October 2020

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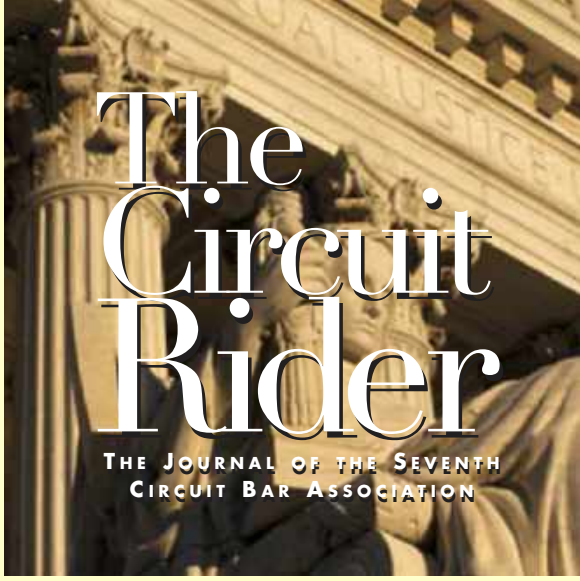
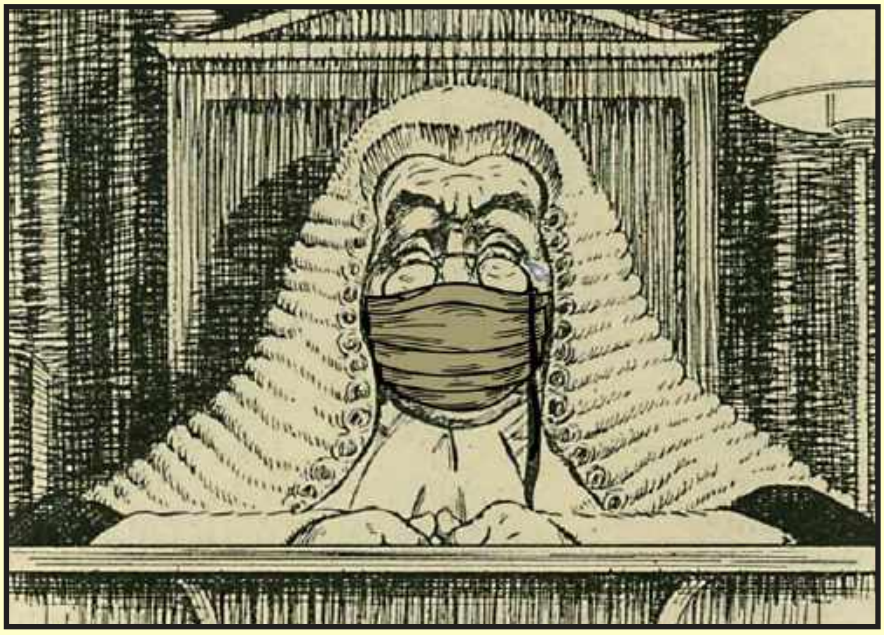


The Circuit Rider

THE JOURNAL OF THE SEVENTH CIRCUIT BAR ASSOCIATION

TRIALS AND Tribulations



In This Issue

Letter *from the* President

President Michael A. Scodro
Mayer Brown, LLC

On behalf of the Association's officers and Board of Governors, I hope everyone and their families are safe and well. Although we were unable to gather this past May for our annual meeting in Chicago, I want to take this opportunity to thank the judges and lawyers on our planning committee who worked tirelessly to plan and organize that event. The committee put together an extraordinary collection of speakers and programs, and the Board of Governors voted to keep our existing leadership in place for another year with the hope that circumstances allow us to gather next year in Chicago. We've reserved space at the Radisson Blu, our usual Chicago locale, for May 2-4, 2021, and we'll continue to monitor circumstances to determine how best to proceed in the spring.

Meanwhile, the Association has been providing an array of programming for members. Since the previous edition of *The Circuit Rider* issued, we've hosted a number of engaging programs — last December, the Association co-sponsored "A 'Chilling Spectacle': Greylord, Gambat, and the Unmasking of Judicial Corruption" as well as "Effective Settlement Advocacy: Training for Participants in the Settlement Assistance Program"; in February of this year, we presented "All Rise: Building Diverse Trial Teams" and co-sponsored a full-day program entitled "Protecting the Elusive Right to Vote"; and in March, we co-sponsored "Implicit Bias for the Legal Community."

Since in-person gatherings became unsafe, moreover, we've been providing web-based programming, with an online session on remote depositions in May and another on Rule 30(b)(6) depositions in June. And in September, we presented a panel entitled "The U.S. Supreme Court Certiorari Process & Amicus Briefing in the Federal Courts." We look forward to continuing our series of online educational offerings on a variety of topics throughout the coming months.

Of course, thanks as always to Judge Cole, *The Circuit Rider's* Editorial Board, and the many authors whose work appears in this issue. It's another excellent edition, including Judge Bucklo's interview of Justice Ginsburg, whom we so recently lost. This installment also features Magistrate Judge Fuentes' tribute to Judge Grady and pieces on a wide range of important issues — depositions during the pandemic, extensions of time for notices of appeal based on good cause or excusable neglect, the study of language as applied to law, federal jurisdiction and the Biometric Privacy Act, symbolism and the legal profession, and solitary confinement. The issue also includes a review of the recent book, *Online Courts and the Future of Justice.*

Finally, as I mentioned at the outset of the last *Circuit Rider,* the Association website (www.7thcircuitbar.org) features a list of our committees. Committee service is a rewarding way to become more involved in the Association, and again, anyone interested in serving on a committee may contact the relevant state or general committee chair. Alternatively, please feel free to reach out to me directly about our committees or any other aspect of Association membership or programming.

Like all of us, I look forward to the day when we can gather again in person. Until then, stay safe and be well.

Get Involved!

Interested in becoming more involved in the Association? Get involved with a committee! Log on to our web site at www.7thcircuitbar.org, and click on the "committees" link. Choose a committee that looks interesting, and contact the chair for more information.

AN INTERVIEW WITH

Justice Ruth Bader Ginsburg

By Hon. Elaine Bucklo[*]

Editor's Note

On September 18, 2020, one of the greatest Justices in the history of the Supreme Court passed away. To say that Justice Ruth Bader Ginsburg was a monumental figure in the development of the law relating to women's rights and equal justice for all people would be a dramatic understatement. Her place in the history of the Court alongside Holmes, Brandeis, Cardozo and Jackson is secure and beyond debate. It is thus appropriate that we begin this Issue reprinting the interview of the Justice in August 2010 at the Justice's chambers at the Supreme Court by Judge Elaine Bucklo.

* * *

EB: Can you talk a little about the influence that your parents had on you and on your career?

RBG: My mother was perhaps the most intelligent person I knew, but she lived in an age when a man felt dishonored if his wife worked. She died at age 48 after battling cervical cancer for four years. One of my most pleasant childhood memories is of my mother reading to me. When I could read on my own, she would take me on an excursion, a weekly excursion, to the library. She would leave me in the children's section while she got her hair done next door, then pick me up with the three books I had selected to bring home that week.

EB: When did you first realize that you wanted to be a lawyer?

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[*]*Judge Bucklo is a Senior United States District Judge for the Northern District of Illinois. She was nominated by President Clinton and confirmed in 1994. Judge Bucklo received her Juris Doctor,* magna cum laude, *from Northwestern University School of Law, where she served on the Law Review as Articles Editor. Following graduation, she clerked for Judge Robert Sprecher on the Seventh Circuit Court of Appeals. Judge Bucklo is a former Associate Editor of LITIGATION, the journal of the American Bar Association, Section of Litigation. In 2017, Judge Bucklo was the recipient of the Chicago Bar Association's Alliance for Women Founders Award. Judge Bucklo's Interview with Justice Ginsburg, which originally appeared in the 2011 issue of LITIGATION, was one of only eight Articles selected for reprinting in the Spring 2019 issue of LITIGATION, entitled "Pearls of Wisdom." The Article is reprinted with the kind permission of LITIGATION Magazine.*

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RBG: In my day, the safe occupation for a well-educated girl was to be a teacher, and I anticipated that I would be a high school history teacher. But I attended Cornell at a bad time for our country. It was the early fifties, the heyday of Senator Joe McCarthy. I took courses with, and was a research assistant for, a great teacher of constitutional law for undergraduates, Robert Cushman, and as his research assistant, one of my tasks was to follow the latest blasts of the House Un-American Activities Committee and the Senate Internal Security Committee. From that experience, I gained two impressions. First, our nation was straying from its most basic values, particularly the right to speak without Big Brother Government looking over your shoulder. Second, there were courageous lawyers who defended people targeted by the congressional committees. The idea Professor Cushman planted was that law might be a profession that would suit me well, one that could equip you to use your talent to make things a little better for your community.

So I took the LSAT in my junior year in college. My husband, who was a year ahead of me, in fact took the LSAT later and achieved a near-perfect score. My family had some misgivings about my pursuit of a law degree. But when I married Marty within days after graduating from college, my family was content: If I couldn't get a job, I would have a man to support me. So far from being an impediment, marriage turned out to be an advantage to my pursuit of a legal education. So did having a child before I entered law school.

Weeks before we married, Marty was called into service. He had been in the ROTC at the tail end of the Korean War. We spent the entire two years of his service in Fort Sill, Oklahoma. Jane was 14 months old when I started law school. I think one of the reasons I did so well as a law student was I was not overwhelmed, as many of my classmates were, by the rigors of the first year. I went to school in the morning and came home at 4 o'clock in the afternoon when our nanny left. The next few hours were Jane's time. Something outside law studies was very important in my life. Jane was a respite from the law books. I think I used my studying time more efficiently than my classmates because I had home and childcare responsibilities.

EB: You transferred from Harvard to Columbia.

RBG: After my second year.

EB: When your husband graduated and took a job in New York?

RBG: Yes.

EB: And you were first in your class at Columbia and close to it or very high in your class at Harvard as well?

RBG: Yes.

EB: Both places. And then you graduated, and there are all these stories about what happened. Is the story true about Justice Frankfurter that you had been recommended for a clerkship and he said he's not ready to hire a woman?

RBG: Yes, that's true. The prospect of a clerkship with Justice Frankfurter arose a year after I graduated. I was clerking for a district judge in the Southern District of New York. Al Sacks, who later became dean of the Harvard Law School, was at the time the professor who chose Frankfurter's clerks. Sacks called me-and this was out of the blue; I never anticipated such a thing-to say that he wanted to recommend me to the Justice. He added that he would give the Justice an alternative, the then president of the Harvard Law Review, John French, and Frankfurter chose John. When I told this story years later, Bill Coleman said it couldn't be true. The reason: Bill Coleman was the first African American ever to clerk at the Court. Bill thought his Justice, Frankfurter, was free from prejudice. One of my Harvard classmates was clerking for Frankfurter the year Al Sacks asked the Justice to consider me. He confirmed that my report was accurate. In 1960, Frankfurter, in common with his colleagues, wasn't prepared to engage a woman as a law clerk.

EB: You ran into issues as well in terms of getting hired by law firms at that time.

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RBG: Yes. No law firm in the entire city of New York was willing to take a chance on me. After my second year in law school, I was a summer associate at Paul, Weiss. I interviewed for that job in my second year, while I was still at Harvard, and was hired on the spot. I barely uttered two sentences during the interview. Later, I realized what was going on. Paul, Weiss was an avant garde firm. They wanted to hire a woman as a summer associate. I had the best grades of the women who signed up for an interview. I thought I did a good job as a summer associate, but the firm didn't give me a bid for a permanent job.

There was a reason for that, I suspect. The firm had engaged a woman named Pauli Murray. She was a "twofer": a woman and an African American. The firm made its statement by engaging Pauli and didn't need me to show their lack of prejudice. For years, Paul, Weiss said they offered me a permanent job, but I preferred to accept a clerkship, so I turned them down. I said, "Check your records." With much embarrassment, they confirmed that they did not offer me a job.

EB: I think I read that you noted recently that there was a silver lining to the discrimination you faced – I think you were talking about Justice O'Connor as well-that if you had not faced a wall of discrimination when you came out of school, by now you might be retired partners from law firms instead of a Justice on the Supreme Court.

RBG: We had to follow a different path. Sandra graduated a few years before I did. She ranked very high in her class. My later Chief, William H. Rehnquist, was number 1 in his Stanford Law School graduating class. Sandra was number 3. Nobody knows who was number 2. Sandra couldn't get a job, so she volunteered her services to a county attorney and said: "I'll work for four months, then if you think I'm worth it, you can put me on the payroll." That's how she got her first job in the law. Women lawyers of our generation were not heartily welcomed by the profession. It is quite true, I believe, that if Paul, Weiss had hired me, I would today be a long-retired partner.

EB: Do you have any message that you would give to young people today facing unfair discrimination in any form from your own experience?

RBG: Well, one thing you don't do is go off in a corner and cry. Instead, your attitude should be "I will somehow surmount this, I will find a way to do what I want to do." That was advice I received from my ever-supportive father-in-law when I became pregnant with Jane while Marty was in service. I had deferred my admission to Harvard, pending completion of his two-year commitment, and worried that I would be unable to manage law school with an infant. My father-in-law said: "Ruth, if you don't want to go to law school, you have the best reason in the world and no one will think less of you. But if you really want to go to law school, you will stop feeling sorry for yourself, and you will find a way to do it."

When I got to know Sandra, I appreciated that she was of a similar mind. Whatever came her way in life, she just dealt with it; she didn't waste time regretting a misfortune. She coped with it as best she could.

EB: You went on to - you actually wrote a book during the first year after you were clerking, then you went to Rutgers.

RBG: Yes. I was for two years associated with the Columbia Law School Project on International Procedure. During that time, I coauthored a book titled Civil Procedure in Sweden. The book was published in 1965 along with studies of French and Italian procedural systems. I clerked in the district court for two years, spent two years on the Swedish adventure, and then joined the faculty of Rutgers Law School in Newark.

EB: While you were at Rutgers, you began taking complaints from the ACLU. I don't know if they covered things other than sex discrimination, but you started taking

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some of these cases. Was that born out of your experience? I mean, you'd seen discrimination certainly against women.

RBG: I started teaching at Rutgers in 1963. It was the year the Equal Pay Act passed. My good dean said: "Ruth, you have to take a significant cut in the salary you've been getting at Columbia." I responded that I understood Rutgers, as a state university, had limited resources. But the amount of the cut was larger than I anticipated. So I asked, "What is so-and-so paid?" The inquiry concerned a male member of the faculty about my age and time out of law school. The response was swift: "Ruth, he has a wife and two children to support. You have a husband with a well- paid job at a New York law firm."

That's the way people thought in the early 1960s. They didn't immediately take the Equal Pay Act seriously. Title VII, enacted in 1964, was not yet on the books. People coming out of law school in the next generation-my younger colleagues, for example-encountered no similar barriers. Justice Sotomayor might have encountered discrimination as a Hispanic, but not as a woman, and I don't think any doors were closed to our newest Justice, Elena Kagan. But for my generation, employers would post interview sign-up sheets headed "Men only." We accepted that as the way things were. But then there was the civil rights movement, vibrant in the 1960s, and the rebirth of the women's movement starting in the late sixties. New kinds of complaints came trickling into the ACLU affiliate in New Jersey. I'll describe two categories of cases that were typical.

One concerned what was euphemistically called maternity leave. Most complainants were school teachers forced out of their jobs, put on maternity leave in the fourth or fifth month of pregnancy or as soon as they began to show. Maternity leave was a euphemism because it was unpaid and provided no guaranteed right to return. If the school district needed you, they'd call; otherwise, you were out of a job.

The pregnancy problem involved much more than unpaid leave. One of my most memorable clients had been in service, left voluntarily when her child was born, and then tried to reenlist. She couldn't because a pregnancy discharge was deemed a moral and administrative disqualification. They never clarified whether it was moral or administrative or both. The complainants in these cases, pregnant women or formerly pregnant women, weren't asking for any favors. They were saying, in effect, I am ready, willing, and able to work; all I seek is a day's pay for a day's work.

A second category of complainants were women in blue-collar jobs whose employers had advantageous health insurance coverage and whose spouses, if they had spouses, didn't have equivalent coverage. So these women wanted to sign up for family coverage. They were told that family coverage is available only to male workers; female workers could get coverage only for themselves, not for a spouse or children. The idea was that the woman working outside the home was only a pin money earner, not the wage earner that counted. The ACLU affiliate in New Jersey referred cases like that to me.

EB: In 1971 then, you wrote the brief in *Reed v. Reed* [404 U.S. 711], in which the Supreme Court held that the Idaho statute that gave mandatory preference to a male applicant as an administrator of an estate over a female applicant violated the Equal Protection Clause. How significant was that case in jurisprudence for women?

RBG: Tremendously significant, I think. It was the first time in history that the Supreme Court ever encountered a gender-based classification it didn't like. The succession of opinions before Reed was daunting. There was *Hoyt v. Florida* [368 U.S. 57], decided in 1961, holding it was OK to call only men for jury duty; there was *Goesaert v. Cleary* [335 U.S. 464], decided in 1948, holding it was OK to bar women from serving as bartenders unless their husbands or fathers owned the tavern. Every case starting with Virginia Minor's came out the same way. Minor's complaint: I read this newly ratified 14th Amendment. It says I'm a citizen.

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The most fundamental right of a citizen is to vote. The Court in *Minor v. Happersett* [88 U.S. 162], decided in 1874, replied: Of course, women are persons and may be citizens, but so too are children, and who would suggest that children should have the right to vote?

The judicial attitude in these cases was quite different from the mind-set of judges in race discrimination cases. By the sixties, almost everyone recognized that classifications disadvantaging racial minorities were odious. But laws restricting women were considered benign. They existed, it was thought, to protect the "little woman." Did they in fact favor women? Consider a law providing that women can work only eight hours a day; well, that meant women couldn't get overtime pay. Or a law prohibiting the employment of women at night, which meant women couldn't wait tables at the time tips are largest.

In Sally Reed's case, the law said that as between persons equally entitled to administer a decedent's estate, males must be preferred to females. Why did Idaho have that law? They copied the statute from California. Why did California have it? The law originated in days before the Married Women's Property Acts released women from common-law disabilities. So we had two people, a man and a woman. Likely the woman was married, and if she were married, she couldn't contract in her own name, sue and be sued in her own name. So it made sense, if you had a choice between two people equally related to the decedent, to pick the man because he wouldn't labor under those law-imposed disabilities.

By the time Sally Reed's case came up, married women's property and contract restrictions no longer existed. But the states hadn't cleaned up their law books. What was significant about Sally Reed's case? The law reflected the notion that women are destined to care for the home and children, while men are destined for a working life outside the home. Sally Reed was a woman from Boise, Idaho, an everyday woman, who sensed that she had experienced an injustice. She believed that courts could redress her grievance. She financed her case through three levels of the Idaho state courts. When the Idaho Supreme Court rejected her claim that the statute was unconstitutional, one of the ACLU's general counsel, Marvin Karpatkin, read the decision and believed Reed would be the turning point case.

ACLU's legal director, Mel Wulf, called Sally Reed's lawyer, Allen Derr, in Boise, Idaho. Derr said he would be glad to have the ACLU brief the case, but he wanted to argue it. So that was the agreement we made. I remember a day in November 1971, coming home from Rutgers on the train and noticing in a fellow passenger's hands the cover page of the New York Post, displaying a banner headline: "Supreme Court Outlaws Sex Discrimination." It was the announcement of the unanimous decision in *Reed v. Reed. Reed* was a very low key decision, but it held great promise for cases in the wings.

EB: It was short.

RBG: The Court didn't admit it was doing anything different from the norm. It simply said the classification was irrational. But, of course, something different was happening.

EB: Two years later [1973], you argued – it was your first argument – *Frontiero v. Richardson* [411 U.S. 677]?

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RBG: Yes.

EB: How rare was it for a woman to argue in those days before the Supreme Court?

RBG: It was uncommon. There was only one woman permanently in the SG's office at that time, Harriet Shapiro. She was a career Department of Justice lawyer. Her husband was also in the SG's office.

EB: Today, is it often that women argue, or does it still seem like it's way more men than women?

RBG: This last term, a woman, an outstanding advocate, argued six major cases. Her name is Elena Kagan. She was then solicitor general of the United States.

EB: Is it true that in *Frontiero,* when you argued, that you needed no notes, that you got up there and you argued and you knew all your cases backwards and forwards, and that your argument was so compelling that nobody asked you any questions?

RBG: I always had an attention-grabbing first sentence totally worked out and memorized, and a few index cards noting the main points I wanted to develop. Oral argument is fleeting. At best, you can get the Court to want to decide in your favor. When I speak to lawyers about briefing cases for the Court, I emphasize that the first thing I read when preparing for argument is not a lawyer's brief; it is, rather, the decisions of the courts that have ruled on the case before it came to us. I start with the trial court, then the appellate court, because I want to know what those judges said. I don't want to get the opinion of a judge filtered through the sometimes skewed lens of an advocate.

EB: In *Frontiero,* eight members of the Supreme Court agreed with you that the statute that allowed a member of the military to claim his wife as a dependent for housing and medical benefits without regard to whether she was in fact dependent but required that the woman, if she was a service woman, prove that her husband was dependent on her for more than half of his support, was unconstitutional.

Four members of the Court agreed with your argument that gender should be a suspect classification.

RBG: Yes.

EB: Four others found that the statute was unconstitutional but did not reach the issue of a suspect classification. At that time, were you frustrated that you didn't get that fifth vote saying that sex was a suspect classification like race and national origin, and has it made any difference in the long run?

RBG: I was surprised that Justice Brennan pushed suspect classification so soon, even though it was the featured argument in our brief. My notion was that there would be four, five, six cases first, as low key as Reed, but striking down the gender line every time. I think Justice Brennan lost Justice Stewart's vote, not for the bottom-line judgment, but for declaring sex a suspect classification, by pressing the issue too soon. If he had waited for three, four, or more cases, he might have attracted the fifth vote.

After *Frontiero,* we had to live with the reality that we weren't going to get a fifth vote for suspect categorization of sex classifications. So the next best thing was to ratchet up the standard. We urged heightened scrutiny. Gender classifications, the Court later said, fail unless supported by an exceedingly persuasive justification, a phrase repeated in the VMI case.

EB: Speaking of VMI [*United States v. Virginia,* 518 U.S. 515], that was 1996. You had been on the Court three years. Was that the first gender discrimination case after you came on the Court in which you wrote the opinion?

RBG: Yes. I had written a concurring opinion in a case called *Harris v. Forklift Systems* [510 U.S. 17 (1993)1; it concerned sexual harassment, and Justice O'Connor wrote the opinion of the Court.

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EB: I was rereading the VMI case yesterday, and I was wondering what it felt like to be on the other side of this bench after having argued five or six cases before the Supreme Court in your capacity as a lawyer, to be writing that decision.

RBG: It was a most satisfying endeavor for me. About 20 years earlier, there was a case against the Philadelphia school district. The plaintiff's name was Susan Vorchheimer. Philadelphia had two high schools for gifted children, one was called Central High, and the other, Girls High. The names told the story.

Susan Vorchheimer wanted to go to Central because science and other facilities were better there. District Judge Newcomer, of the Eastern District of Pennsylvania, ruled in her favor, but the Third Circuit reversed 2 to 1, with a strong dissenting opinion. That left the federal judges evenly divided, 2 to 2. I didn't argue the case when it reached the Supreme Court. As not uncommonly happens at the ACLU, the local lawyer wants to argue the case even though national office lawyers or volunteers wielded the laboring oar in writing the brief. This Court divided four to four, which results in automatic, opinion-less affirmance of the court below. I have commented, in conversation with an ACLU coworker in the *Vorchheimer* case, that the right side prevailed-even if it took 20 years to do so. With time and evolving understanding, a 1977 cliff-hanger became, in 1996, a secure 7-to-1 judgment.

EB: It was a great opinion. Before you got to the Court, you had also argued *Weinberger v. Wiesenfeld* [420 U.S. 636 (1975)], in which eight members of the Court again agreed with you, with Justice Douglas not participating. They agreed that another anachronistic provision of our laws- this one was a provision of the Social Security Act that said men could not get benefits-

RBG: Childcare benefits. The provision at issue in *Wiesenfeld* granted a special benefit to a sole surviving spouse who has in her care a child, a minor child or a disabled dependent of any age. It was a dramatic case. Stephen Wiesenfeld's wife, Paula, died in childbirth, and he vowed that he would not work full-time until the child, Jason Paul, was in school full-time. Every one of these cases presented a compelling real-life situation. To this day, I remain in touch with Sharron Frontiero (now Cohen) and Stephen Wiesenfeld. We took the *Wiesenfeld* case from the district court through the Supreme Court before Jason reached his third birthday, and that was record time. I presided at Jason's wedding and, just this summer, saw him, his wife Carrie, and their three children. I was in Aspen, Colorado, and was interviewed during my stay by a local television station. Jason and his family happened to be on vacation in Aspen, so I invited them to be my audience for this event.

All of the complainants in the ACLU's 1970s gender-discrimination cases were everyday Americans who felt they had experienced an injustice and had faith in our court system. They were not test cases we manufactured. We didn't look for a plaintiff like Stephen Wiesenfeld. He just came to us on the advice of a neighbor.

After Stephen prevailed, many husbands and widowers seeking retirement benefits or survivors' benefits under their wives' accounts stated claims and similarly prevailed. Social Security, like so many laws at the time, divided people into two tight categories. There were wage earners- they were men; and there were dependents-they were women. In all of the Social Security cases after *Wiesenfeld,* a man sought benefits based on his wife's earnings. They all fit the same mold.

EB: For several years, you were the only woman on the Supreme Court. I have read that you have said you didn't like it or that they didn't listen to you as well. I don't know if that's an accurate quote. Was there that feeling?

RBG: Not so much that they didn't listen. By the time I got to the Supreme Court, they did. I had that kind of experience in my younger days. But it was lonely. It wasn't right that there should be just one woman. You looked out in the courtroom. School children filed in and out, as many girls as boys. But when they looked up to the bench, there was only one woman.

For the 12 years Justice O'Connor and I overlapped, the public could see two women. They didn't look alike. They didn't talk alike. One was appointed by a Republican president, the other by a Democratic president.

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Even so, every one of those 12 years, every year that Sandra and I served together, at least one time per term, a lawyer called me Justice O'Connor. They had become accustomed to the idea that there was a woman on the Court, and her name was Sandra Day O'Connor. That did not happen last term. Nobody called Justice Sotomayor, Justice Ginsburg, and I think the same is going to be true with Justice Kagan.

EB: Did you envision a time when there would be three women on this Court?

RBG: Yes.

EB: In your time?

RBG: I was overly optimistic. In one speech or another, I said I expected to see in my lifetime three, four, maybe more. And when people asked me, well, what about that prediction? I said it came true in Canada. Canada's Supreme Court has nine justices; four are women including the Chief Justice.

EB: Do you want to make a prediction about how long it will take before there's a majority of women on our Supreme Court?

RBG: I think it's clear that women are here to stay, they are no longer curiosities, and three is one-third of the bench. That's a better representation than in the House and Senate.

EB: What has been your biggest surprise on the Supreme Court?

RBG: The collegiality of this place. I've been on two law faculties. I never worked in a place where people so genuinely care about each other. I know that from my most recent sorrow, the death of my husband, but also from the two cancer bouts I had while seated on the Court. My colleagues rallied around me and made it possible for me to continue.

And hope springs eternal. I was exceedingly fond of Chief Justice Rehnquist. In my years as an advocate, he dissented in all the cases in which my client prevailed, except *Wiesenfeld.* He was the Justice who said in the Gilbert case that discrimination on the basis of pregnancy is not discrimination on the basis of sex. Yet, he joined the judgment, although not my opinion, in the VMI case. And then, late in his tenure, he wrote the opinion upholding the constitutionality of the Family and Medical Leave Act. When I brought the opinion home to show to my husband, Marty, he said, "Did you write it?"

There is always the possibility of learning-living and learning-and I suspect Chief Justice Rehnquist learned the most from his own family situation. I never discussed this with him, but he was a very caring grandfather to his daughter Janet Rehnquist's two girls. Janet was divorced. I think the Chief served as a substitute father in his granddaughters' lives. So as one lives, one learns.

I'm always hopeful that my colleagues will agree with me. I'm more than occasionally disappointed, but hope springs eternal.

EB: What is the most difficult aspect of being a Supreme Court Justice?

RBG: For me it's by far the death penalty cases. They are not always difficult, not always intricate legally. But it is trying to be part of our system of multiple reviews. An employee in the clerk's office does nothing but handle

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last-minute applications for stay of an execution. I will never become accustomed to dealing with those cases and hope that, in time, they will no longer appear on our docket.

EB: Your nomination to the Supreme Court was confirmed by the Senate on a vote of 96 to 3, despite the fact that in your hearing you defended *Roe v. Wade* [410 U.S. 113 (1973)]. Obviously, the confirmation process has changed over the intervening years, and in a recent speech to the ABA, you noted that you wished this would change again. Do you think the current climate would discourage a president from nominating a person who had, like yourself or Thurgood Marshall, for example, been outstanding advocates for particular civil rights?

RBG: Yes. I don't think I would have had, frankly, a snowball's chance in hell of being nominated in today's climate. The ACLU connection just didn't come up at my hearings. Can you imagine that being so today? The White House was worried about my ACLU affiliation. I said forget it, there's nothing you can do that will persuade me to say anything derogatory about the ACLU, an organization that performs a vitally important role in our society.

It didn't come up. Then Senator Biden chaired the Senate Judiciary Committee. The ranking minority member was Orrin Hatch. He was entirely in my corner. He recalled in his autobiography that President Clinton called him before my nomination and asked, "On my list of potential nominees, who would be acceptable to you?" Hatch said, "Ginsburg and Breyer."

That doesn't happen now. The notion that only five Republicans voted for Elena Kagan, who is so very well qualified for the job, is unsettling. I wish a referee would blow a whistle and say: "Stop this, let's play fair." Just now it's payback time. It started with the Democrats, when they rejected Robert H. Bork's nomination. I was the beneficiary of a committee seeking to overcome its poor performance in the Clarence Thomas hearings.

EB: Recently, you said that you were not concerned about the future of *Roe v. Wade,* although some people have been worried about it. Can you comment on that?

RBG: *Roe v. Wade* was decided in 1973. Generations of girls have grown up with the notion that if they make a dreadful mistake, it's in their hands to decide what their destiny will be. The country will never go back to the way it was. Let's say *Roe v. Wade* were overruled. I'm not predicting that's going to happen, but suppose it did: At the time of *Roe,* four states provided for abortion for any reason or no reason in the first trimester: New York, Washington, Hawaii, and Alaska. Other states occupied a middle ground, permitting abortion where pregnancy resulted from rape or incest, or jeopardized a woman's health, including her mental health. The law was in a state of flux. It was changing. I compared the situation to no-fault divorce, which took the country by storm in 10 years. Abortion reform was heading the same way.

If the Court overruled *Roe,* you would have the situation that existed at the time of *Roe* itself. Then, a woman with the means to travel would have access to a safe abortion someplace in the United States. The sad truth is, were *Roe* overruled, only poor women would have no choice. There will never be a time when a woman who can afford transportation will be unable to choose whether and when to give birth. Current restrictions extend beyond our borders, I might note, affecting family planning grants to impoverished communities abroad.

I anticipate, too, that, over time, science is going to take care of this matter in large part. Women will have the protection they need without even a doctor's prescription.

EB: Do you have any tips for people who are arguing before the Supreme Court?

RBG: Ride with the waves, and don't show the pain you're experiencing when your prepared spiel is interrupted. Justices are constantly asking questions. If you welcome the Justices' questions, you'll do much better. It helps, too, to have a sense of humor when conversing with the Court.

EB: Do you have any views on televising oral arguments before the Supreme Court?

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An Interview with Justice Ginsburg

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RBG: My view is that as long as any one of my colleagues would be discomforted by it, I am not going to be in the ranks advocating televised arguments. Court control would be important, and coverage should be gavel-to-gavel. One can easily distort oral argument by splicing together snippets from discrete portions. My former colleague David Souter was the only Justice who had experience with cameras in the courtroom. He served on the New Hampshire Supreme Court, where arguments are televised. It was his impression that the lawyers sometimes performed in front of the camera in a way they wouldn't absent cameras; but worse than that, he censored his own questions, concerned that an inquiry a lawyer would understand might be misperceived by the public. So he tried to phrase his questions in a way non-lawyers could readily grasp. Sometimes that meant remaining silent or withholding a key question.

So long as any member of the Court would find oral argument an uncomfortable exercise if the argument were televised, then, as a member of a collegial bench, I would not favor television.

EB: The two new Justices like you come from New York.

RBG: We have all the boroughs represented here except Staten Island.

EB: Is this a particular delight?

RBG: Justice Scalia grew up in Queens, Sotomayor in the Bronx, I'm Brooklyn born and bred, and Elena hails from Manhattan. Though we are missing Staten Island, we have Justice Alito, who is from New Jersey, which is pretty close to New York. We are now a disproportionately northeast Court. But it wasn't so long ago that the Court included Chief Justice Rehnquist and Justice O'Connor, both from Arizona, a state with a relatively small population. Geographical diversity is an appropriate consideration, good to have but not essential.

EB: If you were to recommend any single book-this comes from a law clerk of mine-for lawyers or aspiring lawyers, what would you recommend?

RBG: One book I love is Jean Edward Smith's biography of John Marshall. It captures not only the man's brilliance as a jurist but his humanity. Another I would strongly recommend is Gerry Gunther's biography of Learned Hand. Both are great judicial biographies.

EB: Your son lives in Chicago, where he founded and heads the Chicago Classical Recording Foundation. Did he get his passion for music from you and your husband?

RBG: I don't think that we can take full credit for our son James's love of music. When my daughter Jane was born - she is 10 and a half years older than James - Marty was in service in Fort Sill, Oklahoma. Jane never had a feeding without something beautiful playing on the Victrola - a Beethoven symphony or an opera recording, for example. By the time James was born, we were both very much involved in our careers, so we were not compulsive, let's put it that way, about making sure that beautiful music was playing constantly. I noticed something about my dear son at an early age. He was what the school called hyperactive and I called lively. But if we took him to a concert, he would sit still and pay rapt attention. Last year, the Chicago Tribune had a feature, "Ten Chicagoans in the Arts," and James was one of the 10. We were so proud. His venture, as you mentioned, is the Chicago Classical Recording Foundation. He records artists who live in Chicago or have some other strong tie to Chicago, people who are extremely talented but have not yet achieved the full recognition they deserve. A number of them have had their careers take off-among them, Rachel Elizabeth Barton, Jennifer Koh, the Pacifica Quartet.

EB: If you were to have chosen a profession other than law, do you have any idea what it would have been?

RBG: You have to add to that, "and if I had any talent God could give me." Then I would be a great diva, which I am sometimes, but only in my dreams, for to tell the truth, I'm a monotone, rated by all my grade school teachers as a sparrow, not a robin. But in my dreams, I can be Maria Callas, Renata Tebaldi, Beverly Sills, or Marilyn Home.

Depositions During *the* COVID-19 Crisis

*By Danielle N. Bagwell**

With the country being so profoundly affected by COVID-19, many litigators are considering whether and how to take depositions in the coming weeks. Federal court responses have varied, from blanket extensions of civil deadlines to encouraging remote depositions. Whether it is advisable or even permissible to depose a witness under current circumstances will depend on several factors, including the jurisdiction, the deponent, and the anticipated substance of the deposition.

Many Courts are Extending Discovery Deadlines

Numerous courts have issued administrative orders extending all civil deadlines due to COVID-19. The District of New Jersey, for example, in Standing Order 2020-04, extended all filing and discovery deadlines which fall between March 25, 2020 and April 30, 2020 by forty-five days. *See also,* Standing Order 3:20-mc-105 (D.S.C. Mar. 16, 2020) (extending all civil deadlines); Standing Order 20-0012 (N.D. Ill. Mar. 30, 2020) (same).

Other courts have extended discovery deadlines on a case-by-case basis based on general COVID-19 concerns. The District of Minnesota, for example, recently granted a contested motion to extend the discovery deadline, stating "it is essential that all Minnesotans work together to slow the spread of this terrible pandemic. In addition, counsel and litigants need to be patient and understanding with one another, and they should work cooperatively to adjust schedules as needed." *See Elsherif v. Mayo Clinic,* 2020 WL 1441959 at *1 (D. Minn. Mar. 24, 2020). The court further noted the "extraordinary" impact of working remotely, and found a clear showing of good cause existed to extend the discovery deadline where counsel argued he must avoid traveling to protect himself and other high-risk family members from potential exposure to the virus. *Id.*

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**Danielle N. Bagwell is an associate trial attorney at Duane Morris LLP representing major medical device and pharmaceutical industry clients in complex products liability and mass tort litigation in federal and state courts across the United States. Ms. Bagwell holds a Bachelor of Science degree with Honors from Carnegie Mellon University, a Master of Arts from New Mexico Highlands University, and graduated* cum laude *from Temple University Beasley School of Law, where she served on the Temple Law Review.*

Depositions During *the* COVID-19 Crisis

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Other Courts are Authorizing Remote Depositions

Some courts are opting to authorize depositions via remote means. *See, e.g., Sinceno v. The Riverside Church in the City of New York,* 2020 WL 1302053 (S.D.N.Y. Mar. 18, 2020) (authorizing the taking of all depositions by remote means in light of COVID-19 concerns); *Thomas v. Wallace, Rush, Schmidt, Inc.,* No. 3:16-cv-00572, Dkt. 160 (M.D. La. March 18, 2020), ("[g]iven Plaintiff's economic situation and the coronavirus outbreak . . . [c]onducting Plaintiff's deposition by telephone or videoconference is appropriate"); *Velicer v. Falconhead Capital LLC,* 2020 WL 1847773 at *2 (W.D. Wash. Apr. 13, 2020) (refusing to extend discovery deadline, encouraging the parties to take depositions remotely).

Courts may authorize remote depositions under Federal Rule of Civil Procedure 30(b)(4), and consider whether the burden of proposed discovery outweighs the likely benefit under Federal Rule of Procedure 26(b)(1). Courts may quash a subpoena under Federal Rule of Civil Procedure 45 where compliance would subject a person to "undue burden." While some courts require the party requesting a remote deposition to show good cause or "extreme hardship", others liberally permit remote depositions and require the party opposing the remote deposition to make a particularized showing as to why it would be prejudicial. *Compare Shibata v. Swingle,* 2018 WL 4522050 at *2 (N.D.N.Y. Feb 26, 2018) (noting "the party requesting a deposition via remote means bears the burden of demonstrating good cause") *with Jahr v. IU Intern. Corp.,* 109 F.R.D. 429, 431 (M.D.N.C. 1986) ("leave to take telephonic depositions should be liberally granted in appropriate cases . . . . Thus, upon giving a legitimate reason for taking a deposition telephonically . . . the burden is on the opposing party to establish why the deposition should not be conducted telephonically.").

Even where a particular court is generally encouraging parties to proceed with depositions, COVID-19 concerns or the inherent limitations of remote depositions may render particular depositions unduly prejudicial.

Medical Provider Depositions

Courts may be reluctant to permit depositions of medical providers under present circumstances. The Northern District of Illinois stated that it has "developed concerns about whether the depositions of medical providers should continue to go forward without scrutiny from the Court with respect to the question of the burden that deposition participation places or may place on medical providers during the COVID-19 public health emergency." *Lipsey v Walmart, Inc.,* 2020 WL 1322850 (N.D. Ill. Mar. 20, 2020). The court further stated, "the medical community is very, very busy right now, and likely will be busy for weeks or months to come. . . . . .It is reasonable for all of us to expect that at this moment and at least for the next few weeks and possibly longer, the situation at hospitals and medical offices will be all hands on deck. All hands cannot be on deck if some of them are at a law office sitting for a deposition in a tort lawsuit." *Id.,* citing *Devine v. XPO Logistics Freight,* 2020 WL 1322850 at *2-3 (N.D. Ill Mar. 20, 2020).

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Depositions During *the* COVID-19 Crisis

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Accordingly, in the Northern District of Illinois parties must obtain a court order before subpoenaing a medical provider for deposition. *Lipsey,* 2020 WL 1322850 at *4. To obtain a court order, the parties must inform the court of the proposed deponent's current and anticipated involvement in the COVID-19 public health emergency, as well as the nature and extent of the proposed deponent's involvement in the treatment of the plaintiff and his or her relative importance to the case. *Id.* The court will not permit the subpoena if the burden of deposing the proposed medical provider outweighs the likely benefit under the circumstances. *Id.* at *3.

Potential Concerns Regarding Remote Depositions

Even where a telephonic or video deposition is theoretically possible, there are several factors the parties should consider in evaluating the practical impact of proceeding with remote depositions:

- As an initial matter, the noticing party should consider whether the deposition could later be procedurally challenged. The present COVID-19 restrictions may preclude an officer from physically attending a deposition, in violation of Federal Rule of Civil Procedure 28, which requires depositions to be conducted "before an officer authorized to administer oaths". Certain courts have issued COVID-19 related orders stating that a deposition will be deemed to have been conducted "before" an officer so long as that officer attends the deposition via the same remote means used to connect all other remote participants. *Sinceno,* 2020 WL 1302053 at *1. Absent such an order, however, the parties will need to make sure the remote deposition complies with Rule 28. *See, e.g., Kaufman v. Equifax Info. Svcs.,* 2015 WL 6142888 ("most courts read Rules 28 and 30 together to require the officer administering the oath in a telephonic deposition to be physically present with the deponent").

  Holding the deposition without an officer physically present may implicate other practical concerns, such as improper witness coaching. *See Alfaro-Huitron v. WKI Outsourcing Solutions, LLC,* 2016 WL 10516098 at *1 (D.N.M. Mar. 15, 2016) (holding "placing a court reporter in the room with the Plaintiff-deponent and instructing the court reporter to report all individuals present and any communication with the deponent" may assuage concerns regarding improper communication with witness). For this reason, it may be prejudicial to depose a key witness remotely.

- Both parties will also want to consider the grounds available to challenge whether the noticed deposition should only proceed in-person.

  - For example, where the testimony at issue is critical to the case, courts have found that the inherent limitations in remote depositions constitute undue prejudice against the party opposing the remote deposition. *See In re Fosamax Prods. Liab Litig.,* 2009 WL 539858 at *2 (S.D.N.Y. Mar. 4, 2009) (requiring in-person deposition where "testimony may be critical"); *Birkland v. Courtyards Guest House,* 2011 WL 4738649 at *2 (E.D. La. Oct., 7, 2011) ("The ability to observe a party as he or she answers deposition questions is an important aspect of discovery which the Court will not modify except in cases of extreme hardship."); *Kean v. Board of Trustees of the Three Rivers Reg. Library Sys.,* 321 F.R.D. 448, 453 (S.D. Ga. 2017) (holding party is entitled to in-person deposition where witness is a party rather than a "less important witness".).

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Depositions During *the* COVID-19 Crisis

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- Where the deposition will involve a voluminous amount of documents, it can be unduly prejudicial for a deposition to proceed. Some courts have refused to order remote depositions on this basis. *See, e.g., Webb v. Green Tree Servicing LLC,* 283 F.R.D. 276, 280 (D. Md. 2012) ("Courts have held that the existence of voluminous documents which are central to a case, and which the party intends to discuss with the deponent, may preclude a telephonic deposition."); *In re Fosamax Prods. Liab Litig.,* 2009 WL 539858 at *2 ("He is likely to be presented with numerous documents . . . , making anything other than a face-to-face deposition unwieldy."); *Willis v. Mullins,* 2006 WL 894922, at *3 (E.D. Cal. April 4, 2006) (requiring in-person deposition in light of "unreasonable restraints" of video conferencing, "especially concerning the review and use of documents"); *Silva Run Worldwide, Ltd. v. Gaming Lottery Corp.,* 2003 WL 23009989, at *2 (S.D.N.Y. Dec. 23, 2003) (rejecting telephonic or video deposition because of importance of testimony and volume of documents). Even if the deposition does proceed, the parties will want to carefully consider the most efficient and beneficial way to provide the deponent with the exhibits, including considering the disadvantages of providing exhibits to a deponent in advance and allowing him or her to review the documents before providing testimony.

- Finally, remote depositions may implicate confidentiality concerns. As Zoom, a remote conferencing platform, has boomed in popularity in recent weeks, major security issues have surfaced including "zoombombing" – the entry of uninvited participants to zoom meetings. While it does not appear this issue has made it to the courts yet, in the event a deposition involves sensitive information, such as corporate trade secrets or HIPAA protected medical records, it may be necessary to conduct the deposition in person to protect client confidentiality.

In conclusion, litigants are presently dealing with unprecedented barriers to discovery. COVID-19 presents unique and novel concerns that may prevent adequate access to depositions that satisfy due process rights. Requiring that depositions proceed in these circumstances may constitute undue prejudice to the right of litigants to have full and fair access to important discovery.

Writers Wanted!

The Association publishes The Circuit Rider twice a year. We always are looking for articles on any substantive topic or regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

If you have information you think would be of interest, prepare a paragraph or two and send it via e-mail to: Jeffrey Cole, Editor-in-Chief, at Jeffrey_Cole@ilnd.uscourts.gov or call 312.435.5601.

TIME FOR FILING NOTICES OF APPEAL IN FEDERAL COURT CAN BE

Extended *for* Good Cause *or* Excusable Neglect

*By J. Timothy Eaton**

During the midst of the Covid-19 crisis, the Northern District of Illinois issued several General Orders extending certain due dates for discovery, motions, and briefing. On April 22, the court issued its Third Amended General Order, which made clear that deadlines for filing notices of appeal in civil cases nonetheless remained in place. Importantly, in that same Order, the district court "invited" parties to move under Federal Rule of Appellate Procedure 4(a)(5)(A) for an extension of time to file a late notice of appeal, if they needed one. The Order stated that: "if a timely extension motion is filed, then the [District] Court deems that good cause exists for the extension given the public health emergency." What does FRAP 4(a)(5)(A) provide and what are its limitations?

FRAP 4 addresses when Notices of Appeal in civil cases must be filed. It states that a Notice of Appeal must be filed in the district court within 30 days after the entry of the judgment or order appealed from. The Rule also allows for a motion for an extension of time to file a notice of appeal. Such a motion must be filed in the district court. *See* FRAP 4(a)(5)(A).

FRAP 4(a)(5)(A) also states that a motion to extend must be filed within the 30 days following the entry of judgment or within 30 days after the expiration of the original 30 day period. No extension may exceed 30 days after the original 30-day period expired, or 14 days after the date the order granting the motion is allowed, whichever is "later."

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* *Mr. Eaton is a Partner at Taft Stettinius & Hollister LLP and has a distinguished career in commercial and appellate litigation, as well as arbitration. Mr. Eaton, received a JD from Southern Illinois University School of Law in 1977 and an LLM in 1979 from the Washington University School of Law. He is a past-president of the Appellate Lawyers Association and a former editor-in-chief of the Appellate Lawyers Law Review. Mr. Eaton co-authored a book on civil appellate practice and has authored over 60 law review articles and bar publications. He is a frequent lecturer on appellate and arbitration practice.*

Extended *for* Good Cause *or* Excusable Neglect

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Under FRAP 4, motions to extend the time for filing notices of appeal must show "good cause" or "excusable neglect" as a basis for allowing the motion. What constitutes good cause or excusable neglect in order to obtain such an extension? We know from the Northern District's Third Amended General Order that a public health emergency, such as Covid-19, can automatically constitute good cause for an extension. But what are other bases for the extension? Coincidentally, on April 23, the day after the District Court's Third General Order issued, the Seventh Circuit addressed this very issue in *Mayle v. State of Illinois,* 956 F.3d 966 (7th Cir. 2020).

In *Mayle,* the appellee challenged the jurisdiction of the court of appeals, arguing that the district court abused its discretion in granting an extension under FRAP 4(a)(5)(A). The district court granted the extension because the plaintiff had "changed his address and his mail had been misrouted or not forwarded to the proper address," and because the plaintiff was on a business trip the week leading up to the deadline, which had "delayed him from access to his legal filings." The appellee argued that "mail trouble" or "a business trip" did not amount to excusable neglect under the rule.

The Seventh Circuit disagreed and found that the district court's ruling allowing the motion to extend was not an abuse of discretion. In fact, the court of appeals found that the appellant had provided "two plausible bases for an extension in his motion," and that the district court has considerable leeway in deciding whether those bases demonstrate "excusable neglect." The Court of Appeals held:

> Federal civil practice is full of deadlines and rules. They vary in how strictly they must be enforced. Deadlines are important, but if every missed deadline were fatal, federal courts would decide a lot fewer civil cases on their merits. In the human system of federal civil litigation, people make mistakes. Defendants miss deadlines to answer. Plaintiffs miss deadlines to serve process. Many parties miss deadlines for discovery responses or for filing briefs. And Rule 4(a)(5)(A) and 28 U.S.C. §2107(c) recognize that appellants sometimes miss the deadline for a notice of appeal.
>
> Many deadline provisions, though not all, give judges discretion to overlook mistakes, particularly if they cause no significant harm. We should not apply close appellate scrutiny to such a routine and discretionary call as this one by a busy district judge. Nor should we lightly assume that the judge did not understand the familiar legal standard that applied – excusable neglect. Where there is an evident path from the record to the district court's discretionary decision, it would be pointless to remand for a written explanation of the obvious. The district judge would not have abused his discretion if he had denied the extension, but he also did not abuse his discretion by granting it. *Mayle's* notice of appeal was timely. We have jurisdiction over this appeal.

Mayle, 956 F.3d at 969.

The District Court's General Order and the Mayle opinion address when such courts may find good cause or excusable neglect. And when considering whether excusable neglect exists, the Seventh Circuit has also explained that the district court "should take into account such factors as the danger of prejudice [to the non-moving party], the length of the delay

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Extended *for* Good Cause *or* Excusable Neglect

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and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Whitfield v. Howard,* 852 F.3d 656, 660-61 (7th Cir. 2017). The following is a sampling of other instances where good cause or excusable neglect were found or not found.

- *Sherman v. Quinn,* 668 F.3d 421 (7th Cir. 2012). **Not excusable neglect when the attorney was running for governor and working without a legal secretary, allowing cases and deadlines to slip through his fingers.**
- *Jaburek v. Foxx,* 813 F.3d 626, 630 (7th Cir. 2016). **Good cause found when the litigant's attorney had been diagnosed with gout when the appeal was due.**
- *MMG Fin. Corp. v. Midwest Amusements Park, LLC, 457 Fed. Appx. 586, 587 (7th Cir. 2012).* **Good cause not found for a delay in filing a notice of appeal resulting from the lawyer battling the flu, especially when the attorney was not ill during the entire 30-day period for filing the notice.**
- *Abuelyaman v. Ill. State Univ.,* 667 F.3d 800, 808 (7th Cir. 2011). **Excusable neglect found when an attorney thought she had properly electronically filed the notice of appeal, and filed for an extension six days later after discovering she was wrong.**
- *Cooper v. IBM, Pers. Pension Plan,* 163 Fed Appx 424 (7th Cir. 2016). **Not excusable neglect when an attorney thought he had one month to file a notice of appeal, rather than 30 days, and he filed the notice a day late because the month had 31 days and he thought he was entitled to the extra day.**
- *Marquez v. Mineta* 424 F.3d 539, 541 (7th Cir. 2005). **Not excusable neglect for filing one day late because of miscalculation of time.**

The bottom line is that there is a safety valve in the Federal Rules of Appellate Procedure for the timely filing of a notice of appeal, and its applicability often turns on whether the reason for the delay was in the party's control. Unlike its counterpart in Illinois state courts, (Ill. S. Ct. R. 303(d)), the motion must be filed in the lower court and that court, rather than the reviewing court, is left to decide whether the grounds for extension are met. It is an important rule to remember.

Upcoming Board *of* Governors' Meetings

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year's conference. Upcoming meetings will be held on:

Saturday, December 5, 2020
Saturday, March 6, 2021
Tuesday, May 4, 2021 *at the Radisson Blu Aqua hotel in Chicago*

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM

Judge John F. Grady

AND THE CASE OF THE TRANSGENDER AIRLINE PILOT

*By Hon. Gabriel A. Fuentes**

The full measure of Judge John F. Grady's contributions to the law, to the District Court bench in Chicago, and to the careers of so many who knew him is impossible to sum up in a few words, or even a few thousand words. We could start by examining prominent cases during his 39 years of federal judicial service, but probably Judge Grady would say that each of his cases was, to him, as important as any other. Or we might look closely at one case as an illustration of Judge Grady's jurisprudence, his humanity, and perhaps his legacy.

For many who knew Judge Grady well, that one case would be his 1983 decision in *Karen Ulane v. Eastern Airlines.* On June 15, 2020, 37 years after Judge Grady ruled that Title VII of the Civil Rights Act of 1964 barred discrimination against transgender persons, and six months after Judge Grady's death at the age of 90, the United States Supreme Court agreed in *Bostock v. Clayton County, Georgia,* ___ U.S. ___, Nos. 17-1618, 17-1623, and 18-107, 2020 WL 3146686 (U.S. June 15, 2020). Judge Grady's career hardly needed vindicating, but many who saw his *Ulane* decision as a highlight of his career saw vindication in the Supreme Court's affirmation, in *Bostock,* of a point the judge drove home in *Ulane:* When Congress chooses a particular word – such as "sex" – as the basis for a broad statutory rule, judges are to apply the text literally, even if doing so might lead to unanticipated outcomes.

The Karen Ulane story began in the 1960s, thousands of miles away from Chicago, in the skies over Vietnam during the height of the war there. A pilot named Kenneth Ulane flew combat missions in Vietnam and returned to the United States in about 1968 to become a commercial airline pilot. Ulane joined Eastern Airlines. Eastern, run by former astronaut Frank Borman, called itself "the Wings of Man" in television advertising of the day.

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Magistrate Judge Gabriel A. Fuentes was a law clerk to Judge Grady in 1994 and was sworn in by him as a U.S. Magistrate Judge in Chicago in June 2019.

Judge John F. Grady
Case of the Transgender Airline Pilot

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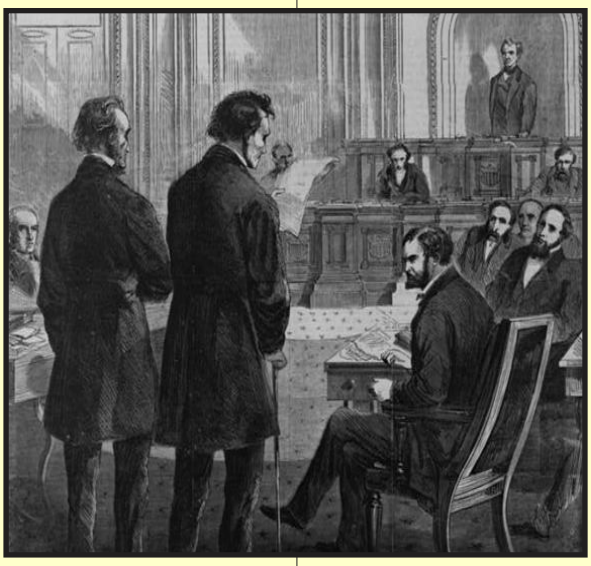
Ulane was "a sterling pilot" at Eastern, said Fay Clayton, who represented Ulane in the lawsuit that landed before Judge Grady. By the late 1970s, Ulane had become a woman. She began going by the name of Karen Ulane. And Eastern eventually found out that she had undergone surgery and no longer identified as a man. Despite Ulane's popularity with her colleagues and her unblemished flight record, Eastern decided that Ulane "no longer had the right stuff" and fired her, Clayton said.



Clayton was a newly minted partner when the case came to the Chicago law firm of Sachnoff, Weaver & Rubenstein in 1981. Clayton and her colleagues, then-litigation head Dean Dickie and then-associate Brian Roche, came up with a legal theory that seemed straightforward enough: Ulane's firing was unlawful employment discrimination under Title VII of the Civil Rights Act of 1964. The underlying question, novel then, would remain unsettled for another 37 years: Does Title VII's protection against sex discrimination extend to transgender persons?

Judge Grady, a Gerald Ford appointee and Northwestern University law graduate who took the bench in 1975 after a long career as a sole practitioner, was a former chief of the Criminal Division of the U.S. Attorney's Office in Chicago. Judge Grady had seen a wide variety of cases and people by this time in his career, and he had finely honed instincts. As a federal prosecutor, he had tried cases of every stripe in an office that had only 12 assistants, meaning that he and his colleagues generally tried cases alone. He was known for his unflinching honesty. The late Chicago trial lawyer Jerold S. Solovy told the Seventh Circuit Bar Association in 2011 that his favorite Judge Grady story came from a criminal false statement case the two tried against each other in 1958, in the Henry Ives Cobb federal courthouse before Judge Julius H. Miner, and in a day before widespread use of photocopy machines. Two hours into the trial, a key government exhibit disappeared, and the defense and prosecution teams traded barbs about which was responsible for losing it. Months later, Solovy received a phone call from then-Assistant U.S. Attorney Grady, who had just found the lost document in his files.

Judge Grady would later tell his law clerks that as a sole practitioner, he warned every new client about litigation's unpleasantness, not to talk them out of suing, but to ensure they had the best information he could give them about what lay ahead. It was a road he knew well.

The road Karen Ulane took into the Dirksen Federal Building in 1981 was largely uncharted. Four years earlier, the Ninth Circuit in *Holloway v. Arthur Andersen & Co.,* 566 F.2d 659 (9th Cir. 1977), affirmed a district court's ruling that Title VII did not prohibit employers from firing workers for transitioning to another gender, and that "transsexuals" – as transgender persons were known in the vernacular of the time – were not a suspect class for purposes of the Fourteenth Amendment. In a passage that would later get closer scrutiny from Judge Grady, the Ninth Circuit related that Title VII's legislative history on the question of sex discrimination was thin, in that "[s]ex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII and without prior hearing and debate."

Moreover, in the social milieu of the early 1980s, it was one thing for a heterosexual man or a woman to make a Title VII claim of sex discrimination, but quite another for a transgender or gay person to make that claim. Many in the gay and transgender rights movement perceived from society, and government, attitudes of fear and hostility at worst, and indifference at best. The late Randy Shilts, who chronicled the U.S. government's sluggish response to the initial spread of AIDS in his acclaimed 1987 book *And the Band Played On,* wrote that his inspiration for the book came in part from his receiving an award for his coverage of the AIDS virus at a 1983 ceremony in which the keynote speaker broke the ice with a joke about AIDS. (Shilts died of complications from AIDS himself in 1994.) In mid-1980s Chicago, the gay community's frustration with intrusions on its civil rights included

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Judge John F. Grady
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a controversial 1985 police raid on Carol's Speakeasy, an Old Town bar popular in the gay community. In suburban Niles that same year, village officials posted five uniformed police officers at the door and suspended the license of what was billed as one of the Chicago area's first suburban gay bars. But for those who seemed to behave as if gay persons were somehow foreign or alien to mainstream society, the mere idea of being transgender may have been even more difficult to grasp.

Part of the problem for Karen Ulane was that many persons had not met a transgender person, or perhaps did not know that they had. Portrayals of transgender persons were non-existent in media and popular culture, but joke caricatures of cross-dressing persons, such as the Klinger character from the popular television show *M*A*S*H,* abounded and only added to the public's lack of understanding of transgenderism. The phenomenon was not just bigotry, but also "nervousness" over transgender persons, Clayton said. Those unfamiliar with transgender persons wondered "what could they do, how would they do it, what was changing in them," Clayton said. "It wasn't a great time to be trying to expand rights into transgender issues, which were really in their infancy."

Against that backdrop, Clayton and her team began to focus on distinguishing "sexual identity" from "sexual preference," she said. The key fact would not be what gender of person Karen Ulane might love, but what gender she actually was.

"Our theory was we had to show the court, and we did persuade Judge Grady, that Eastern could not discriminate against her because she was a woman," Clayton said. "She's a woman, and that was the biggest thing we were proving at trial, without setting out consciously and methodically to prove it."

When Clayton learned that she had drawn Judge Grady, she was unsure of what to think at first.

"I'm sure it wasn't a moment for celebration, because everyone knew Judge Grady was very conservative, but he also had a reputation for being very honorable," she said. "I thought he would give us a fair listen."

The first big break that Judge Grady gave to Ulane was borne not of any conception or conclusion about the case, but of the judge's openness to innovation. Judge Grady was the first Chicago federal judge to allow jurors to take notes and one of the first in the nation to allow them to pose questions to civil trial witnesses. In the Ulane matter, he granted the plaintiff's request to conduct videotaped depositions, a now-common practice but relatively unheard of at the time. Eastern opposed video depositions, but Judge Grady later commented on how valuable they proved to be, particularly when it came to Eastern's medical witnesses. The judge would preside as the fact-finder in a bench trial and could see their demeanor instead of merely reading a cold record. Clayton remembered that Judge Grady took careful notes of those depositions, as well as the deposition of Ulane's expert, during a bench trial that lasted about four months in late 1983.

The other big break that Ulane caught from Judge Grady was not so much a break, but a growing recognition and respect, over the months of the trial, for her as a human being, and as a woman. With Clayton following no methodical plan for proving Ulane's womanhood to Judge Grady, the judge appeared to absorb the proof as the case wore on. Clayton recalled that Ulane, a graduate of St. Ignatius College Prep in Chicago, dressed well and looked feminine. Reporters entered the courtroom and saw her and Clayton at the table, and when someone asked which one is the airline pilot, "people would say it was me, because she was the one with the nice legs," Clayton said.

But beneath the appearances, Karen Ulane's quiet dignity and kindness made a steady and firm impression in the courtroom, Clayton said.

"It was over quite a few months, and that was to our advantage," Clayton said. "Judge Grady really got to know her. It was at least three months, a day here, a couple of days there, half a day there. So what I believe happened is he realized she was indeed a woman. I don't think he realized it on the day she first walked into the courtroom.

"The judge saw her huddling with us, heard people talk about her, heard other pilots saying on the witness stand that they would love to fly with her," Clayton added. "He came to realize what we all recognized. Not only was she a real human being, she was a real lady. A decent human being and kind …. Once Judge Grady realized that Karen Ulane was a woman, then it was easy to see that Title VII would apply, because when Eastern Airlines thought she was a man, she was one of their star pilots. But when they

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thought she was a woman, they fired her."

It was a message that Ulane would have more trouble getting across in the Court of Appeals, where Clayton suspected that the panel might look out from the bench during the relatively brief oral argument and not know which of the persons at the appellee's table was Karen Ulane.

But before the ill-fated trip to the Court of Appeals, Ulane prevailed before Judge Grady in a remarkable 1983 opinion that has held up well over time.

The opinion, published at 581 F. Supp. 821, consists of a short memorandum opinion and supplement. The ruling reads as if the judge read it from an outline or text that contained quotations from authorities and other research, sprinkled in with the judge's thoughts, findings and conclusions.

Former law clerk Thomas Gardiner helped the judge with his denial of Eastern's earlier motion to dismiss but did not participate in the judge's process of reaching his final decision.

"What I remember in this case and others is that Judge Grady would ask us to do research and advise him as to what the law was," said Gardiner, now a Chicago lawyer. "He never approached a case by telling us the result that he was seeking and asking for support. He viewed his job as applying the law to the facts and reaching a decision regardless of politics or his personal beliefs. This principled approach to serving as a judge separated him from many judges. He was truly a judge's judge."

Judge Grady's opinion began by framing the question as whether Title VII's prohibition on discrimination because of an individual's "sex" covered "a person such as the plaintiff who alleges that she is a transsexual or, alternatively, that having gone through sex reassignment surgery, she is now no longer a man but a woman." He took aim at the Ninth Circuit's description, in *Holloway,* of how the word "sex" had been included in Title VII's antidiscrimination provision as an afterthought.

"Well, those who have looked a little further into the matter know that this amendment introducing sex into the picture was a gambit of a [member of Congress] who sought thereby to scuttle the whole Civil Rights Act, and, much to his amazement and no doubt undying disappointment, it did not work. We not only got an act including race discrimination, which he had sought to bar, but we got sex as well. The question we are confronting here today is: What did we get when we got sex?"

He avoided precedents like *Holloway* by pointing out that they all came on motions to dismiss, unlike the Ulane case, which presented him with a fully developed factual trial record. He rejected arguments that Congress could not have intended Title VII to cover transgender persons because unsuccessful attempts were later made to amend the statute to cover "homosexuals" and "transvestites." He then hinted that listening closely to the evidence in the case had indeed had an effect on him.

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"Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female. That there could be any doubt about that question had simply never occurred to me. I had never been exposed to the arguments or to the problem. After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex."

The judge continued: "I find by the greater weight of the evidence that sex is not a cut-and-dried matter of chromosomes, and that while there may be some argument about the matter in the medical community, the evidence in this record satisfies me that the term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII."

As Judge Grady later said to Seventh Circuit Executive Collins Fitzpatrick in a 2011 interview for *The Circuit Rider:* "My point was that Congress had not defined 'sex' in the statute, and I thought the term literally applied."

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Richard Green, who testified for Ulane as an expert in transgenderism, wrote in a 1985 law review article that Eastern claimed it was worried that having transgender persons in the cockpit would distress passengers fearful about the purported psychological instability of such persons and its impact on flight safety.

"Eastern's case might have been stronger if their experts had been able to provide credible testimony about Ulane's psychiatric 'incapacity' or disability post-sex-reassignment," Green wrote. "This was not possible, however, because Ulane had flown flawlessly for a decade while experiencing substantial conflict over *wanting* to be a woman. Now, with Ulane living as a woman, this conflict was necessarily reduced." Richard Green, "Spelling 'Relief' for Transsexuals: Employment Discrimination and the Criteria of Sex," 4 Yale Law & Policy Rev. 125, 135 (1985) (emphasis in original).

Judge Grady firmly rejected Eastern's argument that allowing Ulane in the cockpit was bad for business or a threat to public safety. Reading his pronouncement on that issue from the written page of the published opinion, one can almost feel the thunderous force of his words.

"This is the kind of argument that opponents of civil rights litigation urged back in those long-ago days when we did not have anti-discrimination laws. 'We cannot serve blacks in this restaurant. Nobody will come in. We cannot employ a black to drive this bus. Nobody will ride the bus. We sure can't have any blacks carry the mail or work in a department store. We will lose customers.'

"Well, the American public is a lot smarter than the bigots gave them credit for being, and those predictions did not prove to be true. I am old enough to remember when there were no blacks driving buses in Chicago or virtually none, no black sales clerks in department stores, no black mail carriers. We all know the extent to which those jobs have been opened up to persons of all races and sexes and how much better a society it has made us and how the insuperable problems that were supposed to come about just did not happen. The same thing is going to happen should Karen Ulane resume her seat in the cockpit, and it will happen with the help of people of good will like some of the people who testified here in this courtroom."

But it was not to be.

Reversing in what Judge Grady described to Fitzpatrick as "a remarkably terse opinion," the Seventh Circuit spoke of "Ulane's broad interpretation of the term 'sex'" and disagreed with the judge's premise that the case turned on sexual identity rather than sexual preference. *Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081, 1084-85 (7th Cir. 1984). The Seventh Circuit found no appreciable difference for purposes of Title VII coverage: "While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals."

In another passage, the Seventh Circuit indicated that although Karen Ulane considered herself a woman, the court was not willing to go that far. Instead, the court treated Ulane as someone who merely believed she was a woman but had "a sexual identity disorder":

"The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.,* a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."

According to Clayton, the Seventh Circuit simply had not seen Ulane through the same prism as had Judge Grady during the unfolding of the evidence in the months-long bench trial.

The Seventh Circuit's decision in *Ulane* stood as the law of the circuit for the remainder of Judge Grady's years as an active district and senior judge. But Judge Grady's decision in the case left an indelible mark on many of his law clerks for years to come.

"Judge Grady's Ulane decision was one of the reasons I applied to work with him," said former law clerk Rebecca Zietlow, now a professor at the University of Toledo College of Law. "I remember mentioning it in my interview with the judge, and his response was something like, 'I'm not really that liberal.'"

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Judge Grady took inactive senior status in 2015 and was feted by his former clerks, including Howard Orenstein, who was one of Judge Grady's clerks during the Ulane matter. The Ulane case came up in conversation at the 2015 gathering.

"Judge Grady was remembering things about the case (and my work on it) that I didn't remember," said Orenstein, who went on to serve for a decade as an elected Minnesota legislator. "He remembered research and drafting that he said I had done for his ruling. That speaks to his incredible faculty for details and his graciousness in commending others."

At the event, the former law clerks gave Judge Grady a keepsake book filled with individual letters they wrote to him.

"The case I most remember is Karen Ulane," read Orenstein's letter. "You were way ahead of your time on matters of gender and sexual preference, and you patiently explored the law until you could get to the right outcome. Your willingness to stand up for this talented pilot in her time of trouble showed courage, wisdom, and foresight."

Another of the letters from the former clerks was from Catherine Connors, who in January 2020 became a justice of Maine's highest court. Then a partner in the Maine law firm of Pierce Atwood, Justice Connors wrote that Judge Grady once took her aside and told her that in one important case, he formulated his final decision up to the moment he announced it, considering even the very last arguments the parties had advanced.

"I always keep the point you made that day near to my heart, to remind me that every argument counts, and it's not over until the judge actually rules," Justice Connors wrote to Judge Grady.

As far as Title VII's coverage of gay and transgender persons was concerned, the story would not be over until more judges ruled.

In 2006, District of Columbia District Judge James Robertson held, on a motion to dismiss, that notwithstanding the Seventh Circuit's decision in *Ulane,* Title VII's protection against employment discrimination extended to transgender people. In *Schroer v. Billington,* 424 F. Supp. 2d 203, 212-13 (D.D.C. 2006), Judge Robertson wrote that the Seventh Circuit's positions in *Ulane,* while "perhaps persuasive when written, have lost their power after twenty years of changing jurisprudence on the nature and importance *vel non* of legislative history." Judge Robertson, who passed away in September 2019, added: "Twenty-plus years after [Judge Grady's decision], scientific observation may well confirm Judge Grady's conclusion that 'sex is not a cut-and-dried matter of chromosomes.'"

In 2017, the Seventh Circuit backed away from its reversal of Judge Grady in *Ulane. In Hively v. Ivy Tech Cmty. Coll. of Indiana,* 853 F.3d 339 (7th Cir. 2017) (en banc), the Seventh Circuit decided that Title VII did protect a community college adjunct professor from discrimination on the basis of his sexual orientation. In reaching that conclusion, the Seventh Circuit described its earlier distinction in *Ulane* between sex discrimination and discrimination based on sexual orientation as "dicta" and cited subsequent Supreme Court precedent in support of its holding for the adjunct professor.

Then, in April 2019, the U.S. Supreme Court agreed to hear three cases placing front and center the question of whether Title VII's bar on employment discrimination on the basis of sex protects gays and transgender persons. In one of the consolidated cases in *Bostock,* funeral director Aimee Stephens said she was fired after she advised her superiors that henceforth she would identify and act as a female. In another, a plaintiff named Donald Zarda alleged that he was fired after he mentioned being gay. In the third, plaintiff Gerald Bostock claimed he was fired after joining a gay softball team. Echoes of Judge Grady's words and thoughts reverberated through the

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briefs, the October 2019 oral argument, and the majority opinion released in June 2020.

In perhaps the most striking example, Judge Grady found for Ulane because, as he told Fitzpatrick, he applied the text of Title VII and its use of the word "sex" literally. At the oral argument and in the June 2020 majority opinion in *Bostock,* Judge Grady was not mentioned, but the question of whether to take the word "sex" literally in applying the text of Title VII weighed heavily on the minds of the justices. Justice Elena Kagan commented at oral argument that the text "appears to be pretty firmly in [plaintiffs' counsel's] corner." Justice Neil Gorsuch, an avowed textualist, then called the textual question "really close." Justice Samuel Alito, who went on to pen one of the two dissents in the case, told counsel for the two gay plaintiffs that "you're trying to change the meaning of what Congress understood sex to mean and what everybody understood." Justice Alito stated that holding for the plaintiffs in these cases would be "acting exactly like a legislator."

Judge Grady, of course, as the "judge's judge," probably would have said that in interpreting the word "sex" literally, he was doing no more than enforcing the will of Congress.

"It would be wrong to characterize Judge Grady's opinion as 'activist' or 'legislative' when he was indeed making the most faithful application of the actual text of the statute," said the former Minnesota lawmaker and Grady law clerk, Howard Orenstein. Orenstein helped enact Minnesota's 1993 statutory prohibition on discrimination based on sexual orientation and ushered through an amendment to the bill including transgender persons in the protections.

Recall that Orenstein had told Judge Grady in 2015 that the judge was "way ahead" of his time. In an amicus brief in support of the plaintiffs in *Bostock,* 16 anti-discrimination scholars discussed the Seventh Circuit's Ulane decision and other federal decisions denying Title VII protection to transgender people. The role that gender-based discrimination played in the treatment of the plaintiffs in *Ulane* and these other cases was obscured, the scholars wrote, by "the then-prevalent belief that 'transexuality' and 'homosexuality' were mental illnesses or forms of immoral deviance." Brief of Anti-Discrimination Scholars As *Amicus Curiae* in Support of the Employees, *Bostock v. Clayton County, Georgia* at 31 (U.S. 2019). Today, the medical community does not consider transgender identity itself as a psychological disorder or as an impairment in judgment, stability, reliability, or general social or vocational capability, the scholars wrote. *Id.* (citing sources including the 2013 American Psychiatric Association Diagnostic and Statistical Manual).

"These developments have laid bare the flawed interpretive move at the core of these decisions from the 1970s and 80s: They superimpose classifications such as 'transsexual' on a plaintiff – classifications which at the time had a medical basis – and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification," the anti-discrimination scholars wrote, describing a path that Judge Grady steered clear of in 1983.

So did the majority opinion in *Bostock.* Justice Gorsuch, in emphasizing the literal meaning of Title VII's text over whatever social policy a particular interpretation might advance, reprised some of the thunder one finds in Judge Grady's *Ulane* opinion.

"The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration," Justice Gorsuch wrote in *Bostock.* "In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

Justice Gorsuch also noted, as had Judge Grady, that by some accounts, the word "sex" was inserted broadly into Title VII by one of its Congressional opponents as a "poison pill" intended to scuttle the statute's enactment. In Justice Alito's Bostock dissent, which blasted the majority opinion as "legislation," the justice cited the Seventh Circuit's *Ulane* decision for this very point, observing that the lawmaker in question, U.S. Rep. Howard W. Smith of Virginia, inserted only the word "sex" and not "sexual orientation" or "gender identity" into the text. Justice Alito's implication seemed to be that if Rep. Smith had wanted

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a poison pill, he would have been more specific about including gays and transgender persons, and his not having done so indicates that neither he nor anyone involved in the Title VII's drafting in 1964 thought that "sex" included gays or transgender persons. Justice Gorsuch responded that "[o]ver time, though, the breadth of the statutory language became too difficult to deny." The majority noted that barring discrimination against gay and transgender persons was indeed an "elephant," but not one being squeezed through a "mousehole" during the statutory interpretation, because Justice Gorsuch and the majority could find no mousehole in a statutory text that is "written in starkly broad terms" and that "repeatedly produced unexpected applications." Barring discrimination whenever "sex" was a but-for cause of an employment action "guaranteed" that unexpected applications of Title VII would occur, the majority said: "This elephant has never hidden in a mousehole; it has been standing before us all along."

Justice Kavanaugh, in his *Bostock* dissent, cited the Seventh Circuit's *Ulane* decision as among the first 10 federal appellate courts to address the question, observing that "30 out of 30" federal appellate judges in those cases "agreed that Title VII does not prohibit sexual orientation discrimination." Setting aside the exclusion of *Hively* from that those cases, the dissent's tabulation did not include the fearless Chicago federal district judge who, after a bench trial, came out the other way: Judge Grady. We can only imagine that if Judge Grady were here, he would believe that he got to the right answer 37 years ago, while bearing no ill feeling toward any court, judge or justice who might disagree with him, be they 30 or 1,000 in number.

After all, he liked to say to his law clerks, "that's why they call them opinions."

As for Karen Ulane, she ultimately reached a substantial undisclosed settlement with Eastern in related union proceedings, after the Supreme Court denied *certiorari* in her case. But in 1989, she died at age 48 in a plane crash near DeKalb, Illinois. Ulane was in a propeller-driven, World War II-era DC-3 on a chartered training flight with two other retired pilots when the plane went down in a field, killing all aboard.

On a night nearly 30 years after Judge Grady's decision in Ulane, Fay Clayton and her husband, Lowell Sachnoff, were celebrating their wedding anniversary and ran into Judge Grady and his wife, Pat, at Jilly's Café in Evanston. The judge and his wife were celebrating their anniversary as well. Clayton and Sachnoff stopped by the judge's table to say hello, and the judge encouraged them to linger for a while.

"He said something I would not forget," Clayton said. "Lowell and I were standing next to their table, and it was very quiet, and he said: 'The Ulane case taught me how to be a judge.'" The judge explained that he had not been very sympathetic to Karen Ulane at first, "'but I came around, and I admired Karen Ulane,'" Clayton said.

Now that the obituaries have been written, and now that the Supreme Court has spoken in Bostock, we are left with our lasting impressions of one of the Chicago federal district court's greatest trial judges and his handling of one of its greatest trials. Listening to all the arguments, withholding judgment until all the facts were in, changing his posture as he went along to fit the evidence as it evolved before him, and then making a decisive ruling based on what he thought the law demanded – not to mention what the law actually said: This was Judge John Francis Grady. The many of us who worked with him, for him, and before him will fondly remember.

Corpus Linguistics and *Statutory* Interpretation

*By Justin Weiner**

A movement is afoot to use corpus linguistics as an aid to statutory interpretation. If you made it past that record-scratch of an opening, you are either a grammar nerd or a statutory interpretation buff. Welcome friend! Continue on, and I will explain what corpus linguistics is and why it might or might not make sense as an aid in statutory interpretation.

Corpus linguistics is the study of language, as it is used in the "real world." It is a tool of descriptivists — those who observe language scientifically and ascribe meaning to words based on how it is actually used. *See* Bryan A. Garner, *A Dictionary of Modern American Usage* (Oxford University Press 1998), *Preface.* Contrast the scientists with prescriptivists — those who believe that language gets meaning from rules. Entire essays have been written explaining the two labels. *See* David Foster Wallace, *Tense Present,* Harper's (April 2001). For now, it suffices to oversimplify and say that descriptivists aim to understand how people use words, whereas prescriptivists aim to tell people how to use words correctly. Some descriptivists use statistics to analyze huge volumes of texts and draw conclusions about how people use language. This is corpus linguistics.

In the last decade, a few courts and scholars have advocated for the use of corpus linguistics in statutory interpretation. *See, e.g., Wilson v. Safelite Grp., Inc.,* 930 F.3d 429, 440 (6th Cir. 2019) (Thapar, concurring); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record,* 2017 BYU L. Rev. 1621 (2017). They say that "corpus linguistics is a powerful tool for discerning how the public would have understood a statute's text at the time it was enacted." *Wilson,* 930 F.3d at 440 (Thapar, concurring); *see also* Thomas R. Lee and

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Stephen C. Mouritsen, *Judging Ordinary Meaning,* 127 Yale L.J. 788 (2018). (This Circuit has applied a corpus linguistics analysis without labelling it as such. *See United States v. Costello,* 666 F.3d 1040, 1044 (7th Cir. 2012)). Advocates for corpus linguistics contrast it with dictionaries: "Linguistic corpora allow us to make observations about the way that language is (and was) used through a less arbitrary and more readily measurable methodology than resort to dictionaries." *Id.* at 820.

Others argue that courts should not use corpus linguistics. They urge that corpus linguistics tools are inaccessible to litigants and can only be properly used by those with expertise that lawyers and judges lack. *See* John S. Ehrett, *Against Corpus Linquistics,* 108 Georgetown L.J. 50 (2019). They urge courts to stick to dictionaries, which "are widely accessible and routine consulted by members of the public in cases of linguistic ambiguity." *Id.*

At first, this seems like prescriptivists and descriptivists having a debate. Those against the use of corpus linguistics are the prescriptivists, extolling the virtues of the "proper" or authoritative meaning given to words by dictionaries. Ehrett, *supra* at 64. Those in favor of corpus linguistics are seeking a different kind of meaning — meaning that ordinary users of language give to and understand from language. Lee & Mourtisen, *supra.* But the prescriptivist v. descriptivist labels don't hold up. For starters, many dictionaries are avowedly descriptivist. *See* Foster Wallace, *supra* at 47 (providing an example: *The American College Dictionary*). Certainly some dictionaries are prescriptive, but it's too simple to say that all dictionaries ***are*** arbiters of proper language use. *Second,* not everyone argues for the use of corpus linguistics as an alternative to dictionaries. Some see it as a tiebreaker "in those difficult cases where statutes split and dictionaries diverge." *Wilson,* 930 F.3d at 440. In other words, the idea is to use corpus linguistics ***in addition to*** dictionaries.

The fight here is less dramatic than it initially seems. Corpus linguistics advocates want to derive meaning by studying a lot of texts in the fashion of a statistician, and detractors want to derive meaning by studying a dictionary editor's view (whether prescriptive or descriptive). Both linguists and dictionary editors gather information about words, they just use different methods to reach conclusions. The differences are in degree, not kind.

So who wins the fight? If you made it this far, you deserve a twist ending: maybe neither! Start with theory: Assume that the aim is to ascertain the ordinary meaning of the law when it was passed. *See, e.g., Sandifer v. U.S. Steel Corp.,* 571 U.S. 220, 227 (2014). An understanding of meaning from the time prior to the law was passed is nonsensical. An understanding from some later time or the present usurps Congress's power to make and pass laws. Frank H. Easterbrook, *Textualism and the Dead Hand,* 66 George Washington Law Review 1119 (1998). Hence, the goal of statutory interpretation is to understand the statute's text at the time of its enactment. This is, of course, a very textualist view of the law. But (1) as Justice Kagan famously quipped, "we're all textualists now" and (2) if you are not a textualist, I am guessing that neither corpus linguistics nor dictionaries are super important to you. So, I am assuming a textualist method of interpretation, because otherwise this discussion is

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not meaningful.

Understanding the meaning of words at the time of a law's passage suggests a role for both dictionaries and corpus linguistics, because each provides information about how words were understood at a given time. But there are problems with that approach. Dictionaries are "word zoos" where "one can observe" a word's features but "still cannot be sure how the [word] will behave in its native surroundings." A Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation,* 17 HARV. J.L. & PUB. POL'Y 71, 74 (1994). Put less colorfully: Context matters. *Gundy v. United States,* 139 S. Ct. 2116, 2126 (2019); *King v. Burwell,* 135 S. Ct. 2480, 2489 (2015). Many people who are far smarter than me have championed the use of dictionaries in statutory interpretation, but the importance of context provides a good reason to be cautious in over-relying on them.

The importance of context would seem to suggest a role for corpus linguistics. If a dictionary is a "word zoo," corpus linguistics is an ecological study, providing abundant context for the word in real-world use. But I am not sure that this is the right context. Congress legislates against a backdrop of existing laws, known canons of construction, and other legal principles. I am skeptical that we can find much ***relevant*** meaning for words when stripped of those legal contexts. *See* Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation,* 84 U. CHI. L. REV. 81, 87 (2017) ("Using the norms of private speech to tell us what legislative texts mean is problematic."). To be sure, in the context of criminal laws, the meaning that everyone — lawyers and non-lawyers — ascribe to words takes on Constitutional importance (people must have fair notice before being punished for committing a crime). But notion that Congress writes statutes, even criminal statutes, with the ordinary reader in mind is risible.

I am also skeptical of corpus linguistics, because I have a prescriptivist bent. There are judgments to be made about what words mean. Relying on corpus linguistics means defaulting to an unrefereed meaning of language. There is danger in that approach. People make errors of grammar and usage. If we default to usages from texts — even a great number of texts — without applying any kind of prescriptive judgment on those uses, we risk incorporating those errors into our understandings of statutes.

Federal Jurisdiction and the *Biometric* Privacy Act

*By Jeff Bowen**

The Biometric Information Privacy Act (BIPA), a 2008 Illinois law governing the collection, maintenance and disclosure of biometric data, has generated thorny jurisdictional issues for years. The statue places limitations on the collection and use of such data, mandates public disclosure of a plan governing the scope of use, and requires written consent from individuals whose data is obtained. BIPA also provides a private right of action for persons aggrieved by violation of those requirements. Under the 2016 Supreme Court case *Spokeo v. Robins,* 136 S. Ct. 1540 (2016), the harm alleged under a data privacy statute like this must be both concrete and particularized in order to give rise to standing in federal court. District courts applying Spokeo to BIPA claims have reached quite different results, with some allowing the claims to proceed and others remanding to state court or dismissing the claims outright. Earlier this year, the Seventh Circuit provided significant guidance as to the type of BIPA claims that may trigger federal jurisdiction, with individualized informational injury potentially meeting the standing threshold but violation of general disclosure requirements falling short. *Bryant v. Compass Group USA, Inc.,* 958 F.3d 617 (7th Cir. 2020). The Bryant decision provides important information for both defense counsel and plaintiffs, though several other issues remain in play, such as the scope of preemption under statutes governing collective bargaining agreements and the availability of insurance coverage.

BIPA and Early Federal Court Decisions

BIPA subjects companies to potential liability for collecting, maintaining, or disclosing the biometric information of individuals without certain required disclosures and written consent. 740 Ill. Comp. Stat. § 14/1 et seq. (2008). "Biometric identifier" includes a "retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry," while "biometric information" includes any information based on a

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biometric identifier that is used to identify an individual. *Id.* § 10. The Act requires publication of a retention schedule and guidelines for "permanently destroying biometric identifiers and biometric information." *Id.* § 15(a). BIPA also prohibits the collection or receipt of biometric information without informing the subject of such collection and its purpose and then obtaining written consent. *Id.* § 15(b). Other provisions address the sale, disclosure, and retention of biometric information. Some BIPA claims involve biometric data collected from customers, such as through ticket sales or vending machines. Other cases involve claims brought by employees, whose employers use biometric data to track working hours or restrict access to certain hazardous or sensitive materials.

The Illinois Supreme Court has held that individuals who have suffered no injury beyond the violation of statutory rights under BIPA may still present a claim. *Rosenbach v. Six Flags Ent. Corp.,* 129 N.E.3d 1197 (Ill. 2019). In *Rosenbach,* the claimant's 14-year-old son had provided fingerprint data in order to obtain a season pass to the amusement park. She alleged that she had not received any information about the collection of his fingerprints, nor had she provided written consent, and she sued on behalf of a purported class of similarly situated park attendees. The defendants argued that she had alleged no actual or threatened injury, but the court held that violation of BIPA obligations "constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach." *Id.* at 1206. Because such a person is "aggrieved" within the meaning of the provision creating a private right of action, she is "entitled to seek recovery" without pleading any additional consequences. *Id.*

The availability of this private right of action gives rise to important standing questions in federal court, even when parties have satisfied other diversity requirements. Under *Spokeo v. Robins,* 136 S. Ct. 1540 (2016), claimants must allege an injury in fact that is both concrete and particularized in order to satisfy standing requirements. In that case, the Ninth Circuit had held that a search engine's alleged publication of inaccurate information about the plaintiff in violation of the Fair Credit Reporting Act was sufficiently individualized to confer standing, but the Supreme Court reversed, remanding the case for determination of whether the injury was also sufficiently concrete. *Id.* at 1548-49. The Court stressed that the alleged injury need not be tangible in order to be concrete, but nor could it be a bare procedural violation. In the wake of *Spokeo,* violations of purely statutory rights may give rise to justiciable claims in state court, but federal jurisdiction requires specific allegations of concrete and particularized harm to the individual claimant.

Courts must therefore decide whether alleged violations of BIPA satisfy the *Spokeo* standard, and decisions rendered over the past several years reflect a variety of conclusions. Several district courts recognized allegations of concrete and particularized harm. One court found standing based on the sale of human resources software that collected and stored biometric data on employees without disclosure or consent. *Figueroa v. Kronos Inc.,* 2020 WL 1848206 (N.D. Ill. Apr. 13, 2020). Another found standing based on the requirement that truck drivers provide fingerprint data in order to gain access to freight at railway terminals, which was obtained and disseminated without consent. *Rogers v. CSX Intermodal Terminals,* 409 F. Supp. 3d 612 (N.D. Ill. 2019). *See also Namuwonge v. Kronos, Inc.,* 418 F.Supp.3d 279 (N.D. Ill. 2019) (finding standing under BIPA § 15(a) for failure to publish a data retention schedule but dismissing other claims for insufficiency of allegations).

By contrast, another court held that alleged anxiety over whether an employer would ever delete biometric information did not confer standing due to the absence of alleged concrete harm. *McGinnis v. U.S. Cold Storage, Inc.,* 382 F.Supp.3d 813 (N.D. Ill. 2019). In *Aguilar v. Rexnord,* 2018 WL 3239715 (N.D. Ill. 2018), the court found that employees

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forced to clock in through fingerprints obtained without written consent had failed to allege the necessary concrete injury. Similarly, the creation and retention of unique face templates did not in themselves cause the concrete injury required to establish standing. *Rivera v. Google, Inc.,* 366 F. Supp. 3d 998 (N.D. Ill. 2018). *See also Heard v. Becton, Dickinson & Co.,* 440 F. Supp. 3d 960 (N.D. Ill. 2020) (finding insufficient allegations of control by defendant over collected data); *Colon v. Dynacast,* 2019 WL 5536834 (N.D. Ill. 2019) (finding lack of standing given absence of allegations that data had been collected without knowledge of the subjects).

At the Circuit Court level, the Seventh Circuit agreed that union airline workers had satisfied standing requirements based on an obligation to clock in and out with biometric data. *Miller v. Southwest Airlines Co.,* 926 F.3d 898 (7th Cir. 2019). The court noted that the need to bargain over employee consent or over the means of tracking time might affect the conditions of employment and that the employees had also alleged a heightened risk of disclosure. The Ninth Circuit also held that the use of facial-recognition technology by Facebook without informed consent satisfied standing requirements because plaintiffs alleged invasion of privacy. *Patel v. Facebook, Inc.,* 932 F.3d 1264 (9th Cir. 2019). The Second Circuit, by contrast, held that the video game player plaintiff had effectively consented to the collection of his biometric data by permitting a lengthy scan of his face and proceeding with the creation of a game avatar. *Santana v. Take-Two Interactive Software, Inc.,* 717 F. App'x 12 (2d Cir. 2017).

Bryant v. Compass Group

The Seventh Circuit attempted to synthesize these decisions and provide guidance on jurisdictional concerns in *Bryant v. Compass Group USA, Inc.,* 958 F.3d 617 (7th Cir. 2020). Bryant used a vending machine in her company break room that required each employee to provide a fingerprint, which was then linked to a payment account set up by that employee. *Id.* at 619. Bryant alleged that her employer instructed employees to provide a fingerprint, and she did so. She generally understood why her biometric data was being collected but alleged that the lack of disclosure by the machine operator prohibited her from giving informed written consent. She sued on behalf of a class of similarly situated people, alleging violation of BIPA §15(a) for failure to provide a public schedule of data retention and guidelines and violation of §15(b) for failure to inform her about the collection, use, and storage of her data and failure to obtain her written consent. Bryant filed in state court, but the defendant removed to federal court under the Class Action Fairness Act. Bryant sought remand to state court, leaving the defendant to argue that the claimant had standing to pursue her claims in federal court. The panel ultimately concluded that Bryant lacked standing to bring her §15(a) claim but held that she could proceed with her §15(b) claim.

The Bryant panel distinguished between the vindication of public rights and redress for violation of the private rights of an individual plaintiff, relying in part on the *Spokeo* concurrence penned by Justice Thomas. While the §15(a) obligation was owed to the public generally, the court had "no trouble concluding that Bryant was asserting a violation of her own rights — her fingerprints, her private information" under §15(b) and that this was "enough to show injury-in-fact without further tangible consequences." *Id.* at 624. After all, she had alleged invasion of her "private domain," similar in many ways to an act of trespass.

The court further noted that the alleged inability to give informed written consent satisfied Seventh Circuit case law on standing for informational injury, which requires that the failure to disclose information impairs the "ability to use the information in a way the statute envisioned." *Id.* Thus, in *Groshek v. Time Warner Cable,* 865 F.3d 884, (7th Cir. 2018), the plaintiff did not allege concrete injury because he merely received the required information in a larger document, rather than in a stand-alone disclosure, whereas in *Robertson v. Allied Solutions, LLC,* 902 F.3d 690 (7th Cir. 2018), the plaintiff alleged concrete injury because the failure to provide her with a copy of her background report meant she could not challenge the recission of her employment offer. In *Bryant,* too, the failure to provide substantive information about the use and storage of her personal data meant that Bryant could not give the informed consent required by the statute.

In the wake of *Bryant,* district courts have found no standing for similar general disclosure claims but potential standing for failure to provide information necessary for informed consent.

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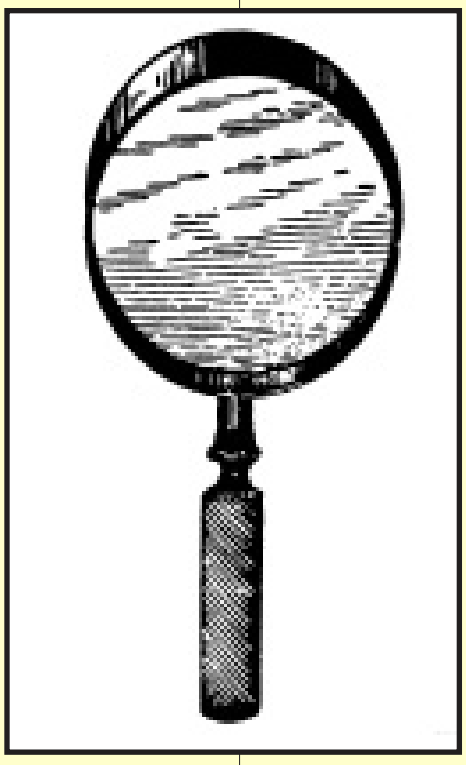
In *Cothron v. White Castle System,* No. 19 CV 00382, 2020 WL 3250706 (N.D. Ill. 2020), the plaintiff alleged that White Castle required her to provide a fingerprint in order to access the computer system. Citing *Bryant,* the court permitted the claims under §§15(b) & (d) to proceed because they alleged failure to provide the information necessary to permit informed consent. In *Kloss v. Acuant, Inc.,* 2020 WL 2571901 (N.D. Ill. 2020), the court remanded § 15(a) claims for lack of standing in light of *Bryant* and dismissed other claims for failure to allege sufficient facts in support.



Other BIPA Jurisdictional Issues

Bryant resolved many significant jurisdictional questions, but BIPA, of course, will likely continue to generate substantial litigation. Although *Bryant* set forth the type of claims that may give rise to standing in federal court, allegations of an individual informational injury do not guarantee federal jurisdiction. For example, employees subject to collective bargaining agreements governed by state or federal statutes may need to bring their claims before an adjustment board or similar entity. Even though the employees in *Miller v. Southwest Airlines,* 926 F.3d 898 (7th Cir. 2019), alleged sufficient concrete and particularized harm to confer standing, the Railway Labor Act required their claims to be heard by an adjustment board. Moreover, the scope of claims that must be submitted to such an entity continues to generate litigation. One court found that that § 301 of the Labor Management Relations Act preempted BIPA claims arising after the collective bargaining agreement governing the plaintiff's employment went into effect but permitted the plaintiff to proceed with claims relating to alleged violations prior to that date. *Peatry v. Bimbo Bakeries USA, Inc.,* 2020 WL 919202 (N.D. Ill. 2020). *See also Darty v. Columbia Rehabilitation and Nursing Ctr.,* 2020 WL 3447779 N.D. Ill. 2020) (agreeing that the LMRA preempted BIPA claims but noting that the named plaintiff was not herself a member of the union, thus requiring remand to state court). Another court found that the Illinois Worker Compensation Act only preempted accidental claims, thereby permitting an assembly worker's BIPA claims against the manufacturer to proceed. *Treadwell v. Power Solutions Intl.,* 427 F.Supp.3d 984 (N.D. Ill. 2019).

Similarly, the *Bryant* decision does not preclude enforcement of valid arbitration clauses, and plaintiffs whose claims fall within the scope of an employment arbitration agreement may need to arbitrate those claims. In *Crooms v. Southwest Airlines Co.,* --- F.Supp.3d ---- 2020 WL 2404878 (N.D. Ill. 2020), for example, the court held that all of the plaintiff ramp agents and supervisors were subject to arbitration of their claims under their employment agreement. Three of the plaintiffs, however, needed to bring their claims before the Railway Labor Board, as the Railway Labor Act preempted immediate arbitration of those claims.

Another lingering issue involves the location of the injury and any potential extraterritorial application of the statute. Thus, the maker of a cloud-based point-of-sale system that allowed restaurants and other businesses to track employee time through a biometric finger scanner challenged the extraterritorial application of the statute. *Neals v. PAR Technology Corp.,* 419 F.Supp.3d 1088 (N.D. Ill. 2019). The district court rejected the extraterritoriality claim but noted the absence of allegations that the plaintiff restaurant was located in Illinois. The court therefore dismissed the complaint but with leave to amend.

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Insurance Coverage for BIPA Claims

Finally, given the number of BIPA claims in recent years, potential insurance coverage for those claims has also become an issue. Depending on the nature of the claims, companies facing exposure under BIPA may turn to several different types of insurance coverage. Cyber policies may respond to a claim based on the unauthorized collection or release of biometric data, depending on the policy definitions of data and the presence of employment related exclusions. General liability policies might cover BIPA claims under the "personal and advertising injury" coverage, though any exclusions related to loss of data or to statutory violations could come into play. Employment practices liability policies could respond to claims brought by employees, though, again, potential exclusions would need to be considered.

Some of these insurance claims have already appeared in federal litigation, though very few decisions have been rendered. In 2018, Zurich filed a declaratory judgment action after its policyholder was sued in Illinois for allegedly using fingerprint data to regulate access to stored medications. *Zurich Am. Ins. Co. v. Omnicell,* 2018 WL 4198057 (Compl.) (N.D. Cal. 2018). The insurer pointed to exclusions in its general liability policy for statutory violations, but no decision was reached because the case was stayed pending resolution of the underlying matter. *Zurich Am. Ins. Co. v. Omnicell,* 2019 WL 570760 (N.D. Cal. 2019). In another recent case, the issuer of a multi-peril policy filed a declaratory judgment action in Illinois federal court, arguing that its employment practices policy excluded liability for violations of law, and that the other coverage forms issued, including general liability and professional liability, all contained exclusions for injuries to employees. *Church Mut. Ins. Co. v. Triad Senior Living Inc.,* Case No. 1:19-cv-07599 (Compl.) (N.D. Ill. Nov. 18, 2019). The case was voluntarily dismissed without prejudice before any decision was entered. Finally, another insurer recently filed a declaratory judgment action arguing that its general liability policy excluded employment practices involving the collection and use of data. *Am. Family Mut. Ins. Co. S.I. v. Schmitt South Eola LLC,* No. 1:20-cv-01872 (compl.) (N.D. Ill. Mar. 19, 2020) The underlying case alleged that a McDonald's restaurant violated BIPA by requiring employees to scan their fingerprints and then sharing that biometric data within the nationwide McDonald's computer system.

Outside of federal court, one Illinois court held that an insurer had a duty to defend a BIPA claim under a general liability policy. *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan Inc.,* 2020 IL App (1st) 191834, 2020 WL 1330494 (2020) (unpub). The underlying case alleged that the defendant required customers to provide fingerprint data along with membership and then automatically entered that data in a national L.A. Tan database. The court concluded that publication to one third-party vendor was sufficient to constitute "publication" under the policy, thus triggering potential coverage under the advertising and personally liability coverage. *Id* at ¶¶ 34-37. The court also held that an exclusion for statutory violations did not apply to BIPA claims because it was limited to statutes governing certain methods of communication. *Id.* at ¶¶42-43. Although this decision was rendered in an Illinois appellate court, federal practitioners can expect the body of case law relating to insurance coverage for BIPA claims to continue to expand.

The Symbolism Surrounding *Our* Profession

By Jane Dall Wilson, Kelsey E. Himmeroeder, and Maria S. Downham[*]

As many have said, we are living history. The global COVID-19 pandemic has forced many of our court appearances from grand, sweeping courtrooms across the Seventh Circuit to laptop-framed web-based video-conferences in our offices or home offices (or, in many instances, our kitchens, bedrooms, and basements serving as makeshift home offices). While we surely must be grateful for the technology which permits our profession and those it serves to continue to access the court system, the last six months have perhaps provoked a certain nostalgia for the rich history and traditions of our legal system and its courtrooms.

Temple-like marble courthouses, judicial robes, and elevated benches are well-recognized institutions of the judiciary that provide legitimacy and somber credibility to the work of the courts and the judges who serve them.[1] This article addresses some of the origins of our legal and judicial symbolism, particularly in the courthouse setting. While many of us are accustomed to seeing and honoring symbols of the law and justice in our non-COVID-19-affected daily lives, what do we know about their meaning? And where did they originate? This article explores certain influences that contributed to well-recognized symbolism in the law — ancient mythology and religions from the classical world and the English judicial system — and briefly notes some of the judicial symbolism that richly pervades the Birch Bayh Federal Building and U.S. Courthouse in Indianapolis.[2]

I. Ancient Mythology and Religious Influences on American Symbols of Law

While courthouse design has gone through multiple phases, the neoclassical architectural style inspired by the classical architecture of ancient Greece and Rome is a predominant courthouse style. Thomas Jefferson promoted the influence of classical architecture through his design of the Richmond, Virginia capital building.[3] Jefferson developed an appreciation for classical architecture while in Paris in the late 1780s,

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where he worked closely with Charles Louis Clerisseau to build a model for the capitol building based on the Maison Carree in Nimes.[4] The neoclassical form of the Richmond capital building became the new standard for courthouse design until the first quarter of the nineteenth century.[5] In addition to prominent buildings, such as the Lincoln Memorial and the United States Supreme Court, state and local courthouses readily adopted the classical design.[6] The use of stone block walls, columns running the length of a building, massive hexastyle pediments, flat roof lines, and Ionic orders became commonplace for American courthouses.[7] While use of the neoclassical design for public buildings was in line with a similar trend occurring in Europe, neoclassicism was particularly prominent in America.[8] The design, inspired by the first Republic, was particularly important for a "new nation founded on principles of popular sovereignty and republican government."[9] The ancient templar forms were utilized to inspire deference from the public to a new form of democratic government.[10]

In addition to influencing the style of many American courthouses, ancient Greece and Rome also helped shape the most prominent symbols of justice, Lady Justice and her scales. Lady Justice has her origin in Egyptian, Greek, and Roman mythology. The first personification of justice dates back to 2680 B.C. with the Egyptian goddess, Ma'at.[11] Indeed, the term "magistrate" derives from Ma'at who assisted Osiris, the god of death, in the judgment of the dead by weighing their hearts.[12] In Greece, Themis was the goddess of justice, order and good counsel, providing counsel to Zeus.[13] Finally, the Romans, borrowing heavily from Greek mythology, had Justitia as the Roman goddess of justice.[14] Justitia holds a sword with two embedded meanings: (1) the enforcement of justice, and (2) protection of the law.[15] Additionally, she holds one of the most familiar symbols associated with law, the scales of justice.[16] The scales symbolize the weighing of both sides of a legal dispute.[17] While the sources that inspired Lady Justice were not blindfold in ancient times, today's Lady Justice tends to be blindfold, demonstrating her impartiality of judgment.[18] Justitia, together with her fellow Virtue, Prudence, are the basis for the term "jurisprudence," or the theory of law.

The United States has also allowed religion to influence symbolism in the law in some respects. Tablets of law are a frequent symbol found in courtrooms with roots closely associated with Moses, the Hebrew lawgiver.[19] According to the Book of Exodus, Moses descended from Mount Sinai with two tablets inscribed with the Ten Commandments.[20] Over time, tablets have come to symbolize ancient law and the permeance of law when "written in stone."[21] Additionally, tablets with Roman numerals I through V and VI through X have been interpreted to represent other sources of law, such as the Bill of Rights.[22] In addition to Moses and the Ten Commandments, other sources of ancient law emanating from religion can be found on some courthouses. For example, on the United States Supreme Court friezes, one can find images of the Qur'an, the primary source of Islamic Law, Confucius, the Chinese philosopher and teacher, and Solon, the Athenian lawmaker, statesman, and poet.[23]

II. English Influence on American Symbols of Law

Beginning in the colonial era, the English judicial system played an important role in shaping the American judicial system. Even after the Revolutionary War and independence from England, many aspects of the English judicial system, including its terminology and symbols, continued to be used. Terms such as "court" and "bar" have their origins in the English judicial system.[24] The term "court" originated from the "King's Court," which referred to where the King resided.[25] While the King originally held hearings himself, this task was later delegated to a group of courtiers who presided over hearings in the absence of the King.[26] These courtiers evolved into a regular "bench."[27]

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Since the main work of the courtiers became judicial, the term "court" came to mean a place where justice is administered.[28]

Additionally, the term "bar" comes from the English judicial system, although its exact origin is less clear. Some authorities claim that the "bar" refers to the literal wooden barrier in old courtrooms, which separates the public area from the space near the judge.[29] Barristers would be "called to the bar" to conduct their business with the Court.[30] Other theories involve the law students at the Inns of Court, the centers for English legal education. Students of the Inns of Court symbolically crossed the physical bars in the Inns of Court when they qualified to become barristers.[31] Alternatively, "bar" could be a reference to the tables in the Inns of Court, which were called a "barre."[32]

Finally, another important English court influence is heard in the opening statement made by the Supreme Court of the United States. When the justices enter the Courtroom, the Marshal delivers a traditional chant: "The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!"[33] "Oyez" comes from the Latin word *audire,* meaning "to hear."[34] The word entered Middle English through Anglo-Norman French.[35] It was used in English courts to call attention when French was still the language of the English courts.[36] The call continues to be used today as a signal for silence before proceedings begin.

While the United States opted to adopt many English judicial customs, some notable English traditions were rejected early in this county's history. English judges wore colorful robes and ornate wigs.[37] The colorful robes may have been used occasionally in the colonies before America's independence, but Thomas Jefferson, for one, opposed the attire.[38] A supporter of modest republican citizenship, Jefferson found the colorful robes to be unnecessarily pompous, particularly "the monstrous wig which makes the English judges look like rats peeping through bunches of oakum."[39] With the exception of Chief Justice John Jay, who wore an academic gown he received with his degree of Doctor of Laws, all the early justices wore simple black robes.[40] The black robe further displays the impartiality of justice and reminds the judge to be equal in the administration of justice.[41]

III. Symbolism at the Birch Bayh Federal Building and U.S. Courthouse

The Indianapolis courthouse for the Southern District of Indiana opened in 1905 and was originally the United States Courthouse and Post Office. While the building no longer includes a post office, remnants of its presence remain, inside and out, in the name of the building engraved on frieze and various features on the inside reflecting the commerce of the post office. But no one can deny that the judicial symbolism of the building gives it its character. Filling an entire city block, the exterior walls of the building are formed by limestone blocks laid individually and decorative Ionic columns around each side. On the occasion of the laying of its cornerstone, State Senator Addison C. Harris remarked, "The building to rise here is to be the abode of national justice in Indiana, and it is fitting that justice shall reside in homes as noble in design as the brain of man can conceive for justice is the supreme power and authority in this republic."[42] And indeed, outside the building, Justice sits as one of four massive sculptures designed by John Massey Rhind, a talented sculptor of the age.[43]

The first floor of the building contains massive amounts of marble and colorful glass tile mosaic ceilings with many classical symbols, including the sword and scales of justice, representing the authority and balancing of law and justice. At the east end, the main figure holds the *fasces,* or bundle of sticks, a Roman symbol of the power of government; the *fasces* includes an ax head on top, further representing the power of government to punish lawbreakers.[44] The sword and scales of justice and the *caduceus,* a sign of peaceful resolution of conflict with two snakes encircling a winged staff, can also be seen in brilliant stained glass in the domes of the main building.[45]

On the second floor, the courthouse has two ceremonial courtrooms: The William E. Steckler Courtroom and The Sarah Evans Barker Courtroom. The William E. Steckler Courtroom features stained-glass windows and hand-painted murals around the perimeter of the room. The painting behind the bench is entitled "Appeal to Justice," by Philadelphia artist W.B. Van Ingen, and depicts the role of justice and perhaps mercy in the judicial system.[46] In this mural, a female figure kneels to Justice, arm outstretched, appearing to appeal to her. Other murals behind the bench feature Justice holding a tablet and the figure of Prudence holding a

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mirror. Van Ingen also painted the bench mural in The Sarah Evans Barker Courtroom.[47] This mural also depicts Justice and a second figure, but in this mural Justice is seated in the background while the second figure addresses people not pictured in the foreground. The artist wrote, "The fore figure is appearing to persons not in the picture, telling them that justice is to be done. The judge who sits on that bench is merely a representative of justice and in the painting I tried to portray her position toward justice."[48]

The rich symbolism in the Birch Bayh Courthouse warrants a visit — whether in-person when circumstances permit, or virtually through the resources the Southern District of Indiana has made available to the public in the form of the online Visitors' Guide or YouTube video cited in this article. In the end, we can look to technology to serve tradition.

Notes:

[1] Christopher E. Smith, *Law and Symbolism,* 3 Det. C.L. Rev. 935, 936-37 (1997).

[2] Special thanks to Court Historian Doria Lynch and her staff for providing a tour to the authors in 2019.

[3] Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial,* 24 Yale J.L. & Human. 311, 324 (2012).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 325.

[9] *Id.*

[10] *Id.*

[11] Bruce Strom, *The Astonishing Truth About the Gospel and Lady Justice,* Gospel Just. Initiative (July 16, 2017), *at* https://www.gji.org/2017/07/16/lady-justice/ (last visited Aug. 24, 2020).

[12] Barbara Swatt, *Goddess of Justice,* U. Wash. Law (Dec. 6, 2011), https://lib.law.uw.edu/ref/themis.html, (last visited Aug. 24, 2020) (citing "Legal Symbols of the Anglo-American Legal Tradition," 11 The Guide to American Law: Everyone's Legal Encyclopedia, Appendix D, 685, 687 (1985)).

[13] Strom, at https://www.gji.org/2017/07/16/lady-justice/; see also Office of the Curator, *Figures of Justice,* Sup. Ct. of the U.S., at 1 (May 23, 2002), *available at* https://www.supremecourt.gov/about/figuresofjustice.pdf (last visited Aug. 24, 2020) (hereafter Figures of *Justice*).

[14] Strom, *at* https://www.gji.org/2017/07/16/lady-justice/; Figures of *Justice,* at 1.

[15] Bradley A. Knox, *The Visual Rhetoric of Lady Justice: Understanding Jurisprudence Through 'Metonymic Tokens',* Inquiries (2014), *available at* http://www.inquiriesjournal.com/articles/896/the-visual-rhetoric-of-lady-justice-understanding-jurisprudence-through-metonymic-tokens (last visited Aug. 24, 2020).

[16] Office of the Curator, *Symbols of Law,* Sup. Ct. of the U.S., at 1 (May 23, 2002), *available at* https://www.supremecourt.gov/about/symbolsoflawinfosheet%209-28-2015_Final.pdf (last visited Aug. 24, 2020) (hereafter Symbols of Law).

[17] *Id.*

[18] Frank M. Covey, *The Symbols of Justice,* 5 Student Law. J. 14, 14 (1959).

[19] Symbols of Law, at 2.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 1.

[23] *Id.* at 1-2; Nathaniel Segal, *Religious Symbols Inside & Outside the U.S. Supreme Court Building,* (2014), http://nathanielsegal.mysite.com/TenCommandments/10SupremeCourtBuilding.html.

[24] *See* Covey, at 16.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] History Revealed, *Why are Barristers 'Called to the Bar'?,* at https://www.historyrevealed.com/eras/medieval/why-are-barristers-called-to-the-bar/ (last visited Aug. 24, 2020).

[32] Covey, at 16.

[33] *The Court and Its Procedures,* Sup. Ct. of the U.S., *at* https://www.supremecourt.gov/about/procedures.aspx.

[34] L. Susan Carter, *Oyez, Oyez, "O yes": American Legal Language and the Influence of the French,* Mich. Bar J. 38, 40 (2004).

[35] *Id.*

[36] *Id.*

[37] Sandra Day O'Connor, *Justice Sandra Day O'Connor on Why Judges Wear Black Robes,* Smithsonian Mag. (Nov. 2003), *available at* https://www.smithsonianmag.com/history/justice-sandra-day-oconnor-on-why-judges-wear-black-robes-4370574/ (last visited Aug. 24, 2020) (hereafter O'Connor, *Why Judges Wear Black Robes*).

[38] Covey, at 16.

[39] O'Connor, *Why Judges Wear Black Robes* (internal quotation omitted).

[40] Covey, at 16.

[41] *Id.*

[42] Indianapolis Federal Courthouse History and Tour, YouTube, *available at* https://www.youtube.com/watch?v=I9uPOMKaOyw (last visited Aug. 24, 2020).

[43] Visitors' Guide to the Birch Bayh Federal Building and United States Court House, United States District Court for the Southern District of Indiana, Indianapolis, Indiana, at 25, *available at* https://www.insd.uscourts.gov/sites/insd/files/USCHVisitorsGuide.pdf (last visited Aug. 24, 2020).

[44] *Id.* at 15.

[45] *Id.* at 17.

[46] *Id.* at 18-19.

[47] *Id.* at 21.

[48] *Id.*

Defining *Solitary* Confinement:

A Contemporary Approach to Limiting the Effects of Solitary Confinement through Examination of Medical Research and Legal Theory

*By Antonio Lee**

In today's society, a persistent question exists whether solitary confinement is a means to an end or an end in itself. Simply put, many ask whether solitary confinement actually corrects improper behavior or adequately protects inmates, rather than inflicting unnecessary physical and mental harm. As researchers test the psychological and physiological effects of solitary confinement on inmates, most agree with the latter.

Many people that endure solitary confinement express concerns about their experiences, which help educate today's society about its effects. Nelson Mandela once stated, "I found solitary confinement the most forbidding aspect of prison life. There is no end and no beginning; there is only one's mind, which can begin to play tricks. Was that a dream or did it really happen? One begins to question everything."[1] Kalief Browder, who spent over 300 days in solitary confinement at age 17, recounted his experience in solitary confinement where he began talking to himself and attempted suicide on multiple occasions.[2] He was detained for three years on Riker's Island without being tried or convicted for the crime of his arrest.[3] When he was released, his mother described his behavior as paranoid, sensitive, and concerning.[4] Browder later committed suicide shortly after his release from Riker's Island, which led to a $3.3 million settlement in January 2019 for his lawsuit against New York City.[5] Both Kalief Browder and Nelson Mandela exemplify noteworthy perspectives from people who experience solitary

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Mr. Lee's dedication to public service is evinced through his community involvement, ranging from advocating for fathers' parental rights, to drafting Illinois policy for employment protections of people with criminal backgrounds. Presently, Mr. Lee volunteers as an Illinois bar exam tutor to increase diversity in the legal profession. Mr. Lee graduated from Ball State University and Atlanta's John Marshall Law School, cum laude.

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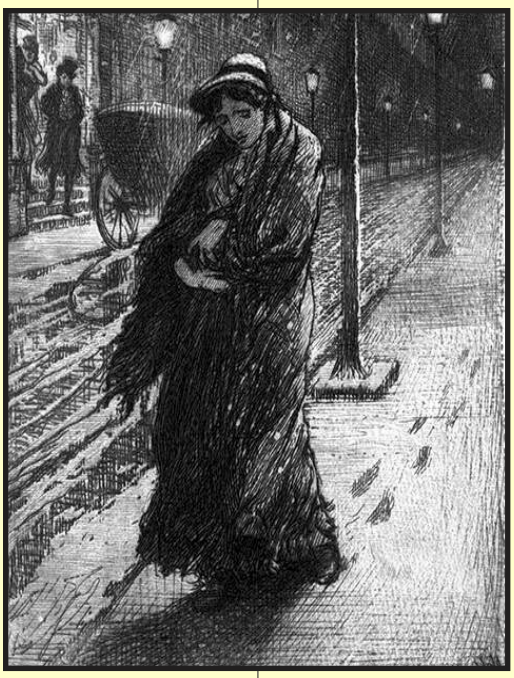
confinement, Nelson Mandela became a political leader and President of South Africa from 1994 to 1999. Kalief Browder created national attention to solitary confinement and New York City's criminal justice system, while receiving recognition from former United States President Barack Obama, who issued a ban on solitary confinement for juveniles in federal prisons.[6]



This article will discuss the statistics and background information for solitary confinement, medical research on its effects, legal theories to approach constitutional violations against solitary confinement, and current reformative changes against the practice.

Statistics & Background

Solitary confinement is commonly understood as the physical isolation of inmates confined to small cells for 22 to 24 hours a day.[7] Solitary confinement, also referred to as administrative segregation, drew concerns since its popularity during the 1980s.[8] There are three types of segregation: administrative segregation, disciplinary segregation, and protective custody.[9] Other names used interchangeably with solitary confinement are isolation, restrictive housing, lockdown, or the hole.[10]

Although proponents believe administrative segregation and supermax units curtail systemic violence, some researchers have found little evidence to support the claim.[11] A 2016 report from the National Institute of Justice stated, "There is little evidence that administrative segregation has had effects on overall levels of violence within individual institutions or across correctional systems."[12] According to the Bureau of Justice Statistics, there were almost 7 million adults under correctional supervision in the United States in 2016.[13] African Americans and Hispanics accounted for 56% of all incarcerated people in 2016.[14] Prisoners in long-term solitary confinement disproportionately represent economically disadvantaged people of color.[15] In 2014, the prevalence of administrative segregation estimated 80,000 and 100,000 inmates likely held in restrictive housing units.[16] However, a 2016 report by the Association of State Correctional Administrators, quoted the number of inmates in solitary confinement decreased to an estimated 68,000.[17]

Proponents for solitary confinement view the method as a remedy for prisoner's safety and a necessary tool for correctional population management.[18] Moreover, they agree solitary confinement can counter the threat of prison gangs and ensure prison safety.[19] On the other hand, opponents deem the method inhumane, ineffective in correcting behavior, torturous, damaging to the psychological and mental health of prisoners, and a violation of the Eighth Amendment.[20]

The United Nations considers solitary confinement for more than 15 days to be a form of torture.[21] Moreover, the United Nation's Mandela Rules state solitary confinement should never be used with youth or those with mental or physical disabilities.[22]

The conditions of solitary confinement were described by researcher Sharon Shalev in a 2009 book entitled *Supermax: Controlling Risk Through Solitary Confinement.*[23] Shalev wrote the prison cells were slightly bigger than the average bathroom or elevator, in which people were held for 22.5 to 24 hours per day without group activity or congregation with other inmates.[24] Sharlev also stated there were very few activities or programs for inmates in solitary confinement, along with strict visitor limitations.[25]

Currently, there are 10 times as many mentally ill people in jails and prisons as there are in mental institutions.[26] These mentally ill prisoners are more likely to be kept in solitary confinement and disciplined by correctional officers.[27] According to a survey conducted by Yale Law researchers and the Association of State Correctional Administrators, more than 4,000 prisoners suffering from serious mental illness in the United States are held in solitary confinement.[28] A "serious mental illness" could include vulnerable people that are psychotic, schizophrenic, or bipolar.[29]

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Medical Research

Extensive medical and scientific research has been conducted to learn about the physical and mental effects of solitary confinement. An inmate can be confined to long-term or short-term segregation for solitary confinement.[30] The damaging psychological consequences of long-term solitary confinement have been well-documented, with a common conclusion amongst researchers that adverse effects from solitary confinement are primarily related to the duration and conditions of the incarceration.[31] Even healthy prisoners with no pre-existing mental illness can develop psychopathology from the conditions of solitary confinement.[32]

Craig Haney, an American social psychologist and professor at the University of California, served as an expert witness in *Mardid v. Gomez* regarding a class-action lawsuit challenging the conditions of confinement at Pelican Bay, State Prison in California.[33] Haney described the psychological consequences of long-term solitary confinement by prisoners who were almost completely isolated from human contact.[34] He concluded that a complete lack of social contact makes it difficult for inmates to distinguish reality.[35] Without social context, people become "highly malleable, unnaturally sensitive, and vulnerable to the influence of those who control the environment around them."[36] This reaction leads to social withdrawal and fear of social contact.[37] Haney further concluded inmates enduring long-term solitary confinement resorted to "acting-out" as a means of testing reality, along with intolerable feelings of frustration, anger, and rage.[38] In regards to mental illness, Haney noted social isolation is correlated with clinical depression and long-term impulse control disorder.[39] Prisoners with pre-existing mental illness have a higher risk of developing psychiatric symptoms, but common symptoms in all long-term solitary confinement inmates are psychosis, suicidal behavior, and self-mutilation.[40]

In 2012, Haney testified to Congress that most of the research regarding solitary confinement has "reached remarkably similar conclusions about the adverse psychological consequences."[41] During this testimony, he referenced his previous studies and cited 70 percent of the prisoners in his report said they were nearing nervous breakdowns, while 40 percent experienced hallucinations.[42] Suicidal thoughts were reported in under a third of Haney's study group.[43] As a result, Haney concluded these symptoms developed and increased while people are confined in solitary, rather than merely being preexisting symptoms.[44]

Another researcher, Stuart Grassian, traced psychopathological conditions, known as secure housing unit (SHU) syndrome, in prisoners living in long-term solitary confinement.[45] In 1983, Grassian conducted evaluations of 14 prisoners in solitary confinement at Massachusetts Corrections Institution at Walpole.[46] The prisoners were housed in a 1.8 m x 2.7 m cell with no natural light and an illuminated 60-watt bulb for a period of two months.[47] The SHU syndrome is characterized by perceptual changes, affective disturbances, difficulty thinking and concentrating, disturbance in thought content, and problems with impulse control.[48] He noted that inmates were hypersensitive to external stimuli and frequently experienced distortions of perception, hallucinations, or feelings of derealization.[49] Along with SHU syndrome, the inmates experienced extreme anxiety and amnesia of the events that occurred during their solitary confinement.[50] The inmates reported violent fantasies of revenge and paranoia of persecution.[51] Similar to the inmates in Haney's study, Grassian concluded the prisoners held in long-term solitary confinement at Pelican Bay fostered destructive behavior, violence, and self-mutilation.[52] Grassian highlighted, most of the prisoners had no previous history of psychiatric problems, but concluded the effects of solitary confinement varied according to the degree of social isolation and sensory deprivation.[53]

Later, Grassian and researcher Nancy Friedman conducted a follow-up study and concluded the quality and intensity of stimuli affected the sensory deprivation in solitary conferment.[54] For example, the amount of light, size of the room, ability to perceive sounds, and color of the environment were essential to the prisoner's experience in solitary confinement.[55] As a result, they concluded the greater degrees of sensory deprivation with longer periods of internment were most likely to produce the psychopathological SHU syndrome.[56]

On the other hand, research has not conclusively established that short-term segregation produce negative outcomes for inmates.[57] Researchers James Bonta and Paul Gendreau concluded "solitary confinement may not be cruel and unusual punishment under the human and time-limited conditions investigated in experimental studies or in correctional jurisdictions that have well-defined and effectively administered ethical guidelines for its use."[58] However, scholars have criticized general conditions

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of solitary confinement do not resemble the safe and sanitized conditions that are typical of research studies.[59] Contrarily, researchers Roberts, J. V., & Gebotys, R. J. concluded even short-term solitary confinement may have subtle effects on psychological functioning that are not easily discernible.[60] Furthermore, researcher Michael Jackson stated punitive short-term isolation may have lasting effects, because inmates are at risk for developing post-traumatic stress disorder.[61]

Prisoners and pretrial detainees with pre-existing mental illnesses are at greater risk of being placed in segregated housing.[62] Extreme isolation and harsh conditions of confinement in SHUs typically exacerbate symptoms of mental illness.[63]

Physical manifestations, including self-mutilation, can also result from solitary confinement. Kalief Browder once cited a Law and Psychology 2013 article, in which researcher John Cockrell listed the physical effects of solitary confinement such as chest pains and weight loss.[64] A 2014 study of New York City jails concluded while only seven percent of people spent time in solitary confinement, those inmates accounted for nearly half of all acts relating to potential fatal self-harm.[65]

It's important to note there are several variables that may affect the psychological and physical effects on solitary confinement. According to a 2015 U.S. Department of Justice (DOJ) report regarding the use of restrictive housing, restrictive housing takes many forms, and inmates' experience in segregation can vary depending on external factors such as the length of stay, conditions of confinement, degree of social isolation, age, and psychological resiliency.[66] The DOJ report concluded although there is clear evidence that psychological effects seem to exist when prisoners are subjected to lengthy or indefinite terms of confinement in administrative segregation, the negative effects of relatively short periods of confinement are far fewer.[67]

As a result of the extensive medical and scientific research on solitary confinement, many researchers draw similar conclusions about the effects of solitary confinement.

Legal Research

Many inmates challenge their conditions and treatments in correctional facilities through federal claims of constitutional rights violations. 42 U.S.C. §1983 is a conduit that allows a plaintiff to assert a civil rights claim found in the federal constitution and other federal statutes.[68]

Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[69]

The Eighth Amendment prohibits excessive bail, excessive fines, and inflicted cruel and unusual punishment.[70] The Fourteenth Amendment protects against deprivations of life, liberty, or property without due process.[71] "The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."[72] "Prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates."[73] To state a claim of an Eighth Amendment constitutional violation, a prisoner must plausibly allege that they faced cruel and unusual conditions of confinement, and that the prison officials were deliberately indifferent to those conditions.[74] A prison official violates the Eighth Amendment if the deprivation is "objectively sufficiently serious" and the prison official has a "sufficiently culpable state of mind" of "deliberate indifference."[75] To show deliberate indifference, a plaintiff must prove (1) the defendant knew of (2) a substantial risk (3) of serious harm and (4) disregarded that risk.[76] To determine whether conditions of confinement are cruel and unusual under the Eighth Amendment, the test must consider the Eighth Amendment's meaning "from the evolving standards of decency that mark the progress of a maturing society."[77] In *Sandin v. Conner,*[78] the Supreme Court held discipline in segregated confinement may trigger due process considerations when it "imposes atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life."[79] Furthermore, courts have recognized that extreme length of disciplinary confinement can be a significant interest under the

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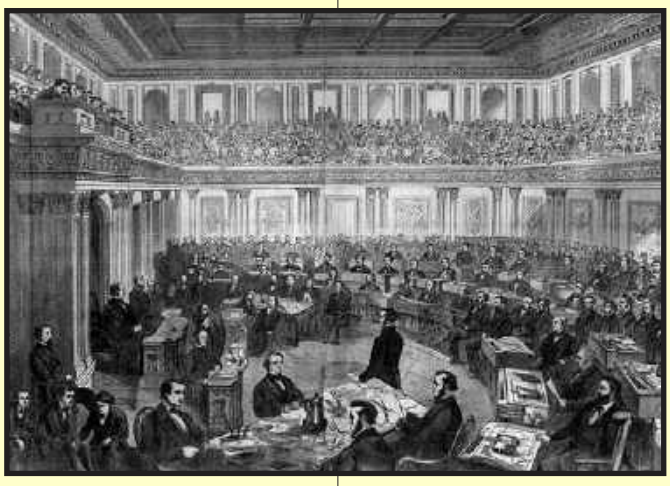
Due Process Clause of the Fourteenth Amendment.[80]

The ability for inmates to pursue constitutional violations in federal court has been subject to the restrictions in the Prison Litigation Reform Act (PLRA). PLRA is a federal law enacted by Congress to reduce frivolous litigation and allow correction officials to remedy problems before an inmate files a lawsuit.[81] PLRA applies to complaints filed by pretrial detainees and prisoners.[82] Among the list of requirements in the statute, inmates must exhaust all administrative remedies prior to filing a suit in federal court, or their suit will be barred and dismissed.[83] PLRA also precludes prisoners from being awarded certain damages based on mental anguish unless they can show a physical injury under §1997e(e).[84]



Despite substantial research concluding the harmful effects of prolonged solitary confinement, the legal standards are still developing. In *Grissom v. Roberts* (2018) the Court granted qualified immunity to the state corrections and prison officials regarding a 42 U.S.C. § 1983 suit alleging constitutional rights violations due to lengthy solitary confinement.[85] The Court reasoned there was "no clearly established law" that would have alerted the defendants that the prisoner's constitutional rights were violated.[86] The district court granted summary judgment against the plaintiff, and he lost the appeal.[87]

In *Grissom,* plaintiff Richard Grissom remained in solitary confinement for nearly 20 years before returning to general population in 2016.[88] Grissom filed lawsuits challenging the solitary confinement in 2013 and 2015 as a violation of his Eighth Amendment and Fourteenth Amendment rights, but summary judgment was granted against him.[89] The Court of Appeals for the Tenth Circuit reviewed the case *de novo,* applying the same standard as the district court.[90] The Court focused its analysis on "fair notice" because "qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[91] The judges stated a law is clearly established when a Supreme Court or Tenth Circuit decision is on point, or the clearly established weight or authority from other courts find the law to be in the plaintiff's favor.[92] Grissom produced an unpublished opinion from the 10th Circuit regarding a similar issue, however, the Court rejected the unpublished opinion because it provided little support that a law is clearly established on a point.[93] Thus, the prison officials were entitled to qualified immunity.[94] The *Grissom* decision showcased the lack of legal precedent to establish guidance for claims alleging constitutional violations stemming from prolonged solitary confinement.

In previous court decisions, judges have generally focused their analysis on the physical harms caused by solitary confinement, and were hesitant to find violations for the psychological effects of solitary confinement.[95] However, legal scholars have proposed theories using neuroscience to connect the physical effects stemmed from psychological harms caused by solitary confinement. For example, the plaintiff's attorneys in *Ashker v. Governor* of California used neuroscience evidence to show prisoners were deprived a "basic human need" of social interaction.[96] Because the human mind needs social interaction with other people, such interaction establishes a basic need within the confines of the Eighth Amendment.[97] One neuroscientist in the case, Matthew Lieberman, concluded social interaction is a basic human need that equates to sleep or exercise.[98] He concluded the deprivation of human interaction in solitary confinement would have deleterious effects on both mental and physical health over time.[99]

Neuroscience can bridge the gap between physical and psychological harm, because mental harm can cause physiological changes in the brain. This theory was addressed in several cases. In *Ziglar v. Abbasi,* an amicus curiae brief was filed by Huda Akil that suggested solitary confinement can "fundamentally alter the structure of the human brain" by changing its structure and functioning based on stimuli from its environment.[100] The term

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is "neuroplasticity," which includes the changes in neurons to make new connections with neighboring brain cells, reforms in brain circuits and the production of new neural cells embedded in the critical circuits of the brain.[101] The hippocampus is a region that is also heavily affected by solitary confinement because under certain conditions for severe and sustained stress, the hippocampus losses neuroplasticity and physically shrinks.[102] As a result, a lack of human interaction is created under the conditions of solitary confinement, which effects physiological changes in the brain based on the psychological harms shown in neurological evidence.[103]

The United States Supreme Court first addressed concerns of mental health issues caused solitary confinement in 1890.[104] Justice Anthony M. Kennedy also sharply critiqued the conditions solitary confinement.[105] In a 2015 concurring opinion, he acknowledged, "years on end of near total isolation exact a terrible price," and described the common side effects of solitary confinement including self-mutilation and suicidal thoughts.[106] Justice Kennedy predicted the Supreme Court may not decide the issue of whether extended solitary confinement is cruel and unusual punished barred by the Eighth Amendment, but rather if prisoners have a right to regular outdoor exercise.[107] He further noted in 2018 that, "some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates."[108] In a 1979 opinion, Justice Kennedy once wrote, "underlying the Eighth Amendment is a fundamental premise that prisoners are not treated as less than human beings."[109]

Five months after the release of Justice Kennedy's article in the New York Times, Justice Sonia Sotomayor published a statement regarding the deprivation of inmate outdoor exercise while being held in solitary confinement. On October 9, 2018, Justice Sotomayor issued the statement on two petitions for writs of certiorari to the United States Court of Appeals for the Tenth Circuit that were denied.[110] Justice Sotomayor stated, "A punishment need not leave physical scars to be cruel and unusual."[111] She noted the method was "deeply troubling," while describing similar confinement conditions such as a small 90 square feet cell with a small vertical glass window and little human contact for 23 hours a day.[112] Justice Sotomayor noted such deprivation is not permitted by the U.S. Constitution absent a compelling interest, because of the awareness that solitary confinement imprints a wide range of psychological scars.[113] She ended her statement by reminding Courts and corrections to stay alert to learn constitutional issues that stem from total isolation in solitary confinement, which "comes perilously close to a penal tomb."[114]

Reformative Changes

Many states and prison directors have responded with sweeping changes to address the effects of solitary confinement.[115] These changes include new programs developed in jails and prisons, federal orders, and state legislation. Recently, Illinois democratic Senator Dick Durbin and presidential candidate Senator Cory Booker of New Jersey advocated extending the limitations of solitary confinement in federal prisons more broadly.[116]

In April 2019, Cook County Sheriff Tom Dart wrote an article in the Chicago Tribune and Washington Post stating, "After years of handling violence just like most other jails, we realized that solitary was not solving the problem."[117] In response, Dart created the Special Management Unit (SMU) to house detainees who resort to violence or break the rules.[118] In SMU, inmates spend time in open rooms or yards with other detainees under staff supervision.[119] In addition, mental health professionals provide weekly sessions on anger management, coping skills, and conflict resolution.[120] As a result, Dart explained the changes helped improve working conditions, significantly dropped detainee-on-detainee assaults, and plummeted assaults on staffers.[121] In 2015, Cook County began addressing certain issues regarding the needs of inmates that suffer from mental illness. By allowing inmates to see clinicians upon arrival, SMU can collect mental health history and ensure proper diagnosis and medication for inmates who are mentally ill.[122] In August 2014, Cook County offered a mental health transition center in

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which selected inmates received cognitive behaviors therapy, job readiness skills, and extra recreation.[123] Other institutions ceased putting prisoners in solitary confinement for minor rule violations, and increased oversight for higher-level approval when deciding to isolate inmates.[124]

In July 2015, former U.S. President Barack Obama requested former U.S. Attorney General Loretta E. Lynch to review "the overuse of solitary conferment across American prisons," and develop strategies for reducing the use of the practice throughout the criminal justice system.[125] The six month evaluation by the DOJ noted there were situations where correctional officials must segregate inmates from general population, but concluded, as a matter of policy, the practice should be used rarely, applied fairly, and subject to reasonable restraints.[126] The evaluation included "50 Guiding principles" for limiting the use of restrictive housing in the criminal justice system, and recommendations for specific policy changes for the Federal Bureau of Prisons and other Department components to implement.[127] Some of the Guiding Principles included reforms for the use of restrictive housing as punishment, appropriate conditions of conferment in restrictive housing, and proper treatment of vulnerable inmates.[128] Afterward, Obama adopted the recommendations of the report, and the Administration banned solitary confinement in January 2016 for juveniles in federal institutions.[129] In an op-ed article published by the Washington Post, Obama mentioned the change would affect as many as 10,000 inmates in the federal system, and stated, "research suggests that solitary confinement has the potential to lead to devastating, lasting psychological consequences."[130] He reasoned the absence of human contact in solitary confinement for extended periods was counterproductive, because of the expectations for prisoners affected by solitary confinement to return their communities as whole people after serving time. In his remarks, Obama mentioned the tragedy of Kalief Browder while advocating for the reform of solitary confinement.[131]

In 2017, lawmakers in Massachusetts introduced bills to restrict the use of solitary confinement by allowing prisoners to be held in segregation for up to 180 days per year, rather than a decade.[132] The bill also required oversight review for isolation every 15 to 90 days.[133] In 2018, the Department of Corrections issued a statement regarding its diligent effort to implement the Massachusetts Criminal Justice Reform Act of 2018, which was aimed to decrease the number of prisoners held in restrictive conditions.[134] The legislation was ultimately singed into law by the governor in April 2018.[135]

In 2019, a recent announcement was made by Governor Michelle Lujan Grisham of New Mexico, stating she would sign House Bill 364 reforming the way solitary confinement is used in jails and prisons.[136] The definition of solitary confinement will be slightly broadened to include anyone in a cell alone for 22 hours or more a day "without daily, meaningful and sustained human interaction."[137] House Bill 364 will also limit solitary confinement on juveniles, pregnant woman, and people with mental illnesses.[138] With the new legislation, Governor Lujan Grisham will enact transparency regarding the use of solitary by requiring quarterly public reports to various government agencies that detail how many people are held in solitary confinement, the length of time, and lawsuit settlements.[139]

In 2016, the American Correctional Association, which is a nonprofit that provides guidelines to correction departments and facilities, issued new standards on restrictive housing including banning confinement use for more than 30 days for pregnant women, people with serious mental illness, and people under the age of 18.[140] In 2018, the American Bar Association passed a resolution to limit the use of solitary confinement for "exceptional cases as a measure of last resort, where less restrictive settings are insufficient, and for no long than is necessary to address the specific reason for placement, typically not to exceed 15 consecutive days."[141] The American Correctional Association also produced national standards that prohibit juveniles, pregnant women, and seriously mentally ill prisoners from entering restrictive housing.[142]

Other states are also reforming solitary confinement. In 2017, the state of Arizona ended its longstanding policy of holding all death row prisoners in solitary confinement.[143] The change in policy was the result of a settlement reached in a lawsuit that targeted the Arizona policy.[144] Effective September 1, 2017, the Texas Department of Criminal Justice made a sweeping change by eliminating the use of solitary confinement for disciplinary purposes.[145] Following the polices for solitary confinement implemented by the United Nations, the state of Colorado limited the use of solitary confinement to no more than 15 days.[146] In 2016, The North Carolina Department of Public Safety implemented a new state disciplinary policy where segregation is generally limited to no more than 30 days.[147]

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In 2015, a major class-action lawsuit was settled with California's Department of Corrections and Rehabilitation (CDCR) and the Center for Constitutional Rights.[148] CDCR was required reform their policies and release prisoners who were in long-term or indefinite solitary.[149]

A year after the agreement, California's solitary confinement population dropped by 65 percent, which was a stark decline from around 10,000 inmates to less than 3,500.[150] However, the settlement was extended through a court ruling due to "systemic and ongoing due process violations" by prison officials that administered solitary punishment.[151] CDCR appealed the Court's decision to extend the agreement to the Ninth Circuit for review.[152]

Overall, the policies implemented by state and federal governments reflect the ongoing changes to solitary confinement and marked a turning point in improving the practices and methods by correctional facilities.

Conclusion

Drawing inspiration from tragic stories such as Kalief Browder, and countless others who suffered adverse effects from solitary confinement, I write this article to highlight the issues in our correctional system and urge the persistent progression of change in reforming solitary confinement. Medical and scientific research has served as key evidence that long-term solitary confinement causes more harm than good. Our nation must consider the serious impacts of solitary confinement, because inmates will be released with the same adverse effects from isolation, which will impact their ability to reenter and reintegrate as productive citizens in their communities. Due to the extensive research and common findings, it would be consistent with courts' Eighth Amendment analysis that the "standard of decency" for solitary confinement has evolved, such that our nation has marked progress in its maturing and understanding on the psychological and physical effects of solitary confinement. More importantly, the basic need of human interaction could be argued as a reasonable measure to guarantee inmate safety under the Eighth Amendment. Many states and correctional facilities have implemented sweeping changes to curtail the harsh effects of solitary confinement, but our nation still has more ground to cover, especially in the judicial system.

Notes:

[1] Nelson Mandela, The Long Walk to Freedom 264 (2013).

[2] Furst, J., Nason, J. and Sandow, N. *The Kalief Browder Story,* S1:e3 at 13:36. (2017); Jennifer Gonnerman, *Kalief Browder Learned How to Commit Suicide on Rikers,* The New Yorker (April 27, 2019 at 9:00 PM), https://www.newyorker.com /news/news-desk/kalief-browder-learned-how-to-commit-suicide-on-rikers.

[3] Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Lead to a $3 Million Settlement,* The New York Times (May 19, 2019) https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html.

[4] *Id.*

[5] *Id.*

[6] *Id.; See also* Note 1.

[7] U.S. Department of Justice, *Investigation of State Correctional Institution at Cresson,* 5, http:// www.justice.gov/crt/about/spl/documents/cresson_find- ings_5-31-13.pdf (May 13, 2013).

[8] Natasha A. Frost & Carlos E. Monteiro, *Administrative Segregation in U.S. Prisons* 3 (2016).

[9] *Id.*

[10] *Id.*

[11] *Id.* at 3.

[12] Stephanie Wykstra, *The Case Against Solitary Confinement,* VOX (April 27, 2019 at 9:00 PM) https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice-reform.

[13] *Key Statistic: Total Correctional Population.* Bureau of Justice Statistics, https://www.bjs.gov/index.cfm?ty=kfdetail&iid=487 (last visited May 16, 2019, 6:58 PM).

[14] *Criminal Justice Fact Sheet,* NAACP, https://www.naacp.org/criminal-justice-fact-sheet/ (last visited May 16, 2019, 6:58 PM).

[15] Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change,* 633, The University of North Carolina at Charlotte (2008).

[16] Frost & Monterio, *Administrative Segregation in U.S. Prisons* 1.

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[17] *Aiming to Reduce Time-In-Cell: Reports from Corrections Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms, Association of State Correctional Administrators:* The Arthur Liman Public Interest Program, Yale Law School (November 2016) at page 1.

[18] *Supra* Note 17.

[19] David C. Pyrooz and Madhan M. Mitchell, *Solitary Confinement Helps Control Prison Gangs,* The Wall Street Journal (April 27, 2019 at 9:00PM) https://www.wsj.com/articles/solitary-confinement-helps-control-prison-gangs-11552344856.

[20] *See supra* Note 17, 4; *See generally Solitary Confinement: Inhumane, Ineffective, and Wasteful, Sothern Poverty Law Center,* 5 (2019)(discussing the harmful effects of solitary confinement).

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Book Review

*By Alexandra L. Newman**

ONLINE COURTS AND THE FUTURE OF JUSTICE
by Richard Susskind

Online Courts: Pandemic Pragmatism, then a Paradigm Shift

Introduction

Futurist and legal philosopher Richard Susskind has an uncanny sense of timing. In December 2019, Susskind presciently published *Online Courts and the Future of Justice,* a groundbreaking book in which he advocates for increasing global access to justice by transforming judicial systems through the use of sophisticated online courts.[1] Just three months later, the worldwide implementation of rudimentary online courts became necessary in the wake of the COVID-19 global pandemic. Accelerated by the COVID-19 crisis, Susskind's vision of a future in which online courts are ubiquitous may arrive sooner than he originally predicted. Policymakers, court administrators, lawyers, judges, legal technologists, and other judicial stakeholders would be wise to study Susskind's book and begin implementing his well-considered ideas. "Never let a good crisis go to waste," as the saying goes.

Susskind enjoys a diverse career as an author, speaker, and independent advisor to major professional firms and national governments. He has been researching, predicting, and promoting novel legal technologies for over 30 years. His research focuses especially on the future of professional services and the ways in which information technology and the Internet are changing the legal profession. Susskind's work tends to be both positive and normative; he excels in describing how current technologies are used to deliver solutions to providers and consumers of legal services, and he is bold in prescribing a vision for how new technologies should be deployed to address his primary moral concern —

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increasing global access to justice.

Online Courts and the Future of Justice is Susskind's first full-length work devoted exclusively to the subject of online courts. Susskind for years, however, has been refining his views on online courts in other works, including, most recently, his 2017 book *Tomorrow's Lawyers*.[2] In that work, Susskind characterized online courts primarily as remote courts that retain the features of physical courtrooms, yet graft those features onto online spaces. Susskind maintained in *Tomorrow's Lawyers* that, in light of the prevalence of video-calls and video-conferencing, there is "enormous scope for virtual courts" in which "judges can sit in their chambers and all participants can attend remotely."[3] Indeed, he observed, many courts already broadcast videos of oral arguments live over the Internet — and some judges participate in oral argument through broadcast videos — so taking the entire judicial process online is merely the next step in that direction. By the 2020s, Susskind predicted in *Tomorrow's Lawyers,* appearance in physical courtrooms will become a rarity, and virtual hearings will become the norm. Future generations of attorneys, "for whom working and socializing online will be second nature," he explained, will embrace the use of online courts.[4] He posited that judicial proceedings offered via online courts will provide a broad opportunity to reduce costs, accelerate the resolution of cases, and "improve access to justice and offer routes to dispute resolution where none would otherwise be available."[5] Little did Susskind know, in 2017, that by 2020, courts around the world would begin using online proceedings not out of the desire to experiment with new technologies, but out of dire necessity.

Remote Courts during the COVID-19 Pandemic

Fast-forward to March 2020, when the COVID-19 pandemic began to spread globally and courthouses around the world began to close. Susskind, in his capacity as President of the Society for Computers and the Law in the United Kingdom, immediately sprang into action. Collaborating with an international community of legal-technology specialists, Susskind created the website *Remote Courts Worldwide* as a resource for justice workers around the world to share best practices about remote-court proceedings.[6] In a statement posted on this website, Susskind observed that "at remarkable speed, new methods and techniques are being developed," including the introduction of various forms of remote court involving "audio hearings (largely by telephone), video hearings (for example, by Skype and Zoom), and paper hearings (decisions delivered on the basis of paper submissions)."[7] Susskind warned, however, that "there is a danger that the wheel is being reinvented and that there is unnecessary duplication of effort across the world."[8] To encourage efficiency, Susskind urged justice workers to use his website to exchange news of operational systems, plans, ideas, policies, protocols, techniques, and safeguards.

Along with their international counterparts, courts throughout the U.S. also leapt into the fray of remote-court proceedings as COVID-19 infections began to spread domestically. Lacking technological uniformity in these efforts, U.S. courts used and tested a variety of platforms to hold these proceedings, including AT&T Conferencing, Court Call, Skype for Business, Cisco Jabber, and Zoom.[9] Court executives began instructing judges to conduct proceedings by telephone or video conference where practicable, for example, to host oral arguments, initial appearances, and preliminary hearings.[10] For certain federal criminal proceedings, the Judicial Conference and Congress authorized teleconferencing and videoconferencing for the duration of the COVID-19 crisis. Federal courts soon began using such technologies to conduct criminal-detention hearings, arraignments, supervised-release-revocation hearings, and misdemeanor pleas and sentencings.[11] Courts also began offering teleconferencing and video conferencing of court proceedings to provide court access for the public and media.[12] Meanwhile, debates emerged about the possibility — and constitutionality — of conducting jury trials remotely via online platforms.[13]

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Not a Graft, but a Paradigm Shift

It is certainly remarkable how courts throughout the world, in response to the COVID-19 pandemic, were able to shift their workings so quickly to remote settings to maintain the pace of certain judicial proceedings. This rapid shift, however, underscores a central concern of Susskind's about the swift transition of courts during the COVID-19 crisis from physical to non-physical settings: Susskind worries that judicial systems, in making unanticipated transitions during such extraordinary public-health circumstances to address immediate practical concerns, will not be bold enough in contemplating the efficacy of online courts to address the global access-to-justice problem.

Departing from his more restrained predictions about online courts in *Tomorrow's Lawyers,* Susskind's principal concern now, as detailed in *Online Courts and the Future of Justice,* is that a shift from physical to online settings should not simply "graft" remote technologies onto physical courtroom processes. "I have a conceptual difficulty with the idea of simply dropping the current process into Zoom, as it were," Susskind declares.[14] This conceptual difficulty, Susskind explains, results from his view that the real power of technology should be to enable society to meet its fundamental objectives in administering an accessible system of justice. Technology, he urges, should be used radically to *transform* the delivery of court services, not simply to *automate* how such services are currently conducted.[15] In *Online Courts and the Future of Justice* and in recent subsequent essays, Susskind advocates that the transition from physical to non-physical court proceedings should entail a fundamental paradigm shift beginning with a bold reimagining of entire court systems starting from "a blank sheet of paper."[16] This exercise, Susskind maintains, would "differ from almost all current digitization programs in not simply grafting technology onto existing processes but in optimizing the processes in the first place."[17] In other words, the online-court developments that are now happening in the midst of the COVID-19 pandemic should be viewed merely as the primitive beginnings of a much more ambitious project to reconceptualize and revolutionize the possibilities of online courts.

Susskind's Motivation: Global Access to Justice

Susskind's views about the transformational purpose of online courts are not motivated solely by the exigencies of the current COVID-19 crisis. Of course, he recognizes that, while the pandemic rages on, courts must operate remotely in order to prevent an insurmountable backlog of cases and maintain a sufficient level of service while courthouses are closed. Still, Susskind's motivation in advocating for online courts over the last number of years, culminating in *Online Courts and the Future of Justice,* is to address the urgency of the global access-to-justice problem.

As Susskind summarizes it, the global access-to-justice problem is that "even in justice systems that we regard as the most advanced, dispute resolution in public courts generally takes too long, costs too much, and the process is unintelligible to all but lawyers."[18] In some countries, he notes, courts have backlogs of millions of cases. Only 46 percent of human beings live under the protection of law, he cites, and "the court systems of our world are inaccessible to the great majority of human beings."[19] The access-to-justice problem, therefore, concerns not only the high cost, lengthy duration, and opacity of court proceedings, but also the unavailability of even these proceedings to most people worldwide. (Susskind might say that the current quality of global access to justice is analogous to the restaurant reviewed in the classic joke: "The food is bad, and the portions are too small.")

Access to justice, according to Susskind, is an intrinsic good, a global entitlement, and an end-in-itself, allowing for respect and dignity of all persons.[20] Indeed, access to justice is a moral imperative. As Susskind argued more generally in his 2015 book *The Future of the Professions,* lawyers contemplating the access-to-justice problem should consider the technique developed by political philosopher John Rawls in his seminal work *A Theory of Justice.* That technique asks us to place ourselves behind a "veil of ignorance" by imagining a "hypothetical situation in which nobody knows his or her personal and social circumstance."[21] Only when a person is behind this veil of ignorance can that person impartially consider what constitutes a just society.[22] Applying this technique, Susskind concludes that from behind the "veil of ignorance," most people would choose to live in a society in which access to justice is widely available, at the lowest cost that innovation allows (or at no cost to those who cannot afford it).

The inaccessibility of justice worldwide is a tragedy of which "lawyers everywhere should be ashamed," says Susskind.[23] He calls for radical transformation in *Online Courts and the Future of Justice* because, he notes, the access-to-justice problem has not been regarded as urgent despite its prevalence and duration.

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Indeed, he explains, the problem "has been handled as a chronic ailment deserving of inquiries and commissions rather than an acute problem requiring immediate care."[24] Although the COVID-19 crisis has accelerated the willingness of court systems worldwide to experiment with remote and online proceedings, the risk Susskind identifies is that once the pandemic ends, courts will return to antiquated processes that celebrate the "majesty" of the physical courtroom but that exclude too many people from accessing justice. At best, Susskind fears, courts that choose to retain any online or remote proceedings will remain satisfied with modest technological "grafting" techniques at the expense of true transformation of judicial systems with reimagined online courts.[25]

Susskind's Transformative Vision of Online Courts

Transformational change allowing for increased access to justice, according to Susskind, first requires an examination of philosophical and technical questions involving the nature of justice and a clear understanding of what "court" is. Next, transformational change requires a radical re-envisioning of how justice can be delivered with novel processes and technologies. What follows is a summary of Susskind's vision for online courts of the future.

Justice According to the Law.
First, Susskind explores the concept of justice according to the law. In doing so, he identifies seven principles of justice that he maintains promote both a just court system and the just resolution of particular cases.[26] These principles are: (1) substantive justice (fair decisions); (2) procedural justice (fair process); (3) open justice (transparency); (4) distributive justice (accessibility); (5) proportionate justice (appropriate balance); (6) enforceable justice (backing by the state); and (7) sustainable justice (sufficient resources).[27] These principles "overlap and interact in complex and subtle ways," explains Susskind, and sometimes they "pull in different directions."[28] Nonetheless, Susskind advises, policy-makers need to weigh these principles in a manner reflective of their communities while building a vision for a transformative modern court system that increases access to justice overall.[29]

Court is a Service, not a Place.
Upon establishing the fundamental principles of what justice according to the law should entail, Susskind advances his vision that court is a service, not a place.[30] This view is consistent with his "outcome-thinking" approach for designing court services of the future. As Susskind sees it, the purpose of a court system is to resolve legal problems; the outcomes matter, not the processes. Perhaps to the chagrin of legal professionals, litigants "do not really want courts, judges, lawyers, rules of procedure, and the rest," writes Susskind.[31] Litigants do not seek to enter majestic courtrooms surrounded by artistic symbols of law, and they are not interested in historic design elements in court buildings.[32] They do not even want to interact with lawyers, no matter how trustworthy, empathetic, and expert the counselors may be.[33] As a result, in Susskind's view, the case for online courts must focus on the outcome-oriented solutions that such courts would bring to those with legal problems, rather than the preservation of traditional legal practices and in-person courtroom processes for their own sake.[34]

The Two Basic Services of Online Courts.
After concluding that court is a service, not a place, Susskind details his view of what online courts should look like. Such courts, he urges, should extend "far beyond video hearings."[35] Instead, he argues, online courts should be characterized by two defining features: (1) online judging; and (2) extended court services.

1. **Online Judging.** Traditional court work, as Susskind describes it, is "synchronous" because it consists of legal-process participants gathering together at the same time while judicial proceedings unfold in real time. This is a slow, expensive, and inefficient process akin to a "live performance."[36] In contrast, online judging would do away with synchronous court hearings entirely. Instead, online judging would entail an "asynchronous process" by which human judges would receive arguments and evidence in an electronic form (*e.g.,* email), litigants would communicate with judges on a continuous basis using an online platform, and judges would deliver binding and enforceable judicial decisions via an electronic form, without the use of any oral hearings (whether in a physical courtroom or by video).[37] Although Susskind acknowledges that online judging might not be suitable for all types of legal disputes (such as complex appellate proceedings), he maintains that the widespread use of online judging would provide a proportionate and convenient format for the resolution of many types of cases.

2. **Extended Court Services.** In addition to incorporating widespread online judging, online courts of the future, as Susskind imagines them, will be complex "extended courts"

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that will offer four distinct layers of services: (1) legal health promotion; (2) dispute avoidance; (3) dispute containment; and (4) authoritative dispute resolution.[38] Whereas traditional courts generally occupy only the fourth layer of providing authoritative dispute resolution, online extended courts should provide all four layers of services. In doing so, Susskind urges, extended courts will "provide services beyond their primary function of delivering authoritative, binding adjudications, backed by the coercive power of the state."[39] Instead, extended courts will include a number of design features intended to provide solutions to legal problems before they ever reach a courtroom:

- questionnaires, decision trees, and diagnostic systems that can help court users (especially *pro se* litigants) to understand their legal rights and obligations;
- guides and checklists that help identify the options for resolution that are open to court users;
- tools that can help nonlawyers organize their evidence and formulate their arguments;
- facilities to encourage and support parties to settle their differences on their own; and
- case officers who can actively offer mediation and other services in the spirit of alternative dispute resolution (ADR) — not as a private-sector offering but as an integral part of the public court service.[40]

Although these types of online dispute-avoidance and dispute-containment services are not currently part of traditional court services, Susskind argues that they have the potential to reduce the need for judges' involvement in many cases.[41] By facilitating the earlier resolution of disputes, these online extended courts would promote more efficient and widespread access to justice than what is currently available in traditional court systems.

Emerging Technologies. As online courts become proficient in offering online judging and extended court services, Susskind predicts that by the 2030s online courts will also become more sophisticated and efficient by incorporating emerging technologies. As always, Susskind argues that the use of new technologies must be deployed with an eye towards increasing global access to justice by making court proceedings more affordable, efficient, intelligible, and transparent. Susskind boldly imagines a world in which technologies such as telepresence, augmented reality, virtual reality, artificial intelligence, computer judges, and prediction machines will assist legal professionals in improving the legal-service experience.[42]

Susskind is diligent, in *Online Courts and the Future of Justice,* in considering and responding to various objections that stakeholders have raised to challenge his vision of the online courts of the future. Lawyers, judges, and other commentators, Susskind acknowledges, have levied objections in many forms, including legal, ethical, social, cultural, emotional, technical, operational, and psychological objections.[43] For example, critics have raised concerns about the cost of designing and implementing online courts;[44] the potentially limited types of cases that are suitably resolved in online courts;[45] the risk that online courts will deliver a lower quality of justice and perpetuate disparities between rich and poor litigants;[46] the potential lack of transparency to the parties, the public, and the media of judicial proceedings conducted via online courts;[47] the danger that online courts will not be capable of delivering a fair trial;[48] the high level of technological literacy required to utilize online courts proficiently;[49] the risk that online courts will encourage litigiousness;[50] and the tension between the private sector and state actors in putting online court systems into place.[51] More fundamentally, Susskind acknowledges that online courts raise "questions of justice, authority, the role of judges, the rule of law, and many more issues that demand, at least in part, some theoretical (general, systematic, rigorous) attention" from legal theorists specializing in the impact of digital technology on the judicial process.[52]

The problem with many of the standard objections, according to Susskind, is that they discourage incremental innovation by demanding immediate perfection, in violation of Voltaire's admonishment that one should not allow perfection to be the enemy of the good.[53] Susskind urges that advancements in court

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technologies should not be delayed merely because the technologies are not fully developed. More fundamentally, however, Susskind maintains that many of these objections "fail to acknowledge that people do not actually want courts."[54] Instead, he says, people "want the outcomes that courts bring. And if these outcomes can be secured in new ways that are less costly, better, speedier, or handier than today's courts, then court users will switch to the alternatives."[55] Online courts in their current form utilizing video hearings and teleconferencing are far from perfect, and Susskind's vision of online courts of the future may have their own shortfalls. But Susskind urges that judicial officers, legal philosophers, and other stakeholders should perform both theoretical and evidence-based analyses to determine what steps can be taken now and in the future to build online courts that modernize the current systems in order to increase global access to justice.

Where Do We Go from Here?

As the COVID-19 pandemic rages on with no clear end in sight, Susskind has developed a roadmap to help governments and judiciaries prepare for the future.[56] In his roadmap, Susskind contemplates a series of short, medium, and long-term actions that judicial stakeholders should take to address how online courts can effectively respond both to the challenges posed by the pandemic as well as the global access-to-justice problem.

1. **Short-Term Actions:** First, Susskind recommends that courts engage in short-term planning to stabilize and improve the *ad hoc* remote-court systems that are currently being used to mitigate the harm of the COVID-19 pandemic on the justice system. These short-term actions should seek to minimize the disruption to court services for the remainder of the COVID-19 crisis. Short-term steps include researching which technologies are working well; identifying and training judges on "best practices" in the conduct of remote hearings; communicating with stakeholder as to the successes of remote hearings; allocating resources so that remote proceedings are deployed for the right types of cases; and engaging court leadership to oversee and lead others through these efforts.

2. **Medium-Term Actions:** Next, Susskind remains focused on the developments that were occurring in the world of online courts pre-pandemic. He advises that judicial stakeholders should use the experiences gleaned during the pandemic to inform any changes in the digitization programs that were being pursued prior to the COVID-19 crisis. These medium-term priorities include revising existing plans; developing new metrics; reviewing feedback; and adjusting expectations about how online courts can be used in the future.

3. **Long-Term Actions:** Finally, Susskind urges that advocates of the online-court movement re-engage with the project of radically redesigning our court systems in order to promote global access to justice. He explains that courts need to "put in place a new configuration of people, processes, technologies, and physical spaces" that are "user-centered, technology-enabled, sustainable, accessible, and better than what we have today."[57] These long-term actions would entail both a "legacy-based" efficiency review of past practices as well as a "vision-based" transformation exercise that invites judicial stakeholders to design a court system "from scratch."[58] This exercise, Susskind predicts, would encourage policymakers to depart from a court system designed "by lawyers for lawyers" and instead construct a system that delivers the outcomes sought by court users.

In sum, it is Susskind's "heartfelt hope," he writes, that court systems throughout the world first "harness the experience of remote courts" gleaned by necessity from the COVID-19 crisis and then "move on to design and build a standard, adaptable global platform for the online resolution of disputes, as a way of encouraging and enabling countries across the world to increase access to justice and respect the rule of law."[59] Online courts may have been created due to pragmatic requirements during the pandemic, but they now should be part of a global paradigm shift in the delivery of justice.

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Conclusion

Online Courts and the Future of Justice is a compelling, well-researched, insightful, and timely manifesto about how judicial systems should deploy modern technologies and engage in a paradigm shift to increase global access to justice. The eruption of the global COVID-19 pandemic subsequent to the book's publication has added increased urgency to Susskind's recommendations. Stakeholders around the world would do well to study this book and consider ways to implement features of the online courts that Susskind has imagined. While courts have been remarkably agile in their adoption of remote-court proceedings during the pandemic, the future development and expansion of online courts should follow deliberate planning that increases global access to justice. Indeed, this crisis should not go to waste.

Online Courts and the Future of Justice by Richard Susskind
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Notes:

[1] Richard Susskind, Online Courts and the Future of Justice (Oxford Univ. Press 2019).

[2] Richard Susskind, Tomorrow's Lawyers: An Introduction to your Future (Oxford Univ. Press 2d ed. 2017).

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[4] *Id.* at 120.

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[6] Remote Courts Worldwide, https://remotecourts.org/ (last visited Aug. 18, 2020).

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[11] *Id.*

[12] *Id.*

[13] *E.g.,* Ann E. Marimow & Justin Jouvenal, *Courts dramatically rethink the jury trial in the era of the coronavirus,* Wash. Post Online (July 31, 2020), https://www.washingtonpost.com/local/legal-issues/jury-trials-coronavirus/2020/07/31/8c1fd784-c604-11ea-8ffe-372be8d82298_story.html; Theodora McCormick & Robert Lufrano, *Will Virtual Jury Trials be Part of the "New Normal" Ushered in by the COVID-19 Pandemic?*, National L. Rev. (Vol. X, No. 235) (Aug. 22, 2020), *available at* https://www.natlawreview.com/article/will-virtual-jury-trials-be-part-new-normal-ushered-covid-19-pandemic.

[14] Richard Susskind & Jonathan Zittrain, Speaker's Corner: What Carries Over?, from The Practice (Vol. 6, Issue 5) (July/Aug. 2020), https://thepractice.law.harvard.edu/article/what-carries-over/.

[15] *Id.*

[16] *Id.*

[17] Richard Susskind, *The Future of Courts,* from The Practice (Vol. 6, Issue 5) (July/Aug. 2020), https://thepractice.law.harvard.edu/article/the-future-of-courts/.

[18] *Id.; see generally* Susskind, Online Courts, *supra* n.1, at 27.

[19] Susskind, Online Courts, *supra* n.1, at 27.

[20] *Id.* at 299.

[21] Richard Susskind and Daniel Susskind, The Future of the Professions: How Technology Will Transform the Work of Human Experts 306 (Oxford 2015).

[22] *Id.*

[23] Susskind, Online Courts, *supra* n.1, at 299; Susskind, *The Future of Courts, supra* n.17.

[24] Susskind, *The Future of Courts, supra* n.17.

[25] *Id.*

[26] Susskind, Online Courts, *supra* n.1, at 73.

[27] *Id.* at 73-86.

[28] *Id.* at 86.

[29] *Id.*

[30] Susskind, Online Courts, *supra* n.1, at 95.

[31] *Id.* at 48, 179.

[32] *See generally* Office of the Curator, Supreme Court of the United States, *Symbols of Law,* available at https://www.supremecourt.gov/about/SymbolsofLawInfoSheet%209-28-2015_Final.pdf.

[33] Susskind, Online Courts, *supra* n.1, at 48.

[34] *Id.* at 52.

[35] Susskind, *The Future of Courts, supra* n.17.

[36] Susskind, Online Courts, *supra* n.1, at 143.

[37] *Id.* at 143-52.

[38] *Id.* at 113-19.

[39] Susskind, *The Future of Courts, supra* n.17.

[40] Susskind, Online Courts, *supra* n.1, at 113-41.

[41] *Id.* at 141.

[42] *Id.* at 253-92.

[43] *Id.* at 179.

[44] Susskind, Online Courts, *supra* n.1, at 180-82.

[45] *Id.* at 187-91.

[46] *Id.* at 187-88.

[47] *Id.* at 193-200.

[48] Susskind, Online Courts, *supra* n.1, at 201-13.

[49] *Id.* at 215-21.

[50] *Id.* at 223-26.

[51] *Id.* at 243-50.

[52] Susskind, Online Courts, *supra* n.1, at 240-41.

[53] *Id.* at 182-84.

[54] *Id.* at 179.

[55] *Id.*

[56] Susskind, *The Future of Courts, supra* n.17.

[57] *Id.*

[58] *Id.*

[59] *Id.*

NEWS AND EVENTS OF INTEREST

Around *the* Circuit

*By Collins T. Fitzpatrick**

Seventh Circuit Bar Association Report on the Seventh Circuit

Court of Appeals

Circuit Judge Amy Coney Barrett has been nominated by the President to the Supreme Court to succeed Justice Ruth Bader Ginsburg who passed away September 18, 2020. The nomination is awaiting a Senate hearing and vote.

Circuit Judge Diane Sykes succeeded Circuit Judge Diane Wood as Chief Judge effective July 5, 2020.

Christopher Conway succeeded as Clerk of Court on March 13, 2020. He succeeded Gino Agnello who retired.

Sarah Schrup took office as the Deputy Circuit Executive September 14, 2020.

Circuit Librarian Gretchen van Dam is retiring at the end of the year.

Northern District of Illinois

Magistrate Judge Iain Johnson was sworn in on September 23, 2020 as successor to District Judge Frederick Kapala who retired.

Assistant United States Attorney Margaret Schneider has been appointed to succeed Judge Johnston as Magistrate Judge.

Circuit Court of Cook County Associate Judge Franklin Valderrama was sworn in on September 23, 2020 as successor to District Judge Ruben Castillo who retired.

Beth Jantz, formerly a Staff Attorney with the Federal Defender Program in Chicago, was sworn in as a Magistrate Judge succeeding Judge Mary Rowland who was named as a District Judge.

Assistant United States Attorney Heather McShain was sworn in as a Magistrate Judge succeeding Judge Sidney Schenkier who retired.

Magistrate Judge Susan Cox succeeded Magistrate Judge Maria Valdez as Presiding Magistrate Judge.

District Judge Blanche Manning passed away on September 20, 2020. She assumed Senior status in 2010.

Southern District of Illinois

State Court Judge Stephen P. McGlynn was sworn in on September 18, 2020 as successor to District Judge Michael Reagan who retired.

State Court Judge David Dugan was sworn in on September 23, 2020 as successor to District Judge David Herndon who retired.

Federal Public Defender Stephen Welby has been replaced by Preston Humphrey, Jr.

Northern District of Indiana

A committee is reviewing applicants to succeed Bankruptcy Judge Harry Dees who will retire on June 1, 2021.

District Judge John DeGuilio succeeded District Judge Theresa Springmann as chief district judge on June 1, 2020. Judge Springmann remains an active judge.

Southern District of Indiana

Southern Indiana Law Clerk Roger Sharpe will replace District Court Clerk Laura Briggs, who retired in May 2020.

Eastern District of Wisconsin

Bankruptcy Judge Brett Ludwig was sworn in September 10, 2020 as successor to District Judge Rudolph Randa who passed away September 5, 2016.

A committee is reviewing applicants to succeed Judge Ludwig as bankruptcy judge.

There is no nominee to succeed District Judge William Griesbach, who took senior status on December 31, 2019.

District Court Clerk Stephen Dries was sworn in as successor to Magistrate Judge David Jones who resigned. He is succeeded as Clerk by Waukesha County Circuit Court Clerk Gina Colletti.

**Collins T. Fitzpatrick is the Circuit Executive for the federal courts in the Seventh Circuit. He began work at the U.S. Court of Appeals for the Seventh Circuit in 1971 as a law clerk to the late Circuit Judge Roger J. Kiley. He served as administrative assistant to former Chief Judge Luther M. Swygert before his appointment as Senior Staff Attorney in 1975 and Circuit Executive in 1976. He is a Fellow of the Court Executive Program of the Institute for Court Management, a Master of the Bench in the Chicago Inn of Court, a member of the Seventh Circuit, Chicago, and American Bar Associations, and a Fulbright Specialist. He has an undergraduate degree from Marquette, a law degree from Harvard, and a graduate degree from the University of Illinois at Chicago.*

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