Law Podcasts & Legal News

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32 Grave Error
A determined Chicago mother hires a lawyer to prove her missing son was not a John Wayne Gacy murder victim.

BY TORI TELFER

44 Standing Back
To reduce the use of deadly force, police departments are implementing de-escalation training. Does it work?

BY KEVIN DAVIS

52 Identity Crisis
Do inconsistent legal definitions of race leave room for abuse of minority contract programs?

BY EMILIE LE BEAU LUCCHESI
In This Issue

6 President’s Letter
Patricia Lee Refo shares her experience as a first-time juror.

9 Inter Alia
9 INTERSECTION Increasing attacks on Asian Americans shine a light on the need for stronger hate crime laws.
10 MAKING IT WORK A lawyer shares lessons learned over 13 years of working remotely.
12 10 QUESTIONS Jeopardy! winner Zach Newkirk champions voting rights.
13 ON WELL-BEING Combat stress by balancing your “body budget.”

16 National Pulse
16 CONSUMER LAWS With regard to environmental and consumer laws, as California goes, so goes the nation.
18 CRIMINAL JUSTICE Former inmate firefighters face barriers getting jobs fighting fires after their release.

20 Business of Law
20 LAW FIRMS How firms benefit from having a chief financial officer.
22 TECHNOLOGY The new personalized health care frontier calls DNA privacy into question.
25 TECHNOLOGY The first all-virtual ABA Techshow highlighted the use of remote conferencing tools.

28 Practice Matters
28 YOUR VOICE As a lawyer, you learn how to argue with piercing logic. But do you know how to use silence?

30 WORDS Need to finish three case filings in one day? Here’s how an experienced legal writer would handle it.

60 ABA Insider
60 MEMBERS WHO INSPIRE Rajesh Reddy heads the world’s first LLM program in animal law.
62 ABA LEADERSHIP Meet Deborah Enix-Ross, the ABA president-elect nominee.
63 Board of Governors candidates share their experiences and plans for the ABA.
66 ABA EVENTS Check out these eight events and mark them on your calendar.
68 GOVERNMENTAL AFFAIRS Children have more access to counsel because of the Family Justice Initiative.

72 Precedents
In June 1992, the U.S. Supreme Court found that a Mexican doctor’s abduction from Mexico by the Drug Enforcement Administration did not prohibit him from being tried in the U.S.
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All Rise for the Jury

Serving as a juror was an unexpected duty during my year as ABA president

BY PATRICIA LEE REFO

“All rise for the jury” is something I have heard scores of times as a trial lawyer. But this time, and for the first time, I heard them as a part of a jury.

As the ABA president, and in the middle of the pandemic, I got a summons from the U.S. District Court in Phoenix to appear for jury duty in May. When I called the recorded line the night before, I was instructed to appear in person at 8 a.m. the following day. When I arrived in the jury assembly room, with the chairs all in socially distanced rows, there were 28 of us. All were there for one civil case.

The court had sent us a questionnaire in advance asking about scheduling challenges, basic personal information and COVID-19 concerns, plus a few case-specific questions. Presumably, those responses were used to excuse in advance those who were unable to serve for this three-day trial.

After watching a well-done orientation video, we were escorted upstairs to the ceremonial courtroom—the largest in our courthouse. We sat in socially distanced and designated seats, answering questions from the court and a few follow-up questions from each side. After a recess during which they sorted out challenges to the venire, eight were called forward to take seats inside the jury box. I was the last one called up. I was now juror No. 8. For the first time, I was serving on a jury.

“Everything about my experience bore witness to the majesty that is the American jury system, even with the challenges of a pandemic.”

Pandemic safety procedures made the experience different from “normal” jury service. The jury rooms were not large enough to safely hold all eight of us, so there was one jury room for the four of us who sat in the front row of the jury box and a different room for the back-row jurors. For the two days we heard evidence, we front-row jurors got to know one another in our jury room, but we did not interact with the back-row jurors beyond the occasional “Good morning.” We also ate better than nonpandemic juries because the court provided lunch for us every day, not just the day we were deliberating.

Of course, pandemic safety continued inside the courtroom. Everyone was spread out. Everyone wore masks all the time, except witnesses, who could remove their masks at the start of their testimony (from behind plexiglass) but had to put masks on after 15 minutes.

Even with strong microphones, the masks meant that more than a few questions and answers had to be repeated. When closing arguments and instructions were finished, the judge cleared the courtroom and turned it over to us for our deliberations.

“Heart and lungs of liberty”

Our founders believed so strongly in the right to a jury trial that they wrote it into our Constitution. John Adams said: “Representative government and trial by jury are the heart and lungs of liberty.” They were so right.

Everything about my experience bore witness to the majesty that is the American jury system, even with the challenges of a pandemic. Eight citizens with nothing in common came together and worked together to deliver justice to the parties. Each listened carefully and respectfully to the views of others, willing to reassess his or her own views when appropriate. We each brought to the deliberations our own disparate life experiences in assessing the credibility of others, and yet those different experiences often got us to the same conclusions.

When there was a question about a fact, we would review our notes and the exhibits and discuss our recollections of the testimony. When there was a question about the law, someone would go back to the language in the instructions—we each had a copy—and find an answer. The discussion was thoughtful, filled with give and take, and driven ultimately by the desire to do justice based upon the law we had been instructed to apply. We moved, during those deliberations, from being eight jurors into being one jury.

It is the jury, not the jurors, for whom we rise in respect.
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**Letters From Our Readers**

**Diverse judges**

In reference to “Reimagining Federal Courts,” April-May, page 9, I served as a law clerk for two district court judges: a white male appointed by President Donald Trump and a Black female appointed by President Barack Obama.

As individuals, the former was politically conservative and the latter liberal. As judges, they approached cases in the exact same way: The first question they would ask when we began discussing a pending motion was, “What does the Circuit say?” Both let the law, and not their political ideologies, lead them to the result.

Jo Neuman
Mandeville, Louisiana

Liane Jackson’s “Reimagining Federal Courts” rightly emphasizes the importance of restoring public trust in our courts. To that end, diversity on the bench should be pursued with vigor.

In comparing the percentage of non-white Donald Trump-appointed Article III judges (16%) to Barack Obama’s (36%), she also correctly characterizes this aspect of Trump’s legacy—the least-diverse pool in the modern era—as disappointing. But Trump did appoint a slightly greater proportion of women to the bench (24%) than either Bush.

Still, the political nature of appointments cannot be ignored. To the extent that presidents appoint members of their own party, Democrats enjoy demographic advantages over Republicans in achieving diversity. It’s unfair to suggest that Republican presidents should have impaired discretion on account of the less-diverse composition of their party rolls. A better rubric would take account of the number of opposing-party appointments—if any—and independents. If only presidential appointments were driven more by judicial qualifications, character, talent and excellence than by party affiliation.

Thomas E. Simmons
Vermillion, South Dakota

**‘Unqualified psychobabble’**

I was a licensed psychotherapist before I became a lawyer, and I am a Californian to boot. But am I alone in engaging in mental eye rolls on what I consider to be unqualified psychobabble in the On Well-Being columns?

Surely there is something informative and entertaining that could go in its place. How about a column that contrasts some aspect of U.S. law with other countries’ laws?

Linda J. Vogel
Pomona, California

**Interpreting the Constitution**

Professor Philip Meyer’s informative article “Origin Stories,” February-March, page 24, leaves out one particularly important voice. No one has had a greater impact on interpreting the Constitution than U.S. Chief Justice John Marshall.

Marshall was of the Revolutionary period. He was Thomas Jefferson’s cousin and rival, a friend of James Madison, and especially of George Washington, with whom he served at Valley Forge. He played a prominent role in Virginia’s ratifying convention, and most important, he sat as the fourth chief justice for 34 years.

Serving early in the court’s existence, he rendered opinions (often unanimous) that read the Constitution broadly. He created judicial review, a concept nowhere mentioned in the Constitution. After 200-plus years, it seems futile to search for the precise meanings of words used by the framers or as understood by the public at that time. Marshall, as a contemporary of that era, certainly didn’t feel the necessity. Even Justice Antonin Scalia recognized that originalism, as that effort is known, can be a dead end. For example, he conceded that in the late 1700s, whipping prisoners would likely not been a violation of the Eighth Amendment prohibition against cruel and unusual punishment, though clearly abhorrent today.

Marshall had it right: Be instructed and guided by the words of the Constitution, but if possible, make the document work for the good of a growing and complex country.

Calvin Bellamy
Munster, Indiana

**Correction**

In Letters From Our Readers, April-May, page 8, the verb “was” was erroneously added to the first line of Thomas Goetzl’s letter.

The Journal regrets the error.

**Letters to the Editor**

You may submit a letter by email to abajournal@americanbar.org or via mail: Attn: Letters, ABA Journal, 321 N. Clark St. Chicago, IL 60654. Letters must concern articles published in the Journal. They may be edited for clarity or space. Be sure to include your name, city and state, and email address.

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**ON THE WEB**

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Targeting Hate
Bigoted attacks must be met with stronger protections
BY LIANE JACKSON

The rise in hate crimes against Asian Americans in recent years shouldn’t come as a shock. A long history of discrimination and racial prejudice piled the kindle; incendiary political rhetoric lit the fire. So now, in the wake of the March 16 mass killing of six Asian American women in the Atlanta area, an acknowledgment of the terror perpetrated against this community has become part of our national reckoning.

Police charged Robert Aaron Long with eight counts of murder in the attack, which catalyzed a movement to address harassment and bias incidents against Asian Americans. Hate crimes against this ethnic group rose about 150% in major U.S. cities last year, an underreported fact that is now front and center.

As often happens with communities of color, there was an invisibility to the victims until a moment in time when something truly horrific happened and captured the national conversation.

The Atlanta slayings were that call to action. The national spotlight has turned to the causes and prevention of attacks on Asian Americans. Some politicians who aggressively blamed China for the coronavirus pandemic encouraged xenophobia. President Donald Trump referred to COVID-19 as the “China virus” and the “kung flu,” further stigmatizing Asian Americans. These dog whistles are just the latest in our long and troubling history of disease racialization and minority scapegoating that too often ends with targets on backs.

For a variety of reasons, including voluntary reporting and a lack of police training or acknowledgment of bias incidents, tracking hate crimes is challenging and imperfect. There were 122 incidents of anti-Asian American hate crimes in 16 of the country’s most populous cities in 2020, according to data compiled by the Center for the Study of Hate and Extremism at California State University, San Bernardino.

The group Stop AAPI Hate received reports of 3,795 hate incidents over a period of nearly 12 months since the pandemic began. And a Pew Research Center survey found that 31% of Asian Americans had been subjected to racial slurs or jokes in the same time period.

The scarlet R
Authorities often downplay or fail to acknowledge killings within communities of color as acts of terrorism or label them hate crimes, particularly when the perpetrator is white. This racial blind spot does nothing to alleviate ongoing concerns about bias within police ranks.

During a press conference, a Cherokee County Sheriff’s Office spokesman said Long told police vengeance for his “sex addiction” was the motive for the shootings, not race. Capt. Jay Baker also noted the killings were a result of Long having “a really bad day” and wanting to eliminate temptation, a bizarre statement that sounded dangerously close to victim-blaming. And
Long’s “bad day” can’t compare to the devastation experienced by his victims and their families.

Fulton County prosecutors have indicated they plan to seek hate crime charges against Long. But a police spokesperson downplaying the likelihood of racial animus isn’t a stretch. It reflects the reluctance of law enforcement to paint perpetrators with the scarlet R—racism as a motivation for a crime—absent a noose or a swastika or racist screeds uncovered online. This country has long preferred to view itself through the rose-colored lens of a post-racial society, even when that hue is from crosses burning in the background. According to FBI hate crime-tracking records, over 80% of participating jurisdictions reported zero bias incidents in their cities every year since 1996, a statistic that strains credulity.

Bias interrupters
The truth is, there can be multiple factors prompting an attack—mental illness, bigotry, misogyny, rage. Motives are not mutually exclusive. It’s also true that hate crimes are extraordinarily difficult to prosecute because they require proving the defendant’s bias was one of the primary reasons for committing the criminal act. This creates an unwieldy burden of proof.

Despite this fact, in a rare demonstration of bipartisanship, the U.S. Senate in April passed a hate crimes bill addressing the rise in attacks against Asian Americans. Among other things, the bill creates a Justice Department position focused on the issue and improves data collection and reporting requirements. At press time, the House was set to vote on the bill the week of May 17.

But not everyone wants to expand hate crime laws and increase criminal penalties, because they view it as another extension of the carceral state. Some argue that these laws would allocate more funding and power to police—controverting the current movement to limit overpolicing. Most hate crime laws enhance sentences for crimes that already carry significant penalties instead of creating new offenses that might not otherwise be prosecuted. And they are often erratically applied, when charges are brought at all. In addition, a hate crime charge could make a straightforward case more complex and harder to win.

Some advocates say resources that would be diverted to training and equipping law enforcement to target and track hate crimes could go toward public education, prevention services and grants to assist targeted communities in other ways.

But even if a hate crime designation is more symbolic than anything else, there is power in calling things what they are. Though these laws are imperfect, they are a means of calling out bias-based attacks and showing members of a community that their concerns are being taken seriously. Yes, there should be a reevaluation of how hate crime laws are constructed, the range of offenses they target and opportunities for alternative punishments that include bias-elimination education and resources for community services. But hate crime laws are important: They send a message to targeted communities that the justice system has their back, and they let perpetrators know there is a steep price to pay for bigoted attacks.

The pandemic has done what I never thought possible, validating what I have known for some time: When one works from home, one is actually working. Despite the industry’s negative projections during the early stages of COVID-19, our firm had a profitable year with all of us working from home.

I began working “remotely” in 2008, well before COVID-19 sent the rest of America home. I was an in-house attorney, traveling the world, with four little kids, one with special needs, when one day my daughter’s therapist told me straight out that my daughter needed me home more. Staying in my job and being home for my daughter was not possible. So I decided to take 12-18 months “off” and focus on my family. We moved to Costa Rica to get away from it all. But as former clients called with work opportunities, I soon found a path I normally would have considered too risky, one where I could still practice and do it from home. What was to be a 12-to-18-month hiatus turned into remote working for nearly 13 years, because even when I returned to a firm, I continued working remotely.

Challenges and rewards
As everyone has learned, it is not easy working at home. When I started, people were not amenable to a crying child or the dog barking (or in some cases, my family chasing the cows out of our yard) during conference calls. But the benefits of being there for my daughter when she needed a hug or going for a midday run with my sons outweighed
the isolation. Of course, the primary detriment is that when you can work from anywhere, the result often is that you never stop working.

At this point in the pandemic, many have figured out tricks to make working from home work, at least temporarily. But even after 13 years, COVID-19 threw a wrench into my routine by bringing schooling home.

I am not superhuman—I cannot watch the kids and/or my parents and draft a shareholder agreement at the same time. Working from home does not mean you suddenly have time for all of these consuming tasks. I could never have succeeded in this alone. I am fortunate that my husband has carried the burden of home care. He shops, cooks, shuttles the kids and the parents, and he is there when we all get sick. What I’ve learned is that you will not survive without help, whether it is your partner, family member, friend, sitter or a combination. Between clients’ demands and long hours, it is not realistic to work from home with kids (or parents) alone. You need someone you can count on to manage the household while you work, or it becomes an impossible situation.

A second critical element to my survival is a schedule. We all set schedules. But like New Year’s resolutions, most fall apart within weeks. Yet structure remains key. I schedule my work events, my kids’ events, my events—running, breakfast, lunch, meeting up with friends. I cannot count how many days I have asked myself, “Have I eaten today?” I schedule when I start work and when I stop; otherwise, I may never stop. It is midnight right now. Also, do not forget to sleep. My impossible goal is seven hours every night.

**Remote work that works**

Everyone working from home needs his or her own space that is preferably not the kitchen table. I have my office with monitors, a work phone and the curtain my daughter painted that serves as my door. When the curtain is closed, everyone knows I am working. But since my daughter’s school went online, she has taken over my office and closes the curtain when she is “in school.” My husband and I work from the kitchen table.

Bad internet, poor connectivity to the office and low ink supply levels are the bane of my existence. I have installed every tool to bump up internet service, but that spinner still appears. My yard is being dug up to install Google fiber. Maybe that will save me—along with buying at least five ink cartridges at a time.

Working virtually, I discovered I have to respond faster than when I am in the office; otherwise, “they” wonder where I am. But this is changing as more people work from home. Previously, if I was not in the office, I was invisible to the team. So I spend extra time on phone calls and now in Zoom meetings.

But I have more self-determination working remotely. I stop working when I choose. I run with my sons. Ski if we are lucky. Pick up the kids from school. Take them for a slushie. When I am sick, I try not to work. I try to remember why I decided to work from home.

I do not want to minimize the devastation that COVID-19 has caused or the particular impact the pandemic has had on women having to leave the workforce. The world will never be the same. None of us will be. But one positive outcome of the past 15 months is that the universal perception in corporate America that when one is working from home, one is not working hard has been shattered. The extra time I had with my kids and the days I was able to spend with my mom before she died were worth more than any title or additional cash. I left corporate America to have a balanced life. I believe going forward, we won’t have to make that choice.

Tracey Mihelic is senior counsel at Husch Blackwell in Salt Lake City, Utah. She is a University of Notre Dame Law School alumnus who is passionate about creating a sustainable world and counsels globally on renewable energy, with a focus on solar and wind projects.
Double Jeopardy!

This voting rights advocate and game show champ is ready with the right answers

BY JENNY B. DAVIS

If “Who is Zach Newkirk?” ever became an answer to a Jeopardy! question, writers for the legendary television quiz show would have plenty of angles to choose from. For example, they could go with this:

This Washington, D.C.-based voting rights lawyer, a six-time Jeopardy! champion in 2020, took home nearly $125,000 in winnings.

Or this one:

This lawyer might have the most unusual winning streak in the show’s history: His run started with legendary host Alex Trebek, who died last year; got interrupted by a global pandemic; and ended with guest host Ken Jennings, a former Jeopardy! champion.

Another option:

In addition to appearing on Jeopardy! last year, this Perkins Coie associate was involved with a lawsuit against then-President Donald Trump on behalf of those injured during the 2020 Black Lives Matter protests in Lafayette Square.

OK, maybe that last one is a bit longer than the traditional format. But the point is, Newkirk had a challenging 2020—and the challenges are far from over. Threats to voting rights continue across the country, and at some point, he may have to start preparing for a return to TV to compete on the next Jeopardy! Tournament of Champions.

Did you just start cramming like you were a 1L again?

Some people got very intense about preparing, but I was more casual about it. I watched some old episodes on streaming services. There are old games online, so my wife read me questions from the games. She also had taken the online Jeopardy! test and was invited for an audition, but at that time, she was eight months pregnant. I keep saying, “You should try again, and we could do a husband-wife run.” It’s been done before! Also, whenever I had downtime, I read Wikipedia. To some extent, I think about the questions I missed and the money—real money—that I left on the table. But maybe I should focus on what I got right.

Any favorite categories or least-favorite categories?

Favorites are history, geography, politics. And definitely 11th Circuit election law cases! I think Jeopardy! contestants are infamously not too knowledgeable about sports, and of course, there’s the dreaded opera category. I know some sports, but there are other sports I don’t know much about, like basketball. I don’t know much more about it other than Michael Jordan was very good, but one of my good friends is “training” me on the subject.

Do you have any sweet plans for your winnings? A vacation? A fancy watch?

No, we are saving for a house. Then there’s the giant black hole of law school loans.

I know your dad passed away shortly before your episodes began to air.

I grew up watching Jeopardy! with him. He was already in the hospital, and I had gone home to Florida to watch the first episode with him, but he passed two days before it aired. But I was able to tell him about it. So at least he knew the outcome and the dollar amount. Last year was a tough year for so many reasons, but on the other side, having Jeopardy! to go back to was something...
I could look forward to much of the year. It was a saving grace.

**What was your involvement in Black Lives Matter D.C. v. Trump, and were you able to work on any other memorable cases last year?**

So many! For the Black Lives Matter case, a team at my firm wrote an amicus on behalf of civil rights leaders to show that the BLM movement was a continuation of a very long movement toward racial equality and social justice. We wrote down the experiences and perspectives of veterans of the ‘60s and ‘70s-era civil rights movement. I spoke to Martin Luther King III, among other leaders, and it was fascinating hearing his stories and experiences. It was humbling to be a part of something like that. At the beginning of the pandemic, we were involved in litigation over the spring primary in Wisconsin. We obtained a court order allowing approximately 58,000 new voter registrations to go through and 80,000 absentee ballots to actually count. That was huge, and it was a crazy pace because it kind of came out of the blue, and we did it in less than three weeks. It went all the way up to the U.S. Supreme Court, and we even got one of those infamous dissents from the late [Justice Ruth Bader Ginsburg]. It was her last dissent in a voting rights case. It was a great team and a great case to work on.

**How did that timing of the Wisconsin case relate to your Jeopardy! appearances?**

It was during my hiatus from Jeopardy! I came back from LA on March 12, and I got involved in this case on March 17. It was pretty much like going from one fire into a very different kind of fire.

**How did you get interested in voting rights in the first place? Were your parents lawyers or involved in politics?**

They weren’t lawyers, but they were politically minded. I’ve been interested in politics since I was a kid—I did canvassing, voter registration, volunteering and knocking on doors, and they were always supportive. I’m from Florida, and I remember the 2000 elections very clearly—not the legal day-to-day, but I remember there were issues about votes not being counted, and it didn’t seem fair. I had always been interested in ensuring anyone who wanted to vote and could vote had as easy access to voting as possible, and that influenced my studies in college and law school. It seems like a different era, but not long ago protecting voting rights was actually a bipartisan issue. The Voting Rights Act’s reauthorization passed the U.S. Senate in 2006 on a vote of 98-0. Unfortunately, attempts to restrict the right to vote feature across a lot of American history, and it really accelerated after 2008. Really, all of my adult life, the right to vote has been under attack.

**Are you hopeful that under President Joe Biden’s administration, things might improve?**

I’ll say that it’s wonderful to have a Congress that’s passing and delivering HR1 and the renewal of the John Lewis Voting Rights Act and to have a president in the White House who just signed an executive order to make voting easier. It’s just refreshing to have public officials who speak out in favor of easy and accessible voting. The shift in tone at the top from unbound-conspiracy theories to President Biden’s recent executive order, it’s just night and day.

**Can you share any details about what you are working on right now?**

Right now, we are monitoring different proposals across almost every state that will restrict the right to vote in one way, shape or form. We’re just gearing up for the next round. We just filed a lawsuit in Georgia, for example, which recently passed a law restricting voting rights. It even goes so far as to ban folks from handing out food and drinks to voters waiting in line at polling locations. That’s the thing about this practice area—the fight is never finished.

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**ON WELL-BEING**

**Balancing Your Body Budget**

Depleting reserves can lead to burnout

**BY JEENA CHO**

“How am I supposed to find time for self-care when I’m working 14-hour days and haven’t had a day off in months?”

I often encounter questions like this when I teach mindfulness workshops at law firms. Billing time in six-minute increments naturally creates a dynamic where lawyers may feel as though they must work around the clock. Further complicating the issue is the fact that each billable hour is generally treated the same, without weighing the value or the quality of the time. When I’m working on a bankruptcy matter, an hour spent reviewing a deposition transcript is billed at the same rate as when I come up with a novel way of potentially discharging a six-figure tax debt.

Compounding the problem is what I’ll call practicing “martyrdom law.” It’s the idea or belief that you must sacrifice yourself and your well-being for the good of your clients or your law practice. Lawyers sometimes confuse being a “good” lawyer with a lawyer who dedicates all waking moments to law practice. There also seems to be the expectation that law practice shouldn’t be pleasurable, fulfilling or enjoyable. If you are happy at your job, you must not be practicing law correctly.

To be clear, I am not devaluing hard work or saying law practice should be easy. What I am saying is that law prac-
Delicate balance
I often coach lawyers who struggle with trying to balance the intensity of law firm life with family obligations. I deeply relate to their struggles. As a mom of a 2-year-old and a lawyer myself, I am familiar with the constant balancing act, trying to keep my head above water. I see lawyers approaching work-life balance solely as a math problem. The challenge is to figure out how to properly allocate the 1,440 minutes of every day so that not a single minute is wasted. If they could just figure out how to budget time with more precision, more efficiency, the problem would be solved. Yet no matter how many planners, checklists or time management tools are adopted, it’s seemingly impossible to find the right balance.

A helpful reframing may be to not only think about work-life balance as a time management issue but also in the context of properly managing the body budget. The concept of a body budget was promoted by Lisa Feldman Barrett, a professor of psychology at Northeastern University and the author of How Emotions Are Made: The Secret Life of the Brain. In her book, she explains that the body keeps a budget, and like your household budget, you make deposits and withdrawals. Certain activities—such as exercise, food, sex, connection with others, experiencing awe, practicing mindfulness and meditation—serve to increase your body budget. One of the brain’s primary functions is to make predictions about your body budget and allocate resources appropriately. “When your brain predicts that your body will need a quick burst of energy, these regions [in the brain] instruct the adrenal gland in your kidney to release the hormone cortisol,” she writes.

Similar to your personal finances, it’s important to establish a solid foundation for the body budget so it can survive the many events that will drain the balance. Occasionally working too many hours or experiencing short periods of high stress is unlikely to have any long-term effect on your well-being, provided that there’s enough reserve in the budget and you engage in activities to replenish it. The trouble arises when the body budget goes in the red and remains there for too long.

Paying the piper
Barrett writes that chronic misbudgeting can lead to the body summoning the “debt collectors,” the immune system. When the body is under prolonged stress, it produces cortisol and proteins called proinflammatory cytokines. This leads to a vicious cycle in which the brain tries to conserve energy. You feel tired, maybe even feel sick, and you find it more challenging to engage in the very activities that will recharge the body budget. You may sleep less, exercise less and begin to eat more poorly when experiencing chronic stress. You may also socialize less. In other words, the longer the body remains in a state of chronic stress, the more difficult it is to bring your body budget into solvency.

This chronically depleted body budget leads to a host of diseases and related health issues, including heart disease, diabetes, obesity, insomnia, reduced memory, depression and anxiety, in addition to other cognitive functions related to dementia and premature aging.

As explained above, it’s precisely when you need to unplug and recharge that there’s the most resistance to it. When you begin to peel back the layers of the belief that “I cannot practice self-care because I must be available at every spare moment,” you may realize that is faulty thinking. Sometimes, the underlying belief is that staying really busy feeds the feelings of being needed or being important. Other times, it’s a way of avoiding exploring more difficult questions.

My advice is this: Make your body budget a priority. If you notice resistance to this, become curious. Start by noticing the beliefs you hold about work as they relate to your well-being. Another question to consider is, “What is my body budget?” The practice of checking in with yourself is a form of mindfulness. Pay attention to what your body is telling you. By asking yourself how you are feeling, you’re opening the door to exploring what would help to recharge your body budget. It doesn’t have to be a huge or radical change (although it could be). Simple changes such as prioritizing and committing to getting enough sleep, spending more time in nature every day, reading for pleasure or connecting with loved ones can make a huge difference in your well-being in the long run. I am stating the obvious, but sometimes a reminder is helpful: We all need time to work, time to rest, time to play, time to spend with loved ones and time to just be.

Jeena Cho is a coach and a consultant who works with law firms on stress management, well-being and mindfulness. She is the co-author of The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation.
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CONSUMER LAW

Golden State Rules

California often leads the way in passing environmental and consumer protection laws

BY STEPHANIE ZIMMERMANN

Consumer activists have been trying for years to get potentially harmful chemicals out of personal care products—such as shampoo and deodorant—or at least get manufacturers to disclose all their ingredients.

They’ll get part of their wish in 2022, when the new Cosmetic Fragrance and Flavor Ingredient Right to Know Act takes effect in California. Companies that under the California Safe Cosmetics Act of 2005 already must disclose to the state chemicals implicated as potential carcinogens or reproductive hazards will now have to reveal an expanded list of chemicals in a public database run by the California Department of Public Health. Consumers will be told exactly what’s in vague “fragrance” or “flavor” ingredients listed on product labels.

And in 2025, the new Toxic-Free Cosmetics Act will take effect in California, making it illegal to sell cosmetics containing 24 chemicals already banned in the European Union, including formaldehyde, polyfluoroalkyl substances, and certain parabens and phthalates.

The legislation had the backing of the Personal Care Products Council, the leading U.S. trade association for such companies.

“It was a large-scale effort,” says Susan Little, senior advocate for California government affairs for the nonprofit Environmental Working Group.

Both new laws will not only affect residents of the Golden State. Consumers from coast to coast are able to access the database.

And once the chemicals ban takes effect, it’s expected that most manufacturers will remove them nationwide rather than create California-only formulations.

The laws are among a slew of measures passed in California in recent years in hopes of expanding consumer or environmental protections further afield.

Whether it’s product ingredients or data privacy or pollution prevention, California is frequently where such laws start. That’s partly due to the state’s size, with a population of almost 40 million and a gross domestic product of about $3.2 trillion—an economy that would rival those of many countries.

It’s also one of only 10 states with a full-time legislature, giving its sizable legislative staffs time to dig into issues.

The coming change in cosmetics laws there represents a major change from the federal Food, Drug and Cosmetic Act of 1938.

Over the past 83 years, the Food and Drug Administration has prohibited or restricted only 11 cosmetic ingredients for safety reasons.

“It’s just a huge area of consumer law and consumer protection policy that is just very underregulated,” Little says. “We’ll have to wait and see how it all pans out and whether products with [for example] formaldehyde will be sold in Maine. But we’re anticipating the industry will conform to the California standard.”

After California’s 2005 law was passed, the state of Washington in 2008 required manufacturers to disclose “chemicals of high concern” in children’s products, and Minnesota banned formaldehyde from similar children’s items in 2013.

Claudia Deeg, a public health associate at the California Public Interest Research Group, says she hopes the latest California cosmetics laws will have an even wider impact. “Our hope
is that … manufacturers are not going to want to make a whole separate slate of products,” she says.

**Data privacy**

California’s recent moves in another area—the realm of data privacy, a hot topic in the technology-heavy state—are helping drive the national discussion around Big Tech.

The state’s first-in-the-nation broad data privacy law, the California Consumer Privacy Act of 2018, took effect last year and allows state residents to find out what type of data companies are collecting about them, request that it not be sold to third parties and demand that their data be deleted.

California voters last fall strengthened the CCPA by passing Proposition 24 and creating the California Privacy Rights Act of 2020, which takes effect in 2023. The CPRA creates a new California Privacy Protection Agency to enforce privacy rules, with stricter penalties for violators.

Though some activists felt California should have gone further and passed requirements that consumers must give clear, affirmative consent to have their personal data collected and processed—as the EU does with its General Data Protection Regulation, or GDPR—others see California’s moves as a step in the right direction.

Many observers expect that someday, a federal data privacy standard will be enacted—which is why there’s a scramble now to lay down standards. This year, Virginia passed its own Consumer Data Protection Act, which drew criticism from some consumer groups for having weaker enforcement provisions than California’s law and for allowing companies to penalize customers who wish to avoid targeted advertising.

Jennifer King, the privacy and data policy fellow at the Stanford Institute for Human-Centered Artificial Intelligence—and formerly the director of consumer privacy at the Center for Internet and Society at Stanford Law School—says there’s a bigger battle ahead to educate consumers on how their information is used. The California law requires consumers to “opt-out” of data-sharing, but many don’t want that hassle, she says. “As long as we are passing laws that require you to do all the work, it’s pretty hard to have a substantial impact,” King says.

In that regard, the United States is still catching up to Europe, which has more robust privacy laws underpinned by the European Convention on Human Rights and its explicit reference to privacy, King says. The U.S. Constitution does not mention privacy, though several key U.S. Supreme Court decisions have affirmed U.S. citizens’ privacy rights in health care, birth control and other matters.

Maureen Mahoney, a policy analyst at Consumer Reports’ San Francisco office, says the California privacy laws still represent progress. She hopes new tools such as a browser signal developed by GlobalPrivacyControl.org will eventually make it easier for consumers to opt-out all at once. Users who download and enable the tool can automatically convey their privacy preferences to websites that they visit. “We think the CCPA should be a baseline or certainly a standard for other states,” she says.

**Environmental laws**

Similarly, California has led the way with environmental laws. The state was alone in getting a provision written into the 1970 federal Clean Air Act to enact tougher automobile emissions rules.

Even though the federal waiver was for California, it had the effect of lowering emissions elsewhere, as more than a dozen states opted to use California’s standards.

That effort took a hit in 2019. With then-President Donald Trump’s administration seeking to gut emissions rules, automakers pressured California to agree to a deal: They’d reduce emissions by more than what the Trump administration wanted but less than what was required by rules from President Barack Obama’s administration. The Trump administration ended up revoking California’s waiver, although President Joe Biden’s administration says it will reverse that decision. Biden, who has pledged to cut U.S. greenhouse gas emissions in half by 2030, has ordered a review of federal fuel-efficiency standards.

David Friedman, vice president of advocacy at Consumer Reports, says the automakers’ actions in California have led to speculation about whether their deal represents the floor or the ceiling for future national emissions rules. “It’s the classic ‘the devil is in the details.’ Or the pollution is in the details,” he says.

Even so, there’s no denying that California has pushed the rest of the country forward for decades. “California has led the nation when it comes to cleaner cars,” he says. “Overall, it is an amazingly positive history.”

Also, California’s Global Warming Solutions Act of 2006 spawned a cap-and-trade program for major greenhouse gas polluters, such as refineries, power plants and industrial facilities. The state now earmarks some of the revenue from cap and trade for disadvantaged communities.

“That was a really unique thing that we now see replicated elsewhere,” says Katelyn Roedner Sutter, manager for U.S. climate initiatives at the nonprofit Environmental Defense Fund. Eleven other states have since adopted market-based approaches to reducing greenhouse gas emissions.

Rosemary Shahan, president of the Sacramento, California-based nonprofit Consumers for Auto Reliability and Safety, has seen the power of California firsthand. Shahan started advocating for consumers’ rights in 1979, when she began picketing a car dealer and pushing for a state lemon law. Connecticut enacted its lemon law just ahead of California’s—by one month—in 1982, but her years of work prompted other states to pass similar laws stating consumers are entitled to a full refund if a defective new car can’t be repaired in four tries.

Shahan believes laws passed in California have a good chance of making an impact elsewhere. “It makes me feel an obligation to really make things happen,” she says. “You can help a lot of people in this state and potentially in other states as well.”
CRIMINAL JUSTICE

Firewall

Former inmates are battling legal barriers to full-time work as firefighters

BY MATT REYNOLDS

Since World War II, California has used inmates to assist full-time firefighters during wildfire season. When an inevitable blaze breaks out, they are deployed, working in treacherous conditions.

Like their civilian counterparts, inmate fire crew members help protect people’s lives and property, and when they are released, some try to find employment in the fire service.

For many, though, full-time jobs can be hard to come by. To remain competitive, aspiring firefighters need emergency medical technician certification. Formerly incarcerated people often cannot get certified because of their felony convictions, confining them to volunteer and seasonal work. California Emergency Medical Services Authority rules prevent a person with one felony conviction from getting a certification for 10 years after his or her release. Anyone with two felony convictions faces a permanent ban.

A path to EMT certification recently opened, but it is limited in scope, according to some criminal justice reform advocates and prisoner reentry experts. In September, California Gov. Gavin Newsom signed Assembly Bill 2147. The first-of-its-kind law allows those who worked in prison fire camps to petition courts to expunge their records upon release. Each judge can choose to grant or deny the request.

The law does not apply to people convicted of murder, rape, arson or any felony punishable by death or life imprisonment.

“’Inmates who have stood on the frontlines, battling historic fires, should not be denied the right to later become a professional firefighter,’’ Newsom tweeted after signing the bill.

Some former prisoner firefighters, however, still lament the lack of full-time opportunities, even though California has sought help from out of state and from Canada and Australia during wildfire season.

But jobs in city fire departments are still highly competitive, and most will not hire people without EMT certification.

Firefighter unions, meanwhile, say firefighters assist people when they are at their most vulnerable, and restrictions protect the public and maintain trust in the profession.

One formerly incarcerated person who can’t make use of the new law is Dario Gurrola, a 39-year-old seasonal firefighter who served at a fire camp while in custody as a juvenile. His attorney, Andrew Ward, with the Arlington, Virginia-based Institute for Justice, says because Gurrola was trained before he was convicted of two felonies, he is ineligible for expungement under the new law and, therefore, ineligible for EMT certification.

Gurrola argues that he should not be punished for mistakes he made in his 20s and is challenging the constitutionality of the rules in court. “I’ve got the skills. This is my passion. Don’t use my past against me,” he says.

Tim Edwards, president of the firefighters’ union Cal Fire Local 2881, is opposed to the new law because he says it “fast-tracks” the process to clear criminal records and risks eroding the public’s trust in professional firefighters. He supports EMT rules barring people with two felony convictions, regardless of the circumstances. “Firefighter associations and unions believe everybody deserves a second chance in life,” Edwards says. But the law poses risks to other firefighters and the public, he says, and inmate firefighters do not receive the same level of training as professionals.

Making firefighting pay

The California Department of Corrections and Rehabilitation runs 44 fire camps across 27 counties with the Department of Forestry and Fire Protection, also known as Cal Fire. The state has almost 3,700 inmates working at the camps, with 2,600 qualified to work on the fire line, the area where brush is cleared to contain fires.
Arizona, Oregon, Texas and Virginia are among several other states using inmate firefighters, according to J. Carlee Purdum, a sociologist at the Hazard Reduction & Recovery Center at Texas A&M University.

Brandon Smith, 37, has two felony convictions for low-level drug offenses, including possession of marijuana. He knows how fraught the journey to employment can be. When he was in a Northern California prison in his 20s, a counselor asked him if he wanted to go to a fire camp. Smith was reluctant, but the work put him closer to his family for visitation and paid better than other prison jobs.

After joining the camp, he fought his first fire as an inmate in Idyllwild, California, in 2013. Smith remembers his “adrenaline pumping.”

“All of us were working together. I liken it to the Avengers fighting Ultron. It’s like everybody was out here trying to fix this problem,” Smith says.

Firefighting gave Smith a purpose. But after he left prison, his convictions ruled him out of many jobs. After attending a fire academy in Victorville, Smith finally found part-time and seasonal work on a hand crew for the U.S. Forest Service.

In 2015, Smith co-founded the Forestry and Fire Recruitment Program, which helps other people with convictions find firefighting work. He welcomes California’s new law, and his group is working with lawyers to help former inmates.

He also agrees that the bar should be high for people entering the profession but notes that demand for firefighters is only going to rise as wildfires increase in frequency and severity.

Restrictions on certification or licensing are not just confined to firefighters such as Smith and Gurrola. People who were trained to do cosmetology and hairdressing inside also have found it difficult to find work on the outside.

“Good moral character” standards at licensing agencies can be a barrier, says Beth Avery, an attorney with the New York City-based National Employment Law Project.

“The standards can be vague, giving the licensing boards and agencies lots of discretion to deny people for almost any conviction or arrest record,” Avery says.

Occupational licensing barriers may increase the rate of recidivism, according to a 2016 study by the Center for the Study of Economic Liberty at Arizona State University, and a James Madison Institute paper from 2019. This year, however, several states have reformed laws on occupational licensing, including Michigan and Ohio.

A firefighter’s lawsuit

Gurrola argues, however, that formerly incarcerated people with violent felony convictions should have a route to full-time firefighter work. He wants EMT rules loosened for those who can show they were rehabilitated.

In a lawsuit filed last year, Gurrola claims that the blanket ban on people with two felony convictions is unconstitutional under the equal protection, due process and privileges or immunities clauses of the 14th Amendment.

When he was 22, Gurrola was convicted of carrying a concealed knife. Two years later, he was sent to prison for assaulting a security guard while he was under the influence of alcohol and drugs.

The California Attorney General’s Office urged the court to throw out the lawsuit. Deputy Attorney General Lisa Tillman wrote in court papers that the ban is based on “the public’s interest in regulating EMTs to ensure the safety of patients, who are often in a vulnerable physical or emotional condition.”

In February, the district court agreed and dismissed the lawsuit. Gurrola has appealed to the San Francisco-based 9th U.S. Circuit Court of Appeals.

With regard to California’s new law, Ward of the Institute for Justice says it is “limited” and does not do enough to offer a pathway for formerly incarcerated firefighters like his client. Prosecutors can formally object when former inmates file petitions for relief, and judges have the power to reject an application regardless of the offense, according to an editorial by Jay Willis in the legal publication the Appeal. Ward says petitioners have to jump through several administrative hoops, and that many former inmates may not be able to afford a lawyer.

“California has erected a massive wall between EMT certification and people with felony convictions. [The new law] added a tiny high-up window that a few people can squeeze through. Of course, that’s an improvement. But the problem wasn’t that the wall didn’t have a window. The problem is that there’s a wall,” Ward says.

Photo courtesy of the Institute for Justice

Dario Gurrola’s record is a barrier to his finding full-time firefighting work.

Jonathan Gitlen, a Washington, D.C.-based litigator, is the former director of the American Bar Association’s Clemency Representation Project. He helped create a collateral consequences database with the ABA that tracks regulations that make it hard for people with criminal records to get occupational licenses.

Public safety is often part of the discussion about whether people with criminal records, particularly violent offenders, should get licenses, Gitlen says. Barriers to licensing also disproportionately affect people of color, he adds. “You might have someone who was not convicted of a crime of violence or had some sort of petty crime that has nothing to do with the license that they’re otherwise talking about,” Gitlen says.

“But the licensing board that has done the background check, they see that this person is a returning citizen, that they have been incarcerated, then that person is done.”
Good Business

How do firms benefit from hiring a financial consigliere?

BY DANIELLE BRAFF

It’s a well-worn cliché that lawyers are lousy businesspeople. As a result, many of the larger firms have already turned to financial specialists to help. More than 70% of Am Law 200 firms and over 85% of Am Law 100 firms employ a chief financial officer, according to a study by Colliers International, a real estate brokerage. The larger the firm’s revenue, the more likely it is to hire a CFO. But what about small firms or solo practices?

“I know of no solos who employ their own CFOs. A scattering of smaller firms with 20 or fewer lawyers use them, but in my experience, they generally delegate that authority to one of the partners,” says Stephen J. Curley, a solo practitioner from Stamford, Connecticut, and the chair-elect of the ABA Solo, Small Firm & General Practice Division.

Is it time for some of these smaller or solo firms to consider employing a CFO?

“Lawyers tend not to be good at business and even worse when it comes to financial issues,” says Michael McCready, the managing partner of McCready Law, a seven-lawyer firm with offices in Illinois and Indiana that employs a CFO. “A CFO should be considered a necessity, not a luxury.”

Kevin Hirzel, managing member of Hirzel Law, a 10-attorney firm with offices in Farmington and Traverse City, Michigan, hired a CFO for the first time in fall 2020. He says the firm experienced rapid growth over the last few years, resulting in more administrative work. He realized his sweet spot was practicing law and marketing, while managing the financial aspect of the firm wasn’t the best use of his time.

The firm hired a recruiting agency and vetted more than 60 candidates for the position. “We specifically looked for somebody who had a background in business as opposed to somebody who was a lawyer or had previous experi-
ence in a law firm, so we were bringing a skill set to the table that the owners of the firm did not have,” Hirzel says.

CFOs typically provide financial reporting (profit and loss statements, balance sheets, cash flow, managerial reports). They also handle banking activities and cash management, are in charge of capital allocation and evaluate financial opportunities, says Bryan Reilly, the CFO of Pond Lehocky Giordano, a workers’ compensation and Social Security disability firm based in Philadelphia.

Reilly, who started as the firm’s staff accountant in 2010, was promoted to CFO in 2014. He also helps the firm with investment analysis, negotiations, employee benefits, and compensation analysis and design.

Having a CFO allowed Hirzel Law to make more data-driven decisions because it now has a better handle on how to allocate resources and project revenue, Hirzel says. “In short, if a law firm is looking to grow, it needs to have a CFO.”

If not now, when?
The struggle, however, is determining when to hire a CFO.

A CFO can be a relatively expensive addition to a firm, with the base salary being about $180,000 annually for a startup company or up to $360,000 for a well-established firm looking for a high-level CFO, says Ethan Taub, the CEO of Loanry, a loan company in California. There are also part-time and fractional CFOs, which may be better options for smaller firms. Fees for outsourced CFO services range from $200 to more than $1,000 weekly, depending on the type and volume of reporting and the desired frequency of communication as determined by the firm, says Kelley Brubaker, a CPA who offers outsourced CFO services to law firms.

Brubaker says the time to hire a CFO will be different for every firm, but there are a few signs: when partners have questions on a regular basis that the bookkeeper is unable to answer; when the firm doesn’t understand the tax preparer’s advice; when the firm is bleeding cash; or when the firm is planning on growing in the near future.

For a smaller firm, a CFO tends to manage the bookkeeper and tax preparer and will ensure the day-to-day work is completed accurately and timely.

However, Roger Royse, who started a solo firm that grew to 27 lawyers, cautions that it’s important for a small firm to control costs and not just add overhead for the sake of having overhead. Royse, who left his firm in March with seven colleagues to join Haynes & Boone, is a CPA and also took on the CFO role at his firm. “But if I had to do it over, I would have hired an outside CFO at about 15 lawyers,” Royse says.

Other law firms are relieved they hired a CFO even when they were small. Matthew Dolan, the founder of Connecticut-based Dolan Divorce Lawyers, which has four attorneys, has been using a CFO for a year now. While Dolan says he has a very good handle on his firm’s financials, he also knows he doesn’t have the same level of knowledge as someone whose sole focus is the financials of the firm.

“As we continue to grow, I want every department of our firm managed by an expert in that field,” Dolan says. “This will free up my own time and will allow us to get to the next level of profitability and client happiness.”

Dolan’s CFO provides bookkeeping services, financial reports and financial forecasting reports. The real benefit of the CFO, however, is the freedom he provides. Dolan says he doesn’t have to get bogged down in the financial details anymore and can instead focus his attention on higher-level management and decision-making.

Plus, Dolan says, the beauty of modern technology is that small firms have...
access now to a CFO they may not have been able to afford in the past. Several agencies provide virtual CFOs who can work for several firms simultaneously. Through a virtual CFO agency, Dolan’s firm was able to afford a financial strategist, whom he says the firm would have never otherwise been able to afford to hire full time.

Before hiring anyone, law firms should consider their cash flow rather than the number of attorneys they have, suggests Keoki Wallace, the CEO of business consultancy It’s More Than Just Numbers. If most of the law firm’s business comes from flat fees or from standard monthly billings that are paid within a specified amount of time, then all they need is a good controller, Wallace says. Where a CFO could make a difference is when there are large discrepancies between months or when cases go over an extended period, such as when there is an upfront payment and then no next payment until many months or even years later.

“I have had many talented controllers work for me over the years who could easily do everything even a large law firm with stable cash flow needs,” Wallace says.

Before selecting a finance professional, Reilly advises looking for someone who can go beyond debits and credits. Reilly says the CFO chosen needs to be an entrepreneur: He or she should understand the business, comprehend how clients are acquired, how clients are serviced and how revenue is generated (which requires some understanding of the law). Other soft skills are important, such as the ability to communicate with peers and partners and fit in with the overall dynamic of the firm, Reilly says.

If you don’t have a CFO, expect to dedicate a significant amount of time to dealing with your firm’s finances, says David Sanders, who owns his Houston-based solo firm but says he doesn’t have the luxury of hiring a CFO. Sanders blocks off the majority of the day once a week to manage his financial affairs. He estimates this accounts for about 25 hours per month. Time well spent?

### TECHNOLOGY

### 23 and You

The new frontier of health care is here, but will DNA privacy be lost?

**BY RICHARD ACELLO**

In February, 23andMe, a company best known for its genealogy testing kits, announced plans to go public through a novel merger funding mechanism called a SPAC, or special purpose acquisition corp.

The merger is with VG Acquisition Corp., a Richard Branson-backed company, and Branson is pouring $25 million into the merger, as is 23andMe co-founder Anne Wojcicki. Once the merger is complete, the merged 23andMe is expected to have an estimated valuation of around $3.5 billion.

At that point, 23andMe will be well-equipped to venture beyond genealogy kits and into the new frontier of personalized health care, using a patient’s DNA as the basis for therapeutics or preventive medicine. It won’t be alone. In December, rival Ancestry.com was acquired in a $4.7 billion deal by private equity firm Blackstone Group Inc. Ancestry CEO Margo Georgiadis said in a press release that the deal would allow the company to bring to life “our long-term vision of personalized preventive health.”

Advocates are concerned about the privacy of data collected by genetic testing companies; what control consumers have over their DNA data once it’s been submitted to 23andMe and other genetic testing firms; and what recourse consumers have if companies’ assurances of privacy prove unreliable.

“Data is the new oil,” says Catherine Arcabascio, a professor at Nova Southeastern University’s Shepard Broad College of Law in Fort Lauderdale, Florida. “I don’t know of any other information that one would hold so dear as their genetic code.”

Big Pharma wants to get its hands on some of this data. GlaxoSmithKline took a $300 million equity stake in 23andMe in 2018 to “focus on research and development of innovative new medicines and potential cures, using human genetics as the basis for discovery.”

“The question is one of consent, and the problem is consumers are not likely reading every detail of the terms of service,” Arcabascio says. “They’re treating DNA the same as a toaster oven. You have the terms of service, and you’re just clicking through.” She says it is difficult to ascertain what the privacy

*Continued on page 24*
It's easy to say that the world has changed—and that the legal industry has changed—as a result of COVID-19. What is harder to say, at the moment, is which changes are temporary, which are here to stay, and which haven't yet arrived.

Now, the industry stands at a crossroads—and whatever path we take could have repercussions for decades to come. All of us working in legal share a collective responsibility to improve the future of legal service delivery; we must push for the changes that will move this industry forward.

For over a decade, I have spoken about how technology would disrupt the legal industry. What I couldn’t have predicted was how much of that change would be compressed into one year. We are seeing profound changes in terms of both how law firms operate and, even more importantly, how consumers approach technology. For example, we learned in the 2020 Legal Trends Report that more than half of legal consumers say that cloud technology is a necessity for them, and even clients who are 90 years old are comfortable signing documents on iPads.

Even more amazing to me is that last year, over 4,500 legal professionals from 46 countries joined us, virtually, for the Clio Cloud Conference—a four-day event about technology and innovation in legal. Attendance of this scale at a virtual legal conference is something I wouldn’t have thought possible just a few years ago.

But, this is where we’ve been: a world of Zoom meetings and court appearances made from our living rooms.

While it’s tempting to ask, “Which changes brought on by COVID will return to the way they were before?” the more important question is, “Which changes represent positive shifts that we should embrace permanently?”

We have an unprecedented opportunity to reshape how law firms, courts, and legal institutions operate—and it’s in the best interests of our clients and our organizations not to squander this chance.

What’s at stake? For starters, the ability to increase access to legal services for our fellow citizens. Fairer protections and advocacy for underrepresented groups in our society. The freedom for legal professionals to make a good living without sacrificing work-life balance. A legal system that truly serves the public good.

There is so much work to do, and such an incredible chance to make a difference by doing it.

Among the many possibilities, some of the systemic changes we’re focused on are centralizing and simplifying business operations for law firms, making it easier for legal clients to collaborate with their lawyers and understand the legal system, and breaking down barriers to legal services for consumers in need of assistance.

At Clio, we believe—on a foundational level—that part of our duty as the market leader is to work to create a world in which our legal and judicial systems promote justice, in the truest sense of the term. This means a world in which every stakeholder in the legal process benefits from better, more equitable models for shaping and administering the law.

In pursuit of these goals, we recently expanded our company’s mission to reflect how we want to show up for our customers and their clients—as well as how we want to help shape the way our society engages with, delivers, and experiences legal services.

Clio’s new mission is to transform the legal experience for all.

This mission is at the heart of everything we do. It invites everyone within our legal and judicial systems—from legal professionals to legal organizations, clients, and consumers—to explore the larger impact we can all have on the legal experience, on a global scale.

As we emerge from COVID-19, let’s not return to normal. Let’s instead focus on creating a better normal. I invite you to help us reimagine the future of legal service delivery, and I leave you with this question:

What does a better future for legal look like to you?

Jack Newton is the CEO and Co-founder of Clio and a pioneer of cloud-based legal technology. Jack has spearheaded efforts to educate the legal community on the security, ethics, and privacy issues surrounding cloud computing, and is a nationally recognized writer and speaker on the state of the legal industry. Jack is the author of The Client-Centered Law Firm, the essential book for law firms looking to succeed in the experience-driven age, now available at clientcenteredlawfirm.com. The essential book for law firms looking to succeed in the experience-driven age, available at clientcenteredlawfirm.com.
Continued from page 22

risks truly are when the industry is only in its infancy.

Arcabascio speculates on whether a law that would protect consumers’ DNA privacy is possible. “Eleven million people have already given up their DNA, and that gives you pause,” she says. “I don’t know how much you could do to protect people who have already consented.”

**Informed consent?**  
Favoring some sort of regulation is Katie Hasson, the program director on genetic justice at the Center for Genetics and Society in Berkeley, California.

Hasson says terms-of-service agreements are inadequate for consumers trying to protect their genetic privacy. “How many people are being asked to agree to terms of service every day?” she asks. “And once you make the privacy decision for yourself, you’re also making it for family members, and you may not even know you have these family members.”

Hasson wonders how informed the consent is that comes about as a result of clicking “agree” on a terms-of-service website button. “23andMe says 80% of their customers consent to have their data used for research purposes, but it’s not clear how informed that consent is or whether it can be withdrawn if the data has already been used,” she adds.

Congress previously has regulated big data involving medical records by passing the Health Insurance Portability and Accountability Act of 1996. However, genetic testing is said to be beyond HIPAA’s scope since it is not applicable to direct-to-consumer testing, Hasson points out.

It would not be surprising to find that regulation of genetic testing services will lag behind their development, as happened with Big Tech. “We’re just not tackling the privacy issue,” says Jen King, privacy and data policy fellow for the Stanford University Institute for Human-Centered Artificial Intelligence. “There’s a big public appetite for acting on a range of privacy issues, and a lack of action on the part of legislatures in getting them passed.”

King notes that the California Consumer Privacy Act, which uses an informed consent model to allow consumers to choose with whom they share their data, exempts certain HIPAA-covered information. But she points out that there’s a lot of health-related data that isn’t covered by HIPAA, including direct-to-consumer genetic testing and data collected from health and fitness apps, for instance.

Whether the CCPA and a similar Virginia law would affect companies such as 23andMe and their efforts to expand their individualized health care offerings would depend on what data is covered by HIPAA.

“What we’re seeing is that many companies are simply using IP-filtering or otherwise asking you to verify that you are a California resident before processing any CCPA requests. What I’ve observed so far is that companies do not seem eager to extend California rights to non-California customers,” King says. She also says she is unaware of any state that has passed a genetic privacy law such as the Genetic Information Privacy Act, which was vetoed by California Gov. Gavin Newsom in September.

When contacted by the ABA Journal, 23andMe did not make anyone available for an interview, but it issued a statement on privacy: “All of our research is still very much opt-in and choice-based and still overseen by our independent institutional review board, which ensures we are conducting research in accordance with all legal and ethical guidelines. As stated in our privacy statement, in the event that 23andMe goes through a business transition such as a merger or acquisition by another company, customer information would remain subject to the promises made in any preexisting privacy statement.” The statement also points out that consumers are free to withdraw their consent at any time, and it states that sensitive information is encrypted, with access limited to authorized personnel only.
Thanks to the ongoing coronavirus pandemic, the first-ever all-virtual ABA Techshow was held in March. Instead of crowded expo halls, packed conference rooms and in-person networking events, conferencegoers logged on to the Techshow virtual platform and watched live remote talks and panel discussions addressing various issues relating to law and technology. In addition to sessions about cybersecurity, artificial intelligence, analytics and ethics, there were the usual introductory tracks showing attendees the basics of Adobe Acrobat, practice management software, Microsoft 365 and marketing. Some more forward-looking sessions examined topics such as how updating technology can allow lawyers to comply with ethical obligations, the continued growth of legal incubator programs and how automated legal reasoning could change the way laws are written.

But the proliferation of remote conferencing tools was at the forefront of Techshow, and many sessions dealt with the new reality for lawyers—one in which tools like Zoom, Microsoft Teams, Skype and others are integral, even vital parts of their practice.

In one of several sessions relating to remote practice, Pennsylvania lawyer Daniel J. Siegel cautioned lawyers working from home that family members as well as virtual assistants such as Amazon Alexa might hear confidential client conversations they shouldn’t. “Working remotely, there’s the potential for eavesdropping from nosy family members,” he said.

Siegel, a small-firm attorney who handles workers’ compensation, personal injury and Social Security disability claims, lives with his son, who spent most of the pandemic working from home, and his wife, who would go to an upstairs room during his client calls.

“She couldn’t hear me, so that was fine,” said Siegel, who serves on the council of the ABA Law Practice Division and chairs the Pennsylvania Bar Association’s committee on legal ethics and professional responsibility.

In addition to avoiding client conversations in home spaces where family members can hear them and limiting or prohibiting the use of virtual assistants, Siegel suggested lawyers working remotely encrypt information sent by email; keep computer operating systems updated to avoid cyberattacks; and do their work on a virtual private network with two-factor authentication. He also recommended having a firmwide policy on what is required for working from home and making sure all employees understand it.

Another session dealt with “Zoom etiquette” and how to or how not to behave while using the popular video-conferencing tool. For instance, even if you are on mute, talking during a Zoom meeting is rude because it shows you are not listening. It’s also a bad idea to drive your car while using the platform. And if everyone else has his or her camera turned on during a Zoom meeting, you should too, so work flow is not interrupted.

Juda Strawczynski, a director for the Lawyers’ Professional Indemnity Company in Canada, shared these tips, which he described as “netiquette,” at an event titled “Lawyer’s Guide to Zoom.”

“We will be using these sorts of technology well into the future because clients want it—it’s cost-effective. It won’t replace every face-to-face meeting, but we will use this technology going forward,” said Strawczynski, who manages a claims and risk initiative for LAWPRO.
Lawyers were also encouraged to embrace and further develop the technological and business innovations they have adopted in recent months even after the COVID-19 pandemic subsides. “We have the opportunity today to build towards that third horizon or slouch back towards that first horizon,” said Ed Walters, CEO and co-founder of legal research company Fastcase. He urged attendees to “build the legal services and law firms of 2022, not rebuild what was broken in 2019.”

For example, Clio CEO Jack Newton pointed out that 69% of consumers prefer working with a lawyer who can share documents electronically, and more than 50% of consumers believe most legal matters can be dealt with remotely. Newton said law firms and lawyers have to a much greater degree adopted such tools during the pandemic, and those who have not would be wise to do so. “This is how you will thrive in this new environment,” said Newton, author of The Client-Centered Law Firm: How to Succeed in an Experience-Driven World.

As technology becomes more prevalent, lawyers could play an important role in helping policymakers and industry leaders think through the various trade-offs of strictly regulating innovative technologies. Keynote speaker Renée DiResta, technical research manager at Stanford Internet Observatory, who investigates the spread of malign narratives across social networks, urged lawyers and policymakers to help counteract that problem by thinking in advance about how new technologies could be misused once they enter the marketplace.

She said this approach would help ensure “that rather than reacting, there is some thoughtful policy creation, and we are a little bit ahead of the game.”

Keynote speaker Renée DiResta encouraged attendees to think in advance about how new technologies could be used for nefarious purposes once they become publicly available.
Ted Born and a young untested associate were called upon to defend a tough—seemingly impossible—lawsuit in one of the most challenging county courts in the United States. The facts looked bad: the client was a tire manufacturer of a tire that blew out, followed by a vehicular crash resulting in a child’s death, a brain injury for another child and other serious injuries. The dead and injured were residents of a county where juries had a history of rendering verdicts in generally millions of dollars in favor of local residents against big out-of-state corporations, even in minor cases. The case, with racial overtones, leads through a labyrinth of mystery and intrigue no one could have imagined as the trial date of a BIG one looms, with surprises that do not end with the trial.

**AMAZON REVIEWS**

**5.0 OUT OF 5 STARS**

**TEXTBOOK LAWYERING**

Though a work of fiction, this book draws on the author’s decades of experience as a trial attorney to describe the anatomy of a complex trial resulting from the tragic crash of a van into a mock orange (hence the title) tree. The Preface concludes by saying that he is writing to illuminate “issues critical to justice in our courts and what civil justice really means.” In what may be a more important lesson, I would add that justice often needs an assist, and this book illustrates how, from really first-rate lawyering. This is a textbook on how to try a case, and how thorough preparation and clear presentation can make complex issues simple and accessible.

– Peter W. Low, Professor of Law, U. of Virginia and former Provost, U. of Virginia system

**5.0 OUT OF 5 STARS**

**GREAT!!**

I really liked this book! It was very interesting, the story was compelling, the characters believable, and it was easy to read!

– W.S.

**5.0 OUT OF 5 STARS**

**GREAT READ!**

Certainly a legal story but I liked the character developments. It showed [the] perspectives of the characters whether it be racial, socio economic or cultural. There was compassion between characters. I enjoyed the book a lot.

– A Kindle Reader – verified purchase

**PURCHASE TODAY AT AMAZON.COM**
A retired legal professor offers a lesson on the artful pause

BY JAMES H. FIERBERG

“How nothing strengthens authority so much as silence.” —Leonardo da Vinci

I have spent 40 years in practice and nearly as long serving as an official and unofficial mentor for young lawyers, as well as more than a decade as an educator at many levels, including law school. All these experiences have informed me of the important skills lawyers need to master for success, most of which are not taught in law school. These are the so-called tricks of the trade or psychological game theories that a lawyer learns along the way, whether through committed, mindful mentoring or by trial and error.

Three of the most essential tools that should be in every lawyer’s toolbox are silence, active listening and critical thinking. And they are connected.

Learn to squirm

About two months into every semester that I taught law school, I would purposely show up for class about five minutes late to be sure that all the students were seated when I arrived.

I then commenced an exercise in which I would place my class materials on the lectern, lean back against the whiteboard, and without any facial expression, proceed to do and say absolutely nothing.

This exercise usually lasted about five minutes. For the class, and frequently me, it seemed like five hours.

Three of the most essential tools that should be in every lawyer’s toolbox are silence, active listening and critical thinking.

—JAMES H. FIERBERG
This was pure, unadulterated, immutable silence.

When, one by one, the students realized something was amiss, ...nant, articulately and then falling into silence cannot be overstated.

**Critical thinking**

Active listening elicits extra data or disclosures from your opponents, but if you don’t capitalize on that added information, the benefit is lost. Critical thinking is an internal affirmative skill that helps you comprehend what is being said. Silence and active listening allow you time to employ your lawyerly skills to formulate a logical response to the messaging that you hear and then craft a point.

If you fail to take advantage of silence, you might lose out on two critical advantages. First, you miss the opportunity to observe the valuable verbal and nonverbal leaks that silence inevitably forces your opponent to make. Second, you obliterate the ability to seize upon the risk adversity the great majority of people possess. Silence is an unnatural state; *horror vacui*. It has been often stated that nature abhors a vacuum.

To eliminate the discomfort of the vacuum, your counterparts will predictably rush right into that void with the most amazing of missteps, causing them to bid against themselves with unnecessary concessions or admissions. Their critical thinking skills, along with their judgment, will be sucked into that vacuum. How will you take advantage?

**Countering silence**

If you dare open the gates of silence, you must also train yourself to overcome your discomfort with it—as to not be similarly exploited by your opponent. One tactic to break the spell of silence when it’s being employed against you is to interject with open-ended questions, or inquiries that cannot be answered with a simple yes or no. An open-ended question demands a substantive response. Pose your open-ended question, and then become silent yourself. You will have flipped the tables.

Lawyer and author Louis Nizer in his 1940 book *Thinking on Your Feet*, said: “Only the amateur fears to be silent for a moment lest interest lag. He depends solely on words to capture attention. The artful performer knows that rhythmic patterns require silence, too, and nothing is more dramatic and effective than a long motionless pause after a statement. It permits absorption of thought. It permits reflection. But more important, it compels attention to what has been said as *if an italicized finger had been pointed at it.*” (Emphasis added.)

Of the three main sensory tools at your disposal—verbal, auditory and kinesthetic—it is the auditory skill that is the most useful in the practice of law. Overcome your fear of silence and learn to be a patient and attentive listener, and you will find more times than not that it is actually your opponent who will advance the cause of your client.

Get comfortable with silence. You will be amazed by what you hear.

James H. Fierberg is a retired litigator and educator. He has mentored many lawyers, and he is the author of A Civility-Based Model for New Lawyers (ABA 2021). He resides in the mountains of North Carolina and continues to teach and consult with lawyers. He can be contacted at flaflexlaw.com.

This column originally appeared on ABAJournal.com on March 17.
Recall the situation: It’s the first day of your new job as an assistant attorney general in your state. You’re an experienced litigator, and you put in for the position touting your skill as a writer. You were told that it would be a demanding job, but you figured that your experience in private practice has been as demanding as anything the new position might present.

It’s 9 a.m. You’ve been handed three case files and told that you must file three court papers by the end of the day: a motion for judgment on the pleadings, a motion to strike expert testimony in federal court and a motion to consolidate two proceedings in the state supreme court. No extensions are possible. Like a contestant on the Great British Baking Show, you’re under pressure to whip up something spectacular in short—very short—order.

Because you’re a devotee of good legal writing, you know what you’re looking for. You have a practiced eye. For each filing, you must discover, in short order, the concrete dispositive point or points to be decided by the court, together with the strongest rationales for its decision.

And because you’re an admirer of Aristotle, you know that every argument is reducible to a syllogism. There will be a major premise (a legal rule) and a minor premise (a crucial fact that plays into the legal rule). From the interrelationship of those premises, the conclusion should be clear. Meanwhile, though, you might uncover a counterargument that needs demolishing.

The major premise for your arguments will derive from one of three sources: a legislative text or court rule, a judicial precedent or a commonsense policy of some kind. You’ll be trying to discover a major premise for each argument and fit it in nicely with a minor premise. If you can’t discover those things, you’re sunk. But fortunately, your experience guides you to identify precisely what kinds of things you’re looking for.

The motion for judgment on the pleadings
The first case involves the renovation of 10 rooms in a state office building. A subcontractor (Olson) not paid by the general contractor has placed a lien on his work and filed claims against both the contractor and the state.

You soon realize that a statute provides that the subcontractor’s sole remedy lies against the contractor’s payment bond. The state is immune from suit. You quickly verify that a payment bond, in fact, protects the subcontractor. So you draft two propositional headings: I. The state is statutorily immune from suit. II. Olson’s sole recourse is against the general contractor’s payment bond.

You’ve made this look easy. In fact, there’s a lot of other noise emanating from the files, but that’s all extraneous and irrelevant to your core points.

And you’re ahead of schedule: It’s only 9:50 a.m.! Time to look at the expert-witness issue.
The motion to strike

Your boss has told you that the expert-witness issue arises in a lawsuit against the operator of an unlicensed waste-disposal facility. The defendant has removed the case to federal court. The issue before you isn’t based on Daubert, but instead on 28 U.S.C. § 1746. You’ve never worked with this statute before, but you quickly ascertain that it allows an unsworn declaration to be submitted in support of a motion for summary judgment only if the declarant signs it as “true under penalty of perjury.” The expert here, Dr. Budd, has signed his declaration but not as “true under penalty of perjury.”

Here your point heading is quite simple: “Because Dr. Budd’s unsworn declaration does not comply with § 1746, this court should strike it from the record.” With some computer searches, you quickly find two federal appellate opinions within your circuit applying the statute as written. Your major premise is well-supported, and your minor premise is undeniable. You’re in good shape.

But wait. Should you number the point heading “I” if you can’t think of a “II”? You seem to remember that the U.S. solicitor general’s office has unnumbered “umbrella” headings if there’s just one overarching point. Sixty seconds on their website confirms your memory.

What-ho! It’s only 11:15 a.m. You’re ahead of schedule. So you go ahead and draft Page 1 of your motion to strike:

**Introduction**

This motion presents the court with the following issue:

Under 28 U.S.C. § 1746, an unsworn declaration cannot be submitted in support of a summary-judgment motion unless the declarant signs it as “true under penalty of perjury”—a provision applied strictly in this circuit. Here, Dr. Budd submitted a declaration without signing it as “true under penalty of perjury”—and the time for submission has expired. Should this court strike the declaration?

Then follows your unnumbered point heading, which effectively answers the question.

It’s now 11:45 a.m., and you’re ready to look at the filing in the state supreme court.

The motion to consolidate

For this third motion, you’re looking for similarities between two proceedings. You want to persuade the appellate court to join two appellate matters into one proceeding. Although the cases seem to be languishing on the court’s docket, they’re fascinating. The facts are outlandish, and the state’s briefing has been stunningly good. You know this much by noon.

In your judgment, you needn’t rehash the record. Perhaps the best approach is simply to write so evocatively as to pique the judges’ interest in the matters. By 12:45 p.m., you decide to write a one-paragraph motion. It goes like this:

Now pending in this court are two cases involving the identical parties and the identical subject matter: cases 21-1441 and 21-1456. One is a mandamus petition, the other a direct appeal. Even a perfunctory look at the briefs demonstrates striking likenesses: the same unfortunate ward, the same guardian ad litem, the same contemnors, the same siblings who confiscated the same corpus of wealth. The dispositive rationales in the two cases should be the same. Judicial efficiency would be served by consolidating the two proceedings and dispatching them together. Respectfully submitted, [your name].

You hand it over to the legal assistant for inserting the caption, the certificate of service and the footer. You ask him to prepare a form of order to accompany the motion.

The rest of the day

It’s now 12:50, you’re more than an hour and 15 minutes ahead of schedule. (Good thing you brought a sandwich to work.) You’re having fun playing with words and ideas, and your practical turn of mind is definitely paying off.

You still have work to do, and there may be some further difficulties you’ll uncover. But you’re well on your way, and your filings should be sound. (Although you expect them to be first-rate, you’d be more inclined to describe them as adequate.) Like a short-order chef who’s been given ingredients and had orders placed, you’re ready to whip up some high-quality fare in relatively little time.

Your boss well understood that not every motion can be done in a day. But these three could. Your boss believed in you. And you believed in yourself, but only because for most of your adult life, you’ve been preparing yourself for days like these.

In part three, we’ll see how the motion to strike and the motion to consolidate turn out.

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Bryan A. Garner, president of Dallas-based LawProse Inc., has taught writing seminars over the years to more than half the offices of attorney general throughout the United States. He has also taught at the U.S. Department of Justice and the U.S. solicitor general’s office. Among his more than 25 books is The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts.
Attorney Steven Becker at Queen of Heaven Cemetery near Chicago, where his client’s son, Michael Marino, was thought to be buried.
Steven Becker wasn’t sure what he’d see at his first exhumation. He’d been a criminal defense lawyer for more than a decade. He was used to filing Freedom of Information Act requests and litigating civil rights matters, not watching coffins emerge from the earth. But here he was, on Sept. 5, 2012, at the Queen of Heaven Cemetery in Hillside, Illinois, on behalf of his client, who insisted that the body in the coffin was not—despite what police said—her son. It was early in the morning. It was cloudy and quiet. Becker hadn’t notified the media; he wanted it to be a reverent process. A crane lifted the burial vault from the grave, and two workers guided it onto the back of a flatbed truck and brought it into a nearby building. They took out the coffin and opened it up. The pathologist began to go through the remains. Before long, he lifted out a clear plastic bag containing the skull, and Becker was shocked to see that the entire lower half of it was missing. The jaws were gone. And the jaws were very important.
Gacy covers his face as he is led to a courtroom where he was charged on Dec. 22, 1978, with slaying a teenage boy.

Becker walks toward the plot where “body No. 14” is buried. The Illinois native can recall the terrifying news of the Gacy murders unfolding when he was a teenager.

After Gacy’s arrest, police suspected he had killed other young men and boys.
The road that led Becker to this particular gravesite started in fall 1976, when a teenage Chicagoan named Michael Marino told his mother that he was heading out to see his friend Kenneth Parker. Neither boy ever came home. For the next two years, the police told Sherry Marino that her 14-year-old son had run away, even though she insisted he’d never do something like that. And then suddenly, the city filled with talk of a serial killer. On Dec. 21, 1978, police arrested John Wayne Gacy, a jovial suburbanite who was involved in local politics, dressed up as a clown for children’s parties and had been burying young men and boys under his house for years. The Cook County medical examiner dropped down into Gacy’s soon-to-be-infamous crawlspace wearing coveralls, saw a pair of human arm bones sticking up from the ground and ordered the entire house sealed.

Becker was a teenager at the time of Gacy’s arrest, living 40 miles south of Chicago on a farm with his parents and two younger brothers. He remembers the “horror of it,” and he was roughly the same age as the victims, but school and farm work kept him distracted. (His specialty was raising bees.) Across the area, though, anyone with a missing boy shuddered. The Chicago Police Department put out a request asking families with missing sons who fit the profile of a Gacy victim to send in their sons’ dental records. The medical examiner had been pleased to find that most of the bodies in the crawlspace still had their jawbones; teeth were vital when it came to identifying victims in the pre-DNA world of 1978. Marino submitted Michael’s records, which noted that one of his upper molars was missing. But before long, police were assuring Marino that her son was not among the 33 dead.

And then they changed their story. On March 12, 1980, Gacy was found guilty of 33 counts of murder. Immediately after the trial, the police knocked on Marino’s door. “We made a grave error, Mrs. Marino,” her daughter Melissa remembers them saying. “Your son was a victim.”

Gacy’s victims had been labeled in the order they were removed from the crawlspace, and police told Marino that body No. 14 was actually her son. Suddenly, Marino was a member of Chicago’s most grief-stricken club: the family members of Gacy’s victims. She joined their ranks, ready to fight for justice. She won a wrongful death suit preventing Gacy from profiting from any book or movie deals. In 1994, she waited on the grounds of the Stateville Correctional Center as Gacy was executed, telling the press, “My son should be mentioned. I am here for Michael Marino, who was 14 years old. My son should be mentioned.”

Still, Marino had her doubts. She thought it was strange that her son was declared a Gacy victim only after the trial was over, after the police had held on to his dental records for more than a year. The clothing that had been found with body No. 14 wasn’t what Michael had been wearing when he said goodbye to her. And she didn’t trust the police. There had been too many moments when she felt as if they were lying to her, first telling her that they’d seen her son around the city and now telling her he’d been dead the entire time. She just didn’t believe them. Every day, rain or shine, she walked the streets of Chicago and the surrounding suburbs looking for Michael.

“I’ve gone all over,” she recalls. “Places I’ve never heard of, streets I’ve never heard of.” She’d follow the most outlandish of tips down the city’s most obscure streets, and she’d elbow her way into dangerous drug dens, just in case somebody really knew something.

“I believe that God gave me certain angels, because I should be dead a hundred times over,” she says. “I would talk to people that most people wouldn’t talk to, and I had a pretty big mouth.”

Body No. 14 was buried on April 12, 1980, in the Queen of Heaven Cemetery under a gravestone that reads: “Beloved Son: Michael M. Marino.” She’d visit the grave religiously.

“I was looking for signs,” she says. “I’d keep an eye on that ground. It was a big area. I would talk to God. I didn’t trust the police. There had been no justice.”

For the next two years, the police told Marino that they’d seen her son around the city and now telling her he’d been dead the entire time. She just didn’t believe them. Every day, rain or shine, she walked the streets of Chicago and the surrounding suburbs looking for Michael.

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Body No. 14 was buried on April 12, 1980, in the Queen of Heaven Cemetery under a gravestone that reads: “Beloved Son: Michael M. Marino.” She’d visit the grave religiously. But every time she was there, the ground felt cold. She’d say, “Michael, if this is you, please give me a sign.” Nothing. Just the cold. She needed a lawyer.
Lawyer Steven Becker never could have expected a client like Marino to show up at his office. But when his private detective brought Marino into his office, explaining that she wanted to look further into the death of her son, Becker found the dark-haired mother a persuasive figure.

“Mrs. Marino was very demure, she was soft-spoken, but she was very convinced that her son was not a Gacy victim,” he says. “At that point, I wasn’t sure what was going to happen, but I just figured at least I could try to bring some closure to her.” Becker had just left his job at the Office of the State Appellate Defender—where he represented indigent prisoners on appeal—in order to start his own private practice. Marino was one of his first cases. He took her on pro bono.

By the time Marino met Becker in 2011, she had been trying for 35 years to get someone to listen to her. Most people thought, frankly, that she was crazy.

She put up reward posters around the city and followed every lead, all of which turned out to be fake. “I went for it every damn time,” she says. “They would say, ‘Meet me at so-and-so,’ and I couldn’t get there quick enough.” She gave out so much money, in fact, that it affects her to this day. “After you hand out money for 40 years, you have very little left,” she says.

When she wasn’t out in the streets searching, she sat in the waiting rooms of Gacy’s prosecutors and watched them walk right past her. She haunted the police. Melissa, her youngest child, remembers accompanying her mother to the Youth Investigation Division of the Chicago Police Department and watching her grow so upset at the cops that she’d lunge for them. Melissa would pull her mother back, terrified that she’d “get her brains splattered all over the police station.”

Anytime anyone remotely connected to the Gacy case appeared on TV—which happened less and less over the years—Marino would write down their names and call them. At the end of 2010, a former homicide detective named Bill Dorsch appeared on local station WGN-TV. Dorsch had his own problems with the Gacy case. He had long suspected that Gacy had buried bodies elsewhere, particularly at a Chicago apartment building where Gacy had been the caretaker. Dorsch lived around the corner in 1975 when he spotted Gacy outside at 3 a.m. with a shovel in his hand. “You know me,” the killer said. “Not enough hours in the day. You’ve got to get it done.”

When Marino saw Dorsch on TV, talking about how he wasn’t satisfied with the cops’ 1998 excavation of the building in question, she screamed to her nephew, “Come here and write this stuff down! I wanna call this guy.” They met up. At the time, Marino had been trying to get the autopsy report for body No. 14, but she hadn’t been able to navigate the system herself.

So Dorsch took her to the Cook County Medical Examiner’s Office. The medical examiner, who knew Dorsch from his days as a Chicago homicide detective, told him, “Bill, leave this one alone.” Dorsch found this ominous. So he decided to introduce Marino to Becker, for whom he was working as a private detective.

Becker was experienced with filing FOIA requests, which Marino needed to access the autopsy report. In fact, his first case out of law school was an FOIA suit on behalf of his professor, M. Cherif Bassiouni, who was known as the “father of international criminal law.” Bassiouni, a professor at DePaul Law School, was openly pro-Palestine, which got him flagged by the CIA and the FBI—unconstitutionally, Becker thought. So he sued the CIA, as well as the FBI, for their files on Bassiouni. After that, Becker went on to handle other complex matters, including representing alleged drug cartel members in international extradition cases and a Bosnian minister of foreign affairs who was convicted of crimes against humanity.

With experience like that under his belt, Becker figured he could help Marino access the autopsy report without much trouble.
“I had never dealt with a serial murder case before, never intended to be involved in one, but this was an area I knew well,” he says. Becker was successful in his request and received the autopsy report, which came with a series of gruesome photos that he refused to show Marino. He never could have predicted the “10-year odyssey,” as he calls it, that came next.

**THE EVIDENCE WASN’T MATCHING UP**
Once Becker received the autopsy report for body No. 14, he began scrutinizing the report against Michael Marino’s dental records—and Sherry Marino’s memory. There were inconsistencies. Body No. 14 had a “possible healed fracture of the right clavicle,” but Michael had never broken his collarbone. The report declared that body No. 14 was white “with some slight to moderate Mongoloid (probably American Indian) admixture,” but Michael was 100% Italian. Most important, the jawbones of body No. 14 showed no “antemortem tooth loss.” In other words, when this young man was killed by Gacy, all of his teeth were intact. Michael, on the other hand, did have a missing tooth. Seven months before he vanished, he had an...
upper molar removed because of a bad cavity. His mother had taken him to the dental appointment.

Armed with these inconsistencies, Becker filed a petition for exhumation. This was a rare move for a private attorney, but the judge declared that he could proceed, though he would have to raise the funds himself. Marino immediately gave as much money as she could, and donors provided the rest. After raising upwards of $6,000—and getting a discount from the Archdiocese of Chicago—the exhumation took place in fall 2012. Becker watched the pathologist take out a saw and carefully remove little pieces of bone. Since the jaws were missing, the pathologist had to take the DNA from elsewhere on the skeleton. They sent the bone fragments to an established medical laboratory chain called Labcorp, and Marino sent in her DNA separately. Anticipating pushback from the authorities, Becker made sure everything was documented by film or photograph.

The judge who granted Becker’s petition for exhumation had also declared that a representative from the Cook County Medical Examiner’s Office could attend the exhumation and collect their own DNA. But no one ever showed up. Instead, Becker received two letters from the Cook County Sheriff’s Office asking to be informed of the DNA test results before the media.

“It was very clear the sheriff’s office was simply interested in controlling the narrative, I think possibly anticipating that there could be a misidentification,” Becker says. He refused to give them the results in advance.

Thirty-six years to the day that Michael Marino went missing, the results came back from Labcorp. Becker solemnly informed his client that she’d been right all along: Body No. 14 was not her biological son.

“She didn’t break down, she wasn’t crying,” Becker says. She just sat there and said over and over again, “I knew it.”

**WHO WAS BURIED IN MICHAEL’S GRAVE?**

So where was Michael Marino? And who was in his grave? In an attempt to find an answer for his client, Becker found nothing but questions. Although he provided the Cook County Sheriff’s Office with portions of the DNA results—“five different loci of the chromosome of the DNA, which is basically a very definitive non-match”—they refused to acknowledge them. The orthodontist who originally worked on the case told the Chicago Tribune that he’d “stake [his] wife and children” on the fact that “the body and the X-rays given to me as Marino are one and the same.” The sheriff’s office declared that they wanted to do their own exhumation and their own DNA testing. They wanted access to Sherry Marino’s full DNA profile, and they wanted to interrogate both her and her daughter.

“That’s where we hit loggerheads,” Becker says. Marino was unwilling to hand over her DNA and had no interest in being interrogated as though she were guilty of something. “She really was horrified,” he says. “She simply did not trust law enforcement.”

So Becker kept working, pressing at the weird spots in the Gacy case like he was poking at a bruise. “From the exhumation until at least 2016, I likely spent more time on Michael’s case than on any other,” he says. “The collective hours over the last decade are incalculable.” He wasn’t doing it for money—the work remains pro bono to this day—but the case had gotten its hooks in him. “It’s of course been an extremely interesting case,” he says. “It’s been intellectually challenging as well.”

Marino felt strongly that she had been repeatedly wronged by the system—and, as a defense lawyer, the idea of systemic corruption really riled Becker. But his connection to the case wasn’t just intellectual or moral. His older brother had been born with an inoperable heart condition and passed away the age of 2½. Becker knew well how much that had affected his mother. He was no stranger to the sight of a mother grieving for her son.

He requested another exhumation, this time for body No. 15, thought to be Michael’s friend, Kenneth Parker. Bodies 14 and 15 were found buried together, with No. 14 on top of No. 15, and Becker thought perhaps the remains had accidentally been switched. But body No. 15 wasn’t Michael, either. He learned that the missing jawbones of body No. 14 were stashed in plastic buckets in a paupers’ grave, along with the jaws of all the other Gacy victims. After the trial, these jaws sat in the “bone room” at the medical examiner’s office until 2009, when they were ingloriously buried. Becker was informed by the Office of the President of the Cook County Board of Commissioners that an administrator at the medical examin-
er’s office had performed an “extensive search” and was unable to find any paper trail “pertaining to the decision to retain the mandible and maxilla bones of John Wayne Gacy’s victims” or to “the decision to bury or to the burial itself.”

“Absolutely incredible,” Becker says. “In the most prolific serial case at the time!” Given that there are still six official unidentified Gacy victims (seven, if counting body No. 14), why wouldn’t authorities hold on to at least those jaws, each one a rich source of DNA? And as far as why the jaws of the known victims weren’t returned to their families after the trial—a move that was actually illegal under Illinois law at the time—“it raises questions as to whether they had questions about the accuracy of the identification of [those] victims,” Becker says.

Authorities dug up a paupers’ grave in 2011 in search of missing jawbones from the serial killer’s victims.
During the 2011 exhumation, the Cook County Sheriff’s Department found the jawbones and teeth of the eight Gacy victims who had not been identified in hopes that modern scientific testing would make their identifications possible.

**DIGGING FOR CLUES DEEPENS THE MYSTERY**

The Gacy case is full of moments like this. Are the jaws part of a conspiracy of silence, pointing toward a larger darkness at the heart of the case? Or did some poor intern accidentally throw away the paperwork? It’s these strange moments that have drawn others to the mystery. The case has turned into something of a rabbit hole; get close enough, and you’ll go tumbling down. There, you’ll meet scrappy characters such as former Chicago Reader editor Alison True and filmmaker Tracy Ullman, who were pulled in by Bill Dorsch and who have been working on long-form projects about the case for 10 years. True and Ullman are the executive consultant and executive producer, respectively, of a recent six-part documentary on NBC’s Peacock streaming platform titled *John Wayne Gacy: Devil in Disguise*, which argues that the Gacy case is rotten at the core due to Gacy’s political connections (he was a precinct captain who infamously took a photo with first lady Rosalynn Carter) and his link to organized crimes (such as a sex trafficking ring that operated out of Chicago called the Delta Project).

These theories stretch far beyond Marino’s personal search for the truth, but the struggles she’s had with her case may point to a deeper corruption.

“Because of the sheriff’s ongoing responses to Becker, my sense that the original case is problematic is just reaffirmed,” True says.

The *ABA Journal* made several attempts to interview an official with the Cook County Sheriff’s Office, which stopped responding to emails.

Of course, Marino and her daughter Melissa are there, down the rabbit hole, and have been for decades. They see treachery everywhere they turn; they are overflowing with stories of odd behavior and sinister events.

For example: After Michael disappeared, they started receiving magazines such as *Newsweek and Amusement Business*—a now-defunct publication about theme parks—addressed to Michael Marino. Six weeks after he vanished, someone broke into their apartment, slashed up his clothing and stole all of Michael’s recent photos. What did it all mean? Nothing? Everything? When Marino began searching for Michael, she’d write all her findings down in a code she invented herself, paranoid that others would find her notes and abuse...
them somehow. It sounded outrageous. But so had her story about Michael’s grave feeling “cold,” and look at how that turned out.

After the DNA results, one of Marino’s neighbors told her daughter, “Man, we just thought your mom was losing it. Man, turns out that she was right.”

A few years ago, Becker finally got a bit of validation for his work. Marino had been going through her files and found an old letter from former U.S. Sen. Charles Percy from Illinois, whose own daughter was murdered in 1966—a case that remains unsolved. Back in 1980, she’d called Percy’s office, expressing her doubts about the identification of body No. 14. And Percy wrote back to her. He said he’d spoken to Gacy’s lead prosecutor, who explained that “despite some initial uncertainty due to a discrepancy in dental charts, one of the bodies recovered from John Gacy’s home has been positively identified as that of your son.” Becker homed in on that word: discrepancy. He’d never heard this admitted before. “This is the first documentary proof I got, years later, that there was a problem,” he says.

**‘That Wicked Wind Whispering Around You’**

Marino refuses to say “John Wayne Gacy.” She simply calls him the devil. After Michael disappeared, Melissa watched the life drain from her beautiful mother’s eyes. “It’s actually, like, killed my mom,” says Melissa. “I’ve seen it just wither right out of her, her life.”

Marino’s hopes rose after the exhumation. Local news sources—and a few national ones—reported on it. The Wikipedia page for John Wayne Gacy was dutifully updated. But then—nothing. The medical examiner’s certificate of death for body No. 14 still bears the name “Michael Marino” and lists the date of his death as Dec. 27, 1978. There was no huge reckoning with the Gacy narrative, no call to action. Instead, everything fell silent again.

Part of the silence was intentional: The Gacy case was open again, which meant that the public no longer had as much access to it as they used to. It had been open since 2011, actually, right around the time the judge granted Becker’s petition for exhumation.

Days after the ruling, Sheriff Tom Dart and his team exhumed the eight bodies of Gacy’s officially unidentified victims. Two would eventually be identified, to great acclaim.

True, who’s working on a book about Gacy, finds this move “interesting from a legal standpoint,” because the fact that the case has been reopened “gives them ground to refuse FOIAs. Not only do they get to sit on all the information, they don’t really have to do anything. That’s the answer they give any request.”

True—and others interviewed for this article—knows that her stance can sound paranoid.

“I’ve had to fight my natural skepticism and consider that there is a conspiracy of silence around the Gacy case,” she says.

Melissa Marino puts it more colorfully: “You become in such a fog, like that dense London fog, that you can’t see any-

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Early in September just before dawn, police officers in Camden, New Jersey, cautiously moved in on a rape suspect they were following. The man, armed with a knife, parked his SUV in an alley, got out and slowly walked toward the officers.

“Drop the knife! Stop moving!” an officer yelled.

“Stop moving!”

Still gripping the knife, the man kept walking toward the officers, who stepped back to maintain a safe distance.

“We’re trying to help you, man,” another officer said.

“I’ll stab you,” the suspect replied.

The officers, some with their guns drawn, others ready with Tasers, waited for his next move. Camden County police are trained to hold back deadly force when possible—to first try to de-escalate situations like this.

De-escalation training is becoming more common in police departments across the country as public pressure mounts.
to reduce the number of people killed by law enforcement officers. Last year, police killed 1,127 people, according to the research group Mapping Police Violence.

In most of those cases, officers initially responded to nonviolent offenses or situations in which no crime was reported. Of those killed by police last year, 180 had a knife or sharp object, and 80 were unarmed; about half had a gun. Of those unarmed, 45 were people of color.

Could police have avoided killing—whether the victims were armed or not?

Advocates of de-escalation believe that many such deaths can be prevented. Yet what de-escalation means and how effective it is remain subject to debate as police and the public try to determine whether it puts officers at greater risk or helps prevent unnecessary killings.

**Respecting life**

The rape suspect in Camden refused repeated commands to drop his knife, and police officers continued to take steps to avoid shooting him. Even though he had a deadly weapon, they didn’t consider him an immediate threat because the officers were able to keep their distance.

Camden’s 400-member police force came a long way to reach this point. For decades, the city was once considered among the most dangerous in the country, beset with high murder rates and complaints of excessive force. In 2013, the city’s police department was disbanded and became a countywide operation, instituting a series of reforms under then-Chief J. Scott Thomson. Among them was de-escalation training, which stresses patience and talking to suspects rather than using aggressive takedowns.

Then in 2019, the Camden County Police Department, working with New York University School of Law’s Policing Project, developed an updated use-of-force policy to complement its de-escalation training. It was backed by the American Civil Liberties Union of New Jersey and supported by the local Fraternal Order of Police lodge. At its core is the department’s declaration that officers “respect the sanctity of life.”

Police use-of-force policies vary from department to department but have been guided, in part, by two U.S. Supreme Court decisions.

In 1985’s *Tennessee v. Garner*, the court ruled that a state law allowing police to shoot an unarmed, fleeing suspect was unconstitutional.

The court found that the law violated the Fourth Amendment’s prohibition against unreasonable seizure—in this case, the seizure being the apprehension of an unarmed criminal suspect. The use of deadly force to stop the suspect, the court reasoned, far exceeded the state’s interest in apprehending the suspect—who in this case was a teenager wanted in connection with a burglary.

Four years later, the court ruled in another Fourth Amendment case, *Graham v. Connor*, that a police officer may only use force, deadly or otherwise, that a “reasonable” officer would use when facing similar circumstances. That case stemmed from an incident in which police, suspicious after a man quickly left a convenience store, detained and handcuffed him only to later learn he was diabetic and was having an insulin reaction.

The policy in Camden County goes further than both cases by seeking to avoid use of force that may be considered lawful but not necessary. “Whenever feasible, officers should attempt

**“WE DO THINGS TOTALLY OPPOSITE NOW. WE UNDERSTAND THAT DE-ESCALATION IS IMPORTANT.”**

—CHIEF GABRIEL RODRIGUEZ
to de-escalate confrontations with the goal of resolving encoun-
ters without force,” the policy states. Officers may only use force “as a last resort.”

Camden County Police Chief Gabriel Rodriguez says when he was a young officer, such policies didn’t exist. “The feeling back then was that it was better to be judged by 12 than carried by six,” he says. “This was the mentality of the police officer back then. Get there, draw a line in the sand, and do not retreat. We do things totally opposite now. We understand that de-escalation is important, using the proper tactics is im-
portant, creating space, giving yourself more time.”

Farhang Heydari, an attorney and the executive director of the Policing Project, worked with Camden police and former chief Thompson to bring the use-of-force policy and train-
ing together.

“Training has to come hand in hand with the policy,” he says. “I think we crafted a policy that put Camden out front of many departments. It definitely can serve as a model for other departments.”

**A call for help**
The encounter with the rape suspect in Camden began early on the morning of Sept. 14 when Sgt. Michael Harper, while on patrol, heard a woman calling for help. Harper stopped and asked the woman what happened and had her get inside his squad car. She told Harper she had been sexually assaulted by a man with a knife.

As they spoke, the man she said assaulted her walked up to the officer’s car holding a knife. He swung the knife several times at the car.

“That right there, when I came on the force 18 years ago, would have been a deadly force situation,” Rodriguez says. “We call them lawful but awful shootings.”

Harper, known for his cool, radioed that the sexual assault suspect had a knife.

He did not get out of the squad car. The man got into his SUV and drove away.

Officers in the area quickly located the SUV and followed it for several blocks until the suspect stopped and got out of the vehicle.

“Put your hands up!” one of the officers yelled.

“Put your hands on top of your head, bro,” another said. The suspect got back in his car and drove off.

In the old days, this might have triggered a police chase. But in Camden, the strategy is to avoid putting anyone’s life in danger, says Capt. Kevin Lutz, who leads the depart-
ment’s training.

Lutz describes de-escalation as a multilayered process. “I don’t think it’s easily defined. It’s a unified way of thinking through crisis,” he says. “At the end of the day, de-escalation is more of a culture of how you deal with individuals, not just during a crisis but in day-to-day interactions. As officers, we may be dealing with people on the worst day of their life, and we want to make sure we’re there to help them, not hurt them.”

But sometimes they face very real threats. “If you put a gun into the scenario, it’s a completely different set of circumstanc-
es at that point, and there are minimal things you can do to de-escalate someone who is threatening you or someone else with a gun,” Lutz says.
Training to think differently

The training model in Camden was developed by the Police Executive Research Forum, a nonprofit police research and policy organization based in Washington, D.C. Chuck Wexler, executive director of PERF, says the idea came to him after he visited the United Kingdom to study police techniques.

His visit came around the same time as the 2014 fatal shooting of Michael Brown by police in Ferguson, Missouri, and the subsequent riots.

“It got me thinking about de-escalation, and why can police in the U.K. arrest people without shooting them?” Wexler says. “It’s about training, not just policy.”

Wexler concluded that while police departments may have use-of-force policies that look good on paper, they can’t be fully effective without proper training. “Changing policy is easy,” he says. “We’re talking about changing culture. Changing culture is the Mount Everest of police reform. How do we implement this strategy and really turn police thinking on its head?”

The organization developed training that encourages officers to keep themselves out of harm’s way while communicating with subjects.

The goal of the training PERF designed is to build rapport that leads to a peaceful surrender. It’s designed for situations involving people who are unarmed or armed with weapons other than guns.

“The notion that cops have to make a split-second decision is not always the case,” Wexler says. “It’s about communicating, working as a team.”

De-escalation training also recognizes that many of those who police encounter may have mental health problems, may be severely intoxicated from drugs or alcohol, and in some instances are seeking “suicide by cop.” (See “Calls for Help,” April-May, page 46.)

The program Wexler helped develop is called ICAT training, or Integrating Communications, Assessment and Tactics. Camden became one of the first test sites for the training. Since 2016, when the first ICAT training guide was published, more than 600 police agencies have attended training sessions, and dozens of agencies are using it.

Other agencies teach police de-escalation techniques, and the training can be as varied as the more than 18,000 law enforcement agencies—large and small—across the country. The common theme is to try to avoid deadly confrontations. But does it work?

Anecdotal evidence suggests that it does, though there haven’t been enough comprehensive studies to confirm it. “Despite vast promotion from politicians, academics, expert panels and the public, we know little about the effects of de-escalation training on officers and police-citizen interactions,” noted a study last year in Criminology & Public Policy.

One of that study’s authors is Robin S. Engel, professor of criminal justice at the University of Cincinnati and director of the International Association of Chiefs of Police / UC Center for Police Research and Policy.

“I was shocked at the lack of evidence about police training, not to mention de-escalation training,” she says. “Officers were concerned that if they engaged in de-escalation that they were going to get seriously injured or killed. And people would
say, ‘You’re gonna kill cops doing this because you’re teaching them to hesitate.’”

However, Engel and colleagues took a closer look at the Louisville Police Department in Kentucky, which has implemented the ICAT training. Their study offers one of the first large-scale evaluations of de-escalation training for police.

The examination in Louisville, where police were heavily criticized after Breonna Taylor was killed in a no-knock raid in March 2020, showed that concerns de-escalation might cause more harm than good were unfounded. The data showed that after the training, officers had 28% fewer incidents involving use of force, 26% fewer injuries to citizens and 36% fewer injuries to officers.

Von Kliem, an attorney, former prosecutor and former police officer in Topeka, Kansas, is the community relations director of the Force Science Institute, which does scientific research, behavioral analysis and training in the use of deadly force.

Kliem says that while officers can be trained in de-escalation techniques, situations often involve making educated guesses, forcing officers to calculate the risk of taking action against the risk of standing back. It’s a layered and complex situation and should not be hastily judged. “Always remember there is a human being behind the badge,” he says.

Each situation, Kliem notes, requires asking what the government interest is in stopping or arresting someone. Cops must be aware of the ongoing tension between demands for law and order and demands for social justice. Will the department and the community support what they do?

He says the edict to only use force when necessary is vague. “That’s such an arbitrary and ambiguous phrase. No one can determine that in advance of using force,” he says. “It sounds great, and we all want to use less force, as necessary. How long do you wait? Was it necessary? This is the position we put cops in all the time.”

Police perspective
Using de-escalation to defuse potentially dangerous situations is really nothing new, some veteran cops say. But the formal training is a more recent development.

“When I first came on 35 years ago, there was no de-escalation training. What the senior officers did teach us was how to talk to people, how to get out of cars and start conversations and really communicate, to learn community policing,” says St. Petersburg, Florida, Police Chief Anthony Holloway, chair of the Law Enforcement Committee of the ABA Criminal Justice Section. “So maybe that was unofficial de-escalation training.”

Official or not, Holloway believes police departments have fallen short in teaching community relations. “I blame myself. We forgot to teach officers how to talk to people,” he says. “We took out the human part of it.”

New Jersey attorney Stuart J. Alterman, a former cop who represents police officers in use-of-force complaints and other matters, argues police are too often expected to act like social workers. “We’re trained to deal with people who do bad things,” he says. “We’re trained to deal with people who are prone to commit crimes.”

Alterman, who also worked as a county corrections officer and prosecutor, believes formal de-escalation policies are not necessary. “I have a great deal of concern about what is being espoused today,” he says.
Cops, he says, are asking themselves whether these techniques can really work. “How long do I sit there and talk to this person, and how effective will I be?” he says. “I think it’s a fine line that has to be handled with each individual case.”

He recalls being trained in the use-of-force continuum, guidelines officers use to resolve a situation that can escalate when civilians or criminal suspects are not cooperative. “The idea was that you can go one step above what the suspect is trying to use against you,” he says.

Alterman says cops want more support and less judgment. “When you’re trying to push de-escalation because it’s politically expedient, you also have to let officers know that if they have to use deadly force, we’ll back them up,” he says. “Now we have cops second-guessing themselves all the time.”

Tense situations are never easy and often require a split-second response, Alterman adds. Having been a cop himself, he understands the pressure, and he says his clients feel persecuted. “You’re supposed to go home at the end of your shift. You didn’t sign up to get hurt or disabled, or worse, dead.”

**The final confrontation**

The officers in Camden caught up once more with the sexual assault suspect in the alley, where he threatened to stab them. As the scene unfolded, the police watch commander, who had been monitoring the situation on the radio, reminded the officers to maintain a safe distance and keep working to de-escalate the situation.

The suspect, who was 5 feet, 10 inches tall and 200 pounds, kept moving closer. The officers ordered him to drop the knife. “What’s your name?”

“I’ll stab you.”

“What’s your name, man? C’mon, man.”

Officers again told him to drop the knife, but he kept moving closer.

“Taser, Taser, Taser!” one of the officers, John Reed, yelled. There was a loud pop. He hit the suspect, sending him to the ground, groaning with pain.

“You got me good,” the suspect said to the officer.

His name was Cesar Sanchez. The 36-year-old was charged with three counts of aggravated sexual assault while armed, aggravated assault with a deadly weapon, simple assault, possession of a weapon for an unlawful purpose, terrorist threats, resisting by flight and restraint.

“He didn’t want to die,” Lutz says. “He didn’t want to necessarily kill these officers or kill someone else. He was having a moment of mental crisis.”

The entire incident was captured by nine police body cameras and has since been compiled into a training video. “We review body cam footage on a daily basis,” says Rodriguez, noting that these videos also reveal their shortcomings. “We’re not saying we’re the best, we’re not waving the flag and saying we’re the greatest.”

**National progress**

Katie Ryan, campaign manager for Campaign Zero, a national advocacy organization that seeks to end police violence, says the incident in Camden is an example of how police can avoid escalating a situation. “There is a level of ownership law enforcement can take in a situation that is already volatile,” says Ryan, who reviewed a Camden police video of Sanchez’s arrest. “They were able to employ a cooler approach.”

Campaign Zero developed policies to help reduce police violence called 8 Can’t Wait after George Floyd’s murder by Minneapolis police officer Derek Chauvin in May 2020. Among the eight recommendations: require de-escalation and exhaust all other means before using deadly force.

“We’re starting to see a lot more police departments aligned with our campaign of 8 Can’t Wait,” Ryan says, adding that
one or more of their policies have been adopted in 340 cities since June 2020.

Campaign Zero has studied the use-of-force policies of at least 500 law enforcement agencies, a fraction of the 18,000 out there, and sometimes faces resistance from departments who see the organization through a narrow lens. “We get lumped into the narrative that we’re anti-police. I think the criticism is ill-informed,” Ryan says.

And there is still the challenge of overcoming bias—explicit or implicit—in how police handle calls and communicate with people of color, says Johnetta Elzie, one of the founders of Campaign Zero. Elzie also believes “the militarization of police” has made some officers see citizens, especially people of color, as enemy combatants, not humans—a culture that will be difficult to change.

“As far as empathy training and anti-bias training? I personally don’t believe those things work because I don’t believe you can teach empathy,” she says. “If the culture is toxic, you can change as many rules as you want on paper. It doesn’t mean there will be any actual people to enforce the change.”

A sign that the de-escalation movement is catching on came when New Jersey Attorney General Gurbir Grewal announced in December that the state would update its use-of-force policy for the first time in 20 years in an effort to reduce violent interactions with civilians.

The new policy is scheduled to take effect in 2022 and calls for all of the state’s 38,000 law enforcement officers to undergo de-escalation training and outlines other strategies for limiting the use of force. “That was the first statewide wholesale adoption of our 8 Can’t Wait policy,” Ryan says.

At the national level, the George Floyd Justice in Policing Act, if passed by Congress, would encourage federal officers to use de-escalation techniques when possible and create grants for de-escalation training in other law enforcement agencies.

“You can come up with policies, all kinds of reform, but if you don’t instill this in the culture of the agency overall—the sanctity of life, all those key things we have in our use-of-force policy—you’re not going to get the change or results that we’re seeing,” Rodriguez says.

Camden County has seen real progress. Since the de-escalation training began, the number of excessive force complaints against the department dropped from 65 in 2014 to three in 2020. Police have fatally shot three people during that same period, and all were considered justified.

“It didn’t happen overnight,” Lutz says. “It was years in the making. And we’re always looking to get better every day. I can tell you that it’s safer policing this way. We’re still getting the violent offenders. We’re still seizing illegal guns off the street. And we’re doing it the right way.”

In the case of the knife-wielding rape suspect, the officer who first confronted him could have made a very different decision. “He could have got out of his vehicle, drawn his service weapon, given a command and shot him, and it would have been legal,” Lutz says. “That’s not what we train to do here, and we have seen multiple success stories.”

Sanchez was one of them. They got him good, as he said. And they got him alive. ■
Do varying legal definitions of race leave room for abuse?

By EMILIE LE BEAU LUCCHESI

In 2010, Ralph G. Taylor took an ethnicity DNA test and learned he had 4% African ancestry and 6% Native American ancestry.

The Washington-based insurance company owner, who has fair skin and short straight hair, used those test results to try to register as a minority-owned business to have access to the state’s minority-owned business contracts. Taylor said his 4% African ancestry qualified him under the state and federal definitions of what it means to be Black, which require that a person descend from “any of the Black racial groups of Africa.”
Taylor was able to successfully register with the Washington state Office of Minority & Women’s Business Enterprises, but he ran into problems when he applied for the U.S. Department of Transportation’s Disadvantaged Business Enterprise program. The agency considered Taylor’s driver’s license photo and questioned whether Taylor actually was Black. It was determined Taylor appeared “visibly identifiable as Caucasian,” and his application was denied in 2014.

Taylor responded by suing both state and federal authorities in 2016, but the district court granted summary judgment and dismissed the case. Taylor appealed, but the San Francisco-based 9th U.S. Circuit Court of Appeals affirmed the lower court in 2018 and refused a petition for a rehearing in 2019.

In the dismissal, U.S. District Judge Robert J. Bryan of the Western District of Washington wrote the agency had a “well-founded reason to question” Taylor’s racial membership claims, which Taylor had sought to bolster by noting membership in his local chapter of the NAACP as well as a subscription to EBONY magazine.

Taylor appealed to the U.S. Supreme Court in 2019, but his petition was denied. In March he said that he had his birth certificate legally changed to “nonbinary Black Native American.” (In 2017, it was changed from Caucasian to “Black, Native American, Caucasian.”) And he intends to resubmit an application for the DBE program with his amended birth certificate as proof of his Black identity.

“The government has to admit they have no legal way to define race,” Taylor says.

The federal government does not have precise legal definitions of what it means to be a member of a particular race. And with no centralized federal guidance, federal and state agencies have pieced together definitions, applying them in disparate settings.

In recent years, these inconsistent definitions have been criticized for allowing undeserving people to fit themselves into racial categories to benefit from contracts, jobs or university admissions slots intended for racial or ethnic minorities.

These vague definitions and how they are applied have similarly raised questions of equity, causing controversies that not only have captured headlines, but also have escalated to the courts. Some law scholars worry that attention to diversity in employment or admissions has become a type of commodity that is disconnected from the past and anti-discrimination laws intended to equal the playing field for minorities.

Questioning DNA
Taylor’s 2019 cert petition to the Supreme Court argued that racial definitions were inconsistent between state and federal agencies and therefore problematic and subjective: “In
doing so, the same people, looking at the same evidence, and using the same definitions found Mr. Taylor both Black and not Black.” It further argued that the inconsistent definitions meant the federal agency overstepped the state when denying Taylor certification. “In doing so, the federal agency did not give full faith and credit, let alone any type of deference, to the state’s determination that Mr. Taylor was Black.”

The Supreme Court declined to hear the case. Marc Rosenberg, counsel of record on the cert petition, declined to comment for this story. He no longer represents Taylor.

Taylor says his DNA is all that matters when meeting the government’s standard. He argues that socioeconomic status defines a person’s experience more than race, and he feels the Black community is too economically disparate to be considered one entity with a shared experience.

“What is the definition of the community? ... Everything is socioeconomic,” Taylor says.

DBE business contracts do have a category for people who are disadvantaged socioeconomically, regardless of their race. The application process involves submission of financial statements to prove such a burden.

Similarly, the process for proving race involves submitting a state identification card, such as a driver’s license, and in some instances, a birth certificate indicating the race of the applicant, a parent or grandparent.

And while Taylor’s position relies heavily on the results of his ancestry test, states do not currently consider ethnicity DNA tests from companies such as 23andMe or Ancestry.com when determining a person’s race.

Genetics experts say ethnicity DNA tests are reliable and have meaning but are limited in what they say about a person’s ancestry and experience. For instance, siblings might not receive the same exact genetic distribution from one set of parents. And a parent of mixed ancestry might pass on unequal genetic markers to his or her offspring.

“It changes every time,” says Joseph Pickrell, who has a doctorate in human genetics and is the CEO of Gencove, a New York City-based biotechnology company.

Another complication is that ethnicity tests are designed to tell people where in the world their DNA has the strongest resemblance.

The tests are based on relatively small samples that do not include most indigenous tribes, according to Marcus W. Feldman, a biology professor at Stanford University who has a doctorate in mathematical biology and is the co-director of the Stanford Center for Computational, Evolutionary and Human Genomics.

Pickrell says the tests are best for identifying DNA between populations that were long geographically isolated, such as those of Asia, Europe or Africa. The more geographically close the regions are, the harder it is to distinguish between them, he adds.

“These bits of DNA that are being tested, they constitute the genotype. What you look like, how you behave, how fat you are, how tall you are—that’s your phenotype. The relationship of the genotype that is Marcus W. Feldman caution against using DNA tests to determine race.
being tested by these companies has nothing do you with your phenotype,” Feldman says.

As a result of these limitations, some experts, including Feldman, advise against using DNA tests to determine race. “The term ‘race’ differentiates from ‘ancestry,’” Feldman says. “Ancestry tells you where those genes you are carrying came from in the world at some point in time. Race is constructed.”

Part of the problem is we disassociate the history of discrimination and marginalization with rewarding these benefits, says Erika K. Wilson, an associate professor at the University of North Carolina-Chapel Hill School of Law.

“It’s no longer about trying to correct past societal rights, particularly against Black and Indigenous Americans. It’s about diversity,” she says.

When it comes to programs aimed at promoting diversity in hiring, Wilson says they could be improved by focusing less on categorizations and more on experiences. She suggests the application process should include a personal statement in which applicants describe their personal histories and the barriers faced by their family members.

**Disproving race**

Employers might hesitate to question an employee’s racial identity, but the government does not. Although the government does not legally categorize private citizens’ racial categories, people applying for contracts intended for minority- and women-owned businesses must supply documentation, such as a parent’s birth certificate that proves their claimed race.

“We focus our public attention on [programs designed to promote diversity in] university admissions, but the big money is in federal government contracting,” says David Bernstein, a professor at George Mason University’s Antonin Scalia Law School and the executive director of the law school’s Liberty & Law Center, a research division that examines government encroachment on civil liberties.

Anti-discrimination laws from the 1960s prompted various state and federal agencies to create programs in the 1970s and ’80s to help minority- and women-owned businesses compete for contracts, often with states varying on these definitions among their agencies.

Federal court orders in the 1970s required police and fire departments to have racial makeups that reflected their communities. These contracts and hiring policies prompted inquiries and lawsuits from people claiming to be a member of a minority group.

Since the 1970s, Bernstein says, there have been lawsuits in which members of police and fire departments have claimed unfair hiring and promoting practices gave an advantage to Black people and Latinos. One famous case from the 1980s involved the Malone brothers in Boston, twins of Irish heritage who claimed to be Black on their job applications. They were exposed 10 years later when their names were on a list for Black firefighters eligible for promotion. The brothers were terminated, and a county judge ruled the brothers were indeed not Black.
In his decision, the judge stated the brothers did not have evidence of their racial identity. They did not look Black in appearance, provide proof of ancestry through a parent’s or grandparent’s birth certificate or live openly as members of the Black community. Bernstein notes the definition is problematic because others falsely performing racial identities have changed their appearance and lived openly as members of the community.

In some states, vague definitions have made it easier for people to qualify as minorities. The result is a lack of uniformity.

So a person who is considered Hispanic in one state might not qualify in another.

“The Hispanic category, frankly, is a very problematic category. It’s an ethnicity, not a race,” Bernstein says.

Rhode Island, for example, defines Hispanic as “all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.” There is a separate category for people of Portuguese culture or origin.

But in Delaware, the Hispanic category is limited to “origins from any of the Spanish-speaking people of Mexico, Puerto Rico, Cuba, Central or South America or the Caribbean Islands.” This definition does not cover people with origins in Brazil, Portugal and Spain, nor Latin Americans of indigenous descent, such as the K’iche’ of Guatemala.

State definitions sometimes conflict with ones used by, for example, the U.S. Small Business Administration or the DOT. This means a person might meet the federal standards for a program, but not a state’s, or vice versa. The inconsistencies demonstrate how definitions of race are malleable and sometimes subject to controversial claims.

Legally defining race
When it comes to legal definitions of race in the United States, are people who they say they are?

“Americans don’t have an official race. It’s very complicated,” Bernstein says.

In the past, there were some state race registration laws that required a baby’s race be recorded on the birth certificate. Whether a child was classified as white, Black or Native American directed the course of his or her life: Who the child could marry and whether he or she could vote or have civil rights were all determined by the check of a box. In some states, such laws were rooted in slavery and segregation.

In 1970, a Louisiana state law specified a person was considered Black if they had “Negro blood” dating back five generations or 1/32nd of their racial heritage.

In 1982, Susie Guillory Phipps, then 48, sued the state’s vital record office after she learned her birth certificate designated her as Black.

She made the discovery years before when she was planning a trip to South America and needed her birth certificate to apply for a passport. She viewed herself as white and claimed the midwife present at her birth was the one who designated her as Black.

In response to the lawsuit, the state hired a genealogical researcher who found Phipps descended from an enslaved woman born in the 1760s.

Although the Louisiana law was repealed in 1983, the courts ruled against Phipps in her quest to have her birth certificate changed. She appealed to the Louisiana Supreme Court in 1986, but it upheld the lower court’s ruling. The U.S. Supreme Court declined to hear the case.

Midwives and vital records offices no longer determine a person’s race at birth. The United States now has both a self-reported and voluntary system when it comes to racial identity.

Both job and college applications, for example, maintain racial identification as an optional disclosure. Applications do not provide uniform definitions on what it means to be a member of a certain race.

Testing definitions
Title VII is the provision of the Civil Rights Act of 1964 that governs most employers when it comes to discrimination, says Barbara Johnson, an employment law attorney in Washington, D.C. “In general, Title VII prohibits employers from making decisions based on the applicant’s race.”

Employers cannot pass on an applicant because of race, but they also can’t intentionally hire a candidate solely because of race.

“Race can’t be a prerequisite for a job. You can’t say, ‘In order to have a job, I’m only going to hire LatinX or Black folks,’” Wilson says.
Affirmative action programs—which many people misinterpret as a quota system—are actually federal requirements for contractors and subcontractors to have training programs and recruitment programs designed to attract a more diverse applicant group.

Just as employers cannot hire because of race, they also cannot fire an employee whose racial identity is later disputed, Wilson says. Instead, employers can create protections by using an ethics agreement as part of the hiring process. “Many employers do this anyway, so that if you misrepresent on the employment application a detail or fact, contract law allows termination,” Wilson says.

Race and ethnicity also can’t be a sole factor in the college admissions process, but it can be considered along with test scores, grade point average, extracurricular activities and socioeconomic status.

In the 2016 Supreme Court decision Fisher v. University of Texas, the justices upheld the school’s right to include race and ethnicity as one aspect of the admissions process.

Similarly, in 2019, a district court judge ruled in favor of Harvard University after a group of Asian American students rejected by the school sued and claimed the admissions process intended to limit the number of Asians; the decision was upheld in 2020 by the Boston-based 1st U.S. Circuit Court of Appeals. In late February, the plaintiffs petitioned the Supreme Court.

Many colleges and universities have sought to increase diversity among their faculty or administrators. In these instances, the department might call for a scholar with a specific area of research that is more likely to attract applicants from an underrepresented community.

For example, this might have been the case when George Washington University in Washington, D.C., hired Jessica Krug (which she said was pronounced “Cruz”). Krug was a history professor, award-winning author, and she self-identified as an Afro-Puerto Rican woman.

Bernstein says the job ad for her position likely specified the candidate be able to teach courses in African history and have research related to African history and the African diaspora.

Krug said she was the daughter of two drug addicts, and she claimed she worked relentlessly to overcome her humble origins to become a full-time faculty member at GWU in 2012. As a scholar, she promised to remain true to her roots as a “unrepentant and unreformed child of the hood.”

She seemingly brought a dose of racial diversity to the history department’s mostly white male roster.

Days after the 2020 fall semester began, however, Krug posted a blog article on Medium confessing her life was a lie. She was a white woman from suburban Kansas City. For years, she had dyed her blondish hair black, applied self-tanner, adopted a fake Bronx accent and intentionally mispronounced her last name. Other academics in her discipline had uncovered the truth prior to her public confession and planned to confront her.

Krug realized that she had been found out and chose to reveal the truth herself first. In response, the history department at GWU immediately released a statement calling for Krug to resign. She complied.

“Her case was easy: scholarly fraud,” Bernstein says.

A GWU spokesperson declined to comment on the situation, and it’s unknown whether Krug identified herself as Black or Hispanic on her application. But she did assume a false identity by pretending to be Afro-Puerto Rican, which called the integrity of her scholarship and mentorship into question.

Krug isn’t the only academic who has either quietly or openly lied about racial identity. Earlier in 2020, when a GWU English professor died from COVID-19, his family then revealed his name was Herman Glen Carroll, not Herman G. Carrillo. His Afro-Cuban identity was fictitious. He wasn’t from Cuba; he was from a Black, non-Hispanic family in Detroit.

In September 2020, doctoral student Christina Vitolo-Haddad at the University of Wisconsin-Madison was exposed for faking a racial identity; she claimed Afro-Cuban ancestry, which proved fraudulent. In response, Fresno State University rescinded its tenure-track job offer set to begin in 2021.

Some call it “racial fraud,” or the act of falsely assuming a race or ethnic identity.

In 2017, legal scholars Khaled A. Beydoun and Wilson coined the term “reverse passing” in the UCLA Law Review to describe white people who intentionally pass as nonwhites to gain access to job opportunities, college admissions, political benefits or social recognition.
Reverse passing presents a complicated legal issue with no set standard for how employers, colleges or government agencies should respond when a false identity is exposed. In many instances, such as the Krug case, employers are not supposed to consider race as a major factor when evaluating job candidates.

Thus, investigating allegations of such a faked identity could open an employer to discrimination claims.

Proving race
The Krug case was unique because it’s one of the few instances in which an employer was emboldened to dispute an employee’s racial identity. Bernstein says most employers would not set themselves up for the potential discrimination liability.

GWU did not investigate Krug. Other academics in the field who were not GWU employees suspected Krug was a fraud and began researching her background. Yomaira C. Figueroa Vásquez, an associate professor of English at Michigan State University who works on Afro-Latinx and Afro-Hispanic literature and culture, was one of the scholars who investigated Krug.

Figueroa Vásquez did not know Krug personally. A junior scholar contacted Figueroa Vásquez and said she doubted Krug’s identity but was afraid to come forward with the allegations.

“I was able to very quickly use Google and look up her hometown, her parents’ obituaries, which I cross-checked with each other,” Figueroa Vásquez says.

“I consulted with another senior scholar, another Afro-Latina, on what was the ethical thing to do. We decided to speak with another senior scholar who knew her distantly and someone who knew her better.”

As for Taylor, despite his losses in court, he continues to make claims to his—and now his children’s—racial identity.

“My daughters can now say they are Black when they apply for college. They are Black. The definition is to trace your ancestry to Africa. They can,” Taylor says.

Taylor assumes his daughters will have a better chance of being accepted to a competitive school or receiving scholarships if they identify as Black on their applications.

But scholars such as Figueroa Vásquez disagree that a person with a white lived experience should pursue affirmative action programs intended to promote equity, even though it may be technically legal.

“You see white folks attempting to take up Blackness or other identities to get what they believe is an advantage. It’s a sense of entitlement,” Figueroa Vásquez says. “There’s a deep-seated racism in this practice because they don’t understand why these resources were set aside. It’s not like there is many of [these resources.] There are very few, and white people have decided they are entitled to these things as well.”

Wilson agrees, pointing to her own family’s history.

“I could speak about my parents growing up in Jim Crow South and my grandmother not being able to finish eighth grade because she was Black,” Wilson says. “I now teach at a law school where they could not have been admitted.”

Emilie Le Beau Lucchesi is the author of Ugly Prey and This is Really War. She holds a doctorate in communication from the University of Illinois-Chicago and studies health communication, medical history and stigma communication.
MEMBERS WHO INSPIRE

Wildlife Welfare

Could animal rights laws prevent the next pandemic? Rajesh Reddy has a plan

BY AMANDA ROBERT

In March 2020, Rajesh Reddy helped organize an ABA webinar featuring David Favre, a law professor in Michigan who has long advocated for an international treaty that ensures the welfare and protection of animals.

Afterward, Reddy and a few of his colleagues from the International Law Section’s International Animal Law Committee and the Tort Trial and Insurance Practice Section’s Animal Law Committee stayed online to talk with Favre about the burgeoning COVID-19 pandemic and how it intensified the need for a treaty.

“We had this crystal-clear vision of how we got to this point,” says Reddy, the chair of the TIPS Animal Law Committee’s International Issues Subcommittee. “Our treatment of animals is how we got here.

“You can be vigilant in how you work to prevent zoonotic diseases and spillovers from different species, but that doesn’t help you if your neighbors aren’t following the same rules and protocols.”

Reddy volunteered to co-author a resolution and report based on their idea that better and consistent treat-
ment of animals can help prevent zoonotic diseases such as COVID-19, which likely originated in bats and may have been transmitted to humans at a live animal market in Wuhan, China.

At the midyear meeting in February, the House of Delegates adopted Resolution 101C, urging the negotiation of an international convention for the protection of animals that “establishes standards for the proper care and treatment of all animals to protect public health, the environment and animal well-being.”

It also encourages the U.S. Department of State to launch and help lead these negotiations.

From his perspective, Reddy, who is the director of both the Global Animal Law Program and the Animal Law Advanced Degree Program at Lewis & Clark Law School’s Center for Animal Law Studies, says it’s one of the ABA’s most progressive animal-related policies.

Seeking justice
Reddy grew up outside of Houston, where he developed an early interest in treating others fairly.

He went to the University of Texas at Austin, where he majored in English and focused on capturing the stories of marginalized communities. While pursuing master’s degrees in English and creative writing at Indiana University, he continued to explore why certain people are disparaged and realized it often involves subhuman treatment.

“A lot of times, the project was: ‘How can I fully develop this character as a person so that readers will be able to appreciate who they are?’” Reddy says. “It was always lifting them out of this animality that they had been branded with that got me to think more critically about animals and their interests.”

As a graduate student, Reddy taught a course analyzing how authors use animals to tell stories about human suffering. He discussed such works as Art Spiegelman’s Maus and Franz Kafka’s The Metamorphosis with his students and introduced them to Gary Francione, a legal scholar who is known for his work on animal rights theory.

Reddy hoped he could show the students that animals can be exploited in the same ways as humans. But on the last day of class, he asked them if they had changed their perspective on how animals should be treated and was shocked when they said no.

“That shock stuck with me and resonated with me,” Reddy says. “I had this idea from that point on about animals and their place in society and the law’s ability to protect them. And eventually, I had a crisis of conscience and looked at the landscape of what I could do.”

In 2014, while also working toward his PhD in English at the University of Georgia, Reddy moved to the West Coast to attend Lewis & Clark Law School. He was drawn to its Center for Animal Law Studies, which offered the most comprehensive animal law curriculum in the country.

While in law school, he was the co-editor-in-chief of the Animal Law Review, the first legal journal with an exclusive focus on animal law, and co-director of the Lewis & Clark Law School Animal Legal Defense Fund, the first student chapter of the nonprofit organization.

Priscilla Rader Culp, the chapter’s other co-director, noticed even then his drive and passion for the field. They became close friends and have continued to work together in the animal law movement.

“The thing with Raj that I’ve noticed over the years is he’s always looking for what’s on the horizon for anything he cares about, and he will put his entire being into it,” says Culp, the education program manager at the Animal Legal Defense Fund. “In law school, we’re told to learn to say no to things, but I don’t know if Raj ever learned that one. He somehow manages to put 100% into everything he agrees to do.”

Passion for the profession
After graduating from Lewis & Clark Law School in 2017, Reddy became a visiting professor at the Center for Animal Law Studies.

In addition to teaching courses on international animal law and animal legal philosophy, he now leads the Animal Law LLM Program, the world’s first advanced legal degree program in animal law.

Pamela Hart, the assistant dean and executive director of the Center for Animal Law Studies, says Reddy is not only the first point of contact for incoming students, but he also continues to support them after they have graduated.

In his newest role, he is overseeing the Global Ambassador Program, an initiative that allows the law school’s international alumni to apply for grants that fund their work in animal law education in their home countries.

“It’s important for Raj to have a positive impact on animal law and education so that he can effect change for animal protection,” Hart says. “He is really marrying his passion with his profession, and every day he is making positive contributions to what I believe is one of the greatest social justice movements of our time.”

Reddy also mentors students through his work with the ABA, which he joined after law school. In addition to his leadership in the TIPS Animal Law Committee, he serves as vice-chair of the International Law Section’s International Animal Law Committee.

Now that the ABA has recognized the need to negotiate an international convention to protect animals, Reddy and his colleagues plan to contact the Department of State and animal law groups in other countries. He says they
hope to encourage them to bring similar measures to their own state departments.

He says the report accompanying Resolution 101C suggests general contours of a treaty, such as the establishment of protocols related to human interaction with different categories of animals, but it avoids endorsing specific protocols. It instead “urges nations to negotiate appropriate standards, taking into account diverse ethical, social, cultural, religious, economic and political perspectives.”

“We would hope that we would have at least some confluence of countries who would agree to the basic parameters of the treaty, and they would have individual protocols,” Reddy says. “What we can see is everybody having a level playing field that can improve not just the protection of animals but also improve the environment and improve human health.”

Deborah Enix-Ross’ priorities will be civics, civility and collaboration.

In August, it will be 39 years since Deborah Enix-Ross attended her first ABA meeting.

She remembers deciding after she graduated from the University of Miami School of Law in 1981 that in order to be a lawyer, she needed to also be a member of the association. After passing the bar exam, the native New Yorker spent her graduation money on a flight bound for San Francisco, where the 1982 annual meeting was being held.

Not knowing any other members, she made her way to events hosted by the International Law Section, which became her first home within the ABA.

“I wanted to be around the best, smartest leaders in the legal profession, and I thought they could only be found in the ABA,” says Enix-Ross, senior adviser to the International Dispute Resolution Group at Debevoise & Plimpton. “When I think about it now, how determined I was to be a part of this association, to be a part of the profession, that I would come to a meeting on my own at my own expense and just walk into a room and try to figure it all out.”

Enix-Ross became not only an active participant but also a known leader in the association. Now its president-elect nominee, she has served as chair of the International Law Section, where she also helped recruit women and minorities as the Goal IX Officer and co-founded the Women’s Interest Network. She also chaired the Section Officers Conference and the Center for Human Rights.

But her biggest leadership role in the association came as chair of the House of Delegates, a role she served in from 2016 to 2018. She describes it as “an extraordinary honor and privilege” that reminded her of the first time she visited a courthouse on a school field trip and was awed by the judge.

“I’d like to think of my fifth- or sixth-grade self, looking up at that judge on the bench, and the corollary was me as chair of the House of Delegates, wanting to make sure that every resolution was considered fairly, that every opportunity was given to delegates to be able to debate the pros and cons of a resolution,” she says. “That was the closest I came to fulfilling that childhood dream of being a judge.”

Enix-Ross will face a vote by the House of Delegates at the 2021 ABA
Annual Meeting in August, after which she will become the president-elect.

Reginald Turner is currently serving as president-elect and will assume his one-year term as president at the close of the annual meeting. He will pass the gavel to Enix-Ross after the 2022 ABA Annual Meeting in Chicago.

**Experience matters**

Enix-Ross aspired to serve as president of the ABA after realizing all her experiences helped her understand its different facets and constituents. After practicing in various settings throughout her career, she also felt she could understand lawyers who were not members and how they might be encouraged to join the association.

She began her career as a staff attorney at MFY Legal Services Inc. in New York City and later served as the U.S. representative for the International Chamber of Commerce International Court of Arbitration.

She was the first African American woman in the position and appointed other diverse lawyers from the United States to serve as arbitrators in ICC cases.

Before joining Debevoise & Plimpton in 2002, Enix-Ross worked as the senior legal officer at the World Intellectual Property Organization Arbitration and Mediation Center in Geneva. In addition to advising lawyers and businesses on the use of alternative dispute resolution, she was responsible for training and appointing lawyers from around the world as arbitrators in internet domain name disputes.

“It made me think, ‘I can contribute, and if I can contribute, I ought to contribute,’” she says. “For me, it’s less about the position and more about, ‘What are my strengths, and what’s the best way of using those strengths?’ As I was moving through the association, it became clear that I feel I have some talents and certainly some energy to offer.”

**The three Cs**

When Enix-Ross accepted her nomination at the ABA Midyear Meeting in February, she reminded members that her plans for the association include a call to action in three areas: civics, civility and collaboration.

Deborah Enix-Ross joined the ABA “to be around the best, smartest leaders in the legal profession.”

This trio continues to resonate with her, particularly as the country remains divided because of “a lack of understanding of how our branches of government should operate, divisive politics, erosion of respect for the rule of law and even the way we manage COVID-19,” she says. And as her grandmother would say, “People need to be able to disagree without being disagreeable.”

Enix-Ross points to the importance of civics education, which gives citizens a better understanding of how government works as well as what to do when it isn’t working properly. They may have differing views on how to approach government, she says, but that’s where civility plays its part.

“We are all responsible for maintaining civility, but as lawyers, we are called to demonstrate what that looks like and how that can be effective,” she says. “You can be an advocate and have strongly held views, but it doesn’t have to devolve into the kind of chaos and disruption that we have seen.”

That focus on civics and civility can happen only with better collaboration between lawyers and people in all professions—and in all political parties—around the world, Enix-Ross adds.

“Some may say the ABA should be focused just in the U.S., but what we do in the U.S. has an impact across the world,” she says. “And if the pandemic has shown us anything, it is that what happens across the world can have an impact here for us.”

Meet the Nominees

Board of Governors candidates share their motivations to serve

**ABAJOURNAL.com/2021BOG.**

**Thomas G. Wilkinson Jr.**

*District 3*

Member of Cozen O’Connor in Philadelphia. Member of the House of Delegates. Past member of the Standing Com-
committee on Professionalism and Standing Committee on International Trade in Legal Services. Member of the Section of Litigation Ethics and Professionalism Committee. Past president of the Pennsylvania Bar Association and Pennsylvania Bar Institute. Co-chair of the PBA Bylaws Committee and Civility in the Profession Committee. Member of the Association of Professional Responsibility Lawyers. Received JD from Villanova University School of Law in 1981.

Positive experience with the ABA: 
“I particularly enjoyed serving as a member of the Standing Committee on Professionalism. Promoting civility and professionalism in the practice of law has been a major part of my professional career. … We worked on the new rule that would permit modest gifts to pro bono clients, and we worked on a number of excellent CLE programs. We continued to promote Rule 8.4(g), prohibiting harassment and discrimination in the practice of law. I’m now pursuing the adoption of Rule 1.8(e), the rule allowing modest gifts to pro bono clients, in the state of Pennsylvania.”

Jennifer (Ginger) Busby
District 5

Partner at Burr & Forman in Birmingham, Alabama. Member of the House of Delegates, currently serving on the Steering Committee of the Nominating Committee. Past chair of the Section Officers Conference and Tort Trial and Insurance Practice Section. Former director of the TIPS Leadership Academy and National Trial Academy. Chair of the Alabama State Bar Litigation Section. Received JD from Samford University Cumberland School of Law in 1990.

Reason to join: “When I started in law school ... my feeling about the American Bar Association was it was the professional organization for lawyers, much like the American Medical Association would be for doctors. While we may not do as good of a job now as I think we did all those years ago in communicating that aspect of the American Bar Association, it is the professional organization in America that you should belong to. It helps you not only invest in your intellect, but it helps you invest in your ability to serve, and it helps you invest in your ability to understand different aspects of how the law works in many parts of your life. You need to understand the broad view of the law and access to justice.”

Grant C. Killoran
District 9


Positive experience with the ABA: “The ABA has allowed me to get to know ABA members from around the country and to talk with them about issues in each of their respective geographic areas involving the practice of law. Most of my work is litigation-related or health care litigation-related, and I am able to talk with other attorneys about what's going on with those areas in their parts of the country. Litigators like to tell war stories. They like to know what's going on with judges. They like to tell stories about cases and legal developments. That sort of interaction with lawyers within the ABA has been quite interesting from both a personal and a practice standpoint.”

Elizabeth K. Meyers
District 14


Plans for term: “I am pretty excited to be starting my term under Reggie Turner, who was the chair of the Commission on Racial and Ethnic Diversity in the Profession. I definitely want to see more diversity and equality. I can't say that I am young, but I am probably on the younger end of the spectrum, so I also want to show during my tenure on the Board of Governors that I have a voice. I don't plan on just sitting back and listening. I plan on contributing. I plan on providing my ideas, which are going to be based on my experience, my gender and my ethnicity.”

Seymour W. James Jr.
District 15

Partner at Barket Epstein Kearon Aldea & LoTurco in New York. Former attorney-in-chief of the Legal Aid Society. Member of the House of Del-
egates. Past member of the Standing Committee on the Federal Judiciary and Standing Committee on Legal Aid and Indigent Defense. Past president of the New York State Bar Association and current co-chair of its Task Force on the Parole System. Member of the New York State Justice Task Force. Received JD from Boston University School of Law in 1974.

Reason to join: “The ABA really is the voice of the profession. We want to be heard as attorneys, and your voice can be heard through the ABA. You can help to formulate policies, establish priorities by being active in the ABA. There are so many issues currently facing our country. The rule of law is important. Racial justice, I think, is of paramount importance right now—equal rights, voting rights. The ABA has to have a voice in all of those areas, and we as lawyers should be contributing to that.”

Judge John Preston Bailey
District 16


Positive experience with the ABA: “My dad was an active member of the ABA, and our family vacations were always state bar or ABA meetings. My first ABA meeting was in New York City in 1964 when I was 6 years old. … One of the positive experiences is being around other lawyers. As I said, my dad was one of those people who enjoyed the company and comradship of other lawyers, and I grew up the same way. The opportunity a couple of times a year to get together with folks is important.”

Chief Judge James E. Lockemy
Judicial Division

First Native American chief judge of the South Carolina Court of Appeals in Columbia. Member of the House of Delegates. Past chair of the Judicial Division’s Appellate Judges Conference and co-chair of the Judges’ Journal editorial board. Past chair of the Appellate Judges Education Institute and member of the Standing Committee on the American Judicial System. Retired U.S. Army National Guard colonel, serving more than 30 years. PhD candidate in history at the University of South Carolina. Received JD from the University of South Carolina School of Law in 1974.

Plans for term: “What I’ve noticed in the 25 years I’ve been involved in the ABA is how many hours of dedicated volunteer service lawyers and judges give to our association. I want to make sure members realize how much we appreciate that, how important it is and that it doesn’t go unnoticed. I know it’s noticed now, but I want to increase that notice. And for people to not just give it lip service but to go to the various meetings, some of the conference meetings, the meetings of the smaller committees to learn. I want to incorporate thoughts from throughout the ABA into the governing body of our organization.”

Maureen A. O’Rourke
Section of Legal Education and Admissions to the Bar

Associate provost for faculty affairs, dean emerita and professor at Boston University School of Law. Past member of the Council of the Section of Legal Education and Admissions to the Bar, serving as chair from 2017-2018. Member of the AccessLex Institute Board of Directors and Marist College Board of Trustees. Member of the American Law Institute. Recipient of Boston University’s Metcalf Award for Excellence in Teaching, the university’s highest teaching honor, in 2000. Received JD from Yale Law School in 1990.

Plans for term: “I hope I can be a source of information about the Section of Legal Education and Admissions to the Bar and work with the board to help the ABA through what I think is a difficult budgetary time for everyone. And, thinking about what the future

Continued on page 67
# ABA Events

## SAVE THE DATE

### Summer 2021

For the latest info, go to americanbar.org and click “Events” and “CLE.”

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 2</td>
<td>Representing Professional Athletes in Divorce and Paternity Suits</td>
<td>Young Lawyers Division • CLE • Webinar</td>
</tr>
<tr>
<td>June 2-4</td>
<td>46th ABA National Conference on Professional Responsibility</td>
<td>Center for Professional Responsibility • CLE • Virtual Conference</td>
</tr>
<tr>
<td>June 9-11</td>
<td>Summer Camp Legal Skills Conference</td>
<td>Government and Public Sector Lawyers Division, Young Lawyers Division • CLE • Virtual Conference</td>
</tr>
<tr>
<td>June 10-11</td>
<td>6th Annual Internet of Things (IoT) National Institute 2021</td>
<td>Science &amp; Technology Law Section • CLE • Virtual Conference</td>
</tr>
<tr>
<td>June 14, 16, 18, 21, 23, 25</td>
<td>2021 Dispute Resolution Arbitration Training Institute</td>
<td>Dispute Resolution Section • CLE • Webinar</td>
</tr>
<tr>
<td>June 25</td>
<td>Experiences in Building an LGBTQ+ Pipeline</td>
<td>Diversity and Inclusion Center • Webinar</td>
</tr>
<tr>
<td>July 21-23</td>
<td>ABA Cross-Border Virtual Institute: The Intersection of Global Discovery, Privacy and Data Security</td>
<td>Litigation Section • CLE</td>
</tr>
<tr>
<td>Aug. 4-10</td>
<td>2021 ABA Annual Meeting</td>
<td>Chicago (governance meetings) / Virtual Conference • CLE</td>
</tr>
</tbody>
</table>
Continued from page 65

of the profession is—from pipeline programs early on in education all the way through law school, through the practice, and how the ABA can play a role at all of those stages—is what I’d be really interested in working on. There are big challenges in terms of diversity, equity and inclusion, and so seeing what we can do to broaden the pipeline of underrepresented groups into the profession is at the top of the list of priorities.”

Leonard H. Gilbert
Senior Lawyers Division


Reason to join: “You learn a lot about the profession through the ABA. The interaction with lawyers from different walks of life, from different practices, from different parts of the country is an extremely valuable experience. It certainly was for me. To this day, if I need help from a lawyer in another part of the country, whether it’s in Alaska or Hawaii or Bangor or Atlanta, I reach for the Redbook, as I know there will be someone in the ABA who can help. It has been extremely helpful in my practice and indeed helpful to others in my firm who once in a while send an email asking, ‘Do you know someone who can help us in a remote location?’ I guarantee I can find somebody in about 30 minutes.”

Richard M. Lipton
Section of Taxation


Plans for term: “I hope to be able to focus, like other people, on fiscal responsibility. I heavily focused on that while I was a member of the tax section and while I was the chair of the tax section. I think that the fiscal house has to be in order in order for the association to succeed … I also want to work on the relationship between the sections and the association and making that work as well as possible. That’s probably a higher priority for me than the overall concept of fiscal matters, because to the extent I will focus anywhere, it will be in the area of the sections.”

Jamie Davis
Young Lawyers Division

Director of specialty compliance and ethics at Walmart Inc. in Bentonville, Arkansas. Chair of the Legal Opportunity Scholarship Committee. Liaison to the Business Law Section from the Young Lawyers Division. Immediate past YLD assembly speaker. Past Business Law Fellow and YLD Scholar. Member of Alpha Kappa Alpha Sorority Inc. and The Links Incorporated. Received JD from North Carolina Central University School of Law in 2012.

Positive experience with the ABA: “The best experience is the relationships I’ve built in the association with lifelong friends who have been there with me, professionally and personally. Those relationships have been vital to my success as a young lawyer. It’s important to realize that there is more to life than work, and when you build those friendships and you’re able to talk about other things besides the profession and the practice of law, that’s inspiring.”

Amy Lin Meyerson
Goal III Minority Member-at-Large


Reason to join: “There are three main reasons I’ve always been a champion of bar participation and bar service. The first is to champion our communities, not only to advocate for attorneys, for issues of concern to us and our practice settings, but to champion our communities and the
Advocacy Works

ABA-backed Family Justice Initiative has improved access to counsel in child welfare cases

For parents and their children, the child welfare legal system can be confusing and intimidating. That’s where a good lawyer comes in. For over 40 years, the ABA has been a leader in advocating for improved access to counsel for parents and children in child welfare cases. Those advocacy efforts previously focused on either a child’s right to counsel or a parent’s right to counsel, but not on both. In 2017, the ABA’s Center on Children and the Law played a key role in launching the Family Justice Initiative, a program that helped change the conversation by uniting national advocacy efforts to ensure both children and parents have access to counsel in these cases. The biggest challenge with this effort is securing adequate funding for that counsel.

Traditionally, federal funding could only be used to pay costs for government counsel in child welfare cases, while state and local funding was used to pay legal representation costs for children and parents.

In 2019, the Children’s Bureau at the U.S. Department of Health & Human Services altered that inequity by revising its Child Welfare Policy Manual to allow states to seek partial reimbursement for the cost of providing child and parent counsel in these cases. The ABA sent a letter commending this change as an important step toward better outcomes for countless children, parents, courts and child welfare agencies throughout the country.

Because it is optional for states to request this new federal funding, it was unclear in 2019 how quickly this rule change might help increase investments in access to counsel. Two years later, 25 states and three Native American tribes are already accessing these legal services funds.

ABA President Patricia Lee Rebozo said the change is having a significant impact.

“This policy has increased the availability of high-quality legal services, making a significant difference in protecting parents’ and children’s legal rights and improving outcomes for children and their families.”

Exiting foster care

Child welfare systems—which operate at the federal, state and local levels—work with children who have been separated from their families, ensuring they can live in safe, permanent and stable settings.

In most cases, children exit foster care by reuniting with their parents. In 2019, approximately 672,600 children spent time in foster care in the United States, including 251,000 entries into foster care and 248,000 exits from it. Of those children exiting foster care, about 47% reunited with their parents; 26% were adopted; and 17% left with a legal guardian or moved in with a relative.

Legal counsel for parents and for children help children exit foster care sooner without risking their safety. From a child’s perspective, less time in foster care can mean spending birthdays and holidays at home with parents or loved ones; starting a new school in their permanent school district; or in the case of adoption, having a new last name and a sense of security.

Over the past decade, research has consistently shown that investing in child and parent counsel reduces delays in case processing, increases parties’ participation in families’ case plans, informs better judicial decision-making, produces cost savings for child welfare agencies and courts and, most important, helps children reach permanency (reunification, adoption, guardianship) at a time when they are the most vulnerable.
For example, a 2012 study of parent representation in Washington state found that children’s exits to reunification were 11% higher in counties that provided high-quality legal representation to parents.

Similarly, in a 2016 child representation study funded by HHS, children represented by legal counsel were 40% more likely, when compared to a control group, to reach permanency within six months of placement in foster care.

Besides funding legal services, the HHS policy change permits child welfare agencies to fund members of a “multidisciplinary” legal team—including social workers, case investigators and peer mentors—who can assist lawyers by helping parent and child clients outside the courtroom in these complex cases.

While nearly 40% of all eligible states, tribes and other jurisdictions are taking advantage of the new policy, more needs to be done.

The ABA will continue working with its Center on Children and the Law to help remaining states explore options to improve access to legal representation for both parents and children in their child welfare proceedings, thereby helping to improve the child welfare system for all involved.

ABA Notice

For more official ABA notices, please visit ABAJournal.com in July.

PROPOSED AMENDMENTS TO THE CONSTITUTION, BYLAWS AND HOUSE RULES OF PROCEDURE

Proposed amendments to the Constitution, Bylaws and House Rules of Procedure of the American Bar Association have been duly filed with the Secretary of the association by the indicated sponsoring members of the association for consideration by the House of Delegates at the 2021 ABA Annual Meeting in Chicago. Go to ambar.org/amendments for the full text of this notice.

The Family Justice Initiative is a collaboration between the ABA Center for Children and the Law, Casey Family Programs, Children’s Law Center of California, the Center for Family Representation and the Washington State Office of Public Defense. For more information, visit the website: familyjusticeinitiative.org.

This report is written by the ABA’s Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the U.S. government.
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INDEX TO ADVERTISERS

<table>
<thead>
<tr>
<th>ADVERTISER</th>
<th>WEB ADDRESS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA ADVANTAGE</td>
<td>ambar.org/advantage</td>
<td>42-43</td>
</tr>
<tr>
<td>ABACLE</td>
<td>ambar.org/freecle</td>
<td>71</td>
</tr>
<tr>
<td>ABA MARKETING</td>
<td>ambar.org/memberlogo</td>
<td>15</td>
</tr>
<tr>
<td>ABA MEMBERSHIP</td>
<td>ambar.org/renew2021</td>
<td>IBC</td>
</tr>
<tr>
<td>ACCENTURE</td>
<td>accenture.com</td>
<td>3</td>
</tr>
<tr>
<td>BLACKMAGIC DESIGN</td>
<td>blackmagicdesign.com</td>
<td>7</td>
</tr>
<tr>
<td>CLIO</td>
<td>clio.com/aba-advantage</td>
<td>BC</td>
</tr>
<tr>
<td>CLIO SPONSORED COLUMN</td>
<td>clio.com</td>
<td>23</td>
</tr>
<tr>
<td>LAWPAY</td>
<td>lawpay.com/aba</td>
<td>5</td>
</tr>
<tr>
<td>LEGAL TALK NETWORK</td>
<td>legaltalknetwork.com</td>
<td>IFC</td>
</tr>
<tr>
<td>THAD LONG LEGAL SERVICES</td>
<td></td>
<td>27</td>
</tr>
</tbody>
</table>
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ABA JOURNAL | JUNE–JULY 2021
Supreme Court Upholds DEA’s Kidnapping of Mexican Doctor

BY ALLEN PUSEY

On Feb. 7, 1985, while on a short walk to meet his wife for lunch, Enrique “Kiki” Camarena Salazar disappeared from a street near the U.S. consulate in the fabled Mexican city of Guadalajara. His body was found a month later on a ranch in Michoacán. There were signs of apparent torture: his ribs and nose broken, his windpipe crushed, his body burned and a screwdriver driven into his skull.

Camarena was an American citizen and a highly regarded agent of the Drug Enforcement Administration. His sources had led to recent raids of marijuana fields controlled by Rafael Caro Quintero, head of the Guadalajara cartel, and news of his disappearance sent U.S. federal law enforcement into a frenzy.

A joint U.S.-Mexico investigation led to a house at 881 Lope de Vega that was often occupied by Caro. Physical evidence was gathered, including audio tapes of the actual torture.

In the months and years that followed, dozens of suspects were arrested. Caro himself was seized in Costa Rica and extradited to Mexico, where he was convicted of several murders—including Camarena’s—and sentenced to 40 years in prison.

Dr. Humberto Álvarez Machain, a Guadalajara gynecologist accused of drugging Camarena to prolong his torture, had avoided extradition. But on April 2, 1990, four men bearing badges arrived at the physician’s office and accused him of performing an illegal abortion. In an operation the DEA later acknowledged it had bankrolled, Álvarez was taken into custody, held overnight in a neighboring state, bundled into a small private airplane and flown to El Paso, Texas, where he was informed by federal authorities that he had been indicted for his part in Camarena’s death.

Álvarez conceded to investigators that he had been to the house on Lope de Vega; his fingerprints had been found there. And he admitted in a later affidavit that he knew Camarena was “in a bad state,” though he asserted a different doctor was attending to the DEA agent. Álvarez claimed that the kidnapping—in effect, the arrest of a foreign citizen on foreign soil in violation of extradition agreements—was illegal, thus nullifying the charges against him.

A history of forcible abductions

Not so, said the U.S. Supreme Court in U.S. v. Álvarez-Machaín. In an 6-3 decision delivered June 15, 1992, the court rejected Álvarez’s defense, citing two cases, both of which involved abducting defendants to bring them before the courts.

In the first, Ker v. Illinois (1886), Frederick Ker fled to Peru after his conviction for larceny in Illinois. A Pinkerton agent hired by the federal government to serve a warrant for his extradition instead abducted him and brought him back. The court ruled that, extradition or no, “such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction which has the right to try him.”

In the second case, Frisbie v. Collins (1952), the court similarly rejected a plea by Shirley Collins that Michigan police kidnapped him in Chicago to stand trial for murder in Michigan. In what became known as the Ker-Frisbie doctrine, the court declared defendants are required to be in court to stand trial, and it doesn’t much matter how the authorities get them there.

After 2001, the Álvarez-Machaín decision became a routine citation justifying the extractions of enemy combatants from foreign countries.

Álvarez, however, was never convicted. Midway through his 1992 trial in Los Angeles, Judge Edward Rafeedie ordered Álvarez’s acquittal on all charges, saying the case was insufficient to send to a jury. And after an effort to detain him for—ironically—illegal entry into the U.S., Álvarez returned to Mexico.

In 1993, Álvarez filed a lawsuit naming several DEA agents, the DEA, and the Mexican operatives who had abducted him under the Federal Tort Claims Act and the Alien Tort statute. Although Álvarez found some success in the lower courts, the Supreme Court unanimously ruled against him in Sosa v. Álvarez-Machaín, a diversely reasoned 2004 decision.
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