits, but as Justice Kavanaugh's concurring opinion illustrates, the logic of the opinion would seem to apply much more broadly. What is valuable about amateur sports? The NCAA's need to answer that question in a convincing way may be the most compelling legacy of the Term.

ANTITRUST

NCAA'S LIMITS ON ATHLETE COMPENSATION VIOLATE SHERMAN ACT

Since its founding, a defining characteristic of the NCAA has been its opposition to compensation for student-athletes. Beginning in 1948, it created a system to expel schools who paid athletes beyond the terms of approved scholarships. For nearly as long, schools, athletes, coaches, broadcasters, and others have litigated in vain to invalidate various NCAA rules and policies through antitrust theories. This term, in *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021)[1], someone finally succeeded, at least with respect to limits on education-related compensation, such as scholarships for graduate school, payments for tutoring, in-kind benefits such as computers, awards for academic achievement, and money for post-graduate internships.

The issue before the Court in *NCAA* was whether the rules limiting such student-athlete compensation violated section 1 of the Sherman Antitrust Act, which broadly prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade." 15 U.S.C. § 1 (2018). The plaintiffs—current and former Division I athletes—challenged these rules, and the district court and Ninth Circuit—employing the "rule of reason" test applicable to all but

AUTHOR'S NOTE: Solicitor General, State of Indiana. The author would like to express gratitude to law students Rugang Feng (Harvard Law School), Michael Froedge (Indiana University Maurer School of Law), Ian Jongewaard (University of Iowa College of Law), Jack Robinson (Notre Dame Law School) and George Sorrells (Indiana University McKinney School of Law) who as law clerks in the Office of Attorney General assisted with initial drafts of these case summaries. Ultimately, however, the analysis (and any errors) are the author's alone.

Footnotes

1. Together with American Athletic Conference v. Alston, No. 20-520.

the most severely anti-competitive activities (such as price fixing and market allocation) that are "per se" invalid—held that the NCAA's education-related benefits rule unreasonably precluded non-salary compensation.

In the Supreme Court, the NCAA argued that its compensation rules should be subject to a less stringent test than the rule of reason, which entails a fact-specific assessment of the pro-competitive and anti-competitive effects of a challenged restraint. It argued that, because the anti-competitive effects of depressing athlete compensation was well established—in contrast with any pro-competitive effects of differentiating amateur and professional sports—the rule-of-reason standard was unfair. The NCAA argued that "abbreviated deferential review" would be more appropriate because it operates as a joint venture that plays a critical role in safeguarding amateur collegiate athletics (and all the social objectives that entails) rather than as a commercial enterprise.

In an opinion by Justice Gorsuch, the Court unanimously held that the rule of reason properly applied to the NCAA's compensation restrictions, which it described as "horizontal price fixing in a market where the defendants exercise monopoly control." It explained that, while joint ventures may get some leeway not available to unitary actors, that did not extend beyond the rules necessary for the joint venture to operate. Here, some rules—such as those defining the rules of the game—are clearly essential for the basic functioning of a sports league and may be deferentially reviewed. Limits on athlete compensation, however, do not fall within that cooperation-facilitating category. And while the NCAA may serve social objectives beyond commercial profit, such considerations are irrelevant under the Sherman Act, which merely permits courts to decide whether actions are anticompetitive, not whether they are on balance good for society. The Court therefore refused to confer "a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade" or "overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money . . . ." (In a striking marginalization of the well-known baseball antitrust exception, the majority opinion acknowledged that "this Court once dallied with something that looks a bit like an antitrust exemption for professional baseball," but just as quickly recounted the criticisms of that "something" with which it "dallied.")

Applying the rule of reason, the Court upheld the district court's determination that "substantially less restrictive means" existed for the NCAA to achieve its pro-competitive goal of differentiating amateur and professional sports for purposes of stimulating consumer demand. Here, part of the problem for the NCAA was that it had failed to adopt and maintain a consistent definition of amateurism over the years, and indeed did not seem ever to have defined it in terms of what might attract consumer demand. Indeed, the NCAA's evidence of how, if at all, a line between paid and unpaid athletes would meet demand for a supposed market for amateur sports (whatever that means) was relatively weak, as it consisted only of interviews with NCAA-connected witnesses selected by NCAA lawyers rather than expert analysis of standard consumer-demand measures. But at the very least, lifting restraints on education-related benefits would not confuse anyone wondering whether these athletes are amateurs or professionals. The NCAA worried that an unrestrained market for educational benefits such as paid internships, academic awards, and in-kind assistance would degenerate into sham arrangements for no-show jobs at car dealerships, payment for a minimum GPA, and fancy cars to get to class. But the Court stressed that, while schools must be free to compete in those areas, under the terms of the district court injunction the NCAA remains free to delineate limits as to what within those categories would be legitimately related to education.

" . . . while the NCAA may serve social objectives beyond commercial profit, such considerations are irrelevant under the Sherman Act . . ."

Justice Kavanaugh joined the Court's opinion *in toto*, but also wrote a separate concurring opinion expressing the view that the NCAA's restrictions on non-education-related compensation—which were not at issue in *Alston*—also raise serious antitrust concerns. As Justice Kavanaugh put it, "[u]nder the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification." In his view, for the NCAA to say that its product is college sports, which is defined by not paying the athletes, which in turn justifies restricting athlete compensation, is "circular and unpersuasive." More doctrinally, "a monopsony cannot launder its price-fixing of labor by calling it product definition." By way of comparison, "[a]ll of the restaurants in a region cannot come together to cut cooks' wages on the theory that 'customers prefer' to eat food from low-paid cooks." And don't get him started on comparisons to capping income for lawyers, nurses, journalists, and movie camera crews. In short, "[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate," and "[t]he NCAA is not above the law."

ARTICLE III STANDING

STATES LACK STANDING TO CHALLENGE ACA INDIVIDUAL MANDATE OWING TO CONGRESSIONAL REPEAL OF TAX PENALTY

California v. Texas, 141 S. Ct. 2104, 210 L. Ed. 2d 230 (2021), was the third major challenge to the Patient Protection and Affordable Care Act of 2010 to reach the Supreme Court, but it fared no better than the first two.[2] Stemming from the Act's "minimum essential insurance"—*i.e.*, individual mandate—requirement, Texas and its co-plaintiff States argued that the 2017 amendments zeroing out the financial penalty rendered the mandate invalid, along with the broader ACA itself through inseverability.[3] Without reaching the merits, the Court, in a majority opinion by Justice Breyer and joined by six others, rejected the States' standing owing to the absence of a "fairly traceable" injury to the "allegedly unlawful conduct." Justice Alito, joined by Justice Gorsuch, dissented.

2. *See National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519 (2012); *King* v. *Burwell*, 576 U. S. 473 (2015).

3. Full disclosure: The State of Indiana was a co-plaintiff in *California v. Texas*, though I did not play a significant role in the case.

" The State plaintiffs failed to establish standing on the basis of 'indirect' costs [due to] lack of traceability to unlawful actions of government officials . . ."

The individual mandate has always been one of the most controversial components of the ACA. Proponents hailed it as critical to the success of the ACA because it required even healthy people to stay in the market for insurance products and effectively subsidize premiums for the unhealthy. Opponents attacked it as a symbol of congressional overreach because, rather than regulate existing commerce, it forced many Americans to engage in commerce they would otherwise eschew. In *National Federation of Independent Business v. Sebelius*, the Court said that Congress lacks authority under the Commerce Clause to enact such a mandate, but the Chief Justice permitted it to remain in place on the theory that it constituted a permissible direct tax under Article I § 9. In the Chief Justice's view, one did not violate the individual mandate by failing to have health insurance; one violated it only by failing to pay the tax levied on those who fail to have health insurance.

In 2017, however, Congress set that tax at $0, seemingly negating the "tax" justification that held the individual mandate aloft. Led by Texas, a coalition of eighteen States challenged the individual mandate—and the entire ACA—anew, both citing the Court majority that rejected Commerce Clause authority for the mandate in *Sebelius* and invoking the federal government's claims in *Sebelius* that the individual mandate was central to the entire ACA financing scheme. Along the way, the Trump Administration refused to defend the ACA, so California and other States intervened as party defendants to take up the cause. Both the district court and the Fifth Circuit agreed with the plaintiff States, though the Fifth Circuit was unwilling yet to embrace a sweeping remedy of enjoining the entire ACA. It remanded the case for the district court to consider the possibility of a narrower remedy.

But in the Supreme Court, ultimately, the case foundered on Article III standing grounds. Plaintiff States had essentially argued two forms of injury: "indirect" costs from greater Medicaid enrollments owing to compliance with the individual mandate and "direct" costs from greater administrative burdens owing to the ACA more broadly. Two individuals who later joined the case argued that the payments required to comply with the individual mandate provided their injury.

The majority dispensed with the two individuals' standing arguments first. Without an injury "that is the result of a statute's actual or threatened enforcement" a plaintiff cannot satisfy the traceability requirement of standing. In the majority's view, the "Government's conduct in question" must be "'fairly traceable' to enforcement of the 'allegedly unlawful' provision of which the plaintiffs complain." Here, without the "tax," no government entity was responsible for enforcing the individual mandate (with no penalty to enforce, the IRS does not even monitor compliance). The majority held that "unenforceable statutory language alone is not sufficient to establish standing."

The State plaintiffs failed to establish standing on the basis of "indirect" costs for the same reason—lack of traceability to unlawful actions of government officials (since no officials enforced the mandate any longer). Moreover, because the costs the States alleged arose from the independent decisions of millions of residents to buy insurance, establishing traceability required showing those residents "will likely react in predictable ways," *i.e.*, that they will be prompted by the individual mandate—and not other reasons—to join Medicaid. On this point, the States showed only that the individual mandate prompted Medicaid enrollment while the tax was still in place; the State did not provide declarations showing enrollments owing to the individual mandate after the tax was repealed. As to the Plaintiff States' theory that they were injured by provisions of the ACA inextricably interwoven with the individual mandate (such as requirements to provide more coverage to more employees, to notify state health plan beneficiaries and the IRS of benefits information, and generally to cope with a web of rules and regulations), the Court deemed it fatal that such "other provisions . . . operate independently" of the individual mandate.

Justice Alito, joined by Justice Gorsuch, penned a thirty-two-page dissent. He found "plenty of evidence that [plaintiffs] incur substantial expenses in order to comply with obligations imposed by the ACA"—including benefit obligations, reporting obligations, and other administrative obligations—and would have checked the traceability box because "the provisions of the ACA that burden the States are inextricably linked to the individual mandate." Critically, he disputed the majority's articulation of the traceability standard—"'fairly traceable' to enforcement of the 'allegedly unlawful' provision of which the plaintiffs complain"—as a "flat-out misstatement of the law." The proper formulation, according to Justice Alito (quoting *Allen v. Wright*, 468 U.S. 737, 738 (1984)) is that the injury must be "'fairly traceable to the defendant's allegedly unlawful conduct.'" And here, Justice Alito explained, the States had alleged that the reporting requirement and other ACA requirements (principally the employer mandate) were unlawfully enforced because they are inseverable from the individual mandate, which is itself unlawful. Justice Alito complained that this theory of standing-by-inseverability went unanswered by the majority even though the plaintiff States had plainly preserved it.

Proceeding to the merits, Justice Alito would have ruled against the constitutionality of the individual mandate and declared it inseverable from the remainder of the ACA: "All the opinions in *NFIB* acknowledged the central role of the individual mandate's tax or penalty." On both counts, he sided with the plaintiffs agreeing with their central argument that the 2017 amendments setting the penalty to $0 slashed the "slender reed that supported the decision in *NFIB*" and rendered the mandate, and therefore the Act as a whole, unconstitutional. In Justice Alito's view, the critical question for severability "is not whether the ACA could operate in *some* way without the individual mandate but whether it could operate in anything like the manner Congress designed. The answer to that question is clear."

Justice Thomas, in response to Justice Alito, wrote a solo concurrence sympathizing with the view that the ACA had a "dubious history" in the Supreme Court but explaining that the Court did not "rescue[] the Act" this time and instead merely "adjudicat[ed] the particular claims plaintiffs chose to bring." He deemed the "standing-through-inseverability argument," while potentially persuasive, forfeited by plaintiffs' failure to articulate the theory below and before the Supreme Court—a claim that Justice Alito refutes in his dissent with citations to plaintiffs' multiple invoca-

tions of the argument at all levels. And while Justice Thomas still believes the Court got it wrong in its prior two Affordable Care Act decisions, "it does not err today."

NOMINAL DAMAGES CLAIM KEEPS CAMPUS SPEECH LAWSUIT ALIVE

Perhaps akin to the Plaintiff States in *California v. Texas,* civil rights plaintiffs challenging an unconstitutional policy sometimes have trouble maintaining standing if the defendant changes the policy. When injunctive relief is no longer necessary, and no real proof of economic damages exists, what justifies the involvement of courts? In *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 209 L. Ed. 2d 94 (2021), the Court held 8–1 (with the Chief Justice dissenting) that a plaintiff's request for nominal damages satisfies the redressability element necessary to confer Article III standing where a plaintiff's claim is based on a past, completed violation of a legal right.

Former students of Georgia Gwinnett College, a public university, shared evangelistic reading materials on campus grounds. In 2016, a campus police officer stopped Chike Uzuegbunam from sharing Christian literature, informing him that Gwinnett College's policies prohibited distribution of religious materials outside two campus "free speech expression areas"—and even there, speech required a permit. Uzuegbunam complied and secured the speech permit, but then another officer told him to stop speaking in the *authorized* zone and suggested that people had complained. Those complaints, the officer explained, meant that Uzuegbunam's speech violated another campus policy—one that prohibited expression of anything that "disturbs peace and/or comfort of person(s)." Again, Uzuegbunam complied, and one of his friends also stopped speaking about religion on campus because of the encounters with police.

Both Uzuegbunam and his friend sued, alleging that the college officials charged with enforcement of the speech policies violated the First Amendment and seeking both injunctive relief and nominal damages, but not compensatory damages. The officials initially defended their power to zone and license others' speech—arguing that "Uzuegbunam's discussion of his religion "arguably rose to the level of 'fighting words'"—but sensibly abandoned that position and "decided to get rid of the challenged policies." The officials moved to dismiss the case as moot, but the students, while now disclaiming injunctive relief, argued that their claim for nominal damages kept the case alive. The lower courts agreed with dismissal, with the Eleventh Circuit embracing the (seemingly) formalistic theory that nominal damages can save a case only as a substitute for claimed but unproven compensatory damages.

The Supreme Court reversed in a majority opinion by Justice Thomas that examined the common law underpinnings of nominal damages. The Court cited Lord Holt and Justice Joseph Story's expositions on nominal damages to derive the rule that a party whose rights are invaded can always recover nominal damages even if they cannot provide the evidence necessary to obtain compensatory damages—the better to afford nonpecuniary rights the same status as quantifiable economic rights. Moreover, the common law did not require a plea for compensatory damages for an award of nominal damages to qualify as redress: "Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages." And although a single dollar provides only a partial remedy, that is sufficient for the redressability requirement under the doctrine announced in *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992). That said, a mere request for nominal damages does not satisfy the injury and traceability components of standing—though both were met here. In short, defendants' enforcement of the challenged policies injured Uzuegbunam in his exercise of First Amendment rights, so he could pursue a claim against them for nominal damages.

" . . .the Court held . . . that a plaintiff's request for nominal damages satisfies the redressability element necessary to confer Article III standing . . ."

Alone in dissent, Chief Justice Roberts concluded that the purpose and reality of nominal damages does not assuage harms suffered by a plaintiff and therefore does not count as sufficient redress to satisfy Article III standing requirements. While he did not dispute the majority's description of common law decisions, he did caution that "[a]ny lessons that we learn from the common law, however, must be tempered by differences in constitutional design"—including the Founders' separation of executive and judicial functions. The Crown's ultimate sovereignty over all governmental powers, including the jurisdiction of courts—rejected by our own Constitution—yielded a system where common law courts would issue advisory opinions requested by the Crown. As the Chief Justice observed, "[w]e would not look to such practice for guidance today if a plaintiff came into court arguing that advisory opinions were in fact an appropriate form of Article III redress." Despite that intentional departure from common law practice, if, under the majority's view, "nominal damages can preserve a live controversy, then federal courts will be required to give advisory opinions whenever a plaintiff tacks on a request for a dollar." The Chief Justice rejected such expansion of judicial power as incompatible even with the view of the authority of *Marbury*: "As John Marshall emphasized during his one term in the House of Representatives, '[i]f the judicial power extended to every *question* under the constitution' . . . then '[t]he division of power [among the branches of Government] could exist no longer, and the other departments would be swallowed up by the judiciary.'" And while the majority expressed concern for valuing non-pecuniary rights the same as those having more readily quantifiable value, the Chief Justice declared that he "would place a higher value on Article III."

The Chief Justice criticized the majority's "sweeping exception to the case-or-controversy requirement," but also proposed his own responsive "sweeping exception": "Where a plaintiff asks only for a dollar, the defendant should be able to end the case by giving him a dollar, without the court need to pass on the merits of the plaintiff's claims." Citing precedential support and Rule 68(d), the Chief Justice suggested such an approach "may ultimately save federal courts from issuing reams of advisory opinions." Yet, that very possibility "also highlights the flimsiness of the Court's view of the separation of powers. The scope of our jurisdiction should not depend on whether the defendant decides to fork over a buck."

"Under Article III, an injury in law is not an injury in fact."

In concurrence, Justice Kavanaugh agreed with the Court's extensive treatment of the history and precedent on nominal damages but wrote separately to note that he agreed with the Chief Justice that a defendant should be able to accept the entry of a judgment for nominal damages against it and thereby end the litigation without a resolution of the merits.

Unmentioned in any of the opinions is the significance of the decision for modern-day attorneys' fee awards. The Chief Justice's dissent did contend that historically nominal damages could substitute for unproven compensatory damages as a trigger for awarding fees and costs—in a system where a damages award of some sort was a prerequisite for fee shifting. In that system, the parties would litigate a larger claim for both liability and compensatory damages, and the court would award nominal damages as a fee-shifting trigger where liability was proven but compensatory harm was not. But under 42 U.S.C. § 1988, the defendant in a § 1983 action must pay fees and costs to a "prevailing party," which requires not an award of damages but only a substantively favorable decision from a court. The Court's decision in *Uzuegbunam* would thus seem to permit otherwise moot cases (where attorneys' fees could not be awarded) to proceed for the *sole* purpose of using nominal damages to justify attorneys' fees. In this framing, a rule requiring a claim for compensatory damages demonstrates its substantive rationale—the lack of such a claim means the *whole* litigation is about attorney fees. That said, the Chief Justice's suggestion that a civil rights defendant can moot a nominal-damages claim by accepting entry of judgment may, if ultimately adopted by the Court, negate the use of nominal damages as a hook for fees under § 1988.

TO HAVE STANDING, FCRA CLASS MEMBERS MUST ALL PROVE CONCRETE INJURY, NOT MERELY A STATUTORY VIOLATION

Five years ago, in *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016), the Court held that Congress may not create a cause of action for statutory damages for a mere technical violation of federal law; instead, the plaintiff must suffer actual, concrete injury to satisfy Article III standing. This term, in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021), the Court further embraced the requirement that plaintiff class members show "concrete harm" to recover on a statutory claim in federal court.

After the September 11 attacks, TransUnion began to identify on its credit reports individuals—typically suspected terrorists, drug traffickers, and other serious criminals—who had been placed on a watchlist operated by the United States Treasury Department's Office of Foreign Assets Control (OFAC). But TransUnion's crude screening tool looked only for matching names without cross-checking birth dates or other identifiers to eliminate false positives. Consequently, TransUnion misidentified many law-abiding Americans as potential terrorists on their credit reports, leading to reputational harm and economic loss for many.

Sergio Ramirez was one of them. While finalizing a vehicle purchase at a Nissan dealership in Dublin, California, Ramirez was turned away because he was supposedly on a "terror list." Humiliated, he brought a class action suit under the Fair Credit Reporting Act (FCRA), alleging that TransUnion did not take reasonable care to ensure the accuracy of his report. He also alleged that TransUnion failed to provide his credit file information in the FCRA-required format upon request. The district court certified the class based on the existence of statutory injury among all class members. The jury awarded statutory damages of $984.22 per class member and punitive damages of $6353.08 per class member, for a total of $60 million. The Ninth Circuit later reduced the punitive damages to $3936.88 per class member, for a total of $40 million.

TransUnion appealed to the Supreme Court, arguing that many class members lacked standing. Of the 8,185 class members, who were all mistakenly flagged as potential matches, only 1,853—including Ramirez—shared their credit reports with lenders or other third-parties. The remaining 6,332, TransUnion argued, suffered no injury, had no Article III standing, and had to be excluded from the class.

The majority opinion, written by Justice Kavanaugh and joined by Chief Justice Roberts and Justices Alito, Gorsuch, Barrett, sided with TransUnion. It reaffirmed the holding of *Spokeo* that, even where a plaintiff asserts an injury defined by statute, Article III requires proof of "concrete" injury, *i.e.*, that is "real, and not abstract" and not a mere technical violation of a statute such as FCRA, even where the statute provides liquidated "statutory damages" as a remedial substitute for actual damages. Physical harm, financial loss, and traditional intangible harms such as reputational damage, disclosure of private information, intrusion upon seclusion, and constitutional harms (such as abridgement of free speech and religious free exercise) are paradigmatic concrete injuries that bear the required "'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." But harms for which Congress creates a cause of action do not necessarily satisfy that test: "Under Article III, an injury in law is not an injury in fact."

Here, class members that TransUnion mistakenly flagged as being on the OFAC watchlist and whose credit reports were disseminated, did suffer a traditionally recognized harm, namely injury akin to the common law tort of defamation. TransUnion rather feebly argued that even those class members were unharmed because their reports were merely "misleading" but not outright "false" because the reports identified the class members as a "potential match" with a name on the OFAC list. The Court was unimpressed: "The harm from being labeled a 'potential terrorist' bears a close relationship to the harm from being labeled a 'terrorist.'"

But class members whose affected credit reports were not disclosed to third parties suffered no traditional concrete harm even though Congress deemed them to be victims of statutory harm. Back to the common law, "[p]ublication 'is essential to liability' for defamation," and these class members did not suffer the harm from publication. Indeed, said the Court, "[i]f those plaintiffs prevailed in this case, many of them would first learn that they were 'injured' when they received a check compensating them for their supposed 'injury.'" And while the Court expressly did not address whether present emotional suffering from a risk of future harm could confer standing (as plaintiffs had not pursued that theory), it generally rejected the theory that *risk* of future harm suffices for Article III standing now. In the end, "[n]o concrete harm, no standing." Accordingly, the Court reversed the judgment and remanded the case for new proceedings, presumably to narrow the class and re-litigate appropriate relief. (Perhaps, in light of

Uzuegbunam above, plaintiffs will amend their complaint and seek nominal damages.)

Justice Thomas, joined by the three liberal justices, dissented on the grounds that plaintiffs seeking to recover for violations of "private rights" (*e.g.*, trespass to land) need not show concrete harm, though a plaintiff asserting violations of public rights (*e.g.,* overgrazing public lands) would. Here, all class members asserted violations of private rights, namely, the failure to follow reasonable procedures in maintaining accurate credit files of individuals. In the dissent's view, the "injury-in-fact" requirement was created as an additional way to get into federal court if one's statutory rights were not implicated in a case; it was not designed to be the touchstone for *all* Article III standing inquiries: "Never before has this Court declared that legal injury is *inherently* insufficient to support standing." Justice Thomas also accused the majority of "reworking" *Spokeo* as to the sufficiency of risk of future harm. While the majority read *Spokeo* to mean that risk of harm may only justify injunctive relief, and only if sufficiently imminent, the dissent pointed out that the Court in *Spokeo* remanded for consideration whether risk of future harm was sufficient to meet the concreteness requirement. Ultimately, the dissent accused the majority of weakening the separation of powers: If Congress made a right against inaccurate credit reports, individuals must be able to vindicate that right.

Justice Kagan, joined by the two other liberal justices, wrote a separate dissent. While Justice Thomas thought private-rights plaintiffs need not prove concrete injury, Justice Kagan concluded that Congress—not the courts—is better suited to decide what suffices for concrete injury. In her view, as the Court trims Congress's power to create statutory torts actionable in federal court, it "transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement."

FEDERAL APPELLATE JURISDICTION

JURISDICTION TO REVIEW DISTRICT COURT'S REJECTION OF FEDERAL OFFICER OR CIVIL RIGHTS REMOVAL EXTENDS TO ALL GROUNDS REJECTED BY THE REMAND ORDER

In *American Electric Power v. Connecticut*, 564 U.S. 410 (2011), the Supreme Court ruled that state and local governments could not use federal common-law public-nuisance claims to extract relief from utilities for global climate change. The entire apparatus of congressionally authorized environmental regulation, the Court ruled, displaced any such common law claims. But that ruling has not stopped state and local governments from suing large corporations they deem responsible for climate change—now fossil fuel companies rather than utilities. In the past six years, cities and States have launched nearly a dozen different lawsuits in state courts across the nation pressing purportedly *state* (rather than federal) common-law public-nuisance theories, among other claims. Industry defendants, in turn, have removed those cases to federal court on a variety of grounds, including federal officer involvement, implicit federal questions, the outer Continental Shelf Lands Act, admiralty jurisdiction, and bankruptcy. Some federal district courts have rejected all grounds for removal, and a federal statute, 28 U.S.C. § 1447(d) generally restricts federal appellate jurisdiction over such rulings but permits appellate review of federal officer removals (and removals under the civil-rights-removal statute). But what about where a party removes to federal court on multiple grounds, one of which is appealable, but most of which are not? This term, in a public-nuisance climate-change case, *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 209 L. Ed. 2d 631 (2021), the Supreme Court held by a vote of 7-1, with Justice Sotomayor dissenting and Justice Alito recused, that a court of appeals may consider all grounds for removal if at least one provides a basis for appellate jurisdiction.[4]

" . . . the Supreme Court ruled that state and local governments could not use federal common law public nuisance claims to extract relief from utilities for global climate change."

Three years ago, Baltimore's mayor and city council filed suit in Maryland state court against various energy companies for promoting fossil fuels while purportedly concealing their environmental impact. The city alleged a number of state-law causes of action, including public nuisance and failure-to-warn claims, among others, and seeking damages for corresponding injuries it claims to have suffered as a consequence of global climate change. The defendants removed the case to federal court, invoking various grounds mentioned above. The district court, however, rejected all theories of federal jurisdiction justifying removal.

Critically, one basis for removal rejected by the district court was 28 U.S.C. §1442(a)(1), which provides a federal forum for any action against an "officer (or any person acting under that officer) of the United States or of an agency thereof, in an official or individual capacity, for or relating to any act under color of such office." Defendants had alleged that some of their challenged exploration, drilling, and production operations were conducted under the direction of federal officials. And 28 U.S.C. § 1447(d) provides that while remands orders are generally not appealable, "an order remanding a case to the state court from which it was removed pursuant to section 1442 [federal-officer removal] or 1443 [civil-rights removal] of this title shall be reviewable by appeal or otherwise." Accordingly, the companies' assertion of federal-officer removal was at least enough to initiate an appeal under § 1447(d).

In the Fourth Circuit, the City challenged the proper *scope* of the appeal, arguing that § 1447(d) authorized the court to review only the federal officer removal theory and no others. The Fourth Circuit agreed and refused to consider any basis for removal other than federal officer removal. The Supreme Court reversed and held that § 1447(d) permits appellate review of the *entire* remand order when a defendant appeals rejection of a federal-officer removal.

4. The State of Indiana filed a multistate amicus brief supporting Petitioners (the fossil-fuel companies) on which I served as counsel of record.

"The Court held that specific jurisdiction exists over claims that sufficiently 'relate to' a defendant's forum contacts, even even is the absence of a causal link."

In a majority opinion written by Justice Gorsuch, the Court first took cognizance of the plain statutory text of §1447(d), which refers to appeal of "an order," not merely of a basis for removal. So while the text of §1447(d) requires a "case . . . removed pursuant to section 1442 or 1443," that qualification does not preclude appellate consideration of the district court's entire order and the potential various theories that might underlie a defendant's bases for removal. Additionally, § 1447(d) does not require that § 1442 or § 1443 be the *sole* basis for removal. It requires only that the defendants' notice of removal must have asserted § 1442 (federal officer) or § 1443 (civil rights) as a basis for removal. "Once that happened," said Justice Gorsuch, "the whole" of the order remanding the case "became reviewable on appeal." Indeed, the Court's precedents, principally *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), confirm that, when a federal statute permits review of a court "order" that review may include any matter fairly included in that "order." In response to the City's consequentialist argument that the Court's interpretation of §1447(d) would yield litigation gamesmanship by allowing defendants to add frivolous §1442 or §1443 grounds to their removals, the Court was satisfied that ordinary sanctions would provide a sufficient deterrent and said its task "is to discern and apply the law's plain meaning as faithfully as we can, [and] not 'to assess the consequences of each approach and adopt the one that produces the least mischief.'" *Lewis v. Chicago*, 560 U.S. 205, 217 (2010).

In dissent, Justice Sotomayor worried that the Court's interpretation allows defendants to "sidestep §1447(d)'s bar on appellate review by shoehorning a §1442 or §1443 argument into their case for removal." In her view, interpreting §1447(d) to allow appellate review of federal-officer (or civil-rights) removal grounds alone would accord with "Congress's longstanding policy of not permitting interruption of the litigation of the merits of a removed case" while still permitting appellate review of the two grounds Congress carved out for special treatment. She found the possibility of sanctions for frivolous uses of federal officer and civil rights removal grounds insufficient. "While sanctions may help ward off egregious misconduct," she said, "they are no fail safe."

Shortly after deciding the *BP* case, the Court had the opportunity to take another of these blockbuster climate-change cases presenting the question whether a public-nuisance climate-change claim must be treated as a federal claim, but the Court declined to do so. *Chevron Corp. v. City of Oakland*, 2021 WL 2405350 (2021) (mem.). So, now it remains with the various circuit courts to determine whether implicit federal question jurisdiction or other grounds for removal are valid. Whether via *BP* or another case, an entire cluster of issues surrounding the climate-change cases seems destined to return to the Court before long.

PERSONAL JURISDICTION

IN AN AUTOMOBILE PRODUCT LIABILITY SUIT, SPECIFIC JURISDICTION EXISTS WHERE DEFENDANT'S FORUM CONTACTS "RELATE TO" THE ASSERTED INJURY EVEN IF THOSE CONTACTS DID NOT CAUSE THE INJURY

For many lawyers, the subject of personal jurisdiction evokes fond memories of satisfying law school naps amidst mind-numbing lectures over forum contacts. For others, discussing the difference between general and specific jurisdiction excites the spirit and stirs the soul in contemplation of the true limits of a sovereign's judicial authority. For my part, I get hunger pangs pondering chopper rides to buy Whoppers® and onion rings.[5] Whatever your personal jurisdiction fantasy, this Term in *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 209 L. Ed. 2d 225 (2021),[6] the Court added to 1L case books by addressing the relationship necessary between forum contacts and injury to satisfy due process.

Recall that, in *International Shoe Co. v. Washington International Shoe Co.*, 326 U.S. 310 (1945), the Court held that a state court may exercise personal jurisdiction over an out-of-state defendant having "minimum contacts" with the forum State where exercising jurisdiction would comport with "traditional notions of fair play and substantial justice." The result has been the familiar alternatives of general ("home state") jurisdiction and specific ("arising out of") jurisdiction. In *Ford Motor Co.*, the Court considered whether specific jurisdiction existed over a product-liability claim stemming from an automobile accident in the forum State (where the victim resided) even though the assertedly defective automobile was designed, manufactured, and sold elsewhere.

In a unanimous decision, the Court held it did. Ford, which is incorporated in Delaware and headquartered in Michigan, did substantial business in the forum State of Montana, including advertising, selling, and servicing the allegedly defective vehicle model (though not the specific car at issue). Those intentional contacts with the forum State, it turns out, were sufficient to satisfy due process, even though they did not give rise to the accident in question. A five-justice majority opinion written by Justice Kagan rejected Ford's argument that the forum contacts must stand in a causal relationship to the asserted injury for specific jurisdiction to exist. The Court held that specific jurisdiction exists over claims that sufficiently "relate to" a defendant's forum contacts, even in the absence of a causal link. Here, the "related to" standard was satisfied because Ford had cultivated a market in the forum State for the models of cars at issue: Ford advertised and marketed its vehicles in the forum State and worked hard to foster ongoing connections to its cars' owners.

Justices Alito and Gorsuch authored concurring opinions questioning the majority's "relate to" standard. Justice Alito argued that the Court need not focus on the words "relate to" as an independent basis for specific jurisdiction, and that doing so "risks needless complications." And Justice Gorsuch, joined by Justice Thomas, elaborated on the "needless complications" referenced by Justice Alito, noting that a causal link would likely "be easy to

5. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), and Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

6. Consolidated with Ford Motor Company v. Montana Eighth Judicial District Court, No. 19-368.

prove." Justice Barrett took no part in the consideration or decision of the case.

U.S. JUDICIAL FORUM FOR INJURIES ABROAD

ALIEN TORT STATUTE: NO U.S. FORUM TO ADJUDICATE LIABILITY FOR INJURIES ABROAD ABSENT RELATED U.S. CONTACTS—GENERAL CORPORATE ACTIVITY IS INSUFFICIENT

Can federal courts provide appropriate forums to sue domestic corporations for aiding and abetting child trafficking and slavery on the theory that major operational decisions enabling those injuries occurred in the United States? In *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 210 L. Ed. 2d 207 (2021),[7] an eight-Justice majority of the Court said no and thereby limited application of the Alien Tort Statute (ATS) to domestic conduct that directly causes injuries abroad. The majority, however, splintered into several competing viewpoints on the scope of the statute. Justice Thomas wrote the only opinion (actually, portions of an opinion) that garnered majority support. Separate groupings of conservative and liberal Justices filed concurring opinions. Justice Alito dissented.

Originally enacted as part of the Judiciary Act of 1789, the Alien Tort Statute provides federal courts with the jurisdiction to hear the claims of "an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. §1350. Over the past two decades, the Court has held that the ATS does not itself create causes of action, *Sosa v. Alvarez-Machain*, 542 U. S. 692, 724 (2004), does not apply to extraterritorial conduct, *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013), and does not authorize new common-law causes of action against foreign corporations, *Jesner v. Arab Bank, PLC*, 584 U.S. __ (2018).

Here, the plaintiffs were several individuals from Mali who worked on Ivory Coast cocoa farms as child slaves. They sued several firms, including U.S. corporations Nestlé and Cargill, for enabling their enslavement via "technical and financial resources" the companies provided the farms in exchange for the exclusive right to purchase cocoa. They alleged that the corporations "knew or should have known" the source of the farms' workforce and yet failed to exercise their "financial leverage" over the farms to stop them from using child slaves. The District Court dismissed the suit, finding that the corporate conduct that allegedly upheld the conditions on the cocoa farms occurred entirely outside of the United States and defendants' domestic "general corporate activity" did not implicate the ATS. The Ninth Circuit reversed and said ATS permits federal jurisdiction over corporate "financing decisions . . . originating" domestically that allegedly cause injury abroad.

The Court, however, rejected the lawsuit as an "improper[] . . . extraterritorial application of the ATS." It confirmed that "a plaintiff does not plead facts sufficient to support domestic application of the ATS simply by alleging 'mere corporate presence' of a defendant," and held that "[p]leading general corporate activity is no better." Here, the specific conduct that allegedly abetted forced labor, *i.e.*, "providing training, fertilizer, tools and case to overseas farms" happened abroad, not in the United States. And while plaintiffs alleged that relevant "decisionmaking" occurred in the United States, such allegations of "general corporate activity" are insufficient to turn an alleged extraterritorial tort into a domestic one.

From here, the points of agreement between the Justices fractured, with no less than five different coalitions musing about the scope of the ATS.

"Can federal courts provide appropriate forums to sue domestic corporations for aiding and abetting child trafficking and slavery? . . . the Court said no . . ."

First, Part III of Justice Thomas's lead opinion (joined by Justices Gorsuch and Kavanaugh), said that allowing the plaintiffs' suit to proceed would effectively create an additional cause of action under the ATS—a "job which belongs to Congress, not the Federal Judiciary." In Justice Thomas's view, "[a]liens harmed by a violation of international law must rely on legislative and executive remedies, not judicial remedies, unless provided with an independent cause of action, only one of which—the Torture Victim Protection Act of 1991 (inapplicable here)—has been enacted in over two centuries. Relying on *Sosa*, Justice Thomas said that judicial authority to recognize remedies is limited to three historical torts relating to safe conducts, ambassadorial rights, and piracy. The limited capacity of federal courts to create new international torts was only reinforced by the holding in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), denying federal general common law. And relying on *Jesner*, Justice Thomas concluded that the potential impact on foreign relations of recognizing a new tort in this circumstance negates any remaining judicial discretion, particularly because the Department of Labor itself was involved in a partnership supplying the sorts of assistance to Ivory Coast farms that defendants in this case supplied.

Second, Justice Gorsuch wrote a concurring opinion stating in Part I (joined only by Justice Alito) that "[n]othing in the [text of the] ATS supplies corporations with special protections against suit" and in Part II (joined only by Justice Kavanaugh) that the Court should reject any authority to create new torts under ATS and thereby "clarify where accountability lies when a new cause of action is either created or refused: With the people's elected representatives."

Third, Justice Sotomayor submitted a concurring opinion, joined in full by Justices Breyer and Kagan, arguing that the Court should, contra Justice Gorsuch, embrace authority for judicial remedies "to ensure that federal courts are available to foreign citizens who suffer international law violations for which other nations may expect the United States to provide a forum for redress." She criticized Part III of Justice Thomas's opinion for threatening to overrule *Sosa* "in all but name" because it limits creation of new torts to the three traditional categories of international law (safe conduct, ambassadorial rights, and piracy). Justice Sotomayor would include within that sweep a broader class of "law of nation torts," including against "torturers, slave traders, and perpetrators of genocide," who constitute (quoting *Sosa*) the "'enemy of all mankind.'"

7. Consolidated with Cargill v. Doe I, No. 19-453.

". . . a property dispute between a state and its own nationals falls under the 'domestic takings rule' and is not within the scope of intrernational law . . ."

Finally, Justice Alito dissented alone. The "primary question" to him was "whether domestic corporations are immune from liability under the Alien Tort Statute." Justices Gorsuch and Sotomayor endorsed this framing as well—and commented that Justice Thomas's opinion never answers that question. (The cert petitions did not phrase a question in terms of immunity, but rather asked (in *Nestle*) whether courts have authority under ATS to impose liability on domestic corporations and (in *Cargill*) whether a domestic corporation is subject to liability under the ATS.) As evidenced by his participation in Justice Gorsuch's concurrence on the historical relationship between individual and corporate defendants following from the text of the statute, Justice Alito answers the question "no." And because he does not think the questions answered by Justice Thomas's opinion and Part II of Justice Gorsuch's opinion were fairly presented at this stage of the litigation, he would merely remand the cases for further proceedings. That said, Justice Alito allowed that Part III of Justice Thomas's opinion and Part II of Justice Gorsuch's opinion "make strong arguments that federal courts should never recognize new claims under the ATS."

FOREIGN SOVEREIGN IMMUNITIES ACT: NO U.S. FORUM TO ADJUDICATE NAZI ART THEFT BECAUSE A COUNTRY'S TAKING OF ITS OWN NATIONALS' PROPERTY IS NOT A TAKING "IN VIOLATION OF INTERNATIONAL LAW"

The lawsuit over Nazi art theft met the same fate as the one over abetting child slave labor—no federal judicial forum—at least under the principal theory advanced by the plaintiffs, *i.e.,* that the theft amounted to an act of genocide given its context. In *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021), the Court, in a unanimous opinion by Chief Justice Roberts, held that an exception to the Foreign Sovereign Immunities Act (FSIA) that permits federal courts to exercise jurisdiction over foreign states for acts undertaken "in violation of international law" did not apply where the foreign state takes the property of its own nationals. Whether the claims ultimately find a home in U.S. courts under the theory that the plaintiffs were not German nationals at the time of the taking will be decided on remand.

At stake is the rightful ownership of pieces of the Guelphe Treasure (referred to in the opinion by its German name Welfenschatz), a centuries-old collection of medieval relics "occupy[ing] a unique position in German history and culture" purchased by a consortium of German Jewish art dealers toward the end of the Weimar Republic. In 1935, allegedly under political persecution and physical threats and at an unfair two-thirds discount, the consortium transferred the relics to Hermann Goering, at that point Prime Minister of Prussia and Hitler's deputy (and later, of course, Reichsmarschall). The descendants of the art dealers, two U.S. citizens and a citizen of the United Kingdom, pressed demands for compensation before a German commission specializing in resolving Nazi-era property claims. The commission, however, found that the sale of the relics had occurred without duress and for a fair price. Undeterred, the descendants took their case to federal court in Washington, D.C., arguing they were owed compensation by the German State.

In suing a foreign state in federal court, the plaintiffs had to find a way around the FSIA, a 1976 law establishing rules for litigation against foreign states in federal courts. As its title suggests, the Foreign Sovereign Immunities Act "creates a baseline presumption of immunity from suit." FSIA immunity does not apply, however, to actions that violate international law. The question in *Philipps* was whether the allegedly coerced sales qualified for that exception because they fit the category of actions in furtherance of genocide, or whether instead German immunity remained intact because the sales are governed by the international law of expropriation, under which "a sovereign's taking of its own nationals' property is not unlawful." The district court sided with the descendants on the grounds that Germany took possession of property under "an act of genocide," and the D.C. Circuit agreed because "genocide perpetrated by a state even against its own nationals is a violation of international law." Judge Katsas, however dissented from denial of rehearing en banc out of concern that permitting what amounts to a domestic takings claim to be heard in U.S. courts as a genocide claim would turn federal courts into war-crimes tribunals.

The Supreme Court reversed. In the unanimous majority opinion, Chief Justice Roberts observed that "international law customarily concerns relations among states, not between states and individuals." Accordingly, a property dispute between a state and its own nationals falls under the "domestic takings rule" and is not within the proper scope of international law because no clash of state interests occurs. Furthermore, the rationales underlying the domestic takings rule were well understood when the FSIA was enacted. After the Supreme Court refused to adjudicate claims arising from Cuba's nationalization of American sugar interests in 1960, Congress amended the Foreign Assistance Act of 1964 to "permit adjudications of claims . . . against other countries for expropriation of American-owned property" that occurred "in violation of the principles of international law." Critically, "nothing in the Amendment purported to alter any rule of international law, including the domestic takings rule," and courts applied it accordingly. A little over a decade later, Congress used nearly identical language in the FSIA, and courts have reached a "consensus" that a country expropriating property from its own nationals does not constitute a violation of international law.

Even so, the heirs argued that the forced sale of Jewish property was an act of genocide (and therefore a violation of international law) "because the confiscation of property was one of the conditions the Third Reich inflicted on the Jewish population to bring about their destruction." The Court was unmoved (legally, at least): "We need not decide whether the sale of the consortium's property was an act of genocide, because the expropriation exception is best read as referencing the international law of expropriation rather than of human rights." Indeed, even as international law has taken greater cognizance of how states interact with their own citizens, "[t]he domestic takings rule endured," as human rights declarations have been silent on property rights.

Part of the Court's concern was the sheer breadth of the sovereign immunity exception the heirs advocated. It would authorize a U.S. judicial forum for a wide array of property claims otherwise barred by sovereign immunity for violations of human rights law,

not merely claims for property taken as part of genocide. And because the FSIA includes separate exceptions for specific human rights abuses (such as torture and death), it would be unreasonable to infer an even larger exception where plaintiffs can use property loss as a hook to litigate more general human rights violations.

The Court also remarked that "we would be surprised—and might even initiate reciprocal actions—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago." The concern for reciprocal legal treatment by another sovereign underlies the entire opinion. The Court suggests that when interpreting "statutes affecting international relations," courts should "avoid, where possible, producing friction in our relations with other nations." As a final limit to the international ripples of this case, the Court reiterated the point from *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108, 115 (2013) and *Microsoft Corp. v. AT&T Corp.*, 550 U. S. 437, 454 (2007), that "United States law governs domestically but does not rule the world."

SEPARATION OF POWERS AND ADMINISTRATIVE LAW

FOR-CAUSE RESTRICTION ON PRESIDENTIAL POWER TO REMOVE HEAD OF FEDERAL HOUSING FINANCE AGENCY DEEMED UNLAWFUL

In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the Court struck down the for-cause restriction on the removal of the single director of the Consumer Financial Protection Bureau. The decision threw into doubt the constitutionality of similarly structured independent agencies headed by a single director. It also raised questions about remedy in such situations, including whether actions taken by a director whose tenure is unlawfully protected by a for-cause removal statute are void *ab initio*. In *Collins v. Yellen*, 141 S. Ct. 1761, 210 L. Ed. 2d 432 (2021), a case concerning another single-director independent agency created amidst the financial crisis, the Court ruled 8-1 that improper removal restrictions did not automatically void a director's official acts.

In 2008, Congress established the Federal Housing Finance Agency to stabilize the mortgage industry. The new agency placed Fannie Mac and Freddie Mae—large U.S. mortgage loan companies that had suffered massive losses—into conservatorship, infusing them with $100 billion in exchange for preferred shares and fixed-rate dividends. In essence, the companies traded much of their market value and profits for government financial support. Before long, notwithstanding the bailout, Fannie and Freddie were losing so much money that they were using their Treasury draws just to pay their Treasury dividend obligations—a circular operation that prevented the secondary housing market from benefiting from the federal government's infusion of capital. Accordingly, in 2012 FHFA and Treasury used rulemaking to amend the terms of the bailout, changing the previous fixed-rate dividend formula tied to the size of Treasury's investment into a variable-rate formula tied to the companies' net worth. Under that amendment, Fannie and Freddie would pay *only* quarterly surpluses (above a specified reserve) to Treasury as dividends. If they lost money, no dividends would be owed.

When the companies' financial condition improved, and they started generating surpluses, Fannie and Freddie paid treasury about $124 billion more under the variable rate formula than they would have under the fixed rate formula—much to the chagrin of shareholders. The shareholders sued, alleging that (1) FHFA and Treasury did not have authority to amend the dividend formula and (2) FHFA is unconstitutional because the President may fire the director only for cause. In a majority opinion penned by Justice Alito, the Supreme Court upheld 9-0 FHFA's amendment of the dividend formula but invalidated 6-3 (with Justices Sotomayor, Kagan, and Breyer dissenting) the for-cause removal restriction, rejecting any distinction with the pre-*Seila* CFPB.

". . . the Court ruled 8-1 that improper removal restrictions did not automatically void a director's offical acts."

The Court upheld FHFA's amendment of the dividend formula as a legitimate exercise of its statutory power to act "in the best interests of the regulated entity or the agency." 12 U.S.C. § 4617(b)(2)(J)(ii). Critically, while the variable rate dividend formula may not have been in the best interests of Fannie and Freddie (because it forced disgorgement of all surpluses as dividends to Treasury), it represented a path to rehabilitation designed to ensure their continued support for the secondary mortgage market. Because the amendment ended the bailout/dividend circle, it freed up capital to back housing loans, to the benefit of the agency, *i.e.*, the public. Accordingly, it fell within FHFA's regulatory authority.

As to the for-cause removal restrictions—which the Trump administration refused to defend, resulting in the appointment of amicus to do so—the majority read *Seila Law* to mean that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." *Collins*, slip op. at 31. With the for-cause removal restriction here being identical to that invalidated in *Seila Law*, it is no surprise that the Court followed suit by invalidating this one as well. Court-appointed amicus argued that FHFA was distinguishable from CFPB because it administered fewer statutes and regulated fewer entities, but the Court said that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head." The critical issue is the President's ability to control the agency and, in effect, keep it subject to political accountability, no matter its size.

The most constitutionally significant issue in this case arose in the context of the remedy: Where the claim is for past financial losses under the leadership of an unremovable agency head, what, if anything, is the plaintiff entitled to? This issue was left open by *Seila Law*, where the Court remanded for the lower courts to determine whether a civil investigative demand had been ratified by an acting director removable at will by the President. Here, a new dividend agreement had already displaced the one that allegedly caused the shareholders injury, so the remedy had to focus on past injury, not, as on remand in *Seila Law,* ongoing regulation. The critical question: When an agency acts for a lengthy but finite period under the leadership of an executive who, in contravention of the Constitution, is not removable at the President's discretion, what are the legal consequences? And here, given the amount of money Fannie and Freddie turned over to Treasury as dividends under the amended formula, the answer could carry a substantial price tag. Indeed, if the implication is

". . . a mere misunderstanding by the Director or President about the permissible grounds for removal . . . does not render the Director's actions unlawful."

that everything an unremovable agency head undertakes might potentially have to be unwound, the consequences could be quite dramatic indeed.

The shareholders argued that because the FHFA director was subject to unconstitutional removal restrictions, his actions were void *ab initio*. The Court instead ruled 8-1 (with Justice Gorsuch the lone holdout) that the invalid removal restriction was severable and did not render appointment of the director improper. First, the dividend formula amendment was adopted by an *acting* director who was indeed removable at will. Second, while a confirmed director (not removable at will) carried out the amended dividend formula, the challenge here is not to *appointment* but to the terms of *removal*. Accordingly, to establish that the actions of a duly confirmed director in carrying out the dividend formula amendment were void, the plaintiffs would need to show that the removal restriction itself affected the 2012 amendment—for example by showing that the President had attempted to remove the director but had been prevented from doing so by the for-cause removal restriction. Accordingly, the Court did not grant the shareholders' request for relief—vacatur of the dividend formula amendment and refund of the alleged overpayment—and instead remanded the case for further consideration whether the shareholders could show that the President had attempted to remove the director but been stymied by the for-cause removal protections.

Justice Thomas wrote a concurring opinion to set forth his view that that "[t]he Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract." He identified and rejected (for reasons provided by the majority in other aspects of its discussion) four theories of unlawfulness in this case: (1) "the removal restriction renders all Agency actions void because the Directors serve in violation of the Constitution's structural provisions, similar to Appointments Clause cases . . ."; (2) the removal restriction "somehow taints all of the Director's actions"; (3) the removal restriction creates insufficiently meaningful presidential oversight, which means the Director exercises power that was never really his; and (4) the statutory authority for the dividend amendment must fall with the removal restriction. First, the separation-of-powers and Appointments Clause cases focused on inappropriate exercise of executive authority by non-executive officers or improper appointment—which was never an issue with the Director, who all agreed was an executive officer properly appointed by the President and confirmed by the Senate. Second, the mere existence of the unlawful removal restraint does not taint the Director's otherwise lawful actions absent some scenario where a Director purported to take action despite a President's attempted removal. Third, a mere misunderstanding by the Director or the President about the permissible grounds for removal—resulting in theoretically deficient Presidential oversight—does not render the Director's actions unlawful. And fourth, given the lack of an *inseverability* clause, it does not make sense to infer that the invalidity of the removal statute renders the conservatorship statute invalid as well. Justice Thomas urged the Fifth Circuit to consider on remand whether the lack of any persuasive theory of unlawfulness is a barrier to remedy for the plaintiffs.

Justice Kagan (joined by Justice Breyer and joined in part by Justice Sotomayor) wrote a separate opinion concurring in part and concurring in the judgement in part stressing that she disagrees with *Seila Law* yet thinks it controls on *stare decisis* grounds, but also thinks the majority improperly stretched it here. She also said that the Court's decision on remedy ameliorates the negative effects of what, in her view, is erroneous constitutional doctrine. Justice Sotomayor (joined by Justice Breyer) wrote an opinion concurring in part and dissenting in part arguing that *Seila Law* did not require invalidation of the removal restraints here.

Justice Gorsuch wrote a separate concurring opinion to stress his view that on remand the lower courts, rather than inquire whether the removal restriction caused the shareholders injury, should merely address whether traditional defenses such as laches apply. The Appointments Clause precedents cited by the majority, he said, mean that the unconstitutional removal restriction deprived the Directors of constitutional authority such that their actions implementing the dividend amendment should be set aside as *ultra vires*. Indeed, said Justice Gorsuch, "removal restrictions may be a greater constitutional evil than appointment defects" since Presidents inherit thousands of Executive Branch officials they may need to fire for sake of policy. For good measure, Justice Gorsuch laments that "the only lesson I can divine is that the Court's opinion today is a product of its unique context—a retreat prompted by the prospect that affording a more traditional remedy here could mean unwinding or disgorging hundreds of millions of dollars that have already changed hands." Bear that in mind if ever someone challenges the independence of the Federal Reserve Board of Governors.

PATENT ADMINISTRATIVE JUDGE INVALIDLY APPOINTED TO BE FINAL EXECUTIVE BRANCH ARBITERS OF "INTER PARTES" REVIEW PROCEEDINGS

Lack of accountability to the President doomed yet another imaginative administrative scheme in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 210 L. Ed. 2d 268 (2021).[8] Five Justices, led by the Chief Justice's majority opinion, agreed that Congress violates the Constitution when it endows inferior officers with "unreviewable authority." Seven Justices agreed that ensuring that senior officers may exercise direct control over the decision-making process happening beneath them would be a sufficient remedy.

Arthrex, Inc. makes medical devices and develops procedures for orthoscopic surgeries. Via the relatively new process of inter partes review (which permits anyone to initiate a proceeding to cancel a previously issued patent), Arthrex went before the Patent Trial and Appeal Board (PTAB), an "executive adjudicatory body" (if that is not an oxymoron) within the Patent and Trademark Office (PTO). A panel of three administrative patent judges (APJs), appointed by the Secretary of Commerce ostensibly as "inferior officers" of the United States, heard the matter. Critically, such a proceeding is "the last stop for review within the Executive

8. Consolidated with *Smith & Nephew, Inc., v. Arthrex, Inc.*, No. 19-1452, and *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 19-1458.

Branch," meaning that neither the PTO Director nor the Secretary of Commerce—who *are* appointed by the President and confirmed by the Senate—has authority to review the PTAB's ruling.

Arthrex lost, meaning that the PTAB panel cancelled its patent—a decision that was not subject to further review within the Executive Branch. On petition for judicial review in the Federal Circuit, Arthrex argued that the authority wielded by the APJs who sit on the PTAB violates the Appointments Clause because they are functionally "principal officers" of the United States yet had been appointed by the Secretary of Commerce rather than nominated by the President and confirmed by the Senate. The Federal Circuit sided with Arthrex and attempted to fix the issue by removing the tenure protection of the APJs—allowing them to be removed at will by the Secretary—which the Federal Circuit believed would "prospectively 'render[] them inferior rather than principal officers." As the Chief Justice put it, "[t]his satisfied no one."

The Chief Justice, joined by Justices Alito, Gorsuch, Kavanaugh, and Barrett in Parts I & II of his opinion, wrote that the APJs' exercise of "unreviewable authority" was "incompatible with their appointment by the Secretary of Commerce to an inferior office." APJs' "significant authority" to determine the "public rights of private parties" brought into play the question whether they were subject to the Appointments Clause. Only principal officers, appointed in accordance with the Appointments Clause, can render a final decision for the Executive Branch—*i.e.*, a decision not subject to further review within the Executive Branch—on important questions. The decisions of inferior officers, in contrast, must be subject to review by a superior executive officer, and, ultimately, by a principal. Here, the Secretary of Commerce's authority to remove APJs did not provide the necessary oversight over any particular decision of the APJs. And the availability of review by Article III courts does not satisfy the need for *Executive Branch* supervision. So, the system for appointing APJs violates the Appointments Clause.

Part III of the Chief Justice's opinion, joined only by Justices Alito, Kavanaugh, and Barrett, addressed the proper remedy for this Appointments Clause violation. At issue is the severability of the "repugnant" portions of the statute outlining the current review process of the PTO. Although "Arthrex asks us to hold the entire regime of inter partes review unconstitutional," in the Chief Justice's view, the Court's "governing principles chart a clear course: Decisions by APJs must be subject to review by the Director." Accordingly, "a limited remand to the Director [of the PTO] provides an adequate opportunity for review by a principal officer." In other words, the Chief Justice would sever from the remainder of the inter partes review statute those portions of the statute that make the APJs' decisions unreviewable by the Director.

Justice Gorsuch, who joined the majority opinion in Parts I & II, dissented as to the appropriate remedy. In his view, the reviewability statue is not the only culprit. Rather, "[i]t's the combination of these provisions—the exercise of executive power and unreviewability—that violates the Constitution's separation of powers." Accordingly, severing the reviewability statute was not the only solution—or the correct one. Other options included forcing PTAB panel members to be appointed by the President and confirmed by the Senate, or invalidating the cancellation power itself and reassigning it to the judiciary (where it formerly resided). But choosing among these options is not a matter of statutory construction, it is a matter of policy that must be left to Congress. "Faced with an unconstitutional combination of statutory instructions," he wrote, "the Court chooses to act as if the provision limiting the Director's ability to review [inter partes review] decisions doesn't exist." Then, "the Court gifts the Director a new power that he never before enjoyed, a power Congress expressly withheld from him and gave to someone else—the power to cancel patents through the IPR process." The proper course, therefore, was to "simply decline[] to enforce the statute in the case or controversy at hand," *i.e.*, to "set aside" the PTAB decision and leave further solutions to Congress.

"Only principal officers, appointed in accordance with the Appointments Clause, can render a final decision for the Executive Branch . . ."

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented as to the constitutionality of the APJs and their status as inferior officers, but agreed with (and provided the winning votes for) the severability analysis and the remedial approach in Part III of the Chief Justice's opinion. The only substantive opinion he offered, however, was on the merits, where, in addition to joining Justice Thomas's dissent (summarized below), Justice Breyer's opinion added two points. First, "the Court should interpret the Appointments Clause as granting Congress a degree of leeway to establish and empower federal offices." This amounts to disagreement with the majority's holding that decision reviewability separates inferior from superior officers. In Justice Breyer's view, the Director's authority to exercise ancillary forms of control—assignment of cases, issuance of regulations and guidance, etc.—constitutes sufficient supervision.

Second, Justice Breyer advocated for a "functional examination of the offices and duties in question rather than a formalist, judicial-rules-based approach." The problem with the majority's formalism, in his view, is that "the Executive Branch has many different constituent bodies, many different bureaus, many different agencies, many different tasks, many different kinds of employees." Courts must appreciate that "[a]dministration comes in many different shapes and sizes" especially "in the context of administrative adjudication, which typically demands decision-making (at least where policy made by others is simply applied) that is free of political influence." Hearkening back to cases such as *Wiener v. United States*, 357 U. S. 349 (1958), and *Mistretta v. United States*, 488 U. S. 361, 409 (1989) (with an incidental cite along the way to *Humphrey's Executor v. United States*, 295 U. S. 602, 629 (1935)), he would have the Court consider and weigh Congress's objectives with a particular bureaucratic scheme along with the potential consequences. Here that would mean deferring to Congress's desire to secure APJ decisional independence and understanding that the Director can provide guidance at the policy level even without the power of case-by-case review.

Justice Thomas dissented on all fronts. In his view, "[n]either our precedent nor the original understanding of the Appointments Clause requires Senate confirmation of officers inferior to not one, but *two* officers below the President," *i.e.* the PTO Director and the Secretary of Commerce. And while he certainly did not embrace Justice Breyer's full-throated Wilsonian apologia for the modern administrative state, he did remark on the Director's "greater functional power over the Board" compared with princi-

". . . the Court ruled 8-0 that . . . [the Religious Freedom Restoration Act] authorizes recovery of monetary relief from government officials sued in their personal capacities."

pal officers in cases where the Court upheld the level of supervision over inferior officers. He relied in particular on the Director's expansive power to appoint APJs to specific cases and to direct rehearing by judges he selects of panel decisions he disagrees with. Quoting *Edmond* v. *United States*, 520 U. S. 651, 665 (1997), Justice Thomas concluded that "this broad oversight ensures that administrative patent judges 'have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.'" Justice Thomas also criticized the majority's effort to treat inferior and superior officers as if they have two separate spheres of power: "Nowhere does the Constitution acknowledge any such thing as 'inferior-officer power' or 'principal-officer power.'"

Justice Thomas also offered the interesting observation that the majority refused to settle on the constitutional problem it was purporting to fix. The case was pled as an Appointments Clause problem, as if superior officers had been improperly hired without presidential nomination and Senate confirmation. Yet, says Justice Thomas, the Court "never expressly tells us whether administrative patent judges are inferior officers or principal. And the Court never tells us whether the appointment process complies with the Constitution." Indeed, he says, "[t]he closest the Court comes is to say that 'the source of the constitutional violation' is *not* 'the appointment of [administrative patent judges] by the Secretary.'" Perhaps the real issue is the Vesting Clause, *i.e.*, that the process vests executive power elsewhere besides the President in a scheme that does not ultimately report to the President. Thomas doubts that is an issue, but even if it were, "Senate confirmation of an administrative patent judge would offer no fix" because it would only further remove appointment authority from the President. Besides, "historical practice establishes that the vesting of executive power in the President did not require that every patent decision be appealable to a principal officer," and "[i]f no statutory path to appeal to an executive principal officer existed then, I see no constitutional reason why such a path must exist now."

As to remedy, Justice Thomas criticizes the Court for transferring final reviewing authority from the Board to the Director, which "underscores that it is ambivalent about the idea of administrative patent judges *actually* being principal officers." That is, if the Court took seriously the idea that the judges were principal officers improperly appointed, the precedents dictate that the proper remedy must be vacatur of the Board's decision and remand for a new hearing before properly appointed judges. And if the problem is merely the Director's lack of review authority, no predicate for a constitutional violation exists because the Director never "wrongfully declined to rehear the Board's decision" (which is the remedy ordered by the majority). Justice Thomas therefore doubts the Court's authority to issue a remedy—and supplies this zinger: "Perhaps the majority thinks Arthrex should receive some kind of bounty for raising an Appointments Clause challenge and *almost* identifying a constitutional violation. But the Constitution allows us to award judgments, not participation trophies."

RELIGIOUS FREEDOM

RFRA PERMITS MONETARY RELIEF

The federal Religious Freedom Restoration Act (RFRA) prohibits the government from imposing substantial burdens on religious exercise unless it uses the least restrictive means to advance a compelling interest. In *Tanzin v. Tanvir*, 141 S. Ct. 486, 208 L. Ed. 2d 295 (2020), the Supreme Court ruled 8-0 (Justice Barrett recused) that, for violations of that legal protection, RFRA authorizes recovery of monetary relief from government officials sued in their personal capacities.

Muhammad Tanvir, Jameel Algibah, and Naveed Shinwari are three Muslim men who claimed that the FBI placed them on the No Fly List because they refused to inform on their religious communities. They sued FBI agents in the defendants' *official* capacities for an injunction to remove their names from the No Fly List and in their *personal* capacities for money damages. The men claimed that their wrongful inclusion on the No Fly List caused lost income and lost airline tickets. A year after they filed suit, the Department of Homeland Security removed them from the No Fly List, thereby mooting the injunction claim. The district court dismissed the damages claim upon concluding that RFRA does not permit such relief.

In permitting the damages claims, the Court's opinion, written by Justice Thomas, began with RFRA's text, which provides that persons whose exercise of religion has been unlawfully burdened may "obtain appropriate relief against a government." §2000bb-1(c). The United States argued that personal-capacity lawsuits are not "against a government" because damages are recoverable only from the individual's assets, not the government's. The Court explained that the "problem with this otherwise plausible argument is that Congress supplanted the ordinary meaning of 'government' with a different, express definition." *Id.*

Specifically, RFRA defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." §2000bb-2(1). The term "official," the Court said, includes not only the office itself, but also (quoting the OED) "to the actual person 'who is invested with an office.'" Further, "[t]he right to obtain relief against 'a person' cannot be squared with the Government's reading that relief must always run against the United States." *Id.* "In other words," said the Court, "the parenthetical clarifies that "a government" includes both individuals who are officials acting under color of law *and* other, additional individuals who are nonofficials acting under color of law." That understanding is also reasonable because Congress borrowed the "persons acting under color of law" phrasing from Section 1983, which permits personal-capacity claims. In summary, "a suit against an official in his personal capacity is a suit against a person acting under color of law. And a suit against a person acting under color of law is a suit against 'a government," as defined under RFRA. §2000bb-1(c).

Turning to whether "appropriate relief" means damages, the Court said that such "open-ended" text is inherently context dependent. Critically, Congress intended RFRA to restore both the free-exercise rights that existed before *Employment Division v. Smith*, 494 U.S. 872 (1990), and the remedies that were available

to redress injuries to such rights, which, under § 1983, included personal-capacity damages. "Given that RFRA reinstated pre-*Smith* protections and rights, parties suing under RFRA must have at least the same avenues for relief against officials that they would have had before *Smith*. That means RFRA provides, as one avenue for relief, a right to seek damages against Government employees." Furthermore, "[a] damages remedy . . . is also the *only* form of relief that can remedy some RFRA violations," such as lost plain tickets and lost income. From this context, the Court found it fair to presume that, had Congress meant to exclude damages from the term "appropriate relief," it would have done so explicitly.

That said, damages may not be available in every personal-capacity case where a RFRA plaintiff can prove monetary loss—qualified immunity may play a role. The Court noted toward the end of the opinion that all parties agreed that government officials are entitled to assert a qualified immunity defense where the alleged violation was not "clearly established." Yet the very author of the majority opinion, Justice Thomas, has forcefully criticized qualified immunity as a court-made defense in § 1983 cases—the very statute whose remedies were a model for RFRA. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring). And to be sure, the *Tanzin* footnote recounting the parties' positions on qualified immunity does not itself endorse the theory.

CITY MAY NOT EXCLUDE ARCHDIOCESE FROM FOSTER CARE PROGRAM JUST BECAUSE IT OPPOSES SAME-SEX MARRIAGE

In his opinion for the Court in *Obergefell v. Hodges,* 576 U. S. 644, 679 (2015), Justice Kennedy promised that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." Yet the co-existence of the right of same-sex marriage with the rights of those morally opposed to it has been tested multiple times, with no clear resolution. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. __ (2018), the Court ruled that Colorado officials unconstitutionally targeted the religious exercise of Jack Phillips when they prosecuted him for refusing to bake same-sex-wedding cakes, but its decision was highly fact-intensive and avoided pronouncing a general rule for such cases. One of the central questions is whether anti-discrimination laws are either (1) religion-neutral laws of general applicability entitled to rational-basis review under *Employment Division v. Smith,* 494 U.S. 872, 878–82 (1990), or (2) if heightened scrutiny applies, a sufficiently narrowly tailored means of advancing a compelling interest. The drama increases as *Smith* itself hangs by a thread—most Justices seem inclined to overturn it in the appropriate case. These dynamics converged this term in *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021), where the Court came to a surprisingly *unanimous* conclusion (albeit via two separate groupings of Justices, those who wanted to overturn *Smith* and those who wanted to avoid doing so here): The Free Exercise Clause protects the right of Catholic Social Services (CSS) to provide foster care services to the City of Philadelphia without agreeing to certify same-sex couples as foster parents.

The Catholic Church has historically played a critical role in meeting the needs of children in Philadelphia over the past two centuries. As Philadelphia itself acknowledged, CSS has "long been a point of light in the City's foster-care system." The City's Department of Human Services executes standard annual contracts with state-licensed private agencies to place foster children with families certified by the private agencies according to statutory criteria. When the Department seeks to place a child, it sends contracted agencies a "referral" and then picks the most suitable available family. Throughout the process, the private agencies continue to support the foster families they certify.

"The Free Exercise Clause protects the right of Catholic Social Services to provide foster care . . . without agreeing to certify same-sex couples as foster parents."

CSS's religious views inform its foster-care work. CSS maintains the longstanding Catholic belief that, as an institution created by God, "marriage is a sacred bond between a man and a woman." Accordingly, CSS will not certify unmarried couples—regardless of sexual orientation—or same-sex married couples—though no same-sex couples have ever sought certification from CSS. CSS will, however, certify gays and lesbians as single foster parents and place children with them. If a same-sex couple sought certification, CSS would "direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples." Yet when a newspaper exposé deduced the implications of the Diocesan position on marriage for the CSS foster-care certification process, the Philadelphia Commission on Human Relations launched an inquiry and the City ultimately refused to contract with CSS unless it agreed to certify same-sex married couples. The City later claimed that CSS's refusal to certify same-sex married couples violated both (1) the agency's contract with the City and (2) the citywide Fair Practices Ordinance.

CSS and three foster parents certified by the agency brought free-exercise and free-speech claims but had no luck in the lower courts—the Third Circuit held that the standard-form contract terms banning discrimination constituted a neutral and generally applicable policy under *Smith*. CSS and the foster parents asked the Supreme Court to apply heightened scrutiny either because the City's policy was not generally applicable or because *Smith* should be overruled.

The Court ruled for CSS, but reprieved *Smith* for another day. Chief Justice Roberts, joined by Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett, issued a majority opinion holding that "[t]his case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable." Citing *Smith* (which in turn quotes *Bowen v. Roy*, 476 U.S. 693, 708 (1986)), the Court observed that "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing '"a mechanism for individualized exemptions."' Here, the non-discrimination condition in the City's standard foster care contract was not generally applicable because its non-discrimination provision permits exceptions at the "sole discretion" of the Commissioner. Said the Court, "[n]o matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions . . . renders the contractual non-discrimination requirement not generally applicable." The operative question, moreover, is not whether the City has

". . . the Court refused to 'set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech . . . or how ordinary First Amendment standards must give way . . .'"

a compelling interest in enforcing its non-discrimination policies generally, but whether it has a compelling interest in denying an exception to CSS while making exceptions available to other agencies. The City had none.

The Court dodged the Free Exercise question surrounding Philadelphia's Fair Practices Ordinance—which forbids sexual-orientation discrimination in "public accommodations"—by concluding the ordinance did not apply. As the Chief Justice observed, "[c]ertification is not 'made available to the public' in the usual sense of the words," because "[i]t involves a customized and selective assessment that bears little resemblance of staying in a hotel, eating in a restaurant, or riding a bus." Because certification constitutes a private, case-by-case process, it is not a *public* accommodation, and the ordinance was irrelevant, despite the City's attempt to use it to justify excluding CSS from the foster care program.

Justice Barrett filed a three-paragraph concurring opinion, joined by Justice Kavanaugh and (except as to the first paragraph) Justice Breyer, implying that *Smith* is ripe for reconsideration, but agreeing that this is not the case for doing so. While Justice Barrett finds the historical record "more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws," she sees robust "textual and structural arguments" for overturning *Smith*. Still, she is wary of "swapping *Smith's* categorical antidiscrimination approach for an equally categorical strict scrutiny regime." She ultimately provided no definitive answer to whether *Smith* should be overruled or, if so, what should replace it, but her concurrence sets forth important terms for debate in future cases where *Smith* is in the crosshairs.

Justice Alito filed an extensive, detailed concurring opinion, joined by Justices Thomas and Gorsuch, even more forcefully condemning *Smith*. Justice Alito examined the "startling consequences" flowing from *Smith*; the substantial body of precedent created by its predecessor doctrine; the ordinary public meaning of the Free Exercise Clause in 1791; and the multifactor test for overruling precedent. According to Justice Alito, *Smith* should be replaced with the test announced in *Sherbert v. Verner*, 374 U.S. 398 (1963): "A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest." Justice Alito criticized the Court for avoiding this fundamental question: "After receiving more than 2,500 pages of briefing and after more than a half-year of post-argument cogitation, the Court has emitted a wisp of a decision that leaves religious liberty in confused and vulnerable state." He sharply concluded: "Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I."

Finally, Justice Gorsuch filed an opinion concurring in the judgment, in which Justice Thomas and Alito joined. Like Justice Alito, Justice Gorsuch criticized the majority for its "circumnavigation" of the core question of whether *Smith* should be overruled. In his view, the Court improperly reframed the case in a way no party or amicus had suggested just to avoid the *Smith* question, particularly via "an uncharitably broad reading (really a revision) of" the Philadelphia ordinance. Justice Gorsuch cautioned that failing to revisit *Smith* will only increase the already-high stakes in cases over the rights of those with moral objections to same-sex marriage, including in the (continuing) litigation against Colorado Christian baker Jack Phillips in the recurring *Masterpiece Cakeshop* saga. Justice Gorsuch stressed that "[t]hese cases will keep coming until the Court musters the fortitude to supply an answer."

Notably, two weeks after issuing the decision in *Fulton*, the Court denied certiorari in *Arlene's Flowers, Inc. v. Washington*, No. 19-333, 2021 WL 2742795 (U.S. July 2, 2021), another case by a wedding vendor with religious objections to same-sex marriage where the Court could reconsider *Smith.* Justices Thomas, Alito and Gorsuch voted to grant the petition.

FREE SPEECH AND ELECTIONS

THE LONG ARM OF SCHOOL DISCIPLINE DOES NOT ALWAYS REACH SOCIAL MEDIA

Social media ultimately makes fools of us all—the First Amendment pretty much guarantees it. At the end of freshman year, B.L., a student at a public high school in Pennsylvania, tried out for varsity cheerleading and a private softball team. She made neither, but was offered a spot on the junior varsity cheerleader squad while a classmate made the varsity team. Her frustrated response on Snapchat from her hangout at the local convenience store: A photo of B.L. and a friend, middle fingers extended, bearing the caption, "Fuck school fuck softball fuck cheer fuck everything." Her school was not amused. It suspended B.L. from the junior varsity cheerleading team. In *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 210 L. Ed. 2d 403 (2021), the Court, by a vote of 8-1, held that the First Amendment protected B.L.'s social media outburst.

Justice Breyer, writing for majority, began by confirming that schools may sometimes regulate off-campus student speech. In cases such as "severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers," schools maintain legitimate regulatory interests even though they occur off campus. Still the Court refused to "set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community." The Court did, however, "offer three features of off-campus speech" that may distinguish off-campus from on-campus speech and figure in the somewhat narrower authority to regulate off-campus. First, a school rarely acts *in loco parentis* when a student engages in off-campus speech. Second, the ability to regulate off-campus speech would effectively include all student speech, so courts should be more

skeptical of efforts to regulate it. Third, as "nurseries of democracy," public schools have "an interest in protecting a student's unpopular expression."

Here, "the special interests offered by the school are not sufficient to overcome B.L.'s interest in free expression." She was merely criticizing the team, its coaches, and the school. Her particular words, while vulgar, "did not involve features that would place it outside the First Amendment's ordinary protection." That is, they were not "fighting words" or obscenity—no worse than "Fuck the draft." *See Cohen* v. *California*, 403 U. S. 15, 19–20 (1971). And she expressed herself after school, off campus, on her own phone, to her Snapchat friends (at least one of whom betrayed her to the larger school community). In Justice Breyer's view, she did not "target any member of the school community with vulgar or abusive language." Furthermore, the school had no real interest in preventing substantial disruption (the standard under *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969)). At most, some cheerleaders were upset and students spent a few minutes discussing it in algebra class. A general concern for student (or cheerleader) morale was insufficient. Indeed, the school's only real interest was in teaching good manners, but that did not apply unless the school stands in the role of *in loco parentis,* "[a]nd there is no reason to believe B. L.'s parents had delegated to school officials their own control of B. L.'s behavior" while she was at the Cocoa Hut convenience store. And while B.L.'s words were perhaps needlessly coarse, "sometimes it is necessary to protect the superfluous in order to preserve the necessary."

Justice Alito, joined by Justice Gorsuch, filed a concurring opinion to set forth his understanding of the proper First Amendment framework. For Justice Alito, it is particularly important to focus on asking "[w]hy does the First Amendment ever allow the free-speech rights of public school students to be restricted to a greater extent than the rights of other juveniles who do not attend a public school?" The Court has not expressly addressed that question, he said, because the answer is so obvious: "Because no school could operate effectively if teachers and administrators lacked the authority to regulate in-school speech in these ways." But the question must be re-asked "when a public school regulates what students say or write when they are not on school grounds and are not participating in a school program," *i.e.*, why does public school enrollment yield reduced First Amendment rights? The answer must lie in the level of implicit delegation of parental authority to schools, which is to say that "the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree—for example, by giving permission for a child to participate in an extracurricular activity or to go on a school trip." Here, any such delegation was lacking, for "whatever B. L.'s parents thought about what she did, it is not reasonable to infer that they gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity."

Justice Thomas dissented because, as he sees it, "schools historically could discipline students in circumstances like those presented here." Schools could, for example, discipline students for off-campus speech that tended to "subvert the master's authority," including one case where a student merely called a teacher "old." Indeed, in Justice Thomas's view, well-accepted punishment for truancy should be seen as a variety of punishment for off-campus activity that tends to undermine school discipline. And because B.L.'s speech tended to degrade and subvert a school program, those precedents should apply here. The majority's effort to identify "pragmatic guideposts" regarding off-campus speech choses "intuition over history," a problem that goes back to the Court's decision in *Tinker* to jettison the historical *in loco parentis* model for the school's relationship to the student. Here, the Court at least acknowledged *in loco parentis*, but it still "fails to address the historical contours of that doctrine, whether the doctrine applies to off-campus speech, or why the Court has abandoned it."

". . . as 'nurseries of democracy,' public schools have 'an interest in protecting a student's unpopular expression."

CALIFORNIA MAY NOT COMPEL NONPROFITS TO DISCLOSE MAJOR DONORS

In *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 210 L. Ed. 2d 716 (2021),[9] the Court struck down California's charitable-donor-reporting requirements as a threat to supporters of unpopular causes. Under a decades-old regulation that until recently had largely gone unenforced, charitable organizations in California must file with the California attorney general their IRS form 990 with attachments and schedules listing the names and addresses of donors who, within the last tax year, contributed upwards of $5,000 or provided more than 2% of the organization's total funding. Lax enforcement ended in 2010 when the Attorney General served "thousands of deficiency letters" forcing charities either to disclose their donors or face fines and suspension of their registration as a tax-exempt charity.

That enforcement led California-based charities Americans for Prosperity Foundation and Thomas More Law Center to sue the California attorney general for violation of their, and their donors', First Amendment Rights. They have always filed their form 990 with the attorney general, but not the "Schedule B" disclosures listing their donors. Providing that information to the attorney general, they said, "would make their donors less likely to contribute and subject them to the risk of reprisals." Indeed, at trial, Americans for Prosperity was able to show past threats and harassment, including an online post from a technology contractor that he could easily walk into the CEO's office and slit his throat. Thomas More Law Center supplied evidence of "threats, harassing calls, intimidating and obscene emails and even pornographic letters." The record also included evidence of "bomb threats, protests, stalking, and physical violence" directed at these charities. The district court, which found that the attorney general "was unable to ensure the confidentiality of donors' information" (*e.g.*, the AG's office had inadvertently posted thousands

9. Together with Thomas More Law Center v. Bonta, No. 19-255

". . . Justices concluded that the charity-donor disclosure requirement represented a 'dramatic mismatch' with the State's professed goal of detectng fraud . . ."

of Schedules B to its website), twice enjoined the enforcement, but the Ninth Circuit twice reversed, holding that the disclosure requirement "satisfied exacting scrutiny."

The Supreme Court reversed the Ninth Circuit, and while a majority agreed with facial invalidation of the disclosure regulation, the Court could not agree on the proper level of scrutiny. Six Justices saw a sufficient comparison to *NAACP v. Alabama*, where the Court rejected efforts by the State to demand membership lists from the civil rights group in "an effort to oust them from the state." But they could not agree what doctrinal standard that decision, or subsequent decisions, employed. The Chief Justice, writing for himself along with Justices Kavanaugh and Barrett, concluded that "exacting scrutiny" (requiring a "substantial relation between the disclosure requirement and a sufficiently important governmental interest") was the appropriate standard. Justice Thomas, on the other hand, would use strict scrutiny (requiring "least restrictive means" to reach a "compelling" interest) because "the right to associate freely" is "subject to the same scrutiny as laws directly burdening other First Amendment rights." Meanwhile, Justice Alito, joined by Justice Gorsuch, was unwilling to slice the baloney between "exacting" and "strict" scrutiny. Since "the choice between exacting and strict scrutiny has no effect on the decision . . . I see no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases" involving the "compelled disclosure of associations."

Yet Justices Thomas, Alito, and Gorsuch all joined the portion of the Chief Justice's opinion elaborating on the difference between "narrow tailoring" and "least restrictive means"—and explaining why "exacting scrutiny" requires only the former. The Court explained (contra the dissent) why narrow tailoring (at least) applies even to restrictions imposing only a "modest" burden on speech: "[A] reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring."

In that vein, the six conservative Justices concluded that the charity-donor disclosure requirement represented a "dramatic mismatch" with the State's professed goal of detecting fraud (which was, concededly, an important interest). No one doubts that, in an appropriate case where the State suspects wrongdoing, the attorney general could subpoena a charity's Schedule B. The question is, what is gained by requiring all charities to provide it routinely without suspicion? In the district court, alas, California provided no instances where a "pre-investigation" Schedule B in any way advanced the State's fraud detection efforts and offered no evidence why more targeted demands would be insufficient. "The upshot is that California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints."

Furthermore, five Justices held that, give the evidence of threats and intimidation directed at unpopular charities, the burden on speech was sufficient to justify facial invalidation using overbreadth doctrine. The core rationale for invalidating this disclosure requirement as to Americans for Prosperity and Thomas More Law Center—the threat of chill compared with the lack of significant utility to the State and the availability of less chilling alternatives—is "true in every case." So, facial invalidation is justified.

Justice Thomas, however, departed from the majority as to the proper remedy. He rejected facial invalidation of the regulation using overbreadth doctrine, the legitimacy of which he has long doubted. Justice Thomas does not specify cases where the disclosure requirement might be lawful but critiques the majority for decreeing facial invalidation merely because it "suspects" (his word) that the law will be invalid in all applications. Justice Thomas ultimately concurred in the judgment because he did not read it to be dependent on the overbreadth determination. Still, he allowed, "[o]ne can understand the Court's reasoning as based on the fundamental legal problems with the law (that are obvious in light of the facts of this suit) that will, in practice, prevent California from lawfully applying the disclosure requirement against a substantial number of entities, including petitioners."

The three liberal Justices, led by Justice Sotomayor, dissented. Because she viewed the burden on plaintiffs as "modest," Justice Sotomayor would have held the requirement constitutional given "a correspondingly modest showing" from California of its legitimate governmental interest, which "given the size of its charitable sector," she deemed to be "especially compelling." The majority went too far, in her view, in "jettison[ing] completely the longstanding requirement that plaintiffs demonstrate an actual First Amendment burden before the Court will subject government to close scrutiny." The way she reads the majority opinion, "a subjective preference for privacy, which previously did not confer standing, now subjects disclosure requirements to close scrutiny." Worse still, from her perspective, [r]egardless of whether there is any risk of public disclosure, and no matter if the burdens on associational rights are slight, heavy, or nonexistent, disclosure regimes must always be narrowly tailored."

VOTING RIGHTS ACT DOES NOT PRECLUDE ARIZONA'S OUT-OF-PRECINCT AND MAIL-IN-BALLOT COLLECTION LAWS

The Supreme Court has frequently applied Section 2 of the Voting Rights Act to legislative districting claims, but in *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021),[10] the Court for the first time applied it "to regulations that govern how ballots are collected and counted." In so doing the Court confirmed the principal role of States as election-rule-makers under the Constitution.

From the passage of the Voting Rights Act in 1965 until 2013, Section 5 of the Act was its main workhorse. It required state and

10. Consolidated with Arizona Republican Party v. Democratic National Committee, No. 19-1258 (U.S.).

local jurisdictions with historically poor voting rights to obtain federal clearance before implementing new election rules or practices—in effect conferring on the Department of Justice control over even the finest details of many States' election codes. The problem was that Congress, while it renewed the Voting Rights Act multiple times, never changed the coverage formula, and it became outdated, with the result that many southern States with higher minority voting rates than northern States still had to preclear any changes to their election laws. The Supreme Court invalidated the coverage formula in *Shelby County v. Holder*, 570 U.S. 529 (2013), rendering Section 5 dormant. Since then, election law activists have increasingly targeted state voting laws using Section 2 of the Voting Rights Act, which forbids election procedures that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 52 U.S.C. § 10301. The Supreme Court originally understood Section 2 to provide no greater protection than the Fifteenth Amendment itself (which the Voting Rights Act was designed to enforce). Under Congress's 1982 amendments to Section 2, however, the Section 2 goes further and creates a violation where, under the "totality of circumstances," "[election processes] are not equally open to participation" by members of protected classes. *Id.*

In *Brnovich*, activists targeted two Arizona election rules. The first—known as the "out-of-precinct policy"—permitted voters to cast ballots only in the correct precinct. The second—often referred to as a "ballot harvesting" restriction—prohibited third-party collection of mail-in ballots except for family members and postal workers. The Democratic National Committee and others argued that the "out-of-precinct policy" violated Section 2 because it disproportionately disqualified minority ballots. They argued that the ballot-collection restriction contravened Section 2 because it disproportionately affected Native Americans living in remote areas, who would otherwise find it difficult to access faraway polling stations. Arizona, for its part, argued that its election procedures, taken as a whole, make it easy to vote and difficult to cheat and that Section 2 prohibits only those rules that cause substantial disparities in minority election participation rather than, as with these two regulations, mere incidental differences.

In a 6-3 decision (with Justices Kagan, Breyer, and Sotomayor dissenting), the Court upheld the Arizona laws. Writing for the majority, Justice Alito first observed that "Arizona law generally makes it very easy to vote." And he identified "equal opportunity" as the touchstone of Section 2: Each racial group must be equally able to access the ballot box. That said, Section 2 does not prohibit *all* election rules that happen to yield *some* disparate racial impact, as nearly all do, including routine registration and ballot-completion requirements. The Voting Rights Act does not prohibit the "usual burdens of voting" even when such burdens exhibit a modest disparate racial impact.

The majority proposed a non-exhaustive list of considerations for courts to use in evaluating Section 2 claims: (1) the size of the burden imposed by a challenged voting rule, (2) the degree to which a voting rule deviates from standard practice in 1982 when Section 2 was amended, (3) the size of the disparate impact on racial or ethnic groups, (4) opportunity to vote under the totality of all voting rules and practices, and (5) the strength of state interests served by the challenged rule. The Court concluded that Arizona's precinct-only and anti-harvesting rules reasonably advanced election integrity and administration interests (offices up for election can vary by precinct, and permitting uncontrolled ballot harvesting often begets coercion of voters by harvesters) and imposed only light burdens on voters. Accordingly, the Court upheld both.

". . . the Supreme Court considered . . . a regulation requiring that agriculture employers afford labor union representatives periodic access to business property . . ."

Justices Gorsuch and Thomas joined the majority opinion but also concurred separately to draw attention to the issue of whether Section 2 of the Voting Rights Act furnishes an implied right of action.

Justice Kagan penned a dissent joined by Justices Breyer and Sotomayor warning that efforts to suppress minority votes continue today. She argued that the majority ignored Section 2's broad "totality of the circumstances" inquiry in favor of an array of new, extra-textual obstacles to Section 2 claims.

TAKINGS AND CONDEMNATION

CALIFORNIA LAW GRANTING UNIONS ACCESS TO EMPLOYER'S PROPERTY CONSTITUTES A PER SE TAKING

When the government physically appropriates private property, it effectuates a per se taking triggering a right to "just compensation" when economic loss to the property owner is trivial. Regulation that merely restricts private property use—though it might inconvenience the property owner—does not, however, usually constitute a regulatory taking: Such regulation is compensable only when it deprives the owner of *all* economically beneficial use. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021), the Supreme Court considered in which category to place a state law prescribing a temporary physical occupation, here a regulation requiring that agriculture employers afford labor union representatives periodic access to business property for purposes of signing up workers.

California law affords union organizers physical access to agricultural employers' property for up to four 30-day periods in one calendar year. To gain access, union organizers need only apply to the State's Agricultural Labor Relations Board and notify the employer. Cedar Point Nursery and Fowler Packing Company, two fruit growers, alleged that the regulation, by giving union organizers unconsented physical access to their property, constituted a per se taking requiring compensation. The district court held against the fruit growers, reasoning that the regulation was not a physical appropriation of private property and should be assessed as a regulatory taking. The Ninth Circuit affirmed, holding that the access regulation only allows temporary access and therefore is not a physical taking.

In a 6-3 decision written by Chief Justice Roberts (from which Justices Breyer, Sotomayor, and Kagan dissented), the Supreme Court reversed and held that the access law was a physical occupation. The Court emphasized that the right to exclude is a critical

". . . an unusual 5-4 majority . . . held that private companies exercising fedeal eminent domain power 'can condemn all necessary rights-of-way' in which States have an interest."

stick in the property rights bundle, and by depriving fruit growers of their right to exclude union organizers for up to 120 days each year, the California regulation amounted to a physical taking. The Court specifically rejected the argument that a temporary right of access under limited circumstances is not a per se taking: Aside from mere trespasses, *all* government-sanctioned physical invasions are per se takings. And it repudiated the dissent's argument that "latitude toward temporary invasions is a practical necessity for governing in our complex modern world" by observing that "the complexities of modern society . . . only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained." That said, the Court also acknowledged that government may condition licensing and other benefits on some right of access for legitimate regulatory purposes, such as pesticide inspections: "When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy." Paraphrasing the Court's precedents, if refusal to issue the permit would not itself be a taking, conditioning its issuance on physical access for inspection does not either.

Justice Kavanaugh joined the majority opinion but wrote a separate concurrence to argue that the Supreme Court's precedent in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), also supports the Court's decision. There, union organizers had a right to access employer property when necessary, such as when workers lived on company property and organizers had no other way to reach them. But such dire conditions did not exist in *Cedar Point Nursery*, as union organizers were never prevented from contacting farm workers. In short, said Justice Kavanaugh, "the California union access regulation intrudes on the growers' property rights far more than *Babcock* allows."

Justice Breyer dissented, joined by Justices Sotomayor and Kagan, on the theory that California's regulation does not physically "appropriate" any private property. Instead, just as countless other regulations restrict how property owners can enjoy their property, the access regulation only modifies the employer's right to exclude. The dissent went on to question the practicality of a blanket rule that deems all government-mandated physical access to be *per se* takings. As noted above, Justice Breyer worried that such an absolute rule would not permit solutions to the complex regulatory problems of "modern life."

FERC MAY AUTHORIZE A PRIVATE COMPANY TO CONDEMN STATE-OWNED LAND FOR PIPELINE RIGHT-OF-WAY

The modern-life complexities of pipeline building received a boost in a case where federal eminent domain power intersected with sovereign immunity. In *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 210 L. Ed. 2d 624 (2021), an unusual 5-4 majority led by Chief Justice Roberts and joined by Justices Breyer, Alito, Sotomayor, and Kavanaugh held that private companies exercising federal eminent domain power "can condemn all necessary rights-of-way" in which States have an interest.

To construct a 116-mile pipeline from Pennsylvania to New Jersey, PennEast Pipeline company obtained a certificate of public convenience and necessity under the Natural Gas Act from the Federal Energy Regulatory Commission. That certificate authorized PennEast to exercise federal eminent domain power to create a corridor for the pipeline. New Jersey objected to PennEast's plan to condemn property in which it had either a possessory interest or easement (such as for conservation) and asserted sovereign immunity as a defense, arguing that the Natural Gas Act did not authorize private parties to condemn the property of nonconsenting States.

In his majority opinion siding with PennEast, the Chief Justice deemed the case an "unexceptional instance" of an "established practice": "Since the founding, the Federal Government has exercised its eminent domain authority through both its own officers and private delegatees. And it has used that power to take property interests held by both individuals and States." The Court cited examples going back to the 19th century. In *Kohl v. United States*, 91 U.S. 367 (1875), the Court recognized that "'[t]he powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States." In *Luxton* v. *North River Bridge Co.*, 153 U. S. 525 (1894), it permitted delegation of the federal eminent domain power to a private company. And in *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941), the Court upheld a congressional enactment authorizing construction of a dam that would flood state-owned lands, concluding that state ownership of land was no barrier to federal condemnation. The Court did not, however, cite any cases where the United States had delegated its eminent domain authority to a private company, who had then exercised that power over a State's property.

These cases not only evince federal eminent domain authority, said the majority, but they also demonstrate that "the States consented in the plan of the convention to the exercise of federal eminent domain power, including condemnation proceedings brought by private delegatees." According to the Chief Justice (quoting *Alden v. Maine*, 527 U.S. 279, 279 (1999), "the plan of the Convention reflects the 'fundamental postulates implicit in the constitutional design.'" Further, regarding to the "exercise of federal eminent domain within the States," the Court has said that one such "postulate" is "that the government of the United States is invested with full and complete power to execute and carry out its purposes." And while the majority could not identify private condemnation suits against States at common law, it contended that States cannot use their sovereign immunity to separate the federal eminent domain power from the duly authorized condemnation suits of a federal delegate, lest States thereby diminish the eminent domain power of a co-equal sovereign. Besides, doing so would only turn States from defendants into plaintiffs when private federal delegates took the property without instituting condemnation actions on the front end.

Justice Barrett, joined by Justices Thomas, Kagan, and Gorsuch, wrote in dissent that the majority's reliance on the "plan of the Convention" had no "textual, structural, or historical support."

Indeed, the fact that the federal government may exercise eminent domain power only by way of congressional enactment using its Commerce Clause power defeats any inference that the issue here is resolved by reference to implicit arrangements at the Constitutional Convention. Justice Barrett would instead resolve the dispute under the Court's existing precedent governing attempted abrogation of the Eleventh Amendment under Congress's Article I power, namely, by applying *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996), and concluding that no such power to abrogate exists. And while other means certainly exist for PennEast to get New Jersey's property, the process matters: "Sovereign immunity limits how Congress can obtain state property for pipelines."

Justice Gorsuch, joined by Justice Thomas, agreed with Justice Barrett's dissent in full, but wrote separately to "address one recurring source of confusion" on the relationship between the Eleventh Amendment and federal subject-matter jurisdiction. He argues that the Eleventh Amendment's plain text prevents PennEast, as the citizen of another State, from bringing this suit against New Jersey into a Federal Court. The majority responded to this theory with the observation that the "plan of the convention" rationale is properly understood as a *waiver* of sovereign immunity, including to the specific form of immunity (in diversity cases) restored by the Eleventh Amendment. But Justice Gorsuch contends that, because it expressly carves out the exercise of federal judicial power, Eleventh Amendment immunity, as distinct from sovereign immunity more generally, is not waivable.

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Judging and Emotion Work:

Discipline Processes as Guidance

Sharyn Roach Anleu, Jennifer Elek & Kathy Mack

What constitutes good judging has long been a matter of discussion.[1] Models of good judging contain norms about judicial demeanor and emotion, especially in court, though typically not expressed in those terms.[2] The conventional model of the impartial judge characterises emotion as incompatible with, and potentially undermining, impartiality and so threatening the legitimacy of judicial authority and the rule of law.[3] However, judicial work necessarily engages a wide range of emotions and requires considerable emotion capacities, which can (appear to) conflict with this expectation of dispassionate, impersonal, and detached judging.[4] Performing judicial authority can entail considerable emotion work[5] on the part of the judicial officer, managing the judicial officer's own felt and displayed emotion, as well as those of other courtroom participants.[6]

From a cognitive psychology perspective, Maroney and Gross argue that 'good judges should seek not to eliminate emotion entirely, but rather to manage emotion skillfully in light of the diverse professional challenges they face.'[7] Similarly, Barrett points out: 'Rather than pretend that affect is absent, it's better to use affect wisely.'[8]

In the current challenging and uncertain climate of political polarization and a global public health crisis with its collateral consequences, the pressure on court users and judicial officers alike generates more, and more intense, emotion. One year in, many people are exhibiting the effects of "prolonged stress, exacerbated by the grief, trauma, and isolation" related to the pandemic.[9] Judges are called upon to manage overwhelming workloads, growing case backlogs, and rising interpersonal tensions. Changes to

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Footnotes

1. *See* Jennifer K. Elek et al., Elements of Judicial Excellence: A Framework to Support the Professional Development of State Trial Court Judges (2017); *see also* Andrew J. Wistrich, *Defining Good Judging* in The Psychology of Judicial Decision Making 249 (David E. Klein & Gregory Mitchell eds., 2010).
2. *See* Sharyn Roach Anleu et al., *The Emotional Dimension of Judging: Issues, Evidence, and Insights*, 52 Ct. Rev. 60 (2016); *see also* Kathy Mack & Sharyn Roach Anleu, *Performing Impartiality: Judicial Demeanor and Legitimacy*, 35 Law & Soc. Inquiry 137 (2010).
3. *See* Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 Ann. Rev. L. & Soc. Sci. 199 (2016); *see also* Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging (2010).
4. Stina Bergman Blix & Åsa Wettergren, Professional Emotions in Court: A Sociological Perspective (2018); Elek, *supra* note 1; Steve Leben, *Exploring the Overlap Between Procedural-Justice Principles and Emotion Regulation in the Courtroom*, 9 Oñati Socio-Legal Series 852 (2019); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 Calif. L. Rev. 629 (2011); Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32 J. L. & Soc. 590 (2005); Sharyn Roach Anleu et al., *Judicial Ethics, Everyday Work, and Emotion Management*, 8 J. L. & Cts. 127 (2020); Jennifer A. Scarduzio, *Maintaining Order through Deviance? The Emotional Deviance, Power, and Professional Work of Municipal Court Judges*, 25 Mgmt. Commc'n. Q. 285 (2011); *Judging, Emotion and Emotion Work*, 9 Oñati Socio-Legal Series (Stina Bergman Blix et al. eds., 2019).
5. Several terms, used somewhat interchangeably, describe concepts relating to emotion and work. 'Emotional labor' (Arlie R. Hochschild, The Managed Heart: Commercialization of Human Feeling (1983); Amy S. Wharton, *The Psychosocial Consequences of Emotional Labor*, 561 Annals Am. Acad. Pol. & Soc. Sci. (1999); Amy S. Wharton, *The Sociology of Emotional Labor*, 35 Ann. Rev. Soc. 147 (2009)). 'Emotion work' (Arlie R. Hochschild, *Emotion Work, Feeling Rules and Social Structure*, 85 Am. J. Soc. 551 (1979)). 'Emotion management' and 'emotion regulation' (James J. Gross, *Emotion Regulation: Current Status and Future Prospects*, 26 Psychol. Inquiry 1 (2015); Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 Emotion Rev. 142 (2014)). 'Emotional practices' (Monique Scheer, *Are Emotions a Kind of Practice (And Is That What Makes Them Have a History)? A Bourdieuan Approach to Understanding Emotion*, 51 Hist. & Theory 193 (2012)). 'Emotional capital' (Marci D. Cottingham, *Theorizing Emotional Capital*, 45 Theory & Soc'y 451 (2016)). Related concepts include 'emotional intelligence' (Daniel Goleman, Working with Emotional Intelligence (1998)) and 'emotional granularity' (Lisa F. Barrett, How Emotions Are Made: The Secret Life of the Brain (2017)). In this article, we use the term emotion work to convey the effort involved in managing one's own emotions and emotion display, as well as seeking to manage the emotions felt and displayed by others. *See* Sharyn Roach Anleu & Kathy Mack, Judging and Emotion: A Socio-Legal Analysis (2021).
6. Sharyn Roach Anleu & Kathy Mack, Performing Judicial Authority in the Lower Courts (2017); Roach Anleu & Mack, *supra* note 5.
7. Maroney & Gross, *supra* note 5, at 143.
8. Barrett, *supra* note 5, at 241.
9. *Stress in America 2021: Pandemic Stress One Year On*, Am. Psych. Ass'n. (Mar. 2021), https://www.apa.org/news/press/releases/stress; *accord* Katheryn Yetter & David X. Swenson, *Judicial Stress and Resiliency Survey: COVID-19 Update*, 57 Ct. Rev. 4 (2021).

court practices, including closures, virtual appearances, and other obstacles to access to justice, at a time when court users may find it especially difficult to comply with traditional court orders, all make patience and courtesy even more vital judicial qualities, and emotion work an essential judicial skill.[10]

How do judges learn 'to manage emotion skillfully'? Where do they find concrete practical guidance? While there are many sources, which identify required, expected, or desired judicial conduct and demeanor, the American Bar Association (ABA) Model Code of Judicial Conduct (2011) (ABA Code) is an important and visible source of guidance in relation to impartiality, dispassion, and emotion.[11] ABA Canons 1 and 2 are relevant for judicial emotion display and emotion work. Canon 1 states: 'A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety'. Rule 1.2 elaborates: 'A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety'. Canon 2 provides: 'A judge shall perform the duties of judicial office impartially, competently, and diligently'. Two subsections of Rule 2.8 implicitly address emotion as part of judicial work:

> (A) A judge shall require order and decorum in proceedings before the court.
> (B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.[12]

This emphasis on decorum, patience, dignity, and courtesy implicitly acknowledges the human relations and social interaction within the courtroom in which emotion emerges. Achieving, or at least displaying, these qualities may require emotion work on the part of the judicial officer. However, there is relatively little concrete guidance within the Code or its commentary for judges about how to achieve these desired qualities in the emotionally demanding context of judicial work.[13]

"How do judges learn 'to manage emotion skillfully'? Where do they find concrete practical guidance?"

The ABA Code has been adopted (or adapted with modification) by most U.S. states, and all states have a judicial conduct commission or similar body. These bodies investigate complaints against judicial officers,[14] and, where conduct is found to violate Code provisions, impose disciplinary sanctions.[15] The Arizona's Commission on Judicial Conduct has a very large, transparent and comprehensive archive of complaints against judicial officers publicly available via its website.

In a previous article, we proposed several research questions about judging and emotion, including: 'What are the formal rules and informal norms that govern emotions in the performance of the judicial role?.'[16] This article addresses that question by asking whether judicial disciplinary cases could help clarify the scope and extent of these norms. Although disciplinary cases represent a very small subset of judicial conduct overall, studying such extreme cases can be valuable.[17] They are visible occasions, which activate explicit consideration of norms and values applied to a concrete situation, in contrast to the more aspirational generalities of the ABA Code.

This article first reviews the overall pattern of complaints and dispositions from the Arizona Commission on Judicial Conduct over a six-year period from 2010 to 2015. It then undertakes a detailed examination of four cases that resulted in a public reprimand. This analysis identifies important norms about emotion, emotion work, and appropriate emotion display or demeanour. However, the study concludes that such material has limited value as practical guidance for judicial emotion work.

JUDICIAL DISCIPLINE IN ARIZONA

Arizona has adopted the ABA Canons 1 and 2 and Rules 2.8(A) and (B) as quoted above.[18] The status of the Arizona Code of Judicial Conduct is articulated as follows:

This code establishes standards for the ethical conduct of

10. *Coronavirus and the Courts*, Nat'l Ctr. for State Cts. (2021), https://www.ncsc.org/newsroom/public-health-emergency; *accord Coronavirus and Judicial Wellbeing*, Jud. Coll. of Victoria https://www.judicialcollege.vic.edu.au/resources/coronavirus-and-judicial-wellbeing-0; Jamey H. Hueston, *The Compassionate Court: Reforming the Justice System Inside and Outside*, 57 Ct. Rev. 108 (2021).
11. Sharyn Roach Anleu et al., *Judicial Conduct Guidance and Emotion*, 28 J. Jud. Admin. 226 (2019); *see also* Anleu et al., *supra* note 2.
12. *Rule 2.8: Decorum, Demeanor, and Communication with Jurors*, A.B.A, (Feb. 14, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_8decorumdemeanorandcommunicationwithjurors.
13. Anleu et al., *supra* note 2; Anleu & Mack, *supra* note 5; Anleu et al., *supra* note 11;
14. Judicial conduct disciplinary organizations have different names in different states. For example, 'Commission on Judicial Performance' in California, 'State Commission on Judicial Conduct' in Texas, 'New York State Commission on Judicial Conduct' in New York, 'Commission on Judicial Conduct' in Kansas, 'Court on the Judiciary' in Delaware, and the 'Judicial Inquiry and Review Commission' in Virginia.
15. Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 Just. Sys. J. 405 (2007).
16. Roach Anleu et al., *supra* note 2.
17. Bent Flyvbjerg, *Five Misunderstandings About Case-Study Research*, 12 Qualitative Inquiry 219 (2006); *see also* Lisa L. Miller, *The Use of Case Studies in Law and Social Science Research*, 14 Ann. Rev. L. & Soc. Sci. 381 (2018).
18. There are some variations, but none apply to the issues discussed in this article. For example, Rule 2.5(C) states: 'a judge shall participate actively in judicial education programs and shall complete mandatory judicial education requirements.' Rule 2.5(C) has no parallel in the A.B.A. code. This is potentially significant when considering disciplinary processes, as an order may require participation in judicial education.

"This investigation of judicial disciplinary processes is part of a large, cross-national project examining emotion and judging."

judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the code. The code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.[19]

This statement directly links the code provisions to discipline, while confirming that the code is not 'exhaustive' and that other resources or 'standards' can be drawn on in 'governing … judicial ... conduct.'

Arizona set up a conduct commission via a state constitution provision creating the Arizona Commission on Judicial Conduct in 1970. In 1988 the Commission was established as 'as an independent state agency responsible for investigating complaints against justices and judges on the supreme court, court of appeals, superior court, justice of the peace courts, and municipal courts.'[20] The Commission has authority to investigate complaints involving violations of the Arizona Code of Judicial Conduct as well as other aspects of judicial behaviour including: 'willful misconduct in office, willful and persistent failure to perform duties, habitual intemperance [e.g., alcohol or drug abuse], [and] conduct prejudicial to the administration of justice that brings the judicial office into disrepute.'[21] The Commission does not have jurisdiction to review the substance of a judge's decision, and it cannot overturn a judge's rulings, intervene in a case, or award damages or other monetary relief.

The range of dispositions available to the Commission are: dismissal, dismissal with comments, which can include an advisory letter or a warning letter,[22] informal sanctions including a reprimand, or directions to participate in counseling or judicial education.[23] The Commission may also initiate confidential consultation with a judge to discuss voluntary retirement or resignation,[24] and it is also possible for discipline to be imposed by consent.[25] The Commission can recommend formal sanctions of censure, suspension, or removal, which can only be imposed under the authority of the Supreme Court of Arizona.[26] A recommendation of censure is final unless a petition to modify is filed with the Court.[27] Recommendations for other formal sanctions may be reviewed by request of the judge, the disciplinary counsel, or the Court's own motion.[28]

The Commission is made up of 11 members—six judges, two attorneys, and three public members—and is supported by staff including an executive director and disciplinary counsel.[29] Commission staff undertake the initial screening of each complaint and make recommendations as to the disposition.[30] If the complaint is not recommended for dismissal, then a preliminary investigation is undertaken, under the auspices of the disciplinary counsel. If the Commission decides to recommend informal sanctions, without formal charges, it sends an 'informal disposition order.'[31] Either the judge or the complainant can seek reconsideration, or the judge can seek a formal hearing.[32] There are several stages of possible further investigation, depending on the findings at each step,[33] including requesting a response from the judge, appointment of an investigative panel, and filing formal charges for the judge to answer, which may entail a hearing to determine if the judge has committed misconduct. Further processes are available where there are allegations of judicial physical or mental incapacity.[34]

During the early investigation stages, Commission proceedings are confidential,[35] as is the case in all states.[36] In Arizona, there is a clear statement that '[a]s a general rule, complaints against judges shall be available to the public following … final disposition.'[37] The timing and the scope of information available varies with the nature of the Commission's disposition, and the seriousness of the misconduct. For example, where the complaint is dismissed, only the complaint and the Commission's order are made publicly available, and all identifying information about the court and any individual are deleted. At the other extreme, where formal charges are laid, the record, as defined in the rules, becomes public after the judge has responded. There is authority for further disclosure in the Commission's discretion.[38]

JUDICIAL CONDUCT COMPLAINTS AND OUTCOMES

This investigation of judicial disciplinary processes is part of a large, cross-national project examining emotion and judging.[39]

19. Arizona Code of Judicial Conduct, Ariz. Sup. Ct. *(2009),* https://www.azcourts.gov/Portals/137/rules/Arizona%20Code%20of%20Judicial%20Conduct.pdf.
20. *Commission on Judicial Conduct: About Us,* Ariz. Comm'n on Jud. Conduct (2020), https://www.azcourts.gov/azcjc/Inside-the-CJC/About-Us.
21. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 6 (2019).
22. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 16 (2019).
23. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 17 (2019).
24. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 16(c) (2019).
25. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 30 (2019).
26. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 18 (2019).
27. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 29(a) (2019).
28. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 29(a) (2019).
29. *See* Ariz. Const. art 6.1, § 1; *see also* Ariz. Comm'n on Jud. Conduct, Commission Rules r. 3(a), 3(b) & 4(a) (2019).
30. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 21 (2019).
31. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 23(b) (2019).
32. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 23(b) (2019).
33. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 22, 23, 24 (2019).
34. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 33 (2019).
35. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 9 (2019).
36. Gray, *supra* note 15.
37. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 9(a) (2019).
38. Ariz. Comm'n on Jud. Conduct, Commission Rules r. 9(c) (2019).
39. The Changing Judicial Performance: Emotion and Legitimacy project is supported by the Australian Research Council Discovery Project Grant (DP150103663), including International Collaboration Awards with the National Center for State Courts. For further description of this project see Anleu et al., *supra* note 2.

The study of Arizona's disciplinary procedures began by locating all complaints and any supporting information publicly available on the Commission website, as well as identifying the outcome of complaints for each year including dismissals, dismissals with comments, reprimands, or formal sanctions (that is, censure, suspension or removal).

Table 1 provides information about the disposition of all formal complaints filed, by year, for each of the six years reviewed in this study. From 2010 through 2015, the Arizona Commission on Judicial Conduct disposed of a total of 2,143 formal complaints. Of these 2,143 complaints disposed, 1,879 (87.7%) were dismissed outright and 193 (9.0%) were dismissed with comment. Of the 193 complaints dismissed with comment, the Commission issued a confidential advisory letter to the judge[40] regarding his or her behavior in 134 cases (6.3% of all dispositions). In the remaining 59 cases disposed as dismissed with comment (2.8% of all dispositions), the judicial officer in question received a private warning from the Commission regarding his or her behavior. For dismissals, the Commission website provides limited information regarding the nature of the complaint and the grounds on which it was dismissed, precluding further analysis. According to the website, most complaints are dismissed because the facts do not support the allegations, or the alleged misconduct does not constitute unethical conduct. Complaints based on alleged legal errors are routinely dismissed, as are complaints alleging judicial bias based only on unfavorable rulings. A party dissatisfied with a judge's rulings, whether alleging legal error or bias, may pursue appellate remedies, but the Commission lacks jurisdiction to require a judge to alter a ruling.

During the six-year time period under review, the Commission issued a sanction in 71 cases (3.3% of all dispositions). In 59 of these 71 cases (2.8% of all dispositions), the Commission issued an informal public reprimand. The Commission imposed/recommended a formal sanction in response to 12 complaints (0.6% of all dispositions). In nine of these cases, the judge was formally censured; in one case, the judge was suspended without pay; and in two cases, the Commission recommended that the Supreme Court remove the judge from office. In some matters, the judge under review may have retired or resigned before the Commission's disposition of the case. In such instances, the Commission might categorize the judge's decision to withdraw from office as a removal disposition, though a judge's decision to withdraw from office was specifically referenced in some case documentation as a mitigating factor.

The next step in the research was to review the available documentation for all 71 cases in which sanctions were imposed. The aim was to identify those in which unmanaged or inappropriate judicial emotion, especially in the interactive context of the courtroom, was or appeared to be an aspect of the conduct giving rise to the complaint.

Rather than discuss all 71 sanctions found for the study period, this article will focus on the most recent year in the review, 2015, and on the reprimands (n=6) issued in that year (see Table 1). Reprimands are the most common type of sanction issued across the six years of the review (n=59), though the actual number in any year varies considerably (from 6 to 23). There is sufficient information available in relation to reprimands to support investigating the apparent role of emotion, if any, but without the considerable volume, detail and complexity of the documentation and issues for the more serious formal sanctions.

"A party dissatisfied with a judge's rulings, whether alleging legal error or bias, may pursue appellate remedies, but the Commission lacks jurisdiction to require a judge to alter a ruling."

In general, the material on the website for cases resulting in a reprimand includes, at a minimum:

- Complaint against the judge

TABLE 1: ARIZONA COMMISSION ON JUDICIAL CONDUCT: DISCIPLINARY CASES, 2010-2015

ACTIONS/ PROCEDURES (N)	YEAR						TOTAL
	2010	2011	2012	2013	2014	2015	
Complaints	361	313	361	342	412	354	**2,143**
Complaints dismissed outright	306	263	305	311	384	310	**1,879**
Complaints dismissed with comments	45	39	32	22	17	38	**193**
– Warnings	16	10	8	6	6	13	**59**
– Advisory letters	29	29	24	16	11	25	**134**
Sanctions	10	11	24	9	11	6	**71**
Informal sanctions							
– Reprimands	6	8	23	9	7	6*	**59**
Formal sanctions							
– Censures	4	2	1	0	2	0	**9**
– Suspensions	0	0	0	0	1	0	**1**
– Removals	0	1	0	0	1	0	**2**

* These six reprimands are discussed below.

Source: These data were retrieved from the annual reports provided by the Arizona Commission on Judicial Conduct, available at https://www.azcourts.gov/azcjc/publicDecisions/2015.aspx (last accessed August 10, 2020).

40. The term 'judge' is used here to encompass the full range of judicial roles in the Arizona court system, as it is used in the Arizona Code of Judicial Conduct. 'Judge' is defined therein as "any person who is authorized to perform judicial functions within the Arizona judiciary, including a justice or judge of a court of record, a justice of the peace, magistrate, court commissioner, special master, hearing officer, referee, or pro tempore judge."

"Examples of such emotion-related conduct include . . . arrogance and making demeaning comments . . . being sarcastic . . . being rude . . . and being aggressive . . . "

- Judge's response to the complaint
- Commission order disposing of complaint

In some cases, additional documents are available, especially if there is a motion from the judge for reconsideration of the reprimand:

- Judge's Motion for Reconsideration
- Disciplinary Commission's Response to Motion for Reconsideration (from disciplinary counsel)
- Decision or order of the Commission on the Motion for Reconsideration

Sometimes material is referred to that is not available on the Commission website. For example, an initial 'complaint' submission to the Commission may refer to an audio or video recording of a courtroom incident, which is not available. Moreover, there might not be a substantive written summary about or characterization of the precipitating event or judicial behavior. In another case, there is a list of eight attachments at the end of the judicial officer's response to the complaint, none of which were available on the website.

Table 1 shows that in 2015 the Commission issued six informal public reprimands as the only sanctions in that year. The Commission determined that the judicial behavior in each case violated one or more rules of the Arizona Code of Judicial Conduct:

- Rule 1.1: Compliance with the Law (in three of six reprimands)
- Rule 1.2: Promoting Confidence in the Judiciary (in three of six reprimands)
- Rule 2.2: Impartiality and Fairness (in two of six reprimands)
- Rule 2.5: Competence, Diligence, and Cooperation (in two of six reprimands)
- Rule 2.6: Ensuring the Right to be Heard (in two of six reprimands)
- Rule 2.8: Decorum, Demeanor, and Communication with Jurors (in four of six reprimands)
- Rule 2.9: Ex parte Communications (in two of six reprimands)

Rule 2.8 is the most frequently identified rule violated in 2015, cited in four of the six reprimands issued by the Commission that year.

CASE ANALYSIS

Six cases[41] resulted in reprimands in 2015. Four violating Rule 2.8 are reviewed in the present analysis:

- Case A involves a male Justice of the Peace found to have violated Rule 2.8 (and Rule 1.2).
- Case B involves a male Justice of the Peace found to have violated Rule 2.8 (as well as Rules 1.1, 2.2, and 2.5A).
- Case C involves a female Court Commissioner/Judge pro tempore found to have violated Rule 2.8 only.
- Case D involves a male Justice of the Peace found to have violated Rule 2.8 only.

Two other cases (E: a female Justice of the Peace; and F: a female Superior Court Judge) are not considered further, as the nature of the judicial conduct resulting in the reprimand does not indicate emotion or inadequate emotion regulation as factors. Neither judicial officer was found to have violated Rule 2.8. Judge E was found to have lacked competence in the law (Rules 1.1, 1.2, 2.2, 2(C), and 2.6(A), and Judge F was disciplined for improper ex parte communication (Rule 2.9).

The four cases involving violations of Rule 2.8, which relates to decorum and demeanor, are the most strongly indicative of judicial emotion and lack of self-regulation or insufficient emotion work. These cases illustrate the difficulty of accessing and using the materials available for future guidance. In these matters, the judicial conduct complained of took place in court and appears to implicate emotion and emotional conduct as part of courtroom interaction. Examples of such emotion-related conduct include: apparent arrogance and making demeaning and derogatory comments (A); being sarcastic, abrupt, and impatient (B); being rude, harsh, brusque, intimidating (C); and being aggressive, accusing, and expressing disgust (D). The complaints arose in a variety of proceedings including a judgment debtor's examination (A), an eviction hearing (B), a criminal matter (C) and one where the nature of the underlying proceeding is unclear (D). In Cases A, B, C and possibly D, the judicial officer had received at least one previous sanction or reprimand for similar conduct. Judge C had resigned before the Commission's decision and Judge D resigned and returned to private legal practice before the complaint was formally filed. In only one matter (A) was the complaint brought by a court participant; in the others it was brought to the Commission's attention by the presiding judge (B) and (D) or by the 'General Counsel' of the county Superior Court (C).

Case A

A close analysis of Case A illustrates many aspects of judicial emotion and emotion work, in relation to the judicial officer himself and others, as well as issues relating to the accessibility and usefulness, or not, of disciplinary materials as sources of practical guidance for other judicial officers.

41. Documents related to each of these cases are available on the Commission's website at https://www.azcourts.gov/azcjc/PublicDecisions/2015.aspx. Although the actual names of the judges whose cases are considered can be identified from the Commission's website, they have been anonymized here by using the letters A, B, C, D, E, and F. While the judicial officers involved in these matters have different roles, the title "Judge" has been used throughout for easier reading and to reflect the normal usage for judicial titles.

The conduct complained of arose during a judgment debtor's exam conducted by Judge A, a justice of the peace. The public file in the disciplinary matter consists of a two-page handwritten complaint from the complainant (the debtor), a six-page letter from Judge A in response, the Commission's order imposing the public reprimand, the judge's motion for reconsideration, the disciplinary counsel's response, and the Commission's order denying reconsideration. The complaint refers to an attached document, which is not part of the publicly available material. The judicial officer's letter refers to the audio recording of the hearing and attaches several documents mainly relating to debtor's underlying debt and bankruptcy, as well as 'biographical information' related to the judicial officer. None of this material is available via the Commission's website.

The hearing, at which the conduct complained of occurred, lasted about 20 minutes and arose out of an earlier judgment against the debtor for unpaid rent and then failing to pay the judgment for that debt.[42] The plaintiff, attempting to collect the debt, appeared by telephone. The debtor was unrepresented, accompanied by his wife, and according to his complaint, he is a 75-year-old veteran. It appeared that the debtor had sought bankruptcy, so that the exam should have been stayed. However, because the pending bankruptcy was not clearly apparent from the court's file, the matter proceeded with the debtor's wife as the nominal witness, as she was not protected by that bankruptcy, though most of the interaction involved Judge A, the debtor, and the plaintiff, including various personal attacks from the plaintiff towards the debtor.

The complainant describes the judge as responding 'arrogantly' when told of the existing bankruptcy and wrote: 'I feel treated unfairly.'[43] In his response, Judge A describes his emotion before the hearing as 'frustrated and in the wrong state of mind' because he was not expecting to hear this matter and was interrupted while undertaking other work as part of a 'high volume' court.[44] This circumstance meant that he 'did not read the entire case file,' and so did not see the bankruptcy notice. He describes his manner as 'terse' at the beginning, but the proceeding as having 'a committee meeting format' and being 'conversational' including '[a]t one point, everyone … laughing.' He identifies several specific comments as inappropriate and apologized and acknowledged that he 'display[ed] animosity.' For example, Judge A said to the debtor 'You act as though you are proud of being broke' and 'You should not be living where you are living [at a country club]. You don't deserve that.' Judge A expressly recognizes the importance, especially with 'self-represented litigants'–that they 'feel that they were treated fairly.' He acknowledges that the complainant 'understandably feels he was not treated fairly.' He attempts to demonstrate by independent evidence that his conduct that day was 'an aberration' but is unable to do so as the Arizona judicial performance review data on 'temperament' is not collected for the court in which he sits. He uses emotion words and language in his response:

> I recognize and acknowledge that many of the statements I made during the [exam] were completely inappropriate. … I am usually able to maintain self-control and am embarrassed that I did not do so on this occasion. I felt bad about what had happened before lunch that day. … I am truly sorry.

"Judge made arrangements to transfer the case so that the [party] would be 'mad at me rather the court system.'"

Judge A made arrangements to transfer the case so that the debtor would be 'mad at me rather than the court system.' In reacting to the complaint, Judge A describes his own feelings of being 'embarrassed,' that he 'felt bad' and was 'truly sorry' about his behavior. He also anticipates the debtor's possible feelings—'mad'—as a result of the judge's conduct.

In its initial order imposing the reprimand, the Commission characterizes Judge A's comments as 'mocking and demeaning.'[45] The Commission recognizes that there are 'extenuating circumstances' to explain Judge A's failure to be aware of the bankruptcy filing, but once he was aware, it determined the exam should not have gone forward. It credits the judge with taking 'responsibility for his unprofessional demeanor' but emphasizes his previous public reprimand in determining that this conduct on this occasion merits a public reprimand.

Judge A's motion for reconsideration again acknowledges the inappropriateness of his conduct (he admitted his comments were 'cringe-worthy'), but emphasizes the lack of substantive harm to the complainant, in terms of outcome of the proceeding.[46] He attempts to justify the conduct for which he was previously reprimanded ('lost my temper with an extremely difficult litigant' who had to be evicted from a property by a SWAT team), explaining he 'was a new judge … and had not yet developed tactics to respond to litigants who scream at me.' He repeats his experience of being 'overtasked.' The judge also claims that the sanction in this case is 'not consistent with other Commission actions.'

The disciplinary counsel's response emphasizes that the complainant 'had to endure a judge mocking and demeaning his failure to pay' in a hearing that should never have taken place, but which proceeded partly as a result of the judge's lack of preparation where he 'conducted himself in an unprofessional manner.'[47] While Judge A has apologized, he 'does not address what he will do to better prepare' in the future, and the disciplinary counsel notes that Judge A did not take adequate 'corrective measures

42. This first summary paragraph is derived from reading all the available documents together. Later discussion contains specific reference to or quotes from particular documents.
43. Complaint Against a Judge, Case 15-085, Ariz. Comm'n on Jud. Conduct (Mar. 30, 2015).
44. Response to Complaint, Case 15-085, Ariz. Comm'n on Jud. Conduct (Apr. 16, 2015).
45. Order, Case 15-085, Ariz. Comm'n on Jud. Conduct (June 22, 2015).
46. Motion for Reconsideration, Case 15-085, Ariz. Comm'n on Jud. Conduct (July 2, 2015).
47. Response to Motion for Reconsideration, Case 15-085, Ariz. Comm'n on Jud. Conduct (July 15, 2015).

"The judicial officer has a significant role in setting . . . the emotional climate in a court proceeding, and in enabling appropriate emotional . . . communicaton with all participants."

concerning his temper' following the previous reprimand for similar conduct. This suggests that the disciplinary counsel doubted that the apology amounted to remorse and was not persuaded of the potential for change. Disciplinary counsel also pointed out that the comparison to previous Commission sanctions 'lacks a factual basis,' that Judge A's conduct harmed the debtor who experienced unfair treatment, and 'public confidence in the judiciary also suffered'. Moreover, because the judge has previous experience as disciplinary counsel for the Commission, he 'should be well-versed in his ethical obligations under the Code.' The Commission denied Judge A's motion for reconsideration.[48]

Case A illustrates several themes: the ways emotion manifests in judicial work; the scope, meaning, and application of formal rules and informal norms regarding judging and emotion; and the usefulness of disciplinary materials as guidance for good judging.

Emotion manifests in judicial work in several ways in this case. Judge A describes the presence of judicial emotion before the proceedings, acknowledging he was 'frustrated and in the wrong state of mind' as his preparation for other matters was interrupted by the need to hear this case. There was also considerable apparent judicial emotion during the hearing, as shown by words and demeanor toward the debtor that implied feelings of animosity, and were assessed by the Commission as mocking and demeaning. Judge A also attributed an emotion (pride) to the debtor, which was inappropriate and perhaps inaccurate. As Barrett points out, '[p]erceptions of emotion are guesses, and they're 'correct' only when they match the other person's experience,'[49] though 'some guesses are more informed than others.'[50] This tension arises through the interactive, dynamic quality of emotion experience and display; for all court participants, especially when a judicial officer is dealing with lay participants. The judicial officer has a significant role in setting or regulating the emotional climate in a court proceeding, and in enabling appropriate emotional as well as procedural or legal communication with all participants.

Judge A points to occasions where other court participants laughed at his comments and jokes, as evidence of success at maintaining a positive emotional courtroom climate. In contrast to this interpretation, such laughter and joking may only affirm the status differential between the judicial officer and courtroom participants who feel obliged to laugh at comment from the bench, but which they may not perceive as funny.[51]

This analysis of the disciplinary materials also provides insight into the scope, meaning, and application of formal rules and informal norms regarding judging and emotion. The Commission recognizes, as does Judge A, that the debtor, as an unrepresented party, may require special consideration to experience a feeling of being treated fairly. While Judge A apologizes and states he is 'truly sorry,' suggesting remorse, this is not seen as sufficient to avoid the application of the Commission's disciplinary power, especially as Judge A's behavior has not changed. This implies that awareness of the special needs of some court participants, and evidence of remorse on the part of the judicial officer who has not effectively managed emotion, are part of the norms governing judicial conduct.

Judge A points to the substantial workload and time pressures in this instance—not able to read the file in advance, not scheduled for that proceeding, and more generally by giving information about the types and numbers of cases. He presents these circumstances as beyond his control, generating stress and frustration that affected his conduct. However, the Commission did not accept these details as excusing inadequately regulated judicial emotion-related conduct.

The judge engages in moral credentialing, pointing to his previous good character, conduct and good works, but this does not outweigh the nature of his conduct as a breach of norms, especially in light of previous sanctions. Judge A's attempt to use previous cases to establish normative boundaries for judicial conduct was rejected by the disciplinary counsel and by the Commission. The judicial officer also appears to experience emotion or concern with being labeled unethical, which may imply a considered choice, when emotion is understood as spontaneous and reactive. The Commission's interest in what he would do to avoid this conduct in the future frames Judge A's conduct as something that can be anticipated and managed. This is also implied by his comment in relation to an earlier complaint, that he had 'not yet developed tactics' for dealing with an emotionally demanding situation, that is, he had not learned emotion management skills. However, he also attempts to normalize his conduct in terms of probability: 'I cannot guarantee anyone that at some point during the next 185,000 cases, that I won't become frustrated with a litigant and say something inappropriate.'

The usefulness of these disciplinary materials as guidance for good judging and emotion work is limited, first because several documents including transcripts or AV records are not available via

48. Order Denying Respondent Judge's Motion for Reconsideration and Request to Appear Before the Commission, Case 15-085, Ariz. Comm'n on Jud. Conduct (Aug. 14, 2015).
49. BARRETT, *supra* note 5, at 195.
50. *Id.*, at 246; *see also* SUSAN A. BANDES, *Introduction*, THE PASSIONS OF LAW 1 (Susan A. Bandes ed., 2001).
51. Michael Kirby, *Foreword, in* JUDGES, JUDGING AND HUMOUR (Jessica Milner Davis & Sharyn Roach Anleu eds., 2018); *see also* Michael J. Lovaglia et al., *Humor and the Effectiveness of Diverse Leaders*, *in* SOCIAL STRUCTURE AND EMOTION 331 (Dawn T. Robinson & Lynn Smith-Lovin eds., 2008); *see also* Sharyn Roach Anleu & Kathy Mack, *Judicial Humour and Inter-Professional Relations in the Courtroom*, *in* JUDGES, JUDGING AND HUMOUR 141 (Jessica Milner Davis & Sharyn Roach Anleu eds., 2018); *see also* Sharyn Roach Anleu et al., *Judicial Humour in the Australian Courtroom*, 38 MELB. U. L. REV. 621 (2014); *see also* Jennifer A. Scarduzio & Sarah J. Tracy, *Sensegiving and Sensebreaking Via Emotion Cycles and Emotional Buffering: How Collective Communication Creates Order in the Courtroom*, 29 MGMT. COMM. Q. 331 (2015).

the Commission website. This makes it harder to understand what actually occurred and so reduces the potential insight that can be gained. Second, while Judge A uses some emotion words to describe other participants (that the debtor might be 'mad') or himself (Judge A is 'embarrassed', 'felt bad', 'sorry' and identifies 'animosity' in his conduct), there are few emotion words and limited characterization of judicial obligations as entailing emotion work from Judge A or the disciplinary counsel or the Commission.

Case B

Case B illustrates several of the same issues as Case A, in a different context and with different emphases. Judge B's case involves an unrepresented plaintiff seeking rent from an elderly defendant, also unrepresented. The complaint alleges that Judge B 'displayed inappropriate courtroom demeanor and did not ensure the litigant's right to be heard.'[52] Commission documents describe the judge's conduct toward each party as falling short of the expected standard.

> When [Judge B] commenced the trial, he was either oblivious to or deliberately ignored the fact that the elderly defendant [using a walker] was having a difficult time in finding a chair that would accommodate her. She likely did not hear him request her opening statement, and instead of patiently waiting for her to get situated at the table, he forfeited her right to an opening statement. [Judge B] was very curt and abrupt with the plaintiff, who was clearly a struggling self-represented litigant. … [Judge B] told the plaintiff to call her first witness. After the plaintiff made a brief statement of the relief she was requesting [her house and rent], he asked "You're done. Really?" in a sarcastic tone.[53]

Judge B then dismissed the plaintiff's case. Neither the transcript nor an AV record of the court hearing is available for this matter via the website.

Similar to Case A, the Commission finds that the judge was sarcastic to an unrepresented litigant and that his 'tone during the trial was not "patient, dignified, and courteous."'[54] However in this case, Judge B disagrees with many of the statements alleged and with the Commission's characterization of what occurred, claiming the complainant misstates the record.[55] The judge insists that the plaintiff's testimony ended with the statement 'and that would be all,' followed by his question 'you're done. Really?' Judge B claims that the Commission's version—'he told her to return to the table'—is a misstatement, and that the record shows that he said, 'you may step down. Thank you.' The judge argues that the 'misstatement may be considered rude, but the record version is polite'. He asserts that "I actually said," … Good luck to you all, court stands adjourned." … I have said good luck to you all, thousands of times. I consider it a courtesy to the litigants … I respectively [sic] DENY that I was 'rude and de-grading'" (emphasis in original). This interchange illustrates the sometimes sharp differences in perception of emotion within social relations.[56] In the one interaction, the judicial officer felt he acted 'courteously,' and normalized his approach by saying he has done that 'thousands of times,' while the complainant interpreted the judicial behavior as impatient, abrupt and sarcastic. The disciplinary counsel notes that while the judicial officer may have said 'good luck to you all' at the close of the hearing, 'his general tone throughout the actual trial was sarcastic.'[57]

" . . . the Commission finds that the judge was sarcastic to an unrepresented litigant and that his 'tone during the trial was not patient, dignified, and courteous.'"

As with Case A, the Commission recognizes the dynamic, reactive nature of the emotional conduct, but regards Judge B's actions as something that can be controlled, and rejects the demanding nature of the court context as a justification. Though Judge A may have expressed remorse and Judge B does not, in each case, the Commission seeks concrete demonstrations of the individual judicial officer's capacity for change to justify not imposing discipline.

The Commission criticizes Judge B because he did not 'provide the litigants any guidance as to how the trial would proceed.'[58] In his motion for reconsideration, the judicial officer raises the high-volume time-pressured nature of the court's work as at least partial justification for the conduct: '5,000 such actions are filed every month in … [county] … As a practical matter, even 5 minutes of procedural guidance per case would swamp the lower courts.' As in Case A, the Commission does not find this sufficient justification to avoid discipline.[59]

The disciplinary counsel's emphasis on the special needs of the unrepresented parties implies that judicial officers should be aware that the court environment is unfamiliar for the litigants. Even such ordinary acts as finding a chair and sitting at a table can be challenging. The normative emotion expectation articulated in this case is that the judicial officer should show more patience and courtesy when addressing litigants directly.

Judge B's lack of remorse, in part based on his denial of the facts alleged, contrasts with Judge A's acceptance of the allegations, apologies and expressions of contrition. Judge B denies the described conduct, stating 'I simply don't see my error.' According to the disciplinary counsel: 'Respondent fails to acknowledge that

52. Order at 1, Case 15-125, Ariz. Comm'n on Jud. Conduct (Aug. 14, 2015).
53. Response to Motion for Reconsideration at 4-5, Case 15-125, Ariz. Comm'n on Jud. Conduct (Aug. 27, 2015).
54. Order at 1, Case 15-125, Ariz. Comm'n on Jud. Conduct (Aug. 14, 2015).
55. Response, Case 15-125, Ariz. Comm'n on Jud. Conduct (May 27, 2015); *see also* Motion for Reconsideration, Case 15-125, Ariz. Comm'n on Jud. Conduct (Aug. 20, 2015).
56. BARRETT, *supra* note 5; *see also* Ian Burkitt, *Decentring Emotion Regulation: From Emotion Regulation to Relational Emotion*, 10 EMOTION REV. 167 (2018).
57. Response to Motion for Reconsideration at 5, Case 15-125, Ariz. Comm'n on Jud. Conduct (Aug. 27, 2015).
58. Order at 1, Case 15-125, Ariz. Comm'n on Jud. Conduct (Aug. 14, 2015).
59. Order Denying Respondent Judge's Motion for Reconsideration, Case 15-125, Ariz. Comm'n on Jud. Conduct (Sept. 25, 2015).

"A lack of apparent warmth, and perceived harshness or intimidation, deviates from gender norms as well as judicial conduct norms."

his conduct and manner in the hearing were even remotely improper courtroom demeanor. He shows no introspection.' The information in the disciplinary proceedings suggests a mismatch between the judicial officer's interpretations of his comments and behavior and the perceptions of his conduct by others. The judicial officer displays little reflexivity regarding his own emotions and those of others.[60] The disciplinary counsel further points out that Judge B 'does not manifest a desire to *change or reform* the conduct the commission has found wanting' (emphasis added). This conclusion is reinforced by the Commission's finding that six years earlier this judicial officer had been reprimanded for improper courtroom demeanor involving 'similar behavior': 'for being argumentative, not allowing litigants to be heard, and aggressively cutting off the litigants' comments.'

Case C

In this matter, Judge C was presiding at a preliminary procedure in which the defendant was waiving the right to a probable cause hearing. Although there was no formal role for a victim, the victim was present, along with a lawyer acting as advocate. The Commission found that when the lawyer/victim advocate attempted to speak, Judge C, regarding her as a disruptive layperson, 'cut her off, and, in a very harsh tone, told her to sit down and to only address the court when she was told to do so.'[61] The Commission determined that, at the end of the hearing, the judicial officer was again 'rude, telling the attorney in a very loud and harsh tone to leave the courtroom or she would summon a deputy' to have her removed. The Commission order describes the judicial officer as 'impatient, harsh, and intimidating' and in violation of Rule 2.8(B) as she 'was not patient, dignified, and courteous.'

Judge C's response to the complaint arising from this incident was to argue that her 'stern' tone is necessary 'for a judge to be forceful with uncooperative laypersons to maintain control of the courtroom … an obligation under Rule 2.8(a).'[62] Though she describes herself as 'regretful,' Judge C seeks to neutralize or normalize her actions, undercutting any claim to genuine remorse.[63] Her response letter repeats that she 'mistakenly thought' that she was dealing with 'an unruly layperson (an all too familiar circumstance in the criminal arena)' and further explains her misperception by emphasizing that victims' advocates do not usually have a role in this type of hearing, thus suggesting her actions in the courtroom were reasonable. She attempts to shift blame to the attorney for failing to identify herself to the clerk or prosecutor in advance, and 'added fuel to the fire' by not following the judicial officer's instruction, confirming the judge's assessment that the 'defiant refusal to sit down' meant she was 'dealing with a disruptive layperson.'

Judge C acknowledges her history of 'sometimes-intemperate demeanor,' claiming she has been actively taking steps to deal with this, and regretted that 'all her hard work and progress was undone in the span of a few minutes.' She indicates that when she learned the identity of the attorney, she sought her out to apologize, but the attorney had left the building. Judge C resigned her judicial position after the complaint, so issues of future judicial (mis)conduct did not arise. Like Judge A, Judge C attempts a comparative argument to show discipline is unwarranted, pointing out that as her conduct was neither profane nor involved racial epithets it was not as serious as in other complaints that resulted in the Commission's sanction or censure of the judge. In applying the requirements of Rule 2.8, the Commission stated that, regardless of the status of the participant, she should have been treated in accordance with the Rule, in a way that was 'patient, dignified and courteous' and so discipline—the public reprimand—was warranted.[64]

This case suggests that behavior described as rude, harsh and loud, combined with a previous reprimand, supports a characterization of a judicial officer as unable to control her emotions. It may be the case that this female judicial officer is being held to different standards compared with her male counterparts. A lack of apparent warmth, and perceived harshness or intimidation, deviates from gender norms as well as judicial conduct norms.[65] However, the material available is insufficient to make strong inferences about gender and judicial behavior.

60. *See* Mary Holmes, *The Emotionalization of Reflexivity*, 44 Soc. 139 (2010); *see also* Mary Holmes, *Researching Emotional Reflexivity*, 9 Emotion Rev. 61 (2015); *see also* Sharyn Roach Anleu & Kathy Mack, *A Sociological Perspective on Emotion Work and Judging*, 9 Oñati Socio-Legal Series 831 (2019).
61. Order at 1, Case 15-192, Ariz. Comm'n on Jud. Conduct (Nov. 13, 2015). An audiovisual recording showing part of the proceeding is available online. See Megan Cassidy, *Commissioner Throws Attorney out of Courtroom, Resigns Day Later*, AZ Central (July 23, 2015), https://www.azcentral.com/story/news/local/phoenix/2015/07/22/maricopa-county-courtroom-outburst-julie-newell-resignation/30541427/.
62. Response to Complaint at 3, Case 15-192, Ariz. Comm'n on Jud. Conduct (Aug. 21, 2015).
63. Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 Am. Soc. Rev. 664 (1957).
64. Order, Case 15-192, Ariz. Comm'n on Jud. Conduct (Nov. 13, 2015).
65. There is a longstanding tight social and cultural association of women with emotion and 'deep-rooted stereotypes about which gender is best suited for particular kinds of jobs'; see Amy S. Wharton, *The Sociology of Emotional Labor*, 35 Ann. Rev. Soc. 147, 149 (2009). Even where women work in traditionally male-dominated occupations such as the judiciary, they may still experience gendered expectations regarding their capacity and willingness to provide emotion work; see Kathryn J. Lively, *Client Contact and Emotional Labor: Upsetting the Balance and Evening the Field*, 29 Work & Occupations 198 (2002); see also Jennifer Pierce, Gender Trials: Emotional Lives In Contemporary Law Firms (1995); see also Francesca Polletta & Zaibu Tufail, *Helping without Caring: Role Definition and the Gender-Stratified Effects of Emotional Labor in Debt Settlement Firms*, 43 Work & Occupations 401 (2016); see also Zaibu Tufail & Francesca Polletta, *The Gendering of Emotional Flexibility: Why Angry Women Are Both Admired and Devalued in Debt Settlement Firms,* 29 Gender & Soc'y 484 (2015); compare with Blix & Wettergren, *supra* note 4, at 4.

Case D

This matter involves a long-standing conflict, still generating intense emotion in Judge D, in relation to an attorney, such that it was the judge's practice to recuse himself in any matter involving the attorney. When Judge D realized the attorney was appearing in a case before him, the Commission found he stated: 'I remember you … I recuse myself from your cases … you are the gentleman who yelled at the lady who is now my wife.'[66] Judge D "went on to state that the attorney was disrespectful to other women based on rumors he had heard in the community, stated he was concerned the attorney was a 'misogynist,' and advised he would never hear that attorney's cases. [Judge D] then brusquely ordered the attorney from his courtroom."

The Commission concludes that the judge 'acted in an undignified and discourteous manner in a judicial proceeding' and 'was not patient, dignified, or courteous to the attorney … rather his tone was accusatory, aggressive, and expressed disgust with the attorney's alleged conduct' violating Rule 2.8(B). This characterization uses specific emotion words, especially 'disgust', to describe Judge D's conduct, indicating that his words and actions displayed feelings that judicial officers are not allowed to express, or perhaps not even to experience.

Although retired from judicial office, Judge D responded to the allegations.[67] He denies misconduct, justifying his refusal to hear from the attorney as needing to put the reasons for the recusal on the record, and the need to control the courtroom. The judicial officer explains that the attorney 'interrupted the Court at least five times' during his attempt to make a record, 'until I finally had to order him out of my courtroom.' Judge D appeals to law to explain his conduct: 'Rule 611 of the Arizona Rules of Evidence allowed me to exercise reasonable control over my courtroom … Rule 2.8 mandates a judge **shall** require order and decorum in proceedings before the court. That means the judge serves as an enforcer of this exact conduct by lawyers' (emphasis in original).

This is also a situation, as in Case B, where the judicial officer's perceptions of his feelings and emotion display are at odds with the Commission's findings. Judge D insists he tempered his interaction and sought to control the courtroom, yet the Commission determines his conduct warrants public reprimand. The judge insisted that his manner and voice were 'tempered': 'I tempered my words to him and was dignified from the bench.' (No audio recording of the proceeding in which the alleged misconduct took place was available on the website.)

As with Judges A and C, Judge D also argues that his demeanor was less objectionable than in other disciplinary matters: 'My judicial behavior was not remotely near what this Commission has previously held to be sanctionable.' Again, the attempt to benchmark the complained behavior against past Commission decisions did not aid the argument against discipline.

DISCUSSION

Findings from this investigation generate insight into the

- emotion demands and opportunities in judicial work;
- application of formal rules and implicit norms about judicial emotion, emotion work, and appropriate emotion display or demeanour; and
- value and limits of discipline materials as a source of practical guidance for judicial emotion work.

"A judicial officer's assessment of a court participant's conduct . . . can pose emotion challenges."

Emotion demands and opportunities in judicial work

Cases A, B, C, and D each involve circumstances described as occurring frequently in lower courts: unrepresented litigants (A and B), a disruptive layperson (though actually an attorney) (C), or an attorney seeking to interrupt court process (D). Emotion can be experienced by the target of the judicial conduct or by the judge before or apart from the events, in the moment of the conduct complained of, and later, in recalling and reflecting on the conduct and engaging with the Commission.[68] These cases involve apparent expressed judicial emotion in the moment (A, 'animosity'; D, 'expressed disgust') as well as feelings articulated in later reflection (A, embarrassed; C, 'especially regretful').

A judicial officer's assessment of a court participant's conduct as distracting from, delaying or interrupting the time-pressured everyday work of the court, can pose emotion challenges. These circumstances may also entail feelings and emotion displays of various kind on the part of the litigants or attorneys. The judicial officers in cases A and B each raise specific concerns that judicial capacity to meet the practical and emotional needs of the unrepresented litigants, especially in busy lower courts, is necessarily limited. Cases C and D involve an observed judicial display apparently entailing emotion, in response to an attorney, whose actions the judicial officer either misinterpreted (C) or were viewed as disrupting judicial work (D), perhaps also reflecting the distinctive emotion demands of lower court work.[69]

The application of formal rules and implicit norms

The four cases chosen for detailed analysis all involved determinations that Rule 2.8 was violated, as these appear more likely to involve emotion. The Rule requires that the judge maintain 'order and decorum' and 'shall be patient, dignified, and courteous.' The meanings of these rules for judicial emotion and emotion work are not expressly articulated, but clearly implied. Some of these cases illuminate emotion in judicial conduct that breaches formal rules and deviates from the model courteous and patient judge. The Commission characterises the judicial conduct for which discipline was imposed as: 'mocking and demeaning' (A), 'sarcastic' (B), 'harsh' and 'rude' (C), and 'accusatory, aggressive and expressed disgust' (D). Each of these words or phrases identifies a specific and unacceptable emotion or implies emotion on the part of the judicial officer, displayed toward others in the courtroom.

An important concept in judicial emotion and related conduct

66. Order, Case 15-267, Ariz. Comm'n on Jud. Conduct (Feb. 5, 2016).
67. Response to Notice of Complaint, Case 15-267, Ariz. Comm'n on Jud. Conduct (Nov. 11, 2015).
68. ANLEU & MACK, *supra* note 5.
69. *See* ANLEU & MACK, *supra* note 5; *see also* ANLEU & MACK, *supra* note 6.

"One key insight . . . is that emotion matters and that failures of judicial emotion . . . can lead to public sanctions . . ."

is temperament. Maroney suggests: 'How well or poorly a particular judge lives up to the temperamental expectations of judicial office depends to no small degree on his or her tendencies toward particular patterns of emotional experience and regulation.'[70] In cases B and C, the Commission was influenced by previous disciplinary findings and apparent continued failure of the judicial officers to change their conduct. This may be an implicit indication that the Commission formed a view that these judicial officers lacked an appropriate judicial temperament.

One key insight that these cases generate is that emotion matters and that failures of judicial emotion regulation can lead to public sanctions for judicial misconduct as violation of Rule 2.8. In making the determinations in these cases, the Commission interprets and applies the very general, abstract, and aspirational words of the rule, clarifying its scope and meaning. Similarly, the ways the judge frames the motion for reconsideration, and how the disciplinary counsel frames the response, provide guidance regarding the norms or feeling rules that inform the Commission's decision.

In describing or explaining their own conduct and emotion, only one judicial officer comes close to expressing remorse: Judge A offers an apology and expresses embarrassment and contrition. Others do not acknowledge error (Judge B) or seek to neutralize or normalize their conduct in the context of the busy lower courts that deal with many unrepresented litigants/defendants (Judges C and D).

There is a recognition of the special needs of some court participants, such as the elderly unrepresented litigant distracted by finding a chair and perhaps confused by the unfamiliarity of the court and so deserving of special patience. However, in two of the four cases the judicial conduct was directed at attorneys, confirming that lawyers and laypersons alike deserve treatment that is patient, dignified, and courteous. In two cases, the judicial officers highlighted their work contexts—a busy court, a heavy workload, large numbers of cases, time pressure, and a need to control the courtroom—as explanations of their conduct and statements; however, in each instance, the Commission discounted these explanations. It is also worth noting that all the judges in these four cases were Justices of the Peace or pro tem judges, who typically lack the same professional legal training of full-time judges yet who preside in busy courts where many citizens have their experience of the court system.

Value of material as guidance

The material generated through these disciplinary processes is gathered for the specific purpose of determining whether a breach of the Code has occurred and whether any sanction should be imposed. This inevitably shapes what is available for guidance and research purposes.

Accessibility is limited by several factors:

- organized by year, listed by complaint/case
- information available is limited, either for reasons of confidentiality or practicality, e.g., AV recordings, transcripts, or supporting documentation
- no searchable database by rule, or type of conduct
- amount of time required to conduct a review of data, identify relevant characteristics, review original documentation
- very few matters from which to generate insights

The result is that these materials provide relatively little accessible practical guidance for judicial emotion work. To review the universe of complaints for potentially pertinent cases, then to read and analyze them to distill any lessons to be learned, requires substantial time investment. Interestingly, attempts by judicial officers in cases A, C, and D to seek a lesser penalty by comparing their conduct to other cases where reprimands were imposed were unsuccessful. This also suggests limited assistance can be derived from this material for future guidance.

In considering what can be learned from these discipline cases, it is important to be mindful of the limitations of the data. Very few judges in Arizona are the subject of formal complaint, and most complaints are dismissed; so the few reprimand cases are not an indicator of the full range of judicial behavior. Moreover, given the small number of cases, each is quite different—in terms of the complaint, the participants, the proceeding—making general inferences difficult. It is also important to note that these cases are, by definition, extreme cases and are backward looking, examining conduct that occurred in the past for a particular legal, disciplinary purpose. In addition, there is considerable filtering and transformation of the material available. For example, in cases B and D, the complaint was made by the county presiding judge, rather than by a court participant. After a case is brought to the Commission, the material is described or characterised by the disciplinary counsel, the Commission itself and the judicial officer involved, as well as by this research.

There are other potential sources of guidance about judicial emotion and emotion work. For example, Arizona has a Judicial Ethics Advisory Committee. The opinions produced provide clarifications of what is required under the Code. However, a review of the 200 opinions issued since 1976 finds that very few address in-court judicial conduct of the kind considered in this article.[71] The opinions are predominantly concerned with a judicial officer's personal, social, business, or community activities outside the judicial role and outside the courtroom. Where opinions address in-court conduct, they primarily address issues of bias and the substance of the decision. The only opinion that appears to address Rule 2.8 involves how a judge might respond to a person who makes threats, suggesting that the judge ought to consult his/her 'own conscience and emotions to determine whether [he or she] harbors any bias or prejudice' against a

70. Terry A. Maroney, *(What We Talk About When We Talk About) Judicial Temperament*, 61 B.C. L. Rev. 2085, 2152 (2020).

71. The review was conducted by (i) perusing the title of each opinion, which would clearly indicate the subject matter of each opinion, and (ii) conducting broad keyword searches of a database of the opinions maintained by Westlaw.

party.[72] Although occasions of unmanaged emotion can have considerable consequences for judicial discipline and public confidence, these are not covered by available guidance.

CONCLUSION

This article commenced with the questions: How do judges learn to manage emotion skillfully, to be good judges? Where do they find concrete practical guidance regarding their own emotion experience and display, and those of court users? Specifically, the article investigates the meaning of Rule 2.8(A) and (B) of the Arizona (and ABA) Codes of Judicial Conduct, requiring judicial officers to be 'patient, dignified and courteous' and to maintain 'order and decorum.' These rules are enforced by disciplinary processes of the Arizona Commission on Judicial Conduct. Data from the Commission's large, publicly available and comprehensive archive of disciplinary proceedings has been analyzed to provide insight into the occasions for judicial emotion work, the meaning of the applicable norms and the value of these disciplinary materials to assist judicial officers to manage emotion skillfully.

The task of the Commission is a legal one: to determine whether the conduct complained of breaches the Code (or other norms) or not; there is little analysis of judicial conduct in terms of emotion and emotion work. However, because the conduct complained of is investigated and considered closely, especially when a motion for reconsideration is filed, some potential guidance can be distilled, as discussed in detail in relation to the four cases analyzed and summarized in the discussion above. While such materials are not readily available or easy to use as guidance for judicial emotion work, they do have potential value.

Disciplinary material could be of more value in supporting judicial emotion work if information about dismissals were available, especially for cases in which the Commission found that undesirable conduct did occur, but was not sufficiently inappropriate to breach the Code or to deserve sanction. This information could be valuable in two ways: (i) where the conduct is found to have occurred, but was not bad enough to be sanctioned, to establish a boundary between acceptable and unacceptable conduct; and (ii) even in cases where the conduct was found not to have occurred, these could be potentially instructive to determine what types of situations or interactions can lead to ethical complaints or perceptions among the public and the court community of improper behavior.

Perhaps the more useful role for these materials is in a structured educational setting in which illustrative cases are reviewed and selected for judges to discuss in depth. This approach may be especially useful if the facilitator has more complete case information than is publicly available. This can provide a launch pad for discussion of issues that judges may face in everyday work—to provide regular, routine opportunities to discuss practical problems of judicial emotion and emotion work, to bring home the everyday reality of emotion challenges judges may face—to help judges better anticipate and avoid potential issues. Such programs would be better able to address changes and challenges to the emotion environment of the court, such as those presented by public health crises like the COVID-19 pandemic, and others which will inevitably emerge. Courtesy and patience, and the emotion work needed to achieve them, may be even more important today, even as it may become more challenging for judges to conduct intrapersonal and interpersonal emotion work skillfully.

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72. Judicial Ethics Advisory Committee (Ariz.), Formal Advisory Ethics Opinion 16-01: Threats: Taking Appropriate Action; Disqualification (2016).

COVID-19 Employer Liability Still Unknown

Heather R. Falks

The COVID-19 pandemic has spurred a new era of personal injury litigation. Across the United States, lawsuits for wrongful death, negligence, and retaliation are being filed against businesses for their failure to protect employees and the public from the known dangers of COVID-19.[1] Tyson Foods was sued for wrongful death by the widow of a Tyson employee who contracted COVID-19 five days after administering temperature checks for Tyson employees at a meatpacking plant. He died from COVID-19 two weeks later.[2] A Trader Joe's employee filed a complaint with the National Labor Relations Board claiming he was terminated in retaliation for requesting greater COVID-19 protections from his employer.[3] New York sued Amazon for disregarding health standards in Amazon warehouses.[4] Colorado congressman Doug Lamborn was sued by a former employee who claims the congressman failed to implement any safety standards and as a result contributed to the spread of COVID-19 to his staff.[5] Most recently, following the death of four courthouse workers, the Superior Court of Los Angeles was fined more than $25,000.00 for COVID-19 safety violations.[6]

In addition to personal injury liability, employers and places of public accommodation also face liability under the Americans with Disability Act (ADA). The ADA requires that reasonable accommodations be provided to permit those with disabilities to engage in employment and other public services; therefore, businesses including the courts must provide reasonable accommodations to both the public and employees permitting them to continue to engage in employment and services regardless of their at-risk status.[7] Title I of the ADA requires employers to provide reasonable accommodations to employees with disabilities and prohibits discrimination on the basis of disability.[8] Title I of the ADA also regulates medical examination and inquiries. Title II of the ADA regulates public services provided by state and local government agencies.[9] Under Title II, state and local government cannot deny services to a disabled person or deny participation in programs or activities that are available to people without disabilities. Titles I and II require that courts continue to protect court employees and the public from exposure to COVID-19 to ensure safe and equal access to the justice system.[10]

AMERICANS WITH DISABILITIES ACT

COVID-19 AS A DISABILITY

A person with COVID-19 or the long-term effects of COVID-19 may be considered disabled under the ADA. Requests for accommodation from employees who are at-risk due to underlying conditions, or employees who have COVID-19 or those who are suffering long-term side effects from COVID-19, should be processed by engaging in the interactive process.[11] The interac-

Footnotes

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2. Sam Wood, *COVID-19 Death of Original Philly Cheesesteak Supervisor Triggers a Lawsuit Against Meatpacking Giant*, Philadelphia Inquirer (Jan. 15, 2021) https://www.inquirer.com/business/philly-original-cheesesteak-fatal-covid-tyson-foods-law-suit-20210115.html.
3. Ellie Hall, *A Trader Joe's Employee Says he was Fired for Asking for Better COVID-19 Protections*, BuzzFeed News (Feb, 28, 2021) https://www.buzzfeednews.com/article/ellievhall/trader-joes-fired-masks-coronavirus-safety.
4. Jaclyn Diaz, *New York Sues Amazon Over COVID-19 Workplace Safety*, NPR (Feb. 17, 2021) https://www.npr.org/2021/02/17/968568042/new-york-sues-amazon-for-covid-19-workplace-safety-failures.
5. Rachael Bade, *Eye-Popping Lawsuit Portrays GOP Lawmaker's Office as a COVID-19 Petri Dish*, Politico (May 13, 2021) https://www.politico.com/news/2021/05/13/lawsuit-gop-lawmaker-office-covid-488274.
6. Debra Cassens Weiss, *Los Angeles Superior Court Fined over $25K for COVID-19 Safety Violations After Courthouse Worker Deaths*, Am. Bar Ass'n (July 8, 2021) https://www.abajournal.com/news/article/los-angeles-courts-fined-25k-for-covid-19-safety-violations-after-courthouse-worker-deaths.
7. *Coronavirus Disease 2019 (COVID-19): Accommodation and Compliance*, JAN, https://askjan.org/topics/COVID-19.cfm (last visited Aug. 10, 2021).
8. Information and Technology Assistance on the Americans with Disabilities Act: Employment (Title I), ADA.gov, https://www.ada.gov/ada_title_I.htm (last visited Aug. 10, 2021).
9. Information and Technology Assistance on the Americans with Disabilities Act: State and Local Governments (Title II), ADA.gov, https://www.ada.gov/ada_title_II.htm (last visited Aug. 10, 2021).
10. What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, EEOC, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last updated May 28, 2021).
11. *Id.; Engaging in the Interactive Process During the COVID-19 Pandemic*, JAN, https://askjan.org/articles/Engaging-in-the-Interactive-Process-During-the-COVID-19-Pandemic.cfm (last visited Aug. 10, 2021); Tracy DeFreitas, *The ADA and Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19*, JAN, https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm (last visited Aug. 10, 2021).

tive process allows the employer to determine what accommodations are necessary to allow that employee to continue working. Employers are required to provide reasonable accommodations under the ADA, and reasonable accommodations may include providing a separate workspace, requiring masks, putting up plexiglass, or placing the employee on remote work. The employer should request medical documentation and engage in conversation with the employee to determine the best accommodation.

COVID-19 IS A DIRECT THREAT

The EEOC defines a "direct threat" as anything that poses "a significant risk of harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." The Equal Employment Opportunity Commission (EEOC) has concluded that the COVID-19 pandemic meets the direct threat standard.[12] COVID-19 poses a direct threat to employees and the public.[13] The courts have a legal responsibility to take all necessary safety measures to protect both court employees and the public. Certain employees and members of the public are more at risk than others due to disabilities and underlying conditions. The ADA prohibits employers and the government from treating individuals differently due to a disability; therefore, disabled, or at-risk employees cannot just be removed from the workplace. The ADA requires that reasonable accommodations be provided to permit those with disabilities to engage in employment and other public services. Therefore, as both a government entity and an employer, the courts must provide reasonable accommodations that will allow for those who are at risk to engage in work and attend court.

REMOTE WORK AS AN ACCOMMODATION

COVID-19 forced many employers to make remote work an option for employees. Employers bought equipment and created processes that would allow employees to work from home during the pandemic, and as a result remote work has now become more widely available. The recent availability of remote work also now makes it a more reasonable accommodation for future disability accommodation requests.

Throughout the pandemic remote work has been used by courts as a way to protect employees and maintain some level of productivity. During the peak of the pandemic many courts were closed or limited to very little activity, which left the courts struggling to find work for their staff on a temporary remote status. As time passed, courts reopened and employees returned to the office. Remote work is often still used to help prevent the spread of COVID when an employee has symptoms or exposure concerns. Much of the work performed by court employees requires them to be in the office or courtroom; it is difficult to maintain a full workload for court employees on an entirely remote basis. Now that employees have been provided the ability to work remotely, some wish to remain on remote. Employees do not get to decide if they remain on remote work; however, if they have a disability and request remote work as an accommodation then the employer needs to process that accommodation request as required under the ADA. Courts do not have to remove essential job functions to provide an accommodation, and they do not need to provide an employee's preferred accommodation. If being in the office is an essential function of the job, then remote work is not an appropriate accommodation. The court is required to provide an effective accommodation that meets the needs of the employee and permits the employee to still perform the essential functions of their job.

" . . . if a court employee requests remote work as an accommodation for a documented disability, then court management must assess if the essential functions of the job can be met on a remote basis."

When an employee requests remote work, the employer must assess the reason for why this request is being made. The employer should ask for an explanation from the employee and ask for supporting medical documentation. If the employee provides documentation of a disability, it then must be determined if remote work is the most reasonable accommodation that can be provided. An accommodation is not reasonable if the employee cannot perform the essential functions of their job even with the accommodation. Most court jobs have essential functions that require the employee to be present in the courtroom to fulfill their full job description. Therefore, if a court employee requests remote work as an accommodation for a documented disability, then court management must assess if the essential functions of the job can be met on a remote basis. If the essential functions cannot be met, then court management should provide alternative accommodations. These alternative accommodations will be very fact specific to the needs of that specific employee. It is important that court management take these requests seriously and engage in this interactive process with the employee to ensure that the requirements of the ADA are being met.

VACCINES: EDUCATE v. MANDATE

COVID-19 vaccines are now available. Even with vaccines the court must still provide accommodations to employees and the public to protect them from COVID-19. The availability of vaccines has created new areas of concern and impacted workplace policy surrounding whether to mandate the vaccine, accommodations and concerns about documentation, and confidentiality.

COVID-19 vaccines have been approved for administration under the Emergency Use Statute. The Emergency Use Statute, 21 U.S.C. 360bbb-3(e)(1)(ii)(III), requires that each person be informed of the option to accept or refuse administration of the vaccine along with being told of the alternatives and risks and benefits. Each person who gets vaccinated must acknowledge that they have a choice to either take the vaccine or not. Due to the limited authorization of the vaccine, most employers have opted not to mandate vaccination. The Department of Labor (DOL) issued an opinion stating that the Emergency Use Authorization requirements do not prevent private or public employers from

12. EEOC, *supra* note 10.

13. *Id.*

"Personal antivaccination views typically will not be enough to establish a sincerely held religious belief."

mandating the vaccines.[14] Many employees have strong feelings about the COVID-19 vaccine and there has been politicization of the vaccine. As a result, if an employer decides to mandate the vaccine, it is likely that they will receive legal challenges to that mandate, even though it is becoming more widely acceptable.

An employer mandating the vaccine must be willing to terminate an employee for not obtaining it. This would require employees to choose between being vaccinated and losing their livelihood. Before deciding to put a mandate in place employers should consider the impact on office morale if it becomes necessary to terminate large groups of employees. It is possible that with the recent FDA approval of the Pfizer vaccine, some previously reluctant employees will change their mind and decide to get vaccinated. Surveying staff who have not yet vaccinated may assist the employer in determining which employees are more willing to get vaccinated now that Pfizer has received full FDA approval versus which employees will not vaccinate regardless of FDA approval. Performing such a survey will allow the employer to determine how many employees may have to be removed from the workforce if they refuse to vaccinate even after a mandate is put into place. One other factor to consider is that many states have passed their own anti-vaccination mandate laws, also known as anti-vaccination passport laws, and this has resulted in a rise of local mandate lawsuits being filed by employees. This may limit the employer's ability to obtain proof of vaccination; however, an employer can encourage staff to provide proof of vaccination by providing incentives or by imposing mask and testing mandates for those who refuse to provide proof-of-vaccination status. Other possible incentives could include providing additional leave days or small gift cards ($15 or less) upon proof of vaccination.

Whatever incentive is offered for obtaining the vaccine, that same incentive must also be offered to employees who are unable to get the vaccine due to a disability or a sincerely held religious belief. If a court decides to offer an incentive, the court must be prepared to evaluate accommodation requests. If an accommodation is granted, then the court must still offer the incentives to those employees even though they are not going to be vaccinated. Failure to provide the incentive to those who receive an accommodation may be considered disability discrimination or religious discrimination.

ACCOMMODATIONS

If an employee can establish that they cannot be vaccinated because they have an underlying health condition that is a covered disability under the Americans with Disabilities Act (ADA), then they should be given an accommodation. Some examples of such conditions are pregnancy, allergies, and autoimmune disorders. Additionally, some employees may be on medications that prevent them from obtaining the vaccine. If an employee requests an accommodation, request a doctor's note and medical documentation to support the request. Once the supporting documentation is provided, then the accommodation should be granted, and the employee should be given any incentives that are being offered to those employees who obtained the vaccine.

Under Title VII a sincerely held religious belief is a requirement to establishing an entitlement to a religious accommodation.[15] Personal and ethical objections are not sufficient. Personal antivaccination views typically will not be enough to establish a sincerely held religious belief. An employee who is not vaccinated due to a sincerely held religious belief will need to provide an explanation. The employee can be asked how obtaining the vaccine impacts their religious beliefs. These requests are very fact specific and need to be evaluated on a case-by-case basis.

DOCUMENTATION & CONFIDENTIALITY

Employers are permitted to gather information from employees concerning their vaccination status. The EEOC has determined that COVID-19 is considered a direct threat under the ADA's standards and this permits employers to conduct more extensive medical inquiries because allowing COVID-19 into the workplace poses a direct threat to others.[16] Courts are permitted to gather documentation related to the vaccination status of court employees. Gathering this vaccination information will help guide the court in making employment policies. Gathering vaccination information will also aid the court in protecting those employees who are not vaccinated. Employers only need a copy of the employee's vaccination card. Some states have passed laws prohibiting "vaccination passports." However, in those states the employer can still provide an incentive that encourages employees to provide documentation of their vaccination. For example, only employees who provide proof of vaccination are permitted to remove their mask in the workplace.

All documentation related to vaccination or accommodation requests must be kept in a file marked as confidential medical information. This file should have restricted access and be separate from the employee's employment file. Do not disclose to other employees who has been vaccinated versus who has not. This information is considered confidential medical information. Only one designated employee should be handling this confidential medical information. Staff should not be gossiping about who is or is not vaccinated and who may or may not have received an accommodation. Employees should not be treated differently based upon their vaccination status. Requiring unvaccinated employees to wear masks is not discrimination and does not identify their vaccination status. Vaccinated individuals still choose to wear masks, so the mere act of wearing a mask does not single out an employee based upon their vaccination status. Requiring the unvaccinated to wear masks is a necessary safety measure and is not discriminatory. The court should not allow coworkers to engage in shaming one another about vaccination status. Employees are likely to have varying opinions about vaccination and each employee will likely have a different rationale

14. *See* https://www.justice.gov/sites/default/files/opinions/attachments/2021/07/26/2021-07-06-mand-vax.pdf.
15. What You Should Know: Workplace Accommodation, EEOC, https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation (last visited Aug. 10, 2021).
16. EEOC, *supra* note 10.

for their stance on vaccination. It is important for the court to encourage civility and for court leadership to model appropriate behavior. Do not put employees in a position where they feel they must disclose their vaccination status publicly. Court management only needs to know the vaccination status of employees to assist in policy development.

According to the CDC, if a fully vaccinated person is exposed to COVID-19 but has no symptoms, then that individual does not need to quarantine or be restricted from work.[17] Based upon the CDC guidance, vaccinated court employees who are exposed to COVID-19 do not need to quarantine but unvaccinated staff would still need to quarantine to prevent spread. This demonstrates why it is important for the court to know which employees are vaccinated versus which employees are not because the court will need to require non-vaccinated employees who are exposed to quarantine.

INDIANA UNIVERSITY MANDATE

Indiana University, a state university, has mandated vaccination for all students and faculty for the 2021 fall semester.[18] Eight students filed a lawsuit and requested a preliminary injunction to stop the mandate. The United States District Court for the Northern District of Indiana denied the students' request for a preliminary injunction. The students have appealed the District Court's decision to the 7th Circuit Court of Appeals.

The court stated the following concerning authority to regulate matters of public health:

> Under our country's federalist system, state and federal governments share regulatory authority over public health matters. States traditionally exercise most authority under their inherent police power—and reasonably so when public health may flux and evolve by locale. States thus have the power, within constitutional limits, to pass laws that "provide for the public health, safety, and morals."[19]

The court went on to reason that action taken by a state actor to protect public health should not be interfered with by the courts unless it violates fundamental rights.[20] The *Zucht* and *Jacobson* cases settled that the state has the power to require vaccination.[21] States have historically adopted vaccination mandates, requiring students obtain vaccinations to attend school.[22] When the government enacts law, in the interest of public health, that infringes on nonfundamental rights the appropriate review standard is rational basis.[23] Strict scrutiny analysis is only appropriate for infringements of fundamental rights. The right to refuse a vaccine, due to an interest in bodily autonomy, is not a fundamental right.[24] The court reasoned that this interest of the state to protect public health does not permit the state to unjustly expand its powers indefinitely; "the government must continually update its practices in light of the most recent medical and scientific developments."[25]

"Indiana University argued that the students were not being forced to vaccinate against their will because they could always choose to go to college elsewhere."

Indiana University argued that the students were not being forced to vaccinate against their will because they could always choose to go to college elsewhere.[26] The "unconstitutional conditions doctrine" forbids the government from denying a benefit to a person because they exercise a constitutional right.[27] The liberty at issue here is the student's Fourteenth Amendment right to refuse a vaccine.[28] It has been suggested that individuals have a constitutional right to refuse unwanted medical treatment.[29] The *Cruzan* and *Glucksberg* cases both involved an individual's choice to refuse treatment with no ramifications to the health of someone else.[30] "Vaccines address a collective enemy, not just an individual one."[31] Vaccines address a public health concern and the decision surrounding whether to vaccinate or not has an impact on society as a whole and not just the individual. Every individual has a choice but that choice is "subject to the state's reasonable measures designed to pursue legitimate ends of disease control or eradication."[32] The University has an obligation to protect students and faculty. As a result, the students have a difficult choice to make but they do have a choice.

The students also argue that the vaccine mandate violates their free exercise of religion. The court reasoned that when evaluating free exercise claims, "[n]eutral and generally applicable regulations need only be supported by a rational basis."[33] The University's vaccine mandate is a neutral rule of general applicability as it applies to all students regardless of religion. The court opined that stopping the spread of COVID-19 remains a compelling state interest, and the University has an interest in protecting the health of students and faculty.[34] The court provided case citations to numerous jurisdictions to support the finding

17. Interim Public Health Recommendations for Fully Vaccinated People, CDC, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html (last updated July 28, 2021).
18. Klaassen v. Trs. of Indiana University, 1:21-CV-238-DRL-SLC, 2021 WL 3073926, at *5 (N.D. Ind. 2021).
19. *Id*. at *17 (citing Barnes v. Glen Theatre, 501 U.S. 560, 569 (1991); Washington v. Glucksberg, 521 U.S. 702, 729–31 (1997); Zucht v. King, 260 U.S. 174, 176–77 (1922), Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 24–25 (1905)).
20. *Id*. at *17–22 (citing Jacobson, 197 U.S. at 31, 38).
21. *Id*. at *24 (citing Zucht, 260 U.S. at 176–177).
22. *Id*. at *19.
23. *Id*. at *21.
24. *Id*. (citing Sweeney v. Pence, 767 F.3d 654, 668 (7th Cir. 2014)).
25. *Id*. at *22.
26. *Id*.
27. *Id*. at *23 (citing Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013); Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 545 (1983)).
28. *Id*.
29. *Id*. (citing Cruzan v. Dir., Missouri Dept. of Health 497 U.S. 261, 279 (1990); Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).
30. *Id*.
31. *Id*. at *24.
32. *Id*.
33. *Id*. at *25 (citing Ill. Bible Colls. Ass'n v. Anderson, 870 F.3d 631, 639 (7th Cir. 2017)).
34. *Id*. at *26.

"The court is not entitled to make medical inquiries of jurors; however, the court can ask about vaccination status if a potential juror asks to be excused due to COVID concerns."

that there is no right to not wear a mask and there is no right to not be tested for the virus.[35]

The court denied the students' motion for preliminary injunction because the students did not establish a likelihood of success on the merits, and the public's interest did not favor a preliminary injunction. The court quoted John Stuart Mill, *On Liberty* 9 (1985), "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[36] This opinion evaluates the individual rights of a few versus the collective interest in public health and safety for everyone and provides legal support for the continued effort to enact policies with the goal of protecting the public from COVID-19.

JURY CONSIDERATIONS

The vaccination status of jurors should not be considered when conducting voir dire. Inquiries of jurors concerning their vaccination status is likely to get into a greater discussion about underlying disabilities and medical conditions. These discussions should not occur in a public forum. The court is not entitled to make medical inquiries of jurors; however, the court can ask about vaccination status if a potential juror asks to be excused due to COVID concerns. The court is permitted to ask about vaccination in this circumstance because if the juror is vaccinated it may eliminate their COVID concerns. The court is not permitted to engage in a discussion of the specific reasons why a juror may or may not be vaccinated because this will open the door for medical inquiry. Diversity concerns is another reason why courts are discouraged from considering vaccination status for jurors. Attempting to limit jury pools to only vaccinated individuals will result in a less diverse jury.

CONTINUE SAFETY STANDARDS

Vaccinated individuals can still be infected with COVID-19. The vaccine reduces symptoms and severity of the infection but it does not prevent infection. Vaccinated individuals can be asymptomatic carriers of COVID-19; therefore, courts should continue to maintain safety standards. Courts should shape their COVID-19 policies based upon CDC guidance and local conditions.[37] The DOL issued guidance on mitigating and preventing the spread of COVID in the workplace, and this guidance provides guidance to employers on how they can best protect both the vaccinated and unvaccinated in the workplace and these recommendations include keeping safety measures such as mandatory masking in place during times of high community spread.[38] Courts should be hesitant to eliminate all COVID-19 safety protocols.

According to the CDC, individuals with COVID-19 who have symptoms may discontinue isolation ten days after symptom onset AND after at least 24 hours have passed since resolution of fever without the use of medication, AND all other symptoms have improved.[39] The CDC also states the following concerning exposure cases: the CDC recommends 14 days of quarantine after exposure based on the time it takes to develop illness if infected.[40] Thus, it is possible that a person known to be infected could leave isolation earlier than a person who is quarantined because of the possibility they are infected.[41]

The CDC recommends that any fully vaccinated individual who has symptoms of COVID-19 isolate themselves from others, following the above guidance for individuals with symptoms.[42] Therefore, any employee, juror, or litigant experiencing symptoms of COVID, whether vaccinated or not, should isolate following the CDC guidance above. The requirement to isolate for at least ten days for individuals with symptoms further reinforces the need to continue with safety protocols such as masking, social distancing, and remote work options to maintain productivity by lessening the occurrence of symptoms.

COURT BEST PRACTICES

MASKS Although many states have lifted their mask mandates, courts can still mandate masks in their courtrooms. Each court will have to assess their local conditions and decide whether to mandate masks in their courtrooms. Courts should consider the vaccination status of their staff and the local conditions. If the court still has some unvaccinated staff then those individuals are at a greater risk for contracting COVID and having a more severe reaction. Therefore, it is in the court's interest to protect those staff members from being infected, and masks are the best way to do that. Since vaccinated individuals can still be asymptomatic

35. *Id*. at *38 (citing Kelly v. ImagineIF Libr. Entity, 2021 U.S. Dist. LEXIS 111958, 8 (D. Mont. June 15, 2021); Whitfield v. Cuyahoga Cnty. Pub. Libr. Found., 2021 U.S. Dist. LEXIS 92944, 4 (N.D. Ohio May 17, 2021); Denis v. Ige, 2021 U.S. Dist. LEXIS 91037, 14 (D. Haw. May 12, 2021); W.S. by Sonderman v. Ragsdale, 2021 U.S. Dist. LEXIS 98185, 5 (N.D. Ga. May 12, 2021); Forbes v. City of San Diego, 2021 U.S. Dist. LEXIS 41687, 11 (S.D. Cal. Mar. 4, 2021); Stewart v. Justice, 2021 U.S. Dist. LEXIS 24664, 20 (S.D. W. Va. Feb. 9, 2021); Oakes v. Collier Cnty., 2021 U.S. Dist. LEXIS 15174, 4 (M.D. Fla. Jan. 27, 2021); Shelton v. City of Springfield, 497 F. Supp.3d 408, 414 (W.D. Miss. 2020); Ryan v. Cnty. of DuPage, 45 F.3d 1090, 1092 (7th Cir. 1995) (no constitutional right to wear a mask); United States v. Berglund, 2021 U.S. Dist. LEXIS 78476, 2 (D. Minn. Apr. 23, 2021) ("Courts have repeatedly found that requiring participants at trial to wear face masks due to the COVID-19 pandemic does not violate a criminal defendant's constitutional rights.")).
36. *Id*. at *43.
37. COVID-19 Integrated County View, CDC, https://covid.cdc.gov/covid-data-tracker/#county-view (last visited Aug. 10, 2021) (CDC map showing local conditions).
38. *See* https://www.osha.gov/coronavirus/safework.
39. Ending Home Isolation, CDC, https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html (last updated Feb. 18, 2021).
40. *Id*.
41. *Id*.
42. Guidance for Fully Vaccinated People, CDC, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html (last updated July 28, 2021).

carriers, if some court staff are not vaccinated and masks are not required in the courtroom then non-vaccinated employees may be exposed and then have to quarantine or be sent home due to illness, thereby, limiting the productivity of the court. Local conditions are important to consider as well, specifically, the level of spread in the local community. If community spread is rising, then courts should consider requiring masks and social distancing again to protect staff and to try and prevent the continued rise in cases.

Courts should continue to require masks of all participants in the courtroom when conducting jury trials. Jury pools will contain a mix of both vaccinated and unvaccinated individuals. Therefore, to protect the unvaccinated who are appearing for jury service, courts should continue to require everyone to wear masks. Additionally, it is not recommended to limit jury service to only those who are vaccinated because of the impact such a decision would possibly have on diversity. Certain communities do not have the same access to vaccines, and some communities are more reluctant to be vaccinated. These individuals would be excluded from jury service if a court tries to limit jury service to vaccinated individuals only. Masks are the best way to keep everyone safe and to prevent a mistrial due to an outbreak.

The court may decide to require only those who are not vaccinated to wear masks. If the court decides to implement such a policy, then signs should be posted informing patrons of the court that if they are not vaccinated they need to wear a mask. It is not recommended that the court take any actions to enforce this requirement. Court staff should not ask to see proof of vaccination. If an unvaccinated visitor of the court decides to disobey the policy and go without a mask then this is a risk they are deciding to take. The court has done its due diligence by having a policy posted that requires unvaccinated individuals to wear a mask. Before making such a policy, the court should consider the vaccination status of court staff. If there are any unvaccinated court staff members, then it may place them at risk to allow court patrons to attend court without a mask. Another option is that if not all court staff is vaccinated, then all court staff may be required to wear masks when interacting with the public. The court's primary priority should be to protect court staff and lessen the spread of COVID in the court.

SOCIAL DISTANCING When used together, masks and social distancing are the best way to limit the spread of COVID-19. Courts are encouraged to consider keeping some social-distancing requirements by limiting the number of people in their courtrooms at one time. Courts should continue to stagger scheduling rather than engaging in cattle-call-type hearings and continue to limit how many people from the public can observe any hearing. Provide virtual hearings as an option and stream hearings online so that the public can view without appearing in person. Jury members should be socially distanced as much as possible as well. Masks and social distancing are most effective at preventing spread when used together.

Vaccinated court employees should not be working in shared workspaces with unvaccinated court employees, especially if masks are not being required while in the shared workspace. Shared workspaces should be limited as much as possible by moving employees into private offices or placing employees on a rotation. Placing vaccinated employees in a shared workspace with unvaccinated employees puts the unvaccinated employees at risk and increases the likelihood that COVID-19 will spread in the court office, thereby impacting productivity and availability of court staff. Additionally, the ADA still requires that employers protect their staff and the public from known risks such as COVID-19.

"Courts should continue to require masks of all participants in the courtroom when conducting jury trials."

REMOTE OPTIONS Continuing to offer remote options for both employees and court proceedings will continue to be an important tool in managing COVID-19. Employees with COVID-19, exposure to COVID-19, or symptoms of COVID-19 should still have the option to work remotely if possible. Continuing to allow for remote work during these limited circumstances is important to encourage continued symptom and exposure reporting. Remote work also allows for staff to continue to be productive even if they are placed on quarantine. If employees are required to use their own benefit time when they are exposed to COVID-19 or have symptoms of COVID-19, then they will be less likely to report that they were exposed or are having symptoms. If court staff do not disclose their exposure or symptoms then the likelihood of spread among all court staff increases.

Remote hearings are still the best way to accommodate litigants and attorneys who have been exposed to COVID-19 or have COVID-19 symptoms. Litigants and attorneys should still have the option to request a remote hearing to prevent the spread of COVID-19 in the courtroom. Courts can identify a contact person or email on court orders that litigants can use to request a remote hearing. Every request for a remote hearing does not have to be granted, especially if the court believes that the privilege has been abused by the litigant or attorney; however, providing remote hearings is the best way to protect court staff from being unnecessarily exposed to COVID-19, especially if a portion of the court staff is not vaccinated.

SYMPTOM REPORTING Courts should continue to encourage employees, attorneys, and litigants to report their symptoms. Employees should be reminded to reach out to the Judge or court administrator before coming into work if they have any COVID-19 symptoms. The employee who has symptoms should then be directed on next steps, and the next steps may vary depending on that specific employee's vaccination status. Each court will have to decide the best approach for them based upon CDC guidance and the vaccination status of all court staff. Litigants and attorneys reporting symptoms should be placed on remote hearings to prevent exposing court staff and the public to possible COVID.

FREQUENT SANITIZATION High-touch areas should continue to be sanitized frequently. Providing sanitizer wipes at numerous locations in the courtroom and court offices with signs encouraging staff and the public to wipe areas they touch. Designating a staff member to engage in a scheduled sanitizing cycle of high-traffic areas such as door handles and countertops. There

should be hand sanitizer available in both the courtroom and court office.

BARRIERS Plexiglass should continue to be used in courtrooms as a barrier. Maintaining barriers is the best way to continue to provide the greatest level of protection for court staff and to maintain productivity by limiting the chances of an outbreak. It is recommended that plexiglass be used in the court office where staff is required to interact with the public. Plexiglass should also be used around the bench, court reporter desk, and witness stand to protect the witness, judge, and court staff during hearings where masks will likely be removed for the purpose of testifying.

FMLA

COVID-positive employees may be entitled to coverage under the Family and Medical Leave Act (FMLA). If an FMLA eligible employee is unable to work for three or more days due to COVID-19 then they should be provided with FMLA eligibility and certification paperwork. Caregivers and relatives of people with disabilities are not entitled to receive workplace accommodations under the ADA; however, these individuals may be entitled to leave under the FMLA. If an employee has a spouse, parent, or child become severely ill due to COVID-19 then they may be entitled to leave under FMLA. If an employee has concerns about exposure at work placing their disabled family member at risk, then they may be entitled to FMLA leave.[43]

IMMUNITY LAWS

Many state legislatures have passed local immunity statutes that give businesses some form of immunity from liability as it relates to COVID-19. It is important to note that these state immunity laws only provide immunity from a lawsuit brought under that specific state's laws—they do not provide immunity for violation of federal laws such as the ADA or FMLA. The federal government has not passed any immunity laws as of the date of this article; therefore, all employers must continue to act in compliance with the ADA and FMLA.

CONCLUSION

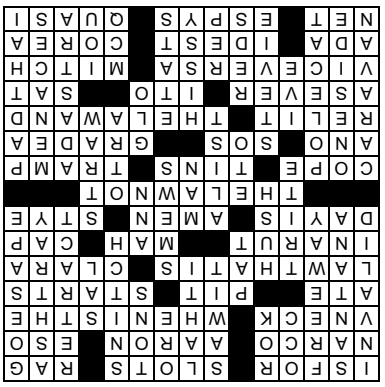
Employers are straddling a line when trying to create and enforce policies that are compliant with their legal obligations to protect employees and the public while also trying to avoid unnecessary costs of litigation associated with assertions of individual rights. Courts have an added constitutional concern as state actors. The pandemic continues to ebb and flow and the courts must be prepared to continually evaluate their practices and policies to ensure the proper balance between safety and personal autonomy. Courts are encouraged to pay attention to local conditions and continue best practices to protect their staff and the public from COVID-19 while also ensuring equal and continued access to the justice system.

Heather Falks serves as the employment attorney and ADA coordinator for the Indiana Supreme Court – Office of Judicial Administration. In this role she provides advice to both the Supreme Court and trial courts on employment law matters and provides guidance on issues involving ADA accommodations and the application of FMLA. Heather also handles questions related to employment policies during the COVID-19 pandemic. Before working for the court, Heather practiced as an employment litigation attorney representing employees before state and federal courts. Heather is a graduate of Indiana University Robert H. McKinney School of Law.

43. COVID-19 and the Family and Medical Leave Act Questions and Answers, DOL, https://www.dol.gov/agencies/whd/fmla/pandemic (last visited Aug. 10, 2021).

Answers to Crossword

from page 187



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A Judge's Experiences and Reflections on Restoring Community

George Nicholson

We cannot play ostrich. Democracy just cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root amid rage. America must get to work. In the chill climate in which we live, we must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. . . . The legal system can force open doors and sometimes even knock down walls. But it cannot build bridges. That job belongs to you and me.[1]

PREFACE[2]

Our nation and our people are strongly but fairly evenly divided. Both sides claim the high ground. Too many of us irrationally despise and demonize one another, including those we have never met. Even for those of us with the mind, heart, and will to do so, the challenge of helping to mitigate the division and demonization looms large. It is a daunting, but consuming task.

Judges, especially appellate court and supreme court judges, are among those best able to help calm this social and cultural storm. Why is that so? Because judges are role models for those in and out of the legal profession, and they are our nation's neutrals, cloaked with community standing, credibility, prestige, and power. I humbly and respectfully suggest we judges share a duty, which we can pursue in ethical ways, to leverage our temporary, lofty circumstances to help rekindle good will, common sense, and common decency among our conflicted factions.[3]

WHAT DIVIDES US AND WHAT CAN WE JUDGES DO?

The theme of the special issue of the *Journal of Appellate Practice and Process* (July 2021) was "what ails and divides our people and afflicts our nation, and what we in the law, especially state, tribal, and federal appellate and supreme court judges, may do to help to mitigate, better yet, ameliorate those ailments and afflictions?" While that theme targets the primary audiences of the *Journal*, I here respectfully add to the list all of you, the members of the American Judges Association. We all can help in large and small ways.

For 20 years, the *Journal for Appellate Practice and Process* was published by the William H. Bowen School of Law, University of Arkansas, Little Rock. It was distributed gratis to all our nation's state and federal appellate court and supreme judges. Through its first two decades, many subjects were discussed in the *Journal*, some in special, single-subject issues. Because, 20 years earlier, I worked with the *Journal* on a special, themed issue,[4] I contacted editor in chief, Professor Nancy Bellhouse May, in the fall of 2019 to propose another, themed issue, this one addressing the positive role appellate court and supreme court judges may play in addressing contemporary division in our nation. Once the publication of the *Journal* was transferred in mid-2020 to the James E. Rogers College of Law, University of Arizona, the theme and special issue jelled into reality.

We recruited 13 distinguished scholars to write for our special issue of the *Journal*. We did not take sides or slant our recruitment of potential authors during a laborious, time-constrained and consuming process. Our authors are progressive, liberal, conservative, Jewish, Muslim, and Christian.

With the theme of the special issue of the *Journal* in mind and, perhaps, after at least a cursory scan of the issue itself, I respectfully suggest four questions for *Court Review* readers: (1) What is

AUTHOR'S NOTE: Associate Justice, Ret., Court of Appeal, Third Appellate District, State of California. I wish to thank Carol Benfell, a distinguished, veteran legal journalist, for editorial advice and assistance, and Annie Thomas, a Juris Doctorate candidate, Class of 2022, McGeorge School of Law, for additional editorial assistance.

Footnotes

1. Thurgood Marshall, Former J. of the Supreme Court of the U.S., Liberty Medal Acceptance Speech (July 4, 1992), *in Thurgood Marshall*, National Constitution Center, https://constitutioncenter.org/liberty-medal/recipients/thurgood-marshall (last visited July 11, 2021).
2. George Nicholson, *A Judicial Role in Calming our Divided Nation*, 21 J. App. Prac. & Process 231–32 (2021) (selected from the themed special issue).
3. I also believe our shared duty requires us to publicly condemn mob violence, especially when it breaches our courthouses. *See* George Nicholson, *Courthouses Under Siege*, The Bench 1, 23 (Fall 2020). *See infra* note 43.
4. While working with Professor Coleen Barger, Editor in Chief, I was visiting an editor of an earlier special issue on the then nascent influx of technology in our nation's judiciaries. *See* George Nicholson, *A Vision of the Future of Appellate Practice and Process*, 2 J. of App. Prac. & Process 229, 230 (2000), https://lawrepository.ualr.edu/appellatepracticeprocess/vol2/iss2/2. A decade earlier, I wrote on the same subject for *Court Review* and began serving as a member of the executive committee of the Commission on the Future of the California Courts from 1990-1993. George Nicholson, *Judges, Technology, and the Future*, Ct. Rev. 1, 5 (1990). *See generally Justice in the Balance Report*, The Comm'n on the Future of the Cal. Cts. (2020) https://www.courts.ca.gov/documents/2020.pdf.

actually causing dissention and division among our people? (2) Is it possible to calm dissention and sooth division? (3) Do judges have a role to play in calming dissention and soothing division? (4) Do lawyers have a role to play in calming dissention and soothing division?

Judges do not engage in politics, but, as we ponder these four questions, it would be folly to ignore the impact of politics in causing or enhancing divisions among our people when pondering these four questions. Indeed, Harvard Professor Edward L. Glaeser suggests, "The supply of hatred depends on the degree to which hatred makes a particular politician's policies more appealing."[5]

Have you ever considered and discussed any of these questions? Do you know of other judges or judicial associations or organizations that have considered and discussed them? Should you? Should they?

For more than 30 years, my judicial colleagues in Sacramento and I have been driven by hope, a shared hope of capturing lightning in a bottle by identifying and pursuing practical ways and means on several fronts to educate and inspire a significant variety of academic, civic, and public audiences, and to engage them in helping to subdue festering hostility and to build bridges. We have succeeded, time and again, largely through court-community outreach.[6] And, it may surprise at least some of you to learn, we have been similarly successful through court-clergy outreach.[7]

Among our most notable court-community outreach collaborations, we helped initiate annual Unity Bar Dinners in Sacramento in 1987, and annual Court-Clergy Conferences in 2014. Both annual events instilled sufficient confidence we could bring disparate people together, and we initiated a unique effort in November 2017 to begin trying to mitigate the immense, long simmering dispute between members of the various LGBT and faith-based communities. Judge James A. Mize, Superior Court, County of Sacramento, and I planned and hosted the 5-hour gathering, including lunch, in the conference room of the Court of Appeal, Third Appellate District, directly across the street from our state capitol. Because it was born of experiences originating in Sacramento's Court-Clergy Conferences, we informally called it the Court-Clergy Liberty Caucus.

"Judges do not engage in politics, but . . . it would be folly to ignore the impact of politics in causing or enhancing divisions among our people . . ."

Presiding Justice Vance W. Raye, Third Appellate District, and Presiding Judge Kevin Culhane, Superior Court, County of Sacramento, made opening remarks and met with participants, all whom were the leaders of several organizations Judge Mize and I invited, including the LGBT Judicial Officers of California and SacLEGAL, the LGBT bar association of Sacramento.

We also invited the founders and leaders of Sacramento's Court-Clergy Lawyers Auxiliary, an organization conceived and cobbled in 2017 by Misha Igra, president, Leonard M. Friedman Bar Association (Jewish); Minha Javed, president, Sacramento Area Muslim Bar Association (Muslim; Tawfiq Morrar, Esq., has now replaced Ms. Javed as president); Angela Lai, St. president, Thomas More Society (Catholic); and Paul Hoybjerg, president, J. Reuben Clark Law Society (Mormon).[8]

The purpose of the meeting was to get to know one another, informally lunch together, and brainstorm ideas on how we, individually and collectively, may act more effectively and with wider impact as role models to help mitigate the broader disarray in the nation, in particular, that between members of the various LGBT and faith-based communities.[9]

5. Edward L. Glaeser, *The Political Economy of Hatred No. 9171*, NATL. BUREAU OF ECON. RESEARCH WORKING PAPER SERIES, 4 (2002), https://www.nber.org/system/files/working_papers/w9171/w9171.pdf. *See generally* Michael Barone, *Both Parties Fail to Respond to Signals in the Political Marketplace*, JEWISH WORLD REV. (July 9, 2021), http://jewishworldreview.com/michael/barone070921.php3; and Angelo Codevilla, *The Scarlet 'E'*, AMERICAN GREATNESS (July 8, 2021), https://amgreatness.com/2021/07/08/the-scarlet-e. *See infra* notes 18 and 37.
6. Beginning in 1999, California's judiciary established court-community outreach as an official duty of judging. CAL. ST. J. ADMIN. STANDARDS Standard 10.5. *See Judicial Outreach*, JUDGES' J. (Dec. 2019), https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/fall (containing several related articles, including one by Judge Richard L. Fruin, Jr., Superior Court, County of Los Angeles, State of California, who is honored in the issue as "a pioneer of judicial outreach for decades"). *See generally* Kari C. Kelso & J. Clark Kelso, *Civic Education and Civil Discourse: A Role for Courts, Judges and Lawyers*, 21 J. OF APP. PRAC. & PROCESS 1, 475 (2021), https://journals.librarypublishing.arizona.edu/appellate/ issues; George Nicholson, *Appendix B: A Judicial Role in Calming our Divided Nation*, 21 J. OF APP. PRAC. & PROCESS 1, 231 (2021), https://journals.librarypublishing.arizona.edu/appellate/issues (describing a history and a virtual "how-to" outline for court-community outreach).
7. Court-clergy outreach is a promising form of court-community outreach and includes Court-Clergy Conferences. These conferences are conducted in six California counties, including our largest, Los Angeles. All these conferences are sponsored by their respective local trial courts and by the California Judges Association. In Sacramento, we usually offer State Bar and Judicial Council continuing education credits for those lawyers and judges who participate and attend. Religious leaders, lawyers active in their faiths, including prosecutors and defenders, interfaith service councils, law enforcement and military chaplaincies, seminary instructors, and law school and university professors who teach religious subjects, comprise a community as surely as any other. *See* George Nicholson, *Appendix A: A Judicial Role in Calming our Divided Nation*, 21 J. OF APP. PRAC. & PROCESS (ISSUE 2) 1, 231 (forthcoming 2021), https://journals.librarypublishing.arizona.edu/appellate/issues (describing a history and a virtual "how-to" outline for court-clergy outreach).
8. They also help document the history of court-clergy outreach. *See, e.g.,* Paul Hoybjerg et al., *Judicial, Civic, and Religious Leaders Meet in Sacramento to Celebrate Differences and Develop Solutions,* SACRAMENTO LAW. 1, 20 (Spring 2020), https://issuu.com/milenkovlais/docs/sacramento_lawyer_magazine_spring_2020_web?fr=sYzk1NTI2ODMzNw.
9. Douglas Potts, *Leading Us Out of the Cultural Divide: Can Court Outreach Inspire the Public to Dialogue with Opposing Factions on Contentious Social Issues? It Did Just That with a Group of Judges and Lawyers in Sacramento*, L.A. DAILY J. (Dec. 13, 2017), https://www.dailyjournal.com/articles/345198-leading-us-out-of-the-cultural-divide. *See, infra* notes 33 and 34; *see, generally,* Thomas B. Griffith, *Civic Charity and the Constitution*, 43 HARVARD J. OF L. & PUB. POL'Y 633, 642–643 (2020), https://www.harvard-jlpp.com/wp-

"'Judges must be mindful . . . of their limitations – as generalists, as lawyers, and as outsiders trying to understand intricate business relationships.'"

Although very congenial, our gathering produced no immediate, practical solutions beyond one very important one, that of establishing new and ongoing friendships.[10] So, the question lingers, are there any practical solutions? I suspect that question is best answered by paraphrasing Justice Kennedy's penultimate paragraph in his opinion for the court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, "The outcome of matters such as this must await further exploration and elaboration in courts and communities throughout the nation, all in the context of recognizing that these disputes must be resolved with tolerance, without *undue* disrespect to *sincere* religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[11]

Exploration and elaboration were not long in coming. Responding to *Fulton v. Philadelphia*,[12] decided on June 17, 2021, two scholars, perhaps a little over-eagerly, declared the case to be "an important win for religious liberty. Philadelphia may not terminate its foster-care services contract with Catholic Social Services on the ground that CSS declines, because of its religious beliefs, to certify same-sex couples as foster parents. Teachings about sex and marriage are central to many religions; so are works of service. If religions lose the ability to serve because they act on their central teachings, the harm to free exercise is severe. The court prevented that here — and the result was unanimous."[13] The high court itself spoke with simple clarity, "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[14]

What states of mind or modes of thinking might judges bring to deciding incendiary controversies such as this? Although addressing a different, highly divisive subject, the United States Supreme Court generally answered that question:

> When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt." United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (CA6 1898) (Taft, J.). But we do not believe the district court fell prey to that temptation. Its judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.[15]

content/uploads/sites/21/2020/05/Griffith-FINAL.pdf; *Religious Liberty & the Culture War Over LGBT Rights: Can University Students Make a Difference?* American Constitution Society (Mar. 27, 2019) https://www.acslaw.org/event/religious-liberty-the-culture-war-over-lgbt-rights-can-university-students-make-a-difference (on file with Case Western Reserve University School of Law).

10. *See infra* notes 33 and 34.
11. What is to be made of the meaning of the paragraph, given the two italicized words? To be entirely balanced, should the court have also inserted the word, "undue," before "indignities"? On the other hand, should the court have simply deleted the word, "undue," from its single use before disrespect? And, as to the word, "sincere," how are lay citizens to deal with it after this case? How are the courts? Of course, judges purport to address "sincere" beliefs quite sincerely from time to time in their opinions, but in trying to do so, how fully and faithfully can judges enter the hearts and souls of others as individual human beings? Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Com'n, 138 S.Ct. 1719, 1732 (2018). *See generally* United States v. Seeger, 380 U.S. 163 (1965); Brnovich v. Democratic National Committee, 141 S.Ct. 222 (2020); Sanford Levinson, *What Are "Sincerely Held Religious Beliefs?" Nobody Really Knows*, Texas Perspectives: University of Texas News (June 9, 2017), https://news.utexas.edu/2017/06/09/what-are-sincerely-held-religious-beliefs.
12. 141 S.Ct. 1868 (2021).
13. Thomas Berg and Douglas Laycock, *Symposium on Protecting Free Exercise under Smith and after Smith*, SCOTUS Blog: Indep. News & Analysis on the U.S. Sup. Ct. (June 19, 2021), https://www.scotusblog.com/2021/06/protecting-free-exercise-under-smith-and-after-smith. *See generally* Tandon v. Newsom, 141 S.Ct. 1294 (2021); Employment Div. v. Smith, 494 U.S. 872 (1990); James R. Copland, *Punting Again on Religious Liberty*, City J. (June 18, 2021), https://www.city-journal.org/supreme-court-punts-on-religious-liberty-again?wallit_nosession=1; Andrew C. McCarthy, *It's Past Time to Strengthen Our Free-Exercise Muscles, the Law has Become a Transformational Weapon Used to Strangle Religious Liberties,* Nat'l Rev. (July 10, 2021), https://www.nationalreview.com/2021/07/its-past-time-to-strengthen-our-free-exercise-muscles; but see, Netta Barak Corren, *Religious Exemptions Increase Discrimination Towards Same-Sex Couples: Evidence from Masterpiece Cakeshop*, J. of Legal Stud. (forthcoming 2021).
14. 141 S.Ct. 1868, 1877 (2021). High court decisions on controversial subjects may be and often are criticized by either or both the left and the right as being partisan, some going so far as to suggest court packing. Might there be a coping mechanism for all this? *Compare* Aaron Tang, *Harm-Avoider Constitutionalism*, 109 Cal. L. Rev. (forthcoming 2021) (defining a "harm-avoider approach" the high court might consider) *with* Jonathan Turley, *Unpacked and Undivided: Is the Court Sending a Message with a Litany of 9-0 Decisions?*, Jonathan Turley: Res Ipsa Loquitur Blog (June 1, 2021), https://jonathanturley.org/2021/06/01/unpacked-and-unanimous-is-the-court-sending-a-message-with-a-litany-of-9-0-decisions (describing how there may be no need for a coping mechanism whether by court-packing or "harm-avoidance"). How do such high court decisions since Professor Turley's blog post impact his and Professor Tang's differing theories? Are they really differing theories?
15. NCAA v. Alston, Nos. 20-512 and 20-520, 2021 U.S. LEXIS 3123, 59-60 (2021).

CRIME, COMMUNITY, AND JUDGING

Cardozo, long ago, wisely suggested a timeless, complementary perspective: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains."[16]

While addressing the "primordial necessity for order in the social life," we must not overlook the spirit and resolve with which we approach criminal justice amid festering, contemporary dissension and division. Despite political, academic, media, and public contention and confusion, we must resolve fact from fiction without fear or favor. And we must, as a matter of law, consider crime victims, fully and faithfully, when relevant to court proceedings. This is vital because crime victims are rarely factored into public or political discourse, or into news media stories or opinions, even though all our nation's people are or may become crime victims, regardless of race, creed, color, gender, or sexual preference. In particular, our largely voiceless inner-city citizens and their families are all too often victims of crime, all too commonly violent crime. They are our nation's forgotten victims.[17] They deserve better. Cardozo, long ago once again, defined the spirit with which we should ponder and pursue delivering better to them, "But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[18]

"Despite political, academic, media, and public contention and confusion, we must resolve fact from fiction without fear or favor."

That balance began to fray severely during the 1960s when I became a prosecutor. After almost a decade in the criminal trial courts of Alameda County (across the bay from San Francisco), I uprooted my family in 1976 and moved to Sacramento to serve as executive director of the California District Attorneys Association, determined to respond to Cardozo's challenge.[19] Eventually, I drafted an initiative and, with several colleagues, helped gather enough voters' signatures to qualify it as Proposition 8, the Victims' Bill of Rights, for the statewide primary election ballot in June 1982.[20] It passed overwhelming. Before the election, the California Supreme Court rejected an attempt to remove it.[21] After the election, the California Supreme Court upheld it.[22] Voters, 26 years later, retained and extended its various provisions, and added new ones, by adopting Proposition 9, the Victims' Bill of Rights of 2008, Marsy's Law.[23]

16. Benjamin N. Cardozo, The Nature of the Judicial Process 141 (Yale University Press 1921), this little book is 100 this year; Joel K. Goldstein, *The Nature of the Judicial Process: The Enduring Significance of a Legal Classic*, 34 Touro L. Rev. 159 (2018).
17. We and our nation's people, all of them, must no longer allow ourselves to be cowed by name calling, finger pointing, blaming one another, and obfuscating reality by accusations of "blaming victims"; we must dispassionately and empirically assess what is wrong and how to fix it; to answer those two questions with any hope of mitigating this long metastasizing dilemma, we all must read patiently and relevantly, ponder seriously, and do something meaningful, and encourage others to do the same. *See* Daniel Patrick Moynihan, *The Moynihan Report: The Negro Family, The Case for National Action*, Off. of Pol'y Plan. and Rsch. U. S. Dep't Lab. (March 1965), https://www.dol.gov/general/aboutdol/history/webid-moynihan; Harvey C. Mansfield, *The Rolling Revolution, Family Life Today is Threatened by a Theoretical Proposition*, Claremont Rev. of Books (Spring Edition) (2021), https://claremontreviewofbooks.com/the-rolling-revolution (discussing the "hidden problem"), a book review of Scott Yenor, The Recovery of Family Life: Exposing the Limits of Modern Ideologies (2020); *and* J.D. Vance, Hillbilly Elegy: A Memoir of a Family and Culture in Crisis (2018). *See supra* notes 5 and 6 and *infra* note 37.
18. Snyder v. Com. of Mass., 291 U.S. 97, 122 (1934).
19. One member of the California Supreme Court wrote a timely law review article in which he correctly noted a search for crime victims' rights in our state and federal constitutions would fail. He accurately observed only criminals have constitutional rights, not their victims. Stanley Mosk, *Mask of Reform*, 10 S.W. U.L. Rev. 885, 889–890 (1978). *Compare* Ballard v. Superior Ct. of San Diego Cnty., 64 Cal. 2d 159 (1966) (providing for involuntary psychiatric examinations of rape victims before their testimony in criminal trials, since abolished by California Penal Code, Section 1112, which I helped draft) *with* Bullen v. Superior Ct. 204 Cal. App. 3d 22 (1988) (providing relief to a crime victim, while noting impropriety of prosecutor representing her).
20. Paul Gann, *Justice for the Accuser: Proposition 8, The Victims' Bill of Rights*, 4 Benchmark: A Quarterly Review of the Constitution and the Courts 1, 69 (Winter 1988).
21. I was one of several amici. Brosnahan v. Eu, 31 Cal. 3d 1 (Cal. 1982).
22. I was co-counsel on two amici briefs, one representing scores of prosecutors and public officials, and one representing two dozen parents of murdered children. The grieving parents cried when I informed them the high court heard them. Brosnahan v. Brown 32 Cal. 3d 236 (Cal. 1982).
23. Cal. Const. art. 1, § 28. *See also Victims' Bill of Rights*, Cal. Dep't Just.: Att'y Gen., https://oag.ca.gov/victimservices/content/bill_of_rights (last visited July 11, 2021); *Marsy's Law*, Marsy's L., https://www.marsyslaw.us/about_marsys_law (last visited July 11, 2021); *The Victims of Crime Resource Center*, McGeorge Sch. of L., https://1800victims.org/wp-content/uploads/2016/07/A-Guide-to-Services-for-Crime-Victims-in-California.pdf (last visited July 11, 2021). *See generally* George Nicholson, *Victims' Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence*, 23 Pac. L.J. 815 (1992); J. Clark Kelso and Brigette Bass, *The Victims' Bill of Rights: Where Did It Come From and How Much Did It Do?*, 23 Pac. L.J. 843 (1992); Frank Carrington and George Nicholson, *The Victims' Rights Movement: An Idea Whose Time Has Come—Five Years Later: The Maturing of An Idea*, 17 Pepp. L. Rev. 1 (1989); Frank Carrington and George Nicholson, *The Victims' Rights Movement: An Idea Whose Time Has Come*, 11 Pepp. L. Rev. 1 (1984); George Nicholson, et al., *Forgotten Victims: An Advocate's Anthology*, Cal. Dist. Att'ys Ass'n (1977); Thomas Condit and George Nicholson, *The Ultimate Human Right: Governmental Protection from Crime and Violence*, 52 L.A. Bar J. 314 (1977); Los Angeles Mayor Tom Bradley, *The Forgotten Victim*, 3 Crime Prevention Rev., 1 (1975); Carrington, The Victim (1975); George Nicholson and Tom Condit, *Prosecutor Homicide*

"We all know there is more to judging than 'how to do its' . . . . The spirit, culture, ethos, ethics, and moriality of judging are vital, too."

I learned early here is no quicker way to lose the faith and fealty of our people than to fail to protect them, their children, and their elders, from crime and violence, or to disregard and disrespect them anywhere within the administration of criminal justice. A great judge told us why, "The rule of law relies on a fragile consensus, which remarkably has endured and allowed us, uniquely among the nations of the world, to live as free people for more than 200 years. It is the guarantor of our freedoms. It emits the glow that illuminates the shining city on the hill, the glow that is never so brilliant as when contrasted to the ominous shadows cast by the brutal tyrannies which have threatened our national existence in this century. More than anything else, the rule of law is at the heart of American exceptionalism. That is the unique place that America occupies among the community of nations."[24]

That fragile consensus is fraying because too many people are frightened or victimized by escalating crime, especially violent crime, in too many of our nation's major urban areas, lost among political, academic, and media discourse on virtually everything else.

JUDICIAL MENTORING

California Gov. Gavin Newsom, on July 1, 2021, officially announced the creation of a judicial mentoring project to encourage more lawyers to apply for positions on California's trial and appellate benches.

Judge Paul A. Bacigalupo, Superior Court, County of Los Angeles, and a former president of the California Judges Association, co-chairs the executive committee of the governor's judicial mentoring project with Luis Céspedes, the governor's Judicial Appointments Secretary.

Justice Martin Jenkins, California Supreme Court, Presiding Justice Lee Smalley Edmon, Court of Appeal, Second Appellate District (Los Angeles), and Justice Teri Jackson, Court of Appeal, First Appellate District (San Francisco), serve as appellate court representatives on the committee. Judge Erica Yew, Superior Court, County of Santa Clara, represents medium and large counties, and Judge Todd Bottke, Superior Court, County of Tehama, represents small and rural counties.

Some courts will work together on regional mentorship programs, including those in Sacramento, Yolo, and El Dorado counties.[25]

Judge Bacigalupo and his court launched their precursor judicial mentoring project in 2020.[26] It has already linked 95 judges with approximately 140 lawyers interested in joining the bench. Another 81 attorneys are awaiting a judge assignment.

Céspedes suggests allowing judges to be more accessible than in the past, while providing opportunities for interested lawyers to learn why they should apply, how they may be qualified, and what matters related to lawyering and potential judging they may need to improve. More importantly, this judicial mentoring program, Céspedes concludes, teaches aspiring lawyers that judges are essentially public servants.[27]

Neither Céspedes nor I have heard of any similar, governor-initiated, judicial mentoring project in the nation. To whatever extent we may be correct, the people in other states may be well served if their governors and judges contemplate or extend similar judicial mentoring projects.

My fervent hope is that these judicial mentoring projects, and any that emulate them, are more than "how to do it" projects and introduce the spirit and specifics of this article and the theme and contents of *Journal of Appellate Practice and Process*, volume 21, issue 2, our special issue discussed above. I also hope judicial mentors introduce judicial care and caution, such as that discussed by the United States Supreme Court in *National Collegiate Athletic Association v. Alston*,[28] Justice Cardozo's definition of judging in his little book, *The Nature of the Judicial Process*, and judicial humility.[29]

We all know there is more to judging than "how to do its," jots and titles, nuts and bolts, or macros, analog or digital. The spirit, culture, ethos, ethics, and morality of judging are vital, too. Whether judicial mentees ever become judges, all of them will be immensely enriched to have been exposed to these indispensable intangibles of judging.[30]

Duty: Court Use of Its Fruits, THE PROSECUTOR, Vol. 2, No. 5 (1975); and George Nicholson, *Prosecutor's Homicide Duty: A Successful Working Model in California*, THE PROSECUTOR, Vol. 2, No. 4 (1975). Campus crime victims' rights are sometimes forgotten, too. *See* George Nicholson, *Campus Crime and Violence, and the Right to Safe School,* DEF. COMMENT MAG. 5 (Summer 2018); s*ee also Did the Law Cause Columbine* (National Press Club Telecast on C-SPAN Aug. 1999).

24. Robert K. Puglia, *Freedom Is Not Free*, 36 MCGEORGE L.J. 751, 754 (2010); *see also* Charles J. Chaput, STRANGERS IN A STRANGE LAND (Henry Holt 2017).
25. *California Judicial Mentor Program*, SUPERIOR CT. CAL.: CNTY. SACRAMENTO, https://www.saccourt.ca.gov/outreach/california-judicial-mentor-program.aspx (last visited July 11, 2021).
26. *Judicial Mentor Program*, SUPERIOR CT. CAL.: CNTY. L.A., http://www.lacourt.org/generalinfo/communityoutreach/GI_CO020.aspx. (last visited July 11, 2021). *See also Pathways to Judicial Diversity: A Judicial Council Initiative to Promote Diversity on the Bench*, CAL. JUD. BRANCH, https://www.courts.ca.gov/partners/judicial-officer-mentorship-program.htm (last visited July 11, 2021).
27. Cheryl Miller, *Governor Launches Mentorship Program for Would-Be Trial Court and Appellate Judges*, THE RECORDER (July 2, 2021), https://www.law.com/therecorder/2021/07/01/governor-launches-mentorship-program-for-would-be-trial-court-and-appellate-judges. *See generally* Emmanuel Salazar, *Unity Bar Celebrates 30 Years*, SACRAMENTO LAW 27 (Spring 2018), https://issuu.com/milenkovlais/docs/saclaw_janfeb_2018_web (providing historical context); George Nicholson, *Visionary Becomes State's New Judicial Appointments Secretary*, L.A. DAILY J. 1 (Jan. 11, 2021), https://www.dailyjournal.com/articles/361034-visionary-becomes-state-s-new-judicial-appointments-secretary (providing an extraordinary, other worldly derivative). *See infra* notes 33 and 34.
28. Nos. 20-512 and 20-520, 2021 U.S. LEXIS 3123, 59-60 (2021).
29. CARDOZO, *supra* note 16.
30. There is an immense price to pay when we fail at this. *See* Spruance v. Comm'n 13 Cal. 3d. 778 (1975).

LGBTQ

Are there any practical solutions to the dispute between LGBT and faith-based communities that we judges may pursue while the high court further explores and elaborates as it suggested it must in *Masterpiece Cakeshop*? A relatively new book, *Free to Believe: The Battle Over Religious Liberty in America*, may be helpful to contemplate that question. Luke Goodrich, a prominent religious liberty litigator before the United States Supreme Court, wrote the book. Most pertinent are chapter 7, "Will Gay Rights Trump Religious Freedom (The Problem)" and chapter 8, "Will Gay Rights Trump Religious Freedom (The Solution)."

Whether readers are adherents of a faith tradition or LGBT or both, the two chapters contain pro and con arguments, along with several down-to-earth ideas and suggestions for civil discourse. Goodrich proposes a new constitutional equilibrium, one that provides justice to both sides of what now seems akin to nothing quite so much as a broken marriage, i.e., one apparently suffering from irreconcilable differences leading to an irremediable breakup. The key word is "apparently," implying the situation may not be firmly fixed. You may disagree with Goodrich, but his are the analytical approaches seemingly suggested explicitly and implicitly by Justice Kennedy in *Masterpiece Cakeshop* and by Chief Justice Roberts in *Fulton v. City of Philadelphia*.

We in Sacramento have proven ourselves good at bringing people together, including LGBT and faith-based, for purposes of getting to know one another, having lunch together, reasoning together, and trying to find common ground. We do very well at process. Although proximity works in many ways, in many places,[31] it does not always produce immediate results, but we must be patient and content with making sure progress is made, albeit slow at times. We must persist.[32]

Near the end of his book, Pages 233–236, Goodrich makes several suggestions for his present and future Christian clientele to consider.[33] Moreover, his suggestions are salutary for any present or future clientele, whether of any faith tradition or none, in any kind of litigation.

Goodrich writes, in part:

> We need to abandon the idea that just because we're Christians in America, we deserve a privileged place in society and will never suffer for our faith . . . .
>
> As our mind-set changes, we'll respond to religious freedom conflicts in different ways. First, we'll reject fear and gloom . . . .
>
> Second . . . we should reject anger and hostility toward our opponents.
>
> When was the last time we prayed for a gay couple in a religious freedom dispute? When was the last time we tried to do something good for someone who was hostile to us? When was the last time we went out of our way on social media to say something kind to someone we sharply disagreed with? The primary characteristic of our tone toward our opponents, both in person and online, should be kindness, gentleness, humility, and love. Of course, we also speak the truth, but we do it with gentleness and respect.
>
> Third, when we engage in conflict—whether a religious lawsuit or an online debate—we should check our motives. Are we driven by a desire to 'win' – to prove our point and preserve our rights? . . . When we're [thus] driven . . . we should confess, apologize, and change our approach.
>
> Fourth, we should stand up for religious freedom for non-Christians. If we really believe religious freedom is a matter of justice, rooted in how God created us and interacts with us, then we should care about religious freedom for everyone.
>
> There is more.

"The primary characteristic of our tone toward our opponents, both in person and online, should be kindness, gentleness, humility, and love."

Whatever our faith traditions or lack of them, if we can be patient and thoughtful enough to read Goodrich's book carefully, especially chapters 7 and 8, and then think deeply about all he proposes, a light may go on for each of us. Whether or not we agree with Goodrich, his work may provide a basis for our own individual and collective efforts at conceiving practical ideas for tangible substance, as well as visualizing ways and means to foster bridge-building between LGBT and faith-based folks and between many

31. David Prince, *Race, Baseball, and the Church: Proximity*, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION (Feb. 27, 2015), https://erlc.com/resource-library/articles/race-baseball-and-the-church-proximity. *See also* George Nicholson, *Kindred Spirits, Humble Heroes: Branch Rickey and William Wilberforce*, INDEPENDENT INST. (Apr. 1, 2007).
32. In the special issue of the *Journal of Appellate Practice and Process*, we invited several eloquent voices as a result of the November 2017 gathering in the conference room of the Third Appellate District. Those voices include, Hon. Therese M. Stewart, *Judicial Words Matter*, 21 J. OF APP. PRAC. & PROCESS 435 (forthcoming 2021); Hon. Joshua D. Wayser, *An LGBTQ Jurist's Perspective on the Crisis in the Justice System*, 21 J. OF APP. PRAC. & PROCESS 457 (forthcoming 2021); Elder Lance B. Wickman, *Lawyers as Peacemakers*, 21 J. OF APP. PRAC. & PROCESS (ISSUE 2) 385 (forthcoming 2021). The two judges are co-chairs of the California LGBT Judicial Officers Association. Elder Wickman is Emeritus General Authority and General Counsel, Church of Jesus Christ of Latter-day Saints.
33. A friend and former judicial colleague recently referred me to a little book that may also help as you read and ponder Goodrich's work and contemplate the necessity sometimes to take risks. *See* KENT M. KEITH, THE PARADOXICAL COMMANDMENTS: FINDING PERSONAL MEANING IN A CRAZY WORLD (2021), http://www.kentmkeith.com/commandments.html. *See also* Kent M. Keith, *The Mother Teresa Connection*, KENT M. KEITH, http://www.kentmkeith.com/mother_teresa.html (illustrating Mother Teresa's connection to the Paradoxical Commandments through her wall mural of Shishu Bhavan in her children's home in Calcutta).

". . .'A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities.'"

others who cannot seem to get along.[34] Given the turbulence that occurred in 2020, these ideas have even broader application and importance now.

EPILOGUE

As we make this effort, keeping in mind our own human frailties, we might overlay and reflect on an observation by Aleksandr Isayevich Solzhenitsyn: "A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralyzing man's noblest impulses."[35]

Whether or not we agree with him, we must seriously ponder Solzhenitsyn's words, because, as Justice Lewis Powell suggested during the Prayer Breakfast at the annual meeting of the American Bar Association in 1978, "These are indeed melancholy thoughts. I repeat them here without endorsement. But they represent the views of perhaps the wisest philosopher and social historian of [the 20th] century. It would be imprudent to reject them out of hand."[36]

Justice Powell concluded by admonishing us to remember, "We occupy a place of influence that is unique. But we have no divine right to enjoy that place. We must continue constantly to merit it by effective leadership both in *making our system of justice serve our people* and in *providing responsible leadership as citizens*."[37]

Abraham Lincoln suggested what might be our guiding spirit during his second inaugural address. We are fortunate he was able to do so. Frederic Douglass suggested why, "I felt then that there was murder in the air, and I kept close to [Lincoln's] carriage on the way to the Capitol, for I felt that I might see him fall that day. It was a vague presentiment."[38]

Douglass was right, but just a little early. "As events later revealed, Lincoln's assassin was in the inaugural throng and boasted of being within shooting range; six weeks later he killed Lincoln in a Washington theatre."

Lincoln's second inaugural address was very brief. And, despite his sense of foreboding and that of Douglass, his speech was humble, reverent, and so eloquent it has been described as his greatest speech.[39]

His concluding paragraph is as relevant today as it was in 1865: "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations."[40]

34. During a panel session at Sacramento's fifth annual Court-Clergy Conference, panelists discussed *Masterpiece Cakeshop* and its implications for the future, and much more. *Building Bridges in Polarizing Times: Religious Freedom, LGBT Rights, and Finding Common Ground*, 5TH ANNUAL CT.-CLERGY CONF. (Oct. 11, 2018), https://robinfretwell-wilson.com/new-events/2018/10/11/roseville-california-5th-annual-sacramento-court-clergy-conference. *See also Court-Clergy Conference: Justice for All*, THE SUPERIOR CT. OF CAL.: COUNTY OF L.A., http://www.lacourt.org/generalinfo/communityoutreach/GI_CO002.aspx. *See also* WILLIAM N. ESKRIDGE, JR. & ROBIN FRETWELL WILSON, RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (2018). *See generally* Douglas Potts, *Scholars Promote Bridging the Culture Wars at Court/Clergy Conference*, SACRAMENTO LAW., 8 (2019), https://issuu.com/milenkovlais/docs/saclaw_jan_feb_2019-v4_web?e=13404642/66846535; William N. Eskridge, Jr. & Robin Fretwell Wilson, *Anthony Kennedy Opens New Chapter in American Pluralism*, REAL CLEAR RELIGION (July 18, 2018), https://www.realclearreligion.org/articles/2018/07/18/anthony_kennedy_opens_new_chapter_in_american_pluralism.html.
35. Alexander Solzhenitsyn, A World Split Apart: Solzhenitsyn's Commencement Address at Harvard University (June 8, 1978), https://www.solzhenitsyncenter.org/a-world-split-apart. *See also* Elder Dallin H. Oaks, Quorum of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints, Canterbury Medal Speech at the Becket Fund for Religious Liberty Dinner (2013), https://www.youtube.com/watch?v=etGWZOnHhzU (delivering a similar message).
36. Justice Lewis Powell, Annual Prayer Breakfast Speech at American Bar Association (1978), https://scholarlycommons.law.wlu.edu/powellspeeches/76. *See also Solzhenitsyn May Be Right: Powell*, 64 AM.BAR ASS'N J. NO. 9 1344 (1978); Lewis F. Powell, Jr., *Duty to Serve the Common Good*, 24 CATHOLIC LAW. 295 (1979); Os Guiness, LEADERSHIP QUALITIES IN WASHINGTON, WILBERFORCE, LINCOLN, AND SOLZHENITSYN (1999) (suggesting how Solzhenitsyn fits into our national identity).
37. Italics added; to help reflect on Justice Powell's admonition. *See generally* DAVID J. BOBB, HUMILITY: AN UNLIKELY BIOGRAPHY OF AMERICA'S GREATEST VIRTUE (Thomas Nelson 2013); ROBERT CURRY, RECLAIMING COMMON SENSE: FINDING TRUTH IN A POST-TRUTH WORLD (Encounter Books 2019); STEPHEN CARTER, CIVILITY: MANNERS, MORALS, AND ETIQUETTE OF DEMOCRACY (Basic Books 1998); Russell G. Pearce and Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1 (2011), https://lawrepository.ualr.edu/lawreview/vol34/iss1/1 (directing their article to lawyers, but has instructional value for judges, too).
38. *See infra,* note 42.
39. Abraham Lincoln, Second Inaugural Address (1865), http://www.abrahamlincolnonline.org/lincoln/education/inaugural2.htm. *See also* RONALD C. WHITE, LINCOLN'S GREATEST SPEECH, THE SECOND INAUGURAL (2006); RONALD STAUFFER, PREFACE, GIANTS: THE PARALLEL LIVES OF FREDERICK DOUGLASS AND ABRAHAM LINCOLN (2009).
40. Peace officers, those serving and those fallen, bear most of the brunt of today's battle for constitutional governance, peace, and unity in our nation. They are in the eye of the storm. Just as many of our nation's courthouses came under fire in 2020, *supra* note 2, so did another core element of American justice, our nation's law enforcement agencies and our peace officers. Both phenomena are irrational, fostered by demagoguery and demonization, and attended by contrived, unconscionable demands for defunding and disbanding law enforcement agencies. It is elementary to observe, peace officers protect our courthouses and all the other facilities that house local, state, tribal, and federal governance. Peace officers also protect judges and, when we are threatened, our families, and our homes. More fundamentally, they protect our people and their homes. Peace officers, whatever the race, creed, color, gender, or sexual preference, in every community in America, are prepared to die and may well die at any given moment while doing their duty for the citizens

To emulate the spirit of Lincoln's words is a daunting challenge in any age, particularly now, in our hyper-partisan, crime-ravaged age. Even so, I believe there is so much to think about, to say, and to do, that I sense no respite for those of us who are willing and able, through our chosen professions, to help restore public recognition and respect for the practical utility of living by the Golden Rule[41] and for the continued vitality of E Pluribus Unum.[42]

I believe we can ethically work toward propagating the spirit of Lincoln's words through court-community outreach and court-clergy outreach. Goodrich's analysis and the special issue of the *Journal of Appellate Practice and Process*, volume 21, number 2, present additional resources for helping us to find for ourselves collective and collaborative ideas on ways and means to address the dissensions that divide our people. We need no administrative or educational mandates. We have it within ourselves to see the good, and just do it.

As we increase our efforts to provide the responsible leadership as judges and as citizens suggested by Justice Powell, and to build bridges suggested by Justice Marshall, we must renew touch with our better angels, foster malice toward none, with charity for all, in our own minds and hearts, as we try, ethically and responsibly, to inspire a similar renewal in the minds and hearts of everyone in our respective jurisdictions.[43]

George Nicholson is retired. Until late 2018, he sat on the Court of Appeal, Third Appellate District, State of California, for 28 years. Previously, he was a trial judge in Sacramento for three years; a senior assistant attorney general for five years, State of California; executive director, California District Attorneys Association for five years; and a senior trial deputy district attorney when he left the Alameda County District Attorney's Office after serving there for ten years.

of their communities. This selfless willingness is inculcated in every cadet in every law enforcement academy. It is part of the mind and heart of our peace officers. The lyrics of a country song, "American Soldier," apply to soldiers, to be sure, but those solemn lyrics also apply to peace officers, whatever their race, creed, or color, whatever their gender or sexual preference. The song was written and sung by Toby Keith (2003) and captures an eternal verity in simple, plain language:

> "And I will always do my duty,
> No matter what the price,
> I've counted up the cost,
> I know the sacrifice.
> Oh, and I don't want to die for you,
> But if dyin's asked of me,
> I'll bear that cross with honor,
> 'Cause freedom don't come free."

And, don't forget, peace officers have families, too, just as did Union Army officers during Lincoln's day. *See* John Kass, *Police Families, How Do They Bear It?*, Jewish World Rev. (July 31, 2020), http://www.jewishworldreview.com/0720/kass073120.php3.

41. *See Norman Rockwell: Golden Rule 1961*, Norman Rockwell Museum, https://www.nrm.org/images/mobile-app/gr/gr.html (last visited July 11, 2021).
42. Chief Justice Joseph E. Weisberger of Rhode Island, *E Pluribus Unum, The American Miracle*, Judges' J. 30 (1995). *See also* Congresswoman Barbara Jordan, Democratic National Convention Speech (1992), https://www.americanrhetoric.com/speeches/barbarajordan1992dnc.html (addressing, in part, e pluribus unum); Illinois State Senator Barack Obama, Democratic National Convention Speech (2004), http://www.americanrhetoric.com/speeches/convention2004/barackobama2004dnc.htm (addressing, in part, e pluribus unum during his keynote address); President Barack Obama, Presidential Speech (2016), https://www.youtube.com/watch?v=0eKUlWnhNIA (addressing, in part, e pluribus unum for a second time); *but see* Arthur Schlesinger, The Disuniting of America, Reflections on a Multicultural Society (1998); Charles Murray, *The Fractured Republic: Exploring the Divide between the Right and the Left*, Nat'l. Rev. (2016); Yuval Levin, The Fractured Republic: Renewing America's Social Contract in the Age of Individualism (2016).
43. I suspect Lincoln would agree, because he closed his first inaugural address in 1861 with this:

> We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield, and patriot grave, to every living heart and hearth-stone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.

Abraham Lincoln, *First Inaugural Address at U.S. Capitol in Washington, D.C.*, The Abraham Lincoln Association (March 4, 1861), http://www.abrahamlincolnonline.org/lincoln/speeches/1inaug.htm. Members of our court sense the mystic chords of memory because Norton Parker Chipman, our first Presiding Justice, was an aide and confidante of Lincoln. Indeed, he was with the president at Gettysburg. *See generally* Norton Parker Chipman, The Tragedy of Andersonville: Trial of Captain Henry Wirz, the Prison Keeper (1911) Jeffery Hogge, Norton Parker Chipman: A Biography of the Andersonville War Crimes Prosecutor (2006); Andersonville (John Frankenheimer dir., 1996); Jeffery Hogge, *The Civil War Roots of the Third District Court of Appeal*, Sacramento Law. 18 (Spring 2014); Scott Cameron, *The Third District Court of Appeal Holds Its Inaugural Judicial Conference and Reception*, Sacramento Law. 22 (Spring 2014); Fran Jones, *Creating a Chronology of Freedom*, Cal. Sup. Ct. Hist. Soc'y Newsletter 10–12 (2014), http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-Creating-Chronology-of-Freedom.pdf; *Let Freedom Ring!*, Cal. Sup. Ct. Hist. Soc'y Newsletter 1–9, (2014), http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-Let-Freedom-Ring.pdf; George Nicholson & William J. Murray, Jr., *A Conversation with Abraham Lincoln*, Cal. Sup. Ct. Hist. Soc'y Newsletter 22–24 (2013), http://www.cschs.org/wp-content/uploads/2014/07/Abraham-Lincoln-Presentation-2013-Newsletter-Fall-Winter.pdf.

The Admissibility of Social Media Evidence in Canada

Part 2: The Canada Evidence Act

Wayne K. Gorman

In Part 1 of this column, I reviewed the law concerning the admissibility of social media evidence in Canada at common law. In this second part, I will consider its admissibility pursuant to the Canada Evidence Act. *Reprinted in* R.S.C. 1985, c. C-5. As noted in Part 1, the issue of authentication of social media evidence has been addressed by Canadian judges through both the common law and the Canada Evidence Act (Act). In *R. v. Hirsch*, it was suggested that the provisions in the Canada Evidence Act dealing with the admissibility of social media evidence "is a codification of the common law rule of evidence authentication." [2017] SKCA 14 at para. 18. This is true, but as will be seen, the statutory provisions are much broader than that, including how an "electronic document" is defined.

WHAT IS AN ELECTRONIC DOCUMENT?

The Canada Evidence Act contains several provisions dealing with the admissibility of "electronic documents". Section 31.8 provides the following broad definition of what constitutes an electronic document:

> [It] means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data.

This definition has been described by one author as "[A] definition of imposing breadth, particularly when combined with the definition of 'data' in subsection 31.8—'representations of information or of concepts, in any form.' The statutory provisions do not therefore catch only documents in the conventional sense. They also catch at least some audio and video recordings." David M. Paciocco, *"Proof and Progress: Coping with the Law of Evidence in a Technological Age"* (2013) 11 CAN. J. L. & TECH. 181 at 190.

Paciocco also suggests that "[This] definition is broad enough to cover copies of all documents stored in a computer, such as business records, bulletin boards from Facebook or other social media, emails, and or 'tweets.'" Paciocco at 189.

A COMPUTER SYSTEM

The Canada Evidence Act also defines what constitutes a computer system. Section 31.8 provides the following definition:

> [C]omputer system means a device that, or a group of interconnected or related devices one or more of which,
> (a) contains computer programs or other data; and
> (b) pursuant to computer programs, performs logic and control, and may perform any other function.

In *R. v. Richardson*, the New Brunswick Court of Appeal held that:

> Facebook posts and messages, e-mails and other forms of electronic communication fall within the definition of an "electronic document." Home computers, smartphones and other computing devices fall within the definition of a "computer system." (Citation omitted). Likewise, MSN messages recorded or stored on a computer are "data" which falls within the definition of an "electronic document." [2020] NBCA 35 at para. 22.

In *R. v. Ball*, the Court noted "[T]he admissibility of Facebook messages and other electronic communications recorded or stored in a computing device is governed by the statutory framework." [2019] BCCA 32 at para. 67.

The broad definitions provided ensures that all forms of social media evidence will be subject to the admissibility criteria set out in the Canada Evidence Act, which is set at a minimal level.

AUTHENTICATION PURSUANT TO THE CANADA EVIDENCE ACT

The Canada Evidence Act, under the heading "Authentication of electronic documents," states the following at section 31.1:

> Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

This is the same test applied at common law and, as we saw in Part 1, it creates a very low threshold for admissibility. If, for instance, a witness says, "I received or sent this text message to or from Mr. Smith," then subject to relevance, the text is admissible. In *Hirsch*, it was noted that section 31.1 of the Canada Evidence Act "merely requires the party seeking to adduce an electronic document into evidence to prove that the electronic document is what it purports to be. This may be done through direct or circumstantial evidence," [2017] SKCA 14 at para. 18.

In *R. v. Martin*, the Court of Appeal for Newfoundland and Labrador pointed out that the language of section 31.1 is important. [2021] NLCA 1 at para. 47. The Act stipulates that

"[T]here must be evidence capable of supporting a finding that the electronic evidence sought to be admitted is what it purports to be." *Ibid.* This creates a very low threshold for admissibility. *Ibid* at para. 60. The Court of Appeal held that:

> Evidence "capable of supporting" a finding is quite different from evidence "determining" or "capable of determining" a finding. In other words, the evidence only needs to assist the trier of fact in determining whether the electronic document is what it purports to be. Moreover, as the Court in *C.B.* noted, section 31.1 does not limit how or by what means the threshold may be met. (Citation omitted). Neither does it impose a particular standard for threshold admissibility of electronic evidence. What is required is only some evidence that is logically probative of whether the electronic document is what it purports to be. Whether the electronic document will be relied on is a matter for the judge in weighing and balancing all of the admissible evidence and finally determining the case. *Ibid* at para. 47.[1]

Another Canadian Court of Appeal has expressed a note of caution. In *R. v. Aslami*, the accused was convicted of an offence in which the primary evidence against him was phone and Facebook messages he purportedly sent to his former partner. [2021] ONCA 249. In setting aside the conviction, the Ontario Court of Appeal noted that the cell phone number from which the messages were sent was registered to someone other than the accused. The Court of Appeal cautioned trial judges to:

> Be very careful in how they deal with electronic evidence of this type. There are entirely too many ways for an individual, who is of a mind to do so, to make electronic evidence appear to be something other than what it is. Trial judges need to be rigorous in their evaluation of such evidence, when it is presented, both in terms of its reliability and its probative value. *Ibid* at para. 30.

However, this ignores the "presumption of integrity" that the Canada Evidence Act creates for electronic documents.

A PRESUMPTION OF INTEGRITY

Sections 32.1(a) and (b) of the Canada Evidence Act indicate that the "best evidence rule in respect of an electronic document is satisfied" by "proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored." Section 31.3 creates a "presumption of integrity" in relation to electronic documents by deeming such documents to be reliable and accurate if the person seeking to enter them, establishes:

> (a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;
>
> (b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or
>
> (c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

Thus, if one of the above prerequisites is established, document integrity is deemed to exist, unless the opposing party presents "evidence to the contrary," which is capable of rebutting the presumption. *See* section 31.3. This is interesting because it reverses the usual burden of proof from the Crown to the accused when the Crown seeks to introduce an electronic document.

THE MANNER OF USAGE

The matters referred to in sections 31.2(2) and 31.3 can be established by affidavits. *See* section 31.6(1). In addition, the Canada Evidence Act provides further assistance to the party seeking admission of an electronic document by allowing evidence of the manner of "usage" of the system from which the electronic document was retrieved. Section 31.5 states:

> For the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.

Based upon this definition, the criteria for admissibility would appear satisfied by, for instance, something as simple as a witness testifying to having received a Facebook message in the "normal manner." This provision seems to invite judicial notice.

THE THRESHOLD TEST CONTAINED WITHIN THE CANADA EVIDENCE ACT

In *R. v. Durocher*, the Saskatchewan Court of Appeal considered section 31.1 of the Canada Evidence Act. The Court of Appeal held that:

> [The] burden of proof to establish threshold authenticity for purposes of s. 31.1 is low and, once satisfied, the

Footnotes

1. It has been suggested that though "This emphasis on the low threshold for admissibility accords with previous case law on electronic documents . . . *Martin* seems to set a new low bar." *See* Lisa Dufraimont, case comment on *R. v. Martin*, NJI Criminal Law e-Letter 315, April 23, 2021).

> document is admissible and available for use by the trier of fact. . . . To meet this threshold, the proponent need only provide sufficient evidence of authenticity from which the trial judge could reasonably find the document to be what it purports to be. [2019] SKCA 97 at para. 82.

Similarly, in *Richardson*, the New Brunswick Court of Appeal held that:

> [The Canada Evidence Act] determines how threshold admissibility of electronic documents is determined, not ultimate admissibility. In addition to the threshold statutory requirements, electronic documents—like any other form of document—must satisfy common law rules to support the admission of their contents, such as being legally relevant and complying with rules applicable to hearsay evidence when documents are adduced for the truth of their contents. [2020] NBCA 35 at para. 24.

The Court of Appeal also held in *Durocher* that the presumptions contained in the Canada Evidence Act in relation to "electronic documents" are "aimed at providing some assurance that no changes in the information found in the document have been caused by technical reasons or human intervention." [2019] SKCA 97 at para. 89. One might suggest just the opposite. The presumptions take away the opportunity to make such an argument at the admissibility stage.

As noted in Part 1, in *Durocher*, the contested evidence was a Facebook text messages said to have been sent by the accused to the complainant, L.A. The Court of Appeal concluded that these messages were admissible pursuant to the Canada Evidence Act simply because "L.A. provided some evidence capable of supporting a conclusion that [the messages were] what L.A. claimed it to be." [2019] SKCA 97 at para. 94. What was that evidence? L.A. testified that the accused sent her text messages. Thus, they were admissible because the Canada Evidence Act mandates admissibility because "[T]he integrity (or reliability) of the electronic document is not open to attack at the authentication stage of the inquiry." [2017] SKCA 14 at para. 18.

DOCUMENT INTEGRITY

The issue of "document integrity" as governed by section 31.1 of the Canada Evidence Act was considered by the Court of Appeal for Newfoundland and Labrador in *Martin*.

The Court of Appeal held that "system integrity is an admissibility issue," and an "admissibility requirement." [2021] NLCA 1 at para. 56. However, the Court of Appeal also held that the test for establishing system integrity is a low one. And the Court of Appeal emphasized the importance of the party objecting to the admissibility of social media evidence having the burden of providing "evidence to the contrary." The Court of Appeal indicated that section 31.3(a):

> Provides that integrity is presumed when, in the absence of evidence to the contrary, there is evidence capable of supporting a finding that the devices by or in which the electronic document was recorded or stored were operating properly. As discussed above in relation to section 31.1 with respect to authentication, "evidence capable of supporting a finding" represents a low threshold which is met by some relevant evidence which could be used to support a finding of system integrity. *Ibid* at para. 60.

The Court of Appeal, in considering section 31.2 of the Canada Evidence Act, indicated a trial judge need only "have some level of assurance that the device which stored or recorded the document did not alter, distort, or manipulate the electronic document so as to affect the integrity of its contents," for this element to be established. *Ibid* at para. 57.

In *Durocher*, the Court of Appeal noted that the accused had not presented any "evidence to the contrary." [2019] SKCA 97 at para. 95. Thus, there was no:

> Basis to doubt the integrity of the electronic document system, i.e., L.A.'s smart phone. While defense counsel took issue with whether Mr. Durocher was the author of the Facebook messages at trial, there was no suggestion that the messages might have been altered or tampered with. I am satisfied that the presumption of integrity set out in section 31.3(a) and section 31.3(b) of the CEA applied. L.A. was never challenged on her evidence and, as such, the presumptions were not rebutted by Mr. Durocher. *Ibid*.

Section 31.3 of the Canada Evidence Act was also considered by the New Brunswick Court of Appeal in *Richardson*. In concluding that electronic messages were properly admitted at trial, the New Brunswick Court of Appeal held that:

> Lay evidence that the messaging system was successfully used, and the messages displayed corresponded to what the different witnesses recalled, can form the basis for satisfying the s. 31.3(a) presumption, for this is evidence the computer system, having faithfully reproduced the information, must have been functioning as it should. *Ibid* at para 46.

The Court of Appeal concluded that the "threshold for authentication" was met because, Mr. Jamieson testified that the accused "was the other person in the MSN conversations." *Ibid* at para 51.

CONCLUSION ON AUTHENTICATION

In Canada, authentication requires the introduction of some evidence to establish that the document is what it purports to be. However, this does not require proof that the document is genuine or accurate. That is a question of weight not admissibility. Social media evidence can be authenticated even when it is disputed that it is what it purports to be.

It has been pointed out that "to authenticate an electronic document, counsel could present it to a witness for identification and, presumably, the witness would articulate some basis for authenticating it as what it purported to be." *Hirsch,* [2017] SKCA 14 at para. 18.

Thus, "[Authentication] for the purposes of admissibility is therefore nothing more than a threshold test requiring that there

be some basis for leaving the evidence to the factfinder for ultimate evaluation." Paciocco at 199.

DOES SUCH EVIDENCE CONSTITUTE HEARSAY?

Section 31.7 of the Canada Evidence Act indicates that sections 31.1 to 31.4 "[D]o not affect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence." Thus, the social media evidence sought to be entered must be otherwise admissible. *See R. v. N.P.*, [2021] BCCA 25. For example, if the social media evidence is found to be hearsay evidence, it will be presumptively inadmissible.

In *R. v. Singh*, it was pointed out that in assessing "text communications between the complainant and the accused," a trial judge "can properly rely on the timing, context, and tone of such prior communications to assess the credibility of both the complainant and the accused." [2021] BCCA 172 at para. 35. The British Columbia Court of Appeal also indicated that:

> [A] text or electronic exchange between a complainant and the accused can have independent cogency. This may be particularly true in the context of sexual assault cases where "there may be little other evidence to serve the court in its truth finding mission beyond the testimony of an accused and a complainant." *Ibid* at para. 37.

In *Durocher*, in which Facebook messages sent by the accused to the complainant were admitted, the accused argued that this social media evidence was inadmissible based upon the hearsay prohibition. The Saskatchewan Court of Appeal indicated that:

> Although there is consensus amongst academics that an admission constitutes admissible evidence, they differ on its rationale for admission: some contend it is an exception to the hearsay rule, yet others view it as part and parcel of the adversary system because the declarant is able to testify.

[2019] SKCA 97 at para. 63.The Court of Appeal concluded that it was "unnecessary to resolve the doctrinal basis for the admissibility of an out-of-court statement by an accused person in order to address Mr. Durocher's argument." *Ibid* at para. 65. This was because the:

> Statements made by Mr. Durocher in the Facebook messages are either not hearsay (because they were not adduced for the truth of their contents) or, if they are, they fell under a recognized exception to the hearsay rule and were presumptively admissible for the truth of their contents. *Ibid* at para 68.

THE ADMISSIBILITY OF SCREENSHOTS OF FACEBOOK POSTINGS

What if the police take a screenshot of a Facebook posting by the accused and the Crown seeks to introduce it as evidence?

This issue was considered by Court of Appeal for Newfoundland and Labrador in *R v. Martin*. In this case, the accused was charged with a number of weapon offences. At his trial, the Crown sought to introduce into evidence six screenshots depicting posts purportedly taken from the accused's Facebook page. The screenshots purportedly showed the accused holding a prohibited firearm. The screenshots were provided to the police by an anonymous source. Some of the officers that testified were able to identify Mr. Martin and his apartment as being depicted in the screenshots from having had contact with him and from having been inside his apartment.

The trial judge concluded that the evidence was inadmissible and the accused was acquitted. The Crown appealed from acquittal.

The Court of Appeal described the issue raised in the following manner:

> The issue on appeal is whether the trial Judge erred in excluding the screenshot evidence. Resolution involves determining whether the screenshot evidence was authenticated so as to meet the test for admissibility.

The appeal was allowed. The Court of Appeal indicated that Facebook posts "fall within the definition of electronic documents in section 31.8 of the Canada Evidence Act." [2021] NLCA 1 at para. 25. The Court of Appeal concluded that:

> The fact that the purported Facebook posts were captured in screenshots and tendered as such, in the absence of credible evidence that screenshot technology could have or did alter the Facebook posts depicted in the screenshots, is immaterial. What requires authentication are the Facebook posts depicted in the screenshots, which appear to be posts from Mr. Martin's Facebook. *Ibid* at para. 29.

The Court of Appeal held that the threshold requirement for authentication had been established because:

> [In] this case there was no evidence to the contrary. Mr. Martin did not testify on the *voir dire*. Neither he nor anyone else said that any person had tampered with any system on which the Facebook posts were recorded or stored, or that the posts had been altered so as to interfere with the integrity of their contents. In other words, Mr. Martin did not advance any "evidence to the contrary" that would rebut the presumption of system integrity found in section 31.3(a) of the Act. *Ibid* at para. 70.

Thus, "[T]he judge erred in failing to admit the screenshots of the Facebook posts purporting to be from Mr. Martin's Facebook. The low threshold required by the provisions of the Act regarding authentication and system integrity was met for the purposes of admissibility." *Ibid* at para. 74.

CONCLUSION

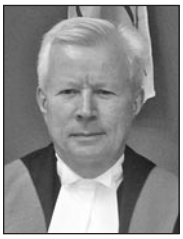
As we have seen, the threshold for the admissibility of social media evidence in Canada is a very low one that can be established with minimal evidence. When this is combined with a presumption of integrity, it results in social media evidence readily admissible in Canada.

In summary, for an electronic document to be admissible in Canada, the party seeking to have it admitted must:

1. Establish authentication. The test at common law and pursuant to the Canada Evidence Act is identical and con-

stitutes a very low threshold: that the document is what it purports to be;
2. This can be established by a witness describing what the item is, or how it was received or sent;
3. Authentication does not require proof that the document is genuine, only some evidence capable of establishing that it is what it purports to be (i.e., an electronic document);
4. There is a presumption of integrity in relation to computer systems, as a result of which the party seeking to have an electronic document admitted does not have to establish that the computer system was working properly when the document was created, found or copied; and
5. The onus rests on the opposing party to introduce evidence to the contrary when seeking to challenge the integrity of an electronic document.

Authentication of social media evidence involves a low threshold in Canada because it is a threshold issue and because of the nature of modern communications. The ultimate weight is to be assessed in the context of the totality of the evidence presented. As Professor Silver points out, in Canada, "There is no room in the [Canada Evidence Act] regime for the gatekeeper function and once admitted under that regime, the social media evidence faces no further threshold scrutiny." *See* Lisa A. Silver, *The Unclear Picture of Social Media Evidence*, (2020) 43-3 MANITOBA L.J. 111, at page 135.



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.*

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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.

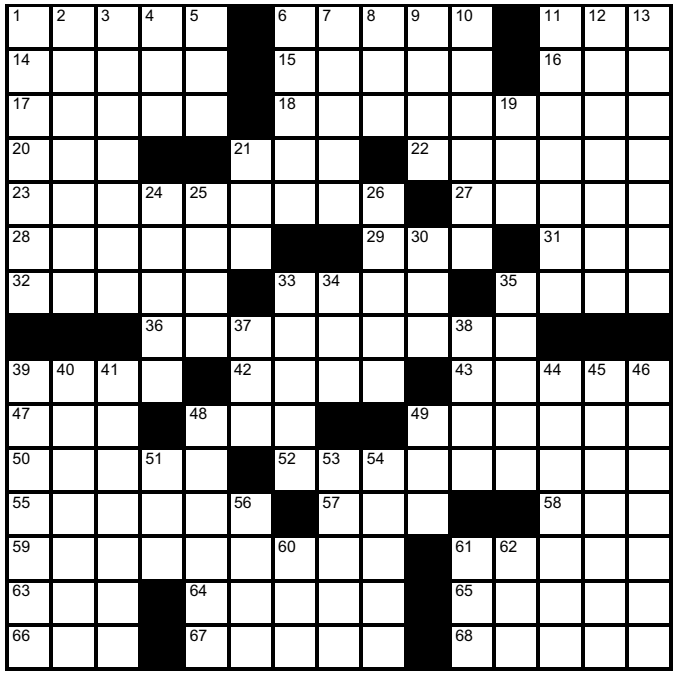
APPLICABILITY ISSUE by Judge Vic Fleming © 2020

Across

1 Sue Grafton's "T ___ Trespass"
6 One-armed bandits, briefly
11 Dust ___
14 Drug buster, slangily
15 Slugger Judge
16 Paul Anka's "___ Beso"
17 T-shirt choice
18 Start of a query in Philip Roth's short story "Eli the Fanatic"
20 Put away
21 "... in the ___ of my stomach"
22 Beginnings
23 Part 2 of the query
27 Pioneering nurse Barton
28 Hardly showing any progress
29 ___-jongg
31 Lid often worn backward
32 "Taps (___ Done)"
33 Prayer-ender
35 Eyelid issue
36 Part 3 of the query
39 Make do, somehow
42 Cookie containers
43 "Lady and the ___"
47 Year, in Cuba
48 Distress signal
49 Like high-quality eggs
50 Fired up again
52 Part 4 of the query
55 "Yours truly" alternative
57 Lance who presided in State v. Simpson
58 Word with up, down, out or back
59 End of the query
61 Albom or Miller
63 Org. for tooth docs
64 That is Latin?
65 Jazz pianist Chick
66 Court divider
67 Some athletic awards
68 Sort of

Down

1 Null and void
2 Carlos with a Grammy
3 High-speed route
4 Infrequent (abbr.)
5 Soldier of Seoul
6 "I ___ with my own two eyes"
7 Christine of the screen
8 Metal-laden rock
9 Freight weight measures
10 Tattler
11 Disavow
12 Receptacle in a smoking area
13 Loses it
19 My gal, of song
21 Butter helping
24 Banal
25 "Be quiet!"
26 Black-and-white ducks
30 "Raggedy" doll
33 Roster of VIP's
34 Word after iron or 35-Down
35 Sipper's device
37 DDE's WWII command
38 Another, in Aragon



39 Saharan sight
40 "... everyone on ___ of the case are citizens of ..."
41 It's kin to a skunk
44 2019 Bard Pitt film
45 Poses a danger to
46 Nutty Asian dish?
48 Nicks or Wonder
49 Shine, in a brand
51 "___ been thinking"
53 Tantrum
54 States, in Strasbourg
56 Some wines and lipsticks
60 Sales ___
61 1974 John Wayne film
62 Initialed chit

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

Solution is on page 170.

The Resource Page

RACIAL EQUITY RESOURCES

Judges all over the country are besieged with cases and issues related to racial tension, either directly or indirectly. State court leaders have been working to build a foundation of resources and material for judges to learn, process, and develop some necessary background skills to fairly approach courtroom evidence and situations. Below are some handy examples of video content that will expand the sensibilities of jurists (and non-jurists) of all races.

HIP HOP, GRIT AND ACADEMIC SUCCESS

https://www.youtube.com/watch?v=tkZqPMzgvzg&t=108s

Dr. Bettina Love is a chaired professor at the University of Georgia. She is a national leader in the thinking and discussion of education reform, including enlarging civic engagement to connect schools with their communities, and bridge "abolitionist" teaching with racial harmony. In this TED talk, Dr. Love outlines the full aspects of hip-hop as an extremely adept way to measure culture and academic success among young students. Dr. Love shows how youth interpretation of the world through hip-hop sensibilities is a direct link to character strength.

HOW DO YOU HANDLE A RACIST JOKE

https://www.youtube.com/watch?v=Bg1aTLsS69Y

Franchesca Ramsey is a television/online celebrity and writer. She first became famous from a 2012 YouTube video about racism, after which she started a YouTube channel of socially conscious comedy sketches. She most notably hosted an MTV web series called "Decoded," joined a Comedy Central series, wrote books, and recorded podcasts. This short video is a "Decoded" feature that adroitly addresses the nature and effects of racist humor in an engaging manner. It seems light, but gets right to the point in a number of helpful ways.

HOW TO DECONSTRUCT RACISM, ONE HEADLINE AT A TIME

https://www.youtube.com/watch?v=RZgkjEdMbSw

Baratunde Thurston is a writer, comedian, and commentator. A Harvard graduate, his 2012 book *How to Be Black* was a *New York Times* best-seller. He has covered political conventions, hosted a Science Channel series, and restarted *The Daily Show* with Trevor Noah. This is a TED talk that mixes wonderful humor/ satire, social criticism, and serious commentary. Although he makes fun of all of us (even his own name), he concentrates on how mainstream media affects society's assumptions and stereotypes about African-Americans.

I, TOO, AM HARVARD

https://www.youtube.com/watch?v=uAMTSPGZRiI

Ashante is a young woman who works as a creative director, video-maker, and producer. She developed a YouTube channel called Ashante the Artist in which she presents stories about personal growth and social awareness. This short YouTube video from her channel shows a variety of Harvard students who put forth their feelings and experiences as African-Americans at Harvard, and society in general. It is a great discussion of commonplace racial treatment.

GREAT BOOKS FOR JUDGES

Last year, the National Judicial College surveyed judges regarding their recommended books. Some of them, like *To Kill a Mockingbird*, are no surprise. But the one most commonly identified was *Caste: The Origins of Our Discontents*, by Isabel Wilkerson. It was written in 2020 by a non-lawyer journalist about specific features of society that enable inequality, particularly between races. Others include:

Just Mercy by Bryan Stevenson: 2014 memoir by a lawyer representing disadvantaged clients.

Eulogy of Judges by Piero Calmandrei: a 1936 collection of anecdotes and observations about the legal system from an Italian lawyer "with quiet wit."

Reflections on Judging by Richard Posner: 2013 diatribe against purported needless complexities of the U.S. legal system, including legal jargon, judicial opinion formalism, even the *Bluebook* itself.

The Undoing Project by Michael Lewis: this 2016 book, from the author of *Moneyball*, *Blind Side*, and other notable non-fiction works, recounts the story of two scientists who earned worldwide recognition for their studies of how human brains solve complex problems—recommended for judges and lawyers by some critics.

Catch-22 by Joseph Heller: famous 1961 novel about the inherent contradictions of bureaucracies, rules, and regimen.

Ten Lessons For A Post-Pandemic World by Fareed Zakaria: the well-known CNN host/journalist expounds his ideas in this 2020 work about how we should view the immediate future and its obvious challenges—critics found it to be original and optimistic.

ZOOM MISCHIEF

"When hearings are conducted by Zoom, it's easy for mischief to occur," said a former Connecticut state trial judge. The *New Jersey Law Journal* published an article about case judgments being overturned due to witnesses being coached off-camera, and other irregularities related to the use of Zoom for trials. In the New Jersey matter, a hearing on a domestic restraining order was conducted for two pro se parties on Zoom. The mother of one party, also a witness, was later found to be in the room during the testimony. It was overturned. The article also recounts a Michigan Zoom criminal trial of a domestic matter in which the defendant and the victim were found to be in the same room, thus affecting the victim's testimony. *See* https://www.law.com/njlawjournal/2021/05/17/zoom-verdict-overturned-was-witness-coached-off-camera-during-remote-hearing/?slreturn=20210808161457.

In Law Technology Today, an ABA resource site, "Legal Issues in Zoom Meetings" was recently published, listing a wide range of relevant topics, including Zoom bombing, general security and privacy, problems with what's visible in the background (leading to personal or HIPPA exposure), and due-process issues for those who do not have access to Zoom. *See* https://www.lawtechnologytoday.org/2021/08/legal-issues-in-zoom-meetings/.