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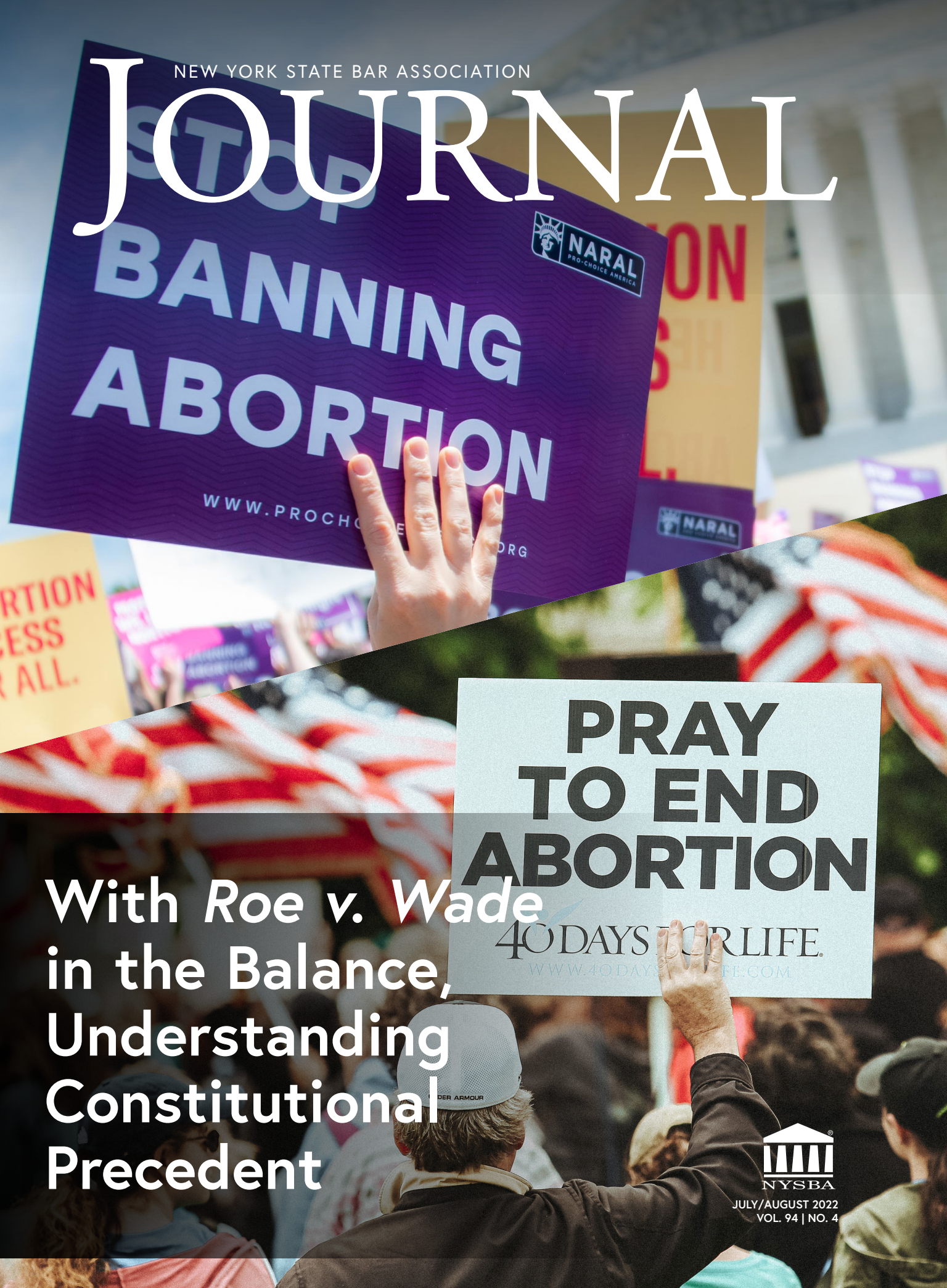

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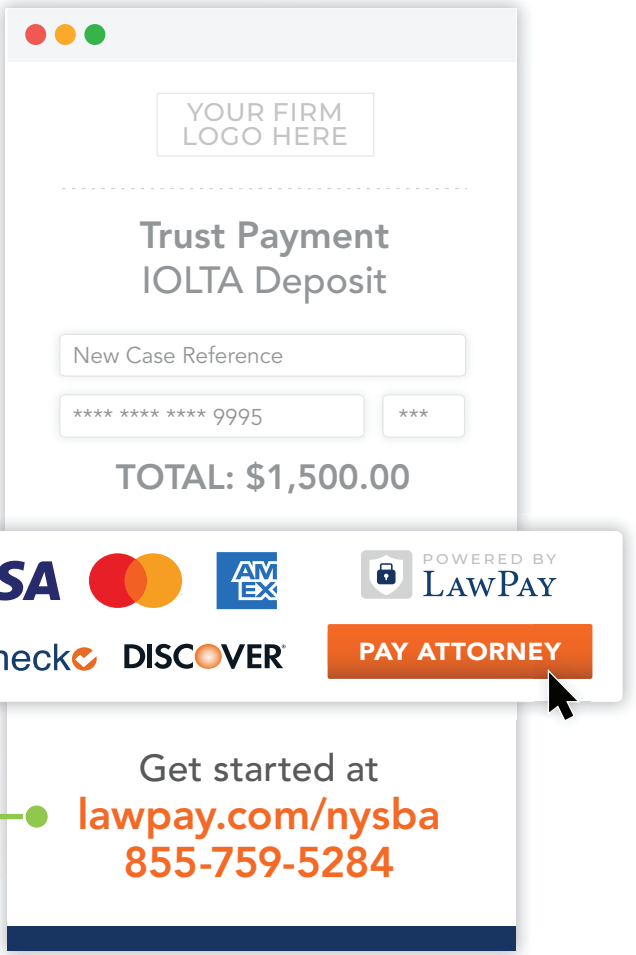

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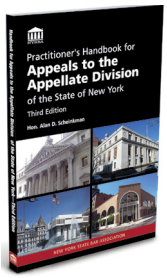

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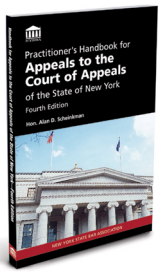

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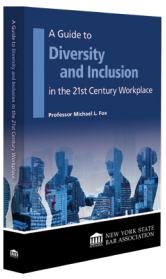

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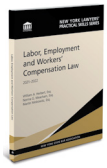

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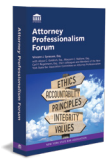

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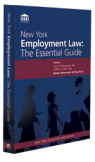

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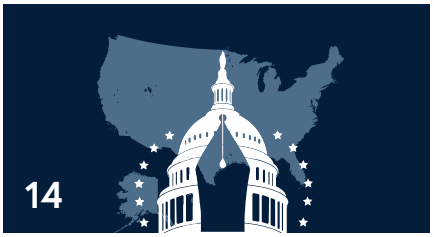

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Investing in the Future of Our Profession

I feel exceptionally privileged and prepared to lead this association as we come out of the COVID-19 pandemic facing an unexpected reality. Our entire system of justice was affected, which required us to pivot quickly to a whole new way of practicing law. Teams, Zoom and other virtual platforms became our new courtrooms and law offices. Constitutional rights were "paused" as we the lawyers, judges and service providers scrambled to find our way and protect our clients.

I spent the first few months of the shutdown working on applications for compassionate or early release from jail and prison for my clients. Each day, I witnessed firsthand the struggle lawyers faced in adjusting to new rules and orders while also giving our clients the attention they required. Through my work at the Legal Aid Society of Westchester County, I witnessed the disparate impact that the pandemic and "pause" had on those charged with crimes or living in lower socioeconomic communities. Even more disheartening was that Black and Brown people were getting sick, dying and losing their homes and employment at a much higher rate than others in the community. So many were paralyzed by fear and were panicking.

Our society's mental health crisis came to the forefront with a new vengeance. The added stresses and emotional turmoil that the pandemic brought to everyone's lives were particularly difficult for people living with mental illness and preexisting trauma. For many others, the pandemic forced mental illness and trauma to the surface. Attorneys were no exception to this struggle. Support services were either limited, virtual or unavailable. So many could not access treatment or even evaluations to understand what was happening to them. Although the pandemic has subsided, this crisis persists. We must make services to support attorney well-being and understanding of how to better serve our clients living with mental health challenges and trauma a priority for our profession and legal community.

It was during this unimaginable and stressful time that I was able to find camaraderie, support, comfort and understanding among my colleagues and friends at the New York State Bar Association and other professional and bar groups. We banded together to do all we could to ensure that we stood true to our purpose to support each other as lawyers and judges, to protect the rule of law and to be sure that our ever-changing legal system provided access to justice for all.

As lawyers and the courts pivoted to virtual practice, virtual law offices and virtual client communications, the New York State Bar Association was ready and able to support this new technocentric world. Our meetings went virtual, hybrid and then virtual again, but we remained strong and committed. NYSBA was a vital professional support system for me, countless members, attorneys and judges during this challenging time. We had constant programing and meetings to learn about our new digital and virtual world and to support attorney wellness. The NYSBA took this opportunity to further develop our wellness program by adopting a groundbreaking report on well-being and then expanding our services to offer four free counseling sessions.

I have been a New York State Bar Association member for more than two decades. I have had the fortune of being mentored by some of our organization's greats and I've worked with our sections and sat on committees that took on issues critical to our profession. I have engaged with colleagues who imparted exceptional wisdom and allowed me to see the organization's impact on access to justice and the rule of law throughout our state, nation and world. As it did during the COVID-19 pandemic, NYSBA has served as a guiding light in my career and a platform for us to speak out and make change. It has allowed me to continue to mentor the lawyers of our future and contribute to the future of our profession. It is a relationship that is part of my identity as a lawyer and woman in the law.

One of my goals as president of the New York State Bar Association is to share my experience and the value of membership with as many lawyers as not only I can personally reach but that the association can reach. The more diverse our membership grows and the more attorneys and judges that we reach, the more perspectives, talent and expertise we have to develop better informed polices and opinions on issues that face our profession and our clients. We have all witnessed through the darkness of the pandemic how support from fellow lawyers can sustain us, give us hope and allow us to see that the challenges we face are not insurmountable.

This organization has been an invaluable resource, a source of friendship, collegiality and guidance for my entire career, and I wish to facilitate that same experience for our entire membership.

As such, I want our members to know who I am and how I plan to guide the association into the future.

I plan to lead us with an eye to the future of our profession while knowing that the New York State Bar Association must address the needs of lawyers from all backgrounds and at all stages of their careers. What we have in common, though, is more important than what divides us. I believe that our membership is dedicated to the pursuit of justice, the rule of law and a profound commitment to serve the public good.

To ensure NYSBA stays on the cutting edge of our profession, I have appointed a Task Force on the Modernization of Criminal Practice, which will look to evaluate sentencing, treatment and diversion programs, fairness, access to justice, technology and efficiency in the administration of criminal justice.

The mental health crisis must be addressed, and we must revisit our abilities and resources to provide adequate representation for those living with trauma and mental illness. It has once again been brought to the forefront of so many critical societal discussions, and I have created the Task Force on Mental Health and Trauma Impacted Representation to evaluate how our legal system can better support people and provide attorneys representing clients living with mental illness and trauma the necessary tools and resources to best represent them. Attorney well-being is also directly impacted by the stress and difficulty of this work.

Also, with an eye to the cutting edge, I have launched a Task Force on Emerging Digital Currency to educate, develop best practices for lawyering in this field and worldwide, and evaluate existing regulations and the need for further regulation both on a state and national level. You can read more about the work of this task force later in this issue in the column by Hilary Jochmans, NYSBA's policy director.

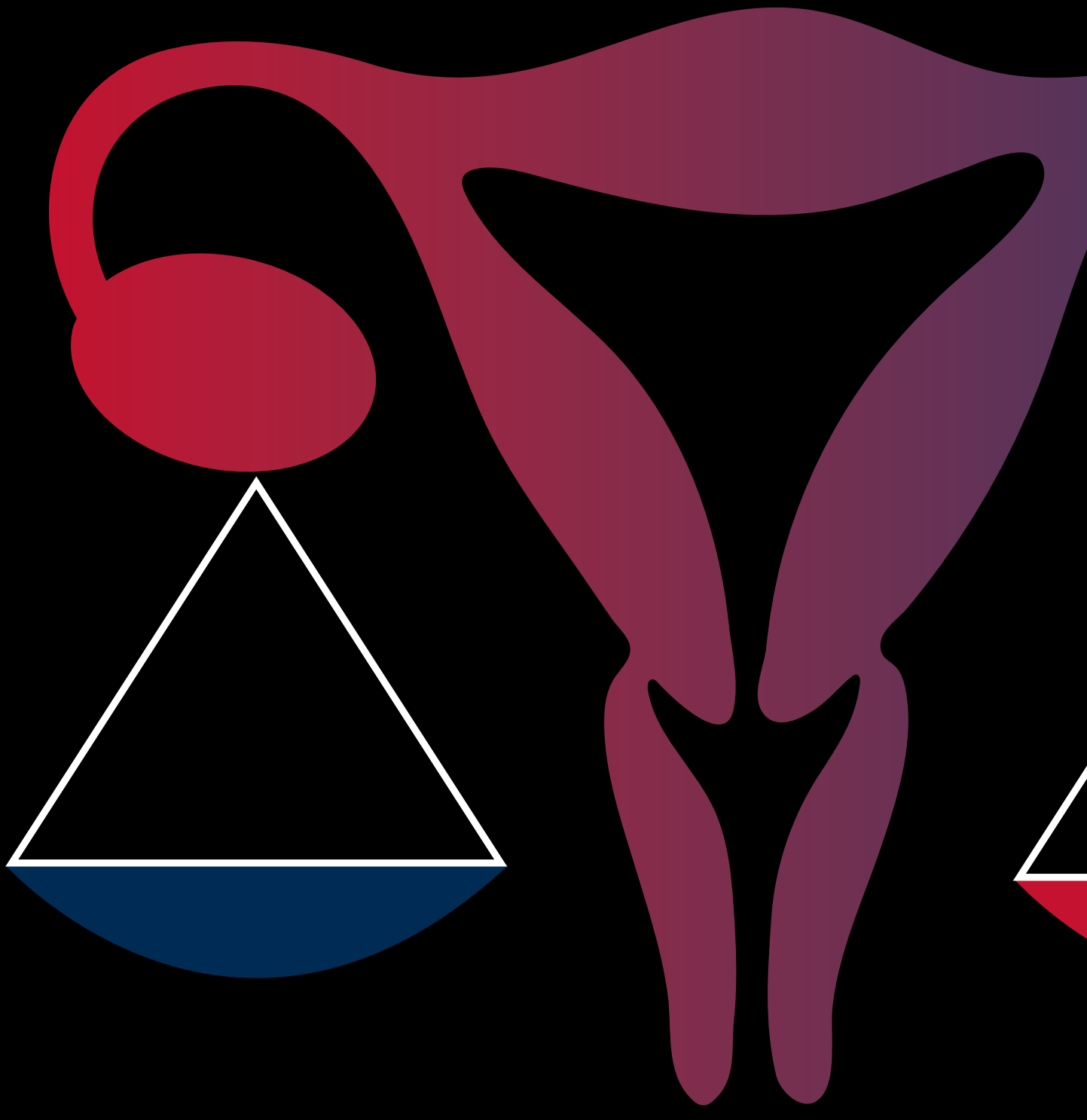
I have also created a task force on an issue that is very dear to me and has been the focus for some of my most respected colleagues. This is the Task Force on the U.S. Territories. It will examine the relationship between the United States and its territories as it relates to the Insular Cases, current U.S. Supreme Court decisions, citizenship, voting rights, political representation and social services. It will look at how these factors have created a second-class citizenship for residents of the U.S. territories and suggest what needs to be done to be sure all U.S. citizens are equal under the law.

While these task forces do their work, I want to hear from members about how NYSBA can better serve and how, in my role as president, I can guide the legal profession toward a better future. Those of you who already know me know I will not back down from a challenge. I never hesitate to stand up for my people. To those of you who do not know me, it is time we changed that. We will have plenty of opportunities this year as our organization continues to move out from under the pall of the pandemic and advances its important work as the vital authority for legal expertise in New York State, the nation and the globe.

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

With *Roe v. Wade* in the
Understanding Constitut

By Vincent Martin Bonventre



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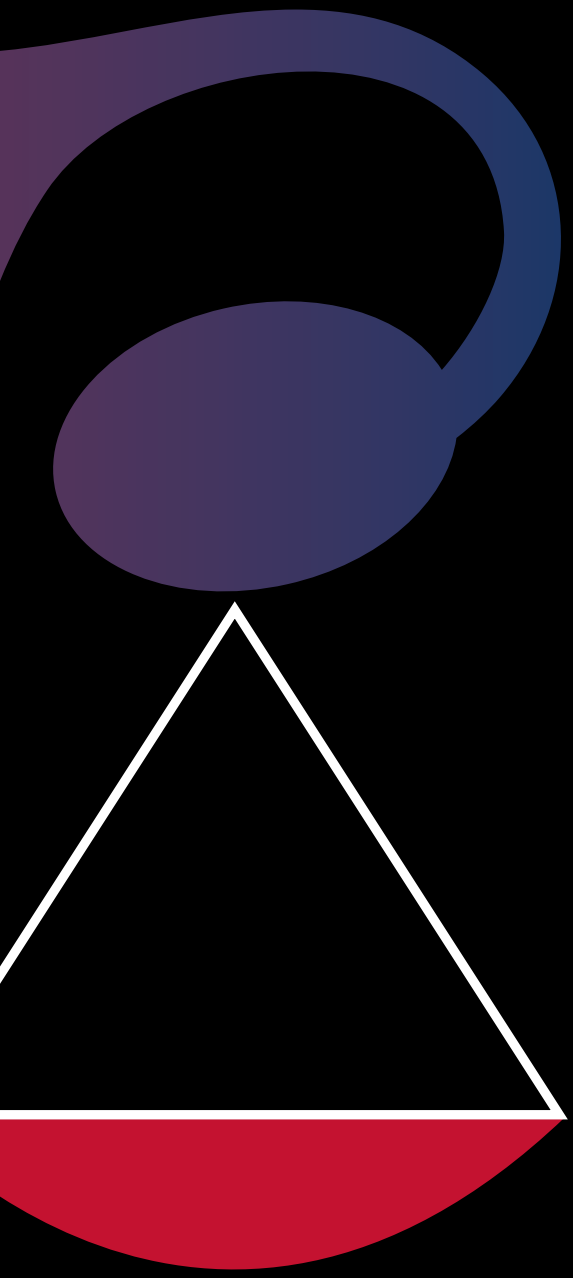


Settled precedent? Super precedent?

A great deal has been asked and asserted about that in recent Supreme Court confirmation proceedings. The specific focus has been on the nominees' views about *Roe v. Wade*[1] and a woman's right to choose an abortion, first recognized by the court in that 1973 decision. Those questions and assertions reached an even higher level of intensity with the leak of Justice Samuel Alito's draft majority opinion in *Dobbs v. Jackson Women's Health Organization*, calling for *Roe* to be overruled.[2]

As the senators who have been asking those questions must surely know, as must the nominees who responded with their requisite rehearsed answers, no precedent is truly settled, let alone somehow "super." No prior decision is actually immune from being overruled. In fact, there have been no fewer than 300 reversals in the court's history.[3]

Beyond that, and perhaps counterintuitively, constitutional precedents are in some ways the most vulnerable. They may well be the most critical to our system of government and to the balance between societal order and individual liberty. Nevertheless, as justices as ideologically distant from one another as Louis Brandeis and Antonin Scalia both concluded, practical necessity justifies a greater willingness on the part of the court to reconsider those past decisions.

"[I]n cases involving the Federal Constitution," the former political activist Brandeis explained, "correction through legislative action is practically impossible"; for that reason, the "Court has often overruled its earlier decisions."[4] Six decades later, the more politically conservative Scalia echoed the so-called "Brandeis dichotomy," i.e., between constitutional precedents and all others. "We have long recognized, of course," he noted without contradiction, "that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents."[5]

While the "Brandeis dichotomy" has become a virtual canon of the court, a vice-virtue dichotomy about the overruling of any particular precedent is considerably more equivocal. The distinction is more often about

the perceived merits of the precedent rather than of the doctrine of *stare decisis* itself. A little reflection, objectivity and candor attest to that truth. Regarding a woman's right to choose, for example, the ardent support for *Roe* is not based on the fact that it is a precedent, nor is the fierce opposition because *stare decisis* is less rigid in constitutional cases.

Indeed, the history of constitutional law is replete with illustrations of overruled precedents. In most cases, the battle between overruling and preserving was hard fought. The competing arguments were sufficiently strong that the issues had to be resolved at the Supreme Court level. In every one of those cases, American constitutional law was changed. In every case, support for the court's resolution was divided – sometimes extremely, bitterly and persistently so. And rarely, if ever, was support for the resolution of fundamental questions of liberty and justice actually dependent upon contending views of *stare decisis*, as opposed to contending views about the substantive merits.

Let's consider a few of the most well-known – i.e., famous or notorious depending on one's perspective – overrulings of constitutional precedent in Supreme Court history.

Of course, we must start with *Brown v. Board of Education*.[6] It is difficult today to find any serious person who opposes that decision to end government-sponsored racial segregation – or is willing to admit it. But in 1953, the court under Chief Justice Fred Vinson had been prepared to uphold the separate-but-equal doctrine of *Plessy v. Ferguson*.[7] With Vinson's sudden death, the appointment of his successor Earl Warren, and a great deal of compromise and persuasion, the court was turned around the following year and unanimously rendered one of its proudest decisions.[8]

The resistance to the decision in *Brown* was so strong that over the course of the next several years, Presidents Dwight Eisenhower and then John Kennedy deployed federal troops to overcome the official and mob defiance in southern and midwestern states.[9] The nation was deeply divided over the court's decision to make racial segregation under the law – which it had endorsed in *Plessy* – now a violation of the Constitution. Was overruling that 58-year-old precedent a vice or virtue? Should *stare decisis* have ruled the day, or racial equality and decency?

Thirteen years after *Brown*, the Supreme Court rendered a decision that was, perhaps, the most dreaded by those who opposed racial integration. In *Loving v. Virginia*, the court invalidated the so-called "anti-miscegenation" laws – still widespread in the South – that prohibited mixed-race marriages.[10]

The court in *Brown* had meticulously avoided addressing that specific issue. There was concern that, although invalidating such laws was a natural corollary to its ruling, it might undermine the court's unanimity and further enrage much of the country.[11] Nevertheless, in 1967, the Warren court mustered another decision, without dissent, to overrule *Pace v. Alabama*[12] in which it had upheld a criminal conviction for "fornication between a white person and a Negro."[13] Would it have been better for the court to adhere to *stare decisis* and uphold that 84-year-old precedent?

If longevity of a precedent is no guarantee that it will be respected, what about its recency? Well, in one of its very finest moments, the Supreme Court, speaking in a magnificently penned opinion by Justice Robert Jackson in *West Virginia v. Barnette*,[14] overruled a decision it had rendered a mere three years previous. Discarding that recent precedent of *Minersville School District v. Gobitis*,[15] this time the court enforced the religious objection of the Jehovah's Witnesses against state laws that mandated recitation of the Pledge of Allegiance by all schoolchildren.

In a turnaround not quite that rapid – but with the same justice who authored the dissent in the first decision still there to author the majority to overrule it in the second – the court in *Gideon v. Wainwright*[16] rejected its prior ruling in *Betts v. Brady*.[17] Speaking through Justice Hugo Black, the court in *Gideon* held that the fundamental justice guaranteed by constitutional due process entitled every person criminally accused, whether rich or poor, to the assistance of an attorney. Accordingly, the court ruled, contrary to its *Betts* decision 21 years earlier, that indigent defendants who could not afford a lawyer on their own were indeed entitled to counsel provided by the government.

As students of the court's history know, *Gideon* was one of a series of decisions which, in short order, overturned an entire body of constitutional caselaw. Rights of the accused, which had previously been assertible only in federal prosecutions under the Bill of Rights, were made applicable against the states, despite earlier decisions rejecting such application.[18] Among those rights made applicable to the states were the protection against unreasonable searches and seizures, against cruel and unusual punishment, against compulsory self-incrimination and against double jeopardy, as well as the right to confront adverse witnesses, to a speedy trial and the previously discussed rights to a jury trial and to counsel.[19]

That was not the only period in which the Supreme Court engaged in a wholesale overruling of precedents. The famous "switch in time that saved nine" in 1937 resulted in the discarding of an entire body of

Lochner-era jurisprudence.[20] Beginning with its 5–4 decision in *West Coast Hotel Co. v. Parrish*,[21] upholding a minimum wage law, followed within days by another 5–4 split in *NLRB v. Jones & Laughlin Steel Corp.*,[22] upholding the right of workers to unionize, the court dismantled the caselaw that had defined its prior rejection of economic protections for workers, children, consumers and other vulnerable participants in the marketplace.

There is not much clamor in current public debate for a return to the free market excesses of the *Lochner* era, to prosecutions without the right to counsel, to criminal investigations without search and seizure protections, to racial segregation, to anti-miscegenation laws or to various other formerly approved aspects of American life, even though they had all been endorsed by Supreme Court precedents. To the contrary, the landmark decisions that later overruled those precedents are mostly taken for granted today and celebrated as part of our national heritage.

But, to be sure, none of this is to suggest that overruling precedents is an unalloyed good, nor to suggest that a change in views at the Supreme Court is always to be welcome. Beyond that, the controversies that surround a revision of constitutional law do not always evaporate.

So it is with *Roe v. Wade*. Whatever else can be said about that decision, the controversy around it has not dissipated. And as said earlier, if that decision should be reaffirmed, it's not because it is a precedent – even a 50-year-old one – but rather because the strong interests that it protects are viewed as outweighing the competing ones.

If, on the other hand, *Roe* should be overruled, it should not be on the basis of political partisanship, or personal religious beliefs, or utter dismissal of competing interests, or taking sides in a culture war or, relatedly, disdain for the still-developing legal protection of women's rights – let alone on the basis of woefully flawed constitutional arguments.[23] But that is another topic.

For now, suffice it to say that the doctrine of *stare decisis* is not what ultimately makes or breaks a decision – especially a constitutional one. And overruling a constitutional precedent may well be a virtue as often as a vice.

Vincent Martin Bonventre is Justice Robert H. Jackson Distinguished Professor of Law at Albany Law School and director for the Center for Judicial Process.

Endnotes

1. 410 U.S. 113 (1973).

2. *See* Josh Gerstein and Alexander Ward, *Supreme Court Has Voted To Overturn Abortion Rights, Draft Opinion Shows*, Politico, May 2, 2022, https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

3. *See* Library of Congress, Table of Supreme Court Decisions Overruled by Subsequent Decisions, http://constitution.congress.gov/resources/decisions-overruled.

4. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (*citing* numerous constitutional decisions that had already been overruled at that time).

5. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991).

6. 347 U.S. 483 (1954).

7. 163 U.S. 537 (1896).

8. For the fascinating and suspenseful story behind the *Brown* decision, *see* David M. O'Brien, Justice Robert H. Jackson's Unpublished Opinion in *Brown v. Board:* Conflict, Compromise, and Constitutional Interpretation (Univ. Press of Kansas, 2017).

9. The tale of the *Brown* decision and its aftermath are well summarized in Henry J. Abraham and Barbara A. Perry, Freedom and the Court: Civil Rights and Liberties in the United States, 8th ed., 390–401 (Univ. Press of Kansas, 2003).

10. 388 U.S. 1, 5 n. 4 (1967).

11. *See* O'Brien, *supra* note 8, at 99–103, 116–17.

12. 106 U.S. 583 (1883).

13. *Loving*, *supra* note 10, 388 U.S. at 10.

14. 319 U.S. 624 (1943). One should never bypass an excuse to quote Justice Jackson in some of the most glorious words in constitutional history: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *Id.* at 642.

15. 310 U.S. 586 (1940).

16. 372 U.S. 335 (1963).

17. 316 U.S. 455 (1942).

18. The very best discussion of this nationalization of federal constitutional rights is in Abraham and Perry, *supra* note 9, at 33–175: ch. 3, The Bill of Rights and Its Applicability to the States, and ch. 4, The Fascinating World of "Due Process of Law."

19. In order as mentioned: *Mapp v. Ohio*, 367 U.S. 643 (1961) (unreasonable search and seizure); *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment); *Malloy v. Hogan*, 378 U.S. 1 (1964) (compulsory self-incrimination); *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy); *Pointer v. Texas*, 380 U.S. 400 (1965) (confront adverse witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Duncan v. Louisiana*, 39 U.S. 145 (1968) (jury trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (assistance of counsel).

20. The era of laissez faire jurisprudence, named after the decision in *Lochner v. New York*, 198 U.S. 45 (1905), where the court invalidated a state law setting maximum working hours, just as it had invalidated numerous other federal and state social welfare legislation, came to an end in 1937. Amidst President Franklin Roosevelt's plan to pack the court by expanding its membership beyond nine, Chief Justice Charles Evan Hughes and Justice Owen Roberts joined Justices Louis Brandeis, Benjamin Cardozo and Harlan Stone to uphold such laws.

21. 300 U.S. 379 (1937).

22. 301 U.S. 1 (1937).

23. I have written elsewhere about the "nonsensical, ahistorical, and contra-constitutional argument[s]" in the leaked Alito opinion – i.e., there is no constitutional right to choose because "it's-not-in-the-text" of the Constitution and because it's not "rooted in the Nation's history and tradition." Those tests would negate most of our cherished landmark decisions. *See The Leaked Opinion – Constitutional Nonsense Revisited* (Part 1 and Part 2) in New York Court Watcher, http://newyorkcourtwatcher.com.

Constitution Day Is Sept. 17 – Join the Celebration!

By Hon. Jonah Triebwasser

Citizens of the United States have celebrated Independence Day and Presidents Day since the 1870s, and in 2005, the nation began to celebrate Constitution Day. Also known as Citizenship Day, Constitution Day is an American holiday honoring the day 39 delegates to the Constitutional Convention signed the United States Constitution. This historic date was Sept. 17, 1787.

Civic education has long been a core commitment of NYSBA's Law, Youth and Citizenship Committee. As part of that mission, we would like to enlighten the bar and the public about Constitution Day. Toward that goal, we offer the following two articles. The first is a historical overview by the Hon. Albert Rosenblatt, retired Court of Appeals judge and president emeritus of the Historical Society of the New York Courts. The second article is a conversation between attorney Jennifer Letitia Smith and Laetitia Nyavingi Kasay Basondwa about her immigrant experience. A native of the Congo, Basondwa is now an immigration attorney.

Join the Celebration!

To mark the occasion, the Law, Youth and Citizenship Committee will be hosting a naturalization ceremony on Sept. 16, 2022, in Poughkeepsie, home of the New York convention that ratified the U.S. Constitution.

We encourage members of the association to speak at their local schools on or about Constitution Day (virtually or in person) about the protections offered in the Constitution, as well as to become more involved with school programming generally, be it by coaching mock trial teams, offering Law Day programs or lawyer-in-the-classroom sessions with the distribution of our pocket Constitutions. We will be using NYSBA's social media accounts to promote the holiday and to educate the public.

Please join us in spreading the word about Constitution Day. For more information, or to obtain copies of the pocket Constitutions, please email Kim Francis at kfrancis@nysba.org.

Hon. Jonah Triebwasser is Constitution Day Subcommittee Chair, NYSBA Law, Youth and Citizenship Committee. Judge Triebwasser brings over 50 years of experience to the bench as a police officer, investigator, attorney, prosecutor and judge. He has served as town and village justice in Red Hook, Dutchess County, since 2007.

Constitution Day: How the States Put Aside Differences To Become 'We the People'

By Albert M. Rosenblatt

On Sept. 17, we commemorate the signing of the United States Constitution in Philadelphia on that day in 1787. That was 235 years ago; not as round a number as 100 or 250, but it will do nicely, as the 70th time we are doing it. On Feb. 29, 1952, by joint resolution, Congress designated Sept. 17 as "Constitution Day and Citizenship Day."[1]

Beginning with the words "We the People," the U.S. Constitution began as a blueprint for governance. It did not emerge full-grown, but had followed a decade of experience in self-rule, with a good deal of borrowing from the state constitutions that preceded it by a decade.

The Constitution was our second try at binding ourselves together. Not long after the Declaration of Independence of July 4, 1776, the fledgling states crafted the Articles of Confederation – our first attempt at forging political bonds, but as a confederation, not as an indivisible nation.[2] The articles contemplated no unitary executive nor any meaningful national power over commerce or taxation. In foreign affairs the country could not speak with one voice; each state had its own say.

The question of the hour was whether to amend the articles and improve them or scrap them entirely in favor of a new arrangement.

The Constitutional Convention in Philadelphia, 1787

Virginia called for a convention, and only four other states – New Jersey, Pennsylvania, Delaware and New York – attended in Annapolis, Maryland in mid-September 1786. They recommended a general convention of the states to meet in Philadelphia to consider amending and revising the Articles of Confederation.[3]

It was not an easy business. There were serious divisions both as to the means and to the ultimate objective. We had been a British colony for about a century and had grown weary of our political dependance on England. In trying to establish self-rule, we had no stomach for a monarchy, but we knew that some form of executive power was necessary, as well as a lawmaking body. Many liked the Athenian ideal that allowed all citizens to have a voice, but we knew we could not assemble the population to vote on whether a road needed patching. The task was complicated by the nature of the participants – former colonies, now called "states," some more commercially powerful than others, each with its own currency and each having operated for several years under its own self-styled constitution.

How was power to be divided under a new, centralized format? Could we successfully separate power among the different branches of a centralized government? Would the branches be able to check and balance each other so that one branch could not devour another?

And what would become of the states? The citizens had come to see their state governments as protecting their rights and liberties. Would a strong central government overpower the states only to rule the population from afar?

In the spring of 1787, New York's Legislature chose Alexander Hamilton, John Lansing, Jr. and Robert Yates as its delegates to the Constitutional Convention in Philadelphia.[4] Divisions soon sharpened between delegates who wanted merely to amend the Articles of Confederation, retaining a good deal of state power, and those who wanted to fashion a new constitution, by which the states would have to yield power – a major sticking point for states like New York, which was in no hurry to give up its commercial advantages.

Governor George Clinton and Melancton Smith, along with Lansing and Yates, were New York's chief proponents of the amendment route, with Hamilton in the other corner. By June 1787 matters came to a head.

James Madison had come to appreciate that New York "would never have concurred in sending deputies to the convention, if she had supposed the deliberations were to turn on a consolidation of the States, and a National Government."[5]

Eventually, though, the convention committed itself to creating a strong central government. In mid-July, Yates and Lansing walked out of the convention, never to return, leaving only Hamilton as New York's delegate.[6]

On Sept. 17, 1787, the delegates, including Hamilton, signed the Constitution and sent it to Congress.[7] In his diary, George Washington wrote: "Met in Convention when the Constitution received the Unanimous assent of 11 States and Colo. Hamilton's from New York. . . ."[8]

Ratification Conventions, State by State

Writing the Constitution was one thing, but getting the states to agree to it was another. Congress could not lawfully authorize the change in concept to a new "Constitution," so it was necessary to submit the Constitution to each state, for them to buy into it (to "ratify" it) or not.[9] This set the stage for ratification conventions in each state, with New York's in Poughkeepsie, the capital at the time, during the summer of 1788. In Article 7, the Constitution stipulated that if and when nine states were to ratify, the Constitution would take effect.[10]

Given their fears that an unknowable centralized government could swallow up too much power, some delegates wanted a declaration – a bill of rights – to protect the citizenry against a federal government. As drafted, the Constitution contained no such provision, and some delegates, particularly at New York's Ratification Convention, fiercely resisted ratification without a set of amendments as a check against the federal government. At first, New York tried to ratify on condition that a bill of rights would follow, but when that failed, the delegation, led by Melancton Smith, agreed to ratify "in full confidence" that the Bill of Rights would later be enacted – as it was, in 1791.[11] Smith had also balked at

the Constitution's three-fifths clause, which strengthened the power of slave states. The Constitution did not refer directly to slaves, as it did not use the term "slave" or "enslaved" or "slavery," but the language of Article 1, Section 2 of the Constitution declared that "any person who was not free would be counted as three-fifths of a free individual for the purposes of determining congressional representation." The clause, commonly known as the "three-fifths clause," served as an additional inducement for slave states to expand their enslaved population. The more people who were enslaved in any state, the greater the state's representation in Congress, thus increasing the political clout of the slave states. The clause was among the framers' concessions to the South, out of the concern that the South would not join the Union without allowances of that kind. The clause, however, gave the South enough political muscle to advance the enactment of such notorious federal laws such as the Fugitive Slave Acts of 1793 and 1850, designed to apprehend and return runaway slaves, without a semblance of due process.

At New York's Constitutional Ratification Convention, Melancton Smith summed up the three-fifths clause with a characterization that has stood the test of time. "What adds to the evil," he wrote, "is, that . . . for every cargo of these unhappy people which unfeeling, unprincipled, barbarous and avaricious wretches may tear from their country, friends and tender connections, and bring into those States, they are to be rewarded by having an increase of members in the General Assembly."[12]

Due Process of Law

In its ratification statement, prompted by Smith and John Lansing, New York proposed language for a list of amendments, including the phrase "due process of law." James Madison adopted those very words in framing the Fifth Amendment.

The concept, if not the precise coinage itself, was not unknown to New Yorkers in 1788. It gives us reason to celebrate not only the United States Constitution, but New York's first Constitution (1777), which used the phrase "law of the land" to convey the idea of due process and the rule of law. Also, in 1787, New York had enacted a statutory bill of rights declaring that "no citizen of this State shall be taken or imprisoned or be disseised . . . but by lawful judgment of his or her peers or by *due process of law*."[13]

And so, we New Yorkers have not one but two documents to which we look for our governance. The United States Constitution has been amended infrequently over the years.[14] In contrast, New York's Constitution has had many amendments, as voters well know from their yearly balloting.

There have been several constitutions and constitutional conventions in our state history, in 1821, 1846, 1867, 1894, 1938 and 1967.[15] In 2017, the editors of this Journal called for a constitutional convention, devoting an entire issue to the prospect, to deal with the environment, the court system, home rule and other important initiatives.

A constitution, earnestly conceived and followed, is a remarkable achievement, setting out the polity's highest ideals. The Constitutions of the United States and of New York contemplate democratic governance by the people, under the rule of law. Over the long span of history, they contrast with rule by monarchy, by divine right or by force. Enjoy the celebration.

Albert M. Rosenblatt was a New York chief administrative judge and served on the Court of Appeals. He teaches at NYU Law School and is of counsel to the law firm of McCabe and Mack in Poughkeepsie.

Endnotes

1. 36 U.S.C. § 106; *A Proclamation on Constitution Day and Citizenship Day, and Constitution Week, 2021*, White House, Sept. 16, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/16/a-proclamation-on-constitution-day-and-citizenship-day-and-constitution-week-2021/.

2. Merrill Jensen, ed., The Documentary History of the Ratification of the Constitution: Volume I, Constitutional Documents and Records, 1776–1787, (1976) at 78–94.

3. For the text of the Annapolis Convention Report of Sept. 14, 1786, *see* https://founders.archives.gov/documents/Hamilton/01-03-02-0556.

4. John Kaminski, ed., The Documentary History of the Ratification of the Constitution, Vol. XIX, 514–25 (Kaminsky); *see also* Stephen L. Schechter, ed., The Reluctant Pillar (1985), 59–60, choosing Alexander Hamilton, John Lansing and Robert Yates (Poughkeepsie Country Journal, March 14, 1787, 5).

5. *See* James Madison's Notes of the Constitutional Convention (June 16, 1787), https://www.consource.org/document/james-madisons-notes-of-the-constitutional-convention-1787-6-16/.

6. The convention approved Virginia's resolution on June 19, 1787; Lansing and Yates left Philadelphia on July 10, 1787, *see* Kaminski, Vol. XIX at 102; *see also*, Susan Westbury, Robert Yates and John Lansing, Jr., *New York Delegates Abandon the Constitutional Convention*, New York History, 82, no. 4 (2001): 313–35, http://www.jstor.org/stable/42677797. In a Dec. 21, 1787 writing, published in *New York Journal* on Jan. 14, 1788, and in the *Pennsylvania Evening Herald* on Jan. 19, 1788, Lansing and Yates explained their departure. https://archive.csac.history.wisc.edu/assessments_25.pdf.

7. Kaminski, Vol. XIX at lxxxv; Washington's cover letter presenting the Constitution to Congress, https://www.let.rug.nl/usa/documents/1786-1800/the-letter-presenting-the-constitution.php.

8. For Washington's diary entry of Sept. 17, 1787, *see* https://founders.archives.gov/documents/Washington/01-05-02-0002-0009-0017. As to Hamilton's signing, see Michael Coenen, *The Significance of Signatures: Why the Framers Signed the Constitution and What They Meant by Doing So*, 119 Yale L.J. 966, 991–92 (March 2010).

9. Nathan Dane made the motion on Sept. 26, 1787. *See* The Documentary History of the Ratification of the Constitution, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan, University of Virginia Press, 2009, https://archive.csac.history.wisc.edu/confederation_7.pdf (Dane's motion, Sept. 26, 1787).

10. 33 Journal of the Continental Congress 549, https://www.loc.gov/resource/bdsdcc.22801/?st=gallery.

11. Kaminski, Vol. XXII at 1673–74; Volume XXIII at 2279–80; New York Daily Advertiser, July 28, 1788, 2; Poughkeepsie Country Journal, July 29, 1788, 2; *see also* Poughkeepsie Country Journal, July 22, 1788, 2 (reporting on the events of July 16 and 17, 1788).

12. Kaminski, Vol. XIX, 253.

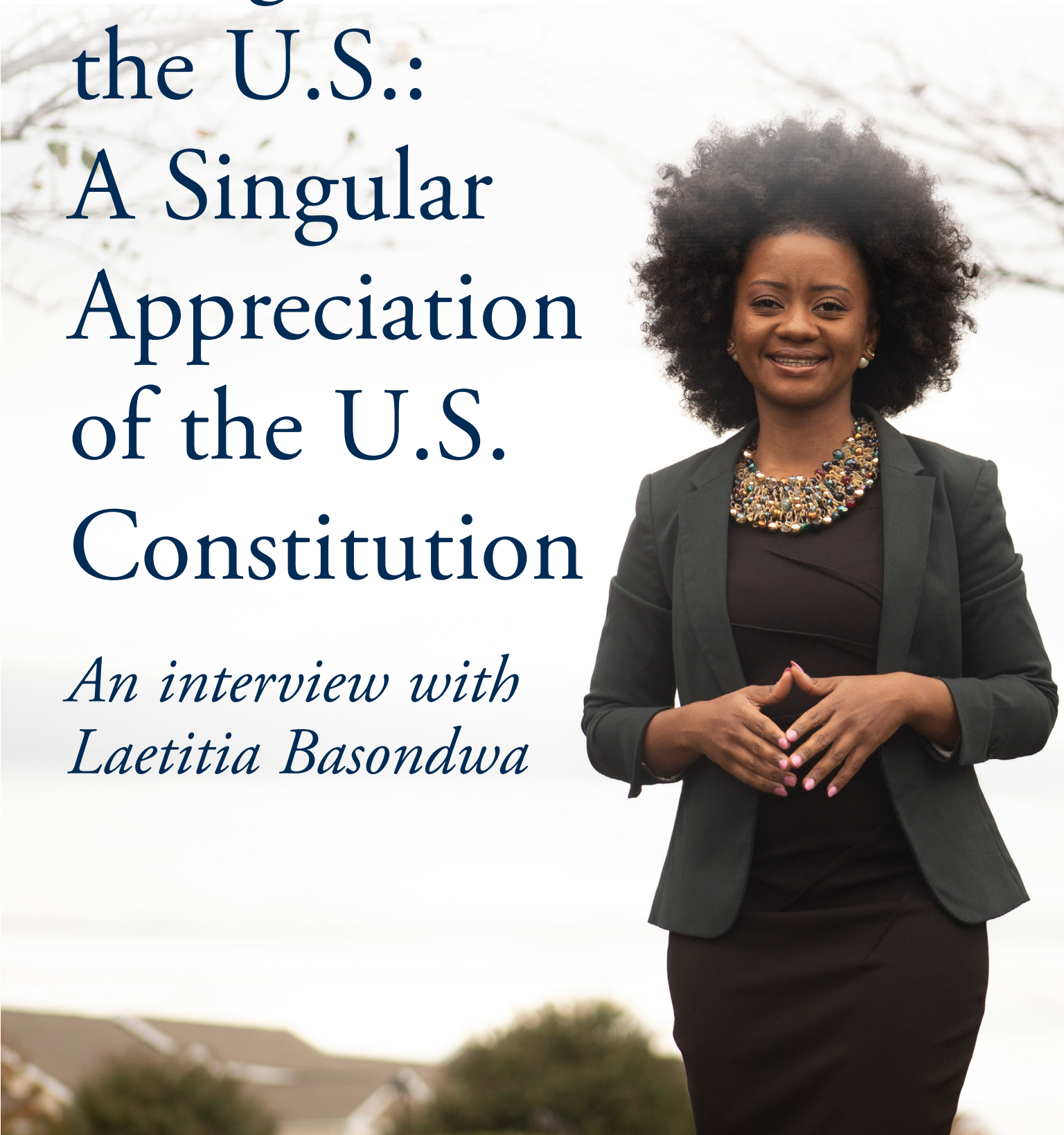
13. New York Bill of Rights, Jan. 26, 1787, https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_New-York-Bill-Of-Rights.pdf (emphasis added).

14. *See* Richard B, Bernstein, Amending America (Univ. Press of Kansas, 1993).

15. *See* Peter Galie, Ordered Liberty, A Constitutional History of New York (1996); Peter J. Galie and Christopher Bopst, The New York State Constitution (Oxford Univ. Press, 2012).

From the Congo to the U.S.: A Singular Appreciation of the U.S. Constitution

An interview with Laetitia Basondwa



In recognition of Constitution Day, Jennifer Smith spoke with Laetitia N. Basondwa. Basondwa was born and grew up in the Democratic Republic of Congo, also known as Congo-Kinshasa. She became a naturalized citizen of the United States and currently practices law in the Washington, D.C. area. The two met through NYSBA's Law, Youth and Citizenship Committee.

SMITH: What is your coming to the United States story?

BASONDWA: Every year, approximately 55,000 individuals apply for visas to enter the U.S. through a program known as the diversity lottery. The diversity lottery allows citizens from countries with historically lower volumes of immigration to the U.S. to apply for the program. The winners are determined through a random drawing from among millions of people who enter each year. I was one lucky recipient of the program and decided in 2009 to give myself a chance to experience my own version of the American Dream.

SMITH: What was the process of becoming an American citizen like? How important was the civics education aspect? Do you feel like you still have things to learn?

BASONDWA: The process was straightforward in my case. By the time I submitted my application for naturalization to the Department of Homeland Security, United States Citizenship and Immigration Services (USCIS), I had lived in the U.S. for more than five years and met all other citizenship eligibility requirements, e.g., adjudged to be of good moral character and continuously, physically resided in the U.S. for at least five years. I was working as a paralegal for a well-known immigration lawyer in the Maryland area who helped me complete and submit my application. After submission, the USCIS scheduled me for a fingerprint collection to run a criminal background check. Then, once I passed, I was scheduled for an interview with a USCIS agent. One interesting aspect of the naturalization process is the civics test, which I believe is unique to the U.S. citizenship process. Applicants must have a knowledge base of – and must study 100 questions about – U.S. government and history. During the interview an applicant must answer six of 10 questions correctly. There is no formal training or official material to prepare for the test, except to learn the answers to the 100 questions.

I studied U.S. history and government in high school and law school in the Congo, so the civics test was a good opportunity for me to revisit crucial aspects of the U.S. system and history that I already knew and helped me to contextualize new things as well. It also stimulated my curiosity to get clarity about American democratic values and important U.S. historical events and figures. For context, I applied for naturalization toward the end of the year 2014, in the middle of the Ferguson protests. At the time I was pursuing a master's degree at American University Washington College of Law and was struggling to comprehend what was happening in the U.S. My education about U.S. democratic values and history gave me a biased impression of the U.S. In general, American history programs in African schools do not cover some deplorable but crucial events and result in a perception of a perfect American society by young Africans.

SMITH: So, you are saying the U.S. is presented as a "shining City on a Hill" and some of the more painful episodes from our past, or times when the U.S. arguably has not lived up to its democratic ideals, have been glossed over or excluded altogether?

BASONDWA: Exactly. The U.S. is presented as the "Utopia." I remember absorbing things like the fictional Rambo character from the movies and the idea of the U.S. as a singular force. But after I had been living here for a few years and while preparing for the test, I learned it takes lots of people and time to achieve the Big Dream! And I was able to determine what values, historical events and figures are important to the American nation and what has made the United States the world's most powerful country. I was particularly fascinated by real-life people like Abraham Lincoln. I still have to learn more about figures like Alexander Hamilton and James Madison.

SMITH: You are an immigration attorney – did your experience of going through the immigration/naturalization process influence your choice of profession?

BASONDWA: Yes and no. My experience working as a paralegal and also volunteering to help at immigration service nonprofits influenced my decision to become a U.S. citizen. Immigration has always been a key issue in the United States. As a U.S. legal permanent resident and not a citizen, I had the right to live and work in the U.S. indefinitely but could not vote. I wanted to be able to vote and influence decisions on immigration. Because I came as a recipient of the diversity lottery visa, when I first arrived in the U.S. I was not aware of

the struggle some immigrants face after fleeing persecution in their country or while trying to reunite with loved ones. While helping immigrants obtain protection in the U.S., I was amazed by the U.S. immigration system and its uniqueness and wanted my contribution to have a greater impact. Going through the naturalization process gave me clarity about my contribution as a lawyer. As a first-generation American, I knew I could bring a unique perspective to the representation of immigrants and foreign businesses. As much as I recognize that the U.S. immigration system values and promotes basic human rights, it is also flawed. For example, the U.S. immigration laws attempt to protect immigrants who are survivors of domestic violence and victims of certain crimes, such as human trafficking. However, some people who have fled their countries as a result of persecution and have applied for protection pursuant to those laws have to wait for years for the adjudication of their application. Some of them have lost their family members while waiting.

SMITH: What do you wish more Americans understood about going through the immigration process?

BASONDWA: Citizenship through naturalization is a privilege, not a right.

SMITH: Let's circle back to our theme – the U.S. Constitution. What does it mean to you?

BASONDWA: "Government of the people, by the people, for the people." Before coming to the United States, I lived most of my life under an authoritarian regime. Democracy was a theory that I had learned in school and could only dream of. I experienced firsthand how a dictatorship can make use of a constitution as a weapon in politics and allow for the instrumentalization of the law and neutralization of values in law. Most countries under dictatorships amend their constitution to allow sitting presidents to remain in power indefinitely; some countries adopt a new constitution for the same purpose. My native country has changed its constitution four times in 20 years, and the current constitution has been amended a couple of times. Many will agree with me that the U.S. Constitution symbolizes the model (ideal) of democracy.

SMITH: How does the U.S. Constitution continue to impact your life today?

BASONDWA: The U.S. Constitution has played an essential part in my life and career, in a way that has allowed me to understand and comprehend that "justice" is not merely a concept or an idea frozen in time but the result of the people's will to live together as one nation and protect human life. When one looks at the different Supreme Court rulings related to issues like the right to privacy, you can see how the American society's approach has evolved in time. As an officer of the court I am honored and privileged to participate in the U.S. legal system.

SMITH: What is the thing you wish Americans would not take for granted about the Constitution?

BASONDWA: The Bill of Rights. My life journey started in a dictatorship. The Bill of Rights gives the U.S. Constitution its sacred aspect and makes it the "ideal" for other nations. The Bill of Rights is a document that defends majorities of people and minorities against abuses by governments (federal or state). It is the centerpiece in the "people's" continuous fight for liberty and equality, which are inalienable natural rights.

SMITH: It is fitting that you mentioned the importance of the Bill of Rights given your experiences living under what you describe as an "authoritarian regime." In his article, "Constitution Day: How the States Put Aside Differences To Become 'We the People,'" [in this issue] Judge Albert Rosenblatt reminds us that initially the Bill of Rights was not unanimously embraced by the framers; however, the view of those prescient convention delegates afraid "that an unknowable centralized government could swallow up too much power" eventually carried the day. What can we do to safeguard the U.S. Constitution and ensure its health and resiliency for the next 235 years and beyond?

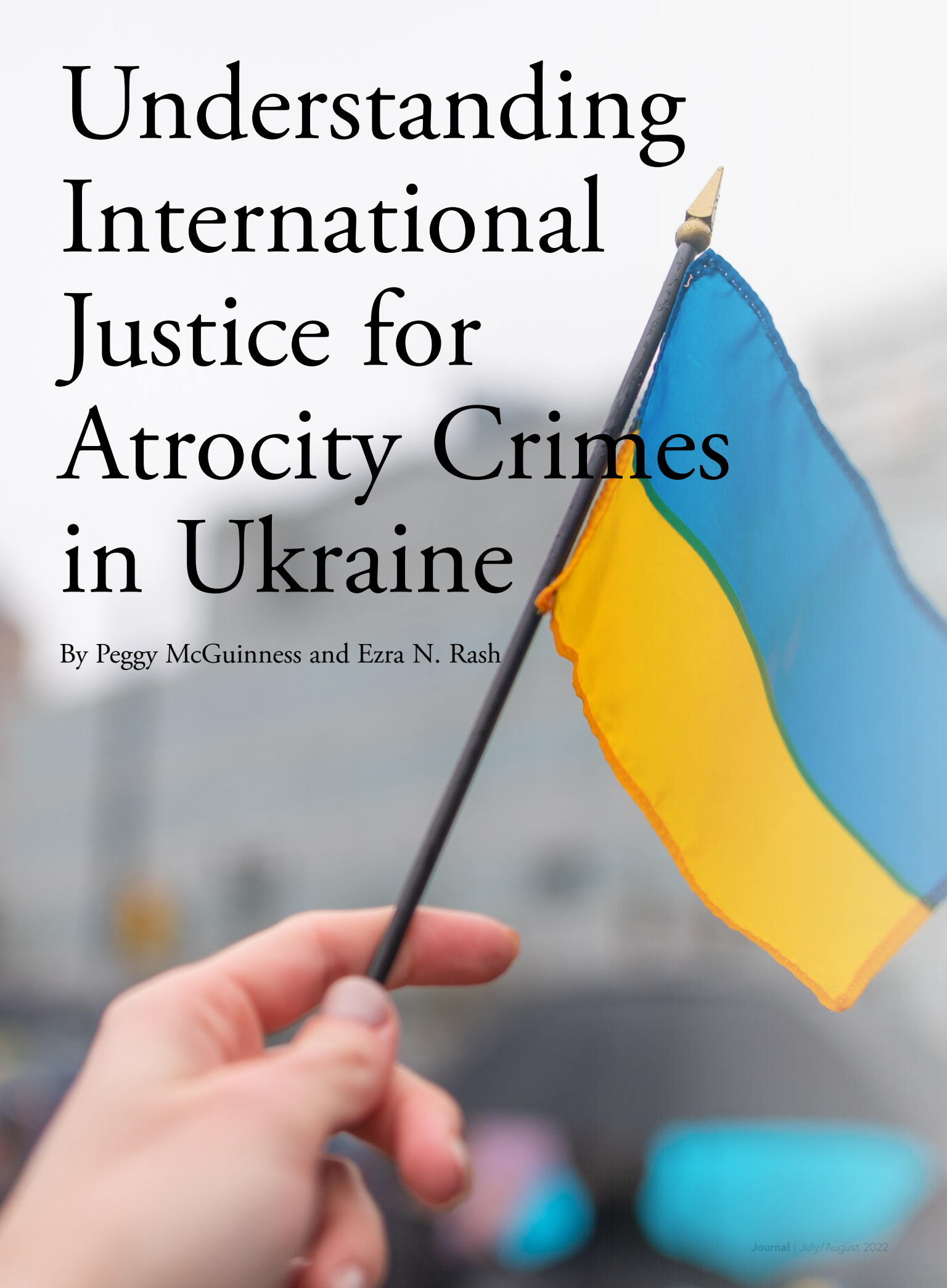
BASONDWA: I have always been amused by the artistic and cinematographic depiction of stories around the U.S. Constitution. Most of them result in a simplistic perception of, and in some cases undermine, the tremendous efforts, sacrifices and time required in the process of getting such a powerful document. Judge Rosenblatt does a great job of illuminating the truth of this process. As French speakers say, "Rome ne fut pas faite toute en un jour" (Rome wasn't built in a day), and the United States as a nation should understand that the ideals of equality, rights, liberty, opportunity and democracy take time to achieve and one should not be discouraged by challenges faced by one's generation in the pursuit of these ideals.

Laetitia Nyavingi Basondwa is managing attorney at Kasay Legal, an immigration and international business firm based in Silver Spring, Maryland. She holds bachelor's and master's degrees in law from the Protestant University of Congo, and an LLM from American University Washington College of Law.

Jennifer Smith is the executive director of the Equity in Law and Diversity Fund, a nonprofit working to promote access to justice and to diversify the legal profession through strategic partnerships and mentoring opportunities. Smith is a graduate of the Benjamin N. Cardozo School of Law.

Understanding International Justice for Atrocity Crimes in Ukraine

By Peggy McGuinness and Ezra N. Rash



In grainy security camera footage, men walk with their heads down across a damp suburban street, flanked by heavily armed Russian soldiers. In a second video, soldiers force the men to the ground. At least eight of the men will not be seen alive again. Instead, their dead bodies appear on drone footage, filmed a day later, two Russian soldiers standing nearby.[1] These are among the thousands of images splashed across every form of media platform that depict apparent atrocities carried out by Russian troops following Russia's invasion of Ukraine in February 2022. Other reports include repeated Russian bombings of apartment buildings and other civilian infrastructure, such as the March 16 bombing of a theater in Mariupol sheltering families, an event that killed hundreds.[2] According to a May 18 report from Human Rights Watch, Russian forces in northeastern Ukraine "subjected civilians to summary executions, torture, and other grave abuses that are apparent war crimes."[3]

As evidence mounts of atrocities in Ukraine, discussions have turned increasingly to questions of justice for the victims: Can anyone be held accountable for these crimes? What exactly do war crimes entail? Are these acts "crimes against humanity"? Do they constitute acts of genocide? How, where, and by whom can perpetrators be prosecuted? The answers to these questions can be found in international law; specifically, in the law governing armed conflict and atrocity crimes.

State and Individual Accountability Under International Law

International law regulates the conduct of states within the international system. Legal rights and obligations of states are created through (1) treaties, which reflect state consent to be bound by law, and (2) customary international law, which is based on state practice carried out with a sense of legal obligation. Some customary international legal rules are recognized as so fundamental that they are non-derogable; they cannot be suspended for any reason, including during times of war. These *jus cogens*, or peremptory norms include the prohibitions against genocide, torture, and crimes against humanity.

States in breach of their international law obligations may face a variety of consequences, including political and economic sanctions applied by other states, punitive actions within international organizations, and, if a state has consented, adjudication before an international arbitral tribunal or court. Lawful countermeasures taken against states may, in some circumstances, also include the defensive use of force.

Since February, Russia has faced multiple legal and political sanctions in response to its invasion of Ukraine, including expulsion from the Council of Europe,[4] European Union efforts to phase out importation of Russian crude oil, freezing the assets of Russia's central bank, and the seizures of assets of individuals and Russian businesses by dozens of states around the globe.[5] However, there is no mechanism to prosecute a state for international crimes. And since Russia is a permanent member of the Security Council, it may, and has, used its veto to block any binding legal action against it at the United Nations.

Until the Allied prosecutions of German Nazi leadership at Nuremberg following World War II, individuals were generally not subject to direct legal responsibility under international law. Whether an individual was prosecuted for a violation of the laws of war was a decision within the discretion of the state in which the person was located. Today, international law distinguishes between the responsibility of states for breaches of their international obligations and the international criminal responsibility of individuals for breaches of international law.

The Nuremberg precedent established that international law may (1) define the content of criminal law applicable to individual conduct, and (2) create prosecutorial mechanisms and courts to hold individuals responsible for criminal violations of international law. Importantly, the Nuremberg tribunal recognized that, even if domestic law does not criminalize an act that constitutes a crime under international law, an individual may be held criminally liable under international law.[6] Individuals may be held liable under international law even if they acted as a head of state, as a government official or under orders from a superior.[7] These principles were invoked in the U.N. Security Council resolutions, which created the war crimes tribunals for the former Yugoslavia (1993) and Rwanda (1994)[8] and later formed the basis for the creation of the permanent International Criminal Court in 2002.[9] The central rationale of international criminal law is to eliminate individual impunity for the most offensive and universally condemned criminal acts and provide a mechanism for justice and redress for the victims and survivors of war crimes and atrocities.

Distinguishing Genocide, Crimes Against Humanity, War Crimes and the Crime of Aggression

Genocide, crimes against humanity and war crimes are each separate legally defined categories of international crimes with distinct elements. The collective term "atrocity crimes" is used to refer to all three crimes, in recognition of their status as "the most serious crimes against humankind."[10] Together with the crime of aggression, these are the core international crimes, as defined in the ICC-Rome statute.[11]

Genocide

The legal definition of genocide is codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The

convention exhaustively lists five prohibited acts: (1) killing members of the group, (2) causing serious bodily or mental harm to members of the group, (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, (4) imposing measures intended to prevent births within the group, and (5) forcibly transferring children of the group to another group.[12] These acts may constitute genocide if "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[13] It is the specific intent element – to cause physical destruction of a national, ethnical, racial or religious group – that makes genocide both unique and difficult to prosecute.[14] The destruction of nationality, as opposed to the systematic extermination of national populations, is not considered genocide. Thus, even though Russia has openly stated its intention to "destroy Ukrainian statehood and identity," this is unlikely to constitute genocidal intent under international law.[15]

Crimes Against Humanity

The ICC-Rome Statute defines a crime against humanity as the commission of certain acts, such as murder, extermination, enslavement, deportation, torture, and rape and sexual violence "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[16] Isolated acts are therefore not considered crimes against humanity (but may nonetheless constitute war crimes, as discussed below). Moreover, Article 7(2)(a) of the ICC-Rome statute requires "a course of conduct involving the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack."[17] Unlike the crime of genocide, there is no requirement that crimes against humanity target a particular group, only that the victims be civilians. Additionally, there is no specific intent element to prove.

War Crimes

International Humanitarian Law, also called the law of armed conflict, laws of war or the *jus in bello*, regulates the conduct of states during war. The Hague Conventions of 1907, the Geneva Conventions of 1949 and their protocols of 1977, together with customary international law, provide the core legal principles of the International Humanitarian Law: distinction between combatants and civilians, proportionality of the force used and military necessity of the use of force and its targets.[18] The law provides special protection against targeting for non-combatants, including injured armed forces, prisoners of war, medical and religious personnel, humanitarian workers, civil defense staff and civilians.[19]

War crimes are defined in Article 8 of the ICC-Rome Statute as "grave breaches of the Geneva Conventions of 1949" or "other serious violations of the laws and customs applicable in international armed conflict" or applicable "in an armed conflict not of an international character."[20] War crimes only occur in the context of armed conflict, unlike genocide and crimes against humanity. War crimes can be committed against combatants or non-combatants, whereas crimes against humanity are committed against civilian populations. Individual acts can constitute a war crime, which need not be widespread or systematic. Any grave breach of the 1949 Geneva Conventions or serious violation of international humanitarian law can qualify as a war crime.

A grave breach of the Geneva Conventions can be the willful killing of civilians, torture, willfully causing "great suffering, or serious injury to body or health," and "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[21] Conduct that involves the "breach of a rule protecting important values" can also be considered serious enough to rise to the level of a war crime.[22]

Aggression

The U.N. Charter prohibits a member state from the threat or use of force against the territorial integrity or political independence of another state, unless the use of force is taken in self-defense or under the authority of the Security Council. The prohibition on aggression thus constitutes a core commitment of all U.N. member states. The ICC-Rome Statute was amended in 2010 to include the crime of aggression within its jurisdiction.[23] Based on the precedent of the Allied powers prosecuting the crime of aggression (which was called "crimes against peace") against individual defendants at Nuremberg, the ICC-Rome Statute defines the crime of aggression as the "planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which . . . constitutes a manifest violation of the Charter of the United Nations."[24] The evidence appears clear that Russia invaded Ukraine in violation of the prohibition against aggression, raising the question whether any individual leaders can be held criminally liable.

Investigation and Prosecution of War Crimes: National and International

War crimes may be investigated and prosecuted on both the international and domestic level. In general, a state may only prosecute through domestic courts (civilian or military) those war crimes that occur on its territory or which are committed by its citizens or residents. A state may also invoke the principle of universal jurisdiction to pass laws that permit its government to investigate and prosecute war crimes that occur outside of its territory and which do not involve its citizens or residents. At the international level, states may invoke the jurisdiction of the

ICC (for those states that have consented) or create special, ad hoc tribunals for prosecution of international crimes.[25] These mechanisms of international criminal law reflect the primacy afforded to national prosecutions through the principle of complementarity: international prosecutions generally only step in where domestic governments are unwilling or unable to prosecute.[26]

Investigations and Fact-finding

Official, formal investigations can occur on the national and international level, and are frequently supplemented by the unofficial work of journalists, non-governmental organizations and "citizen reporters" whose documentation through photos, videos and first-hand accounts provide important information for future prosecutions. At the international level, on March 4 the U.N. Human Rights Council created a Commission of Inquiry into the war in Ukraine "to investigate all alleged violations and abuses of human rights and violations of international humanitarian law."[27] And the ICC Office of the Prosecutor launched a formal investigation into potential crimes in Ukraine on March 2.[28]

On the ground in Ukraine, much of the fact-finding is being accomplished by Ukrainian human rights groups who have been documenting violations since the 2014 Russian annexation of Crimea. These civil society efforts serve to support the Ukrainian government's national prosecutions as well as international investigations. In addition, international human rights NGOs, like Human Rights Watch, have been documenting and reporting on potential war crimes. In April 2022, Human Rights Watch published a report documenting summary executions, rape and unlawful violence and threats of violence against civilians, and the looting of civilian property. All these acts constitute grave breaches of the 1949 Geneva Conventions. Investigations generally take months to years to be completed and include interviewing witnesses and collecting forensic, photo and video evidence. (We have included a list of websites that are collecting information on war crimes and atrocity crimes in Ukraine.)

National Prosecutions

National law and national courts are the primary mechanisms for the prosecution of war crimes. Under the Geneva Conventions, states are required to try those within their jurisdiction who have allegedly committed grave breaches of the conventions, and under the ICC-Rome Statute it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[29] In the United States, the Uniform Code of Military Justice and the War Crimes Act of 1996 make a grave breach of the Geneva Conventions a crime under domestic law – but only "where the person who commits such breach or the victim of such breach is a member of the U.S. armed forces or a U.S. national."[30] A bipartisan bill introduced to the Senate on May 16, 2022 would expand jurisdiction to any offender "present in the United States, regardless of the nationality of the victim or offender."[31] This adoption of universal jurisdiction would allow the United States to prosecute any individuals for war crimes committed anywhere in the world against any nationality.

International Prosecutions

The ICC is the only permanent international criminal court. It investigates and prosecutes war crimes and atrocity crimes. Over 120 countries have joined the treaty that created the ICC, though the United States, Russia and Ukraine have not. Even though Ukraine is not a party to the treaty establishing the ICC, the government made two declarations accepting the court's jurisdiction over crimes committed on Ukrainian territory.[32]

State parties to the ICC are obligated to arrest and surrender indicted suspects for whom the ICC has issued international arrest warrants.[33] Cases can be brought against those who order or condone war crimes, even if they did not personally carry out the act. This "command responsibility" is determined by the overall control test – the defendant must have "a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping the group or providing operational support to it."[34] It is highly unlikely that Russia will turn over any high-level officials to the ICC. Thus, chances are slight that Putin or his senior leadership will be held accountable for any war crimes – or other atrocity crimes – committed in Ukraine. Because of this difficulty, some legal experts are calling for an international tribunal to try those individual Russian leaders responsible for the blatant crime of aggression against Ukraine, just as Nazi party leaders were prosecuted at Nuremberg.[35]

Prosecutions in Ukraine

At the domestic level, as of late May, Ukraine's prosecutor general had opened over 9,000 investigations into war crimes and crimes against humanity. Ukraine's prosecutor formed a joint investigation team with prosecutors from Lithuania and Poland, participation from the ICC prosecutor and support from the EU's Agency for Criminal Justice Cooperation. This investigation bridges domestic, regional and international bodies.[36] A Ukrainian court has already convicted one detained Russian soldier for war crimes under its domestic war crimes statute, for the killing of a 62-year-old civilian on Feb. 28, 2022.[37] The soldier told Ukrainian investigators that he was ordered to kill the man, who was riding on a bicycle and talking on a phone, so that the civilian would not report his location. The court found the soldier guilty of "violating the laws and customs of war" and of committing premeditated murder. He was sentenced to life in prison.

All national war crimes prosecutions must meet international human rights obligations for fair trials and full

procedural due process, whether they occur in Ukraine, Russia or any other country or territory. The International Convention on Civil and Political Rights, to which both Ukraine and Russia are parties, provides a right to "a fair and public hearing."[38] The 1949 Geneva Conventions and the ICC-Rome Statute also require fair trials, the denial of which is a war crime per se.[39] The international community's response to the Russian invasion of Ukraine and the subsequent reports of atrocities emerging from Ukraine create an opportunity to strengthen the systems of international law that deliver justice for these offenses. Successfully delivering justice in Ukraine, however long it may take, can serve to reinforce the architecture of international criminal law – building support for justice mechanisms in other parts of the world in which atrocities have taken place or are continuing. As we rightly focus attention on the atrocities in Ukraine, the international community must also continue to pursue justice for victims of atrocities in other conflicts and across the globe.

Some organizations investigating atrocities committed in Ukraine:
Human Rights Watch
Amnesty International
Public International Law Group
Prosecutor General of Ukraine

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Endnotes

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11. ICC-Rome Statute, *supra* note 9, at art. 5.

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20. ICC-Rome Statute, *supra* note 9, at art. 8(2)(c).

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23. I.C.C. Res. RC/Res.6 (June 11, 2010).

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25. *See, e.g.,* S.C. Res. 1757 (May 30, 2007) (establishing the Special Tribunal for Lebanon); Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003.

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38. International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171.

39. Geneva Convention Relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 6 U.S.T. 3316; 75 U.N.T.S. 135; ICC-Rome Statute, *supra* note 9, at art. 8(2)(a)(vi).

Will Rules of War Survive Russia's Aggression in Ukraine?

By Michael Diederich, Jr.

Since late February, the world has witnessed the day-to-day horrors of Russia's armed aggression in Ukraine. Russia's indiscriminate bombardment of Ukrainian cities, towns and villages has left massive destruction in its wake. Apartment buildings, hospitals and schools have been destroyed, and there are gruesome scenes of bodies of civilians in the streets, some bound and shot in the head execution-style. Many argue that Russia and its leader, Vladimir Putin, have and are committing "war crimes," including genocide, suggesting that international law may have been violated.

A Retired Army Lawyer's Perspective

The rules for war have interested me since childhood. My dad served in combat, fighting Nazi Germany. Airmen were told to surrender to German troops, who would respect the Geneva Convention of 1929[1] regarding prisoners of war, whereas German civilians would kill you. The notion of honor or morality when involved in warfare intrigued me, as it has to this day. Along the way, I spent a good deal of time during my own 29 years of active and reserve military service instructing soldiers and military leaders in the "law of armed conflict" (law of war). Convincing the young soldier, the West Point cadet, and even seasoned soldiers and officers that war has legal rules was often a challenge. After all, isn't it the military's goal to kill or maim as many of the enemy as possible?

Naïve me assumed that most war crimes in the 21st century result from unthoughtful troops, rather than government. After all, my JAG colleagues and I always instructed American troops to abide by the Geneva Conventions and other international law. It was, to me, beyond comprehension[2] that the leader of a nation that is a permanent member of the United Nations Security Council would start the first major war on European soil since World War II and become an archvillain in the process.

Legal and Illegal Ugliness, as 'War Is Hell'

Before discussing what ugliness during war is unlawful, it is worth considering some ugliness that may be entirely lawful. In Mariupol's besieged Azovstal steel facilities, women, children and Ukrainian fighters were surrounded and holed up underground. The Russian military might attack them all with an infantry brigade using machine guns, grenades and flame throwers, or use its air force to drop napalm using fighter jets, or perhaps even detonate a tactical nuclear bomb, vaporizing everyone and perhaps much of the nearby city as well. If destroying Mariupol with a nuke could win the war for Russia, its use would be "proportional" and thus lawful. Moreover, any town or city that houses the headquarters to the enemy's military command, or contains significant enemy forces, is a lawful target.

On the other hand, much of the Russian military's ugliness is clearly unlawful under various bodies of international law. The Russian military appears to have targeted the city of Mariupol's civilian population, and civilian infrastructure of many cities, with Mariupol the most well-known example, leaving most of that city in ruin. Besides Mariupol, Russia has likewise destroyed many other Ukraine villages, towns and cities – the villages around Kharkiv, for example[3] – bombing residential areas, hospitals and schools in the process. The torture and murder of noncombatants, both civilians and captured soldiers, and the rape of women and perhaps even children, are clearly war crimes.

War can bring out the worst emotions and an untempered dark side of our species.[4] International law is designed to temper this – to prevent war, to facilitate the restoration of peace and to prevent the worst behaviors.

Vladimir Putin has shocked the world with his audacity, his hubris and his manifest disregard for international law. Yet his behavior is not surprising, as Homo sapiens have a long history of barbarism toward other humans.[5] This is one reason international laws about warfare exist – to dissuade nations from using armed force to resolve disputes and to mitigate the horrors of war once begun. War, it has been famously said, is "politics by other means."[6] One central rationale for the law of war is that it helps facilitate the restoration of peace between nations.

Rules of law in war allow for some measure of humanity. This has become especially important as advances in technology during and after the American Civil War allowed warfare to be waged on an industrial scale. Combatants are served by restricting combat to "military necessity." Contrary to some views, Homo sapiens are not innately inhumane.[7] This is one reason rules for warfare have developed, with just a few examples being: the Code of Hammurabi, the Bible's Deuteronomy, medieval rules of chivalry, the writings of Hugo Grotius, the U.S. Civil War's Lieber Code, the Hague Conventions, the Kellogg-Briand Pact of 1928 (outlawing wars of aggression) and, most famously, the various Geneva Conventions. Whatever the theoretical underpinnings and underlying reasons, the world developed rules for warfare that exist today.

But what of a national leader who uses armed force against another country for personal power or national ambition? For ego or empire? With a willingness to disregard international law or norms? We can speculate about Vladimir Putin's motivation. Yet what is clear is that the war in Ukraine has not gone as expected for Russia. Perhaps Putin's goal was to try to reestablish the glory of the former Soviet Union or, before that, the Tsarist Russian Empire. Yet empires do not often collapse without bloodshed and cataclysm.[8] What we may be seeing in Ukraine is Putin's empire collapsing, with the Russian military discarding its honor and integrity in its disregard for international law. However, many empires have been created through bloodshed. Putin could prevail, with Ukraine being the first domino to fall, creating a revised world order.

The world is facing a test, both as to international law and to the post-World War II world order. Russia is a nation that possesses enough nuclear bombs to destroy the world and has the second largest armed force on earth. Putin is saying to the world, with its actions in Ukraine, that "the rules of war may be for you, but not for Russia." It is taking a "might makes right" approach that many thought the world rejected with the defeat of Adolf Hitler and Nazism. The international law of nations may have to be adjusted, depending upon Russia's success in Ukraine.

Just War

There are two bodies of international law pertaining to Russia's invasion of Ukraine. *Jus ad bellum* (justice before war) is the body of law justifying a state's use of armed force in the first place. Russia asserts that its invasion is just and necessary. NATO and most nations in the United Nations disagree, viewing Russia as starting an unlawful war of aggression. *Jus in bello* (justice in war) are the rules applicable after an armed conflict has begun, and include the law of war (taught to soldiers to guide their conduct), crimes against humanity, and genocide.

Is a War of Aggression Unlawful Under *Jus Cogens*?

Whether the world permits Russia's aggression may define international law. Not long ago, it would not have violated international law for the United States to attack Canada or Mexico, and irrespective of our close friendship with both countries, the illegality of wars of aggres-

sion is not as clearly established as one would expect.[9] If Russia prevails even to a minor degree in Ukraine, this will undermine the view of many that wars of aggression should be prohibited by jus cogens – peremptory norms and fundamental overriding principles of international law from which no derogation is permitted.[10] This is a strong reason to hope that Russia's war of aggression is defeated.

Russia's war of aggression has resulted in what appears to be the other violations of international law by Russia and its troops in Ukraine, as discussed next.

A State's Responsibilities *Ad Bellum* and *In Bello*

Both nations and individuals can be held responsible for violating international law. A nation's criminality will result in individual responsibility for those state leaders who are culpable. This is what the Nuremberg trials taught: that "[c]rimes against international law are committed by men, not abstract entities . . . [I]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual state."[11]

A state's responsibility is also collective. Even innocent citizens of an offending nation (e.g., the tennis stars who would compete at Wimbledon[12]) can be properly punished to some degree, and morally so, simply for being citizens of a nation engaged in an unlawful war of aggression.[13]

Individual responsibility also exists apart from the state. A soldier's job is to lawfully kill other combatants. Yet "combatant immunity"[14] when engaged in "discriminating" violence "proportionate" to the "military necessity"[15] does not extend to criminality. Judge advocates are military lawyers who play a role in instructing service members and commanders about the rules of war that must be respected in combat. Soldiers guilty of war crimes,[16] particularly "grave breaches" of the Geneva Conventions, such as murder, rape or torture, should be held accountable by their nation – by being court martialed and sent to military prison or death.[17] The Ukrainian prosecutor general reports 15,000 ongoing investigations into Russian war crimes.[18] Three Russian soldiers were convicted in May 2022 of war crimes by the Ukrainian government, with a 21-year-old Russian sergeant pleading guilty to murder and two other soldiers convicted of targeting civilians.[19]

The focus of this article is state violations of international norms, as effectuated through the state's political and military leadership. Directly or indirectly, it appears Vladimir Putin and his military high command are committing at least four categories of violations of international law constituting state action. They are:

(1) engaged in an illegal war of aggression,

(2) targeting civilians and employing the military to take actions amounting to war crimes,

(3) directing crimes against humanity, and

(4) undertaking actions constituting (the U.N.'s definition of) genocide.

War of Aggression

Putin (and Russia) has engaged in an illegal war of aggression. There was no plausible justification for the invasion, which thus violated *jus ad bellum.* The Nuremberg trials following World War II established, as set forth in Nuremberg Principle VI(a), that it is a crime under international law to commit "crimes against peace," namely, "waging of a war of aggression." Though arguably "victor's justice," the Nuremberg principles are the same as those adopted by the United Nations after its formation in 1945. As the successor to the Soviet Union after its 1992 collapse, Russia holds a seat at the United Nations. As such, Russia is obligated to uphold the U.N.'s charter and principles.

The relevant U.N. charter provisions are based on the Nuremberg Principle VI(a), which states that the purposes of the United Nations are:

> [t]o maintain international peace and security . . . (Article 1, ¶ 1);
>
> to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace (Article 1, ¶ 2); and that
>
> [a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. (Article 2, ¶ 4).

The U.N. Charter provides that the Security Council "shall determine the existence of any . . . breach of the peace." However, because the U.N. has allowed Russia to succeed[20] the USSR as a permanent member of the Security Council with veto power over any vote, the U.N. will not be the body enforcing the U.N. Charter against Russia for Putin waging a war of aggression. However, this does not mean the world's hands are tied, as we have seen action both by NATO and the private sector[21] punishing Russia for its aggression. Professor Philippe Sands has presented a strong argument for the creation of an international tribunal to try Russia's top leadership for Russia's war of aggression.[22]

War Crimes

Putin and his military commanders clearly appear to be intentionally targeting civilians and using Russia's military to undertake actions amounting to war crimes. As an Army lawyer, I instructed soldiers about war crimes under the law of war. One of the requirements of the law of war is to provide instruction on the subject to military personnel. A full discussion of all possible war crimes taking place in Ukraine, including the various technical rules, such as discrimination, combatant immunity, proportionality, lawful weaponry, and very technical rules such as flags of truce, perfidy (unlawful) and ruse (lawful) could consume a volume. Yet the most palpable war crimes are the most obvious – the

murder, torture and rape of noncombatants and the targeting of civilians and civilian infrastructure. When a military command embraces warfare criminality to, for example, break the will of a local population, both the perpetrating individuals and the state are culpable.

The most well-known law of war strictures are contained in the Geneva and Hague Conventions, which deal with the conduct of military personnel and weaponry. The law of war affords a measure of protection to noncombatants such as civilians and medical personnel, to certain protected places such as hospitals, museums and churches, and requires that the use of military force must be proportional to the military objective and must not be indiscriminate. Weaponry must not inflict "unnecessary suffering," and thus glassine projectiles and hollow tip bullets are prohibited, where, in contrast, employing flame throwers or 50-caliber machine guns against infantrymen is perfectly legitimate. The law of war prohibits the use of poison gas and prohibits the destruction of civilian infrastructure and dams.

The U.S. military has excellent publications that provide a sound overview of the law of war from an American military perspective,[23] and the most important source documents are also available on various official websites.[24]

From news reports, some of the most egregious violations of the law of war in Ukraine include:

- Rape, torture and extrajudicial killing of noncombatants.[25]
- Indiscriminate target of civilian population centers and civilian infrastructure, where no significant enemy military assets are present.
- The indiscriminate Russian placement of land mines in civilian areas. The placement appears intended to terrorize (by maiming and killing) civilians, and not for bona fide military objectives. In this regard, the Russians appear to be using a new and particularly indiscriminate type of mine that experts regard as an unlawful weapon.[26]

These are actions which, if reported accurately in the press, violate the Hague and Geneva Conventions. They also violate customary international law,[27] which is why it does not matter that, as to land mines, Russia is not a signatory to the Convention on Land Mines (nor is the U.S.).

Russia can lawfully, and brutally, kill Ukraine's non-surrendering troops in Mariupol. Yet once those troops surrender, they are protected by the law of war. Ukraine's President Volodymyr Zelensky ordered his Mariupol troops to surrender, which they did on May 17, 2022, and were taken away into Russian territory. There, they are entitled to be treated as prisoners of war under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, regardless of whether the Russian Supreme Court declares the prisoners members of a "terrorist organization."[28] Abusing prisoners of war, including denying them a fair trial, is also a war crime.[29]

Ukrainian soldiers have also been accused of violating the law of war, including murdering Russian prisoners. The Ukrainian government indicates that it will prosecute a Russian soldier *in absentia* for allegedly committing rape,[30] raising obvious due process concerns.

One of the most important principles that must be taught to military personnel is the legal requirement that military personnel not follow an "unlawful order" – an order violating the laws of war. The Nuremburg trials eliminated the defense of "just following orders." If a commander gives an order that violates the law of war, that commander should be held responsible.

Proving a law of war violation before a tribunal often can be difficult or impossible. It is unlikely that any Russian commanders in Moscow – or Putin – would be held responsible for his troops' thefts, rapes, murders and other non-systemic criminality absent direct proof of complicity. However, liability may attach if evidence is found that Putin or a senior commander authorized the indiscriminate targeting of protected places (hospitals, churches, civilian infrastructure such as dams), the targeting of civilians and civilian housing, or the use of prohibited weapons (cluster bombs, poison gas, anti-personnel mines intended to kill civilians). There is increasing interest in holding Russian leaders responsible.[31]

Crimes Against Humanity

Putin and his military commanders appear to be directing crimes against humanity. As explained by the U.N.'s Office on Genocide Prevention and the Responsibility to Protect:

> Crimes against humanity have not yet been codified in a dedicated treaty of international law, unlike genocide and war crimes, although there are efforts to do so. Despite this, the prohibition of crimes against humanity, similar to the prohibition of genocide, has been considered a peremptory norm of international law, from which no derogation is permitted and which is applicable to all States.[32]

Crimes against humanity are certain acts that are purposefully committed as part of a widespread or systematic policy, directed against civilians, in times of war or peace. They differ from war crimes because they are not isolated acts committed by individual soldiers but are acts committed in furtherance of a state or organizational policy. Generally speaking, crimes against humanity refer to specific crimes committed in the context of a large-scale attack targeting civilians, regardless of their nationality.

Although the U.S. is not a party, the Rome Statute of the International Criminal Court (1998), which created the ICC, contains the most recent and expansive list of specific criminal acts that may constitute crimes against humanity. Its list of crimes include murder, torture, sexual violence, enslavement, persecution, enforced disappearance or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

As the U.N. agency OGPRP cited above explains:

> the notion of crimes against humanity has evolved under international customary law and through the jurisdictions of international courts such as the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Many States have also criminalized crimes against humanity in their domestic law; others have yet to do so.[33]

As to Russia in Ukraine, to the extent that an individual (for example, Vladimir Putin or his commanders) can be shown to have perpetrated crimes against humanity using Russian or allied forces, individual criminal liability could be established in, for example, the ICC. A "Justice for Victims of War Crimes Act" has been proposed to give federal court jurisdiction over war crimes committed abroad (for example, in Ukraine).[34]

Genocide

Finally, Russia appears to be engaging in what is commonly understood to be the gravest offense to global norms – genocide. Specifically, it is targeting a particular group of people to be killed – at least if they do not depart the coastal and eastern portions of Ukraine that Putin wants for Russia. In this, Russia is violating Article Two of the United Nations Genocide Convention (effective Jan. 1951, with the Soviet Union a signatory), which provides in relevant part pertaining to Ukraine:

> any of the following acts committed with the intent to destroy, in whole or in part, *a national . . . group,* as such:
>
> - Killing members of the group.
> - Causing serious bodily or mental harm to members of the group.
> - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (emphasis added).

The signatories to the convention (including Russia as successor to the USSR) also agreed to a general duty to "prevent and to punish" genocide.

Thus, Russia is arguably committing genocide by flattening Ukrainian cities and towns such as Mykolaiv or Bucha, or seeking to drive Ukrainian citizens out of the port city of Mariupol using a Stalingrad-type siege, or targeting civilians waiting to evacuate the area at the train station at Kramatorsk,[35] forcibly moving children to Russia,[36] or seeking generally to drive Ukrainians out of Ukraine (and especially its eastern Donbas region[37]).

These acts may fit the definition of genocide, even if not of the magnitude of, say, the mass human extermination of 6 million people during the Holocaust under Hitler, or the perhaps 2 million people exterminated in the Cambodian genocide under the Khmer Rouge and Pol Pot, or the over 500,000 killed in the Rwandan Genocide, or the tens of millions who died under the Great Purge under Joseph Stalin and the Cultural Revolution under Mao Zedong. A report released on May 27, 2022, by international legal scholars and human rights experts concluded that Russia is responsible for inciting genocide in Ukraine, with the apparent intent of destroying the Ukrainian people.[38]

Concluding Thoughts

Human beings and governments are not perfect. Realpolitik often governs international affairs. Perhaps the former Soviet Union should never have been allowed into the United Nations, as the ideals expressed in the U.N. Charter are the antithesis of Soviet communism. Yet the peace has been kept in Europe after the Second World War based upon aspirational values being respected as necessary for democratic and authoritarian countries to get along. This is realpolitik. I served in Germany during the Cold War and, until Russian invaded Ukraine on Feb. 24, 2022, I simply could not imagine the possibility of a third world war in Europe. Yet we are witnessing one today.[39]

When we look at human history, peace seems the exception and violence the norm. Yet that might not be accurate – humans may be more peaceful than we tend to believe.[40] And our interconnectedness today may facilitate a shared humanity, as we now live in a world where almost everyone is or can be connected. Cell phones and the internet have made many an atrocity instantly available and a mouse click or text away, even for someone living in Moscow. Russians may still believe in the justness of Vladimir Putin's cause.[41] Yet public opinion can change quickly in our modern world. Thus, it may indeed be useful to discuss the law of war as more than ivory tower notions to be disregarded at will by an autocrat, but instead view these as ideals that might prevent a third world war.

The law of nations may provide ideals for helping maintain the better angels of our nature. Ideals for the survival of liberal democracy. Ideals for saving humanity itself. The law of nations helps to preserve world order, peace and humanity. Ukraine is a test. The world can ask whether international rules of law have any meaning if an egregious breach of legal norms by a nation's leader and his military goes unredressed. Individuals at all levels and the state must be held to account, or the law of the jungle will replace international law.

The community of nations must demand that international law governing war and peace be respected. It must stand up for liberal democracy and against Putin's disinformational model for an autocratic world order.

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Endnotes

1. *See* Convention Relative to the Treatment of Prisoners of War. Geneva, 27 July 1929, available at https://ihl-databases.icrc.org/ihl/INTRO/305.

2. Of course, I was not thinking about, for example, the Russian-Georgian War of 2008 and Russian's intervention and war crimes in Syria (with Russian air strikes killing many civilians in 2016-17). Nor was I thinking of America's invasion of Iraq or Afghanistan (I spent time in both) nor of indefinite detentions of presumably unlawful combatants at Guantanamo nor government-sanctioned torture at CIA "black sites."

3. *See* Finbarr O'Reilly, *Around Kharkiv, Ukrainians Emerge to Find Lives in Ruin*, N.Y. Times, May 18, 2022, https://www.nytimes.com/2022/05/18/world/europe/kharkiv-ukraine-russia-photos.html.

4. *See* Michael Ghiglieri, The Dark Side of Man: Tracing the Origins of Male Violence (2000).

5. And barbarism toward the natural environment too. *See, e.g.*, Diederich, *Law of War and Ecology: A Proposal for a Workable Approach to Protecting the Environment Through the Law of War*, 136 Military L. Rev. 141 (Summer 1992), https://tjaglcspublic.army.mil/documents/27431/2247330/1992-Spring-Aassembled.pdf/f224e715-f1a5-4845-94d9-4fcd1262b135?version=1.1.

6. *See* Carl von Clausewitz, On War, trans. Col. J.J. Graham. New and revised ed. with Introduction and Notes by Col. F.N. Maude, in three volumes (London: Kegan Paul, Trench, Trubner & C., 1918), https://oll.libertyfund.org/page/grotius-and-the-laws-of-war.

7. *See* Rutger Bregman, Humankind: A Hopeful History (2020), https://www.littlebrown.com/titles/rutger-bregman/humankind/9780316418553/.

8. *See* Dominic Lieven, *Empires Eventually End Amid Blood and Dishonour*, The Economist, April 16, 2022, https://www.economist.com/by-invitation/2022/04/16/dominic-lieven-says-empires-eventually-end-amid-blood-and-dishonour.

9. I served in Iraq after we attacked that nation without the United Nations' authorization. Books have been written about nations not practicing what they preach.

10. *See* Jus Cogens - International Law - Oxford Bibliographies, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml; *see also* Peremptory norm, Wikipedia, https://en.wikipedia.org/wiki/Peremptory_norm.

11. *See* Stuart Ford, *infra* note 17, at 770, quoting Nuremberg Judgment and Sentences ("Crimes against international law are committed by men, not abstract entities… [I]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual state.").

12. *See* Sally Jenkins, *Wimbledon's Ban on Russian Players Is Unfair, Personal – and Exactly Right*, Wash. Post, April 21, 2022, https://www.washingtonpost.com/sports/2022/04/21/wimbledon-russia-medvedev.

13. *See* Anna Stilzm *Collective Responsibility and the State*, 19 J. of Political Philosophy 190–208 (2011), https://scholar.princeton.edu/sites/default/files/Stilz_JPP_0.pdf.

14. *See* 32 C.F.R. § 11.5, "Definitions (a) *Combatant immunity*. Under the law of armed conflict, only a lawful combatant enjoys 'combatant immunity' or 'belligerent privilege' for the lawful conduct." *See generally* Laurie R. Blank, *Combatant Privileges and Protections*, Lieber Institute, West Point (Mar 4, 2022), https://lieber.westpoint.edu/combatant-privileges-and-protections.

15. "Discrimination," "proportionality" and "military necessity" are terms of art in the law of war.

16. *See*, *e.g.*, Uniform Code of Military Justice, 10 U.S.C. § 920 (Article 120) (rape), and the War Crimes Act of 1996, 18 U.S.C. § 2441.

17. To America's discredit, the United States breached this duty when President Trump pardoned American war criminals in 2019 and 2020 – condoning a "might makes right" mentality violating the spirit, and likely the letter, of international law. *See, e.g.,* Stuart Ford, *Has President Trump Committed a War Crime by Pardoning War Criminals?,* Amer. U. Int'l L. Rev. 757 (2020), https://digitalcommons.wcl.american.edu/auilr/vol35/iss4/3; Geneva Convention (I), Art. I: Respect for the Convention ("The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."); *see also* ICRC, *ICRC Explainer: What Does International Law Say About Pardons for War Crimes*? (May 24, 2019), https://www.icrc.org/en/document/icrc-explainer-what-does-international-law-say-about-pardons-war-crimes. OMIT: Pres. Trump certainly ignored the moral obligation with respect to legal expectations, https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt1.

18. See Caitlin McFall, *Russia-Ukraine war: 15k Probes Into Russian War Crimes, 'Cost of Justice Is Small Potatoes' Says ICC*, Fox News, May 31, 2022, https://www.foxnews.com/world/russia-ukraine-war-15k-probes-russian-war-crimes-cost-of-justice-small-potatoes-icc.

19. *See* Valerie Hopkins, *A Russian Soldier Accused of Killing a Civilian Pleads Guilty in a Kyiv Court*, N.Y. Times, May 18, 2022, https://www.nytimes.com/2022/05/18/world/europe/russian-soldier-war-crime-ukraine-law.html; Greg Norman, *Ukraine War Crimes Trial: Russian Soldiers Learn Their Punishments*, Fox News, May 31, 2022, https://www.foxnews.com/world/ukraine-war-crimes-russian-soldiers-sentenced.

20. It has been argued that because the Soviet Union dissolved, that Russia should not have taken over the USSR's U.N. seat or, alternatively, that it should be removed now based upon its recent conduct.

21. *See* Lauren Hirsch, *After 32 years, McDonald's Plans To Sell Its Russia Business,* N.Y. Times, May 16, 2022, https://www.nytimes.com/2022/05/16/business/mcdonalds-russia.html.

22. *See* Philippe Sands, *Putin's Use of Military Force Is a Crime of Aggression*, Financial Times (Feb. 28 2022), https://www.ft.com/content/cbbdd146-4e36-42fb-95e1-50128506652c; *see also*, Loveday Morris, *An 'Unprecedented' Effort to Document War Crimes in Ukraine. But What Chance of Justice?*, Washington Post (May 28, 2022), https://www.washingtonpost.com/world/2022/05/28/ukraine-war-crimes-investigations/.

23. *See*, e.g., U.S. Dep't of Def., DoD Law of War Manual § 1.11.2 (Dec. 2016) and U.S. Army Operational Law Handbook (2021), https://tjaglcs.army.mil/documents/35956/56931/2021+Operational+Law+Handbook.pdf/4e10836e-2399-eb81-768f-7de8f6e03dc5?t=1630386651949&download=true.

24. *See, e.g.*, Chris Jenks, The Efficacy of the U.S. Army's Law of War Training Program, Oct 14, 2020, https://lieber.westpoint.edu/efficacy-u-s-armys-law-of-war-training-program/.

25. *See* Shashank Bengali and Katrin Bennhold, *Russians Discussed Killings of Civilians in Radio Traffic Intercepted by Germany, Officials Say*, N.Y. Times, April 7, 2022, https://www.nytimes.com/2022/04/07/world/europe/bucha-killings-russian-communications-intercepted.html.

26. *See* John Ismay, *New Russian Land Mine Poses Special Risk in Ukraine*, N.Y. Times, April 6, 2022, https://www.nytimes.com/2022/04/06/us/politics/russia-ukraine-land-mines.html.

27. Customary international law is not founded on a treaty, but rather on the development of international norms.

28. *See* Shashank Bengali, *As Russia Says Hundreds More Mariupol Fighters Surrender, Their Fate Is Unclear*, N.Y. Times, May 18, 2022, https://www.nytimes.com/live/2022/05/18/world/russia-ukraine-war-news.

29. *See* Geneva Convention relative to the Treatment of Prisoners of War, adopted 12 August 1949, https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-treatment-prisoners-war.

30. *See* Andrew Jeong, *Russian Soldier To Be Tried in Absentia in First Rape Trial Since Invasion*, Wash. Post, May 31, 2022, https://www.washingtonpost.com/world/2022/05/31/russia-ukraine-war-news-live-updates/.

31. *See* note 22, *supra*, see also *Ukraine's Prosecutor General Is Determined To Hold Russia Accountable for Atrocities,* All Things Considered, WNYC Radio, April 26, 2022, http://www.wnyc.org/story/ukraines-prosecutor-general-is-determined-to-hold-russia-accountable-for-atrocities.

32. *See* United Nations Office on Genocide Prevention and the Responsibility to Protect, *Crimes Against Humanity*, https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml.

33. *Id.*

34. *See* Charlie Savage, *Russian Atrocities Prompt a Bipartisan U.S. Push To Expand a 1996 War Crimes Law*, N.Y. Times, May 16, 2022, https://www.nytimes.com/live/2022/05/16/world/russia-ukraine-war-news. *See also* the draft legislation amending 18 U.S.C. 2441, https://int.nyt.com/data/documenttools/draft-grassley-durbin-justice-for-victims-of-war-crimes-act/c906804f2cbc4e36/full.pdf.

35. *See* Eric Schmitt, *The Pentagon Says Russia Fired the Missiles That Hit Kramatorsk Station, Killing at Least 50 People*, N.Y. Times, April 8, 2022, https://www.nytimes.com/live/2022/04/08/world/ukraine-russia-war-news#the-pentagon-says-russia-fired-the-missiles-that-hit-kramatorsk-station-killing-at-least-50-people.

36. *See* Marc Santora, *Ukraine Accuses Russia of Forcibly Deporting More Than 200,000 Children*, NY Times, June 2, 2022, https://www.nytimes.com/live/2022/06/02/world/russia-ukraine-war-news - ukraine-accuses-russia-of-forcibly-deporting-more-than-200000-children.

37. *See Russia Takes Territory in Eastern Ukraine,* Wash. Post, May 27, 2022, https://www.washingtonpost.com/world/2022/05/27/russia-ukraine-war-news-live-updates/.

38. *See* Victoria Kim, *A New Report Concludes That Russia Is Inciting Genocide in Ukraine*, N.Y. Times, May 27, 2022, https://www.nytimes.com/live/2022/05/27/world/russia-ukraine-war - a-new-report-concludes-that-russia-is-inciting-genocide-in-ukraine; *see also* An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent, https://newlinesinstitute.org/an-independent-legal-analysis-of-the-russian-federations-breaches-of-the-genocide-convention-in-ukraine-and-the-duty-to-prevent/.

39. *See* Thomas L. Friedman, *Ukraine Is the First Real World War*, N.Y. Times, April 3, 2022, https://www.nytimes.com/2022/04/03/opinion/ukraine-russia-wired.html.

40. *See* Bregman, note 7 *supra*.

41. *See* Ross Douthat, *Putin Is Losing in Ukraine. But He's Winning in Russia*, N.Y. Times, April 2, 2022, https://www.nytimes.com/2022/04/02/opinion/putin-ukraine-russia.html.

The Courts and Contracts: Losing Patience With Unconscionable Agreements

By Geoffrey A. Mort

Contract law has changed relatively little over the decades, and many attorneys assume that so long as two or more parties reach an agreement, memorialize it in writing and execute it, it inevitably has the legal status of an enforceable contract. That is not an unreasonable conclusion, for as the Second Circuit held in *Gold v. Deutsche Aktiengesellschaft*,[1] "[a] party who signs and accepts a written contact . . . is conclusively presumed to know its contents and to assent to them." What is often overlooked, however, is a substantial body of caselaw that addresses a fundamental dilemma in contract law, which is whether there is a point at which a contract arrived at between parties with disproportionate bargaining power or obtained by suspect means is so tainted that the courts should declare it unenforceable – notwithstanding the fact that the parties "agreed" to it. As discussed below, courts to an increasing extent appear to be losing patience with agreements that are patently one-sided.

Such borderline contracts traditionally have been called contracts of adhesion, defined as "a contract formed as a product of a gross inequality of bargaining power between parties."[2] This term has fallen into disuse during the current century, however, and courts now largely prefer the term "unconscionable agreement."

The seminal case on unconscionable contracts is *Gillman v. Chase Manhattan Bank*,[3] where in 1988 the New York Court of Appeals had one of its earlier encounters with this issue. The *Gillman* court reviewed a lower court decision that found a business agreement unconscionable and unenforceable. In its analysis, the court observed that the unconscionability concept "is rooted in equitable principles"[4] as well as in the Uniform Commercial Code. (Section 2-302 of the UCC states that if a court finds a contract to be unconscionable, it may refuse to enforce it.) Other origins of the unconscionability concept are the *Restatement (Second) of Contracts*[5] and the New York Executive Law's definition of "fraudulent" conduct.[6] The purpose of "the unconscionability doctrine is to prevent unfair surprise and oppression"[7] and to "prevent sophisticated parties with grossly unequal bargaining power from taking advantage of less sophisticated parties."[8]

Procedural and Substantive Unconscionability

Under New York law, the definition of unconscionability has not changed since *Gillman:* When "a contract is . . . [so] unconscionable in the light of the mores and business practices of the time and place as to be unenforceable," and to show unconscionability "there must be a showing that such a contract is both procedurally and substantively unconscionable."[9] Simply put, "[t]he procedural element of unconscionability concerns the contract formation process and the alleged lack of meaningful choice; the substantive element looks to the content of the contract."[10]

In some instances, however, a party arguing unconscionability need not show that the contract in question was both procedurally and substantively unconscionable. In other words, "[w]hile determinations of unconscionability are ordinarily based on the court's conclusion that *both* the procedural and substantive components are present . . . there have been exceptional cases where a provision of the contract is so outrageous as to warrant it unenforceable on the ground of substantive unconscionability alone."[11] On the other hand, where there is a "lack of substantive unconscionability, the undisputed facts must describe an overwhelmingly procedurally unconscionable contract in order for the Court to render it unenforceable."[12] As such, if a contract is extremely unconscionable in either a procedural or substantive sense, a court may declare it unenforceable on that basis alone if it is sufficiently flawed.

That courts continue to struggle with this issue is demonstrated by the lack of consensus on what exactly procedural unconscionability is. Some courts have held that agreements that are the product of "economic duress" are per se invalid. The court in *Chanchani v. Salomon Smith Barney, Inc.*[13] so found, concluding that a party to a signed arbitration agreement is not bound by it if she "can demonstrate special circumstances, such as duress or coercion." Similarly, the court in *Govindharajan v. Tata Consultancy Services*[14] pointed out that an agreement "that is unconscionable or was the product of economic duress is invalid." Although a situation where a party signed a contract under duress would seem to be one involving procedural unconscionability, a number of courts nonetheless appear to assess such agreements – at least in some circumstances – apart from the unconscionability analysis altogether.

The core question nonetheless remains this: when do the provisions of an otherwise valid contract or the process by which it was agreed to reach a point where courts are willing to break with the presumption of validity and declare it unenforceable? Although the caselaw reveals no bright line that, if crossed, renders a contract void because of lack of meaningful choice or one-sidedness, a close look provides a clearer picture of when agreements are viewed as sufficiently deficient to be held invalid.

Unconscionability Challenges to Contracts

Challenges to agreements as unconscionable are commonplace, particularly in the areas of mandatory pre-dispute arbitration agreements and standard-form credit card agreements. A majority are unsuccessful, reflecting courts' continuing (though perhaps diminishing) unease with upending long-standing contract law principles.

Few if any courts would take issue with the notion that a "bad bargain, even a terrible bargain, is not *ipso facto* substantively unconscionable."[15] And, with respect to procedural unconscionability, "the presence of unequal bargaining power, by itself, is not enough to invalidate an arbitration provision within an employment contract."[16] That a contract is presented to an individual on a "take it or leave it" basis is not

sufficient to make it unconscionable,[17] nor is the fact that it is a "clickwrap" agreement, i.e., one where its terms are displayed on a screen and a viewer clicks a box to accept them.[18] Additionally, arbitration agreements are not unconscionable so long as they contain an opt-out provision.[19] Many cases where a court finds a contract to be not unconscionable involve plaintiffs who rely on one of the arguments noted above but little else.

When Courts Find Contracts Unenforceable

Nevertheless, a look at the cases where agreements were found to be not enforceable due to unconscionability reveals a wide range of circumstances where parties, often employers, mistakenly took for granted the premise that any contract signed by both parties is a valid one. There are few better examples than *Brennan v. Bally Total Fitness*,[20] a frequently cited case where the court found both substantive and procedural unconscionability and held a dispute resolution agreement invalid.

The plaintiff in *Brennan* signed a mandatory arbitration agreement and thereafter challenged it as being unenforceable. In finding that the plaintiff lacked a meaningful choice when entering into the agreement and did so as a result of "high pressure" tactics, the court pointed to these indicia of an agreement marred by procedural unconscionability: (1) the human resources director gave plaintiff and her co-workers only 15 minutes to review a 16-page agreement; (2) the human resources director did not inform the employees that they had the right to consult with an attorney before signing the agreement or that they could review it at home; and (3) the employees were told that anyone who failed to sign the agreement would not be promoted. The plaintiff decided that she had no alternative but to sign the agreement or suffer adverse consequences, and the court thus determined that the above facts along with a "significant disparity in bargaining power"[21] amounted to procedural unconscionability. Notably, the court in *Clinton* identified similar tactics as examples of procedural unconscionability: "pressuring the prospective employee to sign the agreement without reading it, refusing to let her review the agreement with an attorney, or deceiving her as to its content."[22]

In concluding that the agreement was also substantively unconscionable, the court observed that the terms of the agreement allowed the employer to modify it at any time, imposed a cap on any damages awards an employee might receive in a lawsuit against the company, and established a shorter limitations period for bringing claims against the employer. The first element, in particular, because it could bind employees to a contract term they had never seen, was the dispositive fact for the court in reaching its decision.

Because the facts in *Brennan* are relatively egregious, it likely was not difficult for the court to decide that the agreement in that case was unconscionable and unenforceable. Another example of a case where the facts were sufficiently outrageous that the contract appeared to be indisputably unconscionable is *Jones v. Star Credit Corp.*[23] In *Jones,* an installment contract that required lower-income plaintiffs who were on welfare to pay $900 for a $300 refrigerator was held to be unconscionable on substantive grounds alone, an example of the "exceptional" cases discussed in *Gillman* where a finding of both substantive and procedural unconscionability is unnecessary for an agreement to be found unenforceable.

A number of more recent cases, however, have found contracts to be unconscionable under less clear-cut circumstances, at least suggesting that the unconscionability doctrine is being applied more broadly. *Eisen v. Venulum Ltd.*[24] is one example. The plaintiff in *Eisen* signed a wine purchase agreement with a corporation that contained a mandatory arbitration clause requiring any dispute between the parties to be arbitrated in the British Virgin Islands under BVI law. The court held that the arbitration clause forced the plaintiff to "forgo any application of . . . federal law protections provided to him"[25] by U.S. securities laws, which was enough to make the arbitration provision unconscionable and void. In *People v. Northern Leasing Systems, Inc.*,[26] several companies allegedly induced the plaintiffs into entering into predatory leasing agreements. The court denied the companies' motion to dismiss and, primarily on procedural unconscionability grounds, found some of the contract provisions to be unenforceable on the grounds that "sales representatives targeted vulnerable individuals – the elderly, disabled and immigrants with limited proficiency in English – and employed deceptive tactics" to persuade them to sign the agreement.[27] This would seem to be a departure from prior cases that expressed skepticism about whether a party to a contract being a non-English speaker warranted declaring it unenforceable.[28]

An arbitration agreement was found to be unconscionable for other reasons in *Frankel-Ross v. Congregation Ohr Hatalmud.*[29] The plaintiff in *Frankel-Ross* was a member of a Jewish congregation who invested funds through several of the congregation's leaders and, in doing so, signed an agreement providing that any disputes between the parties would be submitted to religious arbitration. The court invalidated the agreement on both procedural and substantive grounds, noting that the plaintiff was initially reluctant to sign it and did so only after being pressured to sign by both the congregation's principal and her family rabbi. (The plaintiff, who was experiencing significant stress due to a number of personal problems, was called daily by the principal and rabbi, who repeatedly urged her to sign the agreement.) The court found this conduct sufficiently severe to meet the standard for procedural unconscionability and held that the agreement also was substantively unconscionable because it gave the congregation the exclusive power to select the arbitrators.

Spinelli v. NFL[30] presents yet another example of how the unconscionability doctrine has been applied to a variety of situations involving contract formation. *Spinelli* was an

extremely complex case brought by professional football photographers that raised antitrust and intellectual property issues, among others. A key dispute between the photographers and defendants, Associated Press and Getty photography agencies, involved what are known as "contributor agreements" that provided the photographers shooting NFL games with much of their income. The plaintiff-photographers challenged the contributor agreements they had signed with the AP on the grounds of substantive and procedural unconscionability, and the court agreed. It provided three reasons for its finding of procedural unconscionability: the photographers had no other way of earning a livelihood in their field if they did not sign the agreements; there was a gross inequality in bargaining position; and, during negotiations concerning the agreement, the AP made material misrepresentations to the plaintiffs. Combined, these elements were enough for the agreements to be deemed unenforceable. (Substantive unconscionability was also found due to a provision in the agreement providing licenses for free to the NFL, a process that deprived the photographers of additional income.)

In sum, agreements are most likely to be held unconscionable where one party is seen as intimidating the other into signing; where the agreement gives disproportionate power, e.g., the sole right to select arbitrators or make key decisions during a hearing, to one party; where the non-dominant party is denied the ability to freely review the agreement or discuss it with counsel; or when one party misrepresents the contents or obligations set forth in the agreement. A common example of one or more of these tactics being used is the onboarding of new employees by some large companies, where the employee is given a stack of documents to promptly sign without a full explanation of what they are.

Conclusion

It is safe to say that no longer must a contract come into being through the use of overt threats or draconian provisions giving all key rights to one party for a court to find it unconscionable and unenforceable. As the relatively recent cases discussed above reveal, courts appear increasingly disposed to declare agreements unconscionable for a wider range of reasons. One common denominator among these decisions is a sense by the court that the contract in question is by its terms, or because of the way it was negotiated, fundamentally unjust to one party.

The key concept behind the unconscionability principle has not significantly changed in many years; it remains "the plaintiff must prove that the party with superior bargaining power used it to take unfair advantage of its weaker counterpart."[31] What has changed is the courts' willingness to at times construe "tak[ing] unfair advantage" in a broader and more flexible way that considers conduct not previously perceived as unconscionable.

It may be argued that this trend is a positive one, in that it may lead to a decrease in one-sided contracts – clickwrap agreements being a good example – which can significantly disadvantage one party because of a disparity in sophistication and power. Courts, in analyzing unconscionability cases, would be well advised to consider occasionally departing from traditional contract principles created in an earlier era and giving greater weight to the realities of the present time where, increasingly, due to the information technology revolution and other factors, consumers and employees are more frequently signing contracts that contain provisions that are not in their interest and which they do not even fully understand.

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6. N.Y. Executive Law § 63, subd. 12.
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12. *Catz v. Precision Global Consulting*, 2021 U.S. Dist. LEXIS 78626 (S.D.N.Y. April 23, 2021).
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The Courts and Late Discovery: The Honeymoon Is Over

By Peter S. Sanders, Michelangelo Macchiarella and Marissa B. Cohen

The courts are cracking down on late discovery and no one is exempt, not even a former president of the United States. Donald Trump learned that lesson recently when a New York judge fined him $10,000 a day for failing to meet his discovery obligations on schedule. Though Trump's fine was later capped at $110,000, the judge warned him that additional fines will be imposed – retroactively – if there is a further missed deadline.

At issue are CPLR 3126 and CPLR 5104. While CPLR 5104 applies to the Trump case, most of the late discovery cases have involved CPLR 3126.

Indeed, in the state courts of New York, getting an opposing party to comply with discovery demands has been a notoriously long and challenging process. However, recent trends suggest that appellate and lower court judges have become much more active in imposing sanctions against recalcitrant litigants under CPLR 3126. This trend toward preventing prolonged litigation and disobedience with court orders allows CPLR 3126's provisions to serve as an effective tool for parties to obtain relief. A motion under this section often results in a conditional order allowing an additional time-limited opportunity to cure. Such an order can simultaneously serve equity, the preference for determinations on the merits, finality and provide protection against reversal on appeal. Properly drafted and enforced, it can promote just results and judicial economy, but only if the conditional order is given its intended effect. If unenforced, whether out of a sense of leniency or sympathy, it can unintentionally embolden noncompliant parties when continued obstruction is not met with the certitude of the prescribed consequences. It is the advocate's job to convince the court to follow its own orders for these reasons and because the aggrieved party has a right to rely on the court following through on its word. Indeed, although not essential to a right to such reliance, an aggrieved party may even have forgone other remedies to its detriment in reliance on the enforcement of such an order.

CPLR 3126 Has a History of Judicial Non-Enforcement

CPLR 3126 states that a court may impose discovery sanctions, including the striking of a pleading or preclusion of evidence, where a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." But many courts have been reluctant to grant relief under the statute. This reluctance flies in the face of appellate authority that is heavily weighted to the contrary. Indeed, the reader may notice that the word "conditional" does not appear in the text of the statute; rather, the "conditional" portion of CPLR 3126 is a creature of judicial invention meant to temper the "drastic remedies" afforded under the statute in favor of hearing the matter on the merits. When a court refuses to follow its

own conditional order and impose its sanctions, this is essentially a judicial act of clemency that implicates the non-offending party's right to discovery. But litigation on the merits is a privilege that can be lost when procedure is abused, especially when that abuse prejudices a party playing by the rules.

In the leading case from the Court of Appeals,[1] the court urged greater use of discovery sanctions when it firmly stated, "[L]itigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated."[2] This pronouncement, however, has been followed in the lower courts to varying degrees over the last decade.

As a general procedural roadmap, "A court may resort to the drastic remedies" such as "striking a pleading or precluding evidence upon a clear showing that a party's failure to comply with a disclosure order was the result of willful and contumacious conduct."[3] Such failure may be demonstrated by showing a lack of timely compliance with a self-executing conditional order.[4] Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the opposing party to offer a reasonable excuse for its failure to timely or materially comply.[5]

In practice, however, it may take more than one discovery motion to lay the groundwork for sanctions that preclude claims or defenses, strike pleadings, or invoke negative inferences.[6] The courts have not been eager to issue or enforce sanctions because of the "willfulness inquiry" that must be conducted under CPLR 3126 before issuance of sanctions, including those that may spring from a conditional order. The clearest and simplest evidence of "willfulness" is found in repeated non-compliance with court orders. Thus, when the rule that is meant to promote expeditious and efficient litigation is misapplied by courts reluctant to enforce it, it forces litigants to file successive compliance motions.

CPLR 3126 in the Post-Pandemic Era

New York's legal landscape has indisputably transformed because of the COVID-19 pandemic, moving more toward virtual and efficient litigation practices, which seems to be why the courts have begun to take discovery delays more seriously. One reason may be that the courts, which had comfortably operated with relatively more manageable caseloads, suddenly had to adjust to newly revived cases that had been languishing in the interim, including numerous outstanding discovery demands.

In a recent case (that our firm handled, but will remain unnamed as an appeal is still pending), we unsuccessfully sought enforcement of a conditional sanctions order by means of summary judgment after that order had become absolute. The Supreme Court had repeatedly referred continuing disputes over noncompliance to a discovery referee, resulting in a succession of orders, including one where the court ordered compensation to our client for legal fees of over $168,000. Those fees were found to have been incurred as a direct result of the defendants' refusal to comply with their discovery obligations. Nevertheless, the defendants were still allowed a further extension of time to comply before the court's conditional order was to trigger the remaining "drastic remedy" sanctions under CPLR 3126. The defendants, despite submitting further documents in response to the conditional sanctions order, were found to continue to be materially noncompliant after the self-executing deadline converted the order from conditional to absolute.

We then moved for summary judgment once (1) "willfulness" was established by demonstrating a pattern of non-compliance with several orders; (2) a self-executing conditional order was issued in final redress; and (3) the defendant had still not complied. We argued that the court was without discretion to deny a motion for summary judgment once the conditional order had "sprung" and become absolute. Initially, the court rejected our motion and, in an apparent attempt at further leniency and preference for a trial on the merits, reserved the 3126 sanctions for trial. However, upon re-argument, the court reversed itself as having admittedly overlooked the absolute nature of the conditional order at issue and struck the non-disclosing party's answer and counterclaims and resolved all relevant claims in the pleadings in the plaintiff's favor. Reversal on re-argument is a rarity but was warranted in light of the prevailing authority and the court's recognition that no lesser remedy could properly rectify the prejudice caused to the aggrieved party.

In one case, an appellate court reversed a CPLR 3126 order that merely precluded a non-disclosing party from introducing evidence and substituting a wholesale striking of the non-disclosing party's answer as proper after years of non-compliance.[7]

Another appellate court reversed the trial court's denial of summary judgement where a conditional order had merely precluded the non-movant from presenting evidence in opposition, ostensibly as logically inconsistent.[8] This recognition of the logical inconsistency or insufficiency of certain lesser sanctions is noteworthy. Far too often courts fail to recognize that the non-disclosing party's goals may still be achieved, and the aggrieved party still prejudiced, if a sanction fails to provide a complete remedy.

In another case, the appellate court reversed an order of the Supreme Court that had granted the non-disclosing party additional time to comply with a discovery order after a compliance deadline had already passed. In that case, a Compliance Conference Order had already been issued that stated, "Failure to comply [within 30 days] will result in preclusion." Upon a motion for sanctions under CPLR 3126, however, the Supreme Court ignored its own order and allowed the non-disclosing party additional time

to comply without any finding that the defaulting party had made a showing that its default was excusable. The appellate court reversed this order by directing that the motion under CPLR 3126 should have been granted as to preclusion in light of the conditional order's mandatory language. The appellate court's decision here is in line with the principle that when a court says that an order will result in a specified sanction, that court should follow its own orders and apply the sanction in the absence of extraordinary circumstances.

These post-pandemic cases show that lower court and appellate judges are no longer as inclined to forgive repeated discovery delays as had been the case. However, should a movant be able to demonstrate a reasonable excuse for the failure to timely or properly comply, an appellate court may reverse a denial of a motion to vacate a conditional order that had become absolute, thus providing a rare and proper escape valve when bona fide good cause for untimely or insufficient compliance can be shown.[9]

New York's trend toward holding parties accountable for failing to comply with discovery goes beyond CPLR 3126. In *New York v. The Trump Organization, Inc., et al.*,[10] on April 26, 2022, former President Donald Trump was found to be in civil contempt in violation of CPLR 5104 for failing to comply with a subpoena within 14 days of the order compelling compliance, extended by stipulation for another 30 days (Hon. Arthur F. Engoron). The ruling stemmed from former President Trump's failure to prove that he thoroughly looked for the demanded documents, acted in good faith to comply with the court's order and asserted anything other than boilerplate language when submitting his response to the subpoena. In that case, as in ours, the party charged with producing documents cannot merely claim they don't have them without explaining in a sworn affidavit the details of their record keeping practices and bona fide efforts to locate the documents.[11] Judge Engoron fined former President Trump $10,000 per day for non-compliance. The following day, Trump submitted a personal affidavit, which the court rejected as still insufficient to purge contempt. However, on May 11, 2022, the court "conditionally" purged the contempt pending submission of additional affidavits and payment of the fines that had accrued so far, in the amount of $110,000, but warned that contempt charges could be re-imposed with additional fines accruing retroactively to the date they were suspended if sufficient affidavits were not submitted. Although applied under a slightly different standard than found in CPLR 3126, the core of the ruling is the same: "disobedience to a lawful mandate of the court."[12] Trump's case illustrates that sanctions may and will be imposed for ignoring court orders and deadlines. The intolerance toward disobedient parties might be a leitmotif that is rising to a crescendo in post-pandemic New York.

Conclusion

Inevitably, there is still some play as to how many orders have to be issued and how long and egregious the non-compliance of your adversary must be to warrant sanctions. Litigants with bona fide claims or defenses rarely have any reason not to enthusiastically produce evidence supporting their position. But if and when a conditional order is issued, it is imperative for advocates to argue that there is little to no discretion involved in applying the prescribed sanctions of that order should non-compliance continue. Absolute means absolute. If a court still will not enter the sanctions, attorneys should make the argument that at some point the preference for leniency and a determination on the merits is outweighed by the individual and institutional harm rendered by abusive and inexcusable noncompliance. The appellate courts, including no less than the state's highest court, have quite clearly signaled that attempts at leniency have been abused for too long and to the detriment of the litigants who play by the rules. This has disincentivized compliance, and the recent trend of enforcement recognizes that. It is welcome and long overdue.

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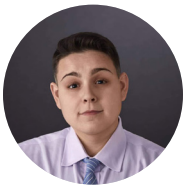

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Endnotes

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Reimagining Access to Justice: Should We Shift to Virtual Mediation Programs Beyond the COVID-19 Pandemic?

By Donna Erez-Navot

Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.
—Robert Frost

Since March 2020, and the start of the COVID-19 pandemic, courts around the country have grappled with the dramatic changes in how they function. Most courts in the United States were not prepared for such a sudden and extreme shift, and many were stalled for months without any progress on the filings within their jurisdiction. Some courts were more successful if they had previously integrated automated systems before the pandemic, such as e-filing, video hearings and other technologically supported protocols.[1] Jurisdictions that already had online dispute resolution (ODR) and video conferencing mediation and arbitration in place were able to continue to function.[2] Other jurisdictions, particularly those that were ill-prepared, were stalled once the pandemic began.[3] New York City's Small Claims Court was completely halted in the beginning of March 2020. But in August 2020, under an Administrative Order by New York City Court Administrative Judge Anthony Cannataro, the courts initiated a new presumptive virtual mediation program in New York City Small Claims.[4] The courts partnered with various law schools, bar associations and community dispute resolution centers (CDRCs) and immediately began mediating small claims cases on virtual platforms.

The umbrella term "ODR" is a broad term that includes all uses of information and communications technologies to help parties resolve their disputes. It includes the online replication of ADR processes, including mediation, arbitration or other ADR processes conducted wholly or primarily online.[5] Some examples include: (1) cases assigned to a court mediator, who facilitates interaction between parties via asynchronous text-based exchanges through a dedicated court-provided system;[6] (2) a judge reviewing court papers from litigants and making a decision based on the papers; or (3) video conferencing mediation, where mediators synchronously work with parties live on Zoom to facilitate a conversation, as seen in the Presumptive Virtual Mediation Program in New York City Small Claims.

ODR is growing, and there are those who argue that it advances access to justice, in part because of its low cost and convenience.[7] Those championing the ODR movement argue that "[f]or minor disputes, the time, money, and real or perceived risks involved with going to court are often not worth the cost or hassle. It is simply more cost-effective and convenient for most people to use ODR for small claims, traffic, landlord-tenant, and similarly smaller or less complex disputes."[8] Especially for Self-Represented Litigants (SRLs), it may allow for more self-help options for consumers and efficient and effective avenues for proceeding in the court system.[9] However, it may not be a panacea. We need to be mindful of those left out of the "ODR party," such as the elderly or those who are not as experienced with online processes, as well as individuals who lack access to broadband connections, smartphones and computers.[10]

This article will focus on a small subset of the ODR landscape, specifically on virtual mediation in New York City Small Claims Court. With wide access to vaccines and a reduction in deaths, the COVID-19 pandemic will slowly recess, and the courts will be able to return to more traditional ways of functioning. The primary question that must be considered is whether the continuation of virtual mediation, post-COVID, will be a positive step toward access to justice for litigants, specifically the most vulnerable populations. On the first level, does virtual mediation allow litigants to have better access to the justice system? Meaning, can these litigants literally participate and show up for their court hearings? On a deeper level, we need to ask questions around whether their participation is "better" or whether it is achieving more procedural justice? Do litigants have more of a voice in the process? Do they feel more respected by the process? This article will set the stage for how to achieve voice, but more research needs to be done to answer some of these important questions.

New York City's Presumptive Virtual Small Claims Program

Since 2019, New York State has been moving to greatly expand their ADR initiatives. Chief Judge Janet DiFiore updated the New York Excellence Initiative on May 14, 2019 to include "presumptive ADR."[11] Under this initiative, some civil actions were automatically directed to an ADR forum, in an attempt to resolve disputes more efficiently and effectively. Less than one year later, beginning in March 2020, COVID-19 hit New York City with such devastation and force that the courts had to shut down completely for a few months. In August 2020, under an Administrative Order by New York City Court Administrative Judge Anthony Cannataro, New York City Small Claims Court initiated a new presumptive video conferencing mediation program that vigorously continues today.[12] "In less than one year, the truly presumptive model has allowed more than 800 cases to be mediated, and newly trained mediators have been able to utilize these opportunities to meet the requirements for other court rosters."[13] Over 53% of mediated cases have resulted in settlements.[14] According to the leaders of the New York City Small Claims Mediation Program, there is no intention to return to in-person mediations, and virtual mediations will be the current format for the near future, if not longer.

Key Highlights of the NYC Small Claims Presumptive Virtual Mediation Program include:

- **Partnership between courts and bar association lawyers, law schools and CDRCs.** Since its inception, the New York City Small Claims Court has partnered with all the local law schools, CDRCs and bar associations. There are virtual meetings with the ADR Coordinator to update on protocols and triage any issues. Cases are assigned to particular mediators or organizations through an initial email, where the litigants are also copied. Mediators are expected to quickly contact the parties via email and/or phone to set up the virtual mediation session. Mediation sessions can occur during the weekday hours (if a court-assigned

interpreter is necessary) or whenever is convenient for the parties and the individual mediator. After-hours time slots and weekends are also available in order to accommodate the litigants' work schedules and/or childcare needs. In light of the fact that the mediations are conducted on virtual platforms and litigants do not appear in court, the scheduling is extremely flexible to meet the needs of the litigants.

- **Court interpreters assigned to interpret every mediation**. The court assigns a formal court interpreter to every mediation session when language access is an issue. While this is a huge investment by the court, it ensures that the parties are able to understand and participate in the mediation process, and it allows the mediator to focus on his or her task of being the neutral third party. Some jurisdictions disallow mediators to also serve as interpreters, in order to ensure the impartiality of the mediator.[15] New York's ethical codes may allow the dual role, but in order to ensure neutrality of the mediator and high-quality interpretation, it is vital to have a court-assigned interpreter present.[16]
- **Pre-mediation development work and technological support by mediators to prepare SRLs.** One of the hallmarks of the New York City Virtual Mediation Program is the pre-mediation case development work of the mediators, which ensures that parties are able to access the technology and understand the mediation process before they enter into the virtual mediation session. For example, the Cardozo Law School Mediation Clinic requires every student to call and/or email the parties before the session and offer a tech-prep session. Many of the SRLs take us up on this offer. In the Small Claims Mediation Program, before COVID, parties would show up for their first court appearance and be offered a free mediation session out in the hallway. Now, the parties are given an opportunity to talk to the mediators on the phone, prepare themselves emotionally and legally for their session, schedule the session for a convenient time for them and feel comfortable with the technology before they have to join the first mediation session.

Lessons Learned From Other Jurisdictions

Research, including conversations with several ADR court administrators, CDRCs and ODR leaders about the virtual mediation processes and with program directors in Nebraska, Oklahoma, Texas, Michigan and others, revealed that some programs were already prepared for the pandemic and were using virtual platforms for years, especially in the rural parts of the U.S.[17] However, over the past two years, many courts and programs have found that their appearance rate has skyrocketed when they moved hearings and mediations to a virtual platform.[18]

Indeed, many programs were proceeding similarly to our NYC Small Claims Mediation Program. Some were using court interpreters, while others were not. Some were using the mediators to help prepare litigants for the challenges of online virtual mediation, while others were using court staff, such as clerks and others, to ensure proper access to technology. The biggest difference and highlight was the use of online systems and pro bono lawyers for SRLs for informed decision-making, as seen with the Michigan and Oklahoma programs, among others.[19] States are looking to begin utilizing ODR platforms, such as those developed by Matterhorn and others, to also help fill the information gaps for SRLs.[20]

Best Practices for Dispute System Design of Virtual Small Claims Mediation (DSD)

Some older research suggests poorer outcomes for individuals on virtual platforms in legal bail hearings[21] and recent studies about virtual platforms and their effectiveness are still being conducted.[22] Nevertheless, there are best practices for dispute system design for virtual mediation that should be implemented for all litigants, but especially the vulnerable, unrepresented parties who are very likely to appear in virtual small claims mediation in New York City.

Key Points for Dispute System Design to Ensure Access to Justice

- **Ensuring procedural justice and party voice through both pre-mediation work and specific session design.** Research shows that specific, targeted outreach can improve online court use, especially for disadvantaged communities.[23] Continuing the great work of the current cadre of volunteer mediators and supporting their pre-mediation work with litigants is key. We also know that particular design choices made in online platforms could enhance – or diminish – opportunities for full participation.[24] For example, if one party must use the telephone because they don't have sufficient broadband, as is often the case in New York City, it is best practice for all the parties to call in using the phone. Zoom has call-in options so that you can still use breakout rooms, or mediators can choose to use a simple conference call. Finally, quantitative and qualitative data in the form of exit surveys and case outcome statistics need to be gathered to ensure effective ADR processes. NYC Small Claims has begun this challenging data collection using a web-based exit survey link (that is used by many programs across the state) that can be placed into the zoom chat or emailed to parties and attorneys after the mediation sessions.
- **Ensuring that procedural and legal information is provided at the outset and throughout the process.**[25] Similar to the ODR Programs in Texas and Michigan, there should be access to legal information before and during the process.

- **Offering court-appointed interpreter services for Zoom mediations.** There are ethics opinions that require the mediator not to take on the dual role of mediator and interpreter.[26] In addition, family members fulfilling the role of interpreter is not best practice. Continuing in the New York manner – assigning court-appointed interpreters to the Zoom platform – would be best practice.
- **Providing access to broadband internet or kiosks for parties who lack basic access to internet.** Approximately 7% of individuals in the U.S. lack access to internet.[27] While there has been an increase in access because of low-cost smartphones, many low-income parties still lack access and struggle to participate in virtual mediation.[28] The New York State Unified Court System has begun to think about solutions to this issue, such as providing kiosks for use in court and other solutions.[29] This needs to be a priority for the future of the courts, if virtual presumptive programs are to continue as the norm.

The New York City Small Claims Virtual Mediation Program has been one of the biggest success stories of the past two years. Despite a global pandemic, local bar associations and attorneys, law schools and the courts have been working together tirelessly to ensure access to justice for our most disadvantaged communities. Virtual mediation will be a permanent part of the legal practice in New York City and, if designed properly, it can provide litigants with a rich opportunity to be heard, expand access to justice and support the overburdened courts through the pandemic and beyond.

Donna Erez-Navot is the assistant director of the Kukin Program for Conflict Resolution at Cardozo Law School, where she also directs the Cardozo Mediation Clinic. Prior to joining the faculty at Cardozo, Erez-Navot was the founding director of the Mediation Clinic at UW Law School. The author is grateful for the research assistance for this article provided by Cardozo Law student Elan Kirshenbaum ('22). This article appears in the current issue of New York Dispute Resolution Lawyer, a publication of the Dispute Resolution Section. For information about joining the Dispute Resolution Section, please visit NYSBA.ORG/DISPUTE.

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Your NYSBA Leadership Team 2022-2023

Sherry Levin Wallach, President

Sherry Levin Wallach, deputy executive director of the Legal Aid Society of Westchester County, became president of the New York State Bar Association on June 1, 2022.

A former chair of the Criminal Justice and Young Lawyers sections, Levin Wallach served as NYSBA secretary for four terms, was a vice president from the 9th Judicial District to the Executive Committee, chaired the Membership Committee and co-chaired the President's Committee on Access to Justice and the Task Force on Incarceration Release Planning and Programs. Levin Wallach serves on the Committee on Professional Discipline, the Committee on Mandated Representation and the Task Force on Parole Reform. She is a member of the LGBTQ Law Section.

Levin Wallach is co-founder of the NYSBA Young Lawyers Section Trial Academy, an annual program offering five days of intensive trial training, where she is a team leader and lecturer.

Levin Wallach organizes and lectures at continuing legal education programs for NYSBA, the New York State Association of Criminal Defense Lawyers and the Westchester County Bar Association on the topics of criminal and civil trial practice, ethics and DWI. She has written a chapter on DWI defense, "Best Practices for Defense Attorneys in Today's DWI Cases," in the book "Inside the Minds: Strategies for Defending DWI Cases in New York," as well as articles on criminal justice issues and trial practice.

Levin Wallach concentrates her practice on criminal defense. She has also practiced in the areas of estate planning, probate and estate administration, real estate and general civil litigation in the state and federal courts. She is admitted to practice in New York, the U.S. District Courts for New York's Southern and Eastern districts and the U.S. Supreme Court. She serves on Westchester and Putnam counties' 18B panels under their assigned counsel plans, which provide criminal defense for indigent people.

She is a former assistant district attorney of Bronx County. Levin Wallach was principal at her law firm Wallach & Rendo for approximately 14 years and of counsel to both Bashian Law, formerly Bashian & Farber, and Brown Hutchinson.

Levin Wallach earned her law degree from Hofstra University School of Law, now the Maurice A. Deane School of Law at Hofstra University, and her undergraduate degree from George Washington University.

Richard C. Lewis, President-elect

Richard C. Lewis of Binghamton serves as special counsel at Hinman, Howard & Kattell. He concentrates his practice in litigation and business law. Lewis most recently served as vice president of the 6th Judicial District on the Executive Committee. He has served on the NYSBA House of Delegates since 2001. He was a member of the Committee on Professional Discipline and the Nominating Committee, as well as the Local and State Government Law Section. Lewis is a past president of the Broome County

Bar Association and past chair of its Endowment, Ethics and Grievance Committees.

Active in his community, he is a past chair of the editorial board of The Reporter Group. He currently sits on the executive committee and endowment committees of the Jewish Federation of Greater Binghamton.

In addition, Lewis has served as a director and vice president of the Broome Sports Foundation. He is a former trustee of Hillel Academy of Broome County and served as its president from 2002–2012. He is past president of the Board of Trustees of Temple Israel; past chair of the Broome County Arena Board; past president of Broome Legal Assistance Corporation; past director of Children's Home of Wyoming Conference; and past director of SOS Shelter, Inc.

Lewis is a graduate of Ithaca College and John Marshall Law School.

Taa Grays, Secretary

Taa Grays is vice president and associate general counsel of information governance at MetLife Legal Affairs. As the lead of information governance, Grays is responsible for the strategic management of MetLife's global Information Lifecycle Management Program. She leads an eight-person team that develops, implements and manages the Information Governance strategic plan.

Grays is co-chair of the NYSBA Task Force on Racism, Social Equity and the Law. She is a member of the Business Law, Corporate Counsel and Women in Law sections. She previously served as vice president of the First Judicial District on the Executive Committee. She previously chaired the New York State Conference of Bar Leaders and the Committee on Women in the Law (now the Women in Law Section). She previously co-chaired the Task Force on Racial Injustice & Police Reform. She received the State Bar's Diversity Trailblazer Award in 2008.

Prior to this role, Grays served as the chief of staff to the general counsel since 2010. She started with MetLife in 2003 in the litigation section. Prior to MetLife, Grays was an assistant district attorney with the Bronx District Attorney's Office in its rackets bureau for five-and-a-half years.

Grays has been recognized as one of 100 Leading Women Lawyers in New York by Crain's New York Business in 2017, a Visionary Leader in Litigation by Inside Counsel in 2016, among the Most Influential Black Lawyers in 2015, and R3 – 100: Ready to Rise to become a general counsel in 2013 and 2015.

Within the legal community, the New York City Bar Association recognized her as a Diversity Champion in 2015. The Metropolitan Black Bar Association recognized her dedication and leadership to the bar in 2010 by honoring her with its inaugural Bar Leaders of the Year Award.

Grays earned her law degree from Georgetown University Law Center and received her undergraduate degree from Harvard College.

Domenick Napoletano, Treasurer

Domenick Napoletano is a solo practitioner focusing on complex commercial litigation and appellate work while maintaining a general practice. 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."

Among his NYSBA activities, Napoletano is a past chair of the General Practice Section and co-chair of the Committee on Civil Practice Law and Rules. He previously co-chaired the Emergency Task Force for Solo and Small Firm Practitioner. He has served on many NYSBA committees including Finance, Leadership Development, Bar Leaders of New York State, Animals in the Law, the President's Committee on Access to Justice, Task Force on the Evaluation of Candidates for Election to Judicial Office and the Task Force on Mass Shootings and Assault Weapons.

Napoletano also served on NYSBA's Executive Committee as vice president from the 2nd Judicial District, and the House of Delegates representing the Brooklyn Bar Association. 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.

While in college and throughout law school, Napoletano worked for then-New York State Assemblyman Michael L. Pesce, who recently retired as presiding justice of the state Supreme Court Appellate Term for the 2nd, 11th and 13th Judicial Districts. Napoletano earned his law degree from Hofstra University School of Law and his undergraduate degree from Brooklyn College.

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Parent, Child Vaccination Issues Add Another Dimension to Family Court Cases

By Jennifer Andrus

Some child custody cases in New York have taken on an extra dimension with parents disagreeing over whether their children should be vaccinated against COVID-19. Other parents have asked family court judges to require ex-spouses to be tested for the virus before visiting with their children.

At a panel discussion, professor Lisa Grumet of New York Law School spoke about several recent New York cases dealing with disputes between parents over COVID-19 vaccination and testing. She said most were at the trial rather than the appellate level.

One case involved a disagreement between parents over public school versus home school because masks were required in school. Grumet also mentioned two instances in which parents had differing views on vaccination, and testimony from the child's pediatrician was instrumental in deciding for the parent who wanted the child vaccinated.

"The court was not actually ordering the child be vaccinated. But by denying the father's motion, the court was facilitating the child be vaccinated because the mother would arrange for that," she said.

The COVID-19 battleground has extended to the New York State Legislature, where there are competing bills over whether a COVID-19 vaccine should be added to the list of mandatory inoculations for school children.

"There is a bill to add COVID to the list. There is also a bill to prohibit making COVID vaccinations mandatory. There has been more political conflict over the COVID vaccine than other types of vaccinations," she said.

School Rules When It Comes to Vaccines

In 2019, the New York State Legislature repealed a vaccine exemption for religious reasons. The removal of the exemption was challenged in *F.F. v. State of New York,* and the Appellate Division, Third Department, ruled in favor of the state in March of 2021. The Court of Appeals declined to grant the plaintiffs leave to appeal in October of 2021. In January, the plaintiffs filed a petition for certiorari seeking to appeal to the U.S. Supreme Court.

Both Grumet and the other panelist, Lorraine Silverman of Copps DiPaola Silverman, discussed how vaccination can become a major issue in cases where the parents share custody of children. Even parents who previously got along developed different approaches to caring for the children during the pandemic.

Silverman says it's an even bigger issue for parents who are not married. "Mary is looking for sole custody so she can get the children vaccinated. If the parents were married, there would be no court order. Mary could get the children vaccinated even if her husband disagreed," she said.

Practical Considerations

When looking at the family dynamic, several questions must be asked, such as: Is there any history of domestic violence, mental or physical health problems or substance use? Is there an exposure risk with a family member who is immunocompromised? Did the children receive other childhood vaccines on schedule or were there issues or delays? Will children be in a high-density school or home-schooled? Does one or both parents work in a field such as health care or public safety with greater exposure risk?

Silverman says gathering information about the children and the family from their pediatrician can be an important element in such cases. Did the children come regularly for checkups? Is this a new doctor just hired by parents, or a professional who has cared for the child/ren for years? On the education front, are the kids' grades suffering? Are there other challenges or considerations in the classroom. Do the children participate in team sports or other activities?

Representing the Child

Silverman advises family law attorneys who represent children. She cited Rule 7.2, "Function of the Attorney for the Child," in taking a zealous approach to advocacy.

Silverman says she first finds out what the child wants and treats them as seriously as she would an adult client. "We stand in the same shoes and in the same manner as if we were representing adult clients, which I want all of us here to remember," she said.

She advises attorneys to look at the petitions filed by the parents and meet privately with each child in the family. She considers whether the parents have always been difficult or whether the vaccine issue is the source of a new conflict between them. Silverman also recommends looking at each parent's social media history to determine whether long-held beliefs are influencing their concerns over vaccines.

Context Is Key

With changing protocols and new scientific information coming in, previous decisions may no longer be effective.

"The guidance is changing; the rules are changing. What's happening in the schools and the New York State Legislature is certainly going to impact advocacy in this area," Grumet said.

President's Pro Bono Service Awards Honor Lawyers Across NY State

By David Howard King

During the 31st Annual President's Pro Bono Service Awards, held on May 2, the New York State Bar Association honored lawyers who have made an exceptional commitment to serving the public good.

The ceremony took place as part of the Law Day Celebration held at the Bar Association headquarters in Albany.

Award recipients were honored for volunteering their time and expertise for a wide range of causes including environmental concerns, domestic violence, and refugee resettlement.

"With this year's Law Day theme, 'Toward a More Perfect Union: The Constitution in Times of Change,' there is no more appropriate time to celebrate the lawyers who are on the ground putting in the work to effect change and making our union more perfect through direct action," NYSBA President T. Andrew Brown said.

Here is a full list of this year's President's Pro Bono Award recipients:

1st Judicial District

Neva Dayton Strom has volunteered with NYSBA's Pro Bono Network Surrogate's Court Volunteer group since May 2020. She has served as mentor to other volunteer attorneys and shared her expertise on Surrogate Court matters.

2nd Judicial District

Peter De Vries is a Brooklyn attorney with more than 15 years as a general practitioner providing a wide range of legal services. He works with the Brooklyn Volunteer Lawyers Project, providing divorce, bankruptcy, and guardianship services to those in need with an emphasis on Spanish-speaking clients.

3rd Judicial District

Jessica Vinson provides pro bono services through the Private Attorney Involvement Program of the Legal Aid Society of Northeastern New York. She was the director and founder of the Legal Clinic to Aid Survivors of Domestic Violence in Glens Falls.

4th Judicial District

Scott Iseman is a former judge advocate in the U.S. Marine Corp. He is a member of the Board of Directors of the Saratoga County Bar Association where he coordinates the bar association's Veterans Affairs Committee and its pro bono veterans' clinic. Iseman is also on the board of directors of the New York State Association of Criminal Defense Lawyers.

5th Judicial District

Erika Hooker, an attorney with Bousquet Holstein, works with the Volunteer Lawyers Project of Onondaga County's free legal clinics at Landlord Tenant Court and Surrogate's Court. Hooker represents low-income tenants facing eviction. In Surrogate's Court, she advises pro bono clients in estate administration and legal guardianships.

6th Judicial District

Robert H. Wedlake is a partner of Hinman, Howard & Kattell and a member of the firm's real estate department.

7th Judicial District

Henry W. Jones IV is a retired court attorney-referee. He represents pro bono clients for JustCause in family court matters such as the preparation and filing of petitions and child support litigation. He also works with Legal Assistance of Western New York.

8th Judicial District

For over 25 years, **Charles D. Grieco** has practiced environmental and land use law while serving on numerous community boards and commissions including the City of Buffalo Environmental Management Commission, Buffalo Niagara Waterkeeper, Preservation Buffalo Niagara, the Western New York Book Arts Center, and City Honors Crew.

9th Judicial District

Jill Miller stepped away from a successful career practicing entertainment law at Frankfurt Kurnit Klein & Selz to raise her twins. When the Pace Women's Justice Center opened a walk-in clinic in 2017 to serve victims of domestic violence, sexual assault, and elder abuse, she became a pro bono attorney there.

10th Judicial District

Since his retirement from a 25-year career in corporate compliance and human resources, **Dennis Buchanan** volunteered through the Nassau County Bar Association and the Volunteer Lawyer Project. Buchanan also assists small nonprofits with employment issues.

11th Judicial District

Regina Alberty began her pro bono service with the Queens Volunteer Lawyers Project in 2002. She won a Small Firm Practitioner Award from InMotion, a legal assistance program for women. The award was for representing victims of domestic violence in divorce, custody and orders of protection cases.

Young Attorney

Emily Allen, a Fordham Law School graduate, has been a legal intern with Brooklyn Legal Services Corporation, advocating for tenants in Bedford-Stuyvesant. She helped draft legislation to extend New York State sexual harassment protections to nontraditional workers. Since graduating, she's worked pro bono with JustCause in the Tenant Defense Project.

Senior Attorney

Hon. Vera R. Johnson is a former supervising administrative law judge for the New York State Office of Temporary and Disability Assistance. Since retiring, she has handled pro bono legal matters for the Rural Law Center, LawNY and the Legal Aid Society of Northeastern New York.

Law Student

Alexandra Hyken is a second-year law student at Brooklyn Law School. She has worked with the Brooklyn Bar Association Volunteer Lawyers Project in consumer debt protection and family law and with Brooklyn Law School's Safe Harbor Clinic in immigration. She volunteers with If/When/How and plans to intern with Advocates for Justice this summer, focusing on public school education and employment discrimination.

Law School Group

The Immigration Law Society and the Justice Center at Albany Law School's Immigration Law Clinic are reducing an enormous backlog of cases involving families trying to get out of Afghanistan since the U.S. withdrawal. More than 220 volunteer hours have been devoted to the Afghan Intake Project, which is dedicated to giving refugees a new home.

Small Law Firm

Mucci & Grace has devoted a significant amount of time and expertise to assist the Legal Aid Society of Mid-New York and its clients. Since 2015, the firm has taken on pro bono divorce cases, many of which include severe instances of domestic violence, and more recently has become a key part of Legal Aid's eviction defense program.

Mid-sized Law Firm

O'Connell & Aronowitz has a long established relationship with local organizations including The Legal Project of the Capital District Women's Bar Association and The Legal Aid Society of Northeastern New York. In the last 10 years, its attorneys have performed over 5,000 hours of pro bono work that has benefitted individuals and businesses while protecting civil rights and liberties.

Large Law Firm

Winston & Strawn has a longstanding commitment to excellence in serving the public interest and has ranked as a top 25 firm on the American Lawyer Pro Bono Scorecard for the past five years. During 2021, U.S.-based Winston attorneys worked on more than 900 pro bono matters and dedicated 70,000 hours to pro bono legal service.

Attorney Professionalism Award Winner

Over the course of his career, **Barry D. McFadden** has assisted the Ontario County Department of Social Services with child protective proceedings, actions to free children for adoption, adult protective cases and petitions for support for children on public assistance. McFadden helped create the Ontario County Youth Court and Juvenile Drug Treatment Court.

Law Students Get Public Service Experience Through New York Bar Foundation Catalyst Program

By Jennifer Andrus

First-year law students have a difficult choice about how to spend their summers. Do they get a job to pay for law school, or do they take an internship – often unpaid – and gain valuable experience? The Catalyst Public Interest Fellowship Program, run by the New York Bar Foundation, has the answer – you can do both. Now in its sixth year, the Catalyst program funds summer internships for law students. It allows students to gain practical legal experience in public service.

The fellowship is an answered prayer for Stephanie Kaczowski, a first-year student at Albany Law School. She is originally from Connecticut, but she and her husband moved to Albany so she could attend law school. Without the Catalyst stipend, she was planning to spend the summer bartending to make ends meet. Now, she will be paid to work for the Empire Justice Center in Albany, helping with its civil legal services for crime victims. She says it's a perfect fit. "I was a women's studies major and have worked in rape crisis, so this is the kind of work I want to do. This program is helping me fulfill my dreams."

Kaczowski is just one of 60 students representing all of New York State's 15 law schools who are benefiting from the program. About 25 student fellows spent the day on May 18 in Albany to kick off the 2022 program. They met Catalyst's founder, New York Chief Judge Janet DiFiore, and toured the New York State Court of Appeals.

DiFiore spoke to the students and showed them around the Great Hall in the New York State Court of Appeals. She encouraged them to seek out public service. "Working in a DA's office is an invaluable example of public service. We are charged with keeping our communities safe. Hopefully you will consider public service after law school."

DiFiore created the program shortly after she became chief judge and funded it with remaining campaign funds raised as Westchester County district attorney. The program is administered by the New York Bar Foundation and pays each student $5,000 during the summer after the first year of law school. Since its inception, 285 fellows have received $1.3 million to fund public service internships.

The students also heard from a young attorney who was in their shoes as a Catalyst fellow just a few years ago. Julia Kosineski, a senior assistant public defender in Schenectady County, spent the summer following her first year of law school with the Schenectady district attorney's office and eventually found her calling in criminal defense. "It was a great experience I would've never had without Catalyst."

"The greatest thing is finding what really suits your passion," she says.

Member Spotlight: Marian Rice

Marian C. Rice serves as general counsel at L'Abbate, Balkan, Colavita & Contini. For nearly 40 years, she has concentrated her practice on the representation of attorneys and risk management for lawyers. Rice is currently co-chair of the New York State Bar Association Law Practice Management Committee and chair of the NYSBA Working Group on Re-Opening Law Firms. In addition, she is a member of NYSBA Committee on Professional Ethics and an alternate to the NYSBA Nominating Committee.

Why do you love to practice in attorney representation and risk management?

It's the greatest area of practice on Earth! You meet a million wonderful people and every day is new and different. You're dealing with a different area of law in every case. While I didn't have a role model that led me to legal malpractice, I am so grateful that the career came to me early on. Now, so many years later and I still think it's the greatest job on Earth.

You take an active role in NYSBA and co-chair the Law Practice Management Committee. Why are you so involved and what do you get out of it?

I enjoy working with attorneys and helping them out, and the bar association is a big part of that. The LPM Committee helps members with tools and information to manage their practices, avoid claims and conflict and in the end how to make money. So many committee members are my role models. They are very good at managing their time while maintaining a work-life balance. Being a lawyer, it's very difficult, and they've been great at getting important material out to everybody.

I can't underestimate the value of networking at the bar association and being able to mentor younger lawyers. So many younger lawyers are putting their shingle out now; it's one of the best ways that they can get access to people who have more experience in their substantive areas of practice or even in the management of a practice.

You signed onto the Committee on Attorney Well Being. How has that helped your own practice and that of other members?

The pandemic forced us to change and adapt faster than we thought possible. It highlighted the need for equilibrium in our lives. I really do believe that as horrible as the pandemic was, it showed us how to recognize attorneys' well-being and still get our daily jobs done. It has shone a light on what is possible with remote work, gaining the attention of a lot of law firms that would have never signed on before. I hope the work of the committee doesn't get lost. I'm glad that it is now a permanent committee.

What advice would you give a lawyer just starting in their career?

My advice to any person is always keep your options open. If there are two paths that you have and one of them will foreclose any other opportunity but the one you're looking at – go for the one that's going to give you options going forward. My advice to people getting out of law school is just keep your options open and try every opportunity. I never would have thought in a million years that defending attorneys would have been a terrific career to have, and it really is. So, just go with the flow.

Marian C. Rice

Finish this statement: "Lawyers should join the New York State Bar Association because . . ."

Without a doubt, in every circumstance, they will become better because of their membership. Better substantive lawyers, better managed lawyers and better able to meet their clients' needs. Plus, they can meet their own needs as well and that's really why they should join the bar association. So many times, when I talk to younger attorneys, they say to me they don't have time. I get that with young families, but the investment pays off exponentially!

CUNY Law School Removes Criminal History Question From Its Admissions Application

By Susan DeSantis

On May 18, CUNY Law School announced that it was removing a question about criminal history from its admissions application, becoming the second law school in New York to do so after the University at Buffalo School of Law.

"A lot of people are talking about this issue right now. CUNY Law did more than talk about it. It was really exciting to be here the day they took action," said Colby Williams, a member of CUNY Law's Formerly Incarcerated Advocacy Association and one of the students who fought for the change.

The school's press release credits the New York State Bar Association for its advocacy to remove a similar question from the bar admissions application. On Jan. 22, NYSBA's House of Delegates approved a report from the Working Group on Question 26 of the New York Bar Exam, which called the bar admissions question illegal.

"The question has driven away untold Black and Latino students who are subjected to the scrutiny of law enforcement to an extent unimaginable to their white counterparts," said T. Andrew Brown, president of the association. "We as an association came together at the House of Delegates meeting in January to call for a complete rethinking of the question. Now, it is time for the New York State Unified Court System to remove the question from the bar application."

The bar admissions question violates two state laws, the New York State Human Rights Law and the Family Court Act, the association said in its press release.

The legal profession routinely ranks as one of the least diverse in the country. Recent American Bar Association surveys found only 5% of lawyers identify as Black and 5% as Latino. Meanwhile, while Blacks make up 15% of New York's population, they account for 38% of arrests, according to the latest data compiled from the Judicial Friends Report on Systemic Racism in New York Courts.

The report approved by the House of Delegates recommends rewording the question to make clear that sealed criminal records, juvenile delinquency and youthful offender proceedings, dismissed cases and arrests that are no longer pending that did not result in a conviction do not have to be disclosed.

Question 26 reads: "Have you ever, either as an adult or a juvenile, been cited, ticketed, arrested, taken into custody, charged with, indicted, convicted or tried for, or pleaded guilty to, the commission of any felony or misdemeanor or the violation of any law, or been the subject of any juvenile delinquency or youthful offender proceeding?"

NYSBA is asking that question 26 be revised to conform with the Human Rights Law and the Family Court Act and that all other questions make clear that applicants do not have to disclose conduct protected by the two laws.

NYSBA Members Fight for Immigrant Representation

By Jennifer Andrus

The New York State Bar Association strives to promote equal access to justice for all, and NYSBA members' zealous advocacy for immigrants is one way attorneys work to achieve that ideal.

Shayna Kessler and Steve Yale-Loehr, co-chairs of NYSBA's Committee on Immigration Representation, focus on education and advocacy to improve the plight of immigrants. The committee hosted several CLE webinars in 2021 and 2022 to train NYSBA members in the fundamentals of immigration law.

"We try to encourage more members to work pro bono for immigrants, and Shayna has been particularly active in trying to work on funding issues and legislative issues to make it easier to get representation for immigrants in New York State," says Yale-Loehr, who is a Cornell Law School professor. "Immigrants are not guaranteed an attorney. Over half of all immigrants don't have a lawyer, and immigration law is one of the most complex areas of law in the country. For asylum seekers, it can be a life and death decision."

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Law School Clinics Fill in the Gap

Immigration work is one of the areas highlighted in this year's NYSBA pro bono awards. Albany Law School's Immigration Law Pro Bono Society is one recipient of the 2022 President's Pro Bono Service Awards. The group is recognized for its innovative clinical program working with the U.S. Committee for Refugees and Immigrants and Immigrant-ARC.

Jake Mantey, Albany Law School '22, recruited and trained more than three dozen student volunteers to help in the immigration clinic this year. Working with USCRI's legal team, the law students conducted over 200 legal screening of Afghan refugees who have resettled in the capital region.

Mantey says he is drawn to immigration law to help those who are often scapegoated. "I think it's a prominent area where you can have a lot of impact that's tangible and it means a lot to disadvantaged people."

NYSBA members and Albany Law professors Sarah Rogerson and Lauren DesRosiers support the students' clinical work on behalf of immigrants. "There's something deeply fulfilling about assisting groups of individuals that are consistently set aside by political winds on both sides of the political ideology," Rogerson says. "Immigrants are consistently overlooked when it comes to national policy and consistently demonized after 9/11. I saw that very clearly as a law student."

DesRosiers was excited to join the Justice Center at Albany Law School's Immigration Clinic to work alongside Rogerson.

"I saw it as a really great opportunity to work with students, get them excited about doing immigration work and also simultaneously be able to serve clients in the community," she says.

Yale-Loehr says his best days are when former students reach out to him about pro bono immigration work, having learned those skills from Cornell's immigration law clinics.

"It keeps me going," he says.

Recognizing Secondary Trauma

Immigrants and asylum seekers are often victims of torture and abuse and hearing their stories can cause a secondary trauma for lawyers. Recognizing this impact is central to the students' clinical work at both Albany Law and Cornell.

"There are recognized techniques that psychologists and psychiatrists use not just in immigration, but in any traumatic situations like terrorism, domestic violence cases or criminal cases. All of these sensitive cases can raise secondary trauma issues and now it's getting more integrated in the curriculum," Yale-Loehr says.

Mantey focused on community care during the work of Albany Law's Immigration Law Pro Bono Society. He provided time and space for student volunteers to talk about their shared experiences. "We look out for each other's mental health because doing this type of stuff is very taxing. A lot of people don't want to get involved in such horrific stories," Mantey says.

Earlier this year, NYSBA and the Committee on Immigration Representation provided a free event on recognizing secondary trauma.

Legislative Action on Immigrant Rights to Representation

The right to immigrant representation is one of NYSBA's legislative priorities for 2022. NYSBA scored a victory this month with the Legislature's approval of increased funding for legal services from $16 million to $20 million. Kessler hopes the funding will spur momentum for supporting mandated legal representation for immigrants in New York.

"We can model immigration policy that is welcoming and centers on human dignity, that ensures that immigrants, faced with federal immigration enforcement, have the support of their state," she says.

Kessler and Yale-Loehr believe that the plight of immigrants must be considered for the recovery from the COVID-19 pandemic to be equitable.

"The enormous amount of danger and lack of safety and lack of health care precautions for people who are in detention is terrifying," Kessler says. "We're seeing immigrants who are disproportionately essential workers continuing to face a year of family separation, of detention and deportation even while working on the front lines of the pandemic."

NYSBA Involvement Is a Lifeline

Rogerson says membership in the New York State Bar Association is a key element in Albany Law's clinical success. "The State Bar provides a network and platform for us to collaborate more effectively. NYSBA has been critical in terms of these pop-up clinics – getting the word out to volunteers and funneling people power," she says.

DesRosiers agrees, saying the association excels at building community. "Having a network of really informed engaged attorneys is just so key and NYSBA is so great at developing and supporting that network."

Roy M. Warner

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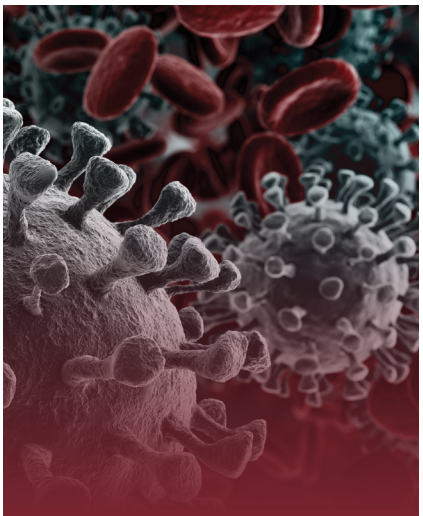

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SPONSORED ARTICLE

How Law Firms Can Benefit From ACH Payments

By Lauren Erdelyi

In today's hyper-convenient world, clients can shop for a near-limitless selection of items – from anywhere, anytime. They can consume a diverse range of content in a few quick clicks. And they can communicate with service providers through channels of *their* choice.

This expectation of ease is no different for the legal industry, especially when it comes to making payments. Today's clients want – or rather, they expect – to have choice. One way to give them the flexibility they're after is to accept ACH payments, the most preferred B2B payment method in North America. To help you get started, we're covering everything you need to know about these payments, from how to accept them to their perks and pitfalls.

What is an ACH payment?

ACH (which stands for automated clearing house) payments are a type of electronic or digital payment between two bank accounts. They're made through an ACH network, governed by an organization called Nacha. This highly impressive network safely and securely processes some 29 billion electronic payments for consumers, businesses, and government agencies each year.

What is an example of an ACH payment?

While the term may not be part of your everyday lexicon, ACH payments are ubiquitous in our lives. If your paycheck automatically appears in your bank account through direct deposit, that's an ACH payment. If you've recently set up bill autopayments on a recurring basis, that's another example of these payments at work.

Why should your law firm accept them?

If you're already accepting a variety of payment methods, you may be wondering why you need to add another one to the mix. Well, ACH payments can bring a host of benefits, including:

- **Greater efficiency.** With traditional checks, clients have to make time-consuming trips to the post office or law firm to drop off their payment – and then legal professionals have to take time out of their day to process it. ACH allows money to be transferred in just a few clicks, saving time for lawyers and clients.
- **Increased revenue.** Clio's *2021 Legal Trends Report* found the average lawyer billed less than three hours of an eight-hour day. By spending less time on administrative tasks – such as making or processing payments – lawyers can increase their billable hours and boost their revenue. The ease and flexibility of ACH payments also helps lawyers collect more money. And as processing fees are typically lower, they'll save money on those.
- **Enhanced client experiences.** Clients appreciate the better experience that ACH payments deliver – and this translates into more repeat business, better word of mouth and online reviews, and additional referrals.

Advantages for clients

Along with unleashing benefits for lawyers, ACH payments can provide clients with:

- **Added convenience**: Clients can pay whenever and wherever they want, without wasting time dropping off payments. This is especially helpful for recurring bills.
- **More security**: As ACH payments are governed by the Nacha Operating Rules, clients can be confident their payment will arrive online and on time.
- **An environmentally friendly option**: According to an Edelman study, 60% of people want to buy from companies that are helping to make the world a better place. Reducing paper usage is a simple way to help clients build a stronger connection with your brand.

Risks to prepare for

It's impossible to guarantee a 100% risk-free transaction. That's why it's important to be aware of the potential threats so you can verify that your payment provider is set up to mitigate them.

- Unlike credit card payments, ACH payments aren't governed by PCI compliance. While the ACH Network offers comparable internal controls, data breaches or data losses are possible.
- According to Corporate Compliance Insights, payment fraud and ID theft could wreak havoc on your firm – yet the risk is low with ACH.

- While system downtime is rare, it can delay payments when it happens.

How can your firm accept ACH payments?

Adding a new process to your law firm can feel intimidating. But the good news is it's easy to get started with ACH payments. We recommend the below steps:

- **Confirm it's right for you:** For instance, ACH payments aren't available to people outside of the US.
- **Choose a provider:** We recommend one that specializes in law firm payment processing, as they'll understand industry requirements and have the checks and balances in place to ensure compliance.
- **Set up the back end:** ACH payment setup is simple and done online, so there's no need to deal with hardware. You can also add payment instructions to invoices and online payment options.
- **Gain authorization:** A good platform will allow you to receive authorization from clients and suppliers in a few quick steps.

How to accept payments securely

Client confidentiality and regulatory compliance are among the most critical aspects for your law firm. Any payment method you offer, as well as the platform you choose to power it, must be secure and meet compliance requirements. Fortunately, ACH payments are low-risk on both fronts.

Still, it's a good idea to confirm the platform you choose is PCI compliant. Although these payments don't need to follow PCI-compliant standards, it's a good indicator of a provider's commitment to security.

How do ACH payments compare to other payment methods?

Now, we'll look at some of the pros and cons of ACH payments, compared to more traditional payment methods.

ACH payments versus credit cards: ACH payments take the convenience of remote, cashless credit card payments to the next level, with two main distinctions. For one, ACH offers lower fees than credit cards. Secondly, while credit cards inform you instantly whether there are enough funds for a transaction, it takes one to three days with ACH payments.

ACH payments versus wire transfers: ACH offers lower fees than wire transfers and allows you to easily cancel transactions. However, these transactions can only be done in the U.S. and can take up to three days, while wire transfers are global and are processed immediately.

ACH payments versus checks: Paper checks offer lower transaction fees, but there are drawbacks. Payers who don't have enough money in their account to complete the transaction via check might be charged a fine, which doesn't happen with ACH. Checks also have a negative environmental impact and lack the convenience that ACH delivers.

How much do ACH payments cost?

You're probably wondering how much this new system will cost your law firm. According to Merchant Maverick, you can expect a flat $0.20-$1.50 fee per transaction, a 0.5-1.5% fee per transaction, or a combination of the two. Unlike credit card transactions, many providers place a cap on ACH fees – which tends to be around $5. This makes ACH payments very cost effective for lawyers.

There are additional fees you need to take into consideration, as outlined below.

Type of fee	Typical cost
Flat fee (per transaction)	$0.20 - $1.50
Percentage fee (per transaction)	0.5% - 1.5%
Monthly fee	$5 - $30
Batch fee (per batch)	<< $1
ACH return fee (per return)	$2 - $5
ACH reversal / chargeback fee (per instance)	$5 - $25

Source: Merchant Maverick via GoCardless

A powerful addition

With their many benefits, ACH payments are growing in popularity among clients. With plenty of tools in the market, the daunting task of figuring out how to accept these payments becomes an easy one. Platforms like Clio specialize in the legal industry, so you can collect more payments, get paid faster, and still remain ethical and compliant.

This doesn't mean you need to throw all other payment methods out the window. Many clients still use credit cards, wire transfers, and checks. When you expand your digital billing options, you give them the flexibility they're after – which makes getting paid easier.

Lauren Erdelyi is a content writer for Clio. She can be contacted at lauren.erdelyi@gmail.com.

Taking a Hard Look at Crypto

Newly minted NYSBA President Sherry Levin Wallach has announced the formation of a cutting-edge Task Force on Emerging Digital Finance and Currency. The task force is charged with studying and evaluating the legal issues and questions surrounding the expansion and regulation of the digital finance and digital currency industries in New York State. Included in its review will be an examination of current and pending laws and regulations impacting the industry. There are many questions raised in this new area of law including the proper role for government.

Let's start with clearing up a common confusion between the words bitcoin and blockchain. Bitcoin is a digital token or currency that can be sent electronically from one person to another. Blockchain is the decentralized database where digital information is stored. Cryptocurrency, or crypto, as it is often called, is a term to describe the thousands of virtual currencies, in addition to bitcoin, including ether and dogecoin. Stablecoins are a type of cryptocurrency which, unlike bitcoin, is tied to another currency, like the dollar, or a commodity, like gold.

Who in government is looking at this new technology? The Federal Reserve is considering issuing a central bank digital currency, or CBDC. Treasury Secretary Janet Yellen said at a May congressional hearing on stablecoins that a comprehensive regulatory framework established by federal legislation is needed so that "there are no gaps in the regulation." The Securities and Exchange Commission and the Commodity Futures Trading Commission are divided over broader jurisdictional questions and the nature of these new currencies, with the SEC arguing its stricter investor protection rules should apply. President Biden waded into the regulation question in March when he issued an executive order to create a coordinated oversight plan for crypto. Far from being an

explicit plan, it is instead a charge for federal agencies, including the Department of Justice, to research a variety of issues including creating a digital U.S. dollar, providing consumer protection, prosecuting crypto crimes and establishing financial stability. Will one agency ultimately have oversight of this industry, or will it continue to be governed by an alphabet soup of federal agencies resulting in jurisdictional turf wars?

Congress is also looking at the myriad crypto public policy issues impacting this $2 trillion market. Several bills have been introduced by tech-savvy representatives and senators, and a few high-profile hearings have elevated the issue in Washington. As of the writing of this article, crypto enthusiasts were awaiting a draft bill by Sen. Cynthia Lummis of Wyoming, home to a robust crypto industry. New York Sen. Kirsten Gillibrand is an early supporter of the measure. The bill is expected to include provisions to determine the nature of a crypto product. Is it a security or a commodity? The answer will determine if it is regulated by the SEC or the Commodity Futures Trading Commission. It is also expected to address consumer protections, taxation and a framework for stablecoins. If this bill becomes the vehicle for all crypto legislative issues, other pending related bills may be folded into this measure.

To fill the void in regulation at the federal level, crypto companies have set their sights on the states to enact legislation. This seems an atypical move. Usually, if an industry desires regulation, the industry pursues it at the federal level rather than the state level, preferring a uniform national standard rather than a patchwork of state regulation. According to the National Conference of State Legislatures, there are 153 proposed laws pending in 40 states and Puerto Rico.

While many support crypto-friendly bills, believing a favorable regulatory environment will bring jobs to a state, not all legislation is beneficial to the industry. In New York, where the electorate and the elected are generally eco-friendly, there is a growing concern about the impact of the crypto industry to the environment. For example, crypto mining is a process that is essential for the functioning of trading in cryptocurrencies. The act of "mining" does not involve drills, subterranean caves or canaries, but rather is the process of creating and verifying currency creation. The amount of energy required for these processes is not insignificant. One estimate puts the amount of energy necessary for a single bitcoin transaction at 2,000 kilowatt-hours of electricity, or enough energy to power the average American household for 73 days. While the number of daily bitcoin transactions varies from day to day, during the last week in May 2022, the daily average was around 210,000.

This amount of energy usage puts a strain on the local energy plant and can cause an increase in rates for residents. In response, legislation to limit this nascent industry has been introduced in the state Legislature. Additionally, at the time of the writing of this article, there were over a dozen crypto-related bills pending in the Legislature on topics such as fraud, payments, investments and state-issued cryptocurrency.

So who is utilizing this new technology for payments in the United States? New York City Mayor Eric Adams has been an outspoken advocate for cryptocurrency. He has made good on his campaign promise to receive his first three paychecks as mayor in crypto – specifically bitcoin and ethereum. Consumers in the luxury space can now use digital currencies to purchase watches from the Swiss luxury maker Tag Heuer, which is owned by international conglomerate LVMH. Will others follow suit? Perhaps additional companies under LVMH's luxury umbrella will begin to accept this form of payment. Will crypto payments be democratized and accepted by more mainstream mass retailers in the U.S.?

When could we see new regulations for this trillion-dollar industry that so few engage in or even understand? Biden's executive order set deadlines for agencies to comply, and first actions could be released by this summer with the rest in 2023. After the midterm elections, the House and Senate could flip to a Republican majority. Crypto-currency is not a strictly partisan issue, so it is unclear how a switch in party control could impact legislation. But what will most likely remain is a body of elected representatives who have limited understanding of these new cutting-edge financial instruments. They will continue to look to the leadership of their colleagues who are well-versed in these issues, as well as to industry leaders for guidance and input.

A final thought to keep in mind when considering a timeline for action is: what happens if there is a catastrophe? There is a popular old Washington phrase: legislating by crisis. The idea is that legislation is often enacted in the wake of a crisis – particularly a high-profile crisis – rather than after careful deliberation. If there is some financial crisis that is linked to crypto, which results in a harm to elected official's constituents, I would not be surprised to see a bill signed into law very quickly. We should be wary of this process because sometimes haste results in bills with unintended consequences – the implications of which can be felt for years and even decades.

Hilary Jochmans, policy director for NYSBA, writes about legislation of interest to members. Previously Jochmans was the director of the New York State governor's office in Washington for both Andrew Cuomo and David Paterson and has spent a dozen years on Capitol Hill working in the House and Senate.

When a Mentor Is Uncivil, You Have Options

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 corporate transactional attorney who has been in practice for nearly 30 years. Every few years I participate in an alumni program at my law school where I am paired with a recent law school graduate to mentor throughout their first few years of practice. A few years ago, I was paired with a graduate who I have mentored for the last five years. She is now a mid-level associate at a boutique litigation firm where she just started. We were having coffee recently and discussing her new position. During our conversation, she recounted a few of her experiences with her new boss that left me troubled and raised some questions as to attorney civility and her ethical responsibilities as an associate and member of the bar.

She told me that the partner that she reports to, whom I will refer to as "Ren," is particularly spirited, so much so that, in my opinion, he appears to cross the line between zealous advocate and unprofessional. For example, she told me that during meet and confer calls he is constantly screaming at adversaries, talking over them and changing course on his prior agreements by telling the court that he did not agree to certain things that she specifically remembers that he did agree to. She also noted that he often attempts to justify his positions and misstatements by indicating that she agrees or that she will recall him saying things that she is certain he never said.

On one particularly offensive occasion, during a meet and confer Zoom call between counsel, the associate on the opposing side attempted to address a discovery issue with her directly. Ren immediately and aggressively interjected by stating, "DO NOT SPEAK TO HER!" She said she was taken aback because she was not only prepared to answer the adversary's question, seeing as she was the attorney who prepared and transmitted the production, but she found it offensive that he would not even afford her the opportunity to speak at all. On another occasion, Ren even went as far as to tell one of their male adversaries to "control" his female co-counsel during a meet and confer call between counsels. While my mentee indicated that she was not comfortable speaking up during the call, she asked me whether I thought she should have addressed the issue with him directly after the call.

I couldn't believe what she was telling me. In my 30 years of practice, I have never encountered such behavior from a professional. Is Ren's conduct a violation of the Rules of Professional Conduct? What about the Standards of Civility? Are there ethical considerations that have to be addressed? If so, as an associate who is employed by the individual exhibiting inappropriate behavior, does she have any ethical obligations that she should be aware of?

Sincerely,
Ainsley Associate

Dear Ainsley,

Unfortunately, lawyer incivility during virtual practice as a result of the COVID-19 pandemic may have increased over the last few years. This is likely due to a variety of factors. First, as numerous studies have documented, lawyers have reported increased levels of stress, anxiety, depression and feelings of being burnt out during the pandemic.[1] Second, while practicing in a home environment, often in their sweatpants, lawyers may have inadvertently dropped their standards of professionalism. Whatever the reason for it, there is little doubt that incivility between attorneys disserves the profession and the client. In the words of the Honorable Justice Sandra Day O'Connor, which have remained true over the years:

> [T]he justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and system itself lose esteem in the public eyes . . . . [I]ncivility disserves the client because it wastes time and energy – time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.[2]

We have addressed the best practices of civility between opposing counsel in several prior Forums.[3] The situation you describe involving your mentee gives us an opportunity to revisit the issue in a somewhat different context – what should an associate do when a supervising partner engages in egregious behavior? Further, we will address the inappropriate gender overtones evident in Ren's behavior, which unfortunately many female litigators have likely encountered during the course of their careers.

First and foremost, the incivility you describe is certainly a violation of the New York State Standards of Civility.[4] These standards were adopted by the courts to guide the legal profession, including lawyers, judges and court personnel, in observing principles of civility. Although the standards are not intended to be enforced by sanctions or disciplinary action, they give us basic principles of behavior to which lawyers should aspire. For example, Section 1 of the standards provides that "lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others" and that "lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses."

In our view, Ren's conduct in screaming at opposing counsel during meet and confer calls and repeatedly talking over them is not acceptable behavior, nor is it in the interest of effective advocacy. The point of any meet and confer call is to attempt to resolve open discovery issues and avoid needless motion practice, which results in larger expense to the clients and increased backlog to the court's already jam-packed docket. A meet and confer is intended to be a conversation between counsel and an attempt to compromise on outstanding issues; it should not be used as an opportunity to pound chests on the merits of each other's respective cases.

By not allowing opposing counsel to get a word in, and in repeatedly changing course on agreed-upon items, Ren has unnecessarily increased the length of the meet

and confer call and, thus, the costs of litigation for both parties. We assume that by engaging in the conduct referenced above that nothing was accomplished during the meet and confer calls, thereby requiring discovery motions or applications to the court, which would serve to unnecessarily increase the cost of the litigation as well as the court's backlog. Attorneys and their clients should know that an attorney who establishes a bad relationship with his or her adversary (and ultimately the court) is taking a big risk should problems arise in the future of the case.

Further, Ren's comments that his male adversary should get "control" over the female co-counsel crossed the line. Not only is such conduct uncivil, but it is highly unprofessional, offensive and inappropriate behavior that, in our view, violates the standards. Needless to say, Ren's conduct is a poor example of proper mentor conduct. Demonstrating combative, unprofessional behavior sets a bad tone for associates for the type of conduct that is acceptably engaged in by lawyers. Although Section I(D) of the standards provides that "lawyers should require that persons under their supervision conduct themselves with courtesy and civility," in the instance you describe it appears that Ren, the partner, has failed to lead by example. However, Ren's offensive behavior goes beyond that, and we would be remiss if we did not address the elephant in the room. It appears that Ren's inappropriate behavior was, at least in part, motivated by a gender bias. Unfortunately, there is a tendency by some male counterparts to dismiss female litigators who are direct and assertive in advocating their clients' positions by characterizing them as "aggressive," "hostile" or, in this case, telling them to get "control" over their so-called emotional state. Two of the co-authors of this article have experienced this very behavior on more than one occasion and therefore can confirm that this unacceptable behavior still persists in 2022. There continues to be a double standard clouding the profession that, where a male attorney is zealous in advocating for his client's position, he is perceived as a leader, assertive and tough, whereas a female litigator demonstrating the same qualities is described as hostile, aggressive, irrational, hysterical or out of control. We raise these uncomfortable issues to bring awareness to this issue and to call it out for what it is – inappropriate gender stereotypes and discrepancies that are never acceptable in any profession, especially the legal profession.

Additionally, the instance you describe where Ren refused to allow his female associate to speak during a meet and confer call, despite being the individual with the most knowledge of the facts and procedures, is also improper and, frankly, a disservice to the professional growth of the associate. In our opinion, while Ren has likely not violated any ethical rule in barring his associate from speaking when spoken to on meet and confer calls, the associate may want to consider having a conversation with Ren about his stunting her professional growth or perhaps speak with someone else at the firm. Unfortunately, there are always some people who do not get the message, and this may be a situation where the best solution is a move to a new employer that is more invested in promoting the associate's professional growth.

Separately, Ren's practice of changing course on his agreements with opposing counsel during meet and confer calls is a further violation of the standards. Section IX(C) of the standards provides that a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court when memorializing agreements. Based on the facts as you present them, it appears that Ren has made a habit out of rewriting the facts to suit his client's objectives rather than stating the correct terms of the agreement. In addition to violating the standards, consistently changing course on verbal agreements made during meet and confer calls also violates several provisions of the Rules of Professional Conduct (RPC) if the misrepresentations are made to the tribunal.

In a prior Forum, we have addressed the ethical implications for Pinocchio adversaries who never seem able to tell the truth.[5] In that Forum we noted what should be obvious: lawyers should never lie to their adversaries or the court. Several rules and decisions prohibit attorneys from making false and misleading statements.[6] For example, RPC 3.3(a)(1) provides that "a lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by that lawyer." RPC 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." In addition, RPC 8.4(c) states that "a lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. Judiciary Law § 487 makes it a misdemeanor for attorney who is guilty of deceit or collusion with intent to deceive court or party. 22 N.Y.C.R.R. § 130-1.1(c)(3) permits sanctions where counsel "asserted material factual statements that are false." Comment 2 to RPC 3.3 is directly applicable to your situation:

> This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impar-

> tial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.[7]

In addition to the safeguards to the profession set forth in the RPC, Section X of the standards echoes the need for lawyers to be mindful of protecting the standing of the legal profession in the eyes of the public. Accordingly, lawyers "should bring the New York State Standards of Civility to the attention of other lawyers when appropriate." Therefore, you may want to speak with another partner at your firm or even your human resources representative about Ren's lack of professionalism.

With regard to your mentee's inquiry as to whether she has an obligation to report his unprofessional and dishonest conduct, the reporting requirement would depend on the extent of the dishonesty. RPC 8.3(a) tells us that

> [a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

As we put it in a prior Forum, "an attorney should use professional judgment and discretion when determining whether and how to report a colleague."[8] This advice is similarly applicable to your mentee's situation. Comment 3 to RPC 8.3 notes

> [t]his Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.[9]

Based on your question as you present it, we do not have enough information to determine whether you or your mentee have an obligation to report Ren's unprofessional conduct. She will need to use her judgment to determine whether the fabricated facts and misstatements of law she witnessed raised a substantial question as to the lawyer's honesty or whether it was merely an attorney exaggerating his arguments in an attempt to diligently represent his client.

Finally, it appears that Ren needs to be reminded of RPC 5.1, which requires supervising attorneys to teach associates to follow the Rules of Professional Conduct. While leading by example is certainly one of the best ways to accomplish this goal, it does not appear that Ren is doing so. Rather, the course of conduct you describe should not be emulated by attorneys under any circumstance. For example, asking his associate to confirm a lie he has told or not letting her speak during conferences is certainly in derogation of that Rule.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT FORUM

To the Forum:

I recently graduated from law school. I took the bar exam and am working in the pool of clerks. The judges and their assigned clerks don't even recognize me, but I recognize them. After working late one night, I went to an Italian restaurant near the courthouse. There, I saw one of the clerks handing an envelope to another person, who I did not know, but seemed familiar. Later, I saw his judge pick him up in his car outside the restaurant.

The next day, I saw an article on the front page of the newspaper about a controversial case currently *sub judice* in our court, reporting on "rumors" as to how the court was expected to rule. The author of the story appeared on the local news program and is a well-known local journalist. The author looked very similar to the person the clerk had met, but I am not certain it was the same individual. When asked by the interviewers how they had heard these rumors, the author did not give a direct answer, but implied that they have a confidential source. This is the first time any such rumors have been published and I am not sure whom I should talk to about this issue.

The judge that I'd seen outside the restaurant was known throughout the courthouse to be a dissenter. I am now conflicted. Am I ethically required to report what I saw based upon mere suspicion, and do the rules apply to me if I have not yet even been admitted to practice?

Sincerely,
Leaker

Endnotes

1. *See* Stephanie Francis Ward, *As Lawyer Stress Escalates During Pandemic, LAP Agencies See Significant Increase in Calls*, ABA Journal, May 26, 2021. *See also* Nicole Black, *ABA Survey: Lawyers Are Stressed Out*, Above the Law, Aug. 5, 2021.
2. *See* The Honorable Sandra Day O'Connor, Civil Justice System Improvements, Speech to American Bar Association (Dec. 14, 1993) at 5.
3. *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., Nov. /Dec. 2012, Vincent J. Syracuse, Maryann C. Stallone & Hannah Furst, Attorney Professionalism Forum, N.Y. St. B.J., March/April 2016.
4. *See* 22 N.Y.C.R.R. § 1200, App. A.
5. *See* Vincent J. Syracuse, Maryann C. Stallone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., Sept. 2016.
6. *See* RPC 3.1(b)(3) (A lawyer's conduct is "frivolous" where "the lawyer knowingly asserts material factual statements that are false").
7. RPC 3.3, Comment 2.
8. *See* Vincent J. Syracuse, Ralph A. Siciliano, Maryann C. Stallone& Hannah Furst, Attorney Professionalism Forum, N.Y. St. B.J., May 2016.
9. RPC 8.3[3].

Upcoming NYSBA Programs and Events

August & September

Video Replay | **Introduction to Entertainment Law: Basic/Current Issues 2018 – Part 1**
August 2 | 11:00 a.m. – 2:00 p.m. | 3.0 Credits

Video Replay | **Gender Equity in Athletics**
August 3 | 12:00 p.m. – 1:15 p.m. | 1.5 Credits

Video Replay | **Introduction to Entertainment Law: Basic/Current Issues 2018 – Part 2**
August 4 | 11:00 a.m. – 2:00 p.m. | 3.0 Credits

Video Replay | **Introductory Lessons on Ethics and Civility**
August 9 | 9:00 a.m. – 1:00 p.m. | 4.0 Credits

Video Replay | **Professional Compensation in Contested Matters**
August 9 | 10:00 a.m. – 11:00 a.m. | 1.0 Credit

Video Replay | **Cyber Ethics Series: Phishing and Ethics**
August 9 | 12:00 p.m. – 1:00 p.m. | 1.0 Credit

Webinar | **General Lifetime Planning Concepts: Medicaid, VA, Special Needs, Life Care Planning Law Firm Model**
August 10 | 11:00 a.m. – 11:30 a.m.

Video Replay | **Defense of Bad Faith Claims – Best Practices**
August 10 | 12:00 p.m. – 1:30 p.m. | 1.5 Credits

Video Replay | **Ethical Considerations and Attorney's Fees in Estate Planning**
August 11 | 10:00 a.m. – 11:00 a.m. | 1.0 Credit

Video Replay | **The Basics on Intellectual Property: Part 3 – Copyright**
August 16 | 12:00 p.m. – 1:00 p.m. | 1.0 Credit

Video Replay | **Professional Conduct Ethics Rules in a Nutshell and Grievance Practices and Procedures**
August 17 | 12:00 p.m. – 1:45 p.m. | 2.0 Credits

Video Replay | **Matrimonial and Family Law Update – Spring 2022**
August 18 | 10:00 a.m. – 12:00 p.m. | 2.0 Credits

Video Replay | **Representing Children in COVID-19 Vaccine Disputes**
August 23 | 10:00 a.m. – 11:00 a.m. | 1.0 Credit

Video Replay | **Current Ethical Issues in Real Estate Transactions**
August 24 | 12:00 p.m. – 1:00 p.m. | 1.0 Credit

Video Replay | **Getting Paid: Attorneys Fee Awards in Surrogate's Court**
August 25 | 10:00 a.m. – 11:00 a.m. | 1.0 Credit

Video Replay | **Ethics 2021-2022: Ethics in the Real World**
August 25 | 10:00 a.m. – 1:45 p.m. | 4.0 Credits

Webinar | **Intro to Artificial Intelligence (AI) Part 2: AI as a Litigation Tool**
September 7 | 12:30 p.m. – 2:00 p.m. | 1.5 Credits

Webinar | **DWI on Trial: The Big Apple XXII**
September 29 | 9:00 a.m. – 5:00 p.m. | 7.5 Credits

Webinar | **Anchoring: How it Impacts Jury Verdicts and Negotiations, What Counsel Can Do to Mitigate its Effects**
September 30 | 12:00 p.m. – 1:00 p.m. | 1.0 Credit

*Details for programs and events may change so be sure to visit our website for the most up-to-date information.

To view all scheduled events, including those newly added, please visit:
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