Maine State Bar Association

MAINE BAR JOURNAL

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COMMENTARY

FEATURES

DEPARTMENTS

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Challenges and Uncertainty in the Age of COVID-19

As I write this column, with my face mask nearby, Maine's Civil State of Emergency remains in effect through Sept. 4, 2020. Governor Mills has tightened restrictions related to wearing face masks, and COVID-19 positives have surpassed 4 million nationwide. The Maine Judicial Branch has revised its Pandemic Management Orders multiple times. Although the Judicial Branch is open for business, multiple restrictions remain in place. On July 29, the MJB issued PMO- SJC-7, indicating that remote hearings are the default except for certain cases and circumstances. On Oct. 5, eFiling will begin in District 5. The MSBA has teamed up with the Judicial Branch to ensure that our members receive training on this new platform. Check our website at mainebar.org and keep your eye out for email announcements regarding training opportunities, Q&As, and updates about the eFiling rollout.

We'll also continue to keep you updated on eFiling and other important issues related to the Judicial Branch during the pandemic through Bar Talk. Back on March 30, we launched Bar Talk via Zoom as an information tool for attorneys to address the rapid changes in the state and the courts. As the rate of change ebbed, we transitioned from a daily 15-minute program to a weekly 30-minute segment on Mondays, effective June 1. Member feedback has been positive overall, and we intend to continue Bar Talk as long as you continue to find it a valuable resource. To find out more or to review previous Bar Talks, which are all recorded and posted online, please visit www.mainebar.org/bartalk.

The MSBA continues to work closely with the Judicial Branch by providing feedback regarding the interpretation and implementation of PMOs. When the Judicial Branch held its Stakeholders Meetings in May, the following MSBA representatives participated: John Gause of the Employment Law section, Jim O'Connell of the Litigation Section, Amy Robidas of the Family Law Section, David Austin of the Business Law Section, and Jonathan Dunitz, who shared the issues raised by the Board of Governors. We appreciate their time and effort. In July, the MSBA conferenced with the Maine Trial Lawyers Association and Justice Horton about revising the remote deposition rules in PMO-SJC-2; we are hopeful that clarifications regarding exhibits, notice, and the integrity of participation will be addressed in future amendments. Our thanks to Jonathan Dunitz and his Ad Hoc Pandemic Committee for its work on remote deposition issues.

Our work continues in other areas as well. On May 25, when George Floyd died, protests and riots ensued nationwide. On June 12, the MSBA issued a statement on equality, which became of topic of discussion on the June 15 Bar Talk. That statement was not enough. The MSBA needed to reassess its efforts in the areas of diversity and inclusion, and we have begun that process. To that end, we have published on page 110 a letter from member Krystal Williams addressing systemic racism. We have also established a Diversity Committee to recommend steps to address diversity, inclusion, and equality within the Association and the greater legal community. This is an ongoing effort, and I encourage you to open your emails, read the Supplement, and use our website to stay informed about our efforts.

When I began my yearlong tenure as your president, I laid out a two-pronged approach to strengthening our bar membership through wellness and youth engagement. Both have proved to be particularly challenging during a pandemic. I had hoped to engage with our youth at local high schools, but we were unable to make in-person visits. We did hold the second annual Law Day Essay contest and selected winners whose essays appear in this issue. This fall, the Maine High School Mock Trial Competition will take place virtually; please contact Amanda Doherty at dohertyesq@aol.com if you would like to become involved.

My second focus, wellness, has also been a challenge. Although we could only gather virtually to discuss wellness, and COVID-19 has undoubtedly added to everyone's stress levels, we do have some excellent resources. Bill Nugent, executive director of the Maine Assistance Program for Lawyers and Judges (MAP), has been a frequent guest on Bar Talk providing insights into the benefits and practice of mindfulness. He also writes a regular column on attorney wellness in this magazine.

Personally, I have worked on renewing my spirit this summer by breathing in the ocean at Owls Head Light, and visiting Roxbury's Height of the Land, where I enjoyed view of the Appalachian Mountains and Mooselookmeguntic and Upper Richardson Lakes. I even gave the rope swing a shot on the Songo River. I hope you have had the opportunity to reintroduce yourself to what Maine has to offer too.

Please know the MSBA is here for you to support your wellness and your practice, and the challenges you face, whether it be eFiling, diversity training, or helping you connect with other attorneys. It is my pleasure to serve you.

ANGELA P. ARMSTRONG is the Maine State Bar Association's executive director. She can be reached at aarmstrong@mainebar.org.

Let's Talk About Membership

Standard membership in the Maine State Bar Association costs less than $23 per month. That is less than *one* tank of gas for most vehicles, or *four* cups of coffee from Starbucks, or even *one* dinner for two at Five Guys or your favorite Thai place. But that $23 monthly MSBA membership rate gets you so much more!

Here are just some of the benefits the MSBA provides to assist you in your daily life as an attorney:

- ✓ Opportunities through our CLE department to become a better-informed attorney and a better person by providing discounted and free substantive law and ethics-based programming.
- ✓ Access to Casemaker, our comprehensive online legal research library. (Casemaker alone would cost $1000 per year, if you could purchase an individual subscription!)
- ✓ Access to discounts on practice management necessities such as Clio, LawPay, FedEx, OfficeMax, Paychex, Verizon Wireless, Smith.ai, and CuroLegal.
- ✓ Free use of conference room space at Bar Headquarters (presently on hold, due to the pandemic).
- ✓ Access to membership in substantive law and demographic Sections to help you network with colleagues, learn from the experts in your field, and meet new people with similar interests.
- ✓ Access to membership on MSBA Committees, such as the Medical Legal, Judicial Evaluation, Legislative Review and Response, and Diversity Committees, that are doing important work to represent the legal community in a positive light, educate the public on the importance of lawyers in the community, as well as collaborate with other professions.
- ✓ Access to important information about the Maine Bar and greater legal community though MSBA email updates, weekly Bar Talk, legislative alerts, *The Supplement* monthly newsletter, and the quarterly *Maine Bar Journal*.

During the pandemic, the MSBA leadership and staff continued to work very hard to keep you informed of changes and updates in the law and within the Maine courts. The MSBA adapted its communication platforms in order to continue serving your needs in a safe but effective manner. We revamped our CLE programming to allow for "live" credit opportunities in the safety of your own home—many of which we offered at no cost. We implemented a daily Bar Talk to provide a forum to regularly and quickly share information and updates about practicing law during the chaos, as well created a conduit to the Governor's office and Judicial Branch to get your questions answered.

As I write this, the state has largely reopened, although uncertainty continues to overshadow school openings, safe workplaces, in-person events, and much more. The MSBA is committed to providing you with seamless access to your member benefits, informative and useful resources for navigating the pandemic, and opportunities to obtain top-notch CLE from the comfort and safety of your home or private office. In fact, for the first time ever, Legal Year in Review will be offered as a virtual conference. Ever mindful of the fact that most of us would rather do *anything* but sit in a Zoom meeting all day, we have developed a unique plan

As you consider where to spend your hard-earned dollars, we ask that you remember the many benefits you receive from the MSBA for less than $23 per month. We look forward to serving you again in the coming year.

to present the Legal Year in Review programming throughout the week, with special member pricing (as always) for individual sessions. We are pleased with our plan to offer our flagship event in a safe and accessible way, and we look forward to presenting it to you. Registration will open in the fall, so be sure to renew your membership prior to registering for this program in order to receive the best pricing.

Speaking of membership renewal, it's right around the corner. Next month, you will begin receiving reminders to renew your membership online at www.mainebar.org. You'll have the opportunity to update your profile, review your Section participation, and renew your membership – all through our online portal. As you consider where to spend your hard-earned dollars, we ask that you remember the many benefits you receive from the MSBA for less than $23 per month. We look forward to serving you again in the coming year.

As always, please feel free to contact me at (207) 622-7523 or aarmstrong@mainebar.org with your questions, concerns, or interests in becoming more involved with your Maine State Bar Association.

MSBA CONGRATULATES 2020 LIFE MEMBERS

The Maine State Bar Association annually recognizes attorneys whose 50 years of "faithful and meritorious service to the Bar have contributed substantially to the honor and dignity of the profession." Although we were not able to honor them in person due to the coronavirus pandemic, we awarded life membership to the following attorneys:

Charles S. Andrews
Andrew P. Averill
Albert C. Boothby Jr.
Phillip D. Buckley
W. Scott Carlisle III
Christopher J.W. Coggeshall
Hon. Thomas E. Delahanty II
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Howard T. Reben
Remington O. Schmidt
Chadbourn H. Smith
Barry Zimmerman

Life members are not assessed annual membership dues, although we invite them to continue their support of the MSBA through Sustaining Membership. Please join me in congratulating your colleagues on this milestone.

Angela Armstrong
Executive Director

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JULIA SHERIDAN worked as an assistant district attorney at the Cumberland County District Attorney's Office for 25 years, and has never indicted a ham sandwich. She was recently named Bar Counsel at the Board of Overseers of the Bar.

Discretion: The Heart of Prosecution

The discretion of prosecutors is often described as extensive, even "limitless."[1] Prosecutors, *inter alia*, decide what charges to bring, make bail recommendations to the court, decide which charges to dismiss in the course of plea negotiations, and recommend sentences. What is the source of this discretion, what are its limits, and how is discretion exercised to further justice?

Under American law, the authority of the prosecutor comes explicitly from the Judiciary Act of 1789, which, pursuant to the mandate of the United States Constitution, created the lower federal courts, the Office of the Attorney General, United States Attorneys and the United States Marshals.[2] Under the Maine Constitution, the Attorney General is a constitutional officer elected by joint ballot of Senators and Representatives.[3] Voters in each of the eight prosecutorial districts elect the Maine District Attorneys,[4] who must prosecute all criminal cases within their districts[5]. "The [Maine] Attorney General shall consult with and advise the district attorneys in matters relating to their duties."[6] Modern court decisions demarcate prosecutors' discretion by holding that the separation of powers in the United States federal system renders prosecutors' professional decisions generally unreviewable by courts.[7]

In *State v. Pickering*, the Law Court addressed prosecutorial discretion through the vehicle of the since-repealed operating under the influence (OUI) statute, which allowed the prosecutor to decide whether to charge a civil or criminal offense.[8] Pickering was convicted after jury trial of criminal OUI.[9] The statutory scheme included a civil traffic infraction for OUI.[10] The statute provided an "[e]lection of charge" to the prosecution, allowing the "attorney for the [s]tate [to] elect to charge the defendant [arrested or summonsed for OUI] with the traffic infraction of operating under the influence of intoxicating liquor or drugs or with an excessive blood-alcohol level," and the prosecutor's decision was not subject to review.[11] The statute provided some limitation on the prosecutor's discretion. The prosecutor could not charge a civil violation if the defendant had a blood-alcohol level of .20 or higher; was speeding by 30 miles an hour or more; eluded or was attempting to elude an officer; or had been convicted or adjudicated for OUI within the prior six years.[12] Pickering challenged the statute's constitutionality, on the grounds of due process and equal protection of the law, and its grant of prosecutorial discretion.[13]

The Law Court upheld the constitutionality of the statute, citing to *U.S. v. Batchelder*,[14] and *Oyler v. Boles*.[15] The Law Court recognized the "critical role of prosecutorial discretion within our system of law in maintaining flexibility and sensitivity."[16] The prosecutor's discretion is not complete, however, and selectivity in criminal law enforcement is subject to the Equal Protection Clause's prohibition on differential enforcement based on an unjustifiable standard such as race, religion or other arbitrary classification.[17] *Pickering* explains that constitutional equal protection rights limit the exercise of prosecutorial discretion.

Another limitation on the charging ability of prosecutors is the Grand Jury, which hears felony matters and determines whether probable cause exists to support such charges.[18] Despite Chief Judge Sol Wachtler's adage that the Grand Jury can "indict a ham sandwich,"[19] Grand Juries can and do return no bills.[20] Even for misdemeanor charges that typically are not presented to the Grand Jury, the court has the power to review probable cause.[21] This practical control on criminal charges means that prosecutors cannot bring charges unsupported by sufficient evidence.

Additionally, at trial on a charge due process of law requires that the state prove every element of the charge beyond a reasonable doubt.[22] Persons accused of crimes are also presumed innocent.[23] These fundamental principles of constitutional and criminal law constrain the exercise of

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prosecutorial discretion.

Yet another limitation on prosecutorial discretion is the fact that the legislature defines crimes,[24] allowable sentences,[25] victims' rights,[26] administration of sentences,[27] and bail parameters.[28] The legislature similarly defines juvenile crimes, procedure and sentences.[29] The legislature also provides for review of convictions and certain court orders through appellate processes,[30] review of certain sentences,[31] and for collateral attacks on convictions through post-conviction review.[32] Additionally, the court limits prosecutorial discretion since it decides the ultimate sentence in a case[33] and can allow a defendant to withdraw his or her plea if the court rejects a proposed sentence.[34] The legislature provides general sentencing principles for courts to follow.[35]

Prosecutors' ethical obligation to seek justice is another limitation on the exercise of discretion. M.R. Prof. Cond. 3.8, provides that a prosecutor "shall refrain from prosecuting a criminal or juvenile charge that the prosecutor knows is not supported by probable cause."[36] "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[37] "This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[38] "It has long been the case that public prosecutors carry special ethical duties…to seek justice [and] not just to convict,"[39] and have "obligations to assure protection of all citizens' rights, including those of criminal defendants."[40] The privilege of practicing law as a prosecutor is conditioned upon the ethical obligation to seek justice.

Finally, the people act as a check on prosecutorial power through jury trials. Despite the existence of probable cause and proof beyond a reasonable doubt, juries can and do engage in jury nullification, either through hung juries or outright acquittals. The jury is the voice of the community controlling prosecutorial discretion.

How does the prosecutor's duty to seek justice guide the exercise of the broad discretion accorded prosecutors? Discretion is exercised when charging, plea bargaining and recommending bail and sentences. The legislature defines charges and sentencing options, including unconditional discharge,[41] fines,[42] incarceration,[43] probation,[44] administrative release,[45] supervised release,[46] restitution,[47] and deferred disposition.[48] In the latter scenario, the defendant pleads guilty and enters into a contract with any variety of conditions that may help to ensure public safety, recognize victims' rights and encourage rehabilitation. Common conditions include any of the following: prohibitions on the use or possession of alcohol, drugs and/or weapons; substance abuse evaluation and treatment; no contact with the victim; community service work, and payment of restitution. If the defendant complies with the conditions throughout the length of the contract, the defendant may withdraw his or her plea, and the charge may be dismissed, he or she may plead to a lesser charge, or the case may be dismissed entirely. Deferred dispositions are commonly imposed throughout the state for a variety of crimes.

Dispositions can also include "informal" deferred dispositions, in which the defendant pleads guilty and the case is simply continued for sentencing. Bail may be amended to require certain conditions, such as alcohol or drug conditions, or payment of restitution. If the conditions are met by the time of sentencing, the plea may be withdrawn and the case dismissed or a lesser charge substituted. Such resolutions can also be accomplished without a guilty plea if such a plea would have collateral consequences outside the criminal justice system, such as on immigration status.

Similarly, the prosecutor may file a case.[49] In this scenario, the case is filed, i.e., put on hold without a plea, for any period of time, again, with or without conditions. The person can also remain on bail with conditions such as no new criminal conduct. If the state does not move to restore it to the docket, the clerk's office will dismiss the case at the end of filing period (typically six months or a year).

Another tool for prosecutors exercising discretion is to drop a felony charge and ask the court to order probation on a misdemeanor. Most misdemeanors do not qualify for probation.[50] If a person has never had the benefit of a "drop-down probation," the state may recommend such probation on a misdemeanor.[51] This result provides the oversight and protection of probation and saves the defendant from a felony conviction.

In addition to all of the above, Maine has diversionary courts. These courts, such as drug court, mental health court and veteran's court, offer defendants the opportunity to engage in treatment and take advantage of services. These courts also allow defendants to avoid potentially harsh consequences, even for serious crimes.

Victims have a variety of statutory rights, which impact the exercise of prosecutorial discretion.[52] Prosecutors must make a good faith effort to inform victims of plea agreements, the right to comment on plea agreements, any proposed dismissal or filing of charging instruments, the time and place of trial, the time and place of sentencing, the right to participate in sentencing and the right to comment on any proposed early termination of oversight such as probation.[53] The victim also has a right to participate in the sentencing.[54] Although victims do not have the final say in the state's resolution of a case, their input is weighed by the prosecutor.

Additionally, whether the victim wants, or is able, to testify at trial has a tremendous impact on the case. If a domestic violence or sexual assault victim cannot undergo the rigor of trial, the state will have to factor that reality into its analysis of the case. Similarly, if a victim cannot testify, due to unavailability in the form of memory loss, mental disability, young age or other reason, and if there is no available method to get the victim's story before the jury, such as through excited utterances,[55] past recollection recorded,[56] or other means, the state's view of the case will change. Prosecutorial discretion allows for amendment of charges and proposed sentence, or even dismissal (if trial has begun and the jury sworn, the defense would have to agree to a dismissal[57]).

Let's consider some hypothetical cases. Daniel, 28 years old, was caught driving without a valid license. This offense is minor and in the normal course has negligible impact on a person's employment or educational opportunities going forward. Daniel is an asylum seeker, however, whose status might be impacted by any criminal conviction. The crime has limited impact on public safety and there are no aggravating circumstances, such as an accident. The prosecutor offers to continue the case, without a plea, for a month or two in order to allow Daniel to get his driver's license. Upon proof that he is properly licensed, the charge will be dismissed.

Next, let's consider a case where hypothetical Sheila, an 18-year-old, was summonsed for shoplifting a pair of earrings while she was at the mall with her friends. This incident happened just after senior year final exams and Sheila is planning to attend The University of Maine with a generous scholarship. The theft conviction could make her ineligible to receive the scholarship and could make it difficult for her to attend college, at all. The charge is relatively minor and Sheila has no criminal history. The prosecutor offers to allow her to plead guilty pursuant to a deferred disposition contract. She would remain on the contract for six months and would have to stay away from the store, complete 30 hours of community service work, complete the Shoplifters' Alternative Program and pay for the earrings. If she succeeds on the contract, she can withdraw her plea and the prosecutor will dismiss the charge, leaving Sheila with a clean record.

These two types of outcomes are ones that prosecutors routinely offer all across Maine. In the first case, the outcome is the goal, conditions of behavior are not necessary and no contract is required. In the second case, conditions under a deferred disposition contract make sense to impress the importance of not stealing and to make financial amends to the store. Now, let's look at some more complicated and nuanced scenarios.

Hal is a 45-year-old software engineer, who supports his wife and two small children. In 2015, he was convicted of operating under the influence. He was sentenced to the mandatory minimum sentence of a 150-day license suspension and a $500 fine. In 2020 he was stopped for impaired operation and charged with second-offense operating under the influence, given that the new incident happened within 10 years of the first conviction.[58] The mandatory minimum sentence for a second offense OUI is a three-year license suspension, a $700 fine and seven days in jail, and the sentence can include probation.[59] Hal does not have seven days leave time from his job and will become unemployed if he serves the seven-day sentence. The Bureau of Motor Vehicles will suspend his license for three years, regardless of whether he is convicted of a first or second offense OUI.[60] The prosecutor is concerned about public safety but feels that the public is protected if Hal is sentenced on a first offense OUI to a $700 fine (higher than the mandatory minimum for a first offense), 72 hours in jail (more than the mandatory minimum but less than the seven days that would cost Hal his job) and a 150-day license suspension (while BMV imposes a three-year license suspension). As an additional protection to the public, Hal could pay to have an ignition interlock device installed in his vehicle after serving nine months of the suspension, if he has it installed for two years.[61] This device would prevent Hal's vehicle from starting if his breath sample registered any amount of alcohol. This resolution is a fair exercise of the prosecutor's discretion and protects public safety while allowing Hal to keep his job.

Next, let's look at a more serious case, a burglary involving a human victim. Alan is 35 years old and has struggled with drug addiction for some 20 years. He has a criminal history comprised of misdemeanor drug possession convictions and one misdemeanor theft conviction, for stealing money from a store's tip jar. In 2020 Alan broke into a locally-owned convenience store at night and stole $100 from the cash register, as well as several bottles of alcohol and a laptop. Police

located Alan nearby, running from the scene, and recovered all of the stolen property. The Grand Jury indicted him on charges of burglary, Class C,[62] and theft, Class D[63]. The prosecutor discusses various outcomes with the storeowner, who is satisfied to leave the resolution of the case to the prosecutor's discretion and hopes that Alan will engage in substance abuse counseling. The storeowner does not want Alan on the store premises, however.

The prosecutor offers Alan an 18-month deferred disposition to the charge of burglary, Class C, and theft, Class D. The offer also includes a bail revocation of 14 days. The bail revocation means that the court will order Alan to serve 14 days in jail, after which time he will return to court to execute the deferred disposition contract. While on the contract, he will be required to stay away from the store, will have to engage in substance abuse treatment, and will be prohibited from using or possessing alcohol or illegal drugs. Throughout the 18-month contract, Alan will also remain on bail with conditions of no use or possession of alcohol or illegal drugs, and drug and alcohol testing to ensure his compliance with the contract. If Alan successfully completes the contract, he can withdraw his plea to the felony burglary charge and the prosecutor will dismiss it. The sentence on the theft, Class D, will be 14 days in jail, credit for the time he spent serving the bail revocation. This resolution will give Alan incentive to comply with the contract, get substance abuse treatment and end up without a felony conviction or additional incarceration. The storeowner's goals will be accomplished and the episode will be an opportunity for Alan to live a substance-free life going forward.[64]

Finally, let's look at a more serious crime, with significant consequences for the defendant and serious impact on the victim. Robert is 23 years old and a Syrian asylum seeker. He has no criminal history. He was at a party at the University of Southern Maine and spontaneously hugged a female student, whom he did not know, grabbed her buttocks and ground the front of his body against the front of her body. She tried to push him away but was unable to break his grasp. Robert released her only when her friend intervened. The state charged Robert with unlawful sexual touching, Class D,[65] and assault, Class D.[66] If Robert is convicted of the unlawful sexual touching, Class D, he might have to leave the country. If he is convicted of assault, Class D, he will likely be allowed to remain but his track to asylum status might become complicated. The legislature enacted the crime of unlawful sexual touching in 2003.[67] Before that date, this conduct would only qualify for an assault charge. Unbeknownst to Robert the victim is a survivor of a previous sexual assault and is retraumatized by Robert's crimes. After speaking with the victim about the case, the Prosecutor understands that the victim needs to feel that her rights to safety and bodily autonomy are protected and vindicated.

After much consideration, the prosecutor offers a plea to two assault charges: one for grabbing the victim and one for grinding against her. Two charges more closely reflect the offenses to the victim. The offer is an "open" plea. An "open" plea allows the prosecutor to argue for jail time, up to the maximum allowable of 364 days on each count.[68] Defense counsel[69] can argue for as little as no time in jail. During the plea proceeding Robert pleads guilty, and the victim takes the opportunity to address the court and explain how seriously the crimes have impacted her. The state asks for three months in jail. The defense argues that no jail time should be imposed and that the convictions, alone, are sufficient punishment. The court imposes a 14-day jail sentence and the mandatory $300 fine, concurrent on each count. The court explains on the record the reasoning for its sentence: that it is recognizing victim impact and the need to protect public safety, minimizing a correctional experience that may serve to promote criminality and imposing a sentence that does not diminish the gravity of the offense.[70] At the end of the sentencing, the victim accepts the result and is glad to have participated in the process, and to have addressed the court and, indirectly, Robert.

These scenarios demonstrate some of the varied factors that constrain the exercise of prosecutorial discretion. While some factors are identifiable across multiple cases to inform the exercise of discretion, defendants and victims have unique circumstances and a formulaic application of discretion is impossible. Some OUI cases involve erratic operation while others involve crashes. Some burglaries are committed off-season in closed summer residences and others terrify occupants, including children. Cases that involve serious crimes, such as gross sexual assault,[71] often allow for little negotiation in terms of charge or sentence. Legislative efforts to standardize some aspects of prosecutorial discretion, such as in the OUI statute addressed by the court in *Pickering*, can be successful. Efforts to control all aspects of discretion, however, are unlikely to succeed and may unintentionally create injustice by impeding the "flexib[le] and sensitive[e]" application of the law recognized as essential by the *Pickering* court.[72] While absolute justice is a subjective and unreachable goal, the search for justice is at the heart of what Maine prosecutors do every day.

ENDNOTES

1 Jordan A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 Journal of Criminal Law and Criminology summer 472-520, 480 (2016).
2 United States Constitution art. III; The Judiciary Act, September 24, 1789.
3 Me. Const. art. IX, § 11; Tinkle, The Maine State Constitution 163 (2d. ed. 2013).
4 30-A M.R.S. §§ 251, 254 (2019).
5 30-A M.R.S. § 283 (2019).
6 5 M.R.S. § 199 (2019).

7 *Wayte v. U.S.*, 470 U.S. 598, 607-08, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (equal protection standards apply to claims of selective prosecution and as long as the prosecutor has probable cause the decision whether and what to charge rests in the prosecutor's discretion, and review of such discretion is "particularly ill-suited to judicial review") ; *U.S. v. Batchelder*, 442 U.S. 114, 124-25, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) (whether to prosecute and what charge to bring are decisions that generally rest in the prosecutor's discretion); *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) (no due process violation exists when prosecutor indicts on more serious charge after defendant rejects offer to plead to lesser offense); *Imbler v. Pachtman*, 424 U.S. 409, 422-29, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (in initiating and prosecuting state's case prosecutor is immune from civil suit for damages under 42 U.S.C. § 1983; judicial review of prosecutor's decisions would impair prosecutor's ability to carry out duties to prosecute crimes and would harm public trust); *Harrington v. Almy*, 977 F.2d 37, 40-42 (1st Cir. 1992) (claims in federal court for damages and injunctive relief against state prosecutors unsuccessful given separation of powers in the federal system and absolute immunity of prosecutors from civil actions arising out of charging decisions; prosecutors' discretion not limitless since prosecutor still subject to criminal prosecution, professional discipline or the unique Maine statutory safeguard, under 30-A M.R.S. § 257 (2019), allowing a judicial proceeding against a District Attorney upon complaint of the Attorney General to determine whether the District Attorney is performing the requisite duties of office and to remove him or her if not).
8 462 A.2d 1151, 1159-63 (Me. 1983).
9 *Id*. at 1154.
10 *Id*. at 1157; 29-A M.R.S.A. § 1312-B (1981), repealed by P.L. 1993, ch. 683, § A-1 (effective Jan. 1, 1995).
11 29-A M.R.S.A. § 1312-C (1981), repealed by P.L. 1993, ch. 683, § A-1 (effective Jan. 1, 1995); *State v. Pickering*, 462 A.2d at 1158-59 & n.8.
12 *Id*.
13 *Pickering*, 462 A.2d at 1159.
14 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755.
15 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962).
16 *Pickering*, 462 A.2d at 1160-61.
17 *Id*. at 1161.
18 *See Sawyer v. State*, 382 A.2d 139, 1042 (Me. 1978); *State v. Arnold*, 421 A.2d 932, 935 (Me. 1980); *State v. Gellers*, 282 A.2d 173, 181 (Me. 1971); *Kaley v. United States*, 134 S.Ct. 1090, 188 L.Ed.2d 46, 571 U.S. 320, 327-28 (2014).
19 Chief Judge Sol Wachtler, interview, New York Daily News (Jan. 31, 1985), https://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208. Judge Wachtler later served time in prison after being convicted of harassment, regained a law license and advocated for veterans and those with mental health issues, *Judging a Judge Less Harshly*, Times Union (Aug. 27, 2013), https://www.timesunion.com/local/article/Judging-a-judge-less-harshly-4469530.php.
20 In order to return an indictment 12 members of the Grand Jury must vote to indict. M.R.U. Crim.P. 6(i).
21 M.R.U. Crim. P. 4(b)(2) (probable cause is grounds for an arrest warrant or summons); 4(c)(2) (court or authorized clerk may issue warrant or summons based on probable cause); 4A (probable cause determination required by court at initial appearance after warrantless arrest).
22 *In re Winship*, 357 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). *See also State v. Poulin*, 277 A.2d 493 (Me. 1971) (holding that juries must not be instructed on presumptions but rather on drawing reasonable inferences and citing to *In re Winship*).
23 *Coffin v. U.S.,* 156 U.S. 432, 432-63, 15 S.Ct. 394, 39 L.Ed. 481 (1894); *State v. Hudon*, 142 Me. 337, 347-48, 52 A.2d 520, __ (1947).
24 17-A M.R.S. § 3 (1977) ("All crimes defined by statute").
25 17-A M.R.S. §§ 1501-2051 (2019).
26 17-A M.R.S. §§ 2101-2109 (2019).
27 17-A M.R.S. §§ 2301-2314 (2019).
28 15 M.R.S. §§ 1001-1105 (2019).
29 15 M.R.S. §§ 3001-3507 (2019).
30 15 M.R.S. § 2115 (2008); 15 M.R.S. § 2115-a (2016).
31 15 M.R.S. §§ 2151-2157 (2019).
32 15 M.R.S. §§ 2121-2132 (2019).
33 *See* 17-A M.R.S. § 1502 (2019); M.R.U. Crim. P. 32.
34 M.R.U. Crim. P. 11A(e).
35 17-A M.R.S. § 1501 (2019).
36 M.R. Prof. Cond. 3.8(a).
37 *Id*. com. (1).
38 *Id*.
39 *Id*. com. (3).
40 *Id*.
41 17-A M.R.S. § 1502(2)(A) (2019).
42 17-A M.R.S. § 1502(2)(C), (F) (2019).
43 17-A M.R.S. § 1502(2)(B), (E), (K), (L) (2019).
44 17-A M.R.S. § 1502(2)(B), (D) (2019).
45 17-A M.R.S. § 1502(2)(I), (J), (K) (2019).
46 17-A M.R.S. § 1502(2)(L) (2019).
47 17-A M.R.S. § 1502(4) (2019).
48 17-A M.R.S. §§ 1502(3) (2019), 1901-04 (2019). Deferred disposition is, by statute, the preferred disposition in certain prosecutions for possession of schedule W drugs and engaging in prostitution. 17-A M.R.S. § 1902(5),(6) (2019).
49 M.R.U. Crim. P. 11B.
50 17-A M.R.S. § 1802 (2019).
51 17-A M.R.S. § 1802(1)(B)(1).
52 17-A M.R.S. §§ 2101-2109 (2019).
53 17-A M.R.S. § 2102.
54 17-A M.R.S. § 2104.
55 M.R. Evid. 803(2).
56 M.R. Evid. 803(5).
57 M.R.U. Crim. P. 48(a).
58 29-A M.R.S. § 2411(1-A)(B)(1) (2017).
59 29-A M.R.S. § 2411(5)(B).
60 29-A M.R.S. § 2451(3)(B) (2017).
61 29-A M.R.S. § 2508(1)(A) (2013)
62 17-A M.R.S. § 401(1-A) (2019).
63 17-A M.R.S. § 353(1)(A) (2008).
64 This result could also be accomplished through Alan's application and admission to drug court, although drug court would require court intervention and oversight, as opposed to DA's Office oversight.
65 17-A M.R.S. § 260 (2019).
66 17-A M.R.S. § 207(2019).
67 P.L. 2003, ch. 138, § 5.
68 17-A M.R.S. § 1604(1)(D) (2019) (maximum sentence on a Class D offense is 364 days). The two sentences could theoretically be "stacked" so that Robert serves a total of 728 days in jail, although such a draconian sentence is unlikely and might violate the presumed concurrent nature of sentences as set forth by the Legislature (17-A M.R.S. § 1608 (2019)).
69 Robert would be entitled to a court-appointed lawyer given that he is facing a risk of jail and qualifies financially. M.R.U. Crim. P. 44. *See also State v. Nisbet*, 2016 ME 36, ¶ 24, 134 A.3d 840.
70 The legislature has recognized general sentencing principles, including minimizing correctional experiences that serve to promote criminality, 17-A M.R.S. § 1501(3) (2019), and recognizing the gravity of the offense, 17-A M.R.S. § 1501(8) (2019).
71 17-A M.R.S. § 253(1) (2019).
72 462 A.2d at 1160-61.

JULIET HOLMES-SMITH, a 1998 graduate of the University of Maine Law School, was the executive director of the Maine Volunteer Lawyers Project (VLP) until August 14, 2020. VLP is a statewide civil legal aid organization that encourages and supports *pro bono* representation for Maine people with low incomes. Ms. Holmes-Smith was a member of the Maine Victims Compensation Board from 2009 through 2014, a member of the Maine Family Law Advisory Commission from 2004 through 2016, and she was co-chair of the Maine Justice Action Group *Pro Bono* Committee.

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The mission of the Maine Justice Action Group (JAG) is to provide leadership and coordination in planning for the provision of civil legal aid to low income and elderly Mainers statewide. The JAG *Pro Bono* Committee encourages statewide *pro bono* initiatives and supports the *pro bono* efforts of Maine legal aid organizations.

PRO BONO SERVICES IN MAINE

The Maine Bar has long adhered, both in word and in deed, to the ideals of public service. This is certainly evident in the rules of professional responsibility that govern Maine attorneys. The first sentence of the Maine Rule of Professional Conduct 6.1 (Voluntary *Pro Bono Publico* Service) states that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay." Providing these legal services can take many forms. The rule lists several recognized categories of *pro bono* service, prioritizing services to persons of limited means, but also laying out other important legal services that Maine lawyers provide *pro bono* to their communities.

Unlike the ABA model rule, the Maine rule does not set forth a specific or minimum number of hours of annual *pro bono* service for Maine attorneys, but this is not because Maine undervalues *pro bono* service. To the contrary, Maine attorneys have traditionally volunteered their time and expertise without a need to impose minimum requirements or expectations. As observed in the Reporter's Notes to Rule 6.1, "Because of the high standard for *pro bono* service Maine lawyers have established, the [Maine] Task Force [on Ethics] thought that any enumeration of hours is unnecessary." This observation is borne out by anecdotal evidence and by the data, though incomplete, that has historically been available.

We know by the hours reported through legal service organizations, statewide surveys on *pro bono* service, focused anecdotal inquiries and other methods, that Maine lawyers volunteer thousands of hours every year, providing *pro bono* legal services to individuals and communities throughout the state. According to Supporting Justice in Maine, a 2017 ABA report on the *pro bono* work of Maine's lawyers, 89.3 percent of Maine attorneys believe that *pro bono* service is either somewhat or very important. The same survey showed that 76.1 percent of private attorneys had provided *pro bono* service in the previous year. Of the attorneys who provided *pro bono* services, 29 percent indicated that their most recent client came directly to them. The remaining 71 percent were referred from some specific source. The most common referral sources were legal aid *pro bono* programs, followed by present or former clients.

While legal aid programs and other non-profits are able to record some yearly *pro bono* hours provided by members of the Maine Bar, this still leaves potentially thousands of hours provided quietly to clients all over Maine unreported. Maine has had no central means of compiling annual *pro bono* data with real accuracy, which has resulted in meaningfully underreported figures.

Why do we need to know?

The ABA Standing Committee on *Pro Bono* and Public Service lists a number of reasons in favor of implementing *pro bono* reporting, all of which apply in Maine. Accurate reporting of *pro bono* services enables the Maine Bar, for example, to collect data on how many hours of service our attorneys provide, to potentially determine where in the state services are most needed and provided, and what types of services are most needed and provided. This data, in turn, is valuable because, as the ABA notes, it:

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- Can provide statistics needed to support increased funding for and monetary contributions to providers of legal services for low income clients
- Can raise awareness of the need for free or reduced fee legal services
- Can send a message to the non-legal community about their responsibility to fund legal services for the poor
- May raise awareness in the Maine Bar of opportunities for *pro bono* involvement
- May raise consciousness about the professional responsibility to provide *pro bono* legal services
- Facilitates engendering confidence in the Bar
- Can be used to enhance the image of lawyers
- Enables recognition of contributing lawyers who wish to be recognized

Even with our currently underreported *pro bono* figures, it is apparent that this data has had a positive impact in Maine. Maine legal aid organizations have been able to enhance grant requests by showing that the Maine Bar is willing to increase legal resources by providing *pro bono* resources. Our legislators respond positively to *pro bono* service numbers when allocating state funding for legal aid organizations and for court-related services. Further, when the media reports lawyers providing *pro bono* services in Maine, the perception of the profession as a whole is enhanced. Imagine what good could be done if our Bar's *pro bono* figures were not underreported, but were fully reported and captured.

In the United States currently, nine states require their attorneys to report *pro bono* hours, and 13 states have voluntary reporting systems in place. Maine wants to join this growing number. After much study and with the support of the Justice Action Group and the Judicial Branch, the Maine Board of Overseers of the Bar will provide the centralized reporting system needed to collect this valuable data by enabling every active member of the Maine Bar to report, on a voluntary basis, their *pro bono* hours as part of the annual online attorney registration.

The reporting is straightforward, and it advances the ethical responsibilities stated in Rule 6.1. Reporting is also quick and easy. When filling out your annual Maine Bar registration, you may check a box stating that you want to report your *pro bono* hours. The reporting section will then pop up after you have completed your registration. This will enable you to record your annual *pro bono* hours without delaying the registration process itself. You will then be asked to estimate how many hours of *pro bono* service in general you completed in the past year, how many of those hours were for persons of limited means, whether you qualify for Katahdin Counsel (the Maine Supreme Judicial Court's *pro bono publico* recognition program), and finally, whether you would like to be recognized by the Maine Supreme Judicial Court as a Katahdin Counsel.

When you report *pro bono* hours on your annual registration, your name will not be shared or reported in connection with the number of hours you have reported. The only exception to this is if you check the box on the registration form accepting public recognition as a Katahdin Counsel. Otherwise, the *pro bono* data that is collected through annual registrations will be owned and maintained by the Board of Overseers and will only be shared, on an anonymous basis, with legal aid programs or other Bar organizations, for the purpose of helping with funding, *pro bono* recruitment, and program planning based on general data sets (geographic location or law firm size, for example).

As with any voluntary data reporting, the more that our Maine attorneys accurately report their *pro bono* service, the more useful the numbers will be. We understand that some attorneys may have reasons to not want their *pro bono* efforts recognized publicly, while other attorneys may welcome court recognition when they achieve the hours for Katahdin Counsel distinction. That choice is entirely up to each individual attorney. However, it is almost a certainty that Maine attorneys are volunteering thousands of hours of *pro bono* legal services that are going uncaptured, which is causing the Maine Bar and the state to fail to realize all the value of those hours. We now have a long-awaited opportunity to capture all of those hours and to realize the benefits that can come from that information. Please help Maine's Bar and its citizens by taking part in the voluntary reporting system the next time—and every time—you renew your annual attorney registration.

Maine-based psychologist AMY WOOD, Psy.D., created Law and the Good Life, a research-based attorney wellness coaching and training system designed to address the challenges of lawyering. She frequently offers CLE opportunities through the MSBA. To learn about upcoming events, visit www.mainebar.org. For more information about Dr. Wood, go to www.amywoodpsyd.com.

How To Feel in Control When Things Are Out of Control

One of my favorite quotes goes something like, "You can't stop the waves, but you can learn to surf." This is perfect advice when it comes to feeling in control when things are out of control around you. Attempting to alter what may not be in your power to change will only exhaust you, but becoming resilient – learning to flex and adapt, in other words, with unpredictability – will allow you to ride the inevitable waves more easily.

These suggestions will show you the way:

Stop Trying to Control What You Can't Control

There is so much we have no command over: traffic, the weather, and sometimes even the court system, to name just a few. And yet all of us waste time and energy worrying about and acting on circumstances outside our jurisdiction. We lie awake at night hoping that we'll pass a particular test, get a certain job, attract an object of our affection, or sidestep a contagious illness. We tense ourselves up trying to beat the competition, win over others, prevent loss and heartache, slow the fast pace of America, and corral global movements that are much bigger than us. Even though we're old enough to know better, we get caught up in the belief that we can will or force outcomes, avoiding the unpreventable realities of life, if we just push hard enough. Often, we notice that the more we try to control what we can't control, the more out of control we become. And, we start to see that those things we can't control are best left to do what they're going to do anyway.

Strive to Control What You Can Control

While it's impossible to control what we have no control over, it's actually quite possible to *feel* more in control when we focus on what we actually *do* have control over: our responses. No matter what is going on around you, you and you alone get to decide what attitude to take, how to prepare, what to say, how to greet bad news, how to treat yourself and others, how to cope. All of which adds up to your character – who you are. The more your character is based on even-keeled, reasonable responses to all that you can't control, the more solid you feel and the more likely it is, because you're not feeling anxious and spent trying to fight a battle you can't win, that circumstances will go more your way. That, of course, is the irony of this control issue: it's when we let go of what we can't change that the sense of control we're after begins to emerge.

Take Excellent Care of Yourself

To step away from the ever-evolving cacophony of what can't be controlled and make pragmatic decisions about how to achieve a stature of calm stability despite it, you need to be genuinely rested and awake with a hardy constitution and clear head. This means making sure that you get enough sleep, eat relatively well, exercise sufficiently, protect yourself from people and environments that drain you, and keep your mind adequately nourished. This also means breaking away from work whenever necessary to take the edge off, have fun, and recharge. The advantage of taking full responsibility for your physical and mental health is that you'll be in a better state of mind to discern between what can't be controlled and what can. And you'll be well-anchored with your wits about you when particularly threatening out-of-control situations trigger the all-too-human misleading impulse to try and make the madness stop.

Focus on What's Certain

One sure way to feel centered when wayward happenings are challenging your sense of security is to swivel your attention from what's tentative to what's definite. This translates to

And that's why it's critical, if you want to ride the big waves deftly rather than get toppled by them, that you build up a regular practice of balancing what you can't control with what you can.

recognizing your existing strengths and resources, counting your blessings, recalling the loved ones you know are here for you, remembering the coping skills you've learned from weathering past out-of-control periods. It's about zeroing in on what you know to be true, regardless of unsteadying developments, putting your mind on what's working and what you actually have currently. Even if your health or home or income or family may be seriously at stake, reminding yourself that you are okay *right now*, regardless of what may happen next, will encourage peace of mind.

Make Letting Go a Regular Practice

It's most obvious amid a crisis that we don't have control over much, but the fact of our limited influence is a reality every single day. Even when things are going just the way we want them to, anything can happen at any instant to thwart our sense of constancy. And that's why it's critical, if you want to ride the big waves deftly rather than get toppled by them, that you build up a regular practice of balancing what you can't control with what you can. Make it your intention every day, not just when you're utterly stressed by uncertainty, to fortify your mind, body and spirit; let others be who they are, allow for our up and down, unpredictable world order; *consider your responses*, and you will be in the best position possible to stand tall and ride out all sorts of crazy conditions. The more you build your life around steadying habits rather than just resist and react when those waves kick up, the more calm amid the storm you will find.

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Why White Privilege Is a Necessary Part of Any Conversation on Racism

Editor's Note: The following letter was submitted to the Maine State Bar Association following remarks delivered during a regularly scheduled edition of Bar Talk, the MSBA's Zoom forum for discussing law practice and MSBA activities during the coronavirus pandemic.

In the Maine State Bar Association's June 15, 2020 Bar Talk Program, Attorney Leah Baldacci asked, how can the Maine bar perform an "introspective look on racism without at the same time proclaiming that attorneys like [her] have white privilege" and making other comments that she considers "racist remarks against the white race?"

Leah's question is compelling, and to my knowledge, no one has yet substantively addressed it. I attempt to do so here. I will also address some of the points raised by Leah's husband, Attorney Jack Baldacci, in his email supporting her position. Before I do that, however, I want to share why it is personally important to me to offer a response to Leah's and Jack's comments.

As a Black, Christian, Female Attorney "from away," I have a Unique Perspective of Maine

Leah's and Jack's combined comments implicated nearly every characteristic by which I define myself. I am a Black, female attorney who practices in Portland, Maine. I am one of seven siblings, and my formative years were spent in North Carolina where our family of nine lived in a Habitat for Humanity community. My now-deceased father was a police officer for most of my childhood, and my mother was a stay-at-home mom, in large part due to her chronic mental illness.

It is a given that I grew up poor. I also grew up as a devout Christian. My paternal grandfather was a Baptist minister in Norfolk, VA, for several decades. And, in our house, we attended church services every Wednesday and Sunday and on all Christian holidays. When I returned from my Peace Corps service, I worshipped at a conservative Baptist church on Capitol Hill in Washington, D.C., before moving to Hanover, NH, to study business administration.

I moved to Maine in 2014, and my time as a student at Maine Law overlapped with Leah's and Jack's for two years. I know them in the way that people in small, academic communities know one another which, in some ways, makes their comments that much more disturbing. I felt the need to respond because I fully participate in some of the communities that Leah and Jack seek to invoke, and I think many of Leah's and Jack's opinions are overly simplistic rationalizations that, as detailed below, echo racist rhetoric of the early 20th century and seek to maintain an untenable status quo.

To Understand and Dismantle Racism, We Must Acknowledge White Privilege

White privilege is the inevitable result of racism. It is axiomatic that if one group is disadvantaged, another group receives an advantage. For well over 300 years, Blacks were deliberately and systematically enslaved and then intimidated and legislated into subordinate societal positions. White Americans were the perpetrators and benefactors of slavery, segregation, and Jim Crow laws. Current White Americans continue to benefit from the legacies left by those systems, legacies which continue to put Blacks and other people of color at a disadvantage in every facet of life.

White privilege is a necessary part of any discussion on racism because systemic racism cannot be truly eradicated unless it is fully understood. It is imperative that White Americans acknowledge that the roots of our current economic and

government systems were, *by design*, established to reinforce and sustain White supremacy. Systemic racism is not just a cop's knee on a Black man's neck. Systemic racism is also predatory lending in communities of color, high infant mortality rates among Black women, the school to prison pipeline, and the use of 911/the police as a tool to control Black people's tone or expression of joy. By understanding and combating the many different ways in which racism manifests, we can begin to truly build toward an equitable society.

White Privilege Does Not Negate Struggles Caused By Other Life Circumstances

White privilege does not negate or ignore the struggles that any White person has faced. White privilege simply means that your struggles – no matter how significant – were not *on account of* your race (in legal speak: there was no nexus between White identity and harm). As recent national events and even local police statistics have painfully highlighted, the same cannot be said for Black Americans which is why we march and shout, "Black lives matter!"

White Americans must acknowledge and accept their White privilege in order to shine a bright light on all the dark ways that racism has been normalized. Racism is insidious and pervasive, and it morphs in language and expression to remain at the fringes of what society is willing to accept as tolerable behavior. Now is the time to cast off the willful ignorance that provides the shade under which racism's roots grow unchecked.

Yet, even as we undertake the important work of dismantling systemic racism and making our institutions equitable, we must not fall into the trap of merely refashioning the tools and language of oppression to use in service to Blacks and other communities of color. There has to be another way forward, and I believe it starts with empathy.

White Privilege Is Not Intended To Shame White Americans for Being White

I didn't attend the training Leah referenced, and I don't know whether the information provided was, as Leah stated "[for] no other purpose than to shame the individuals that [sic] were white in the room." But, as a Black woman, I frequently face assaults on my humanity in large and small ways, and I know what it looks and sounds like when others feel similarly assaulted. The way that White privilege was discussed with Leah attacked her sense of who she is and what she has accomplished in life. Anyone who watches the video will immediately notice the obvious emotion in her voice. I was particularly struck by Leah's comment that she was one of "[m]any of the attorneys in Maine [who] despite having white skin, have had their struggles to achieve all of the academic achievements they have made and become attorneys."

I, too, know struggle. I have moved from poverty to economic comfort through hard work, grace, and opportunity. I know the years of singular focus and sleepless nights that it takes to reshape the very foundation of your life by sheer will. I know how feelings of "not being good enough" can tease the corners of your mind during early morning moments when you are groggy and unguarded. More importantly, I know what it feels like to believe that you have finally "made it" only to have someone – in my case, a corporate vice president – suggest that you don't belong in the one place that you've worked so hard to be a part of. The feeling is indescribable and searing – planting seeds of shame at the very core of your being.

To the Maine State Bar Association I say: *To the extent that your discrimination trainings or trainers intentionally create feelings of shame, isolation, and unworthiness merely for being White, the program and/or program providers need to be replaced.*

To Attorney Leah Baldacci I say: *I see you. I applaud your accomplishments, and I admire the determination, focus, and hard work that it took for you to overcome the obstacles you faced in life. And, I would invite you, Leah, to consider that your struggles – no matter how significant or difficult to overcome – were not caused* because *you are White.*

We Must Continue to Challenge and Reject Racist Rhetoric

I see Attorney Leah Baldacci; but, her comments illustrate that she does not see her whiteness, and she does not see me. In the days and weeks follwoing Leah's comments, many people have appropriately challenged Leah's perspective. Leah's response to these various challenges has been to become more entrenched in her position and more dogmatic in her statements. Her response demonstrates that she *does not want* to see, that she *chooses* not to see. Her opinions were and are stated as facts, as if her experience is "the" experience – these are the tools of White privilege.

I was deeply disappointed by and strongly disagree with Leah's statements, and I have told her so directly. Most, if not all, of Leah's comments are deeply problematic, but for the sake of expediency, I want to focus on her exhortation to Maine's legal leadership to not forget that "we also need to stand behind individuals that [sic] are white, Christian, and heterosexual."

In an attempt to "remind the legal community of America's history as far as racism and sexism is concerned," Leah pointed out that "Black men were given the vote before White women in this country." Leah's factually correct statement ignores the historical context that preceded and flowed from Black men winning the right to vote, very little of which is taught in our schools. Leah's history lesson also completely erases Black women from the conversation, Black women who, coincidentally, won the right to vote along with White women. Under the circumstances, I find this omission telling and laughable. Frankly, Leah may have been better served to be mindful of Maine's history.

For instance, the Ku Klux Klan (KKK) was prominent in Maine for several decades at the beginning of the 20th century – around the same time that women got the right to vote – and targeted nonProtestants, immigrants, and Black Americans, as noted in the Maine Historical Society's Memory Net. The KKK's leaders were known for gaining popularity and increasing the KKK's membership by advocating for "better government and stronger adherence to patriotism, Protestant values, white supremacy, the Bible, and Holy Scripture." Leah's insistence that Maine's legal leadership continue to support "white, Christian, heterosexuals" even as it seeks to address racism is a poor and, perhaps unwitting, attempt to clothe early 20th century KKK slogans in 21st century inclusive ideology. And, might I add, there is no evidence that Maine's legal leadership is currently failing to serve those members of the bar who do happen to be White, Christian, heterosexuals. Maine attorneys and President Day have rightly recognized and rejected Leah's comments as the racist rhetoric that it is.

Leah Baldacci's First Amendment Rights Have Not Been Violated

I would also like to address a few key points from Attorney Jack Baldacci's email supporting Leah in which he decries the reaction generated by Leah's comments and personally commits to ensuring that everyone can exercise their "Fundamental Constitutional rights without fear" of community reprisal. As an initial matter, despite Jack's gratuitous reference to *R.A.V. v. City of St. Paul*, an opinion authored by the late Justice Scalia in which the Supreme Court held that a city ordinance regulating content-based speech impermissibly violated First Amendment rights, I would like to state the obvious: Leah's First Amendment right to free speech is only implicated by government action, not by the private action of individual attorneys and the president of the Maine State Bar Association, a private, member-funded non-profit organization. To imply otherwise is an inappropriate attempt to elevate and establish Leah as a martyr for a conservative cause.

In reality, the kind of discourse that Jack purports to protect does not require that any of us accept his or Leah's opinion without debate. The swift challenges to Leah's publicly stated opinions were an important reminder that the "marketplace of ideas" remains a vibrant and critical aspect in determining who we want to be as a people and a nation. This is what democracy looks like.

It is also worth noting, that in *R.A.V. v. City of St. Paul*, the city sought to restrict the use of words that contained "messages of 'bias-motivated' hatred," including specifically, "messages 'based on virulent notions of racial supremacy.'" Jack's attempt

Looking at and talking about systemic racism is hard. Uncovering and admitting our own racial bias is difficult, messy, and can cause extreme reactions. However painful, we can – right now – choose to dig in, to understand where we are, how we got here, and what we are going to do to create lasting change.

to analogize the City of St. Paul's actions to Maine attorneys' reaction to Leah's speech is apt in that her comments fall into the category of speech that the City of St. Paul sought to limit; namely, words "based on virulent notions of racial supremacy." Beyond this, Jack's analogy fails.

Jesus Saw Ethnicity and Condemned Complacent Hypocrisy

As a Christian, I must also address Jack's invocation of God and the Bible. It is inapposite to Jesus' life and ministry to avoid addressing systemic oppression. Jack correctly stated that "God made everyone in His image," but instead of using that truth as motivation to align with his Black brothers and sisters in fighting for justice, Jack opts for a familiar and, apparently comfortable, religious trope that only benefits White Americans: "God did not mention any individual's skin color, so why should we?" This rhetorical question is problematic on many levels.

As the Apostle Paul makes clear in Philippians 2:5-7, Jesus did not use his divine privilege to bolster his position on earth, but instead used that power – that privilege – in service to others. Specific examples of Jesus' identification with and support of the abused, the forgotten, and the downtrodden people of that time can be found in the stories of the Samaritan woman (John 4:7-42), the healing of the 10 lepers (Luke 17:11-19), the woman with the issue of blood (Matthew 9:2022), the tax collector (Matthew 9:9-12), and the woman caught in adultery (John 8). Jack's perspective also misses the opportunity presented by the teachings of Jesus which regularly condemned the hypocrisy and religious complacency of those who used their ethnic lineage and superior religious and political positions to bolster their status while oppressing others. Examples of Jesus' rejection of such selfrighteous and self-aggrandizing behavior can be found in the stories of the moneychangers (John 2:13-16), the rich young ruler (Mark 10:17-27), and warning to the teachers and the Pharisees (Matthew 23). An impersonal God who does not mention – and by inference places no importance on – an individual's skin color is not the Jesus of the Gospel. The Gospel – literally, the Good News – is too important for the Bible to be a continued tool for oppression much like the slaveowners of the South did for centuries.

Racism and White Privilege Is Personal for Us All

The issue of racism and White privilege is deeply personal for me, just as it is for Leah, and just as it should be for us all. When an executive at a *Fortune 500* Company tells me that despite my educational qualifications and my strong work performance I need to be "realistic" about what a Black woman can achieve – it's personal. When I am stopped by a Cumberland police officer because – allegedly – the small light that illuminates my license plate is out on one side – it's personal. And when that same officer sees my ACLU and Maine Law tote bags in my back seat and "let's" me go only to follow me until I reach my house – it's personal. When I am stopped on my way to the gym by a Cumberland police officer who approaches my car yelling, "Do you have a gun?!" – it's personal.

Even in the face of these experiences and the ones that will inevitably come in the future, I can admit that I am still inordinately privileged because, so far, my life has not been in jeopardy.

Let that sink in.

I count myself blessed and privileged because – to date – my experiences with systemic racism have not resulted in bodily harm or death. This is where we are as a society.

And, yet, the same habits of thought and action made by each of the White men in the above scenarios – and, yes, they were all White men – are the very same habits of thought and action that, when left unchecked, result in an officer kneeling on George Floyd's neck for eight minutes. **This is not acceptable, and it must change.**

Maine Can Model the Change That America Needs

Looking at and talking about systemic racism is hard. Uncovering and admitting our own racial bias is difficult, messy, and can cause extreme reactions. However painful, we can – right now – choose to dig in, to understand where we are, how we got here, and what we are going to do to create lasting change.

Dismantling systemic racism will require us to call on and listen to the better angels of our collective nature. We will need to change ingrained collective habits of governing and policing. Many of us will also need to change aspects of our individual habits of thought and action. Change is a process that begins by wanting to change. Even though it's messy, let's change anyway – together.

LAW DAY ESSAY CONTEST 2020

FIRST PLACE

The 19th Amendment's Effect on the Political Climate of the United States of America

By William Sherrill, Lincoln Academy

The 19th Amendment to the United States Constitution was ratified on August 18th, 1920 giving American women the right to vote. Since the amendment's inception, women have played a pivotal role in the United States' elections. In fact, more women voted more often than men since 1964 (Center for American Women and Politics.) In a modem democracy, voting is not just a privilege, it is a right. By allowing women to vote, the 19th Amendment ensured that government actions reflect the wishes of the entire people.

The first hints of women's suffrage began in the mid 1800s. In 1848 the Seneca Falls Convention was held to discuss "the social, civil, and religious condition and rights of women" (Seneca County (NY) Courier.) A suffragist by the name of Elizabeth Cady Stanton organized the meeting. She presented a paper called The Declaration of Sentiments; the goal of this document was to draw attention toward the suffragist movement. Stanton gained recognition from her work with the convention, and soon she met Susan B. Anthony. The pair would later go on to lead the National Woman Suffrage Association. Despite the traction it was gaining, the suffragist movement was halted in 1861 by the start of the Civil War. However, upon the war's end, many women attempted to widen the 15th Amendment to include females. This attempt proved futile. Even so, Susan B. Anthony attempted to vote in the 1872 election and was subsequently caught and arrested. The ensuing Supreme Court case, *United States v. Susan B. Anthony*, drew attention toward Anthony's cause. Yet the movement did not die there. Colorado, Idaho, Utah, and Wyoming all granted women suffrage before the 19th century ended. The movement had its big breakthrough 19 years later, when President Wilson responded to a query regarding the creation of a Congressional Committee on Woman Suffrage. Wilson stated: "I think it would be a very wise act of public policy, and also an act of fairness to the best women who are engaged in the cause of woman suffrage" (Wilson.) With presidential support, the amendment rapidly passed through congress and was eventually adopted on August 18th, 1920.

Many black women started to experience the same voting discrimination as black men had previously experienced. They realized that states would enforce racist literacy and grandfather laws in order to stop black voters from doing their civic duty.

The process of ratifying the 19th Amendment was tedious. Thirty-six states had to ratify the amendment before it could be adopted. Many states quickly ratified the amendment but Tennessee was ultimately the deciding factor. In fact, the vote in the Tennessee House of Representatives was tied 48-48 until Representative Harry T. Bum changed the ballot. He changed his vote due to a letter that his mother had sent him, '"Dear Son ... Hurray and vote for Suffrage and don't keep them in doubt.... Don't forget to be a good boy'" (Newman). Despite being ratified nationwide, a number of southern states were late in passing the amendment. In fact, Mississippi was the last state to ratify the amendment in 1984.

Despite being adopted, the 19th Amendment did not help some women. Many black women started to experience the same voting discrimination as black men had previously experienced. They realized that states would enforce racist literacy and grandfather laws in order t stop black voters from doing their civic duty. These laws were eventually abolished, for both men and women, when the Voting Rights Act of 1965 was passed. This act "prevents states from enforcing a range of discriminatory practices legislated to prevent African Americans from participating in the voting process" (Batten.) Despite the 19th Amendment's issues, it still plays an important role in allowing women the right to vote.

As with any major piece of legislation, the 19th Amendment forced a change in politics. Electorally, women were no longer second-class citizens; instead women could have a voice in the government of their country. Politicians were no longer allowed to focus only on their male constituents; they now had to focus on all of their constituents. For the first time, women's opinions mattered in government. Women with their own political ideas started running for public office. In fact, a woman had held a high public office before the 19th Amendment's adoption. Jeannette Rankin had been elected the sole Representative for Montana in 1917. The first woman was elected to the Senate in 1932. Notably, Margaret Chase Smith, of Maine, became the first woman to hold a seat in both the House of Representatives and the Senate. More recently, women have started to receive nominations for Vice President and start bids for President. The 19th Amendment granted women their inalienable right to vote and because of that, women are closer to gaining equal footing with their male counterparts. However, societal changes must occur before misogyny is no longer commonplace.

To conclude, the 19th Amendment granted women more than just their right to vote. It opened the door for women to express their thoughts in a political manner. The United States of America is stronger because of the 19th Amendment; no democracy can truly be democratic unless everyone is equally represented. Absolutely nobody should be considered a second-class citizen, especially when it comes to the rights that create the foundation of a democracy. Just like Harry T. Bum, everyone has a mother, and that woman should not be deprived of the ability to vote.

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LAWDAY 2020

SECOND PLACE

"Do what you feel in your heart to be right—for you'll be criticized anyway" —Eleanor Roosevelt

By Cecelia Greenleaf, Mt. Ararat High School

Women did not achieve political or cultural equality when the 19th Amendment was ratified in 1920. Despite having the vote, women in 1920 still faced sexism in many parts of society, including politics, labor rights, family life and reproductive rights. By utilizing and empowering their voices, women successfully won the liberty to vote, a right that would continue to not only uplift them but drive them into future advocacy for many years to come. The19th Amendment would reform our country for the better as it brought expectations of equality that women would fight for, leading them to lives fulfilled with opportunity and independence than ever before.

From a cultural perspective, the attitudes towards whether a woman was "capable" of working outside of the home brought doubt; as for so long, women had primarily a simple (yet important) life of raising a family and retaining a clean, organized household. So was it possible that a woman could sustain and lead a successful life outside of being a housewife? World War II was just the opportunity to prove that. Throughout the first decades of the 20th century, women made up less than 24 percent of the U.S. workforce. During the war however, there was an increase in women's involvement in the workforce because as men were away, they became more self-sufficient. It was an enormous step because men had 'traditionally' been the financial provider for their families, yet women were proving they could do just the same. By 1945, women made up 37 percent of the civilian workforce, earning an average of 59 cents on the dollar compared to men (Equal Pay Act of 1963). Women had traditionally earned less than men for doing similar work, but male workers feared that this growing source of cheap labor would replace them or lower their wages. After the war, many women were pressured to go back into the role as housewives. Federal and civilian policies allowed employers to replace female workers with males and many companies would only hire men, even if they had hired women during the war. Women workers subsequently started unions and they kept working even when that meant less pay or no pay at all. By 1960, there were approximately 25 million women working outside the home (Equal Pay Act of 1963). Women were demonstrating that if they were allowed to vote, surely that should mean they should be able to work and receive an equal salary, too.

In addition to gaining more equality in the workplace, women have also made progress in other areas of society by taking part in the democratic process. For example, since 1920, women have gained financial independence, maternity leave, and more reproductive rights (Roe vs. Wade). Democracy would be a significant system that would not only enable women to take part in law making decisions, but would also allow them to elect people who would advocate for women's issues. This resulted in many major legislative and legal victories, such as The Equal Pay Act and Title 9 (Grady). After the 19th Amendment was ratified, women yearned for more, and the 19th Amendment not only encouraged them to fight on but also redefined what a woman's place in society should look like.

Regarding race, although white women were often the designated "face" of the Suffrage Movement, black women have played a huge impactful role in the ongoing fight for equality. During the Suffrage Movement, black women faced racism as they were often excluded from conventions, protests, and even marches. It even got to the point where many women of color were forced to organize separately through local clubs—eventually forming their own establishments, such as the National Association of Colored Women. However, the struggle to vote did not end with the ratification of the 19th Amendment. Some states took it upon themselves to require literacy tests and poll taxes to make it more challenging to vote. Unfortunately violence was often used as well to stop black women from coming to the ballot. It would become a routine for decades to come, where they would continuously have to face intersectional discrimination, either between their sex or race. Today, techniques such as gerrymandering and voter ID laws target people of color in order to disenfranchise them, which completely defies the exact purpose of the 19th Amendment. Even though today we still struggle with issues regarding race and sexism, the 19th Amendment is a reminder to persevere, "for you'll be criticized anyway." The 19th Amendment not

only drove women to advocate for themselves, but continues to encourage women and men to fight for equality through all aspects of society. When the 19th amendment passed, it was just the beginning. A beginning of which women would continue to speak out their values and introduce ideas to society that would forever change the United States. As a young woman myself, I greatly cherish my right to vote as it not only enables me and millions of other women in America to have a voice and influence within our country but also pushes us to strive for equality. Whether it be contending for job opportunities, fairer wages, education, or birth control, our voices will always align back to the millions of courageous women who stood among the frontlines during the suffrage movement—fighting for all of us.

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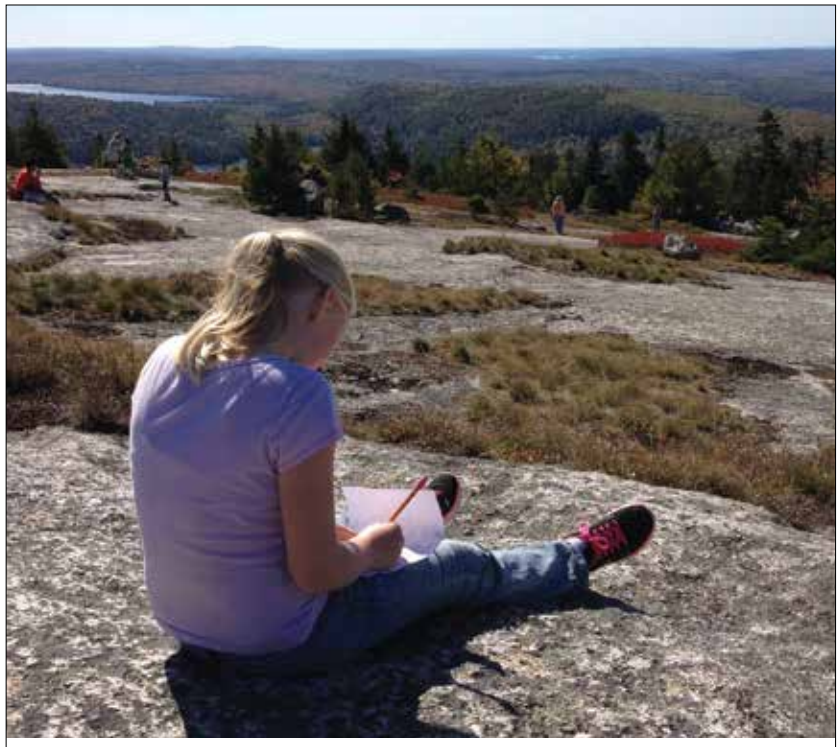

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BEYOND THE LAW: CATHERINE MILLER

Photos courtesy of Catherine Miller

Consider the oyster. For some, it has been described as an apt metaphor for life. Without grit agitating the oyster from within, its prized offspring, the pearl, would never come into being. Indeed, life's most rewarding creations come only with great effort and perseverance. Yet, sometimes an oyster is just an oyster, a delicacy to share and enjoy in the fleeting days of summer. For Catherine Miller, who runs an oyster farm with her family in Cape Elizabeth, both of these factors apply in equal measure. Maintaining oyster cages in the rough waters of the Atlantic Ocean is hardly an easy or simple undertaking. Raising these mollusks from seed to market size has not only provided Miller and her family with a shared sense of purpose, but also has provided her with a steady source of one of her favorite foods. Miller sat down with the *Maine Bar Journal* to discuss her interest.

MBJ: Please tell us about your oyster business.

CM: The name of our oyster operation is Portland Oyster Company (Po/Co). Portland Oyster Company cultivates high quality fresh Maine oysters. Our farm is located off the coast of Cape Elizabeth in a body of very cold, clear, and clean salt water. Using floating gear, our oysters are naturally chipped and shaped by the waves that tumble them to perfection. Our signature oyster is called Kettle Cove Oysters.

MBJ: Have you loved oysters your whole life or was it a taste you acquired as you became an adult?

CM: I actually never tried an oyster until I was in college. Unlike today, oysters were not around much and I never had the opportunity to have one until I was at a gathering in Wellfleet, MA. Like most people, you remember a lot about where you had your first oyster. I loved them from first bite – or should I say, "slurp."

My husband and I summered on Cape Cod during our college years. On our days off of work, we would dive for sea clams, pick mussels off the breakwater, go fishing, and often come across a few oysters in the estuaries. Our love of oysters started during these years.

MBJ: Is Maine hospitable for raising oysters?

CM: Just like lobsters, Maine is recognized around the world for having some of the cleanest, freshest tasting oysters on the market. There is a long history of oysters in Maine. The natural cold water in the Gulf of Maine causes these bivalves

to grow a little slower than in other areas of the U.S. and as a result, they tend to have deep cups full of salty meat.

MBJ: How would you describe the flavor profile of oysters that are found here.

CM: Like wines, oysters take on the flavor of where they are cultivated/grown. One oyster grown 500 yards from another could taste very different. That's the fun thing about tasting different oysters in New England or around the world, for that matter. The Maine oyster is clean and crisp. It tends to be sweet and salty which is a great combination.

MBJ: Please tell us about the process for raising oysters.

CM: Raising oysters is genuinely fun and rewarding, but like any type of farming, it is a lot of work. Each year, we purchase baby oysters 9-11mm large from a farm in Maine that grows them from spat, or seeds, to that size. We measure 4,000 baby oysters in a small measuring cup and place them in mesh oyster bags that our family builds during the off-season. Each bag has a long-line clip on it with two floats. Once deployed onto the long lines on our farm, they will bob and weave on the sea surface tumbling, eating, and growing. Each weekend during the growing period, we shake and flip the bags over to dry and they go back to growing and eating. It's easy when they are babies; the hard work comes when they get bigger and heavier.

I credit my husband and his partner for setting up the infrastructure. You have to work with the Department of Marine Resources to acquire a lease. The leased sites are very



Oysters are so much fun to bring to friends and family and everybody loves hearing about how we grow them. There is something for everyone to do in this venture.

specific as to the coordinates where your farm is located or placed in the ocean. We currently have three general lease sites in Seal Cove, near Richmond Island in Cape Elizabeth. Our location is known for being a cold and somewhat turbulent area. Because of the location, we have a clean, deep-water site that results in a lot of tumbling from the waves.

MBJ: From 100,000 seeds, how many mature oysters would you expect to harvest?

CM:We haven't figure out the precise die-off, but losing about 20 to 30% per year is not unreasonable.

MBJ: Are your oysters available in the marketplace?

CM: Yes. Given this is year four of our grow out, we will have a lot of oysters go to market this summer and into the fall. We sell to local buyers like Harbor Fish Market and The Maine Oyster Company. There are also local events we like to participate in such as oyster festivals or other special events. We have some interest from buyers outside of Maine which is interesting to us as well. Keep your eye out for Kettle Cove Oysters.

MBJ: Have you had any situations where you the oysters were lost or vulnerable?

CM: Oysters on the ocean are always vulnerable. Between the storms, green crabs, algae blooms, and long hard winters, we have lost a lot more oysters than we have brought to market. In the industry, they say you are not a true oyster farmer until you kill a million oysters. We are not there yet, but that tells you how hard it is to grow these guys and bring them to your table. Last October, we had a big four-day nor'easter that surprised us and many others.

MBJ: Were you able to recover most of the oysters?

CM: We lost over half of our oysters when bags opened up and oysters scattered everywhere. We were able to recover some, but we took a big hit in that October storm and others over the years.

MBJ: Do you have plans for an expansion of the business?

CM: Much like the oyster's attitude in Maine, slow growth is the name of the game for us. We all have full-time jobs and like any hobby, you only have so much time to dedicate to it. As a family, we tend to have a few too many hobbies. That will be the next story we can talk about.

MBJ: How do you personally like your oysters?

CM: Love them! The best in the world, of course! We put a lot of passion and energy into these creatures and we take a lot of pride in producing the best oysters in the world. Our oysters taste like the beach. There's nothing like it. If you try one, you'll know exactly what I mean.

MBJ: Somewhere, there is a clever champagne company with a great marketing department... What are some of the challenges involved in raising oysters?

CM: Not having much money to invest in the best equipment and boats is a challenge. The area we are trying to grow oysters in is a massive challenge, but that is what makes them special

and what we believe is the true value behind our product. Outside of these challenges is ingenuity and constantly improving the process or grow out methods.

MBJ: What have been some of the rewards of having an oyster farm?

CM: Well, we always have a lot of friends – just kidding. Oysters are so much fun to bring to friends and family and everybody loves hearing about how we grow them. There is something for everyone to do in this venture. Right now, my daughter likes operating the boat. She and her friend, Lila, are good at sorting oysters. We often spend time bringing home baskets of oysters and sorting them together. My son, Andrew, helps here and there and pitches in most when we need some extra muscle moving gear and oyster bags around. Patrick, our oldest son is a tremendous mechanic and keeps things running on the farm.

MBJ: What is the best advice that you have ever received?

CM: The early worm catches the fish. I am an early riser and I believe it makes a difference in how much I can accomplish in a given day.

BEYOND THE LAW features conversations with Maine lawyers who pursue unique interests or pastimes. Readers are invited to suggest candidates for Beyond The Law by contacting Dan Murphy at dmurphy@bernsteinshur.com.

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MICHELLE GIARD DRAEGER is the Executive Director of the Maine Justice Foundation as of May 2020. A native of Maine, much of Michelle's career has been spent in public service including Pine Tree Legal Assistance, the U.S. Securities and Exchange Commission in Washington DC and Boston, and serving as an Assistant United States Attorney for the District of Maine.

A View From Zoom

The late John Lewis once observed, "We may not have chosen the time, but the time has chosen us."

And what a time it is. If I told you a year ago that we would be in the midst of a pandemic complete with over 500,000 lives lost to date and economic calamity at our doorstep, I doubt I would have been believed. That I would at the same time be taking the helm, almost 100 percent virtually, of a Foundation that procures critical funding to legal service providers who ensure access to justice for over 30,000 of Maine's most vulnerable citizens annually – all while sitting side-by-side at the computer with my fourth grader decomposing fractions as part of our new virtual learning experience – I would have never believed it possible either.

I also sit here in disbelief, that in the year 2020, we are still struggling to find common understanding that we all are created equal, regardless of the color of our skin, or the groups with which we identify. It is shocking that senseless bloodshed and acts of discrimination still occur against Black Americans for undertaking the most basic of human experiences – sitting in a car, jogging in broad daylight, birdwatching or simply trying to breathe. There is so much work to do and so much opportunity to do better, collectively, for our fellow Black, Brown, and under-represented community members, as well as for our neighbors who are economically vulnerable.

As our rather surreal spring unfolded, the timing of my acceptance of this position might have seemed inopportune, but the possibility to make a difference has never been more evident. So I am grateful to have the chance, mostly by Zoom right now, to commit my mind and will to causes and conversations that really resonate with the same reasons why I went to law school and started my career in legal services at Pine Tree Legal Assistance. Indeed, as members of the Bar collectively, we have abundant skills and assets that can be leveraged by many during such challenging times. I am honored to join this effort, and I very much look forward to engaging with members of the Bar to find ways in which we can work together to steward the critical mission of the Foundation – ensuring access to justice for all.

Funds for Legal Services Severely Impacted by Pandemic-related Economic Downturn

The economic downturn ensuing from the pandemic has devastated IOLTA income on a national and local level. Due to near-zero interest rates imposed by the Federal Reserve, banks are feeling the squeeze and are, in turn, reducing interest rates on IOLTA accounts. Long-term projections on IOLTA revenue for the remainder of 2020 and possibly through 2022 are quite dire. In testimony before the Senate Finance Committee, Federal Reserve Chairman Powell indicated that near-zero rates are on track to remain in place through 2022[1]. Moreover, a May 29, 2020 press release from the National Association of IOLTA Programs (NAIP) specified that "36 [state-based IOLTA administration] programs anticipate a drop in IOLTA revenue of $123 million, or 46 percent, with the hardest hit states projecting losses of up to 75 percent." Locally, these reductions yield less IOLTA income available for legal service providers in Maine at a time when the need for legal services is rising dramatically. In Maine, IOLTA revenue for May dropped almost 20 percent from April income, and the deposits for June are down 23 percent from May.

Indeed, a drop in deposits in client IOLTA accounts due to depleted transactional work and litigation settlements of law firms during the period of COVID-19 shutdown will likely cut into IOLTA revenue further. While we can expect some recovery in this regard as businesses re-open, the level and timing of recovery is highly speculative given the potential for further shutdowns associated with COVID-19 resurgence this fall and beyond.

In addition to reductions in IOLTA income, yet another significant source of legal services funding has been drastically reduced. With months-long court closures and the attendant loss of court filing fees and fines, the Maine Civil Legal Services Fund is also suffering dramatic losses of income.

A conservative estimate of lost revenue is more than a million dollars and counting.

While the economic impact to our civil legal services safety net continues to suffer repeated blows as the pandemic continues, the detrimental effects felt by our most vulnerable Mainers has never been greater as their need for legal aid is skyrocketing. Six of Maine's legal aid providers[2] estimate that the pandemic will add $2 million worth of work to their collective budgets as legal needs become more pronounced:

- Victims of abuse are isolated with and at greater risk from their abusers.
- A tsunami of evictions and foreclosures is expected when courts fully re-open and temporary moratoria are lifted.
- Scams that prey upon elderly victims are proliferating due to social isolation and/or dependence on others for basic human needs.
- Assistance procuring public benefits is in high demand with soaring job and business losses.

What You Can Do to Help

Without question, everyone has experienced tremendous loss as a result of COVID-19 whether it be loss of life, economic, health-related, job and business losses, socialization, significant life experiences (graduations, proms, birthday celebrations, weddings, funerals) - the list is long. We can all relate and empathize with one another. Indeed, there is no benefit to comparative suffering to be had.

Those of us who are able can make a choice to make a difference, whether it be in the form of volunteering our professional services to someone in need or making financial contributions to assist those organizations on the front lines of helping others access justice. You can act today by making a much-needed donation to the Campaign for Justice (at www.campaignforjustice.org). If possible, and you are able, please consider an increased gift, because we must meet a level of need we have never seen during the history of this effort. If you have not given before and can contribute something, please do. We will be most grateful for any and all gifts. If you have already donated or pledged and are able to do more, please consider doing so. The money will not go to waste. If you have given before and cannot this year because of your own losses associated with the pandemic, please know that we understand, and we support you in making the best decision based on your own circumstances.

We are all in this together. The Maine Bar is a tremendous community of so many individuals accomplishing so much for the greater good. Despite the headwinds of the time, let us keep moving forward because, together, we will generate greater access to justice for all. As Theodore Shaw once said, "We have to take the baton when it's passed to us and run as fast and hard as we can and then pass it on to someone else." If you can, take the baton. If you cannot run toward the finish line right now, it is OK to pass it on to someone else. There are many of us here waiting for the opportunity.

ENDNOTES

1 https://www.cnbc.com/2020/06/10/fed-meeting-decision-interest-rates.html.

2 Pine Tree Legal Assistance, Legal Services for the Elderly, Volunteer Lawyers Project, Maine Equal Justice, Immigrant Legal Advocacy Project, and the Cumberland Legal Aid Clinic.

Recognizing the Champions of Justice Among the Maine Bar

It is with sincere gratitude that the Maine Justice Foundation acknowledges the work of our dedicated colleagues who have committed countless hours to ensure access to justice for members of our Maine community in dire need. The Board of the Foundation is pleased to honor three outstanding Maine lawyers who are champions of civil legal aid by presenting the following awards:

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New Lawyer Award
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We are proud to honor Jamie, Anna, and Daniel, and will feature their work in our next Access to Justice column.

WILLIAM C. NUGENT, ESQ. is director of the Maine Assistance Program for Lawyers & Judges. Bill can be reached at maineasstprog1@myfairpoint.net.

Lessons from the Pandemic

As I write this we are entering the sixth month of the COVID-19 pandemic. More than 160,000 Americans have succumbed to the virus. Worldwide the disease has claimed more than a half-million lives. None of us has lived through an experience like this.

The pandemic has disrupted our lives in myriad ways. Zoom depositions from home, sheltering in place, social distancing, wearing masks in public – seven months ago none of us had even heard of these activities. Now most of them have become routine. Moreover, the severe economic fallout from the coronavirus has yet to be completely assessed. It will take years for the economy to fully recover.

The invidious nature of the disease has been especially frightening. Asymptomatic people can be unknowing vectors of transmission. Development of a vaccine is, at best, many months away. And this is merely the first wave of the pandemic. Public health officials expect a second wave. The profound disruption of our normal routines is at best unsettling. For many, however, the consequences are more serious. It is believed that the pandemic has aggravated levels of stress, anxiety and depression. A significant increase in alcohol sales has concerned many substance abuse professionals. Preliminary statistics suggest an increase in suicides nationwide.

The devastation wrought by the pandemic makes it difficult to imagine anything remotely like a silver lining to this crisis. However, I submit there are some important lessons to be taken away from this experience. Lessons that will remain useful when COVID-19 is just an unpleasant chapter in our collective memory.

A New Perspective On What's Important

The circumstances of the past months have afforded the opportunity to prioritize aspects of our lives and focus on what really matters. There is nothing like a threat to the health and safety of our loved ones to focus us on what is most important. We have also been given the time to distinguish our wants from our needs. This experience has taught most of us that we can be quite content with much less than we previously thought we needed. (Chai lattes are nice, but toilet paper is essential.) Somewhere Henry David Thoreau is smiling: "Our life is frittered away by detail… simplify, simplify." *Walden; or, Life in the Woods.*

Whose Work Is Really Essential

First responders and front-line medical personnel have been accorded much deserved praise for their efforts during the pandemic. However there are many others whose work has made it possible to continue living a semblance of a normal life, who have not received the credit they deserve. We have been given an opportunity to understand the importance of service workers who, in the past, we might have taken for granted. Thousands of people working less-than-glamorous jobs put their health at risk to check us out at the supermarket, collect our trash, deliver our mail, and provide other essential services. Their labor has been critical for us to carry on. The risks they took to provide those services should never be forgotten and their occupations should never be regarded as insignificant.

It's a Small World

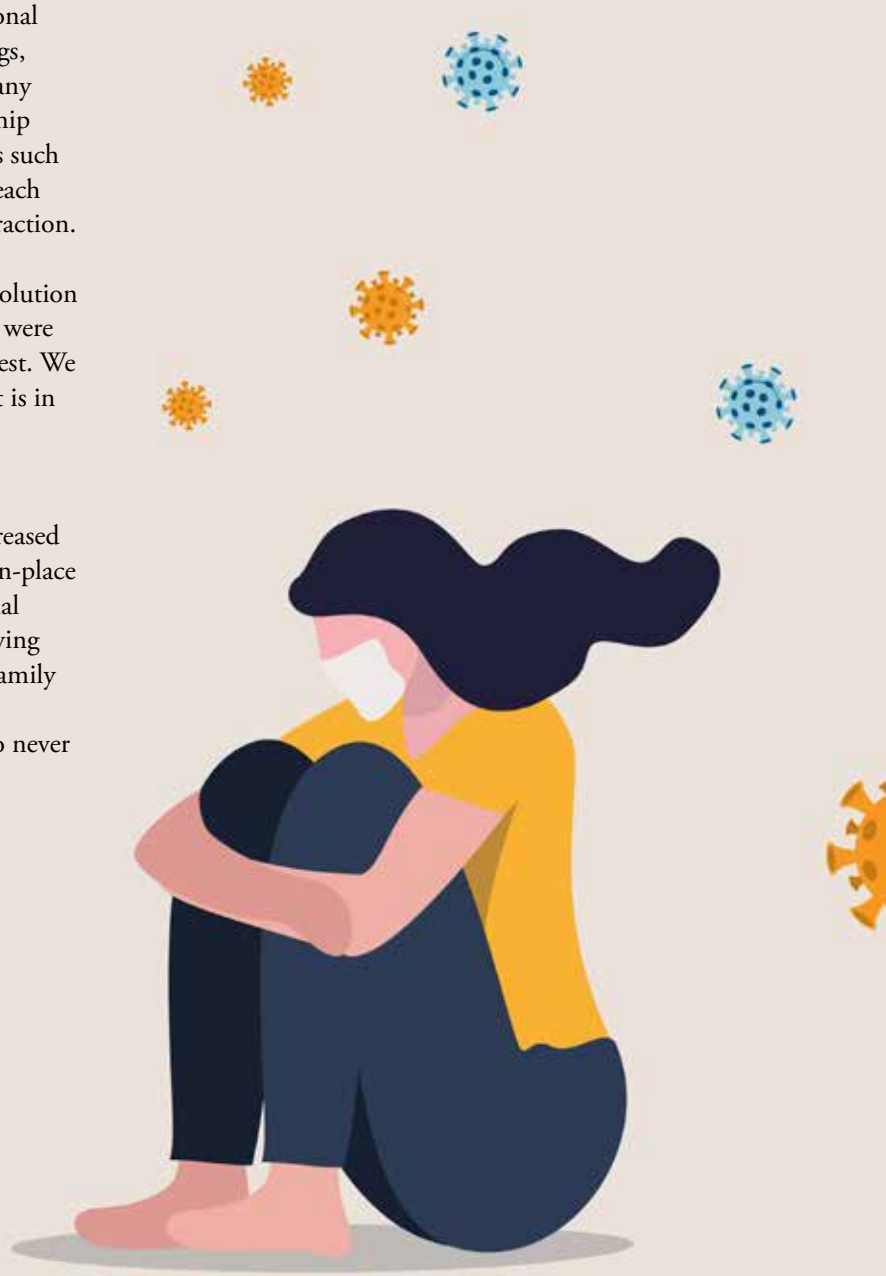
In the period of a few months a lethal disease, which appears to have originated in a single city in China, has sickened millions of victims on six continents. The velocity of the contagion has been breathtaking. COVID-19 has taught us that a seemingly small action, or inaction, can have profound consequences. Likewise the pandemic has been a caution to keep in mind that some things we might do, or fail to do, could have the power to impact the life of *someone on the other side of the world*.

Humans do not tolerate isolation well. Studies have demonstrated that social isolation is associated with increased physical illness and shorter life expectancy. The shelter-in-place and social distancing mandates created a form of personal isolation for many.

Our Need for Personal Connection

Perhaps the most significant takeaway from this experience will be a better appreciation for the importance of interpersonal contact. Social distancing has meant no handshakes, hugs, high fives or the camaraderie of a friendly gathering. Many of us did not fully grasp the importance of companionship until we were unable to gather with others. Applications such as Zoom and Facetime enable us to see and speak with each other, but that is an inferior substitute for personal interaction. Humans are social animals. We do better when we have meaningful contact with each other. Throughout our evolution humans have always needed one another to survive. We were never the largest, swiftest or strongest animals in the forest. We had to stick together. The need for interpersonal contact is in our DNA.

Humans do not tolerate isolation well. Studies have demonstrated that social isolation is associated with increased physical illness and shorter life expectancy. The shelter-in-place and social distancing mandates created a form of personal isolation for many. It was especially difficult for those living alone. The inability to come together with friends and family left many of us feeling a profound void in our lives. The loneliness occasioned by the pandemic will remind us to never take our friends for granted.



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Words in the Time of Coronavirus

On March 27, 2020, Prime Minister Boris Johnson announced that he had tested positive for COVID-19 and was self-isolating at home. Nine days later, on April 5, he was admitted to St. Thomas' Hospital in London, where he was moved to intensive care the following day.

Alarmed by this development, I posted on Facebook that Johnson had "succumbed to COVID-19." Immediately, my Facebook friends started posting comments and sending messages informing me that the prime minister had not "succumbed" to the virus because he was still alive. To my surprise, I learned that someone must die from an illness to succumb to it. I had thought someone could succumb simply by being knocked out, but not necessarily killed by it.

Learning that I had gone my whole life not understanding the true meaning of a word reminded me of the time Professor Mel Zarr informed me that I had used the word "flaunt" when I should have used "flout." By the time this incident occurred, I had joined the faculty at the University of Maine School of Law and was supposed to be a well-versed professor of legal writing. Finding out that "flout" means openly disregarding a rule or law, while "flaunt" means displaying something ostentatiously was a humbling experience. I began wondering what other words I had been using incorrectly all my life.

Facebook Feedback

After receiving so many helpful comments on my misuse of "succumbed," I decided to ask my Facebook friends for other examples of improper word usage that really bothered them. I was astounded by the response: Over the course of two weeks, 227 people sent me 106 different examples of their pet peeves. Whether it was because everyone was cooped up, self-isolating during the COVID-19 pandemic, or the topic really struck a nerve, the responses came in at a feverish pace.

People's most popular pet peeves included "irregardless," "very unique," "I could care less," and "whether or not." Many people were also bothered and confused by the use of "fewer" and "less," "affect" and "effect," "champing" and "chomping at the bit," "gerry-rigged" and "jury-rigged," "disinterested" and "uninterested," and "verbal" and "oral" communication. Several also asked about the meaning of the phrase "begs the question" and the difference between "sex" and "gender."

Some of the comments were enlightening, such as the fact that the old adage, "The proof is in the pudding," began as "The proof of the pudding is in the eating." The latter certainly makes more sense. I learned that "tow the line" is incorrect. The correct expression is "toe the line," a reference to the way runners line up for a race. Also, someone who is waiting nervously for something to happen is on "tenterhooks," not "tenderhooks." A tenterhook is a sharp hook that fastens cloth to a frame on which cloth is stretched, like a tent, to promote even drying and prevent shrinkage.

Reporting the Comments

After receiving so many responses, I knew I wanted to share the wisdom I had gained in a column. The challenge was how to report the wealth of information that flooded in. I wish I could include every example and explain every nuance, but that would take volumes, and I am only allocated a few pages for this column. To meet this challenge, I have chosen to discuss the examples that seem most important and interesting to me.

Affect and Effect

"Affect" is a verb meaning to influence. Example: The temperature of the room affected the time of death.

"Effect" is a noun meaning consequence. Example: The prose-

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cutor noted the effect of the defendant's testimony on the jury.

"Effect," used as a verb, means to cause. Example: The demonstration's goal was to effect change.

Alumnus and Alumna

A male graduate is an "alumnus." A female graduate is an "alumna." The plural of "alumnus" is "alumni." The plural of "alumna" is "alumnae." Similarly, a male can be a "professor emeritus." A female would be a "professor emerita."

Assure, Ensure, and Insure

Someone "assures" another person to remove any doubt. Example: She assured him that she would return in an hour.

To "ensure" is to make something certain. Example: The warden ensured that the cell door was locked.

"Insure" should only be used in the context of insurance. Example: Susan insures her car, her home, and her valuable art collection.

Begging the Question

"Begging the question" is a fallacy that occurs when an argument's premises assume the truth of its conclusion instead of supporting it. It is a type of circular reasoning. Example: Fruits and vegetables are part of a healthy diet because fruits and vegetables are on a healthy eating plan. (The conclusion that fruits and vegetables are part of a healthy diet depends on accepting the premise that fruits and vegetables are on a healthy eating plan. This begs the question of whether fruits and vegetables are actually good for us.)

Champing and Chomping at the Bit

Both "champing" and "chomping" at the bit are correct descriptions of impatience or eagerness. They refer to horses' tendency to champ (or chomp) on the metal bits in their mouths when eager to get going.

Common Law and Case Law

"Case law" encompasses both "common law" and other court opinions interpreting or applying enacted law.

Criterion and Criteria

"Criterion," a singular noun, refers to a standard used to make a decision. Example: Electability is the best criterion for choosing a candidate this year.

"Criteria" is the plural form of "criterion." Example: The three criteria I use when making a purchase are quality, price, and availability. The plurals of "phenomenon" and "millennium" are created in the same way. Example: We have witnessed many phenomena in past millennia."

Demur and Demure

To "demur" is to voice doubt, raise objections, or show reluctance. Example: Normally, she would have accepted the challenge, but this time she demurred.

"Demure" means modest, reserved, or shy. Example: My piano teacher was old fashioned and demure.

Disinterested and Uninterested

"Disinterested" means not influenced by considerations of

Words cannot express the grief we feel during the time of coronavirus, but we can all try to find the right ones to use when reaching out to those who have been most affected by the pandemic. To them, I offer my deepest condolences and hope that a better day will soon be dawning for our country and the world.

personal advantage. Example: An attorney is obligated to give disinterested advice.

"Uninterested" means not concerned about something. Example: When she was young, she was totally uninterested in boys.

Eminent and Imminent

To be "eminent" is to be famous and respected. Example: For many, Justice Ruth Bader Ginsburg is the most eminent member of the United States Supreme Court.

To be "imminent" is to be about to happen. Example: The children were in imminent danger of being swept away by the current.

Fewer and Less

Use "fewer" for objects that can be counted. Use "less" when referring to an amount. Example: He gained fewer pounds when he ate less food.

Farther and Further

"Farther" should be used to describe physical distance. Example: The motel was farther away than we thought.

"Further" is used to describe a measure of degree or time. Example: Let's discuss the case further tomorrow.

Flesh Out and Flush Out

To "flesh out" is to add substance. Example: She fleshed out her argument.

To "flush out" is to clear something, such as by forcing water through it. Example: The plumber flushed out our stopped-up drain.

Held, Ruled, and Stated

When a court applies a legal rule to the facts of a case, it "holds" something. A "holding" is the court's decision in a particular case. The court "rules" something when it announces a legal standard to be used in all cases, not just the case at hand. Such an announcement is called a "ruling." The court "states" something when it makes a comment that is not directly related to the current case or its holding. Such a statement is called a "dictum." Several statements are called "dicta," the plural of "dictum."

Home and Hone

"Home" means to focus in on a target. Example: The owl homed in on the unsuspecting rabbit.

"Hone" means to sharpen. Example: The chef honed his carving knife.

Internment and Interment

"Internment" is imprisoning. Example: Japanese-Americans were sent to internment camps during World War II.

"Interment" means ritual burial. Example: The grieving family attended the interment.

Jerry-rigged and Jury-rigged

"Jerry-rigged" and "jury-rigged" are both correct ways to describe something that was quickly assembled with the materials at hand. Example: The makeshift sail on the boat was jerry-rigged (or jury-rigged) moments before the race.

Lay and Lie

"Lay" means to set down. It always takes a direct object. Example: The attorney lays down the transcript.
"Lie" means to recline or remain in place. It does not take a direct object. Example: The cat lies in the sun.

Lead and Led

The past tense of "lead" is "led," not "lead." Example: The children lead the singing today. Last week, their teacher led them to the auditorium.

Plead, Pleaded, and Pled

The past tense of "plead" is "pleaded" or "pled," never "plead," which is always in the present tense. Examples: The defendant pleaded guilty. The accused bank robber pled not guilty.

Sex and Gender

The difference between sex and gender is not as clear as it once seemed to be. "Sex" generally refers to the label babies are given at birth (male or female), based on their genitalia. "Gender" refers to individuals' concepts of themselves and their gender identity. People may not agree with the sex they have been ascribed at birth and consider themselves transgender, non-binary, or gender-nonconforming.

Since and Because

Use "since" only when you are referring to a time period. Example: Since Wednesday, I have been ill.

Use "because" when you are saying "for the reason that." Example: The witness could not testify because she had laryngitis.

Stanch and Staunch

"Stanch" means to stop the flow of something or to hold something in check. Example: The EMTs saved her life by stanching the flow of blood from her wound.

"Staunch" means steadfast, loyal, and strong. Example: He was a staunch supporter of FDR.

While and Although

Use "while" only when you mean "during the time that." Example: While you were reading, I washed the dishes.

Use "although" when you mean "in spite of" or "even though." Example: Although Andrew was only two years old, he could read.

Verbal and Oral Communication

"Verbal" means in words. Verbal communication can be written or spoken. "Oral" means spoken out loud. It would be wrong to say that the judge explained the law "verbally" if you mean that she explained it out loud. To communicate that the judge explained the law out loud, you need to say that she explained the law "orally." To say that the judge explained the law "verbally" merely means she used words to explain the law. It does not indicate whether she used written or spoken words in her explanation. This distinction is particularly important in contract law. All contracts are "verbal" because they are made with words. If a contract was not in writing, it was an "oral" contract. Saying it was a "verbal" contract is not sufficient.

Conclusion

Words are important in the time of coronavirus. Perhaps the most significant word is the word that describes the tragic fate of so many people all around the world: "death."

Often the words "death" and "dying" have been replaced with euphemisms such as "passed," "passed away," "passed over," "passed on," "did not survive," "left us," "deceased," "gone to eternal rest," "met his demise," and, of course, "succumbed." Although people use these words in an attempt to soften the blow, nothing can diminish the tragedy that has unfolded over the past six months, an on-going tragedy that has not even begun to subside as I write this column at the end of June.

Words cannot express the grief we feel during the time of coronavirus, but we can all try to find the right ones to use when reaching out to those who have been most affected by the pandemic. To them, I offer my deepest condolences and hope that a better day will soon be dawning for our country and the world.

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This Is Just Ridiculous

The first time the Affordable Care Act was before the Supreme Court the challengers at least had a good faith argument that certain of its provisions exceeded the scope of federal power.[1] The second attack on the ACA to reach the Court was more dubious, but it was theoretically possible to imagine a jurisprudential principle that if Congress makes a typographical error—even one that would destroy the most important piece of national legislation in a generation—it falls to Congress, not the courts, to fix it.[2] The case against the ACA that the Supreme Court will hear this fall, however, is just flat-out ridiculous. Yet a district judge was convinced to strike down the statute based on the nonsensical legal argument opponents are now selling, and the Fifth Circuit could not quite manage to tell him that he had gotten it wrong.

As enacted in 2010, the ACA rested on three interlocking pillars: (1) the requirement that everyone have health insurance (the individual mandate); (2) the rule that insurance companies cannot deny coverage to people with pre-existing conditions; and (3) subsidies to make insurance more affordable. The idea was that the three provisions would work together to reduce the number of uninsured Americans, and to a great extent they have.

Congress eliminated the individual mandate as part of the 2017 tax bill. To be precise, it did not eliminate the requirement that everyone have health insurance, but it set the penalty for not having it at $0. This was universally understood to amount to eliminating the individual mandate: the president of the United States declared in his 2018 State of the Union address that Congress had "repealed the core of disastrous Obamacare. The individual mandate is now gone."[3] (Somewhat surprisingly, the ACA nevertheless continues to work just fine.)

Opponents of the ACA then had the following idea. The Supreme Court had upheld the statute's constitutionality in 2012 on the theory that the penalty for violating the individual mandate was a tax. That "tax" was now set at $0. A payment of $0, the reasoning went, cannot be a tax. And if it is no longer a tax, the individual mandate must now be unconstitutional.

To which a sensible person would respond: So what? By setting the penalty for not having health insurance at $0, Congress for all practical purposes eliminated the individual mandate. The requirement that everyone have health insurance remains on the books, but with the consequences of noncompliance removed, it has ceased to be a mandate with any force or effect. That being so, whether the individual mandate is constitutional or unconstitutional at this point is of no real concern to anyone. Except for 19 Republican-led states and a judge in the Northern District of Texas, who accepted their argument that because a penalty of $0 cannot be a tax, the federal government does not have the power to impose it.

Which would have been fine, as just explained—except that after ruling that the individual mandate is unconstitutional, the district court then made the astounding determination that this now-meaningless provision—a mandate backed by a $0 penalty—was so integral to the whole statutory scheme that if Congress had known that it would be struck down, it would have wanted the entire ACA to go too.

"The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480

U.S. 678, 684 (1987). In other words, there is a presumption of severability. So the question was whether it is evident that if Congress had known that an individual mandate backed by a $0 penalty was unconstitutional, it would not have set the penalty at $0. The answer is obvious: because an individual mandate backed by a $0 penalty is a thing of no consequence, Congress would have been indifferent to whether it was constitutional. It is not even remotely plausible to imagine that when Congress set the penalty for noncompliance with the individual mandate at $0—a move the president described as repealing the individual mandate—it believed it was essential to the statutory scheme that the "repealed" mandate this $0 penalty backed remain on the books. But that is what the district court found. *See Texas v. United States*, 340 F. Supp. 3d 579, 617 (N.D. Tex. 2018) ("If the 2017 Congress had any relevant intent, it was . . . to preserve the Individual Mandate, *which the 2017 Congress must have agreed was essential to the ACA*.") (emphasis added).

It is true that the 2010 Congress that enacted the ACA in its original form understood the individual mandate to be essential to the statutory scheme. But it could not be clearer that the 2017 Congress that eliminated the penalty for violating the individual mandate did not—or else it would not have set the penalty at $0 while leaving the rest of the statute in place. As the dissenting justice on the Fifth Circuit put the point, "a severability analysis will rarely be easier. After all, [o]ne determines what Congress would have done by examining what it did, and Congress declawed the coverage requirement without repealing any other part of the ACA." *Texas v. United States*, 945 F.3d 355, 416 (5th Cir. 2019). But the other two judges on the panel for some reason struggled with this easy severability analysis, inexplicably remanding the case to the district court while citing "the need for a careful, granular approach to carrying out the inherently difficult task of severability analysis in the specific context of this case." *Id*. at 397. The Supreme Court, presumably sensing the pointlessness of that exercise, then stepped in, and will hear the case in the fall.

Even Jonathan Adler, the conservative law professor who spearheaded the second challenge to the ACA, sees that this one is baseless, writing that when it acted in 2017, "Congress expressly left the rest of the statute in place—including the insurance protections the Justice Department now says, in the name of congressional intent, must fall. We don't have to ask what Congress intended because we can see what Congress did. Game over."[4]

This case really is that simple. The only puzzle it presents is how it even made it up to the Supreme Court in the first place.

ENDNOTES

1 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).
2 *King v. Burwell*, 135 S. Ct. 2480 (2015).
3 Dylan Scott, "Trump's State of the Union claims about Obamacare's individual mandate, fact-checked," *Vox*, Jan. 30, 2018.
4 Jonathan H. Alder and Abbe R. Cluck, "An Obamacare Case So Wrong It Has Provoked a Bipartisan Outcry," New York Times, June 19, 2018.

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EVAN J. ROTH After nearly 20 years in Portland as an assistant U.S. attorney, Evan is now an administrative judge for the Merit Systems Protection Board in Denver. He can be reached at evan.j.roth@icloud.com.

[I]n this world, with great power there must also come—great responsibility.

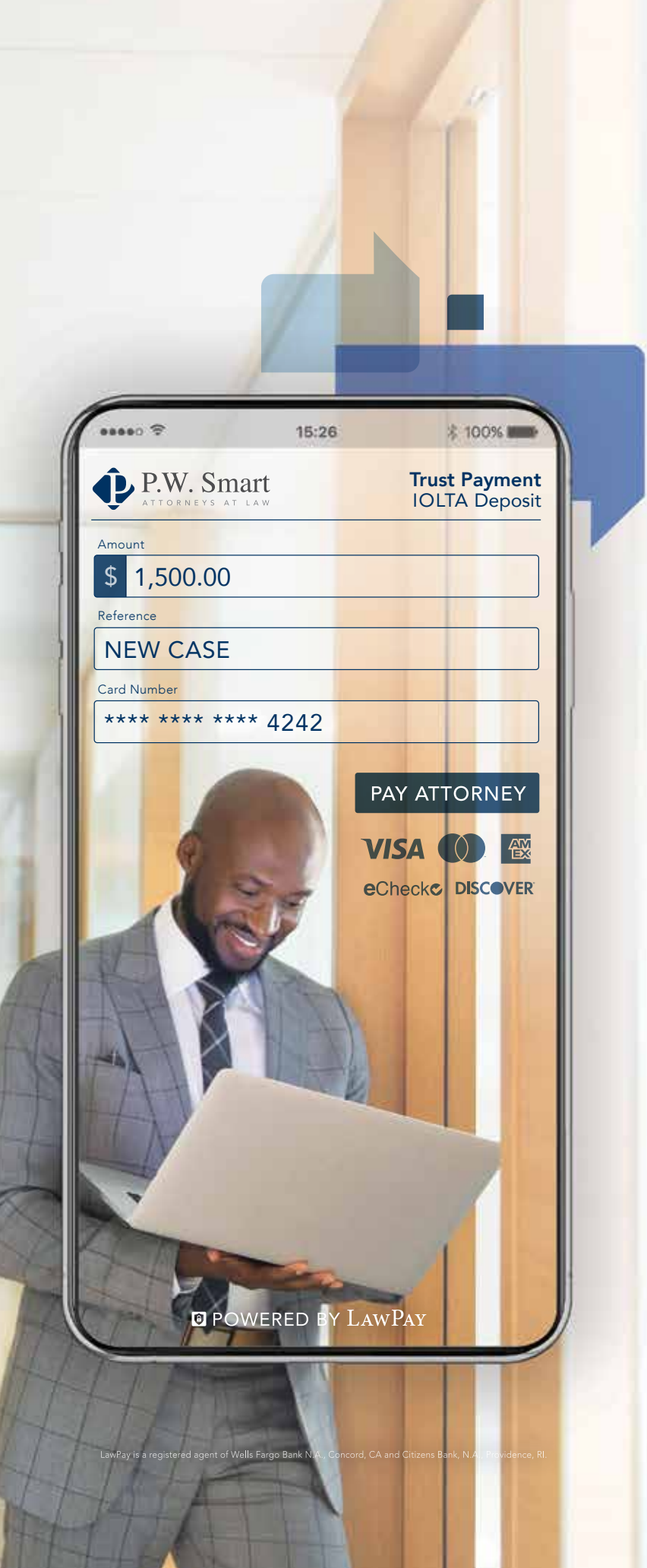
Kimble v. Marvel Entertainment, LLC, 135 S.Ct. 2401, 2415 (2015) (quoting S. Lee and S. Ditko, Amazing Fantasy No. 15: "Spider–Man," p. 13 (1962)).

Kudos to Stephen Kimble who, in 1990, patented a Spider-Man toy, known as the "Web Blaster," which fits around the wrist, and shoots pressurized foam strings that are meant to look like superhero spider webs. Kimble licensed the rights to Marvel Entertainment in exchange for $500,000 plus an annual royalty payment.

Soon after the agreement, Marvel's lawyers devised a way to bring an end to those annual royalty payments. Marvel sought and obtained a declaratory judgment based on an obscure Supreme Court decision, *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), in which the Justices announced a rule that, regardless of any contractual arrangements, royalty payments must cease upon the expiration of the underlying patent. For Kimble, 2010 was the patent expiration date.

When the case reached the Supreme Court, the debate involved *stare decisis*: the doctrine that legal precedents must be followed except in unusual circumstances. Justice Alito took the position that *Brulotte* was an unusual case that should be overturned because it imposed a wrongly-decided judge-made rule that interfered with an inventor's right to earn income from his or her patent. The majority, however, reaffirmed *Brulotte* and ruled in favor of Marvel. Writing for the majority, Justice Kagan emphasized the importance of exercising caution before overturning legal precedent. In support of her judicial restraint philosophy, Justice Kagan summoned the famous motto of the Web-Slinger's creators, as quoted above.

Disclaimer: The views expressed are those of the author and do not necessarily represent the position of the Merit Systems Protection Board or the United States government.



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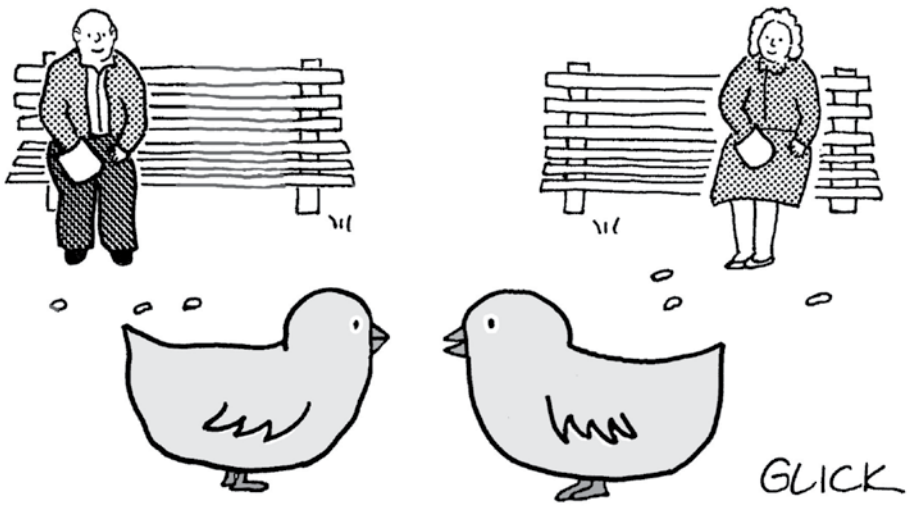
JEST IS FOR ALL

By Arnie Glick

"My lawyer has advised me that when the bread crumb hits the ground, it is deemed to be a completed gift."



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The MSBA offers grateful thanks to these members, whose additional support makes possible some of the work of the Association on behalf of the lawyers and residents of our state.

2020

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Sustaining memberships permit MSBA members to make additional commitments to the Maine State Bar Association. As established by the MSBA's Board of Governors, an individual Sustaining Membership is $100 in addition to a member's regular membership dues.

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MSBA Member Benefits

BUSINESS SERVICES

- Casemaker (free online legal research)
- Maine Bar Journal
- CLE & CLE Club Membership
- Annual Bar & Summer Bar Conference
- Discounted Services & Products
  - ABA Books for Bars
  - Clio
  - Conference Calling
  - CuroLegal Consulting Services
  - Earthlink
  - Evergreen Decisions
  - Expedia
  - FedEx
  - LawPay (credit card processing)
  - Paychex
  - Smith.ai (virtual receptionist)
  - Verizon Wireless

FINANCIAL & INSURANCE SERVICES

- ABA Retirement Funds
- Health, Life, Dental & Disability Insurance
- Automotive, Homeowner's & Renter's Insurance
- Long-Term Care Insurance
- Professional Liability Insurance

PERSONAL & NETWORKING SERVICES

- ALPS Attorney Match
- Silent Partners (helping lawyers deal with problems in substantive and administrative areas of law)
- Online Career Center
- Online Member Directory

CALL 1-800-475-7523

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The MSBA's Silent Partners program offers low-key assistance to lawyers in dealing with problems in substantive and administrative areas of the law where there may be a lack of familiarity or comfort, where some help and guidance would benefit both the practitioner and the client.

The coordinator has a list of attorneys associated with organizations, sections, and committees who are willing to provide help. The program provides confidentiality recognized by the Supreme Judicial Court in Maine bar Rule 7.3(o). We can provide guidance and assistance in most areas of law.

Admiralty Law
Appellate Practice
Bankruptcy
Business Associations (Corporation/ Partnership)
Civil Rights/Discrimination
Collections
Commercial and Consumer Law
Criminal Law
District Court Practice
Economics and the Practice of Law
Education Law
Elder Law
Employment Law
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Ethics
Family Law
General Practice
Gender Bias
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Labor and Employment Law
Litigation
Mediation
Medical Malpractice
Municipal Law
Natural Resources/Environmental Law
Probate Law
Real Estate
Tax Law
Trademark
Social Security Disability
Workers Compensation

To learn more, call Angela Armstrong at 207-622-7523 or email aarmstrong@mainebar.org.

MSBA NOMINATING PETITION

(Must be filed no later than October 1, 2020)

We, the undersigned voting members of the Maine State Bar Association in good standing, nominate

____

(Please print NAME)

for:

____

(Office or Board. If latter, indicate district number or at-large category.)

of the Association for the term beginning January 1, 2021.

Signature	____________	Signature	____________
Print Name	____________	Print Name	____________
Address	____________	Address	____________
	____________		____________
Signature	____________	Signature	____________
Print Name	____________	Print Name	____________
Address	____________	Address	____________
	____________		____________
Signature	____________	Signature	____________
Print Name	____________	Print Name	____________
Address	____________	Address	____________
	____________		____________
Signature	____________	Signature	____________
Print Name	____________	Print Name	____________
Address	____________	Address	____________
	____________		____________
Signature	____________	Signature	____________
Print Name	____________	Print Name	____________
Address	____________	Address	____________
	____________		____________

INSTRUCTIONS FOR MAKING NOMINATIONS

Under Article IX of the MSBA Bylaws, any member eligible to vote may nominate a candidate for office of the Board of Governors by signing the nominating petition and filing it with the Executive Director of the Association by October 1. A minimum of twenty (20) eligible members may nominate a candidate for officer of the Board of Governors. A minimum of ten (10) eligible members may nominate a candidate for district governor or at-large governor. Whenever a contest exists, the Executive Director shall send ballots to each appropriate district for contested governor races or to the membership at-large for contested officer or at-large position races.

OFFICERS are elected at-large; GOVERNORS are elected by resident members in their respective districts, except for the Public Service Sector and In-House Counsel Governors, which are elected at-large.

OFFICES TO BE FILLED

Offices to be filled are those of Vice President, five Governors by district election, and two Governors by general election. 2020 President-Elect Kelly W. McDonald becomes President automatically and 2020 Vice President Frank H. Bishop, Jr. becomes President-Elect automatically. Districts to be voted on are: Three (Cumberland – two seats); Four (Sagadahoc & Lincoln); Five (Androscoggin); and, Seven (Somerset & Piscataquis). At-large positions to be voted on are: In-House Counsel and Public Service Sector.

MSBA CLE

CALENDAR

Maine State Bar ASSOCIATION
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LIVE WEBCASTS

SEPTEMBER 22
19th Annual Employment Law Update | 6.25, including 1.0 H&D

OCTOBER 5
Dealing with Difficult People | 1.0 H&D

OCTOBER 23
2020 Advanced Federal Practice | 6.0

NOVEMBER 16-18
Legal Year in Review (Virtual Conference) | TBA

LIVE WEBINARS

SEPTEMBER 10
Discrimination in the Law Today: A Serious, Sneaky Situation | 1.0 H&D

SEPTEMBER 17
Litigation Holds: Triggering Events, Scope of Hold & Consequences | 1.0

SEPTEMBER 22
19th Annual Employment Law Update | 6.5, including 1.0 H&D

AUDIO WEBCASTS

SEPTEMBER 8
Baskets & Escrow in Business Transactions | 1.0

SEPTEMBER 9
Planning with Single Member LLCs: Part I | 1.0

SEPTEMBER 10
Planning with Single Member LLCs: Part II | 1.0

SEPTEMBER 11
Selection & Preparation of Expert Witnesses in Litigation | 1.0

SEPTEMBER 14
Ethics & Digital Communications | 1.0

SEPTEMBER 15
Income & Fiduciary Tax Issues for Trust and Estate Planners: Part I | 1.0

SEPTEMBER 16
Income & Fiduciary Tax Issues for Trust and Estate Planners: Part II | 1.0

SEPTMEBER 17
Real Estate Finance: Trends & Best Practices: Part I | 1.0

SEPTEMBER 18
Real Estate Finance: Trends & Best Practices: Part II | 1.0

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124 State St.
Augusta, ME 04330

The MSBA is committed to serving our members as well as supporting our employees during these uncertain times. In order to minimize physical contact, the MSBA office is closed to the public until June 1, 2020. However, the staff is working remotely and is available to assist you. Please continue to contact us through email, telephone, and regular mail. Thank you.

MAINE STATE BAR ASSOCIATION

124 State St.
Augusta, ME 04330

CONTINUING LEGAL EDUCATION
T: 207.622.7554
or 877.622.7554
F: 207.623.0083
cle@mainebar.org

MEMBERSHIP & MEMBERSHIP BENEFITS
T: 207.622.7523
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Maine State Bar Association: Always Here For You

Now more than 2,800 members strong, the Maine State Bar Association is the largest and most active alliance of lawyers in Maine. Our members include active and inactive attorneys, judges, law professors, corporate counsel and government lawyers. The goal of the MSBA is to provide its members with membership services and benefits to enhance their practice and enrich their experience in the legal profession. Our MSBA leadership and professional staff are dedicated to meeting your high expectations of quality, commitment and service.