January/February 2017

IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

Lessons from Ferguson: Rededicating Local Courts to Procedural Fairness

The EEOC's Enforcement Priorities: What Municipalities Need to Know

Hydraulic Fracturing and Local Government: Battle in the Shale Fields

Amicus: First Amendment Focus: Stemming the Tide of *Reed*

Code Enforcement: Enter at Your Own Risk

ListServ: Is "Stick 'em up!" Protected Free Speech?

Inside Canada: From Sidewalk Ice To Contested Hiring— Recent Decisions of Interest

Cases: Taxing Online Travel Companies, Withholding Municipal Surveillance Video, and More





Have a job position that you need to fill?

Use IMLA's job board to reach top quality candidates.

Take advantage of our 20% discount until March 31st.

Promo code: MUZ69XDS.



IMLA

Phone: 202.466.5424
Fax: 202. 785.0152
E-mail: info@imla.org
Website: www.imla.org

51 Monroe Street,
Suite 404
Rockville, MD 20850

BOARD OF DIRECTORS

PRESIDENT
Mary Ellen Bench
City Solicitor
Mississauga, ON, Canada

PRESIDENT-ELECT
Arthur Pertile
City Attorney
Stafford, TX

IMMEDIATE PAST PRESIDENT
Herbert Thiele
County Attorney
Leon County, FL

TREASURER
Andrew Whalen, III
City Attorney
Griffin, GA

GENERAL COUNSEL & EXECUTIVE DIRECTOR
Charles Thompson
IMLA
Rockville, MD

DIRECTORS
Patrick Baker
City Attorney
Durham, NC

Tyrone E. Cooper
City Attorney
Beaumont, TX

Robert Croom
Deputy General Counsel
South Carolina Association of Counties
Columbia, SC

Gary Ebert
Director of Law
Bay Village, OH

Wayne Esannason
Village Attorney
Scarsdale, NY

Lori Grigg Bluhm
City Attorney
Troy, MI

Arthur Gutekunst
Senior Assistant Corporation Counsel
White Plains, NY

Cathy Hampton
City Attorney
Atlanta, GA

Roger Horner
City Attorney
Brentwood, TN

Joy Hulton
Regional Solicitor
Newmarket, On, Canada

Rose Humway-Warmuth
City Solicitor
Wheeling, WV

Monica Joiner
City Attorney
Jackson, MS

Gregory Priamos
County Counsel
Riverside County, CA

Nancy Thompson
City Counselor
Columbia, MO

Sozi Tulante
City Solicitor
Philadelphia, PA

IMLA

THE MUNICIPAL LAWYER MAGAZINE



LESSONS FROM FERGUSON: REDEDICATING LOCAL COURTS TO PROCEDURAL FAIRNESS

By: Ryan Kellus Turner, Texas Municipal Courts Education Center and Benjamin Gibbs, Juris Doctor Candidate, Baylor Law School

Incarceration for minor infractions creates a climate of hostility between governments and the public. Municipal courts can devise better alternatives.

PAGE 6

HYDRAULIC FRACTURING AND LOCAL GOVERNMENT: BATTLE IN THE SHALE FIELDS

By: Jesse J. Richardson, Jr., Associate Professor, West Virginia University College of Law

Municipalities and states continue to spar over control of fracking. Land use ordinances and zoning offer localities the greatest opportunity for regulation.

PAGE 12

THE EEOC'S ENFORCEMENT PRIORITIES: WHAT MUNICIPALITIES NEED TO KNOW

By: Larry Lee and David Roth, Fisher Phillips LLC, Denver, Colorado

The EEOC's Strategic Enforcement Program for 2017 to 2021 continues to target six categories of complaints. Local government attorneys should be on notice.

PAGE 18

DEPARTMENTS

15 AMICUS

First Amendment Focus: Stemming the Tide of *Reed*

By: Amanda Kellar, Associate General Counsel and Director of Legal Advocacy

Municipalities continue to push for sensible destinctions between "conduct" and "speech."

16 CODE ENFORCEMENT

Enter at Your Own Risk

By: Jerrod Simpson, Assistant City Attorney, Tampa, Florida

Avoiding Fourth Amendment liability when entering private property.

22 LISTSERV

Is "Stick 'em Up!" Protected Free Speech?

More thoughts on the new contours of the First Amendment.

By: Brad Cunningham, City Attorney, Lexington, South Carolina

26 INSIDE CANADA

By: Monica Ciriello, Ontario 2015

From icy sidewalks to contested hiring—Recent decisions of interest.

27 CASES

By: IMLA Editorial Board

Taxing online travel companies, withholding municipal surveillance video, and more

STAFF

EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Erich R. Eiselt

EDITORIAL STAFF
Caitlin Cutchin

ART DIRECTION & PRODUCTION
Trujillo Design

Views appearing in Municipal Lawyer are those of the author. Publication of articles in this magazine does not reflect a direct or implied endorsement of an author's views. © Copyright 2017 by the International Municipal Lawyers Association (IMLA). All rights reserved. IMLA is a non-profit professional association of municipal lawyers from across the United States and Canada. It offers its members continuing legal education courses, research services, litigation assistance on amicus briefs and an information-sharing network in the field of municipal law. Municipal Lawyer is IMLA's membership magazine. It is published bi-monthly. Views expressed by authors and contributors are not necessarily the views of IMLA. For membership information contact: IMLA, 51 Monroe Street, Suite 404, Rockville, MD 20850, phone: (202) 466-5424, or e-mail: info@imla.org. Contributions of articles are welcome. Municipal Lawyer reserves the right to refuse or edit manuscripts submitted for publication.

IMLA
THE MUNICIPAL LAWYER MAGAZINE

The Year of the Rooster

As the New Year rings in, it is evident that the foreseeable future will deliver more than enough uncertainty to keep municipal lawyers guessing. How a Trump presidency will ultimately change the relationship between localities, states and the federal government remains to be seen, but his early pronouncements and proposed nominees portend a tectonic shift. IMLA, as a non-partisan entity that supports municipal autonomy, with a diverse membership holding many views about how to achieve that goal, will follow the shift with great interest.

Obviously, a reconfiguring of the nation's health insurance program will impact every jurisdiction in the land. Other Trump policies and key appointees – for Attorney General, at the Environmental Protection Agency, Departments of Energy and Labor, and more – reflect significant federal reversals and may put individual local governments in the crosshairs:

- Today, 364 counties and 39 cities ignore Immigration and Customs Enforcement rules requiring notification (and even detention) of undocumented aliens.
- More than half of all Americans now live in jurisdictions whose cannabis laws conflict with the federal Controlled Substances Act.
- A majority of states and scores of municipalities have instituted carbon-centric environmental reforms and renewable energy policies over the last decade.

The biggest elephant in Trump's oval office is the Supreme Court, with one vacancy awaiting his action and others likely within the next four years. The new president's judicial nominees should survive whatever scrutiny a lopsided Republican Congress may exact, potentially changing the face of American justice for a generation. On the signature issue of reproductive rights, a Trump-infused Court may well hand the authority to prohibit abortions back to the states. Close behind may be a roll-back of gun control initiatives, pressuring states and municipalities that prohibit large capacity ammunition magazines or limit concealed carry permits under a "may issue" system. First Amendment nuances, the limits of governmental intrusion into personal privacy, the metes and bounds of compensable takings, the scope of qualified immunity and many more issues of great significance to local governments will no doubt be reshaped.

Against this backdrop will loom the broader question of preemption. At this stage, predicting the new Administration's appetite for federal authority would be premature. In fact, it is possible that promised reductions in federal regulation could afford local government greater autonomy to craft homespun solutions to local problems, as was envisaged during the Home Rule movement a century ago.

In sum, municipal lawyers can look forward to interesting times ahead.

Coincidentally, the Chinese calendar informs us that 2017 will be the Year of the Rooster—a creature that, depending on the observer, is either an alpha-male responsible for the success of a farming enterprise or a disruptive annoyance, especially when expressing itself in the early morning hours.

Without taking any stance on the issue, we wish you a Happy and Healthy New Year.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



Mary Ellen Bench, IMLA President

Welcome to 2017! I hope everyone was able to get some downtime to spend with family and friends. I always look forward to this time of year and delight in seeing how happy my boys (ages 20 and 23) still get when opening Christmas presents, and how excited my beagle gets when she sees snow for the first time in the winter! I have been able to fit in time to cook and bake all of the favourites, and now have to focus on how to walk them off. I gave up on the gym because I could always find reasons why I was too busy to go; then I got a beagle who also likes to eat, but thankfully makes me walk a lot too. I guess a busy year is a good thing!

The old adage of "May you live in interesting times" definitely applies to us now. Our cities, our counties/regions, and our rural communities are all facing challenges as infrastructure ages, litigation becomes more complex, planning decisions pit community groups against development, technology brings new matters to our door step at a faster and faster pace, and so on. I am City Solicitor at the City of Mississauga, Ontario, Canada where we are facing some additional challenges and opportunities as we move from being a suburb of Toronto to being a City with an urban centre and public waterfront. It's wonderful to be part of a metropolis like the Toronto area, but it's also great to be able to find excellent restaurants, shopping and entertainment at home and in my case, I don't even have to get into the car because I can walk to many of them. We are building our first light rail transit using a P3 financing model and are developing a complete downtown with office towers in addition to condos. Very exciting times! I expect 2017 will go by even faster than last year, and not just because I am getting older.

When I need a break, it's great to go down the highway an hour to Niagara, where most of my family still lives. I can always talk a sister or two (or three) into lunch at one of the local wineries. Some of my nieces and nephews who work in the wine industry are crazy enough to do the ice wine harvest. The grapes have to be on the vines for a minimum of three days where the air temperature cannot go above minus 8 degrees Centigrade (that's 17.6 degrees Fahrenheit). I prefer to wait until they are harvested and ready to enjoy indoors. Hopefully you all will get a chance to try ice wine when you come to our Conference in Niagara Falls. It's pretty sweet, but good after dinner poured over strawberries.

In the short time that I have been President of IMLA I am amazed to see how much our organisation does and how many people are engaged in making it happen. I have always known that our core purpose and strength is serving local government lawyers with any number of different challenges and projects we encounter. I have always known that when confronting problems I have never seen before (like when UBER came to town) or when facing new challenges (like a judicial inquiry of my Mayor at the time's conduct) my IMLA contacts will be able to help me get through them. As IMLA members we have so many colleagues we can turn to who are engaged and passionate about helping us meet the issues that we face.

I hope you share my experience. If you can't relate to what I am saying, please reach out to our members, by contacting IMLA staff, reaching out to your state/provincial chair, contacting someone you have talked to at a conference or seminar, or using a list serve. Our strength is our people: our members and our amazing staff team!

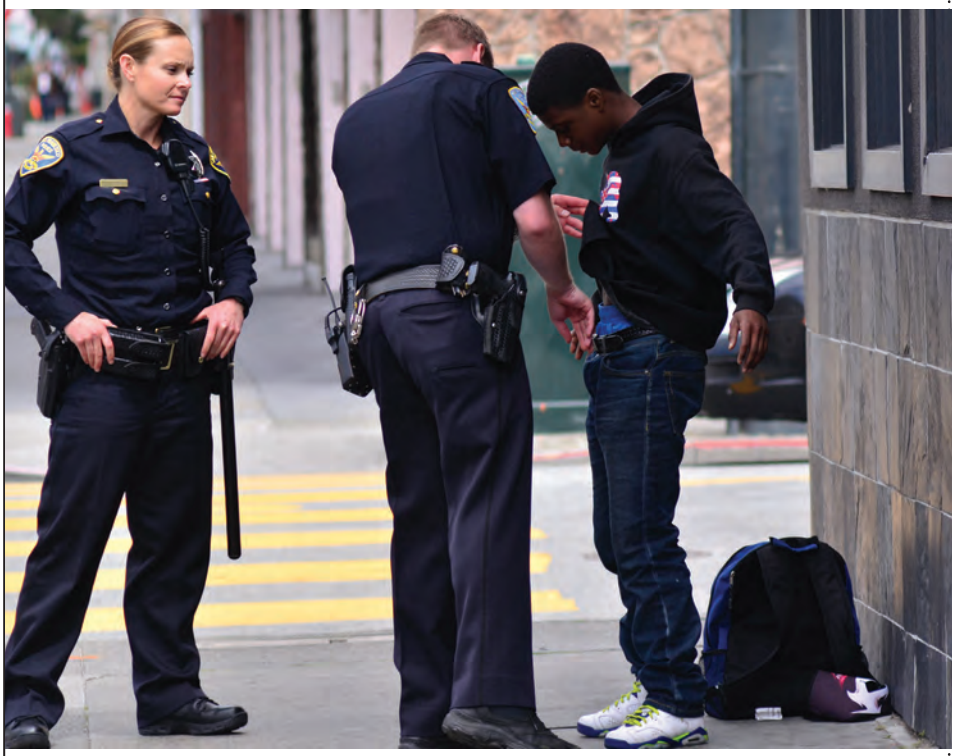
As with any not-for-profit, we rely on volunteers and no organization can have too many volunteers and supporters. That's where you come in. We can always put your passion and drive to use in a way that benefits us all. For our new members just settling into local government practice, or for our sage and seasoned members alike, what better way to learn than through becoming involved in IMLA!

I hope 2017 is a good year for each of you, personally and professionally. ML



Lessons From Ferguson: Rededicating Local Courts To Procedural Fairness And The Rule Of Law

By: Ryan Kellus Turner, Texas Municipal Courts Education Center and Benjamin Gibbs, Juris Doctor Candidate, Baylor Law School



LESSONS FROM FERGUSON
How much do you know about Ferguson, Missouri?

If you are like most Americans, what you know about the subject is limited to what you gleaned from the cable news networks: on August 9, 2014, Officer Darren Wilson shot and killed 18-year-old Ferguson resident Michael Brown. The incident set off a year of protests that placed a community of 20,000 people at the center of a vigorous debate about the relationship between police and African Americans, the militarization of law enforcement, and the use of force doctrine.

In less than two years, what began as a discussion about criminal justice policy evolved into a national dialog on social justice and economic inequality. In response to the shooting, the U.S. Department of Justice (DOJ) conducted an investigation into the policing practices of the Ferguson Police Department (FPD). In March 2015, the DOJ announced that the FPD had engaged in misconduct by discriminating against African Americans and applying racial stereotypes in a "pattern or practice of unlawful conduct."[1]

While the 100-page DOJ report focused primarily on FPD law enforcement shortcomings, it also described how practices in the Ferguson Municipal Court imposed substantial and unnecessary barriers to indigent defendants, eroded community trust, undermined the FPD, and exacted a devastating toll on Ferguson and its residents:

> St. Louis County's municipal courts [including the Ferguson Municipal Court] didn't kill Michael Brown. But they were a major contributor to the outrage and distrust that was on display in Ferguson following Brown's death. Activists now contend that local courts throughout the nation are no different from the Ferguson Municipal Court and are operating "debtors' prisons."[2]

In March 2016, the DOJ issued a letter to state and local courts regarding their legal obligations with respect to the enforcement of fines and fees. That letter put all courts on notice that the "feds are joining the fight" as part of a broader campaign against what Attorney General Loretta Lynch called "the criminalization of poverty."

Missouri municipal courts were sued for unjust jail sentences, referred to by defense counsel as "poverty violations."[3] Civil rights attorneys around the country soon adopted a strategy to force reform in courts that allegedly targeted the poor: aggressively file lawsuits and publicize them in the media (i.e., impact litigation). Civil rights lawyers brought suits in New Orleans; Rutherford County, Tennessee; Biloxi and Jackson, Mississippi; Benton County, Washington; and Alexander City, Alabama.[4] In Texas, federal courts have dismissed lawsuits against the City of Austin and the City of Amarillo and, and as of date, a motion to dismiss is pending in a suit against the City of El Paso.[5]

In September 2016, the National Consumer Law Center in collaboration with the Criminal Justice Policy Program at Harvard Law School published Confronting Criminal Justice Debt: A Guide for Litigation. It is valuable resource for municipal lawyers seeking to better understand various related legal issues (civil and criminal).

For municipal attorneys, Ferguson and the increased use of impact litigation raises the question, "What if this was your hometown—is there something you could do to prevent a similar tragedy?" Fortunately, the DOJ report provides insights that may help other cities throughout the United States avoid a comparable experience.

A. LESSON ONE: Focus (Refocus) on the Proper Role of Local Courts

A court is authorized to generate revenue incidentally through the imposition of fines and despite rhetoric to the contrary, there are strong policy arguments for expanded use of fines and other monetary sanctions in the American criminal justice system. Fines offset criminal justice costs and are cheaper to administer than jails and prisons. Offenders are potentially spared the criminalizing effects of incarceration and the long-term stigmatization that reduces income earning potential.

If, however, a court is viewed by government primarily as a source of revenue (as was the case in Ferguson),[6] the integrity of the judicial system is at grave risk. This is particularly true for municipal courts, with which the public interacts (whether as a

party, juror, witness, and so on) more than all other courts combined.[7] In the wake of Ferguson-inspired lawsuits, now is an ideal time to remind local officials and employees that judicial independence best serves the interests of the public and the interests of government. It not only ensures that the public has access to fair and impartial proceedings, it is also a primary reason why local governments are not held legally responsible for the decisions of local judges.[8]

Do your city and county have the right attitude about municipal and justice courts?

RIGHT ANSWER: Public officials and employees view local courts as being essential, independent arbiters of justice. Courts are viewed as institutions necessary to the fair enforcement of laws that preserve public safety and promote quality of life in the community.

WRONG ANSWER: Judges assess their own job performance based on revenue generation. Courts are viewed as profit centers and judges viewed as debt collectors in robes. Citations are an IOU. When defendants fail to appear in court, their presumption of innocence ceases to exist. Similarly, once an arrest warrant is issued, the defendant is no longer presumed innocent, despite never having entered a plea. Local government depends on revenue from the court in order to balance its budget. The court is more focused on revenue than public safety or quality of life. In a diagram of the local government structure, the court is under the finance department.

Which did you choose? To quote Indiana Jones and the Last Crusade, "You must choose, but choose wisely." Ferguson, as the nation now knows, "chose poorly." The question now is what kind of choices will your local and state officials make?

There is nothing new about the tension between the express and implicit functions of courts that impose fines as punishment and collect court costs.[9] This is not the first time that imposition of fines at the local government level has been called into question on a national level.[10] What is new, however, is the degree of public attention that is being drawn to "court costs" and other fees and surcharges that accompany fines.

Understandably, for most citizens there is no meaningful distinction between "fines," "court costs," and "fees." Regardless of the

This is not the first time that imposition of fines at the local government level has been called into question on a national level. What is new, however, is the degree of public attention that is being drawn to "court costs" and other fees and surcharges that accompany fines.

label, each entails money coming out of a defendant's pocket. Legally, however, it is important that the legislature, the governor, and all members of the judiciary can distinguish "fines" from other legal constructs involving the payment of monies.

The distinctions are becoming increasingly important. In the context of a criminal case:

> *Fines* – are assessed following conviction to punish a defendant for violating a law;
> *Court Costs* – are prescribed by the legislature, determined on a case-by-case basis and varied in relation to the activities involved in the course of the case; and
> *Fees* – are amounts charged for a service by a governmental entity.[11]

With noted exceptions, the media has done little to delve into such distinctions or to increase public awareness of how state-mandated court costs and fees are actually utilized.[12] Nationally, advocacy groups capitalize on this oversight by grouping criminal justice obligations (and the enforcement of lawful criminal court judgments) with private consumer debt (which they contend are enforced through illegal predatory collection practices). Public awareness of these distinctions is increasingly important, particularly amidst claims that municipal courts are turning jails into "debtors' prisons."[13]

To be clear, the public has long supported the imposition of "fines" (a form of retribution and punishment) for common criminal offenses (regardless of a defendant's socio-economic class). What is unclear is whether the public supports, or is even aware, that "court costs" are being used to pay for governmental expenditures which are debatably not related to the criminal justice system, let alone the matter that landed the defendant in court.[14]

LESSON TWO: How the Ferguson Municipal Court Harmed the Community

The DOJ report and letter provide insights that may prevent other American cities from witnessing similar tragedies. In finding that the Ferguson Municipal Court imposed substantial and unnecessary barriers to resolving simple municipal code violations, the DOJ identified various troublesome practices:

1. Procedural deficiencies created a lack of transparency regarding rights and responsibilities;
2. In-court appearances were often needlessly required for code violations;
3. Driver's license suspensions were unnecessarily prolonged by the court, making it difficult to resolve a case and imposing substantial hardship;
4. Even offenses not requiring an in-person court appearance were complicated by additional obstacles; and
5. High fines, coupled with legally inadequate ability-to-pay determinations and insufficient alternatives to immediate payment, imposed a significant burden

Continued on page 8



Ryan Kellus Turner is General Counsel and Director of Education for the Texas Municipal Courts Education Center in Austin, Texas. He is Deputy City Attorney for the City of Dripping Springs and serves as a Substitute Associate Judge on the Austin Municipal Court. He received his B.A. degree in Psychology with highest honors from St. Edward's University and his J.D. from Southern Methodist University. Judge Turner is the co-author of two books and has written more than 70 articles pertaining to criminal law, criminal procedure, municipal law, and juvenile justice. He is currently an advisory member on the Texas Judicial Council's Pretrial Justice Committee. In 2016, he was the recipient of the State Bar of Texas Outstanding Government Lawyer Award.



Benjamin Gibbs is a third year law student at Baylor University in Waco, Texas. He received his B.A. in Broadcast and Mass Communications from Southwest Texas State University. Prior to attending law school, he worked as a court clerk and a juvenile case manager for the City of Austin and the City of Huntsville. In 2015, he was awarded a Texas Municipal Courts Fellowship.

Lessons From Ferguson Cont'd from page 7

on people living in or near poverty.[15] DOJ also reported that the Ferguson Municipal Court imposed unduly harsh penalties for missed payments or appearances, using arrest warrants to secure payment and exacting onerous bond requirements for release from the Ferguson City Jail.[16]

LESSON THREE: Ferguson-Related Legislative Reforms

Nine months after Michael Brown's death, the Missouri legislature passed S.B. 5 (effective August 28, 2015), which, among other things, authorized payment plans, community service for indigent defendants, capped the amount of revenue that municipalities can collect in traffic cases, prohibited jail sentences for common traffic offenses, and abolished the offense of failure to appear for traffic violations.

The Ferguson Commission Report entitled "*Forward through Ferguson: A Path toward Racial Equity*" was issued on September 14, 2015. The 197-page report includes four sets of "calls to action" to guide legislation and community action in improving racial equality in the region.[17] The Ferguson Commission calls for the elimination of incarceration for all minor offenses, for such offenses to be decriminalized, and fines for such offenses to be collected in the same manner as civil debts. While the report does not define "minor offenses," anecdotally it includes traffic offenses (*e.g.*, Driving While License Suspended, Expired License Plates, No Insurance, and Speeding). To avoid assessing a fine or fee a person cannot afford, the Commission suggests that municipal courts should be required to determine a defendant's ability to pay at the defendant's first court appearance and all subsequent hearings.

GOING FORWARD: ASSESSING NEEDS AND PERILS

The events in Ferguson, the shooting of Tamir Rice in Cleveland, the suicide of Sandra Bland in Waller County, Texas, and the subsequent series of violent police and community interactions around the nation seemingly put us at a flashpoint in American legal history. Advocates for reforming America's criminal justice system, such as the American Civil Liberties Union (ACLU), deserve the lion's share of credit for increasing public awareness of the plight of the indigent in American courts.

Real change, including in the criminal justice system, seldom occurs from the top down and it never occurs when people merely observe and remain idle. It occurs from the bottom up—when people stand up and speak out against injustice. Two examples of how real change came about involve cases that began at the local level and were argued all the way to the U.S. Supreme Court. These two decisions remain of paramount importance to the civil liberties of indigent defendants and are at the heart of the debate involving local courts:

- *Tate v. Short* (1971) - The Equal Protection Clause of the 14th Amendment prohibits states from imposing a fine as a sentence and automatically converting it to a jail term solely because the defendant is indigent and cannot pay the fine in full.[18]
- *Bearden v. Georgia* (1983) - A sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings that he was responsible for the failure or that alternative forms of punishment were inadequate to meet the State's interest in punishment and deterrence.[19]

These two decisions can be construed to stand for the propositions that (1) the 14th Amendment requires that defendants accused of fine-only offenses be provided "alternative means" of discharging the judgment to avoid incarceration; and (2) converting a fine and/or court costs into a term of confinement without a judicial inquiry into the reasons for nonpayment and whether nonpayment was willful violates notions of fundamental fairness. In essence, a defendant who is indigent may only be committed to jail after being afforded an alternative means of discharging fines and costs.

A. Assessing Needs

Before leaping to action, lawmakers would be wise to understand the problems facing courts and defendants. Some of those challenges, and some potential solutions, include the following:

1. A Call to Judicial Action

Judges are not immune to the human tendency to form opinions based on their own experiences. As Dr. Steven Covey explains in the "5th Habit" of his book, The 7 Habits of Highly Effective People, people can look at the same thing from completely different perspectives because they understand "autobiographically." In order to effectively handle Ferguson-related issues, it is important for the judiciary to understand what organizations like the ACLU are claiming is happening in municipal courts in America. The ACLU's written statement before the U.S. Commission on Civil Rights hearing on Municipal Policing and Courts is particularly illuminating (March 18, 2016).[20] What is reported to have occurred in courts in Ohio, Georgia, Mississippi, and Washington is very disturbing.

The key to preventing this kind of misconduct is increased awareness and vigilance. Leadership on these issues is needed at all levels of the judiciary and at all levels of government. Change will not occur if local judges merely observe and remain idle.[21]

The good news is that leadership efforts are underway. For example, less than six months after the DOJ Ferguson Report was published, the Texas Municipal Courts Education Center (TMCEC) launched "Lessons from Ferguson," an on-line and live-training education awareness campaign for judges, court staff, prosecutors, and peace officers. Near the one year anniversary of the release of the DOJ Ferguson report, TMCEC began an on-line initiative called "Shared Solutions: Fines, Costs, and Fees," an on-line resource to help courts prepare local forms and handouts to help defendants understand their rights and responsibilities, and the court's procedures.

Similarly, national organizations like the Conference of Chief Justices and the Conference of State Court Administrators (COSCA) created a national task force on fines, fees, and bail practices. In September 2016, COSCA published a policy paper detailing specific policies and practices that courts can adopt to minimize the negative impact of legal financial obligations while ensuring accountability for individuals who violate the law.

2. The Role of Education

Education of voters is the best way to ensure that bad judges are neither elected nor appointed to the office. Education of judges and municipal officials is equally important. As previously explained, there is nothing wrong with local governments retaining

fines, but such revenue must be viewed as an incidental byproduct of justice. Courts should not be viewed by local or state governments as profit centers. Legislation is not required in order for judges to share best practices, such as the use of "safe harbor" and other techniques aimed at reducing the number of people arrested. Judges can be taught to use technology such as the living wage calculator[22] to assist them in determining whether a defendant is indigent.

3. Collaboration on Public Policy—An Example

Last year, the Center for Public Interest Law at the University of Texas facilitated two stakeholder conversations on collections, fines, and fees. A wide range of key stakeholders, including members of the judiciary, state and regional government representatives, civil rights advocates, and public policy experts were invited. The goal of the conversations was to identify shared priorities with an eye toward the 85th Texas Legislature in 2017.

Consensus is possible. The stakeholder conversation revealed that among differing opinions there is ample room for agreement on matters of public policy. Four particularly promising initiatives are presented here:

a. Better Tools for Determining Indigence

How is a judge to know if a defendant is indigent? This has long remained an unanswered question. Judges need tools and standards for determining if a defendant sentenced to pay a fine and court costs is indigent. While the legislature should not mandate a rigid test, which would likely have unintended consequences, it should facilitate the development of standards to assist judges in making such determinations.

b. Expand the Meaning of "Alternative Means" for Indigent Defendants and Access to Community Service

Currently, under Texas law, alternative means consists of installment payments, community service, and for children, tutoring in lieu of community service.[23] Within the bounds of the Code of Judicial Conduct, judges should be given more leeway as to what else might constitute "alternative means." By conceptualizing a broader meaning of "community service," the Legislature could authorize mentoring, job training, and other means that benefit the defendant and society.

Just as it is wrong for judges to make sweeping generalizations about indigent defendants, it is wrong for critics to make similarly sweeping generalizations about the law, courts, and judges. State laws differ. As a consequence, so do municipal courts. This is important and often overlooked by the national media.

c. Broaden the Use of "Show Cause" Hearings

To comply with one of the requirements of *Bearden*, Chapter 45 of the Texas Code of Criminal Procedure already requires courts to give defendants an opportunity to explain themselves at a "show cause" hearing. This is intended to avoid the prospect of possible arrest for failure to submit proof of completion of a driving safety course, or failure to submit proof of compliance with the terms of deferred disposition.[24] It is an oversight in Texas that there is no similar statutory requirement that defendants be afforded an opportunity to "show cause" prior to the issuance of a capias pro fine. Similarly, defendants, particularly if they are indigent, after the imposition of judgment should statutorily be provided an opportunity to request a hearing before the court where their financial circumstances can be considered. Defendants should have the ability to access courts regardless of financial condition and the posting of a bond or other form of security should not be required.

d. Time Payment of Fees

Installment payments are a type of "alternative means" contemplated in *Tate v. Short*.[25] Indigent defendants should not necessarily have to pay more in court costs, as is currently required by Texas law,[26] simply because they cannot pay the total balance of all fines, costs, and restitution within 30 days.

B. Perils to Progress

Despite the success of stakeholder conversations in identifying promising public policy reforms, efforts to change laws in Texas and elsewhere may be endangered for two reasons:

1. The Danger of Sweeping Generalizations. Municipal courts have increasingly been subject to a steady barrage of mostly negative media coverage. Advocacy groups tend to welcome such public clamor because it has the potential to influence public opinion and pave the way for changes in public policy. However, it is possible, particularly in Texas, that sensational and inaccurate headlines coupled with sweeping generalizations could derail reform efforts.

Consider the following headline from *BuzzFeed* in October 2015:

> "THEIR CRIME: BEING POOR. THEIR SENTENCE: JAIL. People in Texas get thrown in jail just because they can't afford their traffic tickets."[27]

To set the record straight, it is not a crime to be poor in Texas, and no one in Texas is sentenced, let alone thrown in jail, for being poor. People alleged to have committed criminal traffic offenses are more often issued citations in lieu of being taken before a magistrate. Just because people receive citations does not mean they are guilty or even that they will pay a fine or court cost. In Texas, everyone who receives a citation is presumed innocent and has the right to be tried by a jury of his peers.

In an age where it pays to play to people's biases, digital ink costs nothing and clickbait has proven to be profitable. Content aimed at generating advertising revenue comes at the expense of accuracy. This appears particularly true when it comes to headline writing. In the age of Facebook and Twitter, success is measured by the number of reads, shares, likes, and re-tweets and makes it easy to lose sight of what has traditionally been considered the attributes of good journalism.[28]

Just as it is wrong for judges to make sweeping generalizations about indigent defendants, it is wrong for critics to make similary sweeping generalizations about the law, courts, and judges. State laws differ. As a consequence, so do municipal courts. This is important and often overlooked by the national media. Although most states have municipal courts, these courts are not governed by a single set of laws. Thus, it is improper to attribute the statutorily authorized acts of one municipal court in one state to all municipal courts in

Continued on page 10

Lessons From Ferguson Cont'd from page 9

the United States.

Municipal court jurisdiction in America varies widely. While some municipal courts have jurisdiction over fine-only misdemeanors (*e.g.*, Texas[29]), others have jurisdiction over misdemeanor offenses punishable by a sentence of jail (*e.g.*, Mississippi[30] and Missouri[31]). Municipal courts in states like Texas are part of the state judiciary; state law governs most facets of their existence. In states like Missouri, prior to what happened in Ferguson and changes to state law in 2015, municipal courts were predominantly vestiges of municipal government and operated in the shadows of state laws.[32] Accordingly, when assessing courts and their treatment of indigent defendants, the laws of each state must be considered independently.

Likewise, when discussing *Argersinger v. Hamlin* (1971),[33] *Scott v. Illinois* (1979),[34] and other Supreme Court decisions relating to the right to counsel, it is important to distinguish between different types of misdemeanor sentences and not make sweeping generalizations. Defendants in Texas accused of Class C misdemeanors (offenses punishable by fine only) have the right to counsel. However, a sentence consisting only of the imposition of fine and costs is not a deprivation of liberty. Commitment to jail for willful nonpayment or failure to discharge through alternative means is not the same as a jail sentence and does not trigger the right to *court-appointed* counsel.

Criticisms aimed exclusively at local courts are misdirected. It is important to distinguish judicial acts from judicial discretion. Judges have legal and ethical obligations to follow the law. The law does not always allow judicial discretion. Nevertheless, since Ferguson, judges have been widely criticized for complying with laws they did not create. Court costs being too high and particular offenses which should not be criminal, for example, are not issues the judiciary can solve. These are legislative matters.

Bad judges are not indicative of the judiciary. The inappropriate acts of a judge or a court in any state should be punished. They should not be attributable to all judges and all courts in that state (let alone throughout the country). All states have a process for handling judicial misconduct. Judges who disregard or ignore laws which serve as safeguards for indigent defendants should not be on the bench.

High-flung rhetoric and divisive dysphemisms are nothing new. More than two decades ago in *Bearden*, the Court warned that the issues "cannot be resolved by resort to easy slogans or pigeonhole analysis."[35] In the context of the "criminalization of poverty" and other hyperbole, the danger of such sweeping generalizations is that critical consumers of information are left with the responsibility of separating facts from opinions and distinguishing isolated incidents from normal practices. This can have unintended consequences. When key decision-makers become fatigued, deceived, and divided along ideological lines, effective reforms are less likely.

2. The Danger of Inverse Discrimination

The solution to discrimination in the legal system is not replacing it with a different type of discrimination. Proposals aimed at making indigent defendants categorically immune to legal penalties do not advance the cause of equal protection under law, they undermine it. Amidst all the hoopla about "debtors' prisons" and touting of the holding in *Tate v. Short*, part of the *Tate* decision is regularly overlooked.

The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.[36]

Citing *Williams v. Illinois* (1970),[37] the Court, in qualifying its mandate that alternative means be provided to indigent defendants, acknowledged the existence of a valid state interest in enforcing payment of fines. The Court also emphasized that its holding did not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor was the *Tate* decision to be understood "as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means."[38] In reiterating the holdings of *Williams* and *Tate*, the Court, in *Bearden v. Georgia*, also "recognized limits on the principle of protecting indigents in the criminal justice system."[39]

Following Ferguson and the DOJ report, such limits may be put to the test in state legislatures and in local governments. What constitutes "alternative means" may be getting turned on its head. In the emerging canon of modern "debtors' prison" literature, seldom do writers acknowledge: "The *Bearden* line of cases thus endeavors to shield criminal justice debtors making a good faith effort to pay, while leaving willful nonpayment unprotected."[40]

Rather, as Professor Neil Sobol at Texas A&M School of Law explains, "given the return of debtors' prisons as well as the historical concerns that led to calls for their abolition, it is time to implement more effective alternatives to reduce the incarceration of individuals who are unable to pay legal financial obligations."[41]

Professor Sobol describes three general classes of alternatives proposed by criminologists and legal professors:

a. abolishing monetary sanctions;
b. basing fines on defendants' earnings; and
c. developing "a more effective system for enforcing existing laws designed to prevent incarceration of indigents."[42]

These proposed alternatives are susceptible to several criticisms:

First, "alternative means" does not mean eliminating punitive consequences for criminal behavior on the basis of socioeconomics. That is tantamount to inverse discrimination. Under *Bearden*, "alternative means" are "alternative punishments."[43]

Second, while custom-tailored fines are preferable, the Constitution does not require a fine be custom-tailored to avoid disproportionate burdens on low-income defendants. In *San Antonio Independent School District v. Rodriguez* (1973), the Court, citing *Williams* and *Tate*, stated that it had "not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate."[44] In *San Antonio ISD*, the Supreme Court "expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive

rational basis review."[45] This holding has been extended in cases decided after *Williams* and *Tate*.[46]

Third, in the context of court-ordered fines and court costs, "alternative means" can entail either a non-monetary substitute or, as the Court stated in *Tate*, "a procedure for paying fines in installments."[47] "Alternative means" do not, however, prevent the lawful incarceration of indigents.

This is not the first time the status of a defendant has been the rallying cry of reformers, nor is it the first time municipal courts in Texas have been caught in the maelstrom. *Powell v. Texas*,[48] holding that Texas law criminalizing public intoxication did not constitute cruel and unusual punishment, began in the Austin Municipal Court and was decided by the Supreme Court in 1968. This is also not the first time people have argued that society loses its moral justification for punishing poor criminal defendants when it refuses to remedy the conditions of inequity and that poverty should be a defense to non-violent crimes, victimless crimes, and "crimes of poverty."[49]

Society cannot allow people to act only in accord with their own subjective moral code. Equal justice under law means that no person, regardless of socioeconomic status, is exempt from the rule of law. Pursuing public policy reforms to improve the lives of people who live in poverty does not have to entail asking society to make choices that are contrary to other compelling interests (e.g., public safety). Unquestionably, justice must be seasoned with mercy. Criminal justice, however, is not social justice. This is not to say that restorative justice cannot play a role, but criminal law is retributive and does not necessarily advance social welfare.

III. A DIFFERENT "FERGUSON EFFECT"

The "Ferguson effect" is the proposition that increased scrutiny of law enforcement officers has led to an increase in crime rates across major metropolitan cities in the United States. Perhaps, however, there is a different kind of "Ferguson effect"—an effect that local governments reconsider what, until recently, was the proper and lawful use of police powers. Consider the following examples:

Unquestionably, justice must be seasoned with mercy. Criminal justice, however, is not social justice. This is not to say that restorative justice cannot play a role, but criminal law is retributive and does not necessarily advance social welfare.

- A proposed law in Philadelphia would permit police to issue civil citations instead of criminal summonses for certain low-level offenses. The legislation "would decriminalize certain violations such as disorderly conduct, refusing to disperse, and public drunkenness."[50]
- In New York City, the police will no longer arrest people for minor infractions such as drinking alcohol in public, urinating in public, or littering in Manhattan. The District Attorney's Office will no longer prosecute most "quality of life" violations.[51]
- The Mayor and City Council of New York are working on a plan to purge "needless warrants" for "small crimes."[52]

Most of these kinds of reform seem aimed at "Broken Windows" policing, and are not without controversy. Against criticism that "Broken Windows" is discriminatory and being used to target minorities, one of the authors of the theory, George L. Keeling, maintains that it is misunderstood by critics, has been misused by some in law enforcement, and continues to be needed. Keeling asserts that quality of life crimes are not victimless; they harm whole neighborhoods, and in New York City, the Broken Window approach has saved lives – most of them minority – cut the jail population, and reknit the social fabric.[53]

The consequence of switching-up police power tactics is not entirely understood. San Francisco, a city known for a tradition of official empathy for the downtrodden, is now divided over whether to respond with more muscular law enforcement or stick to its forgiving attitudes. One member of the local government says, "We are not going to criminalize people for being poor," while another says that San Francisco at times is a "consequence-free" zone.[54] The debate in San Francisco seems all too familiar.

Conclusion

Since 1791, the 10th Amendment has articulated that powers not expressly delegated to the Federal Government are reserved to the states.[55] These powers include the states' authority to regulate behavior and enforce order within their boundaries for the betterment of the health, safety, morals, and general welfare of their inhabitants.[56]

Regardless of whether these powers are exercised under the auspices of criminal or civil law, the 14th Amendment prohibits states and local governments from "enforcing the law" while violating the most important individual safeguards contained in the Bill of Rights.

In the wake of the events in Ferguson, it is not just notions of equal protection and due process that are in question; it is the fundamental use of police powers. Our society regularly endeavors to strike a sound balance between individual and societal interests. The question is how we can better serve the interests of the poor while maintaining public safety and order in our communities. Do we need more laws or do we need to do a better job of enforcing the ones we have? The lessons from Ferguson are an opportunity for municipalities—judges, lawmakers, and local government attorneys—throughout the nation to rededicate local courts to both procedural fairness and upholding the rule of law. It is not a binary choice.

Notes

1. U.S. Dep't of Justice, *Investigation of the Ferguson Police Department*, 9-15, 62-78 (March 4, 2015).
2. *Id.*
3. Aja Romano, *Missouri Municipal Courts Sued for Unjust Jail Sentences*, The Daily Dot– The Kernal (February 10, 2015), http://www.dailydot.com/politics/ferguson- lawsuit-poverty-violations-jail/; Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson Over "Debtors' Prisons,"* NPR Morning Edition (February 8, 2015), http://www.npr.org/ sections/ codeswitch /2015/02/08/384332 798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons

Continued on page 28

Hydraulic Fracturing and Local Government: Battle in the Shale Fields

By: Jesse J. Richardson, Jr., Associate Professor and Lead Land Use Attorney, Land Use and Sustainable Development Law Clinic, West Virginia University College of Law



Introduction

Recent years have seen a rapid increase in disputes between state and local governments regarding the authority to regulate hydraulic fracturing, also known as "fracking." These battles have resulted in court cases and new state statutes. While the general principle is that state law supersedes local law, many states have ceded home rule authority or other broad-based powers to local governments. The question then becomes whether these grants of authority include the power to override state regulation of fracking. Sometimes local regulation may not explicitly conflict with state law but may interfere with state goals. Does state law override local regulation?

This article reviews recent case law, recent statutory enactments, and recent research to ascertain whether state law overrides all local regulation, or whether some areas of local control remain with respect to fracking. To summarize, laws vary significantly among states, but the general answer appears to be that local governments retain the authority to regulate "where" these activities occur, while states control "how" the activity occurs. Local authority primarily manifests itself as traditional zoning and land use regulatory control; however, outright bans are generally considered to both exceed the zoning authority and to interfere with the common state goals to prevent waste and protect correlative rights.

Local Government Responses to Hydraulic Fracturing

A recent study surveyed local governments to determine which policies were being used to address fracking concerns.[1] The authors surveyed 285 communities in Colorado, Louisiana, North Dakota and Pennsylvania, and received 139 responses. Table 1, opposite, reproduces a portion of the table in the study and lists the policies surveyed and the percentage of local governments using that policy. As indicated, 54% of the responding communities reported no policy, even though 40% of the communities had experienced fracking within the past 5 years, and 63% of the communities reported fracking in adjacent communities. The most used policies were (1) restrictions on locations of industrial land use; (2) fencing and landscaping for fracking sites and (3) restrictions on road use for vehicles associated with fracking. The first two policies clearly fall within a jurisdiction's zoning authority, while the third is a relatively common local ordinance. The vast majority of the surveyed activities encompass zoning and local land use regulation. Only 3% of responding jurisdictions imposed moratoria, while none reported a ban.

As indicated, most municipalities had no formal responses to fracking, with relatively small percentages having adopted specific policies. Somewhat surprisingly, local governments were much more likely to state that they had not adopted policies due to "other" reasons as opposed to "legal" considerations (approximately 7 times more likely on average). For example, 21 communities did not adopt a moratorium for "legal" reasons, with 81 not adopting for "other" reasons. Similarly, 20 communities did not adopt restrictions on fracking activities near schools, or near water supply reservoirs, for "legal" reasons, while 74 and 73 communities, respectively, did not adopt such policies for "other" reasons.

Despite these assertions about the reasons for not adopting fracking policies, a majority–52% of local governments–felt that they had a "poor" chance of having the authority to enforce regulations on fracking. And fully 50% of communities viewed their budgetary capacity to address fracking hazards as poor.

TABLE 1

LOCAL GOVERNMENT RESPONSES TO FRACKING (IN ORDER OF PREVALENCE)[2]

No policy	54%
Restrictions on locations of industrial land use	30%
Fencing and landscaping requirements for fracking sites	30%
Restrictions on road use for vehicles associated with fracking	29%
Special use permit requirements for drilling sites	26%
Setback requirements for compressor stations associated with fracking activities	25%
Enhanced performance standards for fracking activities adjacent to residential areas (e.g., noise, dust)	22%
Other zoning restrictions on fracking activities	22%
Minimum building setback requirements for new development in areas with fracking	20%
Zoning for drilling byproduct disposal	16%
Setback requirements for fracking waste disposal facilities	16%
Restrictions on disposal of drilling byproducts (e.g., waste water, tailings or drilling sludge)	15%
Impact fees for areas where fracking will occur/is occurring	14%
Low-density zoning in areas with fracking	13%
Restrictions on fracking activity near schools	13%
Setbacks for new pipelines associated with fracking activities	13%
Restrictions on fracking activity near water supply reservoirs	11%
Watershed protection ordinance protecting water supply from fracking activity	10%
Special hazard ordinance for fracking activity	9%
Environmental impact statement for fracking sites	8%
Stringent conditions on drilling permits (such as water well monitoring)	8%
Moratorium on fracking	3%
Citizens' Bill of Rights	1%

Statutory Provisions

A few states have passed statutory provisions that specifically address local regulation of oil and gas activities. 52 Oklahoma Statutes Annotated Section 137.1, passed in 2015, allows local governments to "enact reasonable ordinances, rules and regulations concerning road use, traffic, noise and odors" related to oil and gas operations. However, the ordinances cannot be inconsistent with the state rules on oil and gas operations. Reasonable setbacks and fencing requirements may also be established. A local government may not effectively ban oil and gas operations through these regulations. The statute also excepts areas within the one-hundred-year floodplain from these provisions, allowing reasonable regulation by the local government within the floodplain. The Oklahoma statute appears to preserve most local government land use authority as applied to fracking, but perhaps not all traditional zoning authority.

The Texas legislature also passed statutory provisions expressly limiting local regulation of oil and gas operations in 2015. Texas Natural Resources Code Section 81.0523 provides for extensive areas of exclusive state jurisdiction and express preemption of local prerogatives in oil and gas regulation. Local governments may regulate certain aboveground activities including "fire and emergency response, traffic, lights, ...noise...[and] reasonable setback requirements." But these local regulations must be "commercially reasonable", and may not "effectively prohibit an oil and gas operation" or be preempted by other state or federal regulation. The term "commercially reasonable" refers to a regulation that allows "a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and not on an individualized assessment of an actual operator's capacity to act." The Texas statute arguably preserves less traditional local zoning authority than does the Oklahoma statute, but a portion of that authority remains.

Bans

Courts have generally found that zoning power with respect to fracking does not include the power to ban. Section 1 of the Standard State Zoning Enabling Act empowers local governments to "regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence, or other purposes."[3] "Most zoning ordinances . . . seek[] to separate, rather than exclude, incompatible uses."[4] "[A]lthough 'zoning [sic] is a means by which a governmental body can plan for the future–it may not be used as a means to deny the future."[5]

Bans also conflict with state law. Many state regulations on oil and gas seek to prevent waste and protect correlative rights. A ban conflicts with these goals, causing waste of the resource by not allowing withdrawal. In addition, a ban eliminates the correlative rights of owners in the targeted area, denying them a share in the pool.

In 1990, the Colorado Court of Ap-

Continued on page 14



Jesse J. Richardson Jr. is an Associate Professor and the Lead Land Use Attorney at the Land Use and Sustainable Development Law Clinic at the West Virginia University College of Law. Before coming to WVU, Richardson was an Associate Professor at Virginia Tech. His research and experience focuses on land use law and water law. Jesse began his legal career in private practice in his home town of Winchester, Virginia, first with a large law firm, then as a solo practitioner.

He is the Past President of the American Agricultural Law Association and has served on the boards of the National Cave and Karst Research Institute, the Virginia Cave Board and Universities Council on Water Resources, and on the Virginia Farmland Protection Task Force and the Virginia Water Policy Technical Advisory Committee. Jesse was honored with the 1999 Professional Scholarship Award from the American Agricultural Law Association, the 2004 William E. Wine Award for a history of teaching Excellence from Virginia Tech (the highest teaching award granted by the university), and the 2009 University Certificate of Excellence in Outreach. He holds a B.S. and M.S. in Agricultural and Applied Economics from Virginia Tech and a J.D. from the University of Virginia School of Law.

Hydraulic Fracturing Cont'd from page 13

peals found that the Colorado Oil and Gas Conservation Act completely preempted local land use regulation of oil and gas activity.[6] The Colorado Supreme Court reversed, finding that the state act exclusively regulates the technical aspects of oil and gas activities, but leaves room for local land use regulation that does not conflict with the state's regulations.[7] On the same day, the Colorado Supreme Court struck down a ban on drilling, finding that a ban conflicted with the state interests in protecting correlative rights and preventing waste.[8] The court distinguished a "*total ban*" from mere regulation.[9] Ten years later, the Colorado Court of Appels again found that state regulation left room for the local government. The court invalidated certain portions of the local regulation, but found that the provisions regulating above-ground structures, access roads, and emergency response costs were valid.[10] The court again distinguished a ban from regulation.[11]

The only state high court to uphold a ban on oil and gas activity is the New York Court of Appeals. The court found that the state's oil and gas statute did not preempt local land use authority,[12] relying heavily on *Frew Run Gravel Products, Inc. v. Town of Carroll.*[13] Although the allowance of a ban represents an outlier opinion, the court succinctly summarized the distinction between state and local regulation of oil and gas regulation, explaining that the local government regulates "where" the activity takes place, but not "how" the activity is conducted.[14]

Finally, the United States District Court for the Southern District of West Virginia recently struck down a Fayette County ban on storage of wastewater in underground injection control (UIC) wells, or temporary storage of wastewater except in certain narrow circumstances.[15] EQT Production Company, a major player in the Marcellus shale fields, argued that the UIC ordinance effectively banned fracking by prohibiting even temporary storage of wastewater at hydraulic fracturing sites.

After finding that EQT had standing due to the uncertainty created by the UIC ordinance as to whether EQT would be able to operate in the county, the court turned to the merits. Fayette County argued that it held plenary power to eliminate hazards to public health and to abate nuisances, and asserted that authority in the ordinance. The court disagreed, finding that the county holds only those powers expressly granted or necessarily implied. The court found that all authority to oversee gas and oil operations in West Virginia lies with the West Virginia Department of Environmental Protection, pursuant to the West Virginia Oil and Gas Act.[16] Even though West Virginia law gives counties the authority to abate nuisances, exercise of that power may not interfere with an area of law that the state has reserved to itself. The court therefore found that the ban, by interfering with state oil and gas regulation, was preempted by state law. In addition, the state UIC program, operated under the federal Safe Drinking Water Act, preempts the ordinance's UIC regulation. Finally, the court noted that public health is a matter of statewide concern and state law is supreme over local law. The county's primary concerns with respect to the UIC well storage revolved around public health.

> Most courts that have addressed the issue of state versus local authority to regulate fracking have concluded that two levels of government share regulatory authority. Most simply, the state holds the authority to regulate "how" hydraulic fracturing may be conducted, while the local government controls "where" the activity occurs.

Hydraulic Fracturing and Home Rule

Recent cases have introduced an additional issue into the conflict between state and local regulation of hydraulic fracturing. Do local governments that hold "home rule" authorities have the authority to supersede state law by banning or placing moratoria on fracking activities?

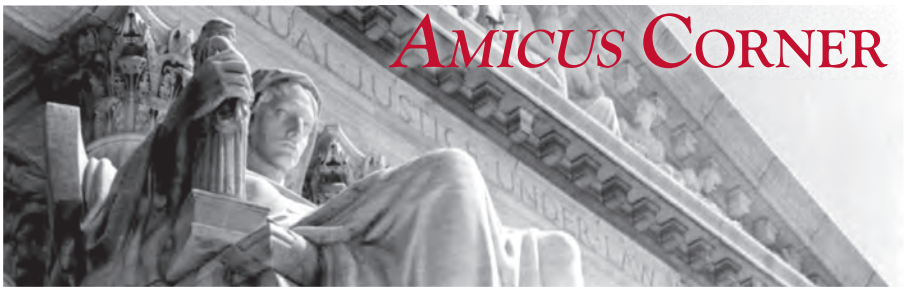
Home rule refers to "the ability of a local government to act and make policy in all areas that have not been designated to be of statewide interest through general law, state constitutional provisions, or initiatives or referenda."[17] Home rule powers are unlikely to impact the final decision on preemption, however. Colorado and Ohio courts have engaged in detailed analyses of the impact of home rule on preemption. Both courts ruled that, despite home rule authority, the local governments lacked the authority asserted in the cases. However, both decisions explained that traditional zoning powers could coexist with state control over oil and gas production.

The Ohio Decision: In 2015, the Supreme Court of Ohio considered the influence home rule authority on the legitimacy of regulations imposed by the City of Munroe Falls.[18] Ohio Revised Code Chapter 1509 regulates oil and gas wells and production operations in Ohio. The chapter reserves certain powers to local governments with respect to control public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, as well as to grant permits to operate certain highways within their jurisdictions. However, Ohio Revised Code 1509.02 prohibits local governments from using this authority "in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities..." Most importantly, Chapter 1509 gives the state government "sole and exclusive" authority to regulate the permitting, location, and spacing of oil and gas wells and production operations.

In the Ohio case, Beck Energy Corporation's Chapter 1509 permit included 67 conditions, including 29 conditions referring to "Urban Areas."[19] These conditions included restrictions as to tree trimming, erosion control, noise mitigation, and parking. Five different local ordinances applied to the operation. Although one of those ordinances was a zoning ordinance, the zoning ordinance provisions in question referred to the Munroe Falls ordinance specifically relating to oil and gas drilling. The other four ordinances fell directly under the oil and gas drilling provisions.

The court examined the Home Rule

Continued on page 34



First Amendment Focus: Stemming the Tide of *Reed*

By: Amanda Kellar, IMLA Associate General Counsel and Director of Legal Advocacy

Reed v. Town of Gilbert was one of the biggest Supreme Court decisions for local government lawyers in recent years, with sweeping implications for First Amendment jurisprudence and local government regulations pertaining to everything from sign ordinances to robo-calls. Since the case was decided a year and a half ago, IMLA has been providing amicus support on multiple fronts to reduce the impact of *Reed* on municipalities' lawful regulatory power. This article previews a few of those cases both at the Supreme Court level and at the lower court levels.

As of this writing, the Supreme Court has already accepted three First Amendment cases this term, and may accept more before all is said and done in June 2017. Though it is debatable as to why the Supreme Court has accepted so many First Amendment cases, it is likely because the First Amendment is seen as a "safe" area for the usually ideologically divided eight Justice Court. Additionally, the First Amendment is an area of particular interest to Chief Justice Roberts, who has generally been protective of First Amendment rights.

While none of the cases the Court has accepted this term seem to present huge issues for local governments on their face, they all have potential *Reed* issues lurking in the background. It is certainly possible, though perhaps less likely, that the Court accepted this large number of First Amendment cases so as to further clarify the scope of *Reed*. IMLA hopes that by participating in some of these cases as an amicus, the result of this First Amendment-heavy term will be to provide some additional clarity for local government lawyers on the scope of *Reed* and also to potentially help walk back some of *Reed's* broader impacts.

Expressions Hair Design v. Schneiderman

This Supreme Court case involves the issue of credit card surcharges, which at first blush appears mundane, but below the surface the case involves a larger commercial speech issue that could implicate *Reed*. In fact, one amicus brief at the certiorari stage argued that *Reed* applied to commercial speech and strict scrutiny should therefore apply in this case.

In this case, a New York law prohibits sellers/merchants from imposing a surcharge on purchasers who use a credit card rather than cash. However, the law does not apply where merchants provide a discount to customers who pay in cash. Thus, per a "no-surcharge" law, if the regular price of an item is $100, then credit-card customers may not be charged $103 and cash customers $100. But if the regular price is $103, then credit-card customers may be charged that regular price and cash customers may be provided a discounted price of $100. (The reason for the difference in treatment between credit card surcharges and cash discounts pertains to studies done that people are more likely to balk at a surcharge even where the result is the same amount charged on the credit card). The state law is modeled off of the expired federal law.

Expressions Hair Design ("Expressions") wants to post a single price for its goods and services, but charge more to credit-card customers, which would violate the New York law. Expressions brought suit, claiming that the law violates the First Amendment. The Second Circuit concluded that the New York law regulates conduct and not speech and it therefore does not violate the First Amendment. The Eleventh Circuit, however, previously held that these types of laws do violate the First Amendment, creating a circuit split on the issue.

The issue before the Supreme Court is whether state no-surcharge laws unconstitutionally restrict speech conveying price information or whether they regulate economic conduct.

While this case seems like an unlikely candidate to extend *Reed* to commercial speech, as noted above, an amicus brief filed on behalf of a number of retailers asking the Court to hear this case argues that the Court should use this as an opportunity to rule that *Reed* applies to commercial speech and that strict scrutiny should therefore be used when analyzing these laws. IMLA is concerned about any case that seeks to expand *Reed*, particularly into the commercial speech arena and IMLA will therefore be joining the SLLC brief in this case. As of this writing, the briefs arguments are not fully formulated and will depend on what the petitioner and other *amici* argue. But assuming similar arguments are made concerning *Reed* as were made at the certiorari stage, IMLA will seek to persuade the Court that any expansion of *Reed* is unwarranted and would have serious deleterious effects on local governments. A positive scenario for this case would be a ruling that specifically and definitively holds that *Reed* does not apply to commercial speech.

See Expressions Hair Design v. Schneiderman 803 F.3d 94 (2d Cir. 2015), *cert. granted* 2016 U.S. Lexis 4464 (U.S. Sept. 29, 2016) (No. 15-1391).

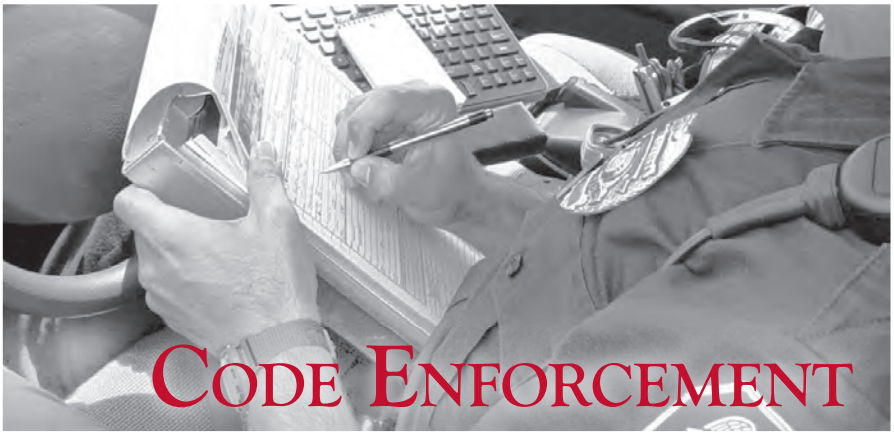
Packingham v. North Carolina

This case involves a North Carolina law prohibiting registered sex offenders from accessing commercial social networking websites where the registered sex offender knows minors can create or maintain a profile, such as Facebook, YouTube, and the New York Times. Lester Packingham was charged with violating this statute because he accessed Facebook. Packingham brought suit, claiming that the statute violates the First Amendment both on its face and as applied to him.

The North Carolina Supreme Court held that North Carolina's law is constitutional. In so holding, the court concluded that the law regulates "conduct" and not "speech" and that even under *Reed* (which the court noted applied to speech, not conduct), the law was content neutral. Specifically, on this point, the court provided:

On its face, this statute imposes a ban on accessing certain defined commercial social networking Web sites without regard to any content

Continued on page 29



Code Enforcement

Enter At Your Own Risk

By: Jerrod Simpson, Assistant City Attorney, Tampa, Florida

Every single day code enforcement officers struggle to decide when they should or shouldn't enter onto private property. Attorneys advising in this area have a special responsibility because an officer who unlawfully enters property could potentially face personal liability.

It's settled law that the Fourth Amendment's warrant requirement applies to entry onto a private property to perform municipal or administrative code inspections or to abate known or suspected nuisances. *See Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523 (1967); *Michigan v. Tyler*, 436 U.S. 499 (1978).

Even though the warrant requirement clearly applies as the general rule, it's been said that "reasonableness is the touchstone of the Fourth Amendment," and it is reasonableness that allows for the many exceptions to the general rule.

However, what is "reasonable" is far from settled, so facts are paramount, and courts seem to be all over the place. Since the jurisprudence on this issue is vast and complicated, this article will explore two recent cases dealing with the context of code enforcement officers: *Archer v. Gipson*, 108 F. Supp. 3d 895, 908 (E.D. Cal. 2015) (appeal pending) and *Davis v. City of Milwaukee*, 13-CV-982-JPS, 2015 WL 5010459 (E.D. Wis. Aug. 21, 2015), aff'd, 642 Fed. Appx. 627 (7th Cir. 2016) (unpublished).

Get Off My Curtilage!

In *Davis v. City of Milwaukee*, the court examined and denied a smorgasbord of legal theories brought under § 1983 by a *pro se* litigant. The case originated from the City's warrantless inspection of two rental properties owned by the plaintiff.

The City had an inspection policy that the court referred to as the "cable guy rule" where basically "if the cable guy [could] go there" then so could the City inspector. The City would not go through a locked gate, around a fence, or walk past a "No Trespassing" sign.

In this instance, the City performed "cable guy" inspections of the two subject properties by walking around the exteriors of the homes and writing up all visible violations. Even though the cases were docketed for municipal court, they were not ultimately pursued there for various reasons. However, the plaintiff was charged an inspection fee, and the § 1983 lawsuit commenced nonetheless.

The court found that the gravamen of the plaintiff's suit was whether or not the inspections violated the Fourth Amendment, and that question hinged on whether the inspector entered the curtilage; if so, did the entrance into curtilage violate a reasonable expectation of privacy.

Looking to the U.S. Supreme Court's four-factor test to determine whether an area constitutes the curtilage of the home (*United States v. Dunn*, 480 U.S. 294, 301 (1987)) the court considered: (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure, (3) the nature of uses in the area, and (4) the steps taken by the resident to protect the area from observation by the public.

However, after articulating these factors the court failed to say exactly whether or not the inspector had in fact entered the curtilage, because the Court decided it wasn't entirely relevant. "Curtilage cannot define a defendant's reasonable expectation of privacy when the very same reasonable expectation is the basis for defining curtilage in the first place."

It was undisputed that the inspector trespassed when he inspected the property, but the court held that "trespasses alone are insufficient to establish a Fourth Amendment violation." (citing *United States v. Karo*, 468 U.S. 705, 713 (1984) ("an actual trespass is neither necessary nor sufficient to establish a constitutional violation.")

The court then stated, "[e]very trespass, by definition, invades someone's right of possession, but not every government trespass violates the Fourth Amendment," because "the Fourth Amendment does not protect possessory interests in land." *United States v. Kramer*, 711 F.2d 789, 794 (7th Cir. 1983) (citations omitted).

The court also noted that the searches performed here were administrative and regulatory—not criminal; therefore, they were inherently less intrusive. The Court cited to *Widgren v. Maple Grove Tp.*, 429 F.3d 575, 579 (6th Cir. 2005) for this proposition. *Widgren* held that a zoning administrator's walk up a driveway and past a "no trespassing" sign to observe a zoning violation was not a Fourth Amendment search because of both: the open fields doctrine as well as the idea that "a criminal investigation is generally more intrusive than an administrative or regulatory investigation."

Finally, the court noted that the property was vacant and admittedly abandoned at the time of inspection. Abandonment is relevant in that it weighs against privacy interests. The court concluded by quoting Judge Tone's dissent in a Seventh Circuit case: "[g]iven the Katz principle that the Fourth Amendment protects people and not places, ownership unaccompanied by either occupancy or any exhibition of an expectation of privacy or an intention to assert a privacy interest should not be sufficient for Fourth Amendment protection." *Wilson v. Health and Hosp. Corp. Of Marion Cnty.*, 620 F.2d 1201, 1219 (7th Cir.1980) (Tone, J. dissenting). The Court also cited to a barrage of cases that have held that empty houses have no curtilage to invade.

On appeal, the Seventh Circuit affirmed the lower court's decision and held that the "[plaintiff] has not identified a single case (nor can we) that applies Fourth Amendment protection to the unenclosed areas surrounding an unoccupied house and prohibits

observations of its exterior from those areas. And [the plaintiff] submitted no evidence that he resided in the house or used it or its yard for any private activities. In fact, he admits that he never lived there, and [the Inspector] was inspecting the property precisely because it had been vacant of any residents for more than 30 days." *Davis v. City of Milwaukee*, 642 Fed. Appx. 627, 629 (7th Cir. 2016) (unpublished).

One Man's Junk Is Another Man's § 1983 Liability!

Compare that result with another recent case, where the Court was not so friendly to the City. *Archer v. Gipson*, 108 F. Supp. 3d 895 (E.D. Cal. 2015) involved another *pro se* litigant who alleged a cornucopia of legal theories, and after several amended complaints and orders, the Fourth Amendment claims stuck.

The key difference here was that the Court drew a distinction between a search and a seizure, and in this case property was seized as part of a nuisance abatement. Clearly the terms "search" and "seizure" have obvious practical differences, but arguably those practical differences equate to legal differences in terms of Fourth Amendment reasonableness.

That is because whether or not a *search* is proper hinges on the individual's reasonable expectation of privacy, and whether or not that expectation of privacy is one that society is prepared to recognize. *United States v. Jacobsen*, 466 U.S. 109 (1984). However, a *seizure* is different because privacy rights need not be implicated at all to be unreasonable under the Fourth Amendment–merely affecting possessory or liberty interests can suffice. *Soldal v. Cook County*, 506 U.S. 56 (1992).

In this case, the City affected the Plaintiff's possessory interest in personal property by seizing a pile of construction materials from the front porch of a vacant home without permission or a warrant. The litigation arose after the Plaintiff sued the City for trying to assess a $937.36 lien for the cost of abating the pile. However, the court ultimately held that the City was not entitled to collect that lien, and in fact, they were on the hook for § 1983 damages.

The court found the City's actions *per se* unreasonable even though the pile of materials was in plain view from the public street, and the City could easily access the porch because the wire fence in front of it was in disrepair.

According to the Plaintiff, the pile had an estimated value of $6,000, and it were planning to use the materials when construction on the property resumed. But the materials sat there for about a year in disorganized fashion and in open view to the public street. Among other things, the City tried to argue that the pile of debris was dangerous because of nearby school children, and that the property owner had no expectation of privacy in what appeared to be an openly visible trash pile.

However, the court held that the emergency exception to the Fourth Amendment requires the "contemporaneous presence of actual and immediate serious consequences." The Court further pointed out that it took several months to initiate the abatement process and such a delay undermined any argument of emergency here. The court also disregarded the City's lack of privacy and plain view arguments, since the property owner had a *possessory interest in the materials* that were seized and that interest was violated by the abatement, rendering any privacy interests irrelevant.

The result of this case is particularly interesting in light of the fact that courts have held that "[s]earch or seizure of abandoned property, even without a warrant, is simply not unreasonable." *United States v. Wilson*, 472 F.2d at 902 (9th Cir.1972). Courts have also held that a warrantless entry into a house that *appears* to be abandoned, but is not actually abandoned, does not violate the Fourth Amendment when officers act on an objectively reasonable mistake of fact. *Olvera v. City of Modesto*, 38 F. Supp. 3d 1162, 1172 (E.D. Cal. 2014). However, the court made no mention of whether or not it was reasonable for the City to believe that the construction debris was abandoned on the vacant property, even though it had been sitting there for a year. The court simply accepted that the property was not abandoned based on the plaintiff's testimony.

Perhaps another big sticking point for the court here were questions of whether or not the City's abatement procedure was sufficient for due process in this case, when there were issues involving lack of notice and questions about whether a meaningful opportunity to be heard was had either before or after the deprivation. Maybe that is because the method of curing an improper search or seizure is dependent on the process that follows it. Courts have held that in some circumstances, the government can cure what would otherwise be an unconstitutional deprivation of life, liberty, or property by providing adequate post-deprivation remedies.

The typical remedy to an improper search is the application of the exclusionary rule to whatever evidence is gathered from that search in the following proceedings. However, it's questionable whether the exclusionary rule would apply in the context of a municipal abatement hearing, which is civil in nature; and regardless, the exclusionary rule is not enough to remedy an improper abatement, since the property seized during the abatement is usually destroyed and may have some value even if the City considers it "junk."

So, let's boil it down. What do we learn from these two cases? First, "cable guy" inspections are ok, and subject the City and the inspectors to minimal risk of liability. Second, when the City proposes to seize or abate property – enhanced procedural protections should be added. Here are some suggestions: 1) Make sure to consummate notice to the property owner *and* all other potentially interested parties beforehand. 2) If you are arguing that the abatement is necessary due to an emergency, then act quickly. Any delay will undermine your argument that it is in fact an emergency. 3) If it is not an emergency, and there is arguably some value to what is to be abated, consider getting a warrant. 4) The more valuable the property to be abated is (or could be argued to be worth), then the more process – pre- or post-deprivation, should be had in order to minimize risk and give the City an opportunity to cure.

And remember:

"Whether [junk] has little or great value, it is constitutionally protected property." *Price v. City of Junction*, 711 F.2d 582, 589 (5th Cir. 1983).

ML



The EEOC's Enforcement Priorities: What Municipalities Need to Know

By: Lawrence Lee and David Roth, Fisher Phillips LLC, Denver, Colorado



In many ways, the City of Haberdash is emblematic of a modern and upwardly mobile urban or suburban America. It has nice homes, good schools, well-kept streets and parks, and a strong sense of community. Haberdash is also a diverse and integrated city—women and minorities are active participants in the workforce, and occupy positions of power and influence. The local government prides itself on serving and keeping happy all of its residents, and on being reflective of the overall community.

Nonetheless, the City has incurred a recent rash of discrimination and harassment claims from its workers. In fact, Haberdash has six separate and distinct Charges of Discrimination against it from either current or prospective city employees.

The first Charge is brought under the ADEA by a 60 year-old employee in its Information Technology Department based on an alleged "pattern and practice of ageism." The employee alleges that despite being fully qualified and highly experienced, the City did not give him full and fair consideration for various higher-level positions in IT. The employee further alleges that the City instead only seriously considered younger applicants straight out of school for open IT positions. Finally, Haberdash improperly disqualified older applicants for computer-based positions because of their age and the inaccurate perception that more mature information technology workers were too old to be up-to-date with the latest trends and technologies.

The second Charge is against the Haberdash's Maintenance Department. One of the City's employees, a Hispanic male who legally immigrated to Haberdash five years ago, claims that he is being segregated from other non-Hispanic workers, being assigned the least-desirable job tasks, and denied opportunities for advancement. His complaint alleges that despite having received positive performance reviews, Haberdash's Maintenance Department is taking advantage of his limited language skills and familiarity with employment laws to deny him the same opportunities it affords its non-Hispanic employees.

The third Charge alleges religious discrimination. The employee at issue is a Sikh who, for religious reasons, wears a turban each day. The employee alleges that his direct supervisor and several of his coworkers have made disparaging and harassing comments about his head covering.

The fourth Charge against Haberdash alleges violations of the Equal Pay Act and Title VII based on gender. The complaint, brought by a female deputy police chief, asserts that the City is purposely paying her less than a similarly situated male deputy police chief. She believes that she and her male counterpart are comparably qualified and that Haberdash should pay them equally.

The fifth Charge pending against Haberdash concerns the ability of an employee to bring a claim against the City. Several years ago, Haberdash implemented an aggressive complaint policy that sought to limit the type and number of civil rights claims its employees could assert. To achieve that end, the City required its employees to sign various waivers, releases, and arbitration agreements. Thus, in addition to mandating that employees go through the standard administrative procedures before bringing a lawsuit in federal court, Haberdash added additional legal protections for itself that sought to limit some of its employees' substantive rights.

Haberdash now faces a lawsuit challenging the legality of these waivers, releases, and arbitration agreements.

Lastly, a sixth Charge brought by a gay employee includes a claim of pattern and practice of discrimination concerning opportunities for advancement and promotion. The employee asserts failure to promote in a recent opportunity based on his sexual orientation. In addition to recovering monetary relief, the employee is seeking to force the City to engage in a holistic prevention program. He wants Haberdash to increase its training and outreach, with the hope that such action will improve the workplace culture and decrease prejudices that serve to discriminate against gay, lesbian, bisexual, and transgender employees.

As a City Attorney for Haberdash, you undoubtedly recognize the potential severity of these six Charges. All raise assertions that, if proven true, could be costly for the city. Moreover, there should be amplified cause for alarm. This is because these six claims all fall within categories of complaints that the Equal Employment Opportunity Commission (EEOC or Commission) has identified in its 2017-2021 Strategic Enforcement Plan (SEP) as areas of particular importance, and that it considers ripe for enhanced scrutiny and action.

New Strategic Enforcement Plan

In December 2012, the EEOC released a SEP covering fiscal years 2013 – 2016. In late October 2016, the EEOC announced that it had approved an updated SEP spanning fiscal years 2017 – 2021 that would reaffirm the Commission's commitment to identifying and prosecuting claims that would have a strategic impact on advancing equal opportunity in America's workplaces. The new SEP is a far-reaching instrument designed to guide and focus the Commission's resources and efforts. As the EEOC's Chair noted, the 2017 – 2021 update addresses persistent and developing issues by sharpening the agency's areas of focus and updating the SEP to recognize additional areas of emerging concern. The EEOC's intent is that the new SEP will lay a solid foundation that will permit the EEOC to concentrate on coordinating strategies and solutions for certain core subjects of workplace law.

The EEOC's intent is that the new SEP will lay a solid foundation that will permit the EEOC to concentrate on coordinating strategies and solutions for certain core subjects of workplace law.

Implementation of the SEP

At the time of this writing, the EEOC has already approved and implemented its newly revised SEP by reallocating resources to prioritize the six areas. This means that the EEOC will shift some of its staff to provide additional support for investigation and prosecution of certain types of claims. The EEOC will also seek increased coordination and collaboration among its staff and among its field offices. The Commission will continually evaluate its progress toward addressing its priorities, and will adapt and reassign resources as necessary. As laid out in the SEP, this implementation effort encompasses proactive actions, careful use of charges, and focused investigative efforts. Although the Commission will, of course, continue to address claims unrelated to those identified in the SEP, the SEP's substantive area priorities will most likely take precedence.

Substantive Area Priorities

The Commission's actions regarding each area will include enforcement, education, outreach, research, and policy development. The EEOC's SEP identified the following six topics as its 2017 – 2021 substantive area priorities:

1. Eliminating barriers in recruitment and hiring;
2. Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination;
3. Addressing selected emerging and developing issues;
4. Ensuring equal pay protections for all workers;
5. Preserving access to the legal system; and
6. Preventing systemic harassment.

Although broad and perhaps seemingly all encompassing, the EEOC's SEP breaks down each substantive area priority and provides better-defined explanations for the types of claims it will be pursuing most vigorously.

1. Eliminating Barriers in Recruitment and Hiring

The Commission will first place a particular emphasis on class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups; older workers; women; and people with disabilities. Included are exclusionary policies and practices; the channeling or steering of individuals into specific jobs due to their status in a particular group; job segregation; restrictive application processes (including online systems that are inaccessible to individuals with disabilities); and screening tools that disproportionately impact workers based on their protected status (e.g., pre-employment tests, background checks impacting African Americans and Latinos, date-of-birth inquiries impacting older workers, and medical questionnaires impacting individuals with disabilities).

The EEOC views increased focus in this area as necessary given the growth of the temporary workforce, the increasing use of data-driven selection devices, and the lack of diversity in certain industries and workplaces such as technology and policing. Although the EEOC notes that this priority will typically involve cases of systemic harassment or discrimination, individual or small-group claims may fall within the ambit of this priority if they raise evidence of a policy, practice, or pattern of discrimination.

Continued on page 20



Lawrence Lee is a partner in the Denver office of Fisher Phillips. He has 20+ years representing the public sector in trial, federal circuit court of appeals, and administrative employment hearings. He also has extensive experience advising employers on avoiding future claims under federal and state wage and hour laws, Sections 1981 and 1983, federal and state Constitutions, and federal and state anti-discrimination and anti-retaliation laws. He has been named as a super lawyer for the last three years.



David Roth is an associate in the Denver office of Fisher Phillips. He counsels and represents employers on a wide array of matters, including issues relating to discrimination, retaliation, harassment, wage and hour compliance, workplace safety, and traditional labor law. David served as a law clerk for the Hon. Elizabeth Harris on the Colorado Court of Appeals and is a graduate of the University of Denver Sturm College of Law. He has been practicing law since 2015.

Enforcement Priorities Cont'd from page 19

2. Protecting Vulnerable Workers

The EEOC will also focus on job segregation, harassment, trafficking, pay, retaliation, and other policies and practices against vulnerable workers, including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities. This substantive area priority is a focus because the Commission believes that these workers are often unaware of their rights under the equal employment laws, or reluctant or unable to exercise them. In the eyes of the Commission, their work status, language, financial circumstances, or lack of work experience make them particularly vulnerable to discriminatory practices or policies. To help implement this priority, the EEOC has indicated that, where available, it will attempt to utilize local government resources to assist it.

3. Addressing Emerging and Developing Issues

The EEOC's new SEP identifies several trends and developments that, in its opinion, are ripe for increased enforcement. Given the emerging or expanding nature of these trends, the EEOC plans to devote additional resources to the following issues:

i. Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
ii. Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA);
iii. Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex;
iv. Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and
v. Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.

4. Equal Pay Protections

Under its 2017 – 2021 SEP, the EEOC will focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because, as the Commission notes, pay discrimination also persists based on race, ethnicity, age, disability, and other protected characteristics, the EEOC will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.

5. Preserving Access to the Legal System

The fifth area that the EEOC is emphasizing focuses on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede the EEOC's investigative or enforcement efforts. More specifically, the EEOC will focus on:

i. Overly broad waivers, releases, and mandatory arbitration provisions (e.g., waivers or releases that limit substantive rights, deter or prohibit filing charges with EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims);
ii. Employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations; and
iii. Significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights. For example, firing a senior director who reports a pattern of discrimination at the workplace sends a strong message to others not to complain about or to report discrimination.

Although claims alleging overly broad waivers, releases and arbitration typically involve systemic cases, the EEOC may prioritize an individual or small-group claim if such claim raises a policy, practice, or pattern of retaliation. Municipalities should have its employment counsel ensure that its administrative processes for internal complaints is prepared to take on this item that will be scrutinized by the Commission.

6. Preventing Systemic Harassment

Lastly, the new SEP makes combatting systemic harassment a priority. The Commission recognizes that harassment continues to be one of the most frequent complaints raised in the workplace. According to its statistics, over 30 percent of the charges filed with the EEOC allege harassment, and the most frequent bases alleged are sex, race, disability, age, national origin, and religion, in that order. The EEOC believes that strong enforcement with appropriate monetary and injunctive relief to prevent future harassment of all protected groups is critical, but not sufficient. Accordingly, the Commission believes a concerted effort to promote holistic prevention programs, which should include training and outreach, is also necessary, and will greatly deter future violations.

The Claims against Haberdash

Because the six pending Charges against Haberdash are the six types of claims that the EEOC's new SEP announced would be prioritized, thoroughly investigated, and if necessary prosecuted, what steps should Haberdash's employment counsel take? What impact, if any, will the EEOC's new SEP have on the Commission's actions? Regardless of whether an employee's claim of discrimination is meritorious, what should employers like the City of Haberdash do to both avoid high priority claims and effectively handle them once they arise?

The 2017 – 2021 SEP unquestionably provides a clear message to employers that these six substantive areas of the law will occupy a considerable amount of the Commission's attention and resources. Major investigations, enforcement actions, and lawsuits brought by the EEOC will likely encompass one or more of these areas. The new SEP further reinforces the fact that the Commission will place particular emphasis on systemic litigation and other cases that it believes will have a strategic impact on workplace laws and culture.

Accordingly, employers should anticipate that the EEOC will focus on high-impact and high-profile cases. When the EEOC has the opportunity to litigate such cases, employers should expect to face a determined and aggressive opponent. As stated in the SEP, the EEOC will attempt to marshal its resources, both locally and nationally, to achieve the results it desires.

To avoid facing an aggressive EEOC, employers should, generally speaking, ensure that their anti-discrimination policies and practices are robust and thorough enough to address any improper behavior that could occur in their workplaces. They will also want to ensure that their policies and pro-

cedures for hiring, firing, promoting, and taking other employment-related actions are structured to avoid actions premised on an individual's protected status, and are applied consistently to all employees.

First Charge: As to the discrimination claim by the potential Information Technology Department worker, the City should examine its hiring and recruiting techniques. If there is a formula used to determine a candidate's suitability for an IT position, the City should ensure that such formula does not have a disparate impact on older job applicants. More relevant, the City should train its IT Department supervisors to ensure that they do not hold unfair biases or prejudices. Even if such biases are common throughout the IT industry, the City needs to make sure that it does not fall prey to unfair stereotypes that improperly perpetuate discrimination.

Second Charge: As to the Hispanic employee who alleges he is an easy target given his limited resources, Haberdash ought to review not only its general anti-discrimination policies, but also properly educate its employees about their rights and responsibilities. If the employee in this hypothetical believes that he is facing adverse employment actions because of his language skills or financial resources, then the City needs to make certain that the employee is not actually hindered in his ability to exercise his rights and seek protection.

Third Charge: The religious discrimination claim by the Sikh employee is, essentially, a run-of-the-mill harassment claim. However, the City should nonetheless seek to educate its employees so that they can understand or appreciate the Sikh employee's religious choices. Given that the EEOC will be on the lookout for discrimination against Sikhs, Muslims, and South Asians, employers should be especially vigilant for, and responsive to, discrimination or harassment against these groups.

Fourth Charge: A claim of equal pay violation should prompt the City of Haberdash to review its pay practices. The City through its employment counsel should conduct an audit and examination of its compensation system to ensure that the metrics used to determine pay or bonuses do not reflect discriminatory practices.

Fifth Charge: The claim challenging the City's use of waivers, releases, and arbitration agreements to limits its liability presents more of a challenge. A discussion of such instruments is beyond the scope of this article, and encompasses a complex and constantly evolving area of the law. Nonetheless, Haberdash would be wise to limit its use of such instruments, and to ensure that any use is clearly permitted by the applicable laws. Because the EEOC will be on the lookout for cases that involve onerous waivers, releases, and arbitration agreements, employers of all types should consider being judicious when asking or requiring employees to enter into such agreements.

Sixth Charge: Lastly, the City should work to address the concerns brought by the gay employee. A review of its discrimination policies, enhanced training and outreach programs, and more awareness on the part of managers and supervisors should help reduce the probability of such claims based on sexual orientation, and therefore reduce the probability that the EEOC, in accordance with its new SEP, will take aggressive action to address such charges. Although sexual orientation is not considered a protected class by Congress under Title VII, the Commission has filed federal lawsuits asserting that discrimination based on sexual orientation is akin to discrimination based on sex, and is therefore impermissible.

Although the six claims pending against Haberdash will undoubtedly attract the attention of the EEOC, and may require that the City consider early settlement negotiations to avoid EEOC litigation, Haberdash should be able to minimize any similar future occurrences if it adopts these recommendations. Accordingly, the City, through its employment counsel, should reevaluate its policies and practices to ensure that it, like the EEOC, is cognizant of and responsive to these types of claims. By ensuring up-to-date practices and keeping an eye out for the specific types of discrimination that the EEOC will be prioritizing, Haberdash ought to be able to serve its citizens, care for its workers, and avoid unwanted attention from the EEOC.

A Postscript on the Implications of a Trump Presidency for the New SEP

The election of Donald Trump as president will likely mean that sweeping changes are coming for many of America's laws, regulations, and enforcement priorities. The U.S. Department of Labor, the EEOC, and other employment-related agencies will not be immune from such changes. However, right now, at the end of 2016, uncertainty reigns supreme. It is simply impossible for lawyers to predict when, how, or to what extent the nation's laws will change.

Despite this, it seems probable that, at least in the immediate future, the EEOC's 2017 – 2021 SEP will remain intact and will guide enforcement efforts. The EEOC is an independent federal agency governed by five presidentially appointed Commissioners who serve until resignation or the conclusion of their term appointment. In addition to the five Commissioners, there is a General Counsel who supports the Commission and provides direction, coordination, and supervision for the EEOC's litigation program.

Currently, three of the Commissioners, including the Chair, are Democrats. The other two are Republicans. Although immediately upon taking office Mr. Trump will be able to appoint a new Chair and replace the soon-to-depart General Counsel, the overall political composition of the Commission will remain unchanged until at least the second half of 2017.

However, once President Trump has the ability to alter the political composition of the EEOC, substantive change will almost certainly follow. What those changes will entail remains unknown. It is possible that a newly directed EEOC will be less aggressive in pursuing litigation. It is also possible that the EEOC will significantly revise its 2017 – 2021 SEP to eliminate certain priorities or change enforcement goals. Other potential changes could affect the EEOC's funding and staffing. For example, a reduction to its budget or staff could impair the EEOC's ability to pursue vigorously the objectives laid out in the SEP. Additionally, there is the possibility that the EEOC will change its internal policies and procedures to slow down or delay the bringing and adjudication of charges of discrimination.

Regardless of what changes occur, they will not occur overnight. All employers across the country should plan on the new 2017 – 2021 SEP remaining in full force and effect for the immediate and near-term future. Moreover, it is possible that the EEOC will drastically increase its activity in the waning days of the Obama Administration in an attempt to bring claims that may eventually be harder for it to pursue. Irrespective of what the future may hold, it is our unsolicited suggestion that employers prepare for increased EEOC action on the six substantive areas named as priorities in the SEP. Mere speculation about future changes should not affect today's realities.



LISTSERV

Is "Stick 'em Up!" Protected Free Speech?

By: Brad Cunningham, City Attorney, Lexington, South Carolina

"Speech" is being defined more and more broadly on a daily basis as First Amendment cases make their way through the courts. The 2015 Supreme Court ruling in *Reed v. Town of Gilbert* dramatically advanced this trend. A topic frequently discussed on the listserv, the First Amendment and Freedom of Speech recently came to light again following a ruling in *Homeless Helping Homeless v. City of Tampa.*

As noted by one IMLA listserv contributor, although federal District Court Chief Judge Steven Merryday ruled against Tampa's "Anti-Solicitation Ordinance" in *Homeless Helping Homeless*, he let the *Reed* decision--and the justices who decided that case--have it, in no uncertain terms:

> *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), an opinion accompanied by three distinct concurring opinions joined by a total of seven justices and an opinion adjudicating a sign-ordinance dispute, appears to govern this action. In other words, an opinion that resolves a dispute about parishioners temporarily planting some small signs directing people to a church service is written in such sweeping terms that the opinion appears to govern a dispute about an ordinance that regulates face-to-face demands for money from casual passers-by. This action illustrates (as Reed illustrates) the frailties of governing discrete local issues, which are otherwise decided by local officials subject to periodic election, by force of intermittently issued decrees, which are conveyed as constitutional directives; which are issued by a majority (or, sometimes, only a plurality) of nine lawyers serving during "good behavior"; and which are uttered in the course of resolving a different dispute in another locality. Nonetheless, this order dutifully applies Reed and resolves the present dispute against the City and in favor of Homeless Helping Homeless. Without Reed, which governs for the moment (despite prominently featuring the badges of a transient reign), I would follow Judge Easterbrook in Norton v. City of Springfield, 768 F. 3d 713 (7th Cir. 2014), and similar decisions, and I would uphold the City's ordinance, which results from a constructive and demonstrably benign legislative attempt to manage fairly and humanely a tangible and persistent problem in a manner narrowly and artfully tailored to fit the compelling facts in the affected community.

It is clear that Judge Merryday did not like having to follow the *Reed* decision. Indeed, it can be seen by some as one in a line of cases too broadly sweeping in its after-effects. In light of *Reed* and *Homeless Helping Homeless*, and the line of cases which appear to extend "Freedom of Speech" to the inclusion of acts as well as speech, consider the following query: If "Freedom of Speech" protects the act of solicitation, could the same analysis also be extended to protect he act of robbery? Preposterous? Maybe, but consider the analysis:

Under many ordinances, both solicitation and robbery are criminal charges presumably enacted for the general safety and welfare of the citizens;

In soliciting, the speech "Can you spare a dollar?" is presumably followed by the act of a person handing money to the speaker;

In robbery, the speech "Stick 'em Up!" is presumably followed by the act of a person handing money to the speaker;

In both cases the person who is asked for money may be very uncomfortable and may act by giving money out of fear;

An unwelcome solicitation has a chance to become violent, as does a robbery;

If free speech "overrules" the crime of soliciting, why couldn't the same analysis be used to overrule the crime of robbery?

Again, it may sound far-fetched but the analysis is fairly similar. Yes, I do say this essentially in jest, but the question is exactly how far will speech be extended to include acts? At what point (if ever) will going beyond words be going too far? Understand, I'm not necessarily advocating against a broad definition, but "speech" has been extended to include: repeated unwanted visits from door to door vendors, blocking sidewalks and roads, using the bathroom on the statehouse grounds and littering a neighborhood with flyers that blow all over the place. Each of these protected actions clearly includes more than just words.

There are plenty of judges and legal minds who believe that the implications of *Reed* have far reaching effects. Some examples of this are shown below, as reported in a recent *New York Times* article:

Recently, an appeals court in Richmond, Va., agreed that *Reed* had revised the meaning of content neutrality. "*Reed* has made clear," the court said, that "the government's justification or purpose in enacting the law is irrelevant" if it singles out topics for regulation. The court struck down a South Carolina law that barred robo-

calls on political and commercial topics but not on others.

In another case, a federal judge in New Hampshire relied on *Reed* to strike down a law that made it illegal to take a picture of a completed election ballot and show it to others. "As in Reed," Judge Paul Barbadoro wrote, "the law under review is content-based on its face because it restricts speech on the basis of its subject matter."

In a concurrence in the *Reed* decision, Justice Stephen G. Breyer suggested that many other laws could be at risk under the majority's reasoning, including ones concerning exceptions to the confidentiality of medical forms, disclosures on tax returns and signs at petting zoos.

Stay tuned for more as various federal courts work through these cases in the aftermath of *Reed*. Clearly, not all judges are thrilled with the decision and the resulting trends.

In this age of what seems like daily news items related to a public tragedies in one place or another, a quick listserv survey of colleagues reveals that almost everyone has law enforcement presence at their regular council meetings. Many report the Chief of Police regularly attends as a department head, but some report slightly higher levels of security.

One colleague reports: " We have metal detectors at the front doors and City marshals attend every Council meeting – it is part of our standard operating procedure. The Mayor also has police officers assigned to her for security that attend as well."

Others report:

"The police chief and fire chief (also a peace officer) attend every meeting as department heads. If we have an idea that there may be a controversial agenda item, or we have word that someone may be coming to make trouble, we will have additional officers present."

"We have routinely have 1-2 peace officers who attend as part of our SOP, but no metal detectors. When we know there will be a large gathering, we typically will request an increase in the number of officers in attendance."

"We have a metal detector and city marshal at every meeting."

"We have 1 or 2 police officers at each Council meeting – another 1 or 2 if there is a particularly contentious issue or an unusually large crowd is expected. We also have 1 or 2 at each Planning Commission meeting."

Sadly, one colleague reports that:

Our city used to be entirely open, but a few years ago a man walked into the Democratic state headquarters a few blocks from City Hall and shot a former state senator (and party chair) dead. So, the City imposed pass cards for all employees, and involved visitor's passes for visitors. We also have two entrances to City Hall for the public that have a metal detector in place. We were in a meeting a couple of years ago when the metal detector picked up on a long knife someone had, and he got extremely angry. Fortunately, the chief of police was in the meeting, and he anger subsided rapidly when he got to the door.

It is a sign of the times, I suppose, that these measures are necessary. I urge everyone to take security issues seriously, and review your emergency operations procedures on a regular basis. Sure, the grumbling is bound to take place, but preventing an incident such as cited above is of paramount importance.

As a profession, I think we need to pause, take a breath and not forget to have a little fun every now and then. The whole legal profession should not become a billable hours contest. There is enough pressure packed into the practice of law that many states now have CLE requirements that must (in some fashion) address substance abuse and mental health issues among lawyers. This is a shame, and I know a few lawyers who have retired and lamented that "The fun has been taken out of the practice of law."

Well, thankfully as one avenue of enjoyment for those of us who belong to IMLA, we have the Water Cooler. If you don't know, the Water Cooler was founded by New Jersey's Bill Kearns years ago for the purpose of discussing a variety of topics (most unrelated to the law) in an atmosphere of "Courtesy, Civility and Collegiality." It provides a momentary break from day to day activities and inserts a little "fun" into our professional lives.

During the IMLA Annual Meeting in San Diego this Fall, 18 of us gathered around the table for the 5th Annual Water Cooler Reunion. This annual event represents the one time of the year where our relationship is not virtual, but becomes reality as we meet face to face. I started this reunion back in 2012 at the Annual Meeting in Austin, and it has grown since that time. We've been to B.D. Riley's in Austin, Foley's in San Francisco, Pratt Street Ale House in Baltimore, The Hofbrau House in Las Vegas, and most recently met at The Field, an Irish Pub / Restaurant in the heart of San Diego's Gas Lamp District.

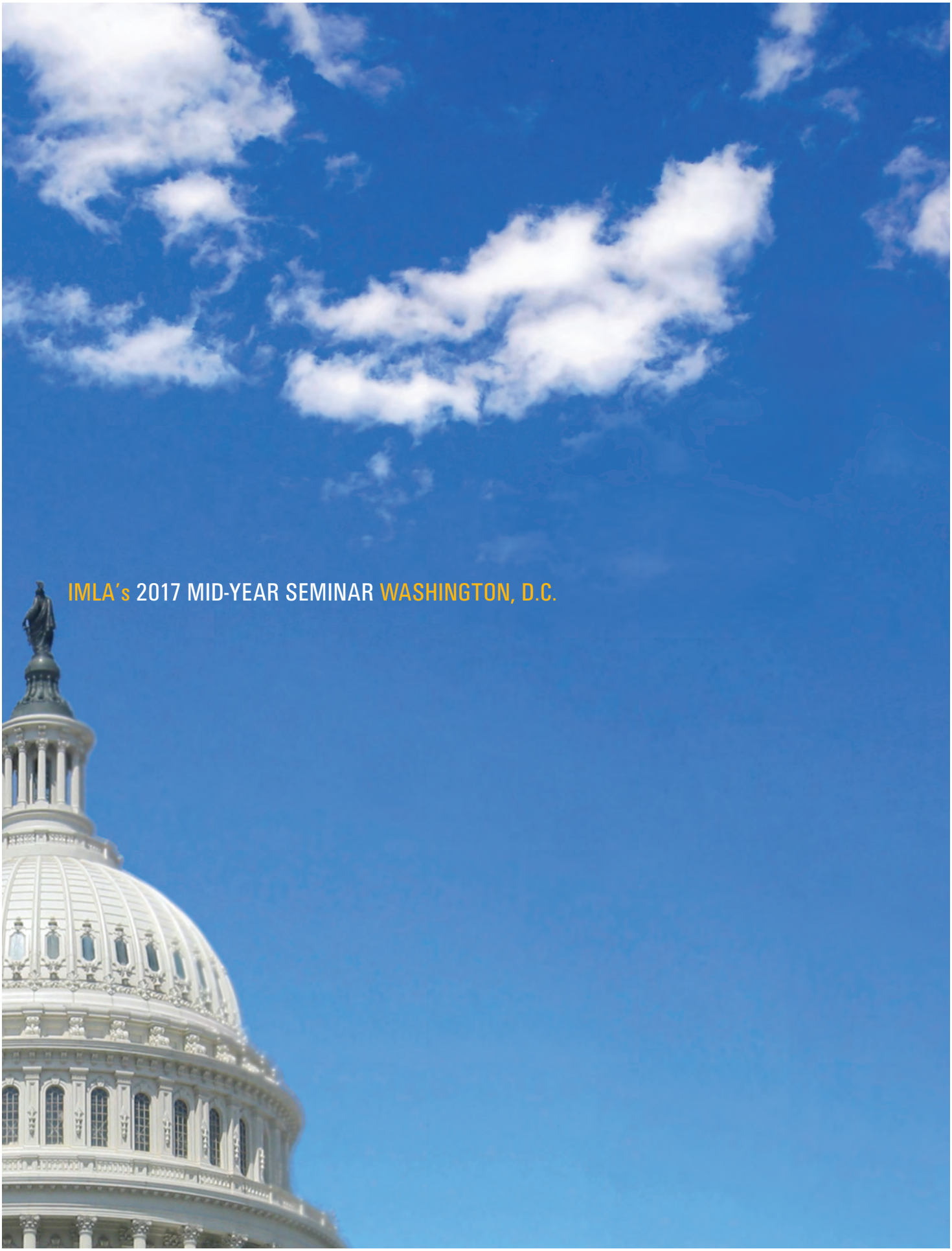
Representatives from Wisconsin, Georgia, Missouri, South Carolina, Kansas, Louisiana, Texas, New York and Canada, as well as some spouses and children, were on hand to share in the fun conversation and great food in the upstairs private room. Non-legal discussions covered college preparations for kids, travel plans and vacations, the birth of grandchildren (pictures were passed around, of course), and athletics. On top of all this, the food and drinks were outstanding! A nod to Chuck Thompson for recommending the venue. It provided a great atmosphere for the annual event, and hopefully we can keep it up. I look forward this event annually, as it is attended by folks who have become some of my best friends.

Of course, the 6th Annual Water Cooler Reunion comes our way during the week of October 14 through October 18th as IMLA visits Niagara Falls, Ontario, for its 82nd Annual Conference. The location and time/date are yet to be determined, but if you can make it to this event it has proven to be quite fun. Of course to make it, you need to register for and attend the Annual Conference. Please do so if at all possible. Support IMLA!

From the "Can You Believe It?" corner, an area city recently had an inquiry from a citizen who wanted to know if they should report getting scammed in a dope deal. Of course, the local police was response was "Yes, tell us all about this person from whom who you bought drugs."

In my fair city, we had a lady come through the metal detector safely as she headed into court. She then handed her purse to the police officer to have the contents reviewed. Upon opening the purse, the officer immediately saw in plain view a bag of marijuana. The officer asked "What are you doing with this?" The reply: "Oh, I forgot about that. Can I take it back outside?"

The prosecution rests, your honor... ML


IMLA's 2017 MID-YEAR SEMINAR WASHINGTON, D.C.


IMLA'S 82ND ANNUAL CONFERENCE NIAGARA FALLS ONTARIO OCTOBER 14-18 2017



Cases of Interest

By Monica Ciriello, Ontario 2015

"Immigration Experience" Desired: Candidate Files Human Rights Application *Konesavarathan v. Guelph* (City), 2016 HRTO 1453 (CanLII) http://canlii.ca/t/gvn41

Kovarthanan Konesavarathan (Applicant) applied for a "Project Specialist, Immigration Partnerships" position posted by the City of Guelph (City). The job posting included a 14-point bullet list under the heading "Qualifications." The first two were:

- Experience related to the duties listed above, normally acquired through a degree or diploma in Social Sciences or related field and experience with community initiatives or in a related area. Candidates with an equivalent education and experience may be considered.
- Experience overseeing projects and project teams ensuring they are on track and completed on time.

The last of the 14 qualification items stated:

- Lived immigration experience will be considered an asset.

The Applicant was not among the eight candidates (out of 110 total respondents) selected for an interview and followed up with the City. The City indicated that taken together, the Applicant's resume and work experience did not present the breadth of knowledge to be brought in for an interview. The Applicant filed a *Human Rights Code (Code)* application based on not getting an interview and on the job posting itself, alleging discrimination based on race, colour, ethnic origin and/or place of origin contrary to the *Code*.

HELD: Dismissed.

DISCUSSION: The Adjudicator began by applying the summary hearing test to determine if the application had a reasonable prospect of success. To set the framework for the test, the Adjudicator relied on *Forde v. Elementary Teachers' Federation of Ontario*, 2011 HRTO 1389: to continue in the Tribunal's process following a summary hearing, there must be a basis beyond mere speculation and accusations to believe that an applicant could show a breach of the *Code*. The Applicant argued that the City did not look beyond the candidates' job titles to determine competencies and skills. This put the Applicant, of Sri Lankan origin, at a disadvantage because his non-Canadian positions had different job titles that were overlooked by the City despite having obtained the requisite competencies and skills for the position. The City indicated that the candidates chosen for an interview demonstrated greater competencies and experiences required for the position in their job applications and resume.

The Adjudicator found that the Applicant was unable to present evidence that his non-Canadian experience was overlooked in the hiring process. In addition, the Adjudicator highlighted *Thambipillai v. Toronto District School Board*, 2012 HRTO 843 which found that there is nothing overtly discriminatory about an employer basing its decisions on whether to grant interviews solely on the information provided by the job applicant. In the issue at hand, that was exactly what the City did; the Applicant had insufficiently described his relevant experience and qualifications in his cover letter and resume.

Next, the Applicant argued that the job posting itself was discriminatory as it indicated that "lived immigration experience" would be an asset, when in reality the City had used that criterion to filter out immigrants, contrary to section 23(2) of the *Code*. Although *Rocha v. Pardons and Waivers of Canada*, 2012 HRTO 2234 held that simply asking a question which serves to classify an individual by a *Code* ground can constitute adverse treatment (and that there is no requirement to show an intention to discriminate) there was no evidence of discrimination here. The Adjudicator contrasted the statements from *Rocha* with the Applicant's argument, finding that in the present case there was no immigration-based adverse treatment towards the Applicant and that "lived immigration experience" would genuinely be viewed as an asset and qualification for the position. The Adjudicator dismissed the application, finding no reasonable prospect of success.

Yes, There is Ice in the Arctic: Unsuccessful Slip and Fall Action *Nancy Vail v. City of Yellowknife*, 2016 NWTTC 16 (CanLII) http://canlii.ca/t/gvhjf

In early November 2015 Nancy Vail (Plaintiff) decided to walk home in downtown Yellowknife (City). It was dark and the downhill sidewalk she was walking on was icy. Plaintiff slipped and fell, suffering a fracture to her wrist that resulted in surgery. The Plaintiff brought forward this claim, seeking $8,000 as compensation for damages from the City for failing to keep the street safe and free of ice. The City acknowledged it has a duty to remove snow and ice from the streets but argued that its actions on the day the Plaintiff fell did not amount to gross negligence.

HELD: Dismissed.

DISCUSSION: The Court began by outlining the provisions in the *Cities, Towns and Villages Act (Act)* highlighting section 87 and 133(1). Section 87 refers to the City's responsibility to keep sidewalks 'in a state of reasonable repair':

87. A municipal corporation shall keep each highway and other public place that is subject to its direction, control and management, including works in, on or above the highway or public place put there by the municipal corporation, in a state of reasonable repair, having regard to the character of the highway, place or work and the area of the municipality in which it is located.

Section 133 of the *Act* limits a municipality's liability to instances of gross negligence:

133(1). A municipal corporation is not liable for loss or damage caused by snow, ice or slush on highways in the municipality, unless the municipal corporation is grossly negligent.

The Court accepted the Plaintiff's evidence that the sidewalk she was

Continued on page 30

Cases



By: IMLA Editorial Board

Taxation: Hotels Must Collect Transient Occupancy Taxes on Full Amount Charged to Travelers by Online Travel Companies
***In re Transient Occupancy Tax Cases,* No. S 218400 (Cal. Dec. 12, 2016)**

The California Supreme Court has found that, although online travel companies are not hotel "operators" for purposes of a San Diego tax ordinance, hotel operators must collect transient occupancy tax on the full amount charged to travelers by the online travel companies for hotel stays.

In December 2004, Los Angeles filed a putative class action on behalf of various California cities against online travel companies (OTCs), alleging that they were liable for transient occupancy tax (TOT) on the full amount charged to the customer (the actual amount paid by the OTC for the hotel room, plus any markup and service fee charged by OTC). In October 2007, San Diego, whose tax ordinance provides for a 6 percent tax on hotel stays (Ordinance), began auditing the OTCs, issuing TOT assessments–which each OTC appealed. An administrative hearing initially determined that the OTCs owed tax on their markup. The superior court subsequently found in favor of the OTCs and issued a writ ordering the hearing officer to vacate his ruling. San Diego appealed. The Court of Appeal affirmed, reasoning that San Diego's Ordinance imposed tax on "rent charged by the … operator" and concluded that hotels, not the OTCs, are "operators" within the meaning of the ordinance.

San Diego petitioned for rehearing to the California Supreme Court.

While holding that the OTCs are not "operators" of hotels, the California Supreme Court agreed with San Diego's argument that, under so-called "rate parity" agreements (which require OTCs to charge the same price for a given room as the hotels do) the hotels were effectively "charging" visitors for the full room price–and TOT was payable on the full amount.

> [T]o the extent a hotel determines the markup, such as by contractual rate parity provisions requiring the OTC to quote and charge the customer a rate not less than what the hotel is quoting on its own website, it effectively "charges" that amount, whether or not it ultimately receives or collects any portion of the markup, and that amount is therefore subject to the tax.

The decision placed responsibility for collection of the additional TOT on the hotel operator:

> We conclude that under the San Diego ordinance . . . the operator of a hotel is liable for tax on the wholesale cost plus any additional amount for room rental the operator requires the OTC to charge the visitor under what have been termed the "rate parity" provisions of hotel-OTC contracts . . .

San Diego also cited indemnification agreements in which OTCs agreed to be responsible to the hotels for any taxes assessed by any governmental authority on the markup. Although the court declined to make San Diego a third party beneficiary of such hotel-OTC agreements, the decision appears to clear the way for California municipalities to demand unpaid TOT from the hotels—which would then demand indemnification from the OTCs. (ML thanks Steven D. Wolens of the Dallas office of McKool Smith, the California municipalities' co-lead counsel in the case, for his observations about the decision).

Damages: Punitive Damages Payable where Officer Demonstrates "Callous Indifference" to Safety of Detainee
***Binkovich v. Barthelemy*, No. 14-16768 (9th Cir. Dec. 2, 2016)**

Although a California police officer's action in spontaneously kicking the legs of a detainee out from under him, causing injury, could not be said to be "overtly cruel," those actions reflected a "callous indifference" to the detainee's well-being, justifying the imposition of punitive damages.

San Jose California police officer Bruce Barthelemy (Barthelmy) was called to a local hotel after complaints were made about an unruly party. As one of the revelers, Aleksander Binkovich (Binkovich), made his way across the hotel lobby, he brushed away Barhtelmy's hand—whereupon the officer kicked Binkovich's legs out from under him, causing a bloody nose. Binkovich was jailed for seven hours but no charges were brought.

A jury found that Barthelemy applied excessive force against Binkovich, awarding $103,000 in legal fees and punitive damages. Barthelemy challenged various aspects of the jury award, including an argument that the district court should strike the jury's punitive damage award, which the court did. Binkovich appealed the denial of punitive damages to the Ninth Circuit, which reversed it, remanding for reinstatement of the jury's award.

The Circuit first provided the standard for sustaining or reversing a punitive damage award: "[A] challenge to the sufficiency of the evidence to support a punitive damage award must be rejected if the award is supported by substantial evidence." The district court's decision to strike the award was based on the fact that there had been no testimony as to the overt cruelty of the officer – not one witness could say that the officer specifically went out of his way to hurt Binkovich. The Circuit, however, rejected this reasoning since juries may award punitive damages under §1983 when there is overt cruelty *or when the action involves reckless or callous indifference.*

Continued on page 32

Lessons from Ferguson Cont'd from page 11

4. Joseph Shapiro, *Lawsuits Target "Debtors' Prisons" Across the Country*, NPR MORNING EDITION (OCTOBER 21, 2015), http://www.npr.org /2015/ 10/21/ 450546542/ lawsuits-target- debtors-prisons-across-the-country; Rick Anderson, *Debtors Prison a Thing of the Past? Some Places in America Still Lock Up the Poor*, LA TIMES (June 8, 2016), http://www.latimes.com/nation/la-na-debtors-prison- 20160607-snap-story.html.
5. *Harris v. City of Austin*, No. A-15-CA-956-SS, 2016 U.S. Dist. LEXIS 33694, at *1 (W.D. Tex. 2016); Robert Stein, *City Sued Over Municipal Fines Policy*, AMARILLO GLOBE-NEWS (January 15, 2016), http://amarillo.com/news/crime-and-courts/2016-01-15/city- sued-over-municipal-fines-policy; Kendall Taggart and Alex Campbell, BUZZFEED NEWS, *El Paso Sued Over Jailing For Unpaid Tickets*, EL PASO TIMES (April 20, 2016), http://www.elpasotimes.com/story/news/2016/04/20/el-paso- sued-over-jailing-unpaid-tickets/83277736/.
6. Dep't of Justice, *supra*, at 9-10.
7. RYAN KELLUS TURNER AND W. CLAY ABBOTT, MUNICIPAL JUDGES BOOK (Texas Municipal Courts Education Center 5th ed. 2014) at 1-3.
8. A local judge acting in his or her judicial capacity is not considered a local government official whose actions are attributable to the local government. *Davis v. Tarrant County*, 565 F.3d 214, 227 (5th Cir. 2009) citing *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995). However, when judges are not acting independently, but effectuate official policies or customs that violate constitutional rights, municipalities face liability including monetary damages and injunctive relief. *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997).
9. Turner and Abbott, *supra*, at 1-31. The express function of such courts is to preserve public safety, protect quality of life, and deter further criminal behavior. The implicit function is revenue generation. In Texas, municipal courts generated more than $681 million in 2013. The tension between the express function and implicit function (which when viewed in the proper perspective is an incidental benefit) has long been a source of conflict between municipal courts and city councils. *Id.* at 1-32.
10. Consider *Ward v.Village of Monroeville*, 409 U.S. 57, 60 (1972), where a conviction was invalidated because the mayor faced a "possible temptation" created by his "executive responsibilities for village finances."
11. Carl Reynolds and Jerry Hall, Conference of State Court Administrators, *2011-2012 Policy Paper: Courts are Not Revenue Centers* 2 (2011).
12. Eric Dexheimer, *Hard-Up Defendants Pay as State Siphons Court Fees for Unrelated Uses*, AUSTIN AMERICAN STATESMAN (March 3, 2012); Eric Dexheimer, *Even Court Officials Find Fees Hard To Untangle*, AUSTIN AMERICAN STATESMAN (March 3, 2012); and Dan Feldstein, *"Loser Fees" Taking Place of New Taxes*, HOUSTON CHRONICLE (March 5, 2006).
13. Texas Appleseed, *Debtors' Prisons*, https://www.texasappleseed.org/debtors-prisons (last visited June 16, 2016).
14. In Texas, for example, court costs may be applied to no fewer than 14 different cost centers, many of which have nothing to do with the actual costs of operating a court. While lawyers have argued that such costs are actually taxes, the collection of which violates separation of powers, in *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015), the court held that as long as the statutory assessment reasonably relates to the costs of administering the criminal justice system, it is not a tax in violation of separation of powers.
15. U.S. Dep't of Justice, *supra*, at 43-55.
16. *Id.* at 55-58.
17. The Ferguson Commission, *Forward Through Ferguson: A Path Toward Racial Equality* 30 (2015).
18. *Tate v. Short*, 401 U.S. 395, 397-401 (1971).
19. *Bearden v. Georgia*, 461 U.S. 660, 664-674 (1983). While *Bearden* does pertain to fines and fees, its application to offenses punishable by the imposition of a fine is less straightforward than one may imagine. It should come as no surprise that there is still debate about *Bearden*, as commentators have observed that states do not necessarily agree on its application.
20. Nusrat Choudhury, American Civil Liberties Union, *Written Statement of the American Civil Liberties Union Before the United States Commission on Civil Rights* (2016).
21. Ed Spillane, *Judges Can Fix the System: Here is How*, JUDICATURE (Winter 2016) at 52.
22. Bourree Lam, *The Living Wage Gap: State by State*, THE ATLANTIC (Sept. 15, 2015); MASS. INST. OF TECH., *Living Wage Calculator*, http://livingwage.mit.edu/ (June 20, 2016).
23. Tex. Code Crim. Proc., art. 45.041, art. 45.049, and art. 45.0492.
24. Tex. Code Crim. Proc., art. 45.0511(i)-(k) and art. 45.051(c-1)-(d).
25. *Tate v. Short*, 401 U.S. 395, 400 n.5 (1971).
26. Tex. Loc. Gov't Code, § 133.103.
27. Kendall Taggart, Alex Campbell, *In Texas It's a Crime to be Poor*, BUZZFEED (October 7, 2015), https://www.buzzfeed.com/kendalltaggart/in-texas-its-a-crime-to-be-poor.
28. *See* Jeffrey Dvorkin, *Why Click-Bait Will Be the Death of Journalism*, PBS Newshour (April 27, 2017), http://www.pbs.org/newshour/making-sense/what-you-dont- know-about-click-bait-journalism-could-kill-you/.
29. *See* Tex. Code Crim. Proc., art. 4.14.
30. Miss. Code Ann., § 21-23-19 (2013).
31. Mo. Rev. Stat., §§ 77.590, 79.470 (2015).
32. *See* Dep't of Justice, *supra* note 7.
33. *See* 407 U.S. 25, 37 (1972). (holding that, absent a knowing and intelligent waiver, *no person may be imprisoned* for *any offense* ... unless he was represented by counsel at his trial) (emphasis added).
34. *See* 440 U.S. 367 (1979). Affirming, *Argersinger* drew a bright line between incarceration (as part of a sentence) and the mere threat of incarceration (separate from a sentence). As the Court explained in *Scott*, "[t]he central premise of *Argersinger* – that actual imprisonment is a penalty *different in kind from fines or the mere threat of imprisonment* – is eminently sound and warrants adoption of *actual imprisonment* as the line defining the constitutional right to appointment of counsel." *Id.*, at 373. Emphasis added.
35. 461 U.S. at 666-667.
36. *See* Tate, 401 U.S. at 399 (1971).
37. 399 U.S. 235, 244 (1970).
38. Tate, 401 U.S. at 400-01 (1971) (emphasis added).
39. Bearden, 461 U.S. at 664-65 (1983).
40. *Note: State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, at n. 22 and 1026 (2016).
41. Neil L. Sobol, *Article: Charging the Poor: Criminal Justice Debt & Modern Day Debtors' Prisons*, 75 MD. L. Rev. 486, 524.
42. *Id.* at 524-532. Additionally, Sobol proposes his own hybrid approach. *Id.* at 532-540.
43. Bearden, 461 U.S. at 674.
44. 411 U.S. 1, 21-22 (1973).
45. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (3d ed. 2006) at 786.

46. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 (1980).
47. Tate, 401 U.S. at 671 n. 5. It is also important to note that "[t]he State is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones." *Id.* at 671.
48. *See* 392 U.S. 514 (1968). The Supreme Court rejected the principal that "[criminal] penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 533.
49. Michele Estrin Gilman, *The Poverty Defense*, 47 U. Rich. L. Rev. 495 (January 2013).
50. Joseph Ax, *Philadelphia, Eying Democratic Convention, to Decriminalize Minor Offenses*, Philadelphia Inquirer (June 8, 2016) http://www.philly.com/philly/news/politics/dnc/20160607_Reuters_L1N18Z1VA_Philadelphia eying Democratic_convention to_decriminalize_minor_offenses.html.
51. Dareh Gregorian, *Littering, Public Urination and Other Minor Offenses in Manhattan Will Lead to Summons and Not Arrest*, New York Daily News (March 1, 2016) http://www.nydailynews.com/new-york/nyc-crime/minor- offenses-manhattan-no-longer-result-arrests-article- 1.2549474.
52. Jennifer Fermino, *Mayor de Blasio, City Council Working on Plan to Purge NYPD Warrants for Small Crimes*, N.Y. Daily News (February 12, 2016) http://www.nydailynews.com/news/politics/mayor-council- purge-old-warrants-small-crimes-article-1.2530407.
53. George L. Kelling & William J. Bratton, *Why We Need Broken Windows Policing*, City J., Winter 2015
54. Thomas Fuller, *San Francisco Torn as Some See 'Street Behavior' Worsen*, N.Y. Times (April 24, 2016) http://mobile.nytimes.com/2016/04/25/us/san-francisco-torn- as-some-see-street-behavior-worsen.html?referer=.
55. *See* U.S. Const., amend. X.
56. Since 1948, it has been well-settled law in Texas that driving an automobile on public roads is not a constitutionally-protected right, but a privilege. Taylor v. State, 151 Tex. Crim. 568, 569, 209 S.W.2d 191, 191 (1948); Naff v. State, 946 S.W.2d 529, 531 (Tex. App.—Fort Worth 1997); *Ex parte* Arnold, 916 S.W.2d 640, 642 (Tex. App.—Austin 1996). This privilege is subject to reasonable regulation under the State's police power in the interest of the welfare and safety of the general public. *Naff*, 946 S.W.2d at 533. ML

Amicus Cont'd from page 15

or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a particular Website are available for use by a minor. (368 N.C. 380, at 386)

Because it concluded that the law was content-neutral, the court applied intermediate scrutiny. It found that the statute was "carefully crafted" by prohibiting registered sex offenders from accessing websites where they could gather information about minors, while still allowing them to use websites "exclusively devoted to speech," including instant messaging services and chat rooms and websites where users must be at least 18 years old to maintain a profile. In this respect, North Carolina had sought to distinguish its statute from similar statutes in Indiana and Louisiana that did not allow registered sex offenders to use chat rooms and messaging services and were subsequently struck down.

The dissent took issue with the majority's characterization of the law as one regulating conduct and not speech and it also indicated that under *Reed* there was a "strong argument" that the statute was "content-based because it prohibits registered sex offenders from accessing some websites, but not others, based on the content that appears on the sites . . ."

The issue before the Supreme Court, as characterized in the petition for certiorari, is whether, under the court's First Amendment precedents, a law that makes it a felony for any person on the state's registry of former sex offenders to "access" a wide array of websites – including Facebook, YouTube, and NY Times.com – that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts, is permissible, both on its face and as applied to petitioner, who was convicted based on a Facebook post in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

Although this case involves a state statute, it is directly applicable to local governments as it is a case involving the First Amendment / speech issues, and the North Carolina Supreme Court discussed *Reed* in its decision. IMLA therefore views this as a case that warrants participation as an amicus and will be joining the SLLC brief in this case. And as with *Expressions*, IMLA's arguments will depend on what the petitioner and other *amici* argue. This case has the potential to broaden the application to *Reed* into laws that regulate conduct and not just speech. That being said, it seems likely that the Court will determine that this regulation limits speech and does not pertain just to conduct. Assuming that is the case, IMLA hopes to be able to persuade the Court to push more laws and regulations into the realm of intermediate scrutiny under *Reed* by arguing that this is a content-neutral regulation.

See State v. Packingham, 368 N.C. 380, 777 S.E. 2d 738 (2015).

Lower Court First Amendment / *Reed* Cases

In addition to the foregoing Supreme Court cases, IMLA has also been involved in a number of cases in the lower federal and state courts involving important *Reed* issues. IMLA believes the *Reed* decision is of such importance to our members, that we filed an amicus brief in a federal district court case (which is extremely unusual as IMLA almost exclusively files briefs at the appellate levels). Because this case could easily become persuasive authority in a post-*Reed* world, IMLA believes our members deserve a voice in helping to shape the outcome of these cases.

Thomas v. Schroer, a case out of the Western District of Tennessee, involves the constitutionality of the core provisions of the Tennessee Highway Beautification Act (which is modeled on the Federal Highway Beautification Act), including local authority to regulate billboards. The issues in this case include: 1) whether the distinction between offsite signs and onsite signs is content-based; and 2) whether government signs are government speech.

Shortly after the *Reed* decision came down, the district court judge granted the plaintiff's preliminary injunction, concluding that the plaintiff was likely to succeed on the merits regarding its argument that the provision of the law distinguishing between on premise and off-premise signs was a content-based distinction.

The law in this area after *Reed* is still in its infancy, and IMLA wants to ensure that local governments' interests are represented in these cases. Because IMLA believes this case could pose a threat to billboard regulation across the country as it could be used as persuasive authority elsewhere, IMLA participated as an amicus in this case at the district court level.

See Thomas v. Schroer, No. 2:13-cv-02987 (W.D. Tenn. Sept. 13, 2016).

IMLA's legal advocacy program is just one of the benefits of IMLA membership. To learn more about the legal advocacy program, contact Amanda Kellar at akellar@imla.org. ML

Inside Canada Cont'd from page 26

walking on was icy as a result of the weather thawing and freezing throughout the day. In response, the City acknowledged that it did have a duty to the Plaintiff under section 87, but its actions did not rise to the level of gross negligence. The City presented evidence by calling three employees as witnesses, to explain its snow and ice removal process. The evidence presented by the City indicated that there is a bylaw in place that requires snow and ice removal from sidewalks within 24 hours and the sidewalk where the Plaintiff fell had been cleared between 2 pm and 3 pm that afternoon. The City argued that it therefore fulfilled its duty to keep the sidewalks in a state of reasonable repair, and that it had no way of knowing that the sidewalk would again be icy by 9 pm.

In addition, the City submitted that it has provided multiple ways for residents to inform the City of situations such as dangerous sidewalks that require City attention, such as calling an emergency dispatcher (on call 24/7 during the winter); reporting the situation online; and reporting the situation to a municipal officer. None of these were utilized on the day of the Plaintiff's fall.

The Court found that despite the snow and ice policies, the City had failed to protect the Plaintiff, however, the Court was unable to find the City grossly negligent. In order to be grossly negligent, the City must have no policy of addressing icy conditions or must ignore known icy conditions, and no such evidence was presented. The Court relied on *Occhino v. Winnipeg (City)* 1988 CanLII 5647 (MB CA) to arrive at this conclusion:

The duty to protect the public from the hazard of snow and ice is far from absolute. The city is not an insurer of safety. It must take reasonable steps to keep the sidewalks free of dangerous conditions, but its failure to do so does not necessarily result in liability to everyone who falls and is injured. For liability to ensue, the cause of the injury must be more than a mere breach of duty. The breach must be of such magnitude that it can properly be described as gross negligence. (Court's emphasis)

Blurred Lines: Accident on Border of Two Municipalities

***Laughlin v. Esmaeili*, 2016 ONCA 826 (CanLII) http://canlii.ca/t/gvgzh**

While driving on Steeles Avenue East, which forms the border between the City of Toronto (Toronto) and the Town of Markham (Markham), the Plaintiff's vehicle hit a concrete curbstone that made its way into the lane. The Plaintiff sued both Toronto and Markham. Toronto responded by cross-claiming Markham. The motion judge dismissed both Toronto's cross-claim and the Plaintiff's claim against Markham, finding that the curbstone originated on a boulevard where Toronto had exclusive jurisdiction. The motion judge ultimately held that it was "just and fair in all of the circumstances of this case" that Toronto be solely responsible to Markham for $51,903 in costs and characterized it as a "*Sanderson* order." Toronto appealed the summary judgment and the costs in favour of Markham.

HELD: Toronto's appeal of summary judgment dismissed, appeal of costs granted.

DISCUSSION: Toronto put forth four arguments:

As a result of the motion judge granting summary judgement, there will be duplication of proceedings and the possibility of inconsistent findings as the plaintiff's claim against it is proceeding to trial.

The motion judge should not have made a finding that the curbstone was a hazard that Toronto had an obligation to remove, as the plaintiff's claim is proceeding to trial.

The motion judge erred in finding that Toronto had exclusive jurisdiction over the boulevard from where the curbstone originated; that Markham was not liable to the plaintiff nor that Markham owed Toronto a duty of care.

The motion judge erred in holding Toronto solely responsible for Markham's cost and making a *Sanderson* order.

The Court addressed and dismissed Toronto's first and second argument together. The Court found that granting summary judgment dismissing Markham would not have an effect on the trial. The trial is set to determine whether Toronto breached its duty to Plaintiff under section 44(1) of the *Municipal Act, 2001* which requires a municipality to keep its highways in a reasonable state of repair. There is no dispute that when the Plaintiff hit the curbstone, the curbstone was in the curb lane of Steeles Avenue, and that Toronto had an obligation under section 44(1) to keep it in a reasonable state of repair. The motion judge made no binding decision regarding section 44(1) and therefore there is no risk of an inconsistent finding at trial.

The Court also dismissed Toronto's third argument, finding that the motion judge correctly relied on a 1974 Agreement in which Toronto assumed jurisdiction over the portion of Steele Avenue where the Plaintiff hit the curbstone. In addition, the Court found that Markham did not owe Toronto a duty of care, as the evidence presented showed that Toronto did not rely on Markham to notify it of "any and all potential problem areas." Therefore, "the facts did not disclose 'a relationship of proximity in which failure to take reasonable care might foreseeably cause harm to the plaintiff' and the motion judge correctly found that Markham did not owe Toronto a duty of care."

To analyze Toronto's fourth argument, the Court relied on *Moore (Litigation Guardian of) v. Wieneck,* 2008 ONCA 162 and stated "unless 'plainly wrong' a motion judge's costs order, *Sanderson* or otherwise, should not be set aside. The Court found the motion judge's *Sanderson* order plainly wrong. A *Sanderson* order deviates from the general rule of costs in a multi-party litigation and compels the unsuccessful defendant to pay all the successful defendant's costs. Here, there had not yet been a determination of Toronto's liability. At this point, Markham was entitled to costs of $25,951 against Toronto on the summary judgment motion and the cross-claim, and costs of $25,951 against the Plaintiff on the summary judgment motion and the action against the Plaintiff. In the event that Toronto was ultimately found to have breached its duty to Plaintiff, it would be required to reimburse Plaintiff for such payment to Markham.

Repair Your Damaged Residence–or the City Will
***Watt v. Kamloops* (City), 2016 BCSC 2029 (CanLII) http://canlii.ca/t/gvg6l**

In 2008 the home of Ms. Watt (Plaintiff) in the City of Kamloops (City) was so badly damaged by a fire that the Interior Health Authority declared it unfit for habitation. In early 2012, following no attempts by the Plaintiff to repair the home, neighbours complained to the City. The City reached out to the Plaintiff and encouraged her to remediate the home; it was unsuccessful. In late 2012, City Council approved a resolution outlining the work required to be completed by the Plaintiff, the timeline to be met, and noted that if the Plaintiff made no attempt to repair the property, the City would commence the remediation work at the Plaintiff's expense. In 2013 a process server served the resolution on the Plaintiff following which the City hired a contractor to begin remediation work. The remediation work was completed in May 2014 at a cost to the Plaintiff of nearly $58,000. The Plaintiff initiated this action claiming that the City did not serve her personally as required under the *Community Charter ("Charter")* and the remediation that was performed by the City was not reasonable. The City responded by requesting a summary trial.

HELD: Dismissed.

DISCUSSION: The Court found it suitable to proceed with the summary trial. Beginning with an analysis on remedial actions, the Court examined section 73 of the *Charter*: only if there is an unsafe condition in contravention of a bylaw or a nuisance may a municipality impose remediation upon a property at the expense of the owner. Both parties agree that the condition of the home was unsafe and/or a nuisance, but the Plaintiff agreed that the City did not serve her notice personally as required under section 77 of the *Charter*. The City submitted the process server's affidavit as evidence, which outlined the time the Plaintiff was served, that the Plaintiff was served personally, and the interaction at the time of service. The Plaintiff submitted that she was out of town visiting her children when the process server claimed to have served the resolution notice and she only found out about the notice in February 2014. The Court challenged the Plaintiff's submission, questioning why the Plaintiff did not obtain an affidavit from her children indicating she was with them on the date of service. In addition, the Plaintiff's daughter appeared before Council in November 2013 opposing the resolution for remediation, which did not align with the Plaintiff's claim of not being aware of the notice until 2014.

The Court held that the Plaintiff was served personally with notice in December 2013 thereby permitting the City to enforce the Council's resolution. The Plaintiff's claim that she was overcharged for the remediation was also dismissed by the Court as the City followed an appropriate process in selecting the contractor to do the remediation. The Court found that the City acted appropriately pursuant to the *Charter*.

Provincial Offences Court Has Jurisdiction to Award Costs Against City
***Oshawa (City) v. 536813 Ontario Limited*, 2016 ONCJ 665 (CanLII) http://canlii.ca/t/gvpgv**

The City of Oshawa ("City") charged numbered corporation 536813 Ontario Limited ("Defendant") for modifying its hanger at the Oshawa Airport when it built a loft within the hangar without obtaining a building permit as required under section 36(1)(c) of the *Building Code Act, 1992 ("Act")*. The Defendant admitted that he did not obtain a building permit when the addition was constructed but argued that the charge by the City was unconstitutional, as the federal government have exclusive jurisdiction over the field of aeronautics. The Court held that under the constitutional doctrine of interjurisdictional immunity, the *Act* does not apply to the Defendant's hanger addition, as it is a core federal competence pursuant to section 52(1) of the *Constitution Act, 1982*. At issue was whether the Provincial Offences Court is a court of competent jurisdiction to order costs against the City.

HELD: Costs ordered against the City.

DISCUSSION: The Court began its analysis with the Supreme Court decision of *Mills v. The Queen,* 1986 CanLII (SCC) that defined a "court of competent jurisdiction" as having: (1) jurisdiction over the person; (2) jurisdiction over the subject matter; and (3) jurisdiction to grant the remedy." The Court easily found that it had jurisdiction over the person and the subject matter before the court. With regards to the jurisdiction to grant the remedy, the Court recognizing that the Provincial Offence Court is created by statute with no inherent jurisdiction, meaning that the court has the powers expressly conferred upon it to control its own process. Comparing the ability of Superior Court to award costs, the Court found that depriving the Provincial Offence Court of the same ability would be undesirable. The legislature could not have intended that the Defendant in this case bring the same action, incurring additional expenses, in Superior Court simply to be awarded costs.

Therefore, the Court was able to conclude that the ability to award costs is an inherent jurisdiction of any court of law to maintain and control its own process, including the Provincial Offence Court. After determining that the Court had the authority to award costs to the Defendant, the Court examined whether such an order was warranted in this case. It found that the City had zealously acted in its own commercial interests while ignoring clear case law that aeronautics and airport-related buildings have been and continue to be a federal sphere of jurisdiction. "In its attempt to pull the foundation out from the defendant's constitutional challenge and despite the wealth of evidence to the contrary, the City tenaciously maintained the untenable position that the Hangarminium development, the defendant's hangar and the modifications made to it were not a part of the Oshawa Airport complex and, hence, could not be aeronautically related." The City had a duty to prosecute in the public interest, and the City overstepped its authority by maintaining its argument. Therefore, the Court ordered costs against the City. ML

Cases Cont'd from page 27

Applying this alternative, the Court found the jury had a legitimate basis on which to base its damages award. The officer's actions in kicking Binkovich's legs out from under him, without warning and when Binkovich posed no threat, provided substantial evidence of callous indifference to the plaintiff's safety. The Circuit remanded and directed the lower court to reinstate the award.

Speech: No Retaliatory Termination Claim for Municipal Employee Fired After Publicized DUI Arrest
***Metz v. Sasser*, No. 15-14709 (11th Cir. Nov. 30, 2016)**

The Eleventh Circuit has upheld the district court's grant of summary judgment against an employee who claimed retaliatory termination when he was fired after a newspaper publicized his arrest for DUI. The plaintiff was unable to show any connection between his mother's allegedly protected speech at the same employer or that other employees of the same entity were valid comparators.

Alexander Metz (Metz), an employee of the Destin, Florida Fire Control District (District), was arrested for driving while intoxicated in February 2010. He subsequently failed to appear for work under the false pretense that he was sick, and he embarrassed the District when a local newspaper published damaging details about his arrest. After the District provided him a written notice of termination, Metz brought suit against the District's Chief, Kevin Sasser (Sasser).

Prior to Metz's hiring, his mother, who also worked for the District, had denounced Sasser and others for violating the Florida open meetings law. Metz attempted to characterize his termination as having been based on his mother's protected speech.

The district court entered summary judgment for the District, finding that Metz had not established a prima facie case of retaliation—and that Sasser provided legitimate, non-retaliatory reasons for his actions which Metz did not rebut as pretextual.

The Eleventh Circuit affirmed. To establish a *prima facie* case of retaliatory termination for exercising a First Amendment right, the employee must prove that he engaged in a protected activity that played a substantial role in the adverse employment action. The employee can rely on evidence that his termination was the "intended means" of retaliating for another employee's protected conduct. Courts consider circumstantial evidence in determining whether a protected activity is a substantial or motivating factor in the employer's conduct, including who initiated the termination proceedings; whether the employer's remarks connect the termination to the protected activity; whether the employer had a motive to retaliate; whether the termination followed on the heels of the protected activity; whether the employer provided varied explanations for the termination; and whether the employee established the reasons proffered for termination were pretextual.

Here, there was no evidence of any connection between Metz's termination and the protected speech allegations of his mother. Metz's offense eroded the District's ability to "maintain public confidence . . . [that it could] carry out its public safety mission," and his disparagement of his superior officers put in peril their ability to "secure discipline, mutual respect, trust and particular efficiency among the ranks."

Metz also failed to prove that other District employees had been treated more favorably than he had. Four other employees Metz identified were not similarly situated; Metz was serving a six-month probationary period when he committed his offense, and he was the only employee who was insubordinate to his superior officers. Three employees were cited for driving while intoxicated, but their offenses were not reported to the public. Two were working for Sasser's predecessor, and Sasser fired the third employee. "[D]isciplinary measures undertaken by different supervisors may not be comparable." A fourth employee, whose theft of a pelican was reported in the newspaper, did not embarrass the District by being identified as a District employee. "[T]he quantity and quality of [a] comparator's misconduct [must] be nearly identical" to evidence discriminatory discipline.

Supremacy Clause: County Cannot Undertake Fire-Mitigation Clearing in Federal Forest Lands without Forest Service Approval
***United States of America v. Board of County Commissioners of the County of Otero*, No. 15-2210 (10th Cir. Dec. 8, 2016)**
The interest of a state or county in protecting the health of its residents does not supersede federal authority over public lands, rendering unconstitutional a New Mexico county's efforts to clear underbrush in a federal forest without approval.

In 2001, after suffering devastating wildfires on federal land within its boundaries, the New Mexico state legislature adopted a statute providing for "self-help" by local communities. The statute purported to enable "a board of county commissioners for a county in which a disaster has been declared . . . [to] take such actions as are necessary to clear and thin undergrowth and to remove or log fire-damaged trees within the area of the disaster" after, among other things, consulting with the Forest Service."

In 2011 Otero County (County), 75% of which is federal land, suffered extreme drought, prompting the U.S. Forest Service to close the surrounding public lands to reduce fire danger, a decision the County replicated by declaring a state of emergency. The County then passed a resolution enacting a fire mitigation plan under the aforementioned New Mexico statutory authority, notified the U.S. Forest Service and, despite disapproval by the agency, implemented the plan.

The U.S. Forest Service sued the County and the state seeking a declaration that the resolution and its enabling statute were preempted by conflicting federal law. The district court granted summary judgment to the United States, holding "the Property Clause grants the federal government plenary power over federal lands, and consequently . . . the Tenth Amendment does not reserve an exclusive sovereign right to New Mexico to regulate federal lands in contravention of federal law." In sum, it held the Supremacy Clause preempted the state enabling statute and the County resolution. The County, but not the State of New Mexico, appealed.

The Circuit first took note that the County had not offered a construction of the statute that might coexist with federal law, instead framing the issue as whether "the Property Clause of the United States Constitution so thoroughly preempts state power that a state may not, under any circumstances,

remove a deadly and destructive nuisance from National Forest lands even where the United States refuses or fails to remove that danger itself[?]"

The County followed up this argument saying "It is both troubling and nearly inconceivable . . . that the federal government would have unfettered and absolute authority over lands not expressly proclaimed by the Constitution as necessary for federal governance." It continued, arguing that the Property Clause does not grant the federal government "absolute, unfettered plenary power" to prohibit the States from taking measures they deem necessary "to protect their citizens from impending harm" and that since the power had not been expressly given to the federal government in the Constitution, it must have been reserved to the States under the Tenth Amendment.

The Circuit Court had little trouble rejecting this argument, citing constitutional and Supreme Court precedent that clearly ran contrary to the County's position. The Circuit referenced *Kleppe v. New Mexico*, 426 U.S. 529 (1976), where New Mexico had challenged the federal Wild Free-Roaming Horses and Burros Act (Act) on the grounds that the Act unconstitutionally expanded power to the federal government over horses and burros, not simply the federal lands they lived on. The Supreme Court rejected the argument, holding "that the Property Clause gives Congress the power over the public lands 'to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them . . . .'" The Circuit also cited a similar Supreme Court case involving elk on federal lands in Wyoming, which again held that federal authority over public lands also included authority over wildlife on those lands.

The County answered that these holdings – and others rendered under them – were based on misunderstandings of constitutional history and nonbinding dicta because the compelling interest at issue in this case – protecting the health and safety of local residents – was not at issue in the cases cited by the district court. The Circuit rejected this position, saying "[w]e have no authority to reject the reasoning behind a Supreme Court holding—whether based on questionable logic or history—and we see nothing in Supreme Court opinions suggesting that the Court might limit its precedents declaring that the federal power at issue here is 'plenary.'"

It concluded by noting that "[w]hen different governments differ in their assessment of danger, one must prevail, and the Supremacy Clause says that in these circumstances it must be the United States."

Technology: No OPRA Right to Video Footage Which Reveals Municipal Surveillance Capacity
***Gilleran v. Township of Bloomfield,* No. a-15-15 (N.J. Nov. 22, 2016)**

The New Jersey Supreme Court has denied an Open Public Records Act (OPRA) request for access to a town's security video footage on the grounds that such review would disclose the area covered by, and vulnerabilities of, the security system; however, there may be a common law cause of action for releasing portions of footage.

Seeking to determine whether certain people had entered the Township's municipal building, Plaintiff Patricia Gilleran requested five days' worth of footage from one of Bloomfield's stationary security cameras. A clerk for the Township asked that the request be narrowed to a shorter time period, noting that five days of security camera footage was quite voluminous. Accordingly, Gilleran reduced her request to one day of footage and was later informed that her request had been denied under OPRA's exemption for security information.

Gilleran commenced action against the Township by filing a claim with its Law Division to access the requested footage under OPRA and a common law right-of-access claim, noting that the camera was in plain sight and surveying a public area. In her complaint, Gilleran requested that the court order the footage ether be released or redacted pursuant to OPRA's security exemptions.

The Township, despite having never viewed the entirety of the recordings, contended that the footage fell within OPRA's security exception because it would allow a viewer to ascertain the actual area being surveyed by the camera. Since the cameras were strategically placed and contained within smoked glass, it was not immediately obvious to the general public as to what the cameras were surveying, despite their location in a publically viewable area. As a result, Bloomfield contended, allowing members of the public to obtain this security camera footage would defeat the original purpose of the security camera. Further, the area potentially surveyed was used not only by public employees, but also by members of the police department, confidential informants, and victims of domestic violence whose identities needed to remain anonymous.

Gilleran responded that none of the OPRA security exceptions warranted a *blanket* prohibition, particularly given the Act's purpose (to grant public access to public records), and urged the court to require Bloomfield to examine the footage in order to determine whether portions of the video contained a security risk. Further, she reiterated, the cameras were publically viewable and had captured nothing that an individual physically present at the same location could also see. She also argued that since the Town had not actually viewed the tapes in their entirety, they had not effectively demonstrated that there was a security risk that warranted the OPRA exemption.

The trial court found Bloomfield in violation of OPRA. The Township appealed and the appellate court upheld the decision of the trial court.

New Jersey Supreme Court reversed the decision of the appellate court, concluding that OPRA's exception, while not a *blanket* exception, nonetheless exempts local governments from releasing of video footage that reveal security capacity for security surveillance systems protecting public buildings. It also found the compelled release of security footage to be at odds with the legislative intent of New Jersey's OPRA statute. The court noted, however, that despite OPRA's security exceptions, there still may be a common law right-to-access claim that balances the interests of both parties and allows for citizens to obtain certain sections of surveillance footage. As a result, the case was remanded to be decided under the unresolved common law claim. ML

Hydraulic Fracturing Cont'd from page 14

Amendment to the Ohio Constitution, pursuant to which municipalities may exercise all powers of local government (functional home rule). In addition, municipalities may enforce local police powers, so long as these powers do not conflict with general laws.[20] These powers give municipalities the "broadest possible powers of self-government in connection with all matters which are strictly local and do not impinge upon matters which are of a state-wide nature or interest."[21] The test applied by Ohio courts to determine when a municipal ordinance must yield to a state statute examines three factors: (1) whether the ordinance is an exercise of the police power, rather than of local government; (2) whether the state statute is a general law; and (3) whether the ordinance is in conflict with the state statute. The court determined that all three factors were met, ruling that the ordinance must yield to the state statute.

Although the court's 4-3 decision rejected the local ordinance in this case, 5 of the 7 justices suggested that a traditional zoning ordinance, as opposed to the ordinance specifically directed towards oil and gas operations presented in the case, would likely have been upheld. Justice O'Donnell filed an opinion concurring in the judgment only, and Justice Kennedy joined that opinion. Justice O'Donnell filed a separate opinion to "emphasize the limited scope of [the] decision."[22] The concurring opinion noted that this case did not present the question of whether the state statute conflicts with local land use ordinances that address traditional zoning issues. Justice O'Donnell suggested that a traditional zoning ordinance that did not conflict with the state statute might be upheld.

The concurring opinion also presented a convincing argument that the terms "location" and "spacing," as used in the state statute, referred to location and spacing on the tract and constituted terms of art in the oil and gas industry.[23] The power to control location and spacing on the larger community scale would therefore be retained by local governments.[24]

Justice Pfeifer's dissenting opinion stated that the home rule amendment would allow zoning ordinances that do not conflict with the state statute. And Justice Lanzinger's dissent, to which Justice Pfeifer joined, opined that "local zoning ordinances can have a place beside the state's statutes regulating oil and gas activities."[25]

The Colorado Decision: The Colorado Supreme Court also recently addressed the question of whether a home rule locality could ban oil and gas activity in *City of Longmont v. Colorado Oil and Gas Association*.[26] The court explained that the key was whether the activity regulated was a matter a local concern where home rule ordinance supersedes state law, or a matter of statewide concern, where state law supersedes a conflicting ordinance. State law also prevails where the matter is one of mixed state and local concern.

The test to categorize whether a matter is of state, local, or mixed concern examines four factors: (1) the need for statewide uniformity of regulation; (2) the extraterritorial impact of local regulation; (3) whether the state or local governments have traditionally regulated the matter; and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation.[27] The last two of these tests were inconclusive; Colorado's state and local governments had long shared the regulation of oil and gas regulation, so the third factor did not indicate exclusive state or local interest. Nor did the state constitution clearly commit the matter to either state or local concern.

However, the Colorado court found that a local ban's extraterritorial effects implicated statewide issues.[28] Specifically, because oil and gas in underground pools fail to respect jurisdictional boundaries and drilling locations are driven by highly technical imperatives, a ban, however "local," became a matter of statewide concern.[29]

The court posited that, because a given pool might lie beneath two or more jurisdictions, a ban in one city might encourage bans in other cities. Finding that the Longmont ban conflicted with the state's greater interest in preventing waste and protecting correlative rights, the court struck down the ban. On the same day, the Colorado high court applied a similar analysis to strike down a moratorium on hydraulic fracturing.[30]

The New Mexico Decision: The United States District Court for the District of New Mexico considered an ordinance passed by Mora County that included a Community Bill of Rights.[31] The ordinance purported to allow local regulation to override state and regulation, denied that corporations were persons, and banned hydraulic fracturing in the county. In a decision spanning over 100 pages, the court found the ban to be invalid.

Conclusion

Most courts that have addressed the issue of state versus local authority to regulate fracking have concluded that two levels of government share regulatory authority. Most simply, the state holds the authority to regulate "how" hydraulic fracturing may be conducted, while the local government controls "where" the activity occurs. However, local authority generally does not include the authority to ban or place a moratorium the activity. Traditional land use regulations like zoning that apply uniformly to fracking and other activities appear more likely to withstand challenge than a stand-alone ordinance.[32]

The following activities appear to lie within state control: on-site drilling, oversight of the chemicals used and the production process, prevention of waste, protection of correlative rights, conservation of oil and gas natural resources, safety, and on-site contamination.[33] Local regulations may address noise, light and other visual impacts, road damage, blasting, dust, traffic, compatibility of the activity to nearby property uses, impact of the activity on property values in the area, adequate off-site infrastructure, adequate services (like police and fire protection), affordable housing, general health, safety and welfare of the community, odors, potential groundwater contamination, methane emissions, habitat fragmentation, and degradation of environmentally sensitive areas.[34]

The above listing is a generalized summary. Clearly, specific regulations differ in each state. Municipal attorneys should thoroughly study state oil and gas regulations, as well as local government enabling authority, when determining the policy approaches their locality may take to regulate hydraulic fracturing.

Notes

1. *See* Carolyn G. Loh and Anna C. Oslund, *Local Land Use Planning Responses to Hydraulic Fracturing*, 83 J. Am. Plng. Assoc. 222, 222 (2016).
2. *Id.* at 229.
3. Standardized State Zoning Enabling Act § 1 (Dep't of Commerce 1926) (footnotes omitted), *available at* https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf.
4. Patricia Salkin, American Law of Zoning, § 9.16 (5th ed. 2014).

5. Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Twp., 228 A.2d 169, 178 (Pa. 1967) (*quoting* Nat'l Land & Inv. Co. v. Bd. of Adjustment of Eastttown Twp., 215 A.2d 597, 610 (Pa. 1965)).
6. *See* Bowen/Edwards Assocs., v. Bd. of Cnty. Comm'rs, 812 P.2d 656, 658-59 (Colo. App. 1990).
7. *See* Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs., 830 P.2d 1045, 1048 (Colo. 1992) (*en banc*).
8. *See* Voss v. Lundvall Bros., 830 P.2d 1061, 1064 (Colo. 1992).
9. See *id.* at 1069 (emphasis in original).
10. *See* Town of Frederick v. N. Am. Res. Co., 60 P.3d 758, 760, 764 (Colo. App. 2002).
11. *See id.*
12. *See* Wallach v. Town of Dryden, 16 N.E.3d 1188, 1192, 1193 (N.Y. 2014).
13. *See* 518 N.E.2d 920 (N.Y. 1987).
14. *See id.* at 922.
15. *See* EQT Production Company v. Wender, __ F. Supp.3d __, 2016 WL 3248503 (2016).
16. W.Va. Code § 22-1-1, et seq.
17. Dale Krane et al.., Home Rule in America: A Fifty-State Handbook 2 (2001).
18. *See* State ex rel. Morrison v. Beck Energy Corp., 37 N.E. 3d 128, 134 (Ohio 2015).
19. *Id.* at 37 N.E.3d 132.
20. *See* Ohio Const. art. XVIII, § 3.
21. State ex rel. Hackley v. Edmonds, 80 N.E.2d 769 (Ohio 1948).
22. *Beck Energy*,37 N.E. 3d at 138 (O'Donnell, J., concurring).
23. *Id.* at 140.
24. *Seea id.*
25. *Id.* at 141 (Lanzinger, J., dissenting).
26. *See* 369 P.3d 573 (Colo. 2016).
27. *See id.* at 580.
28. *See id.* at 581.
29. *Id.* at 580.
30. *See* City of Fort Collins v. Colorado Oil and Gas Ass'n, 369 P.3d 586 (Colo. 2016).
31. *See* Swepi, LP v. Mora Cnty., 81 F.Supp.3d 1075 (D. N.M. 2015).
32. *See* Loh and Osland, *supra* note 1.
33. *See* Jesse J. Richardson, Jr., *Local Regulation of Hydraulic Fracturing*, 117 W. Va. L. Rev. 593 (2014).
34. *Id.* ML



International Municipal
Lawyers Association
51 Monroe Street, Suite 404,
Rockville, MD 20850

Nonprofit Organization
U.S. Postage
PAID
WEST

Codification Services
powered by MunicodeNEXT
municode LEGAL

- Online hosting
- Supplementation
- Codification
- enCodePlus Zoning Solutions

Government Websites
powered by aHa! Consulting
municode WEB

- Stunning design
- Easy for citizens and staff
- Outstanding customer support
- Rich suite of features

Online Payments
powered by Revalocity
municode PAY

- Reduce costs
- Improve operational efficiency
- Streamline all payment processing
- Traditional bill printing



Municode has proudly served America's municipalities for over 65 years.

We've done so with a tradition of providing outstanding service and cutting edge solutions for the future. That's how we fulfill our committment to helping our country's towns, cities, and villages realize their full potential while serving their citizens proudly.

municode
Connecting you and your citizens

Talk to us today
800·262·2633
municode.com