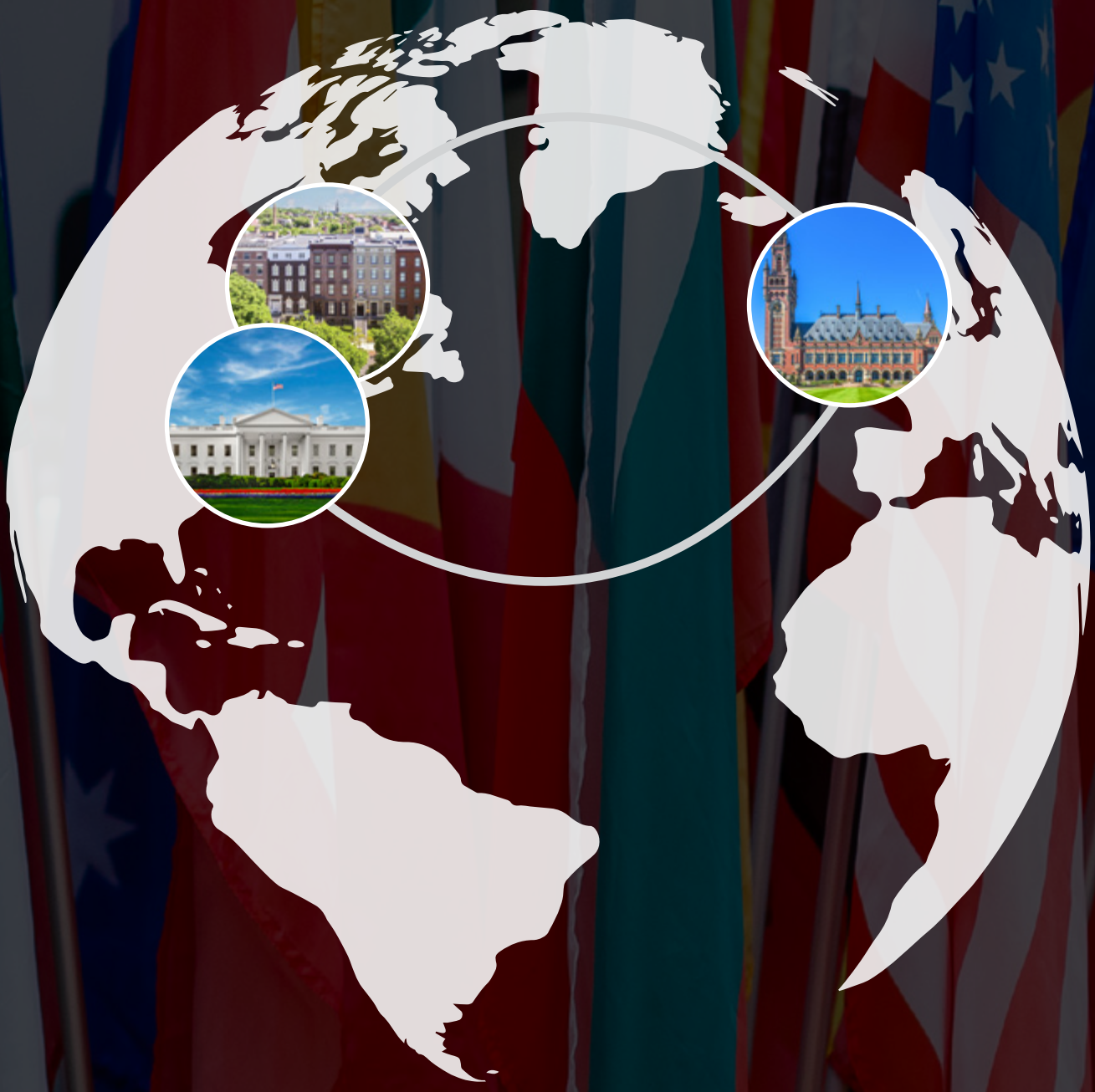
NEW YORK STATE BAR ASSOCIATION

# JOURNAL



## NYSBA's Noblest Act: Preventing War and Establishing a World Court

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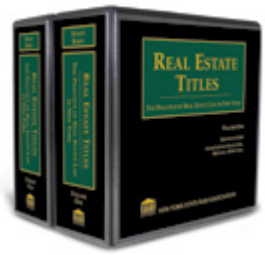


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SHERRY LEVIN WALLACH

# The Importance of NYSBA as a Global Voice

As one of the world's most prominent legal organizations, we must wield our influence to defend the rule of law, protect those who are vulnerable to oppression and create a more equitable society, and we must do everything we can to ensure access to justice, equity, inclusion and equality.

We are at a point in history that is replete with uncertainty, with economic upheaval, the impact of the COVID-19 pandemic and how it has reshaped our world, the deepening political and socio-economic divide, war in Ukraine and the rapid development of the metaverse and the digital economy, which will alter our profession on a grand scale.

In times like these, the rule of law often comes under attack both at home and abroad, and this time is no exception. But the uncertainty we are all feeling also brings opportunity to us as lawyers and bar members – the opportunity to speak out and be a part of the change at home, in the global legal community and in our communities.

We are uniquely positioned to address theses issues because we are New York, a legal community that impacts the nation and the world. As the New York State Bar Association, we have the means, voice and experience to lead and engage.

We have influence within our state and we have impact on a local, national and international scale. We are a global organization. We have formal partnerships with bar associations throughout the world and have nearly 1,500 international members in 84 countries. We are New York, and people at home and globally want to know what we are doing and how and why we are doing it. Our voice matters.

During my presidency, we have signed seven memorandums of understanding with seven bar groups worldwide, incuding the Bar Association of Puerto Rico, The Bar Council of England and Wales, the Bar Association of Serbia, the Law Society of Scotland, the Law Society of England and Wales, the Global Accountability Network and the U.S. Virgin Islands Bar Association.

Our association has not hesitated to tackle issues head on.

Our International Section added a Ukraine chapter, and then launched a task force to assist refugees and displaced lawyers. We called on the United Nations to set up a tribunal to investigate violations of international law there. In fact, we were the first international legal agency to urge the U.N. General Assembly to establish a special tribunal to investigate the crime of aggression against Ukraine, and then, when the American Bar Association adopted our policy as its own in this area, we brought that effort nationally.

That is a mere microcosm of how far our reach extends. I have traveled to Europe and met with bar leaders from around the world several times. I have joined international conversations on the status of the rule of law, access to justice, the status of courts across the world and the virtual practice of law. Each time it opens new doors and opportunities for our association and our members, in addition to raising awareness of the opportunities of membership in a collaboration with the New York State Bar Association.

We have also partnered with the Virgin Islands, Puerto Rico and Guam bar associations to fight for equality for the people of the U.S. Territories and to eliminate the racism embedded in our society and laws because of the Insular Cases. Our Task Force on the U.S. Territories continues to fight to have these cases overruled. The U.S. Supreme Court and lower courts have relied on the Insular Cases to limit the rights to the people of the U.S. territories since the early 1900s, establishing a second-class citizenship status and promoting racism.

Our House of Delegates approved a resolution declaring that residents in the U.S. territories should be afforded the same rights as those in the 50 states. We presented this resolution to the American Bar Association where it was adopted as policy as well. We have helped to educate on the fact that this is a national issue.

We are also addressing the growing mental health crisis within our own profession.

We have launched a Task Force on Mental Health and Trauma Informed Representation that is focusing on the intersection between the growing mental health crisis in the state and its impact on the public as well as criminal and civil justice systems. Individuals living with mental illness

and/or trauma are often incarcerated or housed in hospital emergency rooms instead of in settings that have the resources to provide them with the care they need. Making this issue the topic of the Presidential Summit at our 2023 Annual Meeting displayed the importance of these issues and raised awareness about this very serious problem.

In addition, we have established a 24/7 hotline for attorneys in need of support, and our Committee on Attorney Well-Being has developed programming to support our members on the importance of self-care.

We have filed a lawsuit against the state seeking a statewide pay rate of $164 an hour for assigned counsel. If successful it will ensure that 18-B attorneys in the 57 counties outside of New York City will be compensated the same as those court-appointed attorneys within the city. This will increase the number of attorneys who are able to take on this work and prevent children and indigent adults from being deprived of their constitutional rights to meaningful and effective representation in the criminal and family courts.

With the exception of New York City, where assigned counsel have recently been granted a pay raise by court order, pay for 18-B attorneys has remained at $60 per hour for misdemeanors and $75 for felonies since 2004 in the rest of the state. By comparison, assigned counsel rates in the federal courts of New York in those same years have been raised 14 times to the current rate of $164 per hour.

We have fought against additional bail reform in the wake of the proposed bail reform rollbacks that Gov. Hochul has included in her 2023–24 proposed state budget. These changes would likely force more New Yorkers, particularly people of color, to be incarcerated and for longer periods simply because they lack the financial means to afford bail.

The association continues to protect the legal profession in many ways and keep its members informed. It is addressing the ethical and legal implications of corporations using facial recognition software to ban their adversaries – including all attorneys who work for a firm that sues them – from entering sports and entertainment venues.

Our Executive Committee has launched a Working Group on Facial Recognition Technology and Access to Legal Representation that will explore the impact of this technology on access to justice and our members' ability to represent clients without fear of retribution.

In the wake of our state's struggle to confirm our next chief judge, I have formed a Special Committee to Evaluate the Selection Process for the Court of Appeals. It is imperative that our judiciary remains independent, respected and strong.

After the governor signed into law new requirements for notary publics that have significant effect on the legal community, we immediately developed CLE programming to educate our members on these changes and formed a special committee to study their true impact with the intention to effect change and protect lawyers.

This is vital work.

In addition, our association is uniquely positioned to have an impact internationally. Our voice is part of the discussion on how virtual practice will impact the profession worldwide.

The Task Force on Emerging Digital Finance and Currency is hard at work educating our legal community in New York, across the nation and the world. It has put the New York State Bar Association at the forefront of the discussions regarding regulations, ethical considerations and Web3's impact on the practice of law. It is exploring opportunities for bar associations to engage in and use Web3 technology to teach and provide opportunities to our association and its members. Our sections have also embraced this new ever-changing technology and continue to produce excellent programming to educate lawyers on how to handle matters involving digital assets, digital currency and non-fungible tokens.

The benefits of New York law and courts have made it a go-to place for worldwide commercial contracts. Businesses throughout the world look to our state because it offers among the most sophisticated set of rules covering a wide range of business transactions from collaborations and partnerships to joint ventures.

We are thus positioned to forge change.

We must continue to move forward to help those facing the atrocities of war and oppression, to address quickly evolving technology and to reinforce our position as a voice and ally to the international legal and business communities.

Our stake in safeguarding access to justice for everyone never dissipates. We live in a moment that is rife with issues that can appear to be overwhelming. Conversely, these issues present us with the opportunity to have an indelible impact on our profession and the rule of law itself.

Our association is at its best when it uses its collective voice to weigh in on topics. We learn from each other by exposing ourselves to new approaches toward resolutions. We possess a robust voice that is heard because of our influence, prestige, geographic position and worldwide memberships and partnerships.

We have confronted numerous issues that have demanded our attention. We should be proud of our work and what we have accomplished. However, there is always more that must be done. We must continue to forge a path and express our voice to impact change on these important issues.

**Sherry Levin Wallach** can be reached at slwallach@nysba.org.

# NYSBA's Noblest Act: Preventing War and Establishing a World Court

By Henry M. Greenberg

From its formative years, the New York State Bar Association has had an abiding interest in the world beyond the Empire State. Beginning in the 1880s, the Association's annual meetings often included addresses on international law,[1] given by luminaries such as U.S. secretaries of state[2] and foreign dignitaries.[3] These presentations were arranged not merely to satisfy members' curiosity but to project the organized bar's influence across the globe. In fact, in 1896 and 1899, the Association worked with two U.S. presidents to prevent a war and create the first world court. This breathtaking accomplishment was called at the time "the noblest act that ever honored the name of [the] Association."[4] It remains so today.

Of course, the world we now live in bears little resemblance to the 1890s fin de siècle. Our world is vastly more complex and dangerous. Terrorism is an ever-present danger, and nuclear-armed countries threaten each other and this nation. So, the ideas the Association long ago gifted statesmen to maintain peace among nations are inadequate to meet the challenges of the current geopolitical environment. But the story about that gift is well worth telling simply for what it says about the capacity of the organized bar to do the public good.

## The Venezuelan Crisis of 1895

The Association's glorious heritage in world affairs arose from the Venezuelan crisis of 1895, which brought the U.S. and Great Britain to the brink of war. A long-simmering boundary dispute between Venezuela and the contiguous British colony of British Guiana (today Guyana) was the potential casus belli. The British wanted to acquire area on the Orinoco River to control a vast region on the shoulder of the southern continent. But U.S. President Grover Cleveland believed that that would violate the Monroe Doctrine – the principle that the Western Hemisphere was closed to colonizing by European powers.[5]

**President Grover Cleveland**

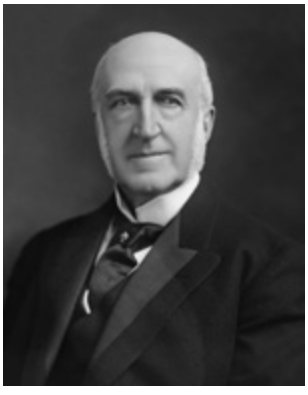
In July 1895, the Cleveland Administration warned Great Britain that it would intervene in the border dispute if the contested territory was forcibly seized. Great Britain did not budge, prompting Cleveland to send Congress a special message declaring that the U.S. would use "every means in its power to protect Venezuelan territory."[6]

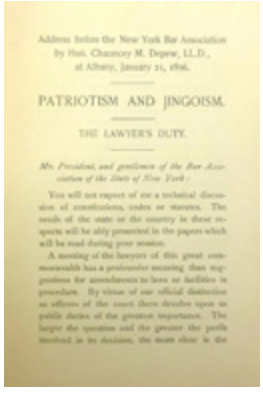
Cleveland's threat ignited a "blaze" that swept the nation.[7] Leading statesmen and the press called for war.[8] But such sentiments were not universal. A near panic descended on Wall Street. Corporate lawyers believed their clients were better served by peace than war. Experts on international law challenged Cleveland's interpretation of the Monroe Doctrine. Plus, the U.S. was in no position to combat Britain's superior naval power.[9]

## The Association Proposes an International Court of Arbitration


NYSBA convened its 19th Annual Meeting at Odd Fellows Hall in Albany.

With war drums loudly beating, on the evening of Jan. 21, 1896, the Association convened for its 19th Annual Meeting at Odd Fellows' Hall in Albany.[10] The leadership believed the Association had a duty to shape public opinion on how to peacefully resolve not only the Venezuelan border dispute but also "all international controversies that appear to be beyond adjustment by ordinary diplomatic agencies."[11] To that end, Chauncey M. Depew, "America's prince of orators,"[12] delivered the opening address entitled, "Patriotism and Jingoism: The Lawyer's Duty."[13]





Address before the New York Bar Association by Hon. Chauncey M. Depew, LL.D., at Albany, January 21, 1896.

PATRIOTISM AND JINGOISM.

THE LAWYER'S DUTY.

*Mr. President, and gentlemen of the Bar Association of the State of New York:*

You will not expect of me a technical discussion of constitutions, codes or statutes. The needs of the state or the country in these respects will be ably presented in the papers which will be read during your session.

A meeting of the lawyers of this great commonwealth has a profounder meaning than suggestions for amendments to laws or facilities in procedure. By virtue of our official distinction as officers of the court there devolve upon us public duties of the greatest importance. The larger the question and the greater the perils involved in its decision, the more clear is the

Chauncey M. Depew and his opening address to the association.

Depew, a lawyer, was president of the New York Central Railroad and a prominent figure in Republican politics, cutting his oratorical teeth campaigning for Abraham Lincoln in the 1860 presidential election. He devoted his career to railroad law with stints in elected office. From 1899 through 1910 he served as a U.S. Senator from New York.[14]

Following an introduction by the Association's president in which he was likened to Moses,[15] Depew stood before a "large and cultured" audience that included prominent lawyers from across the state, the judges of the Court of Appeals, the Lieutenant Governor, many state Supreme Court Justices, and a large number of legislators.[16] Warming to his subject, Depew observed that the Association had never assembled "at a period so interesting and at the same time so fraught with dangers." He implored the Association to offer the nation a means of preventing war, because "[t]he larger the question and the greater perils involved in its decision, the more clear is the mission of the Bar Association to give the subject its attention and to the country the results of its calm deliberation."[17]

Depew condemned war and politicians who would exploit it for political purposes. He cited the examples of Attila the Hun, Julius Caesar, Hannibal, Genghis Kahn and Napoleon, observing that war-mongering dictators replace the Rule of Law with the "Law of the Sword."[18] He quoted Cicero's maxim *silent leges inter arma* ("in times of war, the law falls silent") and described the horror and cost of modern-day warfare.[19]

Depew expressed shock at the "unanimity and hot haste" with which Congress responded to Cleveland's Venezuelan message, "record[ing] their approval of what they believed at the time to be a declaration of war."[20] "The lesson seems to be enforced," Depew said, "that a hasty or passionate president could plunge the nation into war, and the reason and justification for its sacrifices of blood and treasure and industrial interests would be left for academic discussion after the strife was over."[21]

Depew offered a novel cure to prevent war between nations: an international court of arbitration.[22] Replacing war with legal process, he argued, would preserve peace, the only route to "the preservation and perpetuity of civilization and liberty."[23] To "honor and safely move upon the pathway of peace,"[24] Depew urged lawyers in the U.S. and Great Britain to "agitate and educate for the creation of this great court."[25]

Depew's clarion call to replace war with judicial processes for the peaceful settlement of disputes struck a chord with lawyers.[26] It appealed to their conviction that controversies may be settled by conciliation, arbitration and courts of justice – that the "methods of the lawyer lead in the end to more permanent results than the methods of the warrior and that human relations must be based upon reason rather than upon force."[27]

After Depew's speech, Governor Levi P. Morton hosted a lavish reception at the Executive Mansion for the Association and legislators. According to the New York Times, it was the "most brilliant affair of its kind ever held in the mansion." A large orchestra played, fresh cut flowers were on display and guests met the governor and his wife on a receiving line.[28]

The next day, the Association assembled and acted on Depew's recommendation. "[I]mpelled by a sense of duty to the state and nation and a purpose to serve the cause of humanity everywhere,"[29] a motion was made and carried creating a Committee on Arbitration to consider the subject of international arbitration and devise a plan to create a permanent court to resolve disputes between Great Britain and the U.S.[30] The committee's members

included present (William H. Robertson[31]), past (Sherman S. Rogers[32]) and future (Edward G. Whitaker[33] and Walter S. Logan[34]) Association presidents. Like most leading members of the bar in that era, they were statesmen with practical experience in government and public policy. Likewise, the committee's chair, William D. Veeder, was a former U.S. Congressman, state legislator and jurist.[35] The other members – Charles M. Davison (the committee's secretary[36]), Charles A. Deshon,[37] John Ingersoll Gilbert[38] and W. Martin Jones[39] – also distinguished themselves in public service. Depew served as an advisory member to the committee, as did Professor John B. Moore of Columbia University, a former assistant secretary of state and leading authority on international arbitration.[40]

**Edward G. Whitaker, NYSBA president who led delegation to the White House.**

On Feb. 12, 1896, the committee held its first meeting in Manhattan.[41] The committee's charge specified consideration of a court limited to members from the U.S. and Great Britain. However, W. Martin Jones, a foreign policy expert with prior service in the U.S. State Department,[42] advocated establishing a "permanent international court of arbitration" composed of representatives from several nations.[43] The committee agreed, concluding that to establish a court for only two nations would be impractical if not impossible and decided to plan a tribunal open to all nations.[44] A subcommittee, on which Jones and Logan served, was tasked with crafting a plan for such a court.[45]

Jones drafted a report which argued that an Anglo-American tribunal would be impractical, as a court made of an equal number of judges from each nation would be forever paralyzed.[46] Jones proposed instead a permanent tribunal composed of judges nominated by the highest court of nine nations (Argentina, Brazil, France, Germany, Great Britain, Mexico, the Netherlands, Russia and the U.S.) to which would be submitted international disputes that threaten global peace and prosperity. Jurisdiction would be conferred by treaties requiring the parties to submit disputes to the court and binding them to abide by its decision. The court would be open, under certain conditions, to all nations, including those represented on the court.[47]

Also, the subcommittee prepared an eloquent "memorial" to President Cleveland,[48] urging him to implement the Association's plan.[49] To assist in its lobbying efforts, the Association enlisted the support of the organized bar across the country. On March 18, a circular letter was sent to the officers of every state bar association "to unite the sentiment and judgment of the bar of the entire country."[50] The response from several state bars was encouraging: some formed like committees, while others promised to take such action at their coming annual meetings.[51] In an admiring editorial The American Lawyer, a monthly journal, wrote:

> It is seldom that a proposition involving so much departure from established and ancient methods, which in itself is so radical an innovation that it is denounced as Utopian by high authority, merits with so cordial and undoubted an acceptance as has the proposition definitely inaugurated by the New York State Bar Association for the creation of the mightiest Court the world has ever known. The fact of such unanimous sanction from trained legal minds, and from men who rightly stand as the official representatives of the American bar, gives strong prophecy of the due consummation of the hope of all men who believe in the supremacy of reason and conscience over brute force and conscienceless argument of arms."[52]

On March 26, 1896, the Committee on Arbitration held its final meeting at which it adopted the subcommittee report.[53] Because the committee exceeded its charge – by proposing a world court rather than a mere Anglo-American body – the Association needed to consider the matter. That occurred on April 16, when the first special meeting in Association history was held at the State Capitol in Albany. It took an hour for a small but determined group to listen to a reading of the report and adopt a slightly amended version.[54] A three-person delegation was appointed to personally present to Cleveland the plan and memorial: Whitaker, the Association's president; Veeder, the Committee on Arbitration's chairman; and Jones, the author of its report.[55]

Thus, in less than three months, the Association devised an "unpardonably audacious" plan that contemplated "a transformation of governments and an obliteration of traditions of people" with respect to the resolution of international conflict.[56] The plan was thought by some to be the first step any influential body had ever taken to establish a permanent international court of arbitration.[57]

## President Cleveland Meets Association Leaders at the White House

It took only five days to secure a face-to-face meeting with the nation's Commander in Chief, who happened to be a New York lawyer and former Association vice president.[58]

On April 21, the Association's representatives met for nearly an hour with Cleveland at the White House in Washington, D.C.[59] After a cordial greeting by Cleveland, all took their seats, and Whitaker explained the purpose of the visit and presented the Association's memorial and plan, handsomely printed in book form

bound in an illuminated cover with the words of Ulysses Grant, "Let Us Have Peace," printed in red letters at the top.[60]

Cleveland told the delegation he was "deeply impressed with the unselfish efforts of the Association" and pledged to carefully study its suggestions, intimating that they "would be of great practical interest to the Government."[61] Indeed, the Association gave Cleveland precisely what he and his Secretary of State, Richard Olney, needed at precisely the right time. The furor over the Venezuelan message opened their minds to alternatives to war.[62] Cleveland said as much, telling his callers: "[T[here is one fact about the matter: you have a *plan*; nobody else has given us a plan."[63]

After a lengthy discussion, the Association representatives rose to leave, but Cleveland asked them to be seated again and the discussion continued. Upon concluding the meeting, Cleveland cordially shook hands and thanked them, revealing his pleasure that the constructive ideas they shared came from fellow members of the New York bar.[64]

## The Border Crisis Is Resolved Through Arbitration

Jones, Veeder and Whitaker left the White House believing that Cleveland agreed with the Association's plan and that he would do his best to bring about what it "sought to secure, the inauguration of a movement by which differences may be settled without resort to arms."[65] This assessment was soon confirmed, as Cleveland became an exponent of arbitration.[66]

In November 1896, less than a year after the White House meeting, an elated Cleveland announced the completion of negotiations with Great Britain to enter into a convention for arbitration.[67] In February 1897, a month before Cleveland left office, a treaty was inked in Washington, D.C. between Great Britain and Venezuela that submitted their border dispute to arbitration. As the Association recommended, the treaty called for a judicial mechanism to resolve the dispute; specifically, an arbitration tribunal to "determine the boundary line between the Colony of British Guiana and Republic of Venezuela," composed of five members: two named by Great Britain, two by the United States, and a fifth by common consent or, if they proved unable to agree, by the king of Sweden and Norway.[68] Two years later, on Oct. 3, 1899, the border dispute ended when the arbitration tribunal substantially upheld Great Britain's claim, with a few of Venezuela's arguments resolved in its favor.[69]

## The Hague Peace Conference of 1899

In 1898, the Association's plan for a permanent international court of arbitration took center stage again when Russia's Czar Nicholas II called the world's great powers to meet at The Hague to discuss mechanisms for peace and limits on armaments.[70] News of the czar's initiative thrilled the architects of the Association's plan. "Here, at last, in a conference convening the great states of the world, might be a forum that could live up to the grandeur of their ambitions."[71]

**Peace Conference commissioners discussing the peace process at The Hague.**

**Czar Nicholas II**

On Jan. 18, 1899, the Association formed a special committee to draft an address each to U.S. President William McKinley and the czar commending the Peace Conference and recommending international arbitration, "such address to be accompanied by a record of the previous action of the Association on this subject, and of its plan of a Court of Arbitration for the settlement of international controversies that may not be adjusted by diplomatic negotiations."[72] The committee, in turn, prepared "very carefully and artistically" printed addresses.[73] On April 24, the Association delivered McKinley's address to the White House and submitted the czar's address through the U.S. Secretary of State to the Russian ambassador.[74] Copies of the Association's plan were also transmitted through the State Department to the various delegations at the Peace Conference.[75]

## The Association's Vision for a World Court Is Realized

On May 18, 1899, representatives from 26 countries gathered in The Hague for the Peace Conference.[76] President McKinley sent a distinguished Commission with instructions to establish a permanent international court of arbitration along the lines proposed by the Association.[77] Newspapers across the nation praised the Association for devising the "American Plan"[78] – as did conference participants and noted commentators.[79]

During the Peace Conference, the "great question" was whether the commissioners could bring into existence

**Peace Palace at the Hague, which houses the Permanent Court of Arbitration.**

a permanent international court.[80] The American Plan faced significant obstacles. In particular, the German Commissioners opposed the idea of obligatory arbitration.[81] The chair of the American Commission, Andrew D. White, was an experienced diplomat who previously served as U.S. Ambassador to Germany. He dispatched the delegation's secretary, Frederick W. Holls (a New York lawyer) to Berlin to communicate the strength of feeling in America, especially among persons of faith, in favor of peacefully resolving international disputes.[82] Ultimately, German opposition was withdrawn when a purely voluntary arbitration scheme was put on the table.[83] That cleared the way for the Peace Conference to adopt the Convention for the Pacific Settlement of International Disputes. It provided for a Permanent Court of Arbitration (PCA) in The Hague, always open, with power to hear and decide disputes between nations, in accordance with specified rules of procedure.[84]

Ringing paeans of praise came the Association's way for its role in the establishment of the first global mechanism for the settlement of disputes between nations. PCA – which remains in existence – marked a new era in international law and justice.[85] As a former Secretary of State observed at the Association's annual meeting:

> This Association has worthily earned the commendations of the world for its influential part in the creation of The Hague Permanent Court of Arbitration, and every lawyer in the other States of the Union honors his professional brethren of the empire State for this conspicuous service to the cause of justice and peace. . . . It is especially to the credit of the profession in this State that it has made its Association such an efficient instrument in promoting the establishment of the International Tribunal at The Hague.[86]

Through the years the Association remained a champion of international courts and international arbitration.[87] It never hesitated to throw the "weight of its great moral influence" toward sustaining institutions for promoting international peace, such as the Permanent Court of International Justice, the forerunner of the International Court of Justice, which today is a main organ of the United Nations.[88]

Despite the Association's continuing commitment to ending war by peaceful means, the remedies it offered in the horse-and-buggy era seem impractical, if not utopian, today. The 20th century's two World Wars – and countless smaller ones – shattered the illusions of the Hague Peace Conference. So, too, the crimes against humanity Russia now perpetrates against the Ukrainian people. Clausewitz's famous dictum that "war is a continuation of policy with other means" is a superior guide to the current nature of war than the legal theories of the 1890s.

Still, the Association's heritage to secure peace through law is an imperishable gift. What is deathless about the work done in 1896 and 1899 is the altruism and high-minded purpose that inspired it. The Association's service to the cause of justice and peace is a blessing that descends upon present and future bar leaders. To be worthy of this inheritance, leaders must be no less idealistic, no less audacious, no less singular, than their predecessors. May they be so.

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**Endnotes**

1. *See, e.g.,* Deborah S. Gardner & Christine G. McKay, Of Practical Benefit: New York State Bar Association, 1876-2001 19 (2003) (noting that, at the 1882 annual meeting, Hon. George S. Batchellar, a judge of the International Tribunal in Egypt, delivered an address on "Principles of Extra-Territoriality in the Ottoman Empire and Mixed Courts of Egypt") [hereinafter Of Practical Benefit].

2. Former U.S. Secretaries of State that delivered addresses at annual meetings include John W. Foster in 1904; Elihu Root in 1910; and Charles Evans Hughes in 1926. At the 1959 Annual Meeting, Secretary of State John Foster Dulles delivered his last public speech, before he died, on *The Role of Law in Peace.* John Foster Dulles, The Role of Law in Peace, Address before the New York State Bar Association, Jan. 31, 1959, Department of State, Series 8 – No. 79 (U.S. GPO 1959).

3. At the 1902 Annual Meeting, for example, the French Ambassador, Jules Cambon, delivered an address on "the Relation of Diplomacy to the Development of International Law, Public and Private." *See Address by His Excellency Jules Cambon,* Proceedings of the New York State Bar Association, Twenty-Fifth Annual Meeting 336, 126-42 (1902). In a similar vein, at the 1918 annual meeting, during WWI, the Attorney General of Great Britain, Sir. Frederick Edwin Smith, delivered the annual address on "Law, War, and the Future." *Annual Address by the Attorney General of Great Britain,* Proceedings of the New York State Bar Association, Forty-First Annual Meeting 258–81 (1918).

4. In 1901, Hon. John H. Stiness, the Chief Justice of the Rhode Island Supreme Court, praised the Association's efforts to establish a permanent court of international arbitration as "the noblest act that ever honored the name of that Association." *Report of the Committee on International Arbitration,* Proceedings of the New York State Bar Association, Thirty-Fourth Annual Meeting 261, 263 (1911) (quoting Chief Justice on H. Stiness). *See also* Charles Evans Hughes, *The Permanent Court of International Justice,* Proceedings of the New York State Bar Association, Forty-Ninth Annual Meeting 333, 336 (1926) ("I don't know if you are fully aware how glorious your tradition is."); Charles Evans Hughes, *Speech at the National Arbitration and Peace Congress, New York City, April 15, 1907, reprinted in* Addresses of Charles Evans Hughes 1906–1916, 209, 211 (2d ed. 2016) ("New York . . . should take special pride in the intelligent service in the cause of international arbitration which was rendered by the lawyers of this state.").

5. Alyn Brodsky, Grover Cleveland, A Study in Character 366–70 (2000) [hereinafter Cleveland]; Henry F. Graff, Grover Cleveland 123–24 (2002) [hereinafter Grover Cleveland].

6. Brodsky, Cleveland, *supra* note 5, at 371–72; Graff, Grover Cleveland, *supra* note 5, at 124–25.

7. George C. Herring, From Colony to Superpower: U.S. Foreign Relations Since 1876, 307 (2002) (quoting the *New York World*) [hereinafter From Colony to Superpower].

8. *See, e.g.,* Brodsky, Cleveland, A Study in Character, *supra* note 5, at 373 (quoting U.S. Senator Henry Cabot Lodge and newspapers such as the *Sun, Courier-Journal* and *Washington Post*).

9. Calvin DeArmond Davis, The United States and the First Hague Peace Conference 27 (1962) [hereinafter First Hague Peace Conference]; Brodsky, Cleveland, *supra* note 5, at 366–67; Graff, Grover Cleveland, *supra* note 5, at 125; Robert Kagan, The Ghost at The Feast: America and the Collapse of World Order, 1900–1941, 23 (2023).

10. Odd Fellows' Hall (which no longer exists) was located on the corner of Howard and Lodge Street.

11. Addresses of the New York State Bar Association to His Imperial Majesty, Nicholas II, Emperor of All the Russias, and to the President of the United States, on the Occasion and in commendation of the Peace Congress at the Hague and Recommending the Creation of an International Court 6–7 (Apr. 24, 1899), *available at* https://www.loc.gov/resource/gdcmassbookdig.addressesofnewyo00unse [hereinafter Addresses to Nicholas II and President]. The text of the addresses was reprinted in Proceedings of the New York State Bar Association, Twenty-Second Annual Meeting 500 (1899).

12. Walter S. Logan, *A Few Suggestions on Lord Chief Justice Russell's Address at Saratoga,* Proceedings of the New York State Bar Association, Twentieth Annual Meeting 41 (1897) [hereinafter Logan, Twentieth Annual Meeting].

13. *Address of Hon. Chauncey M. Depew*, Proceedings of the New York State Bar Association, Nineteenth Annual Meeting 21–40 (1896) [hereinafter *Address of Hon. Chauncey M. Depew*].

14. Gardner & McKay, Of Practical Benefit, *supra* note 1, at 19; *Chauncey M. Depew Dies of Pneumonia in his 94th Year,* N.Y. Times, April 5, 1928, at p. 1, col. 7.

15. The custom at annual meetings was for the Association's president to deliver the opening address. But the president, William H. Robertson, chose not to do so, explaining to the audience: "The greatest mistake that Pharaoh made in all his life, was in attempting to following Moses through the Red Sea. If your president had attempted to follow Dr. Depew in his eloquent address, he would have committed a greater blunder than Pharaoh." *Address of Hon. Chauncey M. Depew*, *supra* note 13, at 21.

16. MR. DEPEW ON "JINGOISM" – HE DISCUSES WAR BEFORE THE STATE BAR ASSOCIATION – LAWYERS SHOULD USE THEIR INFLUENCE FOR PEACEFUL SETTLEMENTS OF INTERNATIONAL DISPUTES –THE PRESIDENT'S VERSION OF THE MONROE DOCTRINE A NOVEL AND DANGEROUS ONE, N.Y. DAILY TRIBUNE, d Jan. 22, 1896, p. 10, col. 5; MR. DEPEW IS FOR PEACE – Tells New-York Lawyers They Should Work for Arbitration. – ADDRESS TO THE BAR ASSOCIATION – The United States and England Ought to Have a Board to Which All Their Disputes May Be Referred., N.Y. Times, Jan. 22, 1896, p. 16, col. 1; ANNUAL MEETING OF THE STATE BAR ASSOCIATION. – ADDRESS BY MR. DEPEW, Buffalo Courier, Jan. 22, 1896, p. 1, col. 1; EXALTED BY DEPEW – THE RESOURCES AND GREATNESS OF AMERICA DEPICTED ELOQUENTLY – IN AN ADDRESS TO LAWYERS – LAW OF ARBITRATION SHOULD SETTLE ALL INTERNATIONAL DISPUTES – BUT IF A WAR IS NECESSARY – There Should Be No Occasion for Uneasiness Among Our People., St. Paul Minnesota Daily Globe, Jan. 22, 1896, p. 4, col. 4.

17. *Address of Hon. Chauncey M. Depew*, *supra* note 13, at 22.

18. *Id.* at 24, 28.

19. *Id.* at 23, 26–27, 29.

20. *Id.* at 28.

21. *Id.* at 29; *see also id.* at 26 ("The alarms of war agitate a world. The columns of our daily papers are filled with cables and telegrams announcing the rage of nations and the immanence of their flying at each other's throats. The battle blood which is the inheritance of the ages is aflame for fight.").

22. *Id.* at 32, 35, 38–39.

23. *Id.* at 40; *see also id.* at 32 (urging lawyers "to perform a great work upon the lines of lawyers of the centuries in promoting arbitration").

24. *Id.* at 35.

25. *Id.* at 40.

26. *See, e.g.,* 53 Alb. L.J. 49, 50–51 (Jan. 25, 1896) ("If the recent meeting of the Bar Association had accomplished nothing else, it did allow a broad-minded man to forcibly, intellectually and brilliantly advocate the use of a modern and civilized means of settling dissensions and discord."); *Annual Address of Edward G. Whitaker, President of the New York State Bar Association, Delivered at Its Annual Meeting at Albany on January 20, 1897,* Proceedings of the New York State Bar Association, Twentieth Annual Meeting 53, 58 (1897) ("The moving cause was a sudden and unexpected possibility of war between the United States and Great Britain. It brought the question of war or peace sharply before the people. And the lawyers, true to their peaceful instincts and sense of justice and humanity, were the first to realize that a war between the two great Anglo-Saxon races, the two great civilizing forces of the world, would be a calamity.") [hereinafter Whitaker, Twentieth Annual Meeting].

27. Frederic R. Coudert, *International Law Supreme*, 15 N.Y. St. Bull. 25, 29 (1943); *see also* C. Roland Marchand, The American Peace Movement and Social Reform 1898–1918, 57 (1972) ("Ingrained habits of thought tended to lead the lawyers to envision all international problems as specific, definable legal disputes, amenable to judicial determination. . . . In other words, grave international problems could and should be reduced to a series of 'justiciable disputes.'").

28. *GOV. MORTON'S GREAT RECEPTION The Most Brilliant Event that Has Ever Occurred Within the Walls of the Executive Mansion.,* N.Y. Times, Jan. 23, 1896, p. 4, col. 7.

29. Memorial of the New York State Bar Association to the President Recommending the Creation of an International Court of Arbitration 1 (Apr. 16, 1896), *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.35112102630342&view=1up&seq=3 [NYSBA Memorial]. The text of the memorial was reprinted in Proceedings of the New York State Bar Association, Nineteenth Annual Meeting 290–95 (1896).

30. *See* Proceedings of the New York State Bar Association, Nineteenth Annual Meeting 60–61 (1896) (motion made and carried to establish a committee whose members would be appointed by the Association president "to consider and report upon the question of arbitration of differences between this country and England which has been so ably presented and urged by our distinguished citizen, Hon. Chauncey M. Depew."), 138 (president announced five initial appointees), 218 (listing 11-members of the Committee).

31. Robertson was Association president in 1895. He was a prominent lawyer and politician who previously served as a State Assemblymen (1849–50) and State Senator (1854–1855 and 1872–1881), Judge of the Westchester County Court (1856–1866), and U.S. Congressman (1867-1879). *See HON. WILLIAM H. ROBERTSON DEAD – DIED AT HIS HOME IN KETONAH – Senator, Congressman, Judge, Presidential Elector, Collector,* Mt. Vernon Daily Argus, Dec. 6, 1898, pg. 1, col. 3.

32. Rogers was Association president from 1881 to 1882. He was a prominent lawyer and previously served as a state senator in 1876. *Sherman S. Rogers*, N.Y. Times, March 24, 1900; 61 Albany L.J. 193 (March 31, 1900).

33. Whitaker was Association president from 1896 to 1897. He previously served as a Deputy Attorney General and Supreme Court Justice. *EDWARD G. WHITAKER, EX-JUSTICE, IS DEAD; Retired Jurist of Supreme Court Succumbs to Heart Disease in Southampton at 79.,* N.Y. Times, July 26, 1931, p. 4, col. 1.

34. Logan was Association president in 1899. He was a prominent lawyer and reformer, who devoted much time to public affairs. For example, in 1887 to 1889 he served as chairman of the Executive Committee of the Ballot Reform Association of New York State. *See Biography of Walter Seth Logan,* Proceedings of the New York State Bar Association, Thirtieth Annual Meeting 344–48 (1907); *WALTER SETH LOGAN in* 3 New York State's Prominent and Progressive Men: An Encyclopedia of Contemporaneous Biography 187–89 (Mitchel C. Harrison, ed., 1902); *W. S. LOGAN FALLS DEAD IN EQUITABLE BUILDING – The Lawyer Stricken Suddenly with Angina Pectoris – ASSOCIATE OF CHAS. O'CONNER – He Served Also As President of the State Bar Association-Club Man and Reformer,* N.Y. Times, July 20, 1906, at p. 7, col. 5; *W. S. LOGAN DROPS DEAD. – Lawyer Succumbs to Apoplexy, Brought on by the Heat,* N.Y. Daily Tribune, July 20, 1906, at p. 7, col. 4.

35. Veeder was a former U.S. Congressman (1877–1879), state assemblyman (1885–86), member of the State Constitutional Convention in 1867–68, and Surrogate of Kings County (1867–1877). *William D. Veeder,* Brooklyn Daily Eagle, Dec. 4, 1910, at p. 12, col. 6.

36. Davison was a prominent attorney and office holder from Saratoga Springs. He had been appointed by President Cleveland to be a delegate to the World's Educational Convention and later served as a Commissioner of the Northern District of New York. *CHAS. M. DAVISON, FORMER OFFICER HOLDER HERE, DEAD – Attorney Had Served as Supervisor and U.S. Commissioner,* The Saratogian, April 9, 1932, p. 1, col. 2.

37. Deshon was a prominent lawyer, who organized and served as President of the New York Southern Society and Columbia Boat Club. CHARLES AUGUSTUS DESHON in Year Book New York Southern Society For the Year 1919–20, 70–74 (1919).

38. Gilbert was a former state assemblymen, state senator and Delegate to the State Constitutional Convention of 1894. *John Ingersoll Gilbert.,* N.Y. Times, Dec. 20, 1904, p. 9, col. 6.

39. Jones was one of Rochester's most distinguished lawyers. During the Lincoln administration, he served as the private secretary to Secretary of State William H. Seward. He was promoted to Chief Clerk of the Consular Bureau at the State Department. He then served as U.S. Counsel at Clifton Canada (1866–1871). He later ran unsuccessful campaigns for New York Attorney General (1885) and Governor (1888). *See Biography of W. Martin Jones,* Proceedings of the New York State Bar Association, Thirtieth Annual Meeting 338, 338–40 (1907) [hereinafter *W. Martin Jones,* Thirtieth Annual Meeting]; *William Martin Jones* in New York State Men: Biographic Studies and Character Portraits, 167 (Frederick S. Hill, ed., 1910) [hereinafter *William Martin Jones,* New York State Men]; Rochester and Monroe County New York: Pictorial and Biographical, 318–22 (1908) (detailed biography of Jones) [hereinafter Rochester and Monroe County].

40. *See, e.g.,* Davis, First Hague Peace Conference, *supra* note 9, at 14 ("John Bassett Moore at Columbia became the country's leading scholar in the field [of international arbitration]."); *PLAN FOR PEACE: EXPERTS' VIEWS. – President Angell of Michigan and Dr. Rogers of Northwestern Discuss It. – CREDIT TO NEW YORK BAR,* Chicago Tribune, June 2, 1899, p. 1, col. 1–2 (noting that the Association's Committee on International Arbitration was assisted by "Professor J. B. Moore of Columbia University, at one time the Assistant Secretary of State, and a leading authority upon the subject of international arbitration") [hereinafter PLAN FOR PEACE].

41. W. Martin Jones, *The Plan of the New York State Bar Association,* Report of the Fifth Annual Meeting of the Lake Mohonk Conference on International Arbitration, 43 (1899) [hereinafter *The Plan of the New York State Bar Association*].

42. *See supra* note 39 and accompanying text.

43. Rochester and Monroe County, *supra* note 39, at 318 ("At the first meeting of the committee Mr. Jones set forth his views and pointed out the difficulties attending arbitration where the litigants only are arbiters, and strenuously advocated the establishment of a 'permanent international court of arbitration composed' of representatives of several nations.").

44. Jones, *The Plan of the New York State Bar Association, supra* note 41, at 43 ("As lawyers, we saw that litigants cannot sit on juries to determine questions of facts, or even question of law, between themselves; that humanity has not yet reached that stage of development when men who are citizens and subjects of a litigant nation can enter into consideration of a disputed question and reach a conclusion unbiased by the circumstances by which they are surrounded.").

45. *Report of Sub-Committee on International Arbitration,* Proceedings of the New

York State Bar Association, Nineteenth Annual Meeting 276, 288 (1896) [hereinafter *Report of Sub-Committee*]; *W. Martin Jones,* Thirtieth Annual Meeting, *supra* note 39, at 340–41.

46. *Report of Sub-Committee, supra* note 45, at 276–80; *William Matin Jones,* New York State Men, *supra* note 39, at ("A prime mover in establishing a Permanent International Court of Arbitration, he drafted the plan of the New York State Bar Association and was member of the committee to present the memorial to the President, April 21, 1896."); Rochester and Monroe County, *supra* note 39, at 319 (Jones "prepared a report which was successively approved, without alteration or amendment, by the sub-committee, the whole committee, and the Bar Association at a special meeting called to consider the matter.").

47. *Report of Sub-Committee, supra* note 45, at 281–87; *see also* Walter S. Logan, *Working Plan for a Permanent International Tribunal,* Report of the Second Annual Meeting of the Lake Mohonk Conference on International Arbitration 59, 62-66 (1896) (describing the Association's plan).

48. See NYSBA Memorial, *supra* note 29.

49. For example, the memorial closes with the following appeal to Cleveland:

> Believing that, in the fulfillment of its destiny among the civilized nations of the world, it has devolved upon the younger of the two Anglo-Saxon Powers, now happily in the enjoyment of nothing but future peaceful prospects, to take the first step looking to the permanency of peace among nations, your Petitioner, representing the Bar of the Empire State, earnestly appeals to you . . . to take such timely action as shall lead eventually to the organization of such a tribunal as has been outline in the foregoing recommendations. While ominous sounds of martial preparation are in the air, the shipbuilder's hammer is industriously welding the bolt, and arsenals are testing armor plates, your Petitioner, apprehensive for the future, feels that delays are dangerous, and it urgently recommends that action be taken at once by you to compass the realization of the dream of good men in every period of the world's history, when nations shall learn war no more and enlightened Reason shall fight the only battles fought among the children of men.

NYSBA MEMORIAL, *supra* note 29, at 6–7.

50. FOR INTERNATIONAL ARBITRATION. New-York State Bar Association Ready to Begin the Work., N.Y. Times, March 26, 1896, p. 4, col. 5 [hereinafter FOR INTERNATIONAL ARBITRATION]; *see also Report of Sub-Committee, supra* note 45, at 282 (recommending that correspondence be opened immediately with other bar associations in the U.S. inviting them to join in the memorial to President Cleveland, "in order that action by the government of the United State be secured at as early a date as seems practicable and consonant with such an enterprise and the dignity of the undertaking"). The text of the circular letter read as follows:

> My Dear Sir –
>
> The New York State Bar Association, at its last annual meeting, appointed a Committee on International Arbitration, with power to devise and recommend a plan for the organization of a permanent international tribunal, to which should be referred for peaceful settlement all controversies arising between English speaking people. This Committee is now organized and has inaugurated effort to various directions.
>
> It is desired to secure the co-operation of all like bodies, and we would ask whether your State Bar Association will not join us in this movement? It is hoped that a committee of your Association will be promptly appointed to act in concert with this committee, and we shall be glad to hear from you at your early convenience that this has been done.
>
> The plan of the work, generally, will be to agitate the question and create public and legal opinion in its favor, and, at the proper time, to initiate such practical methods, looking to the fulfillment of the purpose named as shall be deemed wisest in the judgment of those who combine in this effort. We send you by this mail, under separate cover, some printed matter on this question, which may be of interest in connection with this communication. May we not hear from you favorably?
>
> Yours very truly,
>
> Frank C. Smith, Secretary

Quoted in Proceedings of the Second Annual Meeting of the Iowa State Bar Association 30–31 (1896).

51. FOR INTERNATIONAL ARBITRATION, *supra* note 50 ("Correspondence has been opened with the officers of all the State Bar Associations, and in several instances, in response to the request of the committee, like committees for co-operative efforts have already been appointed. Others promise like action at their approaching annual meetings.).

52. *INTERNATIONAL ARBITRATION – PLAN PROPOSED BY THE NEW YORK STATE BAR ASSOCIATION – OTHER STATE BAR ASSOCIATIONS COMING INTO LINE.,* The American Lawyer, 156, 156–58 (April 1896).

53. FOR INTERNATIONAL ARBITRATION, supra note 50.

54. Jones, *The Plan of the New York State Bar Association*, *supra* note 41, at 43-44; *INTERNATIONAL ARBITRATION SCHEME. Report of the Committee to Consider One Submitted to the State Bar Association,* N.Y. Herald, April 17, 1896, p. 4, col. 4 (took an hour to read report; adopted with some amendments); 53 Alb. L. J. 259–60 (April 25, 1896) (stating that special meeting was attended by a "small and determined" group that "accomplished what it meant to do," although "nine-tenths" of the discussion "could have been dispensed with").

55. *W. Martin Jones,* Thirtieth Annual Meeting, *supra* note 39, at 341.

56. Whitaker, Twentieth Annual Meeting, *supra* note 26, at 59.

57. *See id.* ("no definite and well considered plan for the peaceful settlement of international controversies had ever before been suggested even, and to the New York State Bar Association belongs the honor of having devised and formulated the first definite plan"); *Report of Everett P. Wheeler on behalf of the Committee on International Arbitration,* Proceedings of the New York State Bar Association, Thirty-Sixth Annual Meeting, 124–25 (1913) (the Association's plan was "the first step that was taken by any organized body in this country, and I think in the world, in advocacy of an International Court of Arbitration, a permanent International Court, was taken by this Association"); Charles Evans Hughes, *The Permanent Court of International Justice*, Proceedings of the New York State Bar Association, Forty-Ninth Annual Meeting, 333, 335–36 (1926) (the Association "was the first influential [body] that sought to have established a Permanent Court of International Arbitration").

58. In 1882, Cleveland, then the Association's vice-president for the Eight Judicial District, was elected Governor of New York, on his way to becoming U.S. President a few years later. *See* New York State Bar Association, Reports, Vol. VII 100 (1884) ("At the last election, the people took up its [Association's] President, the Hon. William C. Ruger, and made him the Chief Judge of the State; and they took up its Vice-President for the Eight Judicial District, the Hon. Grover Cleveland, and made him Governor of the State.") (quoting Elliott F. Shepard).

59. Report of the Third Annual Meeting of the Lake Mohonk Conference on International Arbitration, 69 (1897) (remarks of W. Martin Jones, stating: "We had a conference which lasted nearly an hour, and went over this matter carefully and deliberately[.]") [hereinafter Third Annual Meeting of Lake Mohonk Conference].

60. NYSBA Memorial, *supra* note 29. The "beautifully printed" memorial was also "distributed to the leaders of thought and leading statesmen and divines of the civilized world, and . . . received nothing but the most favorable comment." Whitaker, Twentieth Annual Meeting, *supra* note 26, at 58.

61. *Id.*; *A PLAN FOR ARBITRATION. Submitted to President Cleveland by the New-York Bar Association.,* N.Y. Times, April 22, 1896, p. 9, col. 6 (the Association's representatives met for a half hour with Cleveland, who "promised to give careful consideration to the views presented"); *see also* PETITION FOR ARBITRATION – ACTION OF THE NEW YORK STATE BAR ASSOCIATION – IS AN ABLE DOCUMENT – RECOMMENDATIONS PRESENTED TO THE PRESIDENT – SCOPE OF THE TRIBUNAL – Abstract of the Report at the Committee of the Association-Suggestion as to the Settlement of Disputes Without Recourse to War., Rochester Democrat and Chronicle, April 22, 1986, p. 1, col. 7 [hereinafter PETITION FOR ARBITRATION]; *WANT WARS STOPPED – New York Bar Association Asks the President to Favor a Court of Arbitration. – EARNEST PLEA FOR PEACE. – Outline in the Petition of the Proposed International Tribunal and Its Duties. – MR. CLEVELAND MUCH IMPRESSED. – He takes a Deep Interest in the Project and in the Conference To Be Held To-Day,* N.Y. Herald, April 22, 1896, p. 7, col. 6.

62. Davis, First Hague Peace Conference, *supra* note 9, at 29 ("Secretary Olney had need for plans like that of the New York State Br Association, for he too had become a champion of arbitration."); Jones, *The Plan of the New York State Bar Association*, *supra* note 41, at 44 (stating that Cleveland requested the delegation leave with him a copy of the report and memorial "for Mr. Onley, that he might make use of it").

63. Third Annual Meeting of Lake Mohonk Conference, *supra* note 59, at 69 (W. Martin Jones quoting Cleveland) (emphasis in original).

64. PETITION FOR ARBITRATION, *supra* note 61.

65. Jones, *The Plan of the New York State Bar Association*, *supra* note 41, at 44.

66. Davis, First Hague Peace Conference, *supra* note 9, at 29.

67. *SETTLEMENT OF VENEZUELAN MATTER A VICTORY. Many Congratulations Received – Venezuela Practically Ignored in the Final Negotiations – Further Delays Necessary,* N.Y. Times, Nov. 12, 1876, p. 1.

68. Lars Schoultz, Beneath the United States: A History of U.S. Policy Toward Latin America 122 (1998); *see also* Herring, From Colony to Superpower, *supra* note 7, at 308 ("Britain agreed to arbitrate once the United States accepted its conditions for arbitration."). At the Association's 1897 Annual Meeting, Walter S. Logan, congratulated the membership for influencing the treaty between the U.S. and Great Britain providing for arbitration of the Venezuela dispute and the general treaty of arbitration entered into by the two powers shortly thereafter. Logan, Twentieth Annual Meeting, *supra* note 12, at 41, 42.

69. Brodsky, Cleveland, *supra* note 5, at 375.

70. Davis, First Hague Peace Conference, *supra* note 9, at 36–53; John Fabian Witt, Lincoln's Code: The Laws of War in American History, 347–48 (2012) [hereinafter Lincoln's Code].

71. Witt, Lincoln's Code, *supra* note 70, at 348 (referring to peace movements in the world).

72. Proceedings of the New York State Bar Association, Twenty-Second Annual Meeting 357–58 (1899) (resolution to establish special committee made and adopted by the Association); *see also id.* at 125, 264 (earlier resolutions on the same subject). The members of this committee were W. Martin Jones, William D. Veeder and Edward G. Whitaker – the same three men who on behalf of the Association met with President Grover Cleveland on April 21, 1896. Addresses to Nicholas II and President, *supra* note 11, at 10.

73. Addresses to Nicholas II and President, *supra* note 11. Accompanying the addresses – which were "very carefully and artistically" printed – was the 1896 Memorial to Cleveland; the Association's plan for an international court; and Chauncey Depew's address to the Association at the 1896 Annual Meeting. *Report of the Committee on Arbitration and motion relative thereto,* Proceedings of the New York State Bar Association, Twenty-Third Annual Meeting, 249, 249–50 (1900) [hereinafter *Report of the Committee on Arbitration*].

74. *Report of the Committee on Arbitration, supra* note 73, at 249–50; *see also* Jones, *The Plan of the New York State Bar Association, supra* note 41, at 45 ("Before transmitting the Emperor's address to the ambassador, to be forwarded to him, it was . . . submitted for inspection to the Secretary of State. He promptly replied that there was nothing in it that it would not be a pleasure to the Department at Washington to submit for transmission to the Czar by the hands of his ambassador.").

75. *Report of the Committee on Arbitration, supra* note 73, at 250; *W. Martin Jones,* Thirtieth Annual Meeting, *supra* note 39, at 341–42.

76. Witt, Lincoln's Code, *supra* note 70, at 348.

77. The members of the American Commission were Andrew D. White, Seth Low, Stanford Newel, Capt. Alfred T. Mahan of the United States Navy, Capt. William Crozier of the United States Army, and Frederick W. Holls, secretar. Davis, First Hague Peace Conference, *supra* note 9, at 64-80; *see also* Everett P. Wheeler, *report of the Committee on International Arbitration,* Proceedings of the New York State Bar Association, Thirty-Sixth Annual Meeting, 125–26 (1913) ("President McKinley received our second memorial and he instructed Andrew D. White and the other delegates to the conference at the Hague to advocate the establishment of an International Court of Arbitration and they did."); *Report of the Committee on Arbitration, supra* note 73, at 250–51 ("It may be a matter of some gratification to the members of the a New York State bar association to know that it's plan for a Court, to which, when appropriately organized, may be submitted controversies that baffle peaceful adjustment by diplomatic negotiation, was the plan, in substance, under the instruction of the President, that was advocated by representatives of this nation in conference at The Hague, and it may also be a matter of congratulation that portions of that plan were eventually adopted by the conference in its final action."); Jones, *The Plan of the New York State Bar Association, supra* note 41, at 43 (stating that W. Martin Jones "had the pleasure of placing one of . . . [the Association's] reports and the plan for a permanent court in the hands of President McKinley and of inviting his attention to it").

78. *See, e.g.,* PEACE CONFERENCE PLANS. – Views of President Angell and Henry Wade on the Arbitration Scheme – Bar Association Praised. N.Y. Evening Post, June 2, 1899, p. 7, col. 5 ("'The New York bar has the honor of having practically worked out the plan which our representatives at The Hague have adopted as their own and which has been received with marked favor by the representatives from the countries participating in the congress of nations now in session.'") (quoting Henry Wade Rogers, the President of Northwestern University and an international law expert); PLAN FOR PEACE, *supra* note 40 ("[The Association's plan] . . . is practically the plan proposed by the New York State Bar Association in 1896. The plan was worked out carefully by a committee created for the purpose, and composed of some of the leading members of the bar of the state, assisted by Professor J. B. Moore of Columbia University, at one time the Assistant Secretary of State, and a leading authority upon the subject of international arbitration.") (quoting Henry Wade Rogers); ARBITRATION TO REPLACE WAR., College Professors Discuss the Peace Plan-/Which Are Being Considered in Session at The Hague., Sacramento Record Union, June 2, 1899, p. 7, col. 3 (same).

79. For example, Frederick W. Holls, the Secretary of the American delegation, wrote in his history of the Peace Conference that "[t]he plan for an International Tribunal, carefully elaborated by a committee of the New York State Bar Association, . . . was almost identical with the plan proposed on behalf of the American government[.]" Frederick W. Holls, The Peace Conference at the Hague: And Its Bearings on International Law and Policy, 328 (1900). Similarly, John W. Foster, a former U.S. Secretary of State and president of the National Arbitration Conference, wrote that the Association plan was the basis of the instructions to the American delegates at the Hague. John W. Foster, Arbitration and the Hague Court, 60 ("the delegates of the United States to the Conference had been instructed to make this a cardinal point in their propositions"), 101 ("That plan became the basis of the instructions of the American delegates to the Hague Conference, and the essential features of the Permanent Court now in existence at The Hague are in accordance with that plan.") (1904). *See* also *W. Martin Jones,* Thirtieth Annual Meeting, *supra* note 39, at 341–42 ("The memorial having been duly presented to President McKinley and to the representatives of the Czar . . . afterwards became known as the 'American Plan.'"); cf. Aubrey Parkman, David Jayne Hill and the Problem of World Peace, 75–76 (1974) (noting that the instructions delivered to the American delegation drew from the Association's plan but were not identical to it).

80. Davis, First Hague Peace Conference, *supra* note 9, at 137.

81. Witt, Lincoln's Code, *supra* note 70, at 349.

82. *Report of the Committee on International Arbitration,* Proceedings of the New York State Bar Association, Thirty-Sixth Annual Meeting 145, 148–49 (1913); Davis, First Hague Peace Conference, *supra* note 9, at 90, 154–55.

83. *See, e.g.,* Davis, First Hague Peace Conference, *supra* note 9, at 150–61; *Report of the Committee on International Arbitration,* Proceedings of the New York State Bar Association, Thirty-Fourth Annual Meeting, 261, 263 (1911).

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85. PCA's website is accessible at the following link: https://pca-cpa.org/en/home/.

86. John W. Foster, *What the United States Has Done for International Arbitration,* Proceedings of the New York State Bar Association, Twenty-Seventh Annual Meeting 124, 125 (1904).

87. *See, e.g., Report of Committee on International Arbitration*, Proceedings of the New York State Bar Association, Forty-Fourth Annual Meeting 161, 162 (1925) ("We stand, as we have stood since 1896, for International Courts and International Arbitration, and we are not in favor of exempting the country, any more than we favor exempting any other country, from settlement of international differences by the peaceful processes of the International Courts.").

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# An Attorney Flees the Taliban and Finds Support in New York's J-COR Program

By Liz Benjamin

When Somaia Sharif Zada came to the United States in August 2021, she had little more than the clothes she was wearing and her laptop computer.

But the 28-year-old Afghan native also brought with her something intangible – and she hopes, in the long term, far more valuable: More than eight years of experience as a practicing attorney, with a focus on assisting other women in domestic violence, divorce, and other cases.

"I sat on the U.S. Air Force plane, and I told myself, 'You should start again from zero, because you have lost everything,'" Sharif Zada recalled. "But I brought my hopes with me."

It was Sharif Zada's work that forced her to flee Afghanistan when the Taliban re-took control of the country's capital, Kabul. After two decades of being out of power, the Taliban quickly set about rolling back all the progress that had been made in its absence, including the law on Elimination of Violence Against Women (EVAW), decreed in 2009 and reconfirmed in 2018, which made acts of abuse against women – including rape and forced marriage, or prohibiting women and girls from going to school or work – criminal offenses.

The Taliban banished women from the judiciary, effectively denying all women legal protections and leaving them nowhere to turn as the country returned to a hardline Islamic approach to governing that forbade them most freedoms – including education, unaccompanied travel, and the ability to work in public.

"I think all the time of the Afghan women I left behind," Sharif Zada said. "I saved my life, but they are still in danger."

Sharif Zada came to the U.S. alone, leaving behind her immediate and extended family. Her husband was already in the states pursuing a master's degree. Though she was a Fulbright Program finalist in 2015, Sharif Zada's visa application took a long time to process, so she stayed behind to focus on providing free legal services to underserved low-income women.

She arrived first in Virginia, and then requested a transfer to New York, in part due to the international reputation of its law schools, and was placed in the Capital Region. Once settled and reunited with her husband, Sharif Zada hoped to return to practicing law. But she was unsure where or how to make that happen. As she researched the process, it seemed daunting, time-consuming and expensive.

Then she happened upon an announcement about the Unified Court System's new program, Judges for Career Opportunities for Refugees (J-COR), which provided placement opportunities for Afghan refugees like herself with law-related experience or interest.

The J-COR program, funded by the Office of Court Administration, places eligible Afghan refugees in full-time, paid "analyst" positions for a 12-month period. To qualify, applicants need to be proficient in English, have relocated to the U.S. from Afghanistan in 2021 or 2022, have the appropriate immigration status to work here, and, most of all, have relevant experience in the legal profession.

Sharif Zada applied and was accepted. Since August, she has been working at the Albany County Supreme Court and other county courts in the Capital Region.

"This program gives me the opportunity to practice my language (skills) and get familiar with the procedures and the laws and how the courts are run in different counties in the U.S.," Sharif Zada said. "It also gives me the opportunity to prove to the judges that I understand legal concepts, because that is my profession, no matter that I am from Afghanistan. It gives me the chance to advance many steps."

**Sharif Zada said her experience with the J-COR program has given her an appreciation for the U.S. legal system, as she regularly sees judges who are "searching for solutions, not punishments" and "thinking about humanity, not just enforcing laws."**

The J-COR program was formally announced by then-Chief Judge Janet DiFiore this past March in response to an October 2021 resolution passed by the National Conference of Chief Justices that urged its members to identify employment opportunities for Afghan refugees who worked in their country's justice system and were being persecuted – and even murdered – as a result of their work to defend and enforce the legal rights of women and girls.

"This is a truly worthy endeavor, and the least that we can do here in New York to support the courageous women judges and lawyers who have risked their lives over the last 20 years to uphold the rule of law and enforce the human rights of women and girls living in Afghanistan," DiFiore said at the time.

News of the assassination in January 2021 of two women judges on their way to work at the Afghan Supreme Court, as well as the fate of more than 220 other female judges who were in hiding due to fear of retribution under Taliban rule, had spurred Court of Appeals Judge Madeline Singas to suggest to DiFiore that New York reach out to the National Conference of Chief Justices.

"I couldn't believe that these women were in such danger just for doing their jobs," Singas recalled. "They had been acting in their official capacity as judges, and defense attorneys, and prosecutors, and now they were in hiding and their families were threatened. I couldn't just sit back. These women are our sisters. They're professionals. I can't imagine what they've been through."

Singas said she was saddened to learn that some of the women who had managed to escape from Afghanistan to the U.S. were unable to put their professional skills to use in this country and instead were cleaning houses or working as cashiers.

"They were grateful to have any employment, but these are remarkably educated, brilliant people who need dignity in work," Singas said. "This program can really be life altering for them."

Acting Chief Judge Anthony Cannataro praised Singas for recognizing both the need to help legal professionals from Afghanistan after the Taliban's return to power and the opportunity for the New York courts to help. He said it was "no surprise" that she swung into action, given her long-standing dedication to public service and commitment to protecting vulnerable individuals.

"The court system is very proud of Judge Singas's truly inspiring efforts, and we are so pleased to do our part in offering assistance and hope to Afghan refugees in their time of need," Judge Cannataro added.

To date, 10 refugees have been placed in the program, and eight are currently active. One left early to attend law school "which is great," Singas said. The program is also now accepting men as well as women.

One male J-COR participant, who lives in the Buffalo area but asked to remain anonymous to protect his family still in Afghanistan, said he worked as a defense attorney for 10 years before he was forced to flee the country. His work included a stint with USAID, assisting women and girls in getting access to legal representation and running information sessions to inform them of their rights.

"I am so happy to have this opportunity," the J-COR participant said. "My main goal is to get back to my professional career, and I thank the program and its staff for initiating this golden opportunity. Even my children will remember this historic moment that happened in their dad's life and what these people did for him."

Attorneys in other states are also stepping up to assist Afghan refugees with legal experience. Singas said she hopes to be able to expand J-COR here in New York in the coming years, and also encourage other associations and organizations to use it as a model for similar undertakings. As a descendant of immigrants herself, Singas said, she feels particularly motivated to assist those who come to the country determined to improve their circumstances.

"My entire extended family came from Greece and settled here, starting at the bottom," Singas explained. "They were grateful for the opportunity. I saw my own family struggle, not speaking the language and trying to make their way. But these women, they came here under the threat of death, which added a whole level of urgency to their situation. I cannot imagine what they're going through, and to be able to just help them professionally and give them their dignity back, that's worth it."

Sharif Zada said her experience with the J-COR program has given her an appreciation for the U.S. legal system, as she regularly sees judges who are "searching for solutions, not punishments" and "thinking about humanity, not just enforcing laws."

This is a stark difference from her experience in Afghanistan, where she worked mostly on divorce cases. Many judges were predisposed against women, Sharif Zada said, even if their husbands were abusive and violent. And in many cases, even if she was successful in securing a legal victory for her clients, their families might then seek revenge in a so-called "honor killing."

"It's more difficult in Afghanistan for a woman to be an attorney; we had to fight for basic rights, like education," Sharif Zada said. "First, you face cultural restrictions and society roles, and then you face the real law and the real problems. Mostly for women, being a lawyer wasn't safe, but it's also not safe even for men in some districts."

Sharif Zada remains hopeful she will one day be able to practice law here in the U.S. While studying for the bar and preparing for the birth of her first child this spring, Sharif Zada keeps in touch with her extended family when it's safe to do so, as well as her colleagues who are still practicing law in Afghanistan. She often thinks about the future – including the possibility of someday returning home.

"Imagine you are sitting by the stove with a mug of tea or coffee, and you look outside, and see children are freezing; how can you be happy? These women need us, they need to be informed about their rights," she said. "I will not go back while the Taliban is still in Afghanistan. But if the region changes, and something good happens, then yes."

**Endnotes**

1. 373 U.S. 83 (1963).

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# How To Successfully Navigate a Turbulent Legal Market

By Jack Newton

The legal industry has evolved rapidly in recent years. This has been the case despite many macro-level challenges, not the least of which have included inflation, rising interest rates, volatile hiring markets, and major shifts in client expectations.

In response, law firms have had to upend how they think about spending, attracting and retaining talent, and meeting the needs of clients.

Given the scope and scale of these disruptions, you might think the situation would be dire for law firms, but in fact, the opposite is true. According to the latest Legal Trends Report, which looks at aggregated and anonymized data from tens of thousands of U.S. law firms, average revenues have increased significantly since 2019 – seeing increases as high as 45% in August of 2022.

Nicholas Taleb's concept of "antifragility" can help us explain these trends. In his book "Antifragile: Things That Gain from Disorder," Taleb writes, "Some things benefit from shocks; they thrive and grow when exposed to volatility, randomness, disorder, and stressors and love adventure, risk, and uncertainty." To be antifragile is to embrace that which cannot be controlled and to become better through adversity.

What does antifragility look like for law firms? There are a few hallmarks any law firm should look to embody as the industry continues to weather the challenges and uncertainty that businesses face in 2023.

Finding deep connections with clients is the first point of focus that firms should strive for. Connecting with clients requires an understanding of what consumers look for in a law firm, and more importantly, how to meet and exceed their expectations. This goes beyond knowing what clients *want*, since not every client is fully equipped to know what's involved in working through a legal matter (that's the lawyer's job). Instead, firms should be focused more on what clients ultimately *need* when getting through a legal matter–often, this boils down to responsive and timely communications.

Adaptive capacity is also crucial to antifragility. It's not enough for law firms to understand their market, it's important that they be able to fundamentally change in reaction to it. This means being willing to explore new opportunities as they emerge, and to embrace them when they yield positive results. This doesn't always mean that firms need to initiate these ventures themselves–in the increasingly connected world we live in, businesses also have the opportunity to learn from the examples set by others.

Finally, firms should have a strong foundation for managing their essential operations, so that they can focus more on the creative aspects of their business. Keeping infrastructure lean and cost-effective is key. We've seen that technology–specifically cloud-based technology – offers the resiliency and flexibility that has helped firms both deal with *and thrive* in the challenging environments of recent years. Cloud-based legal technology centralizes information while giving lawyers the ability to work from anywhere, which – in addition to the range of enhanced capabilities and workflows–has helped countless law firms adapt to the needs of the day.

In fact, research shows that firms using cloud-based technology prove to be more successful. On an individual level, lawyers using cloud-based technology are 60% more likely to report having positive relationships with clients, and 29% are more likely to have a good professional life. On a higher level, lawyers using cloud-based software are 43% more likely to report high client satisfaction for their firm and 11% more likely to report strong revenues.

Today's unsettled legal landscape brings new challenges and immense opportunity. To support you in navigating the challenges that still lie ahead, we have created a guide, "The Building Blocks of an Antifragile Law Firm." Consider it a blueprint with key steps and tactics on how to make the most out of a turbulent market. Read the guide at clio.com/antifragile-law-firm.

**Jack Newton** is the CEO and 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, available at client-centeredlawfirm.com.

# In Iran, Women Lead the Way in the Fight for Justice

By Azish Filabi

If you've walked around New York City recently, you may have heard the rallying slogan of "Women, Life, Freedom," or, in Persian, "*Zan, Zendegi, Azadi*." From Washington Square to Times Square, demonstrations and rallies are calling for support of Iranian women who have, since Sept. 16, been leading a renewed revolution against the fundamentalist Islamic regime.

The Iranian diaspora rallying in numerous U.S. and European cities are amplifying protestors on the streets and in the prisons of Iran. The uprisings began after the news about the death in police custody of a 22-year-old woman named Mahsa Zhina Amini became widely known through social media. The protestors' chants include "Mullahs get lost," "We don't want an Islamic republic," and "Death to the supreme leader [Khamenei],"[1] calling for the overthrow of an abusive and corrupt regime.

Amini was visiting Tehran with her family from Saqiz, a predominantly Kurdish town in Western Iran, when she was unexpectedly and suddenly detained by the "morality police" for having supposedly covered her hair too loosely with her head scarf. Hours later, she was in a coma at the hospital, bruises on her face and blood dripping from her ear.

Amini's death from injuries sustained under police custody has sparked outrage in Iran and calls for revolution against the Islamic Republic. A billboard in Time Square on Oct. 26 included her photo, commemorating the 40th day of her death.

## A History of Human Rights Abuse

Human rights violations are not new in Iran. Neither are protests in support of civil and political rights. In 1979, a popular revolution overthrew Mohammad Reza Shah Pahlavi, who was widely seen as corrupt and unrepresentative of the Iranian people. Iranians then largely sought a secular democratic government, free of Western influence. In the chaos that followed, Ayatollah Khomeini established the Islamic Republic of Iran, a regime that fundamentally changed the legal, social and political system of the country.

Iran had until that time been a multi-religious and multi-ethnic nation. After Khomeini consolidated his power, there was a mass exodus of Christians, Jews, Baha'is, Turks and Kurds, as well as anyone whose political views or speech were contrary to those of the new Islamic government.

Mandatory Islamic dress codes, including a hijab for women, were among the decrees that Khomeini's regime instituted. On March 8, 1979 – International Women's Day – the women's rights organizations mobilized. Thousands of women gathered on the streets of Tehran to protest mandatory veiling and in support of equal rights and non-discrimination. Viewed in historical context, Iranian women have been leading a fight for justice for over 40 years, despite violent threats to their lives and livelihoods.

## What Solution? Revolution!

What began this year as women-led protests and hijab-burning has expanded to a revolution by a broad cross-section of the Iranian people demanding an end to the Islamic regime. Men and women of all ages, from teens to the elderly, are actively engaged. Generation Z is at the forefront, and a number of teenagers and even younger children have become vocal elements of the movement. Labor strikes, merchant boycotts and even the burning of the childhood home of Imam Khomeini, the original leader of the 1979 Islamic regime, demonstrate the widespread anger among the population. This revolution has been in the making for 40 years.

The regime's crackdown has reportedly targeted minors, using the same brutal imprisonment, torture and punishment tactics against teenage boys and girls that it does against adults. The U.N. reports that at least 14,000 people have been arrested since the protests began this fall, and some estimate this figure is closer to 20,000. There are reports of widespread torture and a fire of unknown origin at Evin Prison in October 2022, a facility notorious for detaining, torturing and murdering political prisoners since the 1980s. Moreover, the regime has begun executing protestors, based on hasty trials without procedural protections or due process.[2] This is a large-scale humanitarian crisis and must be addressed as such by the international community.

Notably, Mahsa Amini was an Iranian Kurd, thus the Iranian Kurdish community has mobilized in their opposition to the Islamic regime.[3] This risks regional conflict, as the opposition Kurdish leaders and other dissenters are based in, or recently escaped to, Kurdish bases in Iraq. The Iranian Revolutionary Guards Corps, a paramilitary group currently devoted to the Islamic government, launched targeted missiles at the Kurds in Iraq in early November, prompting the U.S. State Department and the U.N. mission in Iraq to condemn the attacks as a violation of Iraq's sovereignty.

## The International Community and Diplomacy Called to Action

The Islamic Republic threatens not only its own citizens, but also peace and stability internationally. It recently supplied drones that the Russians used in the war against Ukraine. It funds and trains Shia militias in several countries, including Lebanon, Iraq, Syria and Yemen.[4] It has continued to attack Kurds in neighboring Iraq and has backed attacks against Israel. The U.S. State Department has designated it as a state sponsor of terrorism.

Standing in solidarity with the Iranian people against the Islamic regime should be a priority for the international community. Naming the protests as an act of revolution honors the voice of Iranians who are putting their lives on the line for basic, universal values. It also helps contain a terrorist regime that threatens global stability.

France and Canada have been leaders in demonstrating the important role of law and diplomacy in this crisis, and they should continue to escalate diplomatic aims. French President Macron recognized the people's movement in Iran as a revolution and met with several Iranian activists to learn more about and support their cause.[5]

The Canadian government designated the Iranian regime and Iranian Revolutionary Guard Corps as a terrorist organization, and identified senior members who will be sanctioned and banned from entry to Canada.[6] The EU is likely to impose similar sanctions, while the U.S., which had previously designated the Iranian Revolutionary Guard Corps as a terrorist organization, added additional sanctions on companies doing business with Iran, yet stopped short of imposing travel bans on regime officials.

The international community must support the Iranian people amid this crisis by increasing the isolation of the Iranian regime and refusing to treat it as a legitimate government. Governments should strengthen sanctions against the leadership of the Islamic Republic, and freeze the assets of regime officials. The U.S. Congress is considering a bill, H.R. 9203, known as the MAHSA Act, which has bipartisan support to impose targeted sanctions on the leaders of the Islamic Republic. Such sanctions could enable the freezing and seizure of assets owned by those leaders in the U.S. to hold them accountable for their role in human rights violations.

Other actions the international community should consider includes diplomatic ones, such as recalling ambassadors from Iran. Moreover, they should also publicly press for the release of all political prisoners. Now is the time for diplomacy to show its might and support calls for democratic governance.

The Iranian government is a signatory to numerous international conventions and treaties of which it is currently in breach. Those include the International Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination.[7] The regime's gross human rights violations are running afoul of these laws, and the U.N. should take stronger action.

The U.N. has taken some action against Iran through the Commission on the Status of Women, as well as the Human Rights Council. The Commission on the Status of Women is an organization whose mission is to be a "global champion for women and girls." U.S. representatives indicated that Iran's continuing role would be an "ugly stain" on the commission's credibility, considering the Islamic Republic's human rights record.[8] On Dec. 14, 2022, Iran was removed from the 45-member commission in response to strong momentum by the U.S. government and Iranian activists.

On Nov. 24, 2022, the U.N. Human Rights Council voted to establish a fact-finding investigation into human rights

abuses in Iran in connection with the recent protests, an important step that could make prosecutions more likely in international courts.

Civil society and professional organizations also have a key role to play in these measures and in maintaining pressure both on Iran and policy makers responding to the Islamic regime's illegal conduct and human rights abuses. To this end, NYSBA President Sherry Levin Wallach and the International Section's Rapid Response Committee have expressed solidarity with Iranian women and others fighting for justice, and grave concern about the brutality and crackdown against them.[9]

The coming months in Iran will inevitably be bloody. The people of Iran are doing their part to fight for the rule of law. The international community should stand in solidarity with them.

**Azish Filabi** is the executive director of the American College Cary M. Maguire Center for Ethics in Financial Services, Charles Lamont Post Chair of Business Ethics and associate professor at The American College of Financial Services. She has worked as a corporate lawyer and assistant vice president, ethics officer and counsel in the legal group at the Federal Reserve Bank of New York. Filabi was born in Mashhad, Iran, and immigrated to the U.S. in the early 1980s. She has a J.D. from the University of Virginia School of Law and a master's in international affairs from John Hopkins School of International Studies. Filabi is the chair of NYSBA's International Section.

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# NYSBA Ukraine Task Force: From the Rule of Law to Rules of War

By Deborah H. Kaye and Sheryl B. Galler

In December 2021, the International Section of the New York State Bar Association entered into a memorandum of understanding to promote understanding and cooperation between NYSBA and the Ukrainian Bar Association, and to offer benefits and opportunities for their members. The International Section then formed a Ukraine chapter and met virtually with the leadership and members of the Ukrainian Bar Association to launch the new chapter. Shortly after that presentation, Edward K. Lenci, then chair of the International Section, formed the NYSBA Ukraine Task Force to effectuate the goals of the new chapter, and long-time section member Serhiy Hoshovsky was appointed to co-chair the task force. Women in Law Section Chair Sheryl Galler and Chair-elect Kim Wolf Price joined the task force, and Deborah Kaye volunteered to serve as its secretary. Current co-chairs are Andre R. Jaglom, Serhiy Hoshovsky and Scott M. Karson, past president of NYSBA.

**The first meeting of the Ukraine Task Force was held virtually on Feb. 17, 2022. Barely a week later, Russia invaded Ukraine. Our new connections made the war feel personal even for those of us without relatives there.**

The first meeting of the Ukraine Task Force was held virtually on Feb. 17, 2022. Barely a week later, Russia invaded Ukraine. The task force continued to meet regularly to explore how to support Ukraine during the war and assist the advocacy of the Ukrainian Bar Association.

Our new connections made the war feel personal even for those of us without relatives there. Ukrainian Bar Association Executive Director Inna Liniova shared first-hand reports on the situation in Kyiv. We worried for her safety and the safety of her friends and family as she fled to western Ukraine and eventually to Bulgaria. Anna Dabrowska, a law firm partner in Warsaw and chair of NYSBA's Poland chapter, invited Ukrainian refugees, including a mother and baby, to stay in her home. Anna shared the tale of their harrowing journey and the dedication of colleagues who helped them along the way.

NYSBA Past President T. Andrew Brown joined the task force's meeting on Feb. 24 to condemn Russia's criminal invasion and to affirm that NYSBA stands with Ukraine. NYSBA issued press releases stating its support of Ukraine and the rule of law and inviting others to follow. At the Ukrainian Bar Association's request, task force members used their connections to encourage bar associations around the world to issue their own similar statements.

Over the next few weeks, the mission of the task force grew to include teams specializing in: (1) providing guidance on the sanctions imposed on Russia and its companies and citizens; (2) providing advocacy and immigration assistance for Ukrainian refugees, residents and immigrants in Europe, Canada, Poland, Moldova, Germany, Ireland, the United States and elsewhere; (3) collecting information regarding charities and resources to assist Ukraine, including guides in multiple languages; (4) providing guidance on the collection of evidence of war crimes – an immensely complicated subject – and other preparations for Ukraine to bring claims against Russia in international tribunals;

(5) helping Ukrainian attorneys find remote jobs in other jurisdictions, even as far away as Canada; and (6) coordinating large swaths of law school volunteers for research on myriad projects relating to the invasion (chaired by Kim Wolf Price). The task force has now grown to more than 70 people as it has welcomed additional NYSBA members and staff, representatives of other bar associations in the U.S. and abroad, and representatives of law firms and pro bono legal services organizations, all with the goal of coordinating efforts for Ukraine and its people.

Our refugee and immigration effort has been so successful that it is now independent of NYSBA and the Ukrainian Bar Association, and thanks to the help of the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, it has a wonderfully working website in multiple languages.

NYSBA helped promote the task force's efforts through articles and press releases, and by creating a resource page with links to international statements against the invasion, international resources on sanctions, lists of charities collecting for Ukraine, plus news articles and updates. (*See* https://nysba.org/legal-resources-on-the-ukraine-conflict.)

In March, NYSBA offered specialized training on how to help Ukrainian refugees apply for Temporary Protected Status. Nearly 750 attorneys took part in the training, and many people volunteered afterward. It was reported to be the most watched webinar in NYSBA's history.

Recent developments include signing a memorandum of understanding with the highly regarded Global Accountability Network, which was created by Professor David Crane. The network was designed to create criminal information to support human rights commissions and other countries in their endeavors to protect human rights. The Global Accountability Network's first project, the Syrian Accountability Project in 2011, was followed by many more (such as in Sierra Leone, Yemen, Syria and others). Professor Crane established a Ukraine task force for crime dossiers on Putin and Russia on incitement to genocide against the Ukrainians by (1) creating a conflict map; (2) determining the most responsible parties; and (3) drafting a white paper. The memorandum of understanding with the task force will commence work on similar reports with respect to crimes committed by Russia and others in Ukraine.

Co-chair Scott Karson spearheaded an important effort by the task force, the Global Accountability Network and the American Bar Association to enter into a "Report and Resolution of the International Section of the New York State Bar Association Regarding Prosecution of the Russian Federation and Its Culpable Officials for Aggression and Related War Crimes Arising From Its Illegal Military Invasion of Ukraine." The goal of this report and resolution is ultimately to further the prosecution of culpable individuals at the appropriate time and place, and presentation of the resolutions to the United Nations. The NYSBA resolution, which was supported by Ukraine, supports the similar resolution of the American Bar Association that "condemns the unlawful invasion of Ukraine by the Russian Federation."

The New York Law Journal and other legal news outlets have written and reported about the task force, its mission and accomplishments and the individuals who are making this happen. Anna Ogrenchuk, president of the Ukrainian Bar Association, continues to be a shining star in the war efforts on the legal stage, winning awards, such as from the NYSBA's International Section on Jan. 22, 2023, and Inna Liniova from the Madrid Bar Association in June 2022.

We are honored to be part of this important project but hope that the task force can soon return to its original long-term goals: to provide advice and guidance to the legal profession and the judiciary in Ukraine concerning the protection of the rule of law, professional and judicial ethics, best practices in the legal profession and the judiciary, and the greater involvement of young lawyers and women lawyers in the legal profession. We hope that the war will end soon, and that Ukraine can begin to heal and rebuild. Meanwhile, we hope and pray for the safety of our friends and colleagues at the Ukrainian Bar Association, their families and fellow citizens.

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**Deborah H. Kaye**, co-chair of the Women in Law Section's Champions Committee, is a former managing director and senior managing counsel at BNY Mellon, where she was the chief managing attorney for multiple companies in the international securities, futures, mutual funds and collateral business lines. She also created their Global Pro Bono Committee. Previously she worked at several other major international financial institutions, including JP Morgan Chase. She is a proud member of the FBI New York Citizens Alumni Academy.

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An earlier version of this article appeared in WILS Connect, the publication of the Women in Law Section. For more information, go to NYSBA.ORG/WILS.

# Too Little, Too Late? The Mass Exodus of Law Firms From Representation of Kremlin-Backed Clients

By Alyssa N. Grzesh

Lawyers who take on the task of representing unpopular or unorthodox clients and causes are frequently the subject of heated debates and controversies. Such debates and controversies may produce a chilling effect on the availability of counsel, where unpopular or unorthodox clients are prone to experience much greater difficulties in implementing the constitutional right to representation and finding a lawyer who will agree to represent them.

But what happens when there are moral questions involved in representing an odious client? Is a law firm justified in refusing to represent such clients, or should it adhere to the constitutional principle that everyone, no matter how despicable, is entitled to representation? There may be no one answer to this question in general, and even more so when specific circumstances are at play, such as what is happening now as Russia wages war on the Ukrainian people.

When Russia launched a pre-dawn assault on Ukraine on Feb. 24, 2022, leading to massive destruction, suffering and one of the greatest humanitarian and refugee crises to face Europe since World War II – an assault that continues in full force seven months later – the legal community drew a line in the sand. While representing unpopular clients is nothing new, the legal community has struggled to confront the magnitude of the moral questions presented by Russia's invasion of Ukraine.[1] Having generated billions in legal fees from Russian business, international law firms immediately faced intense pressure from their staff and politicians to distance themselves from Kremlin-linked companies and individuals, whether targeted by the restrictions or not.[2] Law professors at Stanford, Yale and Harvard set up a website to monitor major U.S. and U.K. law firms' ties to Russia, and encouraged attorneys to end relationships with the Kremlin, state-owned or controlled firms, and sanctioned entities and people.[3]

Readers may recall the tragic fate of Flight MH17, the Malaysian Airlines plane that was shot down over Ukraine in 2014.[4] Flight MH17 was brought down over territory held by the Donetsk People's Republic, a Moscow-backed pro-Russian separatist force in eastern Ukraine, as it flew from Amsterdam to the Malaysian capital Kuala Lumpur, killing all 298 people on board. About two-thirds of the passengers were Dutch.[5] When fighting broke out in 2014 between the DPR, and forces loyal to the pro-Western Ukrainian government in Kiev, the Ukrainian government designated the DPR a terrorist group.[6]

One of the victims, American Quinn Lucas Schansman, 18, was aboard Flight MH17 on his way to meet his parents for a family vacation. In April 2019, Schansman's family filed a lawsuit under the U.S. Antiterrorism Act against U.S.-based money transfer companies and two Russian banks, Sberbank of Russia and VTB Bank, for providing services to the self-proclaimed Donetsk People's Republic.[7] Russian lender Sberbank retained global law firms White & Case and Debevoise & Plimpton, and Latham & Watkins was retained as counsel by VTB.[8] According to the lawsuit, filed in the Southern District of New York, "[d]efendants' provision of material support to the DPR [Donetsk People's Republic] was a substantial factor in the DPR's ability to launch a missile from territory it controlled – an attack that killed Quinn and 297 other innocent victims."[9] Quinn's father, Thomas Schansman, said in a statement, "We realize that we will never get our son back. But we are committed to shedding light on – and holding accountable – all who participated in his murder."[10]

Sberbank is the largest financial institution in Russia, holding about one-third of all bank assets.[11] VTB, the second-largest lender in Russia, provides both traditional banking services and conducts investment banking operations through its VTB Capital arm.[12] VTB Capital opened its first U.S. office in 2012.[13] Atanas Bostandjiev, chief executive officer for VTB Capital in London, stated in 2011, when VTB Capital was first given the green light by securities regulators to start an investment bank in U.S., "Our New York office will be our distribution hub from which we reach out to institutional investors interested in emerging market risk, fixed income or equity. Mainly we will be selling Russian corporate equity and debt to U.S. investors, but if we see U.S. companies looking to invest in Russia through private equity we will likely participate in that eventually, too."[14]

Sberbank and VTB were already subject to U.S. sanctions, which imposed restrictions on a number of Russian banks in 2014 after Russia annexed Crimea. That round of sanctions sought to limit the ability of these banks to access U.S. debt and equity markets.[15] Executive Orders 13660, 13661 and 13662, all passed in March 2014, targeted those responsible for undermining Ukraine's democracy and Russian officials operating in the arms sector, as well as those operating in Russia's financial, energy and defense sectors. On Feb. 24, 2022, the U.S. Department of the Treasury's Office of Foreign Assets Control took significant and unprecedented actions to respond to Russia's further invasion of Ukraine by cutting off the ability of Sberbank and VTB to process payments through the U.S. financial system.[16]

White & Case and Debevoise & Plimpton were able to exit the litigation when lawyers at the New York-based firm Wilk Auslander were retained to replace them in their representation of Sberbank, while Latham & Watkins was not able to withdraw. Brafman & Associates, a New York firm known for representing some unpopular clients, attempted to substitute in as defense counsel for VTB in early June, but could not enter the case until Latham & Watkins was paid for its services.[17]

"VTB deserves legal representation, the plaintiff deserves to have the claim resolved and the court deserves to have the case move forward, and we will continue to search for a solution," Brafman attorney Marc Agnifilo said in an email. Although officials at the Office of Foreign Assets Control assured Agnifilo that payments to the firm for its representa-

tion of VTB would be legal despite U.S. sanctions, because the bank is named in a federal lawsuit, Agnifilo was unable to find any bank willing to process the Russian payment, or any law firm that would be willing to take on VTB as a client.[18] Consequently, U.S. Magistrate Judge Gabriel Gorenstein granted Latham's request to withdraw from the case. He said that without lawyers to defend it, VTB is now in default and the plaintiffs can request a default judgment against the Russian bank.[19]

Though White & Case was able to exit the Schansman New York federal case, the firm must continue its defense of Russia in a Washington, D.C. federal court lawsuit brought by shareholders of the defunct oil company Yukos seeking to enforce a $50 billion judgment against the country.[20] Andrey Kondakov, director general of the International Centre for Legal Protection, an independent body created to defend Russia in complex litigation, said in an affidavit that he communicated to White & Case that Russia would oppose efforts by the firm to withdraw from the case because it "would have a material adverse effect" on the country's interests.[21]

Legal ethicists like UCLA School of Law professor Scott Cummings say that law firms should drop Kremlin-associated clients "because it's the right thing to do," and "even when representation is legal, that doesn't mean it's right."[22] On the other end, ArentFox Schiff LLP attorney Matthew Tuchband, who spent 21 years at the Office of Foreign Asset Control's Office of the Chief Counsel, makes an important point that cutting off legal representation would run afoul of the purpose of sanctions: "They're meant to change behavior, not just to punish, though punishment sometimes is a way of encouraging future behavior to be different. The idea of sanctions is that they're supposed to work and go away."[23]

As VTB, a highly sanctioned entity, searched for months for new U.S. legal representation to no avail, Marc Agnifilo of Brafman & Associates made a powerful point about the nature of our legal system: the family of Quinn Schansman deserves to have its claims resolved. Few governments have created statutes such as the Antiterrorism Act, which allow foreign entities to be hailed into U.S. courts and potentially be held accountable for international crimes. While such statutes are often criticized for a multitude of reasons, namely the potential risk the U.S. and its diplomats might face if similar laws were adopted by other countries, most legislators, Democrat and Republican alike, have supported and passed legislation to help strengthen such statutes. As recently as 2016, the Justice Against Sponsors of Terrorism Act passed the Senate and House of Representatives with no opposition. While New York-based and international firms may be vilified for their continued representation of Kremlin-backed clients, and the lawyers at Wilk Auslander will likely face heavy criticism for their representation of Sberbank, the practice of law is not all about optics. If behind-the-scenes international entities continue to pour money into Russian coffers that will ultimately be used to fund the war in Ukraine, law firms withdrawing their representation from Russian clients in cases circulating through U.S. courts could ultimately allow for victims' recovery to be a merely symbolic show of support. Right now, Ukraine needs much more than symbolic shows of support.

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# Automation Nation: What Happens When Algorithms Decide Entry for Immigrants and Refugees?

By Alexandra B. Harrington

In an increasingly digital world, we now have an expectation of immediacy. We demand instant replies. We can get nearly anything delivered to us within hours, with the fine-tuned forecasting and optimization algorithms of services like Amazon Prime efficiently selecting and sending out goods.[1] Yet, in return for quick delivery there is a human cost. Amazon also used algorithms to fire employees expediently with little to no human oversight.[2] How, then, does one balance the benefits of efficient algorithms with usage that infringes on the rights of those it targets?

When international organizations and state governments use algorithms for decisions, it may be difficult to detect problems, and the consequences are dire. A key example of this is the use of automated decision-making systems in the context of migration. Individual states such as the United Kingdom and Canada employ automated decision-making for deciding visa applications, and the United States and many European Union member states use artificial intelligence and automated decision-making at some level of their immigration and migration policy.[3] Though use of automated decision-making is acknowledged, the extent to which public bodies are allowing algorithms to make decisions is difficult to ascertain; many remain intentionally silent on the matter.[4]

This article explores the use of automated decision-making in migration considerations, particularly immigration and refugee applications. It defines key terms, looks at the history surrounding treatment of immigrants and refugees, identifies and explains relevant legal instruments, examines the uses of automated decision-making by states and international organizations, evaluates the benefits and ramifications, and concludes by offering suggestions for best practices moving forward.

## Background

### Definitions

Automated decision-making is a process by which decisions are made by automated means, without any human involvement, using machine learning.[5] Machine learning is a commonly used subset of artificial intelligence in which an algorithm is given raw data and generates a series of rules or predictions based on that data, known as training data. The algorithm learns from those patterns and applies them to new situations.[6] The legal definition of "refugee" comes from the 1951 Refugee Convention and is someone who "is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[7] The Office of the U.N. High Commission for Refugees (UNHCR) notes the requirement of border-crossing, stating that "[r]efugees are people who have fled war, violence, conflict or persecution and have crossed an international border to find safety in another country.[8]

### Immigration and Refugee History and Policy

For as long as countries and states have had borders, there have been people attempting to flee and cross them. No doubt someone in Israel was making a comment on all of the Egyptians flooding the border in the age of Moses. Nevertheless, it is not until relatively recently that states have begun to control migration at their borders and set parameters over who may enter and remain. Throughout the 1800s in the U.S., immigration was open and encouraged; the Bureau of Immigration was not created until the 1890s.[9] Following the "Great Wave" of immigration in the early 1900s, the U.S. Border Patrol was created, and quotas were introduced to limit numbers by nationality.[10] In 1952, the first Immigration and Nationality Act was passed, and in 1965, Congress amended the act to abolish national origins quotas and expand immigration opportunities for those outside the Western hemisphere.[11] Over the past decade, right-leaning politicians increasingly stoked fears about immigrants, particularly non-white immigrants, replacing citizens in their jobs.[12] This rhetoric included refugees fleeing untenable situations and those who support them.[13]

The UNHCR estimates there were 21.3 million refugees at the end of 2021, not including 53.2 million internally displaced people and those who do not survive border-crossing.[14] Since 2014, an estimated 24,000 people have died or gone missing when attempting to cross the Mediterranean Sea, fleeing war-torn countries such as Syria, Iraq and Afghanistan.[15] The war in Ukraine drastically increased the numbers of forcibly displaced people. By the end of April 2022, less than two months into the conflict, reports estimated 11 million people fled their homes in Ukraine, with 5.3 million leaving for neighboring countries, and nearly 6.5 million being displaced internally.[16] The true number is likely much higher, with those from Russia and neighboring countries fleeing for fear of persecution.[17] Nations worked quickly to aid those fleeing Ukraine. The U.K. instituted a new visa for Ukrainian nationals coming to the U.K., provided they have an eligible sponsor and enacted "Home for Ukraine," providing monetary incentive to those in the U.K. willing to house Ukrainian refugees.[18] Unfortunately, with the program due to expire, there is concern that the over 100,000 Ukrainian nationals participating will face homelessness.[19]

## Applicable International and State Law

Multiple legal instruments, ranging from human rights legislation to data protection laws, apply to those immigrating to or seeking refuge in a foreign country.

### 1948 Universal Declaration of Human Rights and the International Bill of Human Rights

Following World War II, the newly created United Nations enacted the Universal Declaration of Human Rights, a milestone document mandating that certain rights, such as the right to life and the right to seek and enjoy asylum from persecution, are fundamental.[20] Stemming from the declaration is the International Bill of Human Rights, composed of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.[21] It guarantees the right to life, protection from torture, cruel, inhuman, or degrading treatment, freedom from arbitrary arrest or detention and basic trial rights.[22]

### UNHCR and the 1951 Refugee Convention

The United Nations Human Rights Commission on Refugees was established to help displaced persons, including refugees, internally displaced persons, asylum seekers and those hoping to return home.[23] The 1951 Refugee Convention and 1967 protocol defines who may be classified as a refugee, provides for the protection of refugees and forbids *refoulement*, the practice of expelling a refugee against their will and returning them to a territory in which they fear for their life.[24] It is grounded in the declaration's Article 14, the right to seek asylum for persons fleeing persecution.[25]

### European Convention on Human Rights

In 1950, the Council of Europe passed the European Convention on Human Rights to further realize the protections and rights guaranteed by the Universal Declaration of Human Rights.[26] It provides basis for legal actions in the U.K. and EU when an individual's human rights have been breached and there is not adequate regulation in their home jurisdiction on which to bring an action.

### General Data Protection Regulation

The General Data Protection Regulation is a data protection regulation adopted by the EU in 2016.[27] It protects an individual's data, including how organizations may use, process, and store that data; provisions for obtaining consent; and remedies.[28] It makes data protection a fundamental right, relating to Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life.[29] Under this regulation, when personal data has been obtained about a data subject, the data subject should be told when automated decision-making is used and given the logic behind it to ensure fair and transparent processing.[30] Further, Article 22(1) states that a data subject has the right not "to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."[31]

### U.K. Data Protection Act 2018

When the General Data Protection Regulation came into effect, it was directly binding on the U.K. as an EU regulation. The Data Protection Act is a ratification of the General Data Protection Regulation into U.K. domestic law, and post-Brexit, the U.K. is free to change these regulations.[32] Currently, there are parallel provisions to the regulation in the Data Protection Act, such as Article 22(1).[33]

## Automated Decision-Making for Migration Decisions

Automated decision-making is not new in the public law sphere, and concerns have been raised, especially when it is used to make welfare decisions, from the allocations of benefits to predicting the risk of recidivism.[34] As discussed below, both international organizations and states have used automated decision-making for immigration and refugee decisions, and its use is likely on the rise with many countries having severe backlogs and longer-than-expected processing times.[35]

### Uses of Automated Decision-Making by International Organizations and States

#### The United Nations

In 2018, the U.N. released a report entitled "United Nations Activities on Artificial Intelligence," listing how agencies use artificial intelligence, from screening job candidates to studying population migration within Somalia.[36] The UNHCR currently sorts refugee applications through various categories and procedures. The regular refugee status determination is examined on an individual basis by a trained eligibility officer, with an accelerated process when a special need or groups for protection arises.[37] The simplified refugee status determination procedure pre-populates the forms with legal analysis and any relevant country of origin information for the sake of efficiency.[38] Additionally, there is a prima facie approach to admit large groups when, on the face of it, they meet the criteria. The UNHCR's Procedural Standards as well as data protection policies show much of the intake management is digitized, though nothing indicates they currently use automated decision-making to process refugee applications.[39]

#### The EU's Failed Program

The EU funded and piloted a program that used automated decision-making to screen non-EU nationals at the border, known as iBorderCtrl and then iCROSS.[40] A virtual border guard asked questions to the non-EU national and if they passed, they could continue. If not, they were taken to a border control point, had their biometric information taken, and a human agent would review and make an assessment.[41] Facing controversy, including a lawsuit by Patrick Breyer, a member of European Parliament, and a court decision by the Court of Justice of the EU, the program ended.[42]

**Individual States**

Germany has partly digitized the asylum-seeking process, with name translation and dialect recognition as examples of now-automated components.[43] Their tools determine the plausibility of information submitted by refugee applicants but have document error rates, with one report indicating that in the 6,000 times the process was used, it could have produced approximately 900 false results.[44]

Canada has been using automated decision-making since 2014 in its immigration decisions.[45] Its system divides applications into simple and complex cases. Simple cases are reviewed and decided by an automated process; complex cases require a level of human review.[46] There have been concerns about impacts on refugees when making these decisions, and in 2021, Canada announced it was halting the use of algorithms for asylum-based decisions.[47]

The U.K. has been a notorious user of automated decision-making in immigration decisions.[48] In 2018, it deported over 7,000 students, revoking their visas immediately without appeal, when they were erroneously accused of cheating on an English language exam.[49] Later reports revealed the automated decision-making used by the testing organization to spot fake results was flawed.[50] The U.K. Home Office has since expanded its use of automated decision-making for immigration decisions, though applicants are not told that decisions made about their applications are being made by a computer.[51] One such process used by the home office is the "sham marriage" tool, which identifies eight undisclosed risk factors, flagging those who meet them for review.[52] This results in an intrusive investigation and elongated process for individuals.[53] While the goal is important, reports show that automated decision-making has disproportionate negative effects on certain nationalities, including Bulgarian, Greek, Romanian and Albanian people.[54] Automated decision-making is also used in the processing of other visa applications, though the U.K. Home Office refuses to say to what extent.[55]

In 2019, the UNHCR began sharing biometric information of refugees with U.S. Customs and Immigration Services, raising concerns on how that information is used, such as for surveillance.[56] The U.S. uses automated tools in immigration and refugee matters, including for determining potential removal of immigrants[57] and placement for refugees.[58] This includes the "Annie MOORE" program, a matching system designed to provide optimal placement and employment for refugees.[59]

### Effects of Using Automated Decision-Making

The past decade has seen a dramatic increase of refugees.[60] This escalated in 2015 when over a million refugees entered Europe. Syrian refugees seeking to find safety from a civil war were the largest group represented.[61] In 2022, an ongoing tally at the UNHCR's Operational Data Portal focusing on Ukrainian refugees counts 7,785,514 refugees fleeing Ukraine since Feb. 24 (as of Nov. 1, 2022), with 4,460,847 registered for temporary protection or other similar schemes throughout Europe.[62] This has added exponentially to an already stressed system. With this increase in the number of people in a highly vulnerable situation, it is crucial to have efficient systems in place to process applications.

Simultaneously, it is difficult not to think about those for whom automated decision-making will make a wrong decision and lead to the deprivation of their rights. Many organizations and governments are not transparent in their use of automated processes, especially when making immigration and refugee decisions.[63] For example, the U.K. government's website has a standard disclaimer on their refugee and immigrant visa pages, including on the Homes for Ukrainians site, stating that an application decision will not be based solely on automated decision-making.[64] This is the conundrum of Article 22 of the Data Protection Act and General Data Protection Regulation: it specifies that decisions cannot be made solely by automated decision-making.[65] What that looks like, however, is open to interpretation. The vagaries of Article 22 have incited calls to repeal it; nevertheless, others feel it is an important safeguard, even in flawed form, and should instead be reformed.[66]

Due to a lack of transparency over how automated decision-making is used, it is difficult to definitively say if Article 22 is being breached. Even with some human oversight, there is a danger of automation bias.[67] Automation bias is the propensity for individuals to believe the decisions of an algorithm even when it contradicts their instincts or training.[68] In essence, humans tend to believe what computers tell them, not appreciating that machines are as fallible as the humans who programmed them. Trained professionals, including pilots and clinicians, have been documented as disregarding their own judgement in favor of an incorrect opinion produced by automated decision-making.[69] If automated systems are deciding immigration or refugee placements, with the priority being efficiency, it is highly likely that automation bias will lead to officials rubber-stamping the decisions given to them by the system.[70] This may not contravene the regulation to the letter, but it certainly goes against the spirit of Article 22.

## Conclusion

In September 2021, the U.N. High Commissioner for Human Rights issued a statement warning about problematic implementations of artificial intelligence and its impact human rights. In her statement, Commissioner Bachelet cautioned, "Artificial intelligence can be a force for good, helping societies overcome some of the great challenges of our times. But AI technologies can have negative, even catastrophic, effects if they are

used without sufficient regard to how they affect people's human rights."[71] The accompanying report advocates for a human rights-based lens when deploying artificial intelligence, highlighting fundamental human rights problems intrinsic in the algorithms.[72] This includes biased training data leading to the incorrect result and the opacity and "black box" nature of machine learning, which lacks transparency and the ability to explain decision making.[73] It also discusses border-management concerns and the consequences of faulty decisions such as arbitrary arrest, and perpetuating discrimination from data that reflects historic ethnic and racial biases.[74]

The report was largely a response to the increasing use of artificial intelligence and automated decision-making by governments that may be quick to implement the efficient technology without due diligence.[75] As countries face an increasing backlog on immigration visas, and as refugee cases continue to increase, it is inevitable that automation, if not already employed, will be needed at some level to handle the volume. With overwhelming numbers of people needing to find safety, there is a benefit to using automated decision-making to facilitate people leaving incredibly dangerous, life-threatening situations as quickly as possible. At this intersection of efficiency and protection of human rights, how does one balance a system that can accelerate outcomes, getting more people to safety, with one that can also strip them of fundamental human rights?

When considering this, it is important to weigh the benefits of using automated decision-making, the potential ramifications, and the role international organizations must play in regulating this technology. The UNHCR, for example, delegates refugee applications directly to member states who have the infrastructure to process them; it is primarily their responsibility.[76] Though the U.N. may not be using automation to inform refugee decisions, many of its member states currently or have used automated decision-making for immigrant or refugee determinations, with varying levels of regulation. Some, like the U.S., do not even have comprehensive data privacy legislation or protections.[77] Therefore, it is the responsibility of the U.N. and other international organizations to provide guidance and consistency to its members and ensure the technology being deployed by states is compatible with human rights protections. Automated decision-making alone is not good or bad; it is neutral. It is the way human beings use it that determines its value, and there is clear value in using automation in the face of crisis and backlog. The problem comes with the unexplainable or undetectable errors, wrongful denial of applications and the lack of a framework to recognize and intervene when this occurs.

Ideally, in addition to the appeals process for negative decisions, every flagging or refusal of an application would be blindly reviewed by a human being. Realistically, a more efficient approach would be a sub-sampling of both negative and positive decisions for blind, human review. This would prevent automation bias and ensure human oversight in some refusals. Then, by cross-checking these against the initial decisions, potential error rates and discrepancies could be uncovered, including any bias or commonalities in these errors. This would allow for an overall increase in processing speed and aid in error detection.

International organizations need to create clear, unified processes on how automated decision-making may be used and under what circumstances. With organizations like the U.N. having 193 sovereign states, it is not reasonable to suggest a "one-size fits all" approach. Instead, there must be rules and guidance that can be flexibly tailored to the needs of member states and demands of the time, especially given the speed with which technology changes. There should be a robust, fundamental framework that new machine learning models, including automated decision-making, must satisfy. As we continue to move further into the digital world, it is crucial that humans and international organizations remain at the helm to ensure technology is used responsibly in the physical world.

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# *Dobbs v. Jackson*: Changes in U.S. Global and Domestic Leadership for Women's Rights

By Laurie Coles and Danielle Essma

"In light of [the] worldwide liberalization of abortion laws, it is American States that will become international outliers after today."[1] So concluded the dissenting United States Supreme Court Justices Breyer, Sotomayor and Kagan in their response to the majority opinion in *Dobbs v. Jackson Women's Health Organization*.[2] *Dobbs*, issued on June 24, 2022, tumultuously overturned 50 years of precedent in abortion law set in 1973 by *Roe v. Wade*,[3] eliminating the constitutional protection U.S. women had from unduly restrictive state regulations during the early stages of pregnancy. This decision called into question many things – the vulnerability of the judicial branch to political influence, the equality of women under the U.S. Constitution, the impact of geography on personal choice and the power of societal institutions to control decisions about women's bodies. Importantly, because *Dobbs* came from the highest court of our nation, it also called into question the ability of the U.S. to be a global leader on issues of women's rights, including its ability to protect freedoms previously taken for granted.

This article uses the *Dobbs* decision to explore the United States' international leadership role in women's rights. It examines the United States' past record in this area, revealing that the U.S. has not necessarily been the global leader one might assume it to be. It explores the fragmentation of leadership among states with varying laws and the resulting disparate impacts on women. Finally, the article posits that the new supporters and protectors of women's rights might be neither state nor federal institutions.

## *Dobbs*: An Embarrassing Clawback of Constitutional Rights

When the Supreme Court decided *Roe v. Wade*, it spoke with a voice of reason and balance, which is the type of voice that is easy to hold up as an example to other nations. In *Roe*, the Supreme Court needed to reconcile two strongly competing sets of interests: the interests of the states in protecting fetal life and the interests of women in being able to make very personal and consequential life decisions autonomously. In such cases of competing goals, the court will often strike a balance, recognizing the interests and rights of both sides and creating a middle ground to effectively pave a pathway forward. Accordingly, the interests of the states

and women in *Roe* were blended into a functional rule balancing an individual's right to make this personal choice during the early stages of pregnancy on one side, with the state's right to protect fetal life in the later stages of pregnancy on the other side.

By taking into consideration the interests of women, and using those interests in formulating a decision, *Roe* helped strengthen the status and autonomy of women under the Constitution. At the same time, it encouraged a positive societal relationship between the federal government and women. "Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control."[4] Having this sphere of freedom is important because as a general principle "we do not believe that a government controlling all private choices is compatible with a free people."[5]

In *Dobbs*, the court (and specifically the conservative majority controlling the Supreme Court) presents a completely different approach. Casually throwing precedent and the doctrine of stare decisis out the window, *Dobbs* forgoes a balancing of interests and instead focuses solely on the interests of the states. As noted by the dissent, "[t]he Constitutional regime we enter today erases the woman's interest and recognizes only the State's."[6] *Dobbs* denies that women have any constitutionally protected interests in this area, under the Fourteenth Amendment or otherwise, effectively collapsing the "sphere of freedom" in which women had the ability to make a private choice without government control. This collapse is devasting to women's autonomy and equality, and it's damaging to women's relationships with government institutions.

*Dobbs* leaves open the possibility for individual states to create laws that mimic the earlier, balanced approach of *Roe*; however, they have no obligation to. Indeed, there is no constitutional obstacle to a state forcing a woman to bring a pregnancy to term from the moment of conception, regardless of rape, incest, viability of the fetus or medical harm to the mother. The constitutional protections of privacy and autonomy have been lost, and this loss is profound: "Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."[7]

Remarkably, *Dobbs* arrives at its result by asserting that the 14th Amendment cannot possibly include a privacy choice involving abortion, because there was no "deeply-rooted" American tradition affording such a right in 1868 when the 14th Amendment was written. This backwards reasoning immediately endangers all progress and evolution of constitutional liberties and rights that the U.S. has made since 1868. To put this timing into context, women had no constitutional right to vote until 1920. Until 1967, states could still outlaw interracial marriage. Certainly no "deeply rooted"[8] American tradition affording a right to interracial marriage existed in 1868, so by the court's reasoning, the Constitution should not protect this right today.

In *Dobbs*, the Supreme Court thus turns the U.S. Constitution into a static, stale and expressly limited document instead of an enduring declaration of liberty for other nations to admire. Global leadership arguably involves moving forward and adapting to changing circumstances over time. By this measure of leadership, the Supreme Court failed.

## International Reaction to *Dobbs*: Distancing and Criticism

As an expression of U.S. judicial (and political) power on a global stage, *Dobbs* was impossible to ignore. Global leaders from the European Union and the United Nations reacted to the decision with concern and by expressing solidarity with U.S. women. It is problematic to have a country that is supposed to be a powerhouse of economic and social leadership take a "serious step backwards for women's rights," as stated by Norway's prime minister and echoed by both the U.K's prime minister and the first minister of Scotland.[9] They were joined by French President Macron who expressed his support for "the women whose liberties are being undermined by the Supreme Court of the United States,"[10] while a popular photo in the media showed French women out protesting *Dobbs* in solidarity with U.S. women.[11] At the same time, Belgium's prime minister recognized that the U.S. has global influence and expressed concern about "the signal [*Dobbs*] sends to the world."[12]

Perhaps the comments most damaging to the U.S.' authority in women's equality came from United Nations representatives. The U.N. secretary general spokesperson and the U.N. high commissioner both criticized *Dobbs* as running counter to the ideals of international human rights law. Their comments were particularly damaging because the United Nations is itself a global authority – one that recognizes on a global scale that every individual (regardless of nationality) deserves certain rights and freedom from certain oppressions. U.S. women may have experienced confusion in having their interests reaffirmed as a global citizen by a global authority, while having those same interests eliminated as a national citizen by a national authority. Even greater confusion ensued as each state looked to put its own rules into place, whether or not those rules were compatible with those of neighboring states. Such domestic fragmentation further jeopardizes the U.S.' ability to be a global leader.

## Was the U.S. a Global Leader of Women's Rights Prior to *Dobbs*?

Some key milestones in gender history could lead one to think that the U.S was a leader of women's rights. The Equal Pay Act of 1963 marked significant, meaningful progress, even if the goals of the act have not matched reality particularly well. In 1971, the Supreme Court's decision in *Eisenstadt v. Baird*[13] determined the right of unmarried women to birth control as another stepping stone of progress. And the U.S. presents as a strong leader when contrasted with countries running much more gender-oppressive regimes.

However, a closer look at the U.S.' gender equality record reveals that the U.S. is not at the forefront of advancement or strong leadership in this area. For example, while the goals of the Equal Pay Act remain difficult to achieve in the U.S., Iceland bolstered its equal pay laws with a requirement for all companies with at least 25 full-time employees to obtain government certification verifying equal pay practices, ensuring better compliance.[14]

The U.S.' failure to ratify the Equal Rights Amendment is another indicator of weak women's rights leadership. The ERA, first presented 50 years ago, would have added language to the Constitution stating that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[15] Unfortunately, the amendment has yet to be ratified by 38 states and still is not part of the Constitution. In contrast, 85% of U.N. member states have express constitutional provisions prohibiting discrimination on the basis of sex.[16] In this respect, "the U.S. is out of step with the rest of the world to the detriment of women and girls."[17]

The U.S. also showed weak leadership in gender equality by failing to ratify the Convention on the Elimination of Discrimination Against Women. Adopted by the U.N. in 1979, the convention aims to end discrimination against women and establish equality in various focus areas such as health care, education, employment, marriage, and political participation. "The U.S. is the only established democracy in the world that has failed to ratify CEDAW."[18]

Additional examples are easy to find, such as the U.S.' dubious status as one of only nine countries that do not guarantee paid leave to mothers of newborns.[19] Thus, the U.S. is not a global trailblazer for women's equality. It is not even, necessarily, a good follower.

## *Dobbs* and the Interstate Network Effect: Fragmentation in the Absence of Federal Leadership

When *Dobbs* removed federal recognition of women's interests and left decisions to the states, it prompted women to reassess their relationships with the state authorities surrounding them, which leads to the question of how power is maintained at a national level. The ideal function of nationalism ". . . demand(s) that there be no rule of difference in the domain of the state."[20] Ironically, this disfunction of the nation is exactly how the U.S. federal government conceded power to individual states regarding the protection of reproductive rights.

These federal and state authorities present inconsistent and competing rules that leave women in a bewildering maze of where they can find their reproductive health care interests protected. This specifically happens in the fragmented and conflicting laws between states. The disjointed, inconsistent inability for a state to protect rights based on geography is caused by a failure of federal leadership. When leadership on the national level fails, states are enabled to default to populist-driven politics.

The relational networks in the U.S. between the states can be both weak and strong; either way, there is no guarantee of leadership that promotes women's interests. At the same time, "trans-territorial or trans-state collectivities in turn [bring] about an important repercussion, namely the development of strong tendencies to redefine boundaries of collectivities, and of new ways of combining 'local,' global, transnational, or trans-state components."[21] When cultural values align between states that swing politically to the most conservative version of Republican ideals, as in Texas and Idaho, repressive law is not only passed but considered a new and normal standard, forming new ideological collectives that jump across geographical boundaries. States like Texas and Idaho form a strong network, and these states are then supported by a larger network of states having similar ideology. These networks, whether weak or strong, are derived from illusory borders that are chartered to lead their respective collectives; but networks are vulnerable to trends.

Shortly after strict state abortion laws were passed in Texas, Idaho followed to pass a total abortion ban as well. Though Texas and Idaho are not contiguous, these non-tangible borders held together by the idea of a network of laws reinforce the moral-fueled ideology of statehood. The imaginary borders are held together by collectives in networks that influence and uphold the laws in these areas, causing a gap in leadership for the vulnerable individuals within these invisible boundaries. However, state identity defined in this way can be divisive. "The effects of deeply penetrating interventions on state autonomy transcend the realm of ideology and cultural legitimation. Increased penetration of civil society by the States actives political responses and increases the likelihood that societal interests will attempt to invade and divide the state."[22] Indeed, this division is seen within neighboring states to Idaho,

like Oregon, where the network of services, particularly around abortion, had previously been transitory between state lines. For example, Idaho's capital city, Boise, with a total population close to one million people, is no longer in a position to provide women of Eastern Oregon, who live geographically closer to the Idaho border than to urban areas in their own state, the health care they need to access.

Even with laws that protect women's interests, the leadership of the states are not able to create equity in health care. The issue is that even at the state level, the laws of other states decide the outcomes for women in a network effect ". . . as more and more states put bans in place . . . residents are going to have to travel out of state for care."[23] The overarching problem is that traveling out of state is what some women had to do to begin with, and now that those states have halted services, there is a backlash on state government as a capable structure to protect and preserve freedoms. The division that is apparent between states and their polarized political arguments leaves the states positioned as weak leaders, swinging one way or the other on a polarized issue, and leaving women grouped on either side of an imaginary boarder in an absence of representative leadership.

When the federal government leaves it to the states to govern based on their own disparate ideologies, many of which are dismissive of women's interests, the collective of all states reflecting the identity of the nation has failed to maintain its position as a global leader.

## *Dobbs* and the Rise of Corporate Leadership

With national and state leadership in fragmented disarray, a gap opened for new leadership to come forward. Corporations stepped into this gap. Mentioned in "The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights," there are "important implications of business corporations being considered as bearers of human rights for determining the proper scope and purpose of international human rights norms, and for conceptualizing their relationship to constitutional democracy."[24] The world has seen this responsibility of bearing protection over human rights led by international corporations.

Leadership is both reactive and proactive as well as progressive and regressive. It is evident that the Supreme Court provided regressive leadership for the U.S. in its ruling excluding consideration of women's interests. These laws concede proactive power to corporations that set standards in the private sector for proactive protection of women and their interests at the cost of a demotion in global position as a nation.

When the federal government allows states to choose to what degree interests will be protected, like the freedoms that are allowed to be dismissed in the wake of *Dobbs*, it is private sector corporations that lead by providing care for the people whom the states fail to protect. This was evident in the media after *Dobbs*. Many private companies stepped up publicly to state that they would help their employees pay travel costs associated with abortions.[25] It is ironic that "the man," slang for an organization of power and authority, is both left to and able to provide for women in this instance of diminished freedom by state governing law, which was enabled by deflection of leadership at the national level.

Corporations like Amazon and Adidas, among dozens of other international companies, are raising the bar in terms of what support is provided to protect reproductive health. Peter McGuinness, chief executive officer of Impossible Foods, for example, has stated that "[s]upporting our colleagues in their reproductive health is absolutely the right thing to do."[26] As another example, Walmart has taken the lead on offering health care services to its female employees by expanding health care coverage. In addressing racial disparity in maternal care, Walmart acknowledges that in some states, distrust of the medical community puts women at risk. To this end, Walmart offers coverage for doula services for family planning in order to reach those who would otherwise be underserved and at risk when giving birth, exemplifying the care corporations can and are extending to women in their organizations.[27]

There is a limit to the reach of corporate leadership in this area, however. Unemployed women are at risk of being failed by national and state law and unable to be helped by a corporation. The list of companies that are increasing coverage for reproductive health is long, but women who have no income and cannot work for such a generous company are left as victims. The federal government fails them, the state fails them and the corporate sector that is there as an alternative leader does not have reach past the women who qualify to have their rights protected because they have employable skills.

## Conclusion

The intersection of society and culture with political belief is ever-changing. As sociologist Bonilla Silva said in *Social Currents,* "We must become sociologically driven citizens concerned with building a more democratic, inclusive, and just society."[28] Some sociologically driven citizens have worked to reinforce women's interests as a meaningful response to *Dobbs*, resulting in encouraging progress, such as New York's passage of the ERA in two consecutive legislative sessions, which now allows the ERA to be placed on the ballot for vote by New Yorkers during the 2024 general election.[29]

However, the idea of a "just" society is still fragmented on a state and national level leaving leadership to a sec-

tor that has the power to leverage its economic muscle for leading and protecting human rights. "In social and political contexts, we typically attribute power to agents when we hold them responsible for bringing about significant outcomes."[30] The leadership and power to protect and bring about these significant outcomes for women in the U.S. is in some states entirely up to the organization of private sector corporations. The interstate network effects further fragmentation and decay of global leadership, which in turn signals the rest of the world that, in this respect, the U.S. has an atrophied system of governance. The international response to *Dobbs* sent a wave of shock and disproval for a decision that appeared reactionary and regressive for women under global standards. This was not a ruling made in a vacuum involving only the U.S.; it impacts the entire world, and with fragmentation and shifting collectives in place of leadership, the U.S. appears as "one of many countries that appear whole only on maps."[31]

Moreover, such fragmentation leads to confusion for individuals who must reconsider what it means to be citizens of a particular state, of the United States or a global citizen, when each type of citizenship brings different levels of protection or types of affirmation. "The bond of citizenship has long been premised on the belief that states serve to protect certain socioeconomic, political, and civil rights of their citizens."[32] This bond becomes strained when protection is inconsistent, and geography is a determining factor of whether important personal interests will be valued. State governing bodies are now allowed to independently impose law where federal leadership has failed to consider the interests of women, and international corporations have new leadership, power and opportunity to deliver solutions.

The clawback of the constitutional rights of women and the international reaction to *Dobbs* have both a globalized impact and a localized state impact that leaves power to corporations in the private sector, mainly for U.S.-led companies, to correct infringements on human rights. Who knew that the corporate "man" would still need to protect a woman's decision in 2022?

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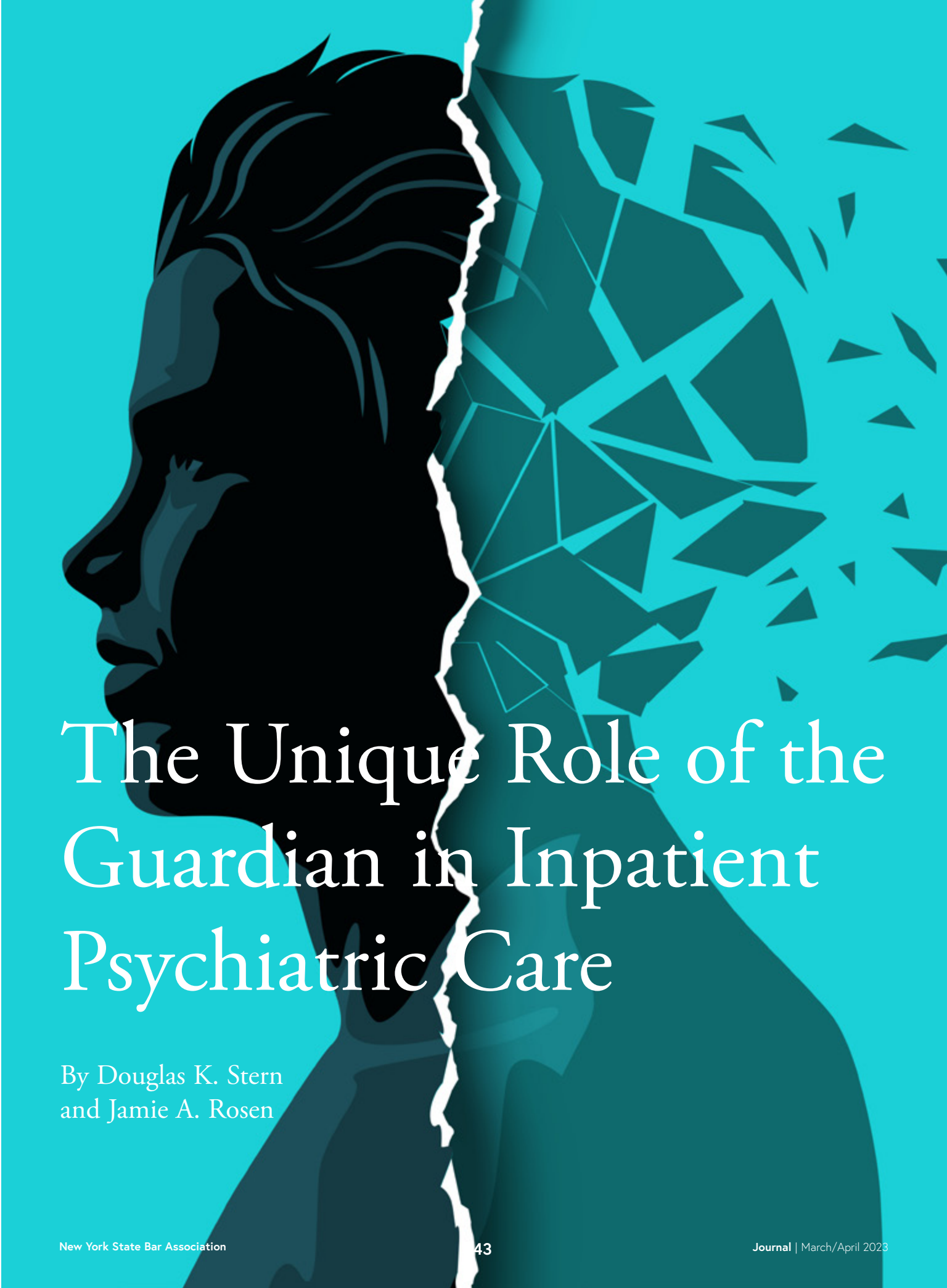

# The Unique Role of the Guardian in Inpatient Psychiatric Care

By Douglas K. Stern and Jamie A. Rosen

The Article 81 guardian plays a unique role when the incapacitated person (also known as "the ward") is suffering from a mental illness and requires admission to a hospital for inpatient psychiatric care. As rates of mental illness continue to climb and more of these individuals who suffer from such an illness find themselves in guardianship court, it is essential that all practitioners understand the nuances of inpatient psychiatric treatment. In fact, this insight into Mental Hygiene Law Article 9 and related issues is relevant for all guardianship practitioners, whether in the role of guardian, court evaluator, counsel to the alleged incapacitated person or otherwise.

## What Is a Mental Illness?

There are many conditions that are classified as "mental disorders" (or mental illnesses) according to the Diagnostic and Statistical Manual of Mental Disorders.[1] The manual recognizes diagnoses such as schizophrenia and other psychotic disorders, bipolar disorder, trauma and stress-related disorders, eating disorders, conduct disorders and neurocognitive disorders.[2] Symptoms of these disorders can include, but are not limited to, delusions, hallucinations, agitation, labile mood, aggression, disorganized thought process, paranoia, suicidal or homicidal ideation, isolative behavior, refusal to take prescribed psychiatric or medical medication and/or an inability to care for oneself. Dual diagnoses exist where there is a psychiatric diagnosis and either alcohol or substance use. Many of these conditions and the related symptoms, especially when untreated, significantly impair judgment and decision-making ability.

## Does the Incapacitated Person Have a Mental Illness?

The guardian must obtain information and/or records to fully understand the incapacitated person's mental health condition and history, if any. To start, the pleadings in the underlying guardianship proceeding should explain the psychiatric history, prior hospitalizations, prescribed medications and the pattern of symptoms or behaviors that impair the ability to manage personal and/or financial affairs. The guardian should speak with the petitioner as well as any other family, friends and treatment providers. These people can provide valuable insight into the incapacitated person's condition and symptoms, including what "red flags" to look for when he or she may have stopped taking prescribed medication, may be decompensating and/or may require hospitalization.

The court evaluator's report should also have information obtained from family, treatment providers, and other collateral sources that can provide value to the guardian. Further, the court evaluator may have applied to the court for permission to inspect medical, psychological and/or psychiatric records that would be useful to the guardian.[3] If so, the court can direct disclosure of the court evaluator report to the guardian and can direct further disclosure of the medical records to the guardian, as the court deems appropriate.[4]

If none of these avenues prove fruitful, or perhaps if the current presentation of symptoms and behaviors is a "first break," the guardian may wish to consider an evaluation by a mental health professional. Such authority to obtain an evaluation can be granted by the court in the underlying Order and Judgment Appointing Guardian or can be requested in a subsequent application, where appropriate.

## Access to Medical Records

When caring for an incapacitated person with mental illness, the Order and Judgment Appointing Guardian must contain specific and unambiguous language allowing the guardian to access protected health information as well as the authority to disclose and/or release such information. Sample language can be found directly in the statute – Men-

tal Hygiene Law Section 81.22(a)(5): "authorize access to or release of confidential records."

Access and disclosure of such medical records is protected under federal and state law. The federal law, known as the Health Insurance Portability and Accountability Act (HIPAA), and the New York State law, found in Mental Hygiene Law Sections 33.13 and 33.16, protect patient records and generally preserve doctor-patient confidentiality. The guardian must have authority to override such protections, including authority to access and disclose records over the ward's objection. Such language in the order and judgment prevents a situation where the ward's refusal to consent to the release of information or records disrupts the guardian's ability to perform his or her duties. The guardian must be able to review records and communicate freely with the treatment providers. Such communication is essential, especially when the ward is hospitalized and receiving psychiatric treatment in a facility.

## Getting to the Hospital

The guardian of a mentally ill incapacitated person must understand the clinical and legal systems available to secure a psychiatric evaluation and/or treatment in a hospital setting. The initial evaluation will be completed either in an emergency room or a comprehensive psychiatric emergency program (CPEP) of a hospital.

If the individual is willing to obtain a psychiatric evaluation and/or treatment, the individual can see a psychiatrist or "self-present" to a hospital for an evaluation and admission. Voluntary presentation to a mental health professional or hospital is the least restrictive form of intervention.

If the individual is uncooperative, likely lacking insight into the symptoms and impaired functioning, there are several ways to request an initial assessment in the community that may lead to a formal evaluation in a hospital. First, the guardian, a neighbor, a family member or other concerned person can call 911 and request a "well-check," whereby police and/or emergency medical services can assess the individual's safety in the community and ultimately bring the individual to a hospital for an evaluation. Second, the guardian or other persons can call the local mobile crisis team, a group of behavioral health professionals such as social workers or other advocates, who generally provide an in-person visit within a few hours of receiving a referral.[5] The teams offer a range of services, including, but not limited to, assessment and crisis intervention. If the team determines that a person in crisis requires further psychiatric assessment, they can arrange for the individual to be transported to the hospital for a psychiatric evaluation.

The guardian or other concerned person can also apply to the court for a mental hygiene warrant and request that a judge remand the individual to a hospital for a psychiatric admission.[6] The guardian can request the secondary appointment of counsel to assist with this legal proceeding.[7] The verified statement or petition filed with the court must allege with specificity that the individual has or may have a mental illness and exhibits behavior that is likely to result in serious harm to self and/or others.[8] Based upon these allegations, the court can issue a civil warrant for the local sheriff to bring the individual to court for a hearing. The individual is appointed counsel through the Mental Hygiene Legal Service.[9] At the hearing, the court determines if the legal standard has been met by clear and convincing evidence, and, if so, the court can issue an order directing the removal of the individual to a hospital for immediate evaluation not to exceed 72 hours.[10]

Regardless of how the individual gets to an emergency room for a psychiatric evaluation, the next step is that the hospital, through its procedures, must ultimately determine whether that individual should be admitted for psychiatric treatment.

## The Psychiatric Admission

The principal statute governing the inpatient hospitalization of individuals with mental illness in New York State is the Mental Hygiene Law Article 9. Article 9 sets forth the legal requirements for voluntary, involuntary and emergency admissions to a hospital, as well as the retention of patients pursuant to a court order.[11]

In the emergency room, the role of the guardian is one of advocacy. The guardian, first and foremost, must provide the hospital staff and/or evaluating psychiatrist with collateral information. This is where the previously discussed history, symptomology and access to records are extremely useful. The guardian can provide firsthand information about the individual's behaviors and symptoms in the community, past medications and past hospitalizations, if any. This information can support the clinician's assessment in furtherance of a psychiatric admission to the hospital.

A voluntary admission, where the patient consents, is the least restrictive form of admission for psychiatric treatment. If the individual is willing, a hospital may admit as a voluntary patient "any suitable person in need of care and treatment, who voluntarily makes written application" for admission.[12]

The hospital can pursue an involuntary admission when the individual does not consent, likely due to a lack of insight and understanding of the psychiatric illness and symptoms. Under Mental Hygiene Law Section 9.39, the need for psychiatric care must be certified by a staff physician. An individual may be held for up to 15 days involuntarily if suffering from a mental illness for which immediate observation, care and treatment in hospital is appropriate, and the individual's condition is likely to result in serious harm to self or others.[13] Under Mental Hygiene Law Section 9.27, the need for psychiatric care

must be certified by two physicians. An individual may be held for up to 60 days involuntarily if suffering from a mental illness for which immediate observation, care and treatment in hospital is appropriate, and the individual's condition is likely to result in a substantial threat of physical harm to self or others.[14]

Neither Article 9 nor Article 81 provide the guardian with authority to take an active role in the admission process. Article 81 specifically states that a guardian cannot consent to the voluntary formal or informal admission of the incapacitated person to a mental hygiene facility.[15] The involuntary admissions process is uniquely a clinical determination based upon a diagnosis of mental illness and the likelihood of danger that an individual poses to self or others. As described above, the guardian's role is one of advocacy and support.

## Requesting Release From the Hospital

Article 9 affords a voluntarily or involuntarily committed individual the right to request judicial review of the propriety of their stay within the hospital. This means that the incapacitated person, now a patient on the inpatient psychiatry unit, can request to be discharged. If the psychiatric treatment team does not believe that the individual should be discharged, the court holds a hearing where a judge will determine this ultimate issue. The only parties to this proceeding are the hospital and the patient. A guardian does not have party status but, under certain circumstances, may be called as a witness to support further retention in a hospital. A court must be satisfied by clear and convincing evidence that the individual is both mentally ill and poses a substantial risk of serious harm to self and/or others.[16] The guardian should be prepared for a less than optimal discharge plan should a court grant the patient's request for release. The patient could be discharged from the hospital as early as the same day as the hearing, which often means that the hospital staff have not been able to secure outpatient appointments or follow up for treatment in the community.

## Discharge Planning

Generally, the goal of inpatient psychiatry treatment teams is short-term stability and not long-term comprehensive recovery. Hospital stays in New York are short and often frequent. Long-term treatment is generally delegated to outpatient care programs. This reality creates a challenge to the guardian who has the obligation of providing care and safety in the community. Thus, the guardian must begin planning for discharge almost immediately upon admission. The clock is ticking as soon as the individual is admitted as there are time constraints written into the Mental Hygiene Law to protect patient rights. The above-mentioned Article 9 hearings could result in a ward's discharge from a hospital with very little notice. A guardian who has been actively planning for discharge with the treatment team throughout the admission is in a much better position than a guardian caught by surprise.

The guardian must advocate early and often for a comprehensive discharge plan. The discharge plan can include services such as an outpatient psychiatrist, an outpatient therapist, a partial hospital program or a clinic appointment. A psychiatrist must be identified to perform medication checks and write prescriptions.

If the ward meets criteria for participation in the Assisted Outpatient Treatment[17] program, the guardian must advocate for the hospital to apply. Assisted Outpatient Treatment is a valuable discharge tool for mentally ill individuals who refuse services and/or medication in the community and are frequently hospitalized. It can provide case management or an Assertive Community Treatment team to coordinate the individual's care, as well as individual and/or group therapy, medication, alcohol or substance abuse counseling and urinalysis or blood testing for the presence of alcohol or illegal substances.[18] If non-compliant with the Assisted Outpatient Treatment plan, the individual can be brought to a hospital for an evaluation and possible admission.[19]

Applying for Assisted Outpatient Treatment and gaining acceptance into the program is a lengthy process that requires cooperation from the inpatient psychiatric team and approval from the court. Ultimately, the state Supreme Court, after a hearing, determines whether the patient should be required to participate in the program.[20] In addition to advocacy, the guardian may also have to authorize access to and disclosure of the ward's prior psychiatric records to demonstrate that he or she meets the criteria for the program.[21] The guardian may also testify at the hearing to describe the ward's non-compliance with treatment in the community and symptoms that led to hospitalization.

Discharge planning must also include housing, requiring cooperation between the guardian and the social work staff to either confirm that the ward can return to a previous residence or to ensure that the hospital makes the appropriate referrals to secure new housing. A referral for the shelter system, Section 8 housing or other mental health supportive housing takes time. There is limited bed availability across all types of housing, long waitlists and lengthy interview procedures. The hospital likely needs authorizations to access and release the ward's psychiatric records to apply for such housing. When the guardian starts this process on day one, the chances of a safe, successful discharge plan increase.

In some cases, the guardian may consider action before the appointing guardianship judge as it relates to discharge planning and securing services in the community. For example, the guardian may wish to retain and pay for

a geriatric care manager or psychiatric case manager to ensure a successful discharge plan and long-term stability. A case manager, often a social worker or other mental health professional trained in behavioral issues, can supplement the role of the guardian to assess the individual's ability and needs, arrange and advocate for services and monitor the individual in the community. A case manager can also find creative solutions to maintain an individual safely in the community or assist with locating housing if the individual's current living situation is no longer appropriate.

## Refusing Medications

The role of an Article 81 guardian is extremely limited when it comes to psychotropic medications. In New York, neither a guardian, family member nor a health care agent can authorize the administration of psychotropic medications.

On an inpatient psychiatric unit, the treatment team can follow the appropriate clinical and legal procedures to obtain authorization to treat an involuntary patient over his or her objection. This involves a capacity determination, an internal administrative review process[22] and a hearing before a Supreme Court judge.[23] The patient is entitled to counsel through the Mental Hygiene Legal Service.[24] Often the patient's medical record is entered into evidence. The treating psychiatrist must testify that the individual lacks the capacity to make a reasoned decision regarding the psychiatric treatment, amongst other criteria.[25] This capacity determination must be made notwithstanding a previous court determination of incapacity pursuant to Article 81.

Similar to the Article 9 retention hearings discussed above, the guardian is not a party to these treatment over objection proceedings. The guardian may be called as a witness, perhaps in support of stabilization on the recommended medication before discharge. The guardian can testify to behaviors in the community when the individual may have been functioning well on a medication regimen versus behaviors exhibited when he or she stopped taking a certain medication. Such firsthand knowledge can influence a judge's decision to authorize treatment.

## Conclusion

The Article 81 guardian plays a unique role when managing the care and safety of a mentally ill incapacitated person. Rather than struggling to understand and navigate both the legal and clinical mental health systems amidst a crisis, practitioners should educate themselves and plan proactively so that when the incapacitated person decompensates, the guardian is able to confidently advocate and support for the ward's best interests.

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6. MHL § 9.43.
7. 22 N.Y.C.R.R. § 36.1(a)(10).
8. MHL § 9.43(a).
9. *See* MHL § 47.01.
10. MHL § 9.43. At any time during the 72-hour period, the patient may, if appropriate, be admitted as a voluntary or involuntary patient.
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13. MHL § 9.39; *see* MHL § 1.03(20) for the definition of "mental illness."
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15. MHL § 81.22(b).
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21. MHL § 9.60(c). To be eligible for Assisted Outpatient Treatment program, the individual must be 18 years of age or older, suffer from a mental illness, unlikely to survive safely in the community without supervision and have a history of non-compliance with psychiatric treatment. *Id.*
22. 14 N.Y.C.R.R. § 27.8.
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# Does Attorney-Client Privilege Survive a Client's Death?

**The Attorney Professionalism Committee** invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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## To the Forum:

I am an attorney involved in a case against a large biotechnology company accused of defrauding investors and patients. My client was the chief scientist at this company and told me that none of its devices were functional despite investors and health care professionals believing they were. This put hundreds of thousands of patients at risk as they received false test results that either led them to believe they had a disease they did not have or provided them a false sense of relief, allowing their underlying conditions to go untreated. After noticing the devices were producing inaccurate results, my client approached the CEO to warn him. The CEO was dismissive and insisted that the devices worked despite evidence to the contrary. My client was then removed from his position as chief scientist and placed in a clerical role.

Once legal action commenced, my client was called to testify against the company as to his knowledge surrounding the devices' inaccuracy and the CEO's awareness of such. He was distraught about testifying because he was sure that the company would sue him for breaching a non-disclosure agreement all employees were forced to sign upon hiring. While I assured him not to worry, he was not assuaged and felt there was no way out.

Devastatingly, my client committed suicide the day before he was to testify against the company. Rumors swirled that his death was not a suicide but a murder to prevent his testifying. The prosecutor issued a subpoena for my testimony regarding what my client would have testified about. However, while I am being ordered to testify, I do not want to breach confidences.

Does attorney-client privilege survive a client's death? What defenses do I have to defying or quashing the subpoena to uphold the privilege I am bound by?

***Sincerely,***
***V.R. Scared***

## Dear V.R. Scared:

The short answer is that, yes, the privilege and an attorney's duty to keep client confidences survives that client's death, but that privilege can be waived after death in some instances. Although there are many rules, formal opinions and precedent protecting the confidential relationship, there are many exceptions to that rule that may prevent an attorney from being sanctioned for disclosing confidential information.

Rule 1.6 of the New York Rules of Professional Conduct governs the confidentiality of information exchanged between attorney and client.[1] It prohibits attorneys from "knowingly" revealing confidential information or using

> such information to the disadvantage of a client or for the advantage of the attorney or a third person, unless under 1.6(a): (1) the client gives informed consent; (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or (3) the disclosure is permitted by paragraph (b).

Paragraph (b) of Rule 1.6 outlines several instances in which an attorney may reveal confidential information. It is important to note that under these exceptions, an attorney is not required to reveal confidential information but is merely permitted to do so.

We presume here that none of the exceptions to 1.6(a) apply to your situation and turn to the permissive disclosures under 1.6(b). The most well-known instance in which an attorney may reveal such information is to "prevent reasonably certain death or substantial bodily harm" to the client or third parties. If the death or bodily harm has already occurred, even if the attorney knows of facts and circumstances surrounding such occurrence that could help police in an investigation, the attorney is not required (nor may be compelled) to breach confidentiality. This happened in the infamous "Buried Bodies Case," in which Robert Garrow Sr. (the client) told Frank Armani and Francis Belge (his attorneys) where he had buried the bodies of his murder victims. Under threat of disbarment and criminal charges (not to mention harassment and death threats), Armani and Belge stood their ground and did not disclose.[2] In fact, the Committee on Professional Ethics found that the attorneys would have violated their confidentiality duties if they disclosed the location of the bodies to authorities.

There was tremendous public outcry because disclosure would have brought peace to the families, but that disclosure would not have prevented deaths or harm. Thus, the exceptions under Rule 1.6(b) did not apply, and Armani and Belge were bound by confidentiality. This case is a testament to the importance of confidentiality within the legal community, though we cannot ignore the professional fallout and personal toll maintaining a high ethical code can take. Armani and Belge were ultimately absolved of any wrongdoing.[3]

Another exception under Rule 1.6 states that an attorney may – but need not – reveal confidential information "when permitted or required under these Rules or to comply with other law or court order." This might include a subpoena compelling an attorney to disclose client information as is the case here.

In 2022, the New York Committee on Professional Ethics issued Formal Opinion 2022-1 regarding an attorneys' obligations upon receiving a subpoena for documents that contain confidential information learned while representing a client.[4] The committee opined that a subpoena may constitute "other law" under Rule 1.6, such that the disclosure of confidential information would be appropriate. Before proceeding with disclosure, however, the attorney must take certain steps, such as communicating or attempting to communicate with the current or former client whose information is requested, seeking the client's consent to provide the requested information and, if consent is not received, the attorney must "assert reasonable and non-frivolous objections to the subpoena and provide only the information not subject to such objections." Following this committee's guidance, you must assert the objections and disclose responsive records not subject to those objections.[5]

The American Bar Association issued similar guidance in 2016, Formal Opinion 473.[6] However, the ABA added the caveat that if the client is unavailable for consultation regarding the confidential information – such as in your case – "the lawyer must assert all reasonable claims against disclosure and seek to limit the subpoena or other initial demand on any reasonable ground." After showing that the attorney made reasonable attempts to consult with the client and is unable to do so, the attorney is permitted to comply with the court order. Following the ABA's guidance, you should meet and confer with the party issuing the subpoena to limit the subpoena before asserting objections and choosing to disclose responsive records not subject to those objections. In either case, as your client is deceased, you must make reasonable objections to disclosure to the prosecution and the court.

Apart from disclosure of records, there may be instances where an attorney may have to provide testimony about a client or their representation. According to New York Civil Practice Law and Rules 4503(a), attorneys are generally prohibited from disclosing any communication made between the client and attorney. This law even prevents a client from being compelled to disclose such communication "in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof."

This section of the CPLR mandates that the attorney-client privilege can survive the client's death. However, *Mayorga v. Tate* illustrates that an administrator or executor can waive privilege, in which case an attorney can be compelled to testify.[7]

In *Mayorga*, the defendant-attorney had represented the decedent in a matrimonial action and was being accused by the executor of legal malpractice during that prior representation. During the malpractice action, the executor sought disclosure of the attorney's file in regard to the decedent. While the attorney successfully argued that the file is covered by the attorney-client privilege even after his client's death, the court held that the executor may waive the attorney-client privilege. The court held that "just as the attorney-client privilege itself survives the death of the client for whose benefit the privilege exists, the right to waive that privilege in the interest of the deceased client's estate also survives and may be exercised by the decedent's personal representative."

The court explained that the statute, CPLR 4305(a)(1), expressly permits the "client" to waive the privilege. For purposes of the statute, the client's conservator or executor of their estate "may act as a surrogate for the client and waive the privilege on the client's behalf" when the client is incapacitated or otherwise unable to waive it themselves.

In your situation, you may invoke the attorney-client privilege to object or move to quash the subpoena as it is law that this privilege survives the client's death. However, if your client's personal representative decides to waive that privilege, you may have to abide by the subpoena.

Precedent and ethics opinions suggest that you will not be sanctioned for disclosure or proper non-disclosure; however, it might be worth considering your reputation as an attorney in the eyes of potential clients if you do choose disclosure.

The attorney-client relationship is considered to be a fiduciary relationship, meaning that attorneys must act in the best interests of their clients. Breaching confidentiality may be considered a breach of this fiduciary duty that an attorney may be sued for. This would arise under a legal malpractice action. In an action like this, the plaintiff-client must prove (1) the existence of a fiduciary relationship; (2) misconduct by the defendant-attorney; and (3) damages that were directly caused by the misconduct.[8] An attorney's failure to maintain confidentiality with the client may be the kind of misconduct anticipated by this cause of action.

In your situation, you would likely have a defense to such an action because you were compelled by the

court to make a disclosure that breached confidentiality. And while your deceased client is not capable of bringing an action against you, there is the question of whether his estate might do so.

Generally, non-clients cannot bring an action against an attorney who did not represent them, as non-clients lack privity between themselves and the attorney. In *In re Estate of Pascale,* the court granted the attorneys' motion to dismiss a legal malpractice action brought against them by the legatees of their deceased client's will.[9] The court found that "the lack of privity between any of the legatees under the decedent's will and the attorneys precluded the legatees from recovering damages." So, while a personal representative or executor of an estate may have the authority to waive privilege, it is not a given that they have standing to sue you for breach of confidentiality under these circumstances.

Maintaining the sanctity of the attorney-client confidential relationship is necessary for the effective practice of law. Without their client's trust, attorneys are unable to provide proper and effective representation. In many circumstances, the laws and ethics rules protect this relationship. Sometimes, though, disclosure of this information is necessary to prevent harm or achieve justice. Even then, attorneys are generally not required to disclose all information.

***Sincerely,***
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## Question for the Next Forum

The Jones Company needs advice on a real estate transaction that has complicated federal and local tax ramifications. The company is considering hiring one of the following:

(a) Archie Anderson is both a New York-admitted attorney and a CPA. Anderson has separate websites for his work as an attorney and as an accountant, advertises both his law firm and accounting firm separately to the general public and keeps separate books and records for each. Anderson says he will handle the real estate transaction through his law firm and provide the necessary tax services through his accounting firm at a lower hourly rate but one higher than the accounting firm, Smith & Taylor, across the street.

(b) Bill Baker is a New York-admitted attorney whose practice emphasizes real estate. He does not do tax work, but his brother-in-law, Carl Carlson, has an accounting firm in which Baker has a one-third ownership interest. Carlson offers his firm's accounting services to the general public (i.e., not just to Baker's clients). Baker says he will handle the legal work but will refer the accounting/tax work to Carlson, who also charges more than Smith & Taylor.

(c) Davis & Davis is a 30-lawyer real estate firm that has a CPA as a full-time employee. The CPA only does work for Davis & Davis clients. Davis & Davis bills the CPA at an hourly rate that is also higher than the highest rate charged by Smith & Taylor.

Under New York Rule of Professional Conduct 5.7, what disclosures must each of these providers make to The Jones Company, and what conflict waivers (if any) must they obtain?

Would your answer above change if each provider was doing purely legal work on the real estate deal for The Jones Company, and The Jones Company asked for help with a local tax filing on an unrelated matter that requires no tax law expertise?

***Sincerely,***
***G. C. Jones***

**Endnotes**

1. In fact, the New York City Bar proposed adding an explicit amendment to Rule 1.6 that would state: "[T]his rule does not prohibit a lawyer from revealing or using confidential information, to the extent that the lawyer reasonably believes necessary, to prevent or rectify the conviction of another person for an offense that the lawyer reasonably believes the other person did not commit, where the client to whom the confidential information relates is deceased." However, this applied only to situations where the client's confidential information would rectify a wrongful conviction and was not incorporated into Rule 1.6 as it stands today. See New York City Bar, Committee on Professional Responsibility, Proposed Amendment to Rule of Professional Conduct 1.6 – Authorizing Disclosure of Confidential Information of Deceased Clients (2010).

2. https://nala.org/client-confidentiality-buried-bodies-case/2018/.

3. New York State Bar Association Committee on Profession Ethics, Formal Opinion No. 479 (1978).

4. https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/lawyers-obligations-receiving-subpoena-seeking-client-info.

5. *See also* Ethics Opinion 1198, requiring lawyers who received subpoenas or court orders to disclose confidential information of a former client to first consult with the former client and should seek to limit the demand or disclosure prior to disclosing any confidential information.

6. American Bar Association Formal Opinion 473, Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information (2016).

7. *Mayorga v. Tate*, 302 A.D.2d 11 (2d Dep't 2002). *See* http://www.newyorkle-galethics.com/personal-representatives-waiving-attorney-client-privilege-after-death/.

8. *Harbor Consultants Ltd. v. Roth*, 26 Misc. 3d 1219(a) (Sup. Ct., N.Y. Co. 2010), *citing Kurtzman v. Bergstol*, 20 A.D.3d 588, 590 (2d Dep't 2007).

9. *In re Estate of Pascale*, 168 Misc. 2d 891 (Sup. Ct., Bronx Co. 1996). *See also Deeb v. Johnson*, 145 Misc. 2d 942 (Sup. Ct., Rensselaer Co. 1989) (holding that an attorney was not liable to the executors for the harm caused by his negligence in drafting the decedent's will because there existed no privity between the parties).

# Domenick Napoletano To Take Over as President-Elect of the New York State Bar Association on June 1

By Jennifer Andrus

Domenick Napoletano will become the president-elect of the New York State Bar Association on June 1. Napoletano, who has been the association's treasurer for almost four years, is chairing the association's Working Group on Facial Recognition Software and Access to Legal Representation. The working group is researching the implications of facial recognition software on civil liberties.

When Napoletano takes over as president-elect on June 1, he will become the chair of the association's Committee on Access to Justice. He will take over as president on June 1, 2024.

"I am excited to take on this new leadership role and continue to work hard for our members on behalf of our profession," he said "We can accomplish so much when we work together tackling the tough issues we are facing as lawyers today."

In 2020, Napoletano co-chaired the association's Emergency Task Force for Solo and Small Firm Practitioners. As a solo practitioner, he knows the challenges of running a small business and worked hard to serve fellow members who were struggling during the pandemic.

Napoletano was a former chair of the association's General Practice Section and co-chair of the Civil Practice Law and Rules Committee. He has worked in the association on a variety of issues, including animal rights, gun violence and the rights of Puerto Rico citizens.

In his legal practice, Napoletano focuses on complex commercial litigation and appellate work. A number of his cases have appeared in published decisions, most involving real property and tenancy and occupancy issues. He has also spearheaded various state and federal class action lawsuits, including one against the New York City Department of Finance for its imposition of "vault taxes." These are levied on spaces beneath city sidewalks that are connected to private buildings.

He is a past president of the Brooklyn Bar Association, the Columbian Lawyers Association of Brooklyn, the Confederation of Columbian Lawyers of the State of New York and the Catholic Lawyers Guild of Kings County.

A native of Brooklyn, he serves in his parish, St. Mary's Star of the Sea Roman Catholic Church. He also serves at Knight Commander with Star Equestrian Order of the Holy Sepulcher of Jerusalem.

Napoletano has practiced law since being admitted to the bar in 1981 following his graduation from Hofstra Law School. He holds a bachelor of arts degree from Brooklyn College.

Each year, the New York State Bar Association elects its president-elect in January to serve for a year in that capacity prior to assuming the presidency of the association the following year.

# NYSBA Says Any Discussion of Bail Reform Should Be Removed From the Budget

By Susan DeSantis

Sherry Levin Wallach, president of the New York State Bar Association, issued the following statement about Gov. Kathy Hochul's proposed changes to bail reform in her 2023-24 executive budget:

"We are deeply concerned by the rollbacks in bail reform that Gov. Kathy Hochul has put in the state budget; it is a significant policy matter that requires a full and fair debate. It is critical that the law is not changed in a manner that will result in more New Yorkers – particularly Black and Brown people – incarcerated for longer periods of time for offenses simply because they are too poor to afford bail.

"In the budget process, history has proven there is a significant risk of this issue not getting the attention it deserves. Debating bail reform as a stand-alone matter on its own merits would give lawmakers, interest groups, and members of the public sufficient time to think the issue through and consider all the possible consequences."

# At Urging of NYSBA, ABA Votes To Support LGBTQ-Inclusive Language in Court Proceedings Nationwide

By Jennifer Andrus

The American Bar Association adopted a new policy spearheaded by the New York State Bar Association on the use of gender-inclusive language in all court matters across the country. The resolution passed by a wide margin at the ABA meeting in New Orleans.

The policy, called a bench card, provides information and guidance for judges on the use of LGBTQ+ inclusive language and pronouns, including how to interact with transgender, non-binary and gender-expansive court users in accordance with the Judicial Rules of Conduct.

The policy outlines the use of she, he and they pronouns and encourages judges to avoid using gender-specific words like "ladies and gentlemen." The policy also deals with topics of gender expression, identity and gender confirmation surgery.

The bench card was developed by the New York State Ninth Judicial District Access to Justice Committee's LGBTQ+ Subcommittee. It was adopted by the New York State Unified Court System's Office of Court Administration and by the New York State Bar Association House of Delegates. With the adoption of this policy, the ABA encourages lawyers and judges in all 50 states to adopt this gender-inclusive language.

NYSBA President Sherry Levin Wallach led a New York delegation to the meeting and expressed her support of the resolution. "Our profession must be vigilant in protecting the LQBTQ+ community, and especially transgender individuals within the courtroom, and encourage judges to foster an environment free of bias, prejudice and harassment," she said.

The resolution reminds judges of a duty to foster an environment free of bias, prejudice and harassment. "Judges act in accordance with this rule by respecting an individual's requested pronouns," the resolution said. "Failure to refer to someone using their preferred pronouns manifests bias and prejudice as to the individual's gender identity and gender expression."

The resolution urges federal, state, local, territorial and tribal courts nationwide to use the policy to ensure a welcoming and safe space for members of the LGBTQ+ community.

# NYSBA Working Group To Study the Impact of Facial Recognition Software on Individual Freedom

By Susan DeSantis

The New York State Bar Association is examining the legal and ethical implications and the impact on the personal freedom of corporations employing facial recognition software to ban their adversaries – and every lawyer who works for a firm that represents them – from entering sports and entertainment venues.

The association's Executive Committee has launched the Working Group on Facial Recognition Technology and Access to Legal Representation. The group will study the impact the technology is having on a lawyer's ability to represent clients without fear of retribution.

MSG Entertainment, the owner of Madison Square Garden and Radio City Music Hall in New York City, has deployed facial recognition software to ban from its venues lawyers who work for firms that sue the company.

"The use of facial recognition software to exclude members of law firms from a Knicks basketball game or a Taylor Swift concert discriminates against lawyers for doing their jobs," said Sherry Levin Wallach, president of the New York State Bar Association. "A law firm should be able to represent clients in a personal injury lawsuit, a dispute about concert tickets or any other legal matter without fear of retribution. We must regulate facial recognition software before it has an irreversible impact on the personal lives of all of us."

Domenick Napoletano, a solo practitioner in Brooklyn who will become the association's president-elect on June 1, is chairing the working group. The group will report back to the Executive Committee, which will consider taking further action.

Levin Wallach appointed the following members of the Executive Committee to the working group:

- Orin J. Cohen, a solo practitioner at OrinCohen in Staten Island
- Sarah Gold, a solo practitioner at the Gold Law Firm in Albany
- LaMarr J. Jackson, a solo practitioner in Rochester
- Thomas J. Maroney, a partner at Maroney O'Connor in New York City
- Michael R. May, a partner at Levene Gouldin & Thompson in Ithaca
- Ronald Hedges, the principal of Ronald Hedges in Hackensack, N.J.

# Panel Addresses Implicit Bias During Jury Selection

By Jennifer Andrus

Implicit bias. It's an issue we discuss often, but what does it mean in the context of choosing a jury?

The Criminal Justice Section held a panel during Annual Meeting to discuss how implicit bias should be handled during voir dire. With recent changes to jury instructions, including a mandatory video presented to prospective jurors, how should lawyers – who are hampered by time constraints and a limited number of challenges – deal with this difficult issue during jury selection?

The panel included Special Narcotics Prosecutor Nigel Farinha and past New York State Bar Association President Seymour James. They were joined by Acting New York County Supreme Court Justice Daniel Conviser, and the panel was moderated by Justice Cheryl Chambers of the Appellate Division, Second Department.

## Who Brings Up the Issue of Implicit Bias in Voir Dire?

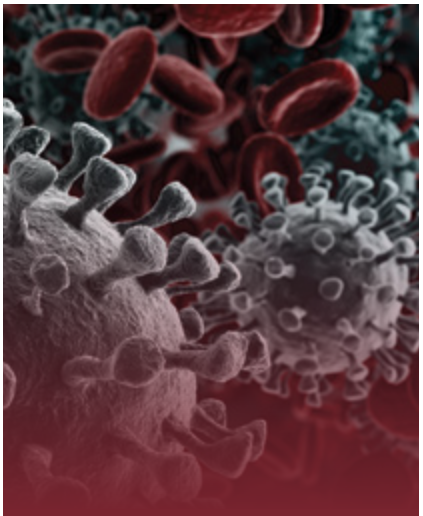
The panelists agreed that discussing the topic of implicit bias prior to the start of voir dire is a good strategy. Farinha said if all sides agree on a road map and set the right tone, "early engagement with the judge as a neutral arbiter is best." Farinha and James agreed that if the judge introduces the topic to potential jurors, it takes the heat off the lawyers and may be better received.

Justice Conviser reminded the attendees that implicit bias is a lifelong, subconscious, learned behavior. "We all think of ourselves as fair people," he said. "But [implicit bias] is not a conscious view but an ingrained prejudice." Justice Chambers agreed, saying most jurors want to do the right thing, but often the people chosen for juries are those who did not communicate their feelings during questioning.

## Tell Your Own Story

In discussing strategies in the voir dire, James encouraged fellow attorneys to tell potential jurors about their own experiences with bias. It will help the jurors understand the issue and relate to the lawyer before the lawyer begins to delve into jurors' implicit biases.

Farinha agreed, saying it is impossible for people to divorce their life experiences – such as past encounters with police – from their work as jurors. As the special narcotics prosecutor, Farinha's cases are often based on an undercover drug buy using police. "If evidence [in my case] is from the police," he says, jurors may be "unconsciously skeptical of that evidence collected through police work in the wake of George Floyd. Prosecutors have to explore implicit bias. Until we examine the issue and lay it bare, that is how we get to the other side."





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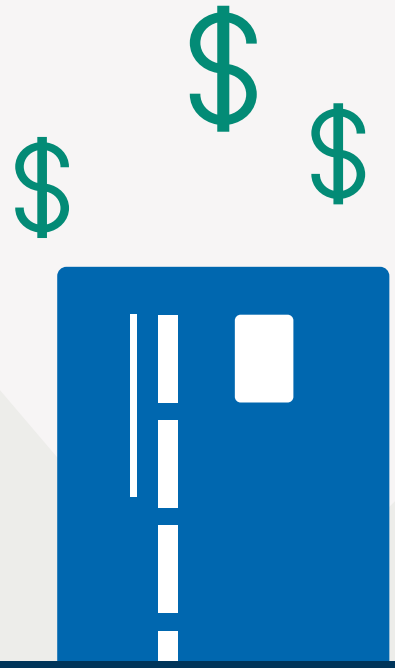

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