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Trumping Home Rule:
Constraints on Federal Action to Induce State and Local Collaboration

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A Superlative Gathering at Niagara Falls

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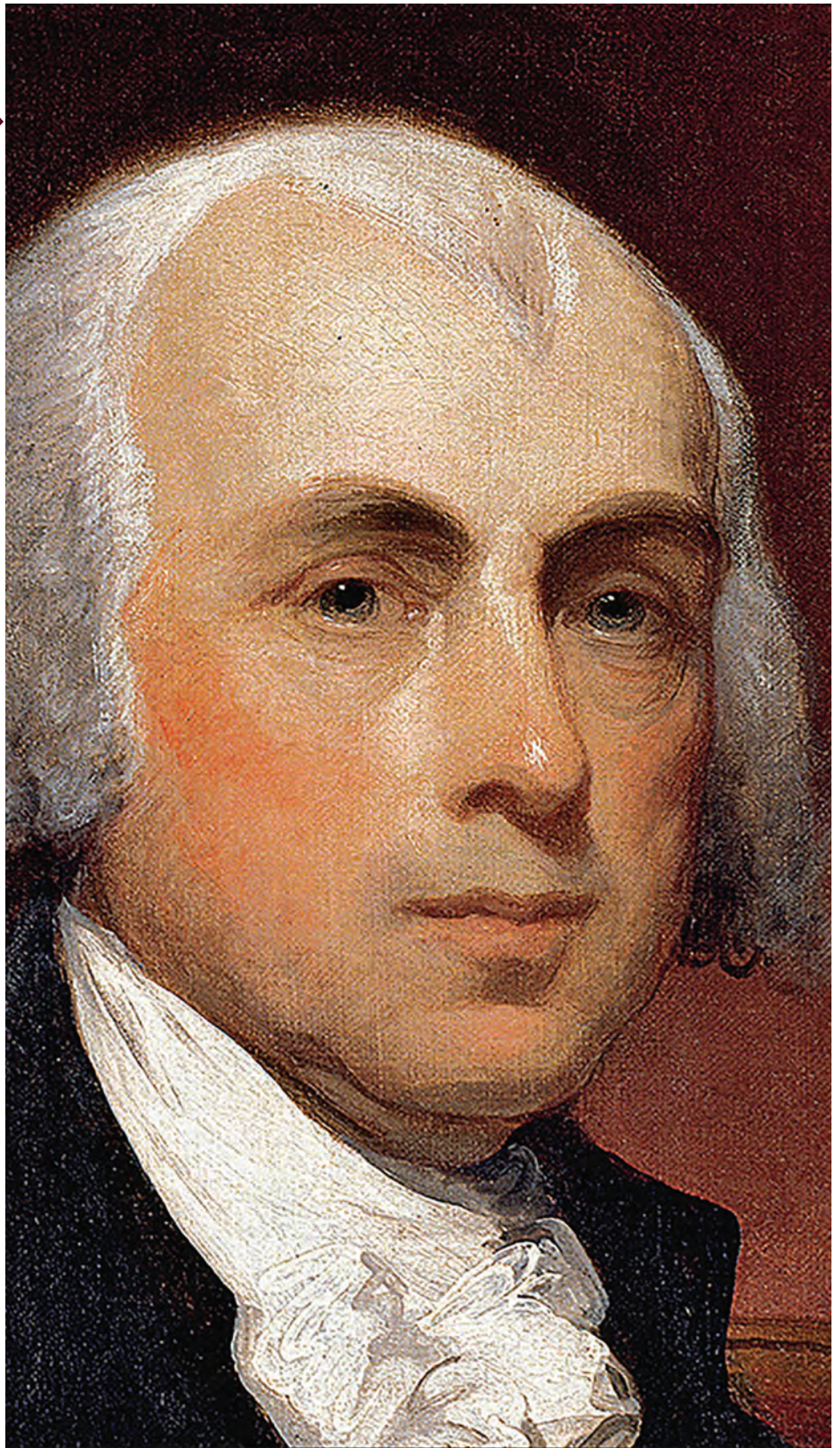

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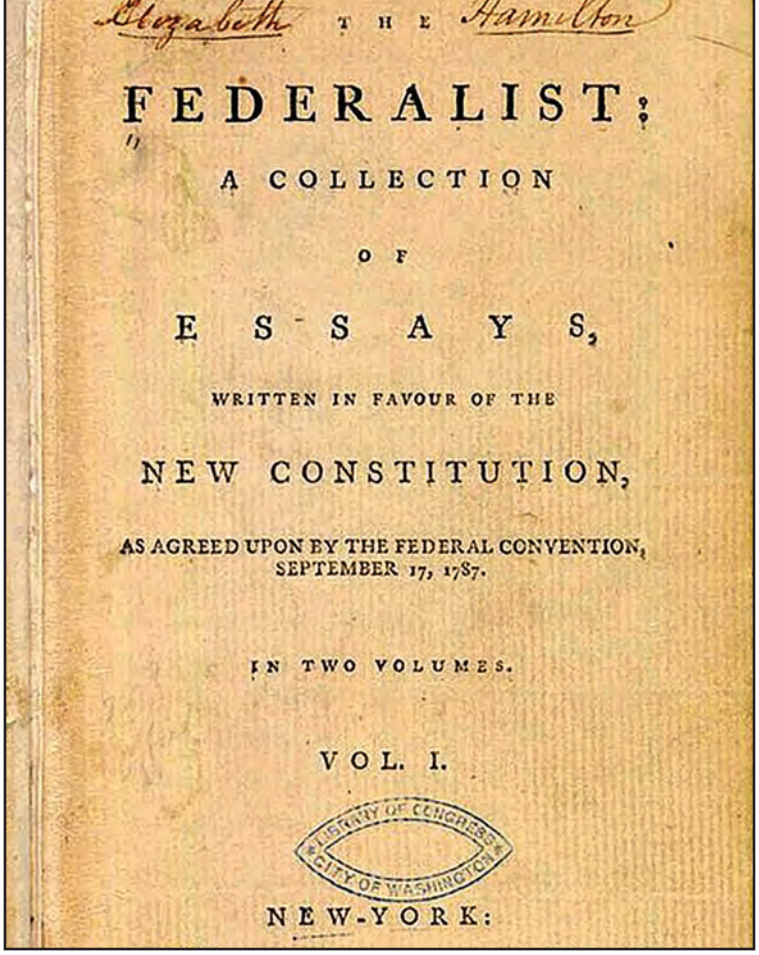

IMLA
THE MUNICIPAL LAWYER MAGAZINE

Trumping Home Rule and Sanctuary Jurisdictions: Constraints on Federal Action to Induce State and Local Collaboration with National Programs

By: Hugh D. Spitzer, Professor of Law, University of Washington School of Law, Seattle, Washington

The battle over local assistance to federal immigration efforts is nothing new—the debate about how much power the national government should wield has animated American jurisprudence since the Constitutional Convention.

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EDITOR'S NOTE:

Let Them Eat Cake

As many in the legal community look ahead to December 1 and the High Court's consideration of a baker's refusal to decorate a wedding cake for a gay couple, a more explosive iteration of that dispute is quietly gathering energy in Mississippi. While *Masterpiece Cakeshop* involves an assertion of free expression and religious prerogative in a relatively narrow context, the Mississippi legislature has taken action that exponentially accelerates the discussion. Magnolia State lawmakers have essentially sanctioned outright discrimination against the LGBT community based not only on religious grounds, but also on a more ambiguous standard—"moral conviction."

The measure, HB1523, is titled the "Protecting Freedom of Conscience from Government Discrimination Act." Signed into law by Governor Phil Bryant on April 5, 2016, it was Mississippi's response to the Court's declaration in *Obergefell* that same-sex partners have Constitutional rights equal to those of heterosexual couples. Its purpose is "to provide certain protections regarding a sincerely held religious belief or moral conviction for persons, religious organizations and private associations."

In clear rebuttal to *Obergefell*, HB1523 codifies three "sincerely held beliefs" that are to be protected in Mississippi. They are:

> "Marriage is or should be recognized as the union of one man and one woman; and
> Sexual relations are properly reserved to such a marriage; and
> Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."

The law prohibits Mississippi from taking a "discriminatory act" against religious groups, private associations or individuals that exercise such sincerely-held beliefs. HB1523 applies across a wide swathe of activities. It squarely answers the *Masterpiece* question, excusing every conceivable wedding-related business—bakers, photographers, limo drivers, flower arrangers, poets, disc jockeys, printers and the like—from having to serve same-sex unions. Also safeguarded are officials, judges, individuals and entities who decline to perform or solemnize such weddings; as are as clerks and registrars who refuse to record same-sex unions in Mississippi's public archives.

The range of HB 1523's protected beliefs extend far beyond nuptials. Religious entities are immune from state action for not considering LGBT job applicants or for terminating LGBT workers, and may refuse to rent or sell real estate to LGBT prospects. Medical professionals may decline to perform sex-reassignment surgeries, offer hormone replacement services or provide gender identity counselling. Adoptive and foster care parents are free to attempt converting LGBT children back to the law's core heterosexual moorings.

Not surprisingly, it took barely one month for legal challenges to HB1523. Among plaintiffs' arguments were that, by enumerating explicit religious tenets for state protection, the measure endorses a particular species of Christianity, transgressing the Establishment Clause. In June 2016, the law was enjoined by a federal district court before it could take effect. That decision was reversed by the Fifth Circuit in June 2017 on the grounds that the plaintiff, the Campaign for Southern Equality, had not itself been injured by HB1523 and lacked standing. In late September, the Circuit declined, en banc, to reconsider the case. HB 1523 thus went into effect in October 2017.

IMLA has added its voice to the *Masterpiece Cakeshop* debate, signing on to an amicus brief that points out, among other things, that more than 100 jurisdictions around the country have enacted measures similar to the Colorado non-discrimination law challenged by the baker. But other jurisdictions have enacted laws similar in tone to Mississippi's (albeit not as extreme). Like the stark dichotomy presented in the sanctuary cities discussion, where California has moved to declare itself a sanctuary state while Texas has attempted to criminalize the failure of officials to actively assist federal immigration efforts, the wedding cake dispute exemplifies a great divide among Americans.

In this circumstance, the role of our courts to discern a way forward is critical—as is the national will to accept, however grudgingly, a judicial determination as to what the Constitution permits. IMLA's interest is not only in a just society but in local antonomy. As municipal lawyers, we are privileged to have a front-row seat to this ongoing evolution.

Best regards,
Erich Eiselt

EXECUTIVE DIRECTOR'S LETTER

By: Chuck Thompson, IMLA Executive Director and General Counsel



I want to thank all of you who were able to join us for IMLA's 82nd Annual Conference at Niagara Falls.

As the dust (or in this case, the mist) settles, we are hearing from attendees that this event really hit the mark, from many angles: our speakers were well-prepared and energized, we properly honored those among us who demonstrated excellence and commitment in serving their communities, and our social events buzzed with members making new friendships and renewing longstanding ones.

While the Ontario host committee cannot claim credit for our spectacular backdrop—the Falls truly are, hands-down, one of the great wonders of the world—our Canadian hosts selected and helped to fund venues that made the very most of what that remarkable region has to offer. Where else could one discuss the latest in qualified immunity (or baseball) while enjoying a cocktail and sumptuous dinner fare before donning yellow rain gear and descending down a damp catacomb to witness the incredible power of Niagara, up close?

We also thank our sponsors, who greatly contributed to the success of the Conference, both financially and by bringing to our attention new products and services that will assist the practice of municipal law. And if there were any doubts that our newly-configured IMLA team could thrive under the transition process put in place by the now-retired Veronica Kleffner, they were surely put to rest—with an exclamation mark!

But the most important ingredient in this mixture was you—some 700 members who traveled from all over Canada, the lower 48 states, Alaska and Hawaii. You faithfully attended sessions, asked great questions, met to share extra insights at the WONK breakfast, and joined in the State League, Small Cities and International Committee discussions. You made our job easier by relying on the IMLA "app" and exuding an overwhelmingly positive attitude (even if there was an occasional bus ride to contend with).

We are grateful that you could be there to see one great IMLA President, Mary Ellen Bench, hand over her responsibilities to another great—Art Pertile, City Attorney of Stafford, Texas and IMLA Board member—as he takes on our presidency for 2018. We'll look forward to hearing from Art in this spot in future issues of *ML*.

As with many municipal lawyers, no sooner does one all-consuming task end than the next one begins. We are already hard at work putting together the programming for next spring's Mid-Year Seminar in Washington DC and our 2018 Annual Conference in Houston, home to the newest World Series champs. Given our new IMLA President's Lone Star provenance, we expect to offer our members nothing less than the Biggest and Best of the Texas experience next October—so start planning now to join us!

In the meantime, we aspire to provide members with even better versions of our ongoing services. Our goal is to provide more daily case updates to our various work groups, targeting decisions important to each. Members will only need to join those groups to receive notice of these cases. With some we hope to offer practice suggestions and relay concerns about developing trends. We are expanding our already-extensive menu of webinars, delivered by domain experts at a very modest price point. We are augmenting *Municipal Lawyer* with a fully searchable, fully digitized version. We will continue our Sanctuary Cities working group, and are organizing an Opioid Litigation work group as states and localities across the country increasingly seek legal recourse. And we are putting IMLA's credibility and influence behind ever more amicus briefs.

Tomorrow's local governments will clearly be influenced by technological advancements. We intend to highlight the effect these changes will have on local government law and lawyers. Whether the issue is social media and its intersection with the First Amendment, the regulation of drones, the impact of autonomous vehicles, or many other leading-edge issues, our members require up to date information and our goal is to provide it.

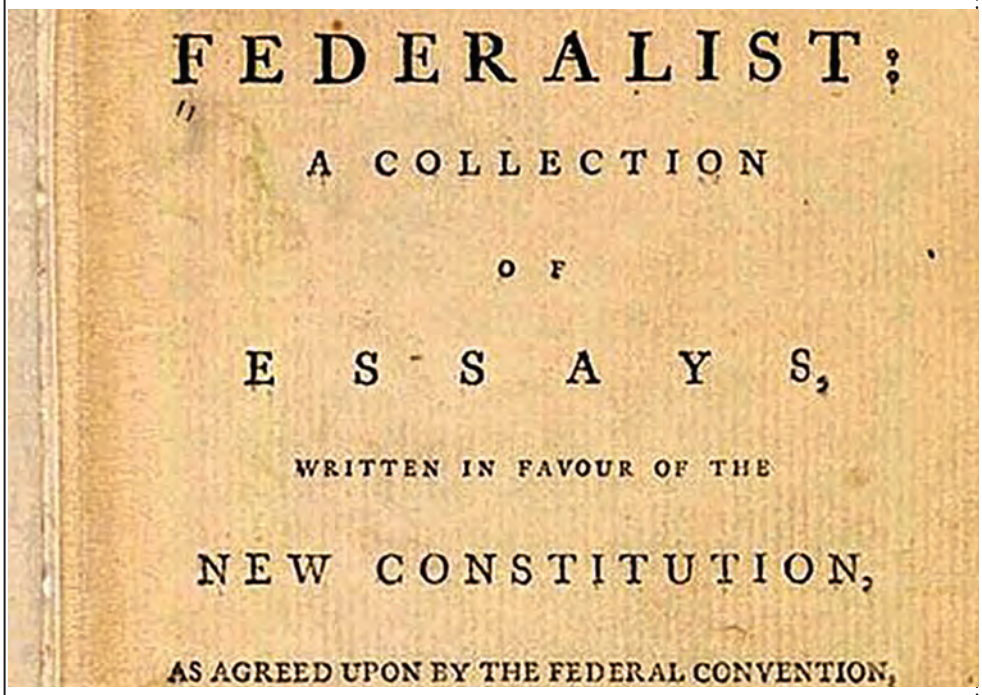
Accomplishing all of this with limited resources will be a challenge—but one we are confident we can deliver for you. As always, we thank you for your support and solicit your comments as to how IMLA can be an even better resource. ML



Trumping Home Rule and Sanctuary Jurisdictions

Constraints on Federal Actions to Induce State and Local Collaboration in National Programs

By: Professor Hugh D. Spitzer, University of Washington School of Law



President Donald Trump's January 25, 2017, executive order targeting "sanctuary cities"[1] has garnered a fair amount of attention. In Section 9 of that order, President Trump stated that it was "the policy of the executive branch" to ensure that states and their political subdivisions cooperate with federal immigration officials, and threatened to cut federal grant money to non-cooperating jurisdictions.[2]

While the executive order was issued with great fanfare about punishing uncooperative states and municipalities, federal power to effectively enforce the order is quite thin—thanks in large part to U.S. Supreme Court opinions authored by Chief Justice William Rehnquist, Chief Justice John Roberts, and their more "conservative" Court colleagues. Those opinions reflected a strong commitment to a type of federalism that takes states seriously, and rejects federal attempts to "commandeer" (*i.e.*, dragoon) the states into spending their resources carrying out national programs. The limits on the federal government's authority to force states to do its bidding is exemplified by the ongoing challenges of various cities and states to the sanctuary cities executive order.

This article will review briefly 225 years of the ups and downs of federal authority vis-à-vis the states. It will point out that federal-state tensions are nothing new. In fact, those tensions were built into the Constitution on purpose, to prevent the national government from accumulating too much power. The checks and balances between the federal and state governments were meant to function regardless of policy or partisan divisions, and regardless of who was in power at any particular point in time. Depending on social and political conditions, and depending on the composition of the U.S. Supreme Court, our country goes through centralizing periods followed by shifts of power back toward the states. The national government's power has certainly grown over time. But the pullbacks continue to occur (as they should). And, as noted above, the courts' decisions cut both ways. For example, the Constitutional restraints on the federal government that Chief Justice Roberts relied on in striking down key elements of the Affordable Care Act (a/k/a "Obamacare") are precisely the restraints that Democratic governors and mayors will effectively employ to fend off most of the Trump administration's attempts to penalize state and local jurisdictions that decline to collaborate with Immigration and Customs Enforcement personnel.

If these built-in constitutional limits continually slow things down, frustrate presidents, and drive congresses crazy—that was precisely the Founders' intention in 1787. And, while some justices appear to have shifted their approach to the Constitution's constraints on federal power depending on the subject matter involved, hopefully a majority of the Supreme Court's justices (and particularly Chief Justice Roberts) will stick to federalism philosophies they have espoused over the course of their respective careers.

Back to the Basics: John Marshall, the Federalist

To fully appreciate the Constitution's constraints on any federal administration's attempts to force state cooperation, we have to go back to introductory Constitutional Law. We'll see some of the same themes that characterize the federal versus state debate today.

In *The Federalist*, No. 39, James Madison had insisted that states' rights advocates who opposed the new Constitution's stronger national government powers need not fear. Madison and his erstwhile colleagues, Hamilton and Jay, had hijacked the label "federalist" for their side of the debate, suggesting that they were advocating an approach that was nicely balanced between a "federal" approach (then understood to mean that substantial power remained in the states) and "national" approach (meaning strong powers lodged in what we today call the "federal government"). In *The Federalist* No. 39, Madison recounted all of the significant powers remaining with the states in the proposed Constitution, and the many controls that the states would continue to have over an over-weaning national government. In the last paragraph of that essay, Madison wrote:[3]

> The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

Sound muddled or confusing? It was meant to be. But then, the respective powers of the states and the national government were *meant* to be muddled. That was the point—to

keep things complicated so no one could accumulate too much power.

During the Constitutional Convention, James Madison initially advocated for a strong national government, but he compromised on that. Ironically, a decade later he (along with Thomas Jefferson) had swung around 180 degrees and appreciated the multiple checks on the national government that he had helped build into the Constitution as a price of its ratification. On the other hand, Chief Justice John Marshall was always an ardent nationalist, and never changed his stripes. Marshall backed John Adams' Federalist administration, and in 1800 was one of Adams' midnight appointments to the federal bench before the pro-state, anti-federal Thomas Jefferson rolled into power. Chief Justice Marshall was Jefferson's second cousin, but there was no love lost between them. Marshall had supported a powerful national government since his dreary days at Valley Forge with George Washington, when a weak Congress and self-absorbed states ignored the cold, hungry and badly-equipped Continental Army. So when, twenty-two years later, the Federalist Adams dropped Marshall onto the Supreme Court, the new Chief Justice donned his robe with a serious mission, *i.e.*, to strengthen the Court as an institution and to strengthen and preserve federal power, the Jeffersonians notwithstanding.

So the Marshall Court was marked by decisions that were, by and large, strongly centralist in character—at least by the standards of the day.

- In *Fletcher v. Peck*, 10 U.S. 87 (1810) established that state laws could not violate express restraints on states imposed by the Constitution.
- The Court in *Martin v. Hunter's Lessee*, 14 U.S. 204 (1816), established the authority of the Supreme Court to overturn state supreme court decisions.
- In *McCulloch v. Maryland*, 17 U.S. 316 (1819), Chief Justice Marshall held for a unanimous court that the states could not burden the operation of a nationally-chartered entity properly formed by Congress. In *Gibbons v. Ogden*, 22 U.S. 1 (1834), Marshall's Court ruled that the State of New York could not allow a monopoly steam vessel service in a manner that blocked New Jersey boats from traveling across the Hudson (*i.e.*, in interstate commerce) to New York.

All of these decisions expanded the power of the federal courts and the national government. However, as Chief Justice Marshall grew older, and then passed away, and as new voices joined the Court (particularly justices appointed by Andrew Jackson), the pendulum started to swing back toward state power vis-à-vis the national government. Key cases included:

- *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829), which allowed the State of Delaware to permit weirs on navigable waterways because Congress had not affirmatively restricted the states' sovereign police powers in that regard.
- *Mayor of the City of New York v. Miln*, 36 U.S. 102 (1837), where the Court, now led by Chief Justice Roger Taney, permitted New York—notwithstanding federal control over immigration—to reject potential new immigrants and to take "precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts…[and] to guard against the physical pestilence."
- In *Cooley v. Board of Wardens*, 53 U.S. 299 (1851), the Taney Court held that that Congress' constitutional power to regulate commerce did not deprive states of the power to regulate who could pilot vessels, and what fees might be required of ships that did not use local pilots. The Court ruled that while Congress *could* have exercised what today we call "field preemption," it hadn't done so.

The Federal Government Goes to Sleep (and Then Begins to Awaken)

In a number of ways the Taney Court gradually ratcheted back on federal power vis-à-vis the states, and local governments too, and that Court tended to support the exercise of state police power against federal interference. Of course, slavery (and states' rights) advocates took a very different approach when it came to applying national power to enact and enforce federal fugitive slave laws. A number of northern states and cities had attempted to interfere with slave-catching in their jurisdictions. But at that time, the Constitution had an effective provision *mandating* state cooperation with slave catchers and barring state interference with slavery,[4] and that provision provided the legal basis for the national government to demand state and local collaboration with the fugitive slave laws. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

But generally speaking, with the exception of the temporary growth of federal power during the Civil War, most of the Nineteenth Century saw a very modest national government. Most of the political action lay with the states. The feds were focused primarily on foreign affairs, currency, the postal service, immigration, expansion and settlement of territory to the west, and the management of Indians and public lands. Apart from the money supply, Washington D.C. did little to control the Nation's growing economy. This was how most Americans liked it, at least until the federal government's *laissez-faire* approach was seen as permitting a small number of "Robber Barons" to get very rich at the expense of the bulk of the population.[5]

Toward the end of Nineteenth Century, labor strife, corruption in state government, and awareness of income disparity, all led to a shift in public perceptions. Middle class voters were simultaneously troubled by the country's wide income disparities, business corruption of politics, and labor strife.[6] This led, among other things, to widespread support of an increased role for the federal government in regulating the national economy. The public's changing attitude resulted in national legislation like the Interstate Commerce Act in 1887 (regulating interstate railroads) and the Sherman Anti-Trust Act in 1890 (regulating monopolies).[7]

Back and Forth with the Commerce Clause

But the U.S. Supreme Court had not moved along with the general public (or, for that matter, with the more progressive state courts).[8] In *United States v. E.C. Knight*,[9] the Court gutted the Sherman Antitrust Act. In an 8-1 decision, it ruled that the American Sugar Refining Company's moves to control almost all of the nation's sugar companies could not be blocked by the federal government because the various companies' refineries not were engaged in "interstate commerce." Instead, each company was manufacturing sugar within a state, and the federal government lacked the authority to extend its arm into the manufacturing process. Never mind that the American Sugar Refining managed to control the prices nationwide. What is particularly relevant is Chief Justice Fuller's reasoning:[10]

> It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States,

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Trumping Home Rule Cont'd from page 7

> and essentially exclusive. The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with.... The power to regulate commerce is the power to prescribe the rule by which *commerce* shall be governed, and is a power independent of the power to suppress monopoly.

In other words, the Court held that while the federal government could regulate the *channels* of commerce, it could not regulate manufacturing. This business-friendly stance was repeated in a number of cases over the ensuing four decades. There were some exceptions.[11] For example, in *Champion v. Ames*,[12] the Supreme Court upheld the national regulation of the sale of lottery tickets where those tickets had originated in Paraguay, moved to Texas, and then to California. The Court held that "lottery tickets are subjects of traffic and therefore are subjects of commerce" so that federal controls were appropriate.[13] Chief Justice Fuller, joined by three of his more conservative colleagues, wrote a vigorous dissent; he maintained that the power to suppress lotteries belonged solely to the States and not to Congress, and that the statute was essentially an exercise of federal police power that violated the Tenth Amendment.[14] One wonders whether the subject matter of the case (regulating shady lottery ticket dealers) affected in the outcome, and later we'll see a similar tension within the Court in how it addressed federal regulation of home-grown marijuana in *Gonzales v. Raich*.[15]

Other early 20th-century Supreme Court cases rejecting Congress' regulatory powers as not falling within the Commerce Power included:

- In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court held that a law banning the interstate transportation of goods manufactured by children in factories was beyond the regulation of interstate.
- *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935)(the "Sick Chicken Case") invalidated the 1933 National Industrial Recovery Act, an important early piece of New Deal legislation regulating wages, prices, and industrial production, including in this instance the sale of potentially diseased chickens.

But then the Court swung around from its 40-year restrictive view of the Commerce Clause, partly due to political and public pressure, but mostly due to gradual changes in membership and outlook. The most famous cases reflecting the shift in Commerce Clause doctrine included:

- *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), upholding the National Labor Relations Act's regulation of union-management relations. In that case, the Court held that labor practices "affecting commerce," burdening and obstructing the flow of interstate commerce, and "bearing a close and substantial relation to interstate commerce," were all fair game for federal regulation.
- In *United States v. Darby*, 312 U.S. 100, 123 (1941), the Court overturned *Hammer v. Dagenhart* and upheld federal wage and hours laws governing the *manufacture* of goods for interstate commerce. The opinion specifically found that Congress could act to suppress "nationwide competition in interstate commerce by goods produced under substandard labor conditions."
- *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) represented perhaps the farthest reach of federal power under the Commerce Clause (at least until Justice Scalia's opinion in *Gonzales v. Raich*). In *Wickard*, the Court permitted the federal government to prohibit an individual farmer's production of wheat to provide seeds for his own use—not exactly interstate commerce, but the Court held that his home-grown wheat, when replicated nationwide by many other agriculturists, could exert "a substantial economic effect on interstate commerce."

The New Deal Court's expansion of federal power continued into the Warren Court period, as exemplified by key civil rights decisions. For example, in *Heart of Atlanta Motel v. United States*,[16] the Supreme Court relied on *Darby* and upheld Title II of the 1964 Civil Rights Act, ruling that Congress could ban race discrimination by lodging facilities because that discrimination suppressed travel by black Americans and adversely affected interstate travel and commerce. At the same time, in *Katzenbach v. McClung*,[17] the Court relied on *Wickard* and held that a Birmingham, Alabama restaurant ("Ollie's Barbecue") similarly could not discriminate if it served any interstate travelers; the Court's opinion noted "a close and substantial relation between local activities and interstate commerce which requires control of the former in the protection of the latter."[18]

Then, after the election of Richard Nixon, and later Ronald Reagan, the composition of the Supreme Court changed, and with it the Court's view of the extent of federal power under the Commerce Clause. Nixon appointed William Rehnquist to the Court, and Reagan later elevated him to the role of Chief Justice. Rehnquist was a committed believer in "Dual Federalism," the concept that the national and state governments have distinct roles that must be protected. In a number of key decisions—most of them authored by Rehnquist—the Court trimmed the reach of the Commerce Clause. For example, in *United States v. Lopez*,[19] Chief Justice Rehnquist held that the Gun-Free School Zones Act of 1990 could not be used to prosecute an individual for possessing a handgun near a school. Rehnquist emphasized that mere possession of a gun was an activity that was intrastate, noneconomic, and "not an essential part of a larger regulation of economic activity."[19] His language leapfrogged backwards over the Warren and New Deal Courts and echoed the opinions of the late Nineteenth and early Twentieth Century that restricted federal government's Commerce Clause powers. Rehnquist's opinion also echoed several Taney Court opinions[21] by emphasizing the importance of state and local police powers and the national government's limited ability to directly regulate activities that did not restrict interstate commerce. Similarly, in *United States v. Morrison*,[21] Chief Justice Rehnquist overturned key provisions of the federal Violence Against Women Act of 1994, holding that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[23] Importantly, in construing the Commerce Clause, Rehnquist wrote: "The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted."[24] Well—maybe that principle hasn't been altogether consistent, but Rehnquist wanted to make sure that it bounced back.

The Tenth Amendment Rises Again

Another constitutional provision that Rehnquist helped bounce back. Reads: "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*."

Ever since *Darby,* the Tenth Amendment had been treated as "but a truism that all is

retained which has not been surrendered."[25] Rehnquist didn't see it that way at all. He took the Tenth Amendment seriously, believing that it was a key to the principle that the Constitution made a distinct apportionment of powers between the national government and the states. He and his colleagues drove that home in case after case:

• In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court's opinion by Justice Sandra Day O'Connor held that a federal statute (the Age Discrimination in Employment Act of 1967) could not be held to apply to judges in a state where that state's constitution mandated retirement at age 70. O'Connor noted that in Madison's compound republic, the public was protected by a double division of political power: between the three branches of the federal government, and between the federal government and the states.[26] Justice O'Connor wrote: "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[27] She went on to rule that Congressional interference with the decision of the people of Missouri to set a judicial retirement age "would upset the usual constitutional balance of federal and state powers."[28]

• In *New York v. United States*, 505 U.S. 144 (1992), Justice O'Connor again addressed that constitutional question "as old as the Constitution,"[28] *i.e.*, the federal-state allocation of powers—in this instance what tools the national government could use to induce (or force) the states to joint regional compacts to handle radioactive waste. In that case, the Court ruled that while the Commerce Clause and the Spending Clause allowed Congress to attempt to entice states to collaborate, the federal government could not force states to assume ownership and liability for all radioactive waste produced within their borders if they refused to join a regional compact. She labeled this an unconstitutional "commandeering" of the state's powers and legislative processes in order to carry out a federal program.[30]

• In *Printz v. United States*, 521 U.S. 898 [31] (1997), Justice Antonin Scalia's opinion for the Court held that the Brady Handgun Violence Prevention Act could not require state and local police officials to perform background checks on gun purchasers. He reiterated that "Congress cannot compel the States to enact or enforce a federal regulatory program…[or to] circumvent that prohibition by conscripting the State's officers directly. [32]

And the Spending Power Has Limits Too

The Rehnquist Court's last important doctrinal area on the federal-state power split related to the Spending Power in Art. I, Sec. 8. The Supreme Court had many years before permitted the national government to use the Spending Power to induce states to participate in federal programs, although the Court in 1937 had noted that at some point inducements might reach "the point at which pressure turns into compulsion."[33] In *South Dakota v. Dole*,[34] the Court held that the use of federal grants to encourage states to set their drinking age at 21 years had not reached the point of compulsion. In his opinion for the Court, Chief Justice Rehnquist held that because just "a relatively small percentage of certain federal highway funds" was involved (5% in that instance), there really wasn't any coercion.[35] Justice O'Connor dissented, but not because she disagreed about the small amount not constituting coercion. Her disagreement was based on her view that the drinking age had only "an attenuated or tangential relationship to highway use or safety,"[36] *i.e.*, there was not a sufficiently direct relationship between the highway construction funds being withheld and the drinking age.

In most of the Rehnquist Court federalism decisions, we see the "conservative" members of the Court backing Chief Justice Rehnquist's efforts to control the national government's powers, while "liberal" members of the Court (with personal backgrounds in the New Deal and the Civil Rights Movement) backing strong federal powers, including powers to force the states and local governments to comply with federal mandates.

It All Comes Back with Obamacare (*NFIB v. Sebelius*)

Although members of the Supreme Court characterized as "conservatives" have been fairly consistent in their willingness to restrain federal government mandates on the states, one striking anomaly is *Gonzales v. Raich*,[37] a 2005 decision in which Justice Scalia teamed up with the "liberals" to permit federal drug enforcement agents to confiscate marijuana lawfully grown (under California law) by Angel Raich to treat a personal medical condition. Justice Stevens' majority opinion was based on *Wickard*. While Justices O'Connor, Rehnquist and Thomas vigorously dissented, asserting that the decision breached the "outer limits of Congress' Commerce Clause authority,"[38] Justice Scalia concurred with the majority. Scalia's stated rationale was that "marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market."[39] One wonders if Justice Scalia's approach might have been different if the topic had been something other than controlled substances—his change of federalist heart reminds one of the Supreme Court's willingness to expand the reach of the Commerce Clause in 1906 in *Champion v. Ames*, where the subject matter was gambling.[40]

But all three strands of constitutional doctrine defining (and limiting) the federal government's power to cause the states to act on its behalf—the Commerce Clause, the Spending Power, and the Tenth Amendment—converged in *NFIB v. Sebelius*,[41] the 2012 decision partially upholding and partially striking down "Obamacare." Chief Justice Roberts' opinion for the Court upheld core provisions of the Affordable Care Act against a challenge from a number of (mostly Republican) state attorneys general. Most importantly, he held that the Act's penalty on middle and upper income people who do not purchase health insurance was an appropriate exercise of the federal government's taxing power. But he used the Rehnquist-era Commerce Clause, Spending Power and Tenth Amendment cases to knock out two key provisions of the legislation. First, he held that Congress could not mandate that individuals purchase health insurance. He reasoned that while *Wickard* relied on the Commerce Clause to block a farmer from growing wheat that would affect interstate commerce, that was a *regulation* of existing commerce; however, the national government could not force individuals to *engage* in commerce in the first place, any more than the national government could mandate that citizens purchase cars or broccoli.[42] Then Roberts overturned the Affordable Care Act provisions that would withdraw all Medicare funds from states that declined to expand the number of enrollees. He relied on the anti-commandeering language of *New York v. U.S.* and the anti-coercion language of *South Dakota v. Dole* to hold that the Medicaid expansion requirement was an unconstitutional attempt to "compel the states to enact or administer a federal regulatory program.[43] He noted that federal Medicaid funds represented 20 percent of some state budgets—greatly exceeding the five percent of highway funds involved in *South Dakota v. Dole*.[44]

Continued on page 10

Trumping Home Rule Cont'd from page 9

Immigration, Sanctuary Cities, Charter Schools, Abortion...and More

As the Trump administration moves forward, we can expect repeats of that administration's attempts to use threats of brute political and financial force to cause the states and local governments to comply with new federal goals. Based on the longstanding stated Republican ideology of downsizing the federal government and shifting responsibilities to the states, one might expect a GOP administration and Congress to avoid mandating state collaboration with their favored programs. But neither short nor long term consistency should be expected in politics. For example, Secretary of Education Betsy DeVos, who for years demanded local control of education and a reduction of federal influence, is now, as a national office-holder, taking a tough line against states and local districts in pushing her specific policies.[45] And, while short term consistency can be found among common law judges, it seems to fade away over the long haul. American history is replete with strange shifts of position when those changes help one faction or another reach a policy goal. It is often forgotten that it was the New England states that first threatened to secede from the Union—when they opposed the War of 1812 and its adverse effects on trade.[46] After the Civil War, it was the pro-business, libertarian wing of the Supreme Court who were very much "activist judges" in developing novel legal theories to curb federal power (and state regulatory power as well). In recent years, everyone is familiar with the flip of the Republican and Democratic parties—the formerly solid, middle and upper-middle class, sensible Republicans have become populist (and some might say zany), while the formerly populist Democrats have morphed into the staid, centrist grouping that includes many upper middle class adherents who moved over from the old GOP.

In any event, we should expect the current Republican President and Republican Congress to ignore their party's tradition, and attempt to use the Commerce Clause and the Spending Power to force blue states and blue cities to cooperate with their policy goals. This should surprise no one. When he was in power, Republican Richard Nixon was a supporter of "big government," price controls and various centralizing schemes. George W. Bush, a tried and true Republican, did little to devolve federal programs or decision-making to the states.[47] One reason is that Presidents, regardless of party, tend to support federal power if it assists them reach their personal political goals.

But the good news is that James Madison and his colleagues wound up designing a balanced federal system that really was meant to stand the test of time, human frailties, and changing factions, policies and political party positions. The other piece of good news is that during his tenure Chief Justice William Rehnquist was a consistent and committed Madisonian federalist. Chief Justice John Roberts is a committed (and hopefully consistent) Madisonian federalist today. While judges certainly can be inconsistent on occasion (witness Justice Scalia's position in *Raich*), we can hopefully count on Roberts not to embarrass himself by shifting the strong views that he expressed, in *NFIB v. Sebelius*, about the Commerce Clause, the Spending Power and the Tenth Amendment.

What this means is that as the Trump administration attempts to withdraw funds from "sanctuary" states, counties and cities that decline to actively assist Immigration and Customs Enforcement, it will meet stiff legal challenges if and when it tries to reduce federal aid to those states or municipalities by more than five or ten percent, or if tries to reduce federal aid in areas altogether unrelated to immigration enforcement. Several lawsuits challenging Trump's January 25, 2017, executive order have already been filed, and right out of the box, the City of San Francisco successfully obtained a nationwide temporary restraining order from Federal Judge William H. Orrick III of the Northern District of California.[48] In his order, Judge Orrick relied heavily on *NFIB v. Sebelius* and Justice Roberts' reasoning on the Spending Power and the Tenth Amendment.[49] Chicago has now filed a lawsuit challenging the U.S. Department of Justice's apparent intent to cut funding to that city for police assistance.[50] We can expect the same type of pushback—likely successful—if Congress attempts to cut federal education grants to states that decline to sign on to other federal efforts, such a program requiring states to share public school funds with private schools (including religious schools) through voucher programs. In Washington State, that would run into serious state constitutional problems, and the state's government would actively challenge a national program that was inconsistent with state law and policy.

Historically, states have exercised a broad array of tools to protect themselves from the national government, challenging attempted federal preemption, lobbying, participating in federal programs in such a way that those programs become "captured" and changed, or simply refusing to play ball (the ultimately successful approach of many states with respect the "No Child Left Behind" project).[49] But an often successful tool is the sustained legal challenge, just like the Republican attorneys general that reduced the effectiveness of Obamacare in *NFIB*, or New York's challenge of the federal nuclear waste program in *New York v. United States*, or Montana and Arizona law enforcement officials blunting the Brady Handgun Violence Protection Act in *Printz*. And it doesn't matter which party is driving a particularly federal policy or program—some state isn't going to like it, and that state will use the tried and true Madisonian tools in its attempt to do so. William H. Rehnquist and John G. Roberts played a large role in shaping the constitutional federalism tools we are living with today, and we can expect those tools to be an effective mechanism in challenges to the Trump administration and future administrations as well.

Notes

1. Executive Order, "Enhancing Public Safety in the Interior of the United States," January 25, 2017; Exec. Order No. 13,768, 82 Fed. Reg. 8799; https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

2. Section 9(a) of the President's executive order specifically targeted "jurisdictions that willfully refuse to comply with 8 U.S.C. 1373." As discussed below, that federal statute bars federal, state and local governments from prohibiting their employees from sharing information about individuals' immigration status with federal immigration officials. The statute does not require that state or local governments collect immigration status information in the first place. The President's executive order seems to have been substantially narrowed by an interpretive memorandum later issued by Attorney General Jeff Sessions. *See,* Vivian Yee and Rebecca R. Ruiz, "Sessions Narrows Order Against Sanctuary Cities," New York Times, May 23, 2017, available at: https://www.nytimes.com/2017/05/22/us/politics/sanctuary-cities-jeff-sessions.html.

3. The Federalist No. 39 (James Madison) (Liberty Fund ed. 2001) 199.

4. U.S. Const. art. IV, §. 2, cl. 3: "No person held to service or labor in one state, under the laws thereof, escaping to another, shall, in consequence of any law or regulation therein,

be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."
5. See, generally, Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (2009).
6. *See, generally,* Richard Hofstadter, *The Age Of Reform: From Bryan To F.D.R.* (New York, 1955), 144-146; Gabriel Kolko, *The Triumph Of Conservatism: A Reinterpretation Of American History, 1900-1916* (1963); Stanley P. Caine, "The Origins of Progressivism," in The Progressive Era, ed. Lewis L. Gould (1974).
7. For an overview of the shift in American political thought towards greater government regulation of the economy—particularly federal regulation—*see*, Nancy Cohen, The Reconstruction of American Liberalism 1865-1914 (2002).
8. *See*, Hugh Spitzer, *Pivoting to Progressivism: Justice Stephen J. Chadwick, the Washington Supreme Court, and Change in Early 20th-Century Judicial Reasoning and Rhetoric*, 104 Pac. N.W.Q. 107 (2013).
9. 156 U.S. 1 (1895).
10. *Id.* at 11-13 (emphasis added).
11. An exceptional non-Commerce Clause case during this period that is of particular interest in the context of "sanctuary cities" is *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). *Yick Wo* was primarily an Equal Protection case banning the discriminatory application of a facially neutral ordinance. But it effectively held that state and local criminal laws, based on the police power, could not be applied to control immigration by distinguishing between citizens and non-citizens. Immigration control was at that time seen as a purely civil, not criminal matter, and was viewed as purely the domain of the federal government. *See, generally*, Christopher N. Lasch, et al., *Understanding "Sanctuary Cities,"* 58 B.C. L. Rev. ___ (forthcoming, 2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3045527.
12. 188 U.S. 321 (1903),
13. *Id.* at 354.
14. *Id.* at 365.
15. 545 U.S. 1 (2005). Discussed at p. 9.
16. 379 U.S. 241 (1964).
17. *Id.* at 294.
18. *Id.* at 297.
19. 514 U.S. 549 (1995).
20. *Id.* at 560.
21. *See* p.7.
22. 529 U.S. 598 (2000).
23. *Id.* at 613.
24. *Id.* at 617-18.
25. United States v. Darby, 312 U.S. at 124.
26. 501 U.S. at 459.
27. *Id.* at 457.
28. *Id.* at 460.
29. *505 U.S.* at 149.
30. *Id.* at 161.
31. 521 U.S. at 935.
32. *See, also*, Galarza v. Szalczyk, 745 F.3d 634, 643 (2014), in which the Third Circuit ruled that detainer orders by federal immigration officials to local officials had to be treated as mere requests, because: "Under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government. Essentially, the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials."
33. Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).
34. 483 U.S. 203 (1987).
35. *Id.* at 211.
36. *Id.* at 215.
37. 545 U.S. 1 (2005).
38. *Id.* at 42.
39. *Id.* at 40.
40. *See* p. 6.
41. 567 U.S. 519, 132 S.Ct. 2566 (2012).
42. 132 S.Ct. at 2591.
43. *Id.* at 2601-04.
44. *Id.* at 2604.
45. Erica L. Green, "DeVos's Hard Line on New Education Law Surprises States," New York Times, July 7, 2017, available at: https://www.nytimes.com/2017/07/07/us/politics/devos-federal-education-law-states.html?_r=0.
46. *See, Why New England Almost Seceded Over The War Of 1812* (WBUR, June 15, 2012), available at: http://radioboston.legacy.wbur.org/2012/06/15/new-england-succession.
47. *See, e.g.*, Tim Conlan and John Dinan, eds., *U.S. Federalism and the Bush Administration*, Publius, the Journal of Federalism (Summer, 2007).
48. Order Granting the County of Santa Clara's and City and County of San Francisco's Motion to Enjoin Section 9(a) of Executive Order 13768, No. 17cv-00485-WHO (N.D. Ca. Apr. 25, 2017).
49. *Id.* pp. 37-41.
50. City of Chicago v. Sessions, No. 17-CV-5720 (N.D. Ill. Aug. 7, 2017).51. 51. *See, generally,* John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking* (2009).



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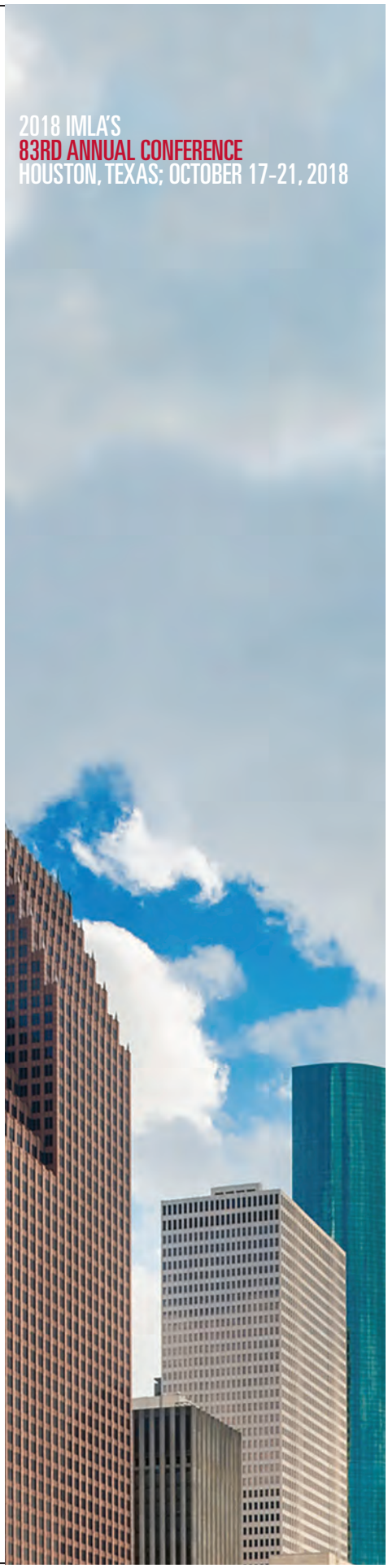









Last month, 700 IMLA members convened in Ontario along the banks of the Niagara River. We trust all will agree that the Conference was a huge success, highlighted by the sights and sounds of Niagara Falls, the hospitality of our hosts and the excellence of our presenters.




















Tara Steeley
Hugh Spitze














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Award Recipients

Charles S. Rhyne Lifetime Achievement in Municipal Law Award

Benjamin E. Griffith Board Attorney
Oxford, Mississippi

Garry E. Hunter, General Counsel,
Ohio Municipal Attorney's Association

Thomas Grundhoefer, General Counsel,
League of Minnesota Cities (posthumous)

Brown, Mulligan, Rocha Distinguished Public Service Award

Michael Keith Horn Managing Attorney
Lexington-Fayette, Kentucky

Patrick K. O'Neill Divisional Deputy City Solicitor,
Philadelphia, Pennsylvania

Marvin J. Glink Private Practice Local Government Award

Kevin K. Kilby City Attorney, Parma, Michigan

Ivan T. Webber Attorney
Ahlers & Cooney, P.C., Des Moines, Iowa

Thomas P. Bayer Partner, Klein Thorpe & Jenkins
Chicago, IL

Bruce A. Noble Distinguished Canadian Municipal Lawyer Award

Jennifer Smout Solicitor II
London, Ontario, Canada

Outstanding State League Counsel Award

Claire Silverman Legal Counsel
League of Wisconsin Municipalities

Daniel J. Curtin Young Public Lawyer Award

Daniel R. White Assistant City Attorney
Yuma, Arizona

Kimberly Campbell Assistant City Attorney
Scottsdale, Arizona

Brad D. Bailey Assistant City/ County Attorney Award

Douglas Hoffer, Assistant City Attorney,
Eau Claire, Wisconsin

William I. Thornton, Jr. IMLA Faculty Award

Randall D. Van Vleck, General Counsel
New Mexico Municipal League

President's Most Outstanding Associate Award

Gene Tanaka, Partner, Best Best & Krieger
Walnut Creek, California

President's Most Outstanding Provincial Chair Award

Brian Loewen, Barrister & Solicitor, Leduc,
Alberta, Canada

James H. Epps, III Award for Longevity of Service to a Community

Robert Shields, City Attorney, Woodburn, Oregon

Jim Nugent, City Attorney, Missoula, Montana

Garry E. Hunter, General Counsel, Ohio Municipal Attorney's Association

Executive Director's Special Award for Longevity of Service

Larry Baer, Legal Counsel,
League of Kansas Municipalities



















Epps Award Note

Contributing Elements or Factors Important to Providing Municipal Attorney Legal Service to a Community for a Long Period of Time!

By: Jim Nugent, City Attorney, Missoula, Montana

Editor's Note: At our Niagara Conference, IMLA celebrated the accomplishments of many outstanding municipal attorneys, including three practitioners who received the James H. Epps, III Award for Longevity of Service to a Community. The Epps Award honorees included Robert Shields, City Attorney of Woodburn Oregon, Gary Hunter, General Counsel of the Ohio Municipal Attorney' Association, and Jim Nugent, who has served as legal counsel to the City of Missoula, Montana for more than 42 years. As requested of Epps winners, Jim provided the following thoughts about longevity in serving as a locality's municipal lawyer:

The City of Missoula, Missoula County is located in western Montana, which is the fourth largest state by land area in the United States. The City of Missoula has a population of approximately 70,000 people in an immediate urban area of approximately 100,000, and is the second largest city in the State of Montana. (Billings is the state's largest city, with a population of approximately 105,000). Missoula is home to the University of Montana, and especially within city limits has a very active, generally progressive citizenry that is involved in many successful community endeavors and projects; voters generally approve the issuance of bonds for important special purposes requested by various local taxing jurisdictions.

Montana has a relatively new State Constitution adopted in June 1972 with several unique provisions that facilitate improving the quality of life, equality of opportunity and protections against discrimination while securing the liberties and rights of its citizens. Examples include provisions pertaining to (1) inalienable rights of persons, such as a clean and healthful environment; (2) individual dignity of its citizens; (3) constitutional protection from laws impairing freedom of speech or expression; (4) right of reasonable opportunity for citizen participation prior to final decision making by any governmental agency; (5) right to know, including the general right to observe the deliberations of all public bodies; (6) a general right of individual privacy; (7) a requirement that every vote of each member of the legislature on each substantive question must be recorded and made public; (8) a commitment to recognizing the distinct and unique cultural heritage of American Indians and the preservation of their cultural integrity in educational goals; and (9) perhaps most importantly to Montana local governments-- city and county--a constitutional mandate that the powers of all Montana local governments "shall be liberally construed," thereby eliminating in Montana the historic general Dillon Rule of statutory interpretation that provided that any local government power must be explicitly stated in state law or inherent in the statutory language of state law.

The above elements illustrate the general constitutional legal environment that influences the legislative, administrative and civil operations of Montana local governments.

Our office has been involved in numerous municipal government achievements and endeavors that have improved the quality of life, safety and security for the Missoula community. Our office also prosecutes Montana state law misdemeanors as well as municipal ordinance violations.

In June 1975, I was employed as a misdemeanor criminal prosecutor for the City of Missoula. I was appointed City Attorney in June of 1977. I primarily perform civil, administrative and legislative legal work as city attorney, including appearances in all courts in which the city is a party litigant, as well as at several state administrative agency proceedings, numerous appearances at the state legislature, construction arbitrations, and many collective bargaining contracts. Also, for several decades, I have quite actively participated in statewide municipal government related organizations such as the Montana League of Cities and Towns, Montana City Attorneys Association, and the Montana Municipal Interlocal Authority (MMIA), a municipal self-insurance pool for liability, workers compensation, property and employee health and dental programs that was originally created three decades ago by Montana municipalities when private insurers quit providing liability insurance for municipalities in Montana as well as nationwide.

The City of Missoula Municipal Court, where our office staff attorneys prosecute, have for years had more court case filings than any other lower court in the State of Montana. Important criminal offenses prosecuted by our office include partner family member assaults, DUI's, thefts, criminal mischief, violations of Orders of Protection, sexual assaults, indecent exposures, assaults, reckless driving, vehicle collisions, and so on. (The monetary cut off between a felony and a misdemeanor for non-traffic criminal offenses is generally $1,500.00 in the state).

Legal services are provided by our office to approximately 25 Missoula municipal related departments/divisions/entities plus several municipal boards/commissions/ committees, a Missoula Housing Authority and Mountain Line transit services. Our current staff consists of 17: eight attorneys and nine administrative support staff members. We strive to serve the public as a team effort, providing customer service on a daily basis.

There are likely a multitude of factors, elements or reasons that lead to successfully providing public service as a municipal attorney for a lengthy period of time. Quite a significant list of potential elements or factors come to mind from my experience that may contribute to longevity of service as municipal city attorney. With obviously no order of priority, examples include, but are not limited to:

1) Initially, it is important to have a personal desire and passion to serve the public as well as the public interest to the best of one's abilities, so that municipal government succeeds in bettering people's lives.
(2) Municipal teamwork is always important. In order to succeed as a team, it is important to seek out and draw upon resources within the municipal organization.

It is also important to provide thorough, competent legal advice and services to city staffs and elected officials to assist them in best performing their respective duties and responsibilities and in achieving their legal goals and objectives.

(3) It is important to be motivated by and possess a desire to improve the quality of life for citizens of, and visitors to, the community through municipal attorney public service.

(4) It is important to listen to concerns that are being expressed by city elected officials, city employees and the public concerning goals, objectives and issues.

(5) It is important to assist crime victims and work closely with organizations that assist crime victims.

(6) It is important to strive to provide thorough, competent, correct, timely customer service to elected officials, city employees and the public to the extent reasonably, legally possible.

(7) It is also is important, when possible, to work with and assist other Montana municipalities to succeed. I believe that statewide municipal government success fosters local government success. Examples include, but are not limited to: writing amicus briefs for supreme court proceedings relevant to municipal issues; seeking state legislative enactments; and generally brainstorming municipal government issues.

(8) In order to earn their appreciation, confidence and respect, it is important to be available and willing to guide municipal employees and elected officials when they seek assistance to act within legal parameters in their municipal government operations.

(9) When providing legal guidance, it is important to cite legal authority, basis or grounds, so others know there is a legal source for the advice provided.

(10) It is important to represent municipal employees and elected officials thoroughly, competently and, most importantly, accurately.

(11) It also is important for a municipal attorney to inform municipal employees and elected officials when a proposal or suggestion is not legal and/or to advise about the legal downside of a topic being considered--and explain the legal basis for those concerns.

(12) It is important to consider municipal public service as a team effort, both within your office staff, as well as, importantly, among the entire city organization, elected officials and all other municipal employees seeking to best serve the public interest and improve the quality of life of the community.

(13) It is important to be neutral, impartial and objective in researching and providing legal advice to elected officials as well as to public employees. Being neutral requires that the municipal attorney not take sides, such as not being an advocate for city staff proposals when city staffs are taking projects and/or regulatory measures/proposals before the city council governing body for consideration. This is especially true when, later, the municipal attorney may have to defend or otherwise represent the decision of the city council and/or mayor in any litigation that might arise from the agenda item.

(14) It is important that a municipal attorney not take sides or get politically involved in discussions/debates amongst the elected officials, and avoid political involvement in internal government operations and administration. A prudent municipal attorney should not take political sides on issues between city council members and/or between city council members and the mayor.

(15) It is important for a municipal attorney to have an exemplary personal work ethic, exhibiting diligence, thoroughness and competence.

(16) It is important that municipal attorneys not use their positions to seek personal publicity or limelight.

(17) Municipal attorneys should allow the elected officials and/or key staff who are working an agenda item to be the person in the limelight for community issues. Municipal lawyers best work in the background, especially with respect to political or controversial issues. This makes it is less likely that they might have taken sides prior to a final decision being made. On a related note, municipal attorneys must also avoid public discussion of any specific details related to pending litigation.

(18) With respect to decision making by elected officials, it is important that a municipal attorney remain neutral, impartial and objective and not attempt to manipulate legal advice toward a personally preferred outcome.

(19) A municipal attorney has responsibilities and duties to the public, as well. These include ensuring that municipal government meetings and decisions are legally conducted and transparent, as well as assuring that the public is provided with a reasonable opportunity for participation prior to a final decision being made.

(20) Once a final decision is made by the municipal governing body, the municipal attorney must be prepared to defend that decision.

It is challenging to identify what aspects of a person's work performance and/or work ethic might contribute most to success at work; especially in regards to longevity of public service to a community. In my own case, it has been a desire and passion to be involved in having our municipal government, as well as those of other Montana municipalities, be a success in serving their communities and improving the quality of life of those in the community. I am proud of the many achievements and accomplishments of the City of Missoula during my employment with the City. Most of all I have loved my job and the community I live and work in. ML



Jim Nugent is a graduate of the University of Montana Law School and holds a degree in finance from the University of Montana Business School. He has served in the Missoula City Attorney's Office for 42 years, starting as a criminal prosecutor and becoming city attorney in 1977. He has been a Montana Municipal Interlocal Authority Board of Director for 31 years, twice president of the Montana League of Cities and Towns and several times President of the Montana City Attorney's Association. Jim is currently President of the Montana City Attorney's Association and received the Montana State Bar George Bousliman Professionalism award in 2011. He has been married to his wife Janice for more than 46 years, and has five children: Jim, Anna, Erin, Mike and John and one grandson, James.



Rare Eclipse Affects All Aspects of Municipal Government

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

Unless you were on another planet, or, in our case didn't read the listserv this summer, there was a rare Solar Eclipse here in the Continental United States. We were fortunate enough here in the cozy confines of Lexington, SC, to be directly in the center line of the eclipse. Thus, we encountered the longest period of totality on the entire east coast. The period of totality lasted just over 2 ½ minutes. However, the preparation and effects lasted for months, and the extra crowds and traffic affected virtually every branch of municipal government.

The eclipse occurred on Monday, August 21, but it had been talked about constantly around here for over a year. Rumors swirled about its ominous meaning and its potential effects... "It will reverse the polar magnetism and compasses won't work... Animals will go crazy... Computer systems will shut down... The temperature will drop dramatically, so make sure your heating and air system is ready...Stores will run out of food... Gasoline will be in short supply... The roads will be so clogged that you won't be able to get out of town..."

Local residents began preparations a week in advance. Lines formed at the gas pumps. Bread and milk were in short supply. (How this was supposed to help, I have no idea). Folks were taking off from work. Businesses were closing. Courtrooms were closing. In all seriousness, it was as though we were preparing for the end of the world. Even moon pies were in short supply.

On Friday, the Wal-Mart parking lot, among others, began to fill up with motor homes and tailgating activities ensued. If you hadn't heard, you would swear the town was either gearing up for a tremendous tailgate party and SEC football game, or hunkering down for another hurricane.

The preparation for area municipal governments wasn't without issues. The phones began ringing long before the solar event. "Is the garbage going to be picked up that day?" ... "Will the police be on extra patrol?"... "Are you open that day?"... "Where can we see the eclipse from?" (Umm... From earth, maybe?)

One popular rumor that circulated was the story that the South Carolina Highway Patrol was going to reverse lanes on one side of the Interstate to deal with traffic. Calls to Town Hall were directed to SCHP. The rumor became so prevalent that it made its way into mainstream media channels. Finally, the SCHP had to hold a press conference to say this is NOT true! In fact, it was never discussed, because if there are indeed thousands of visitors, they will be coming from both directions--so reversing lanes would be of no use.

The Town of Lexington conducted a "viewing party" at its new 900 seat amphitheater. Calls began early on... "Will it be rescheduled in the case of inclement weather?"... "Why are you doing this on a school day? Wouldn't it be more convenient on a weekend?" "My eclipse glasses broke. Where can I get more?"...

Other stories include the theory that there would be an increase in crime due to the darkness. (All two and one half minutes of it) In fact, I heard of folks who took the day off for THIS reason, not because of viewing the eclipse, but to "protect their property." Reports of eclipse glasses being sold on Ebay for $100 circulated. (They were free in most places, and we still have a thousand or so here) Many people simply reported taking the day off due to all the "uncertainty." Nobody knew what was "going to happen."

An interesting post on the listserv regarded whether cities should "issue warnings to city employees that will be working during the solar eclipse or any kind of instructions on the risks involved in the eclipse or precautions to take during the event?"

The question is fair, but the responses were interesting. "What risk?"... "We have to tell employees not to look directly at the sun?"... "And, remind them to breathe, when necessary."... "Be careful not to trip over anything in the dark."... "Come on now...if all employees had common sense that would cut into a lot of our jobs, wouldn't it?"... "It is probably covered by worker's comp." (I did not know viewing the eclipse was within the scope of employment.)

Let's fast forward to the actual day of the event. What really happened? For one, an enterprising doughnut chain began selling "Eclipse Doughnuts," which were simply the same dark chocolate doughnuts that could be had on any other day for less cost. But, enthusiasts just had to have them and lines formed at the doughnut shop before 4:00 a.m. There were actually upset people who didn't know what to do because the shop had run out of doughnuts by the time they arrived. Folks called the Town to see if we knew where they could find more doughnuts (I'm not kidding about this!)

But, other than the run on the doughnut store, nothing extremely unusual occurred... There were no computer crashes...No lane reversals...Eclipse glasses ($100?) were found on the ground... Police reported that the roads in Town were a virtually deserted...There was no increase in crime...No temperature drop...Gasoline could still be purchased, as could milk and bread...No computer crashes...No cats and dogs sleeping together...The world did not end...

It got dark for two minutes and 41 seconds, and then the sunlight returned.

That was it. It was like the time I hosted a party for the Larry Holmes fight, and the match only lasted for 30 seconds. Everyone sat around thinking "Now, what do we do?"

Yes, there were plenty of people in Town. Hotels and restaurants were full. There was a measurable economic benefit to the Town. And truth be known, after all the hype, it was still a fascinating event to witness. But, outside of a few mid-afternoon rooster crows, there was nothing extremely unusual in the aftermath of this "once in a lifetime" event.

Life went on as usual. If you are on the Water Cooler, I posted some pictures from the centerline. Comb through the archives and take a look. (But don't look at them for too long!)

Call me old if you want, but I am disturbed by the lack of respect people have for each other and for authority these days. There are all sorts of examples of this in the national media, and we have discussed on the listerv what to do when folks get out of order at public meetings. I encountered one such situation in court recently.

A young lady stepped up to the lectern having been charged with Simple Possession of Marijuana, Possession of Drug Paraphernalia and Disorderly Conduct. She pled not guilty. Once the officer had proceeded with testimony, the young lady (with a sneer on her face and her hand on her hip) began asking the judge "Now, why would I do that in public. That would be stupid. Why would I stand there and do that? Why would I tell the "cops" that?"

Seriously, her defense was "Who would do something that stupid?" The judge cut her off stating "You are not the one asking questions of me. That is not the way it works. Do you have anything else to say in your defense?" Yes, she said. "He (the officer) is lying!"

The judge was intrigued. "Did you see the pictures? Did you review the evidence?" The young lady responded "Yes. I did not do it. That would be stupid."

The judge found her guilty, and sentenced her to a fine on all three charges, even giving her 90 days to pay the fine. He lectured her about the behavior and her demeanor, and the fact that she was wearing cut off shorts and a T-shirt to court. Then, he excused her. Upon turning from the bench she audibly muttered a popular two word expletive. You know, the one often abbreviated as "FU." The judge did not hear it, but many people did, including the bailiff who is an officer. He asked her to step back up to the microphone and repeat to the judge exactly what she had just said. She exclaimed "I didn't say anything..." He then told the judge what she said, and the judge became red in the face. "I did not say that," the young lady insisted.

"Did anyone else in the courtroom hear her say this?" the judge asked? About half the hands in the room were raised. The judge then held her in Contempt of Court, giving her 30 days in jail. In addition, he revoked the fine on her other three charges and sentenced her to 30 days on each – to run consecutively.

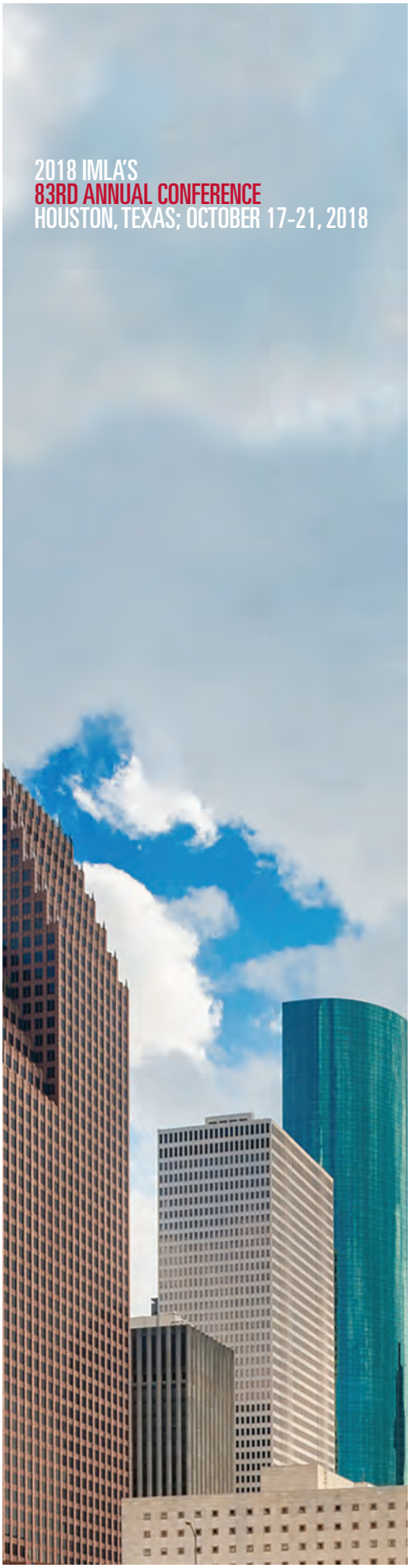
So, solely for the simple reason of not being able to keep her mouth shut, consider this. The young lady went from walking out the door with a fine and 90 days to pay it, to being escorted out the door to become a guest of the government for 120 days and likely losing her job. I wonder if it was worth it?

Maybe her behavior was caused by the eclipse?

There has been listserv discussion in the past about municipalities passing "Texting and Driving" ordinances. Fortunately for our municipalities in South Carolina, this issue has been taken up by the State. But, the issue is serious. A few weeks ago, my co-workers and I were nearly broad-sided by a young lady on her way to work. She ran a red light at full speed, and only some fancy driving by our Parks Director kept us from being creamed. However, she did hit the next car in line. Having witnessed the accident, we stopped.

The young lady jumped out of her car with a cell phone in hand and exclaimed "What happened?" We all told her, and she said she never saw the light. The truth is she was sending someone a text message. The other driver said "Well, we have four people here who did see it." The young lady did admit she wasn't paying attention, and that she was running late for work. We all know. It was that text about what you had for dinner last night that was so important.

The prosecution rests, your honor. ML





CODE ENFORCEMENT

After a Hurricane: Helping the Community Stabilize and Recover

By: Frank M. Johnson, Assistant City Attorney, Gaithersburg, Maryland

Enforcing local codes of all types, from noise ordinances to property maintenance requirements, starts with what the law requires. But, in many ways, the ongoing work can be less about following specific provisions or sections of the law than solving problems, especially on a neighborhood or community scale. That's in part because municipal and county code enforcement staff aren't just there to collect fines or issue citations. For example, failure to maintain a building can raise community concerns based on poor appearance as well as safety, and issuing a fine, by itself, doesn't solve the problem. In addition, most code enforcement cases are complaint driven, meaning the person complaining wants to see the violation corrected.

So, how do local communities handle code enforcement after a hurricane or natural disaster? Given the set of hurricanes which have recently hit the southeastern United States in rapid succession, this isn't a theoretical question. And with the help of the internet after a summer of such repeated hurricanes, from Harvey to Irma to Maria and elements of Jose, we have current evidence of practical steps dozens of communities have taken and are taking. The reality is that many localities in Texas, Florida and other parts of the southeast were devastated. Powerful winds not only damaged but wreaked havoc on some homes and buildings. Flooding, after forcing people out, will now force repairs and rebuilding. And as they recover, local governments have used the internet to try to get the word out to their communities as to the next steps, despite a lack of electricity in many areas, not to mention lack of computer access.

As anyone living through a disaster knows, priorities change for communities struggling to survive, where thousands of residents and homeowners have been struck all at once. Immediate needs have to be addressed, and lives are often at stake. And for code enforcement, the problems to be solved have multiplied exponentially. No more can code enforcement staff focus on individual homeowners who may have failed to paint or who may have an unsafe handrail or steps. Many buildings, including local government structures, are partly if not entirely destroyed, and in many cases, almost everyone in the community faces such damage – including local government staff and officials.

Thus, in such a widespread disaster, relief efforts focus on the emergency, such as providing immediate shelter for persons who have to evacuate. While relief agencies may take the lead role, local government shelters are also widely provided. But when the hurricane passes and people go back home, it's often local government which then provides the backbone of support. In reviewing reports after the most recent hurricanes as well as those from past decades, it's apparent that the immediate goal for code enforcement staff is to identify properties with damage and to try to make homes safe.

That doesn't start with citing anyone for code violations, however. News reports indicate, for example, that after Hurricane Irma moved through, code enforcement officers in Hillsboro County, Florida, were stopping to check on residents and to assist them in assessing the damage they faced. The County reported code enforcement staff – as well as building services, public facilities, parks and recreation and many others – were all canvassing the areas to identify homes with serious safety concerns and to try to bring assistance, through social services and other relief agencies, to persons needing shelter, food and clothing even as they returned home. Another reality is that in most cases, electric and other utilities aren't operating after a hurricane. It's apparent that part of the local effort in having staff canvass areas and notify people how they can start to recover is also to focus on the use of portable generators to ensure safe use. As the City of Weston, Florida, emphasized, generators can't be operated in enclosed spaces due to carbon monoxide fumes, can't be plugged into wall outlets, as electrocutions can result, fuel can't be stored inside the home, and generators should be installed by professional electricians.

Broward County, Florida, established a formal Home Damage Assessment Program to assist in identifying key safety concerns within the community, and established a set of protocols, including comparison photos and a Home Damage Assessment application, allowing residents to identify the extent of damage (from "minor, habitable," to "major damage, uninhabitable" or even "destroyed.")

While damage assessment is one of the first steps in rebuilding, the reality is that hurricanes involve both flooding and high winds. Thus, even as residents begin to recover and assess damage, other practicalities have to be addressed. Many local governments, such as St. John's County, Florida, note the need for proper disposal of sandbags, many of which were provided by the local governments in the first place to allow residents to try to control flooding. The code enforcement aspect becomes apparent when the sandbags are no longer needed. St. John's encouraged residents to keep them for the next time, as a pre-

caution, but to store them properly, and to dispose of sandbags which were used or came in contact with floodwaters. The City of Oviedo, Florida provided a drop off container in a public area for sandbag disposal, and Clearwater, Florida noted that sand can be taken out of used bags and put in the garden or, if they did not come in contact with floodwater, can be saved and reused later.

As to the impact of high winds, almost every local government has focused on the need to clear and remove debris as one of the first steps to recovery. In many ways this underscores the extent of the damage, for in normal circumstances, the code enforcement aspects are also apparent – as most local ordinances include prohibitions against solid waste in yards or on the streets. Here, entire streets can be blocked by all sorts of debris. West Miami, Florida, for example, noted that contractors would begin storm debris removal "to the extent that these areas can be safely accessed," and asked residents to place storm debris in the right of way for pickup.

West Miami's request that debris be separated by category underscores their challenges. It's worth noting that those categories include vegetative debris, such as whole trees and leafy material; construction and demolition debris, including damaged components of buildings; household hazardous waste, such as paints, cleaners and pesticides; "white goods," such as appliances which no longer work, including freezers, refrigerators and the like; and electronic waste, such as computers and televisions. Similarly, Altamonte Springs, Florida, noting that contractors would be removing debris from roadways "seven days a week from 7 a.m. to 7 p.m" asked residents to place yard waste separate from construction and building debris in rights of way for pickup. The City of Kissimmee, Florida, asked for separation of tree debris from construction debris as well, as close to the road as possible without being in the roadway. The Town of Lauderdale-By-The-Sea, even while noting it sustained relatively minimal damage, hired a contractor the week after Irma to begin hurricane debris removal. Residents were asked to separate vegetation, including tree limbs, from hurricane debris such as fences and roof tiles, and to keep debris out of the roadway to allow passage. Even in noting minimal damage, the Town's website advised that it "will take several days" to complete clean-up for the entire Town.

As Pinellas County, Florida has noted, rebuilding begins after the area has been stabilized. Rebuilding is indeed the next step even as water recedes and debris is cleared, and that directly involves application of building codes and code enforcement processes. The hard reality is that local government staff will face exponentially more permit and plan reviews, and when disasters are so widespread, there's no chance to bring in additional staff from other jurisdictions – as they are facing their own community needs.

Yet even with more permits and plan reviews, in many cases local governments give staff less time to complete reviews. That's not to cut the code enforcement process short, but to assist residents and businesses in rebuilding by expediting permit approvals. Such changes in the days after Hurricane Irma, to "facilitate the recovery efforts," were specified, for example, by Altamonte Springs, Florida. The City of Melbourne simply noted that "all storm-damage permits will be expedited." After Hurricane Harvey, the City of Victoria, Texas specified that no permits were required before emergency repairs could begin, even as the City noted that permits would be "eventually required" in all cases, implying that no emergency repairs could be completed without final approval, even while asking for patience in that regard. Generally, communities specified that even while permits may be expedited, permits were still required, such as, for example, Orange County, Florida.

To encourage rebuilding, local governments waive or reduce permit fees, usually for a short time in the immediate aftermath of a hurricane. After Hurricane Matthew last year, the City of St. Augustine, Florida, specified that no building permit fees would be charged to homeowners for removal of storm damage material from their homes, or for "owner/builder" repairs to residences in response to hurricane damage. After Hurricane Irma, Port Orange, Florida instituted a temporary building permit fee waiver, from September 5 until November 8, 2017, exempting permits for tree removal, roof repairs, sheds, fences, sign repair or any other repairs caused by Hurricane Irma, but still requiring a separate affidavit and application to waive fees, along with the permit itself. The City of Oviedo waived fees for fence, roof and screen enclosures, but only for one month after Hurricane Irma passed – clearly encouraging those permits to be applied for during that first month, rather than later.

But waiving fees temporarily does not necessarily mean that permit requirements will be reduced. After Hurricane Hugo nearly 20 years ago, a University of Colorado study on permitting in South Carolina found instances in which local governments waived permits or were not stringent in approving permits for rebuilding. Miller, Elliott, "Building Code Enforcement Following Hurricane Hugo in South Carolina (1991)", FMHA Publications, at 5-6. It's always possible that permit applications or final building projects will be reviewed less stringently given the rush of permits after a disaster. But even the 1991 Report, while critical of local permitting officials in many ways, found that no city or county implemented a policy granting variances. *Id.* In reviewing local government responses to the recent hurricanes, many allowed temporary permit fee waivers, but no permit waivers were noted, even where emergency work was allowed to begin without a formal permit.

The rush of needed rebuilding and repairs will of course encourage contractors into the area, some of whom may not be licensed or even competent. As the 2006 Miami-Dade County Progress Assessment Report noted after Hurricane Wilma, the large need can lure unlicensed contractors who will prey on homeowners. "Post Hurricane Wilma Progress Assessment, Miami-Dade County Building Code Compliance Office, April 2006," at 17. This element of recovery involves code enforcement as well, both to ensure contractors have proper licensing as well as the quality of their work. The City of Victoria, Texas, noted that all contractors must hold a valid and current license with the City, would be fined $100 for not having such

Continued on next page

a license, and that unlicensed work "will not be tolerated." The City also noted that contractors soliciting work door to door needed a solicitor's permit from the City. The City clearly reflects the local government concern that their residents not become victims, which may also inhibit overall area recovery as well. In that light, Pinellas County, Florida noted that residents should not "let your eagerness to make repairs leave you a victim" of an unscrupulous contractor, advising everyone that they should insist on license numbers, references and a written estimate – and that the County's Department of Justice and Consumer Services could assist with more information.

One type of waiver was noted in a recent report from the City of St. Augustine, Florida after Hurricane Matthew: due to the state of emergency, homeowners could reside in a recreational vehicle on the property for up to six months while the hurricane damage was being repaired. Hurricane Matthew Recovery, City of St. Augustine Planning and Building Department (2015) at 1. But no zoning or building code waiver was granted, and the Report specified that permits and all requirements still applied. *Id.* at 2. This demonstrates that code enforcement efforts continue to be relevant throughout the recovery process, as waiving building code and construction requirements is not part of that recovery.

For the long term, code enforcement can become the critical element enforcing the need for a community to recover. For instance, when property owners don't make repairs in a timely manner, it falls to code enforcement staff to inspect, re-inspect, issue notices of violation, and pursue civil citations or even orders for construction or demolition, where necessary. A November 13, 2016 SUN-SENTINEL article noted that after Hurricane Matthew threatened Florida, many homes remained boarded up in South Florida, presenting a bad visual appearance while also potentially blocking a resident's ability to escape a fire. Huriash, Lisa, "A Month After Hurricane, Cities Crack Down on Residents Who Haven't Removed Shutters," SUN-SENTINEL, November 13, 2016. The article reported that the City of Parklane issued nine warnings, and the City of Tamarac, Florida, modified the local code to require shutter removal 15 days after a hurricane, with fines to be imposed if the shutters remain.

Taking another approach, the City of North Miami Beach, Florida, instituted an Administrative Code Waiver program which ended on December 31, 2016, allowing property owners to legalize zoning and building code violations without facing a penalty. The program specified that permits would be required but no fines or penalties, beyond the $25.00 fee to apply for the waiver, would be imposed.

Recovering from the flooding, collecting debris, rebuilding and recovering all takes weeks, months, even years. But only one week after Hurricane Irma and a few weeks after Hurricane Harvey, it was apparent that local counties, cities and towns affected were starting the path to recovery. Such survival and recovery is worth celebrating, as the City of Madeira Beach, Florida, recognized. That city was not in the direct path of Hurricane Irma as initially feared, but still suffered serious damage, power outages, and flooding. But in the midst of recovery, the City put word out that they wanted to take a moment to celebrate the volunteers, city staff, support teams and others, including the Pinellas County Sheriff Department and the Madeira Beach Fire Department "and our great community as a whole for coming together at this time," inviting everyone to the City Hall parking lot the Friday after the hurricane for a celebration toast.

Life thus goes on, even through disaster and recovery, and that does deserve celebration. As noted at the beginning, code enforcement is essentially about problem solving. This article demonstrates that code enforcement staff are also very much part of the solution after a natural disaster It requires both more, and in some ways less, from code enforcement. Any emergency that causes widespread damage to a community results in less stringent enforcement – because the details don't matter as much as life and safety. Thus, code enforcement offices and staff become part of the community's overall response, assisting with life safety and property emergencies. They will help assess building damage for recovery, while also helping enforce debris removal and even disposal of sandbags used to prevent flooding. Waiving fees to encourage rebuilding and expediting the permit review process also adds to the code enforcement work load, as it essentially requires the same staff to accomplish more, in less time. But permit and building code requirements are generally still honored and enforced by code enforcement staff, as they work with their towns, cities and counties to help their communities recover. ML

Become A Speaker

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Op-Ed

Sticks, Stones, and... Snakes? Unusual Deadly Weapons and Threatening Objects

By: Caitlin Cutchin, IMLA Associate Counsel

What do garden hoses, sticks, pencils, and saliva all have in common? Within the right context and jurisdiction, they are considered by the courts to be a threat to others. The following represents a brief survey of unusual objects (mostly inanimate—but not all) found to be threatening by American courts.

The Garden Hose: *Roell v. Hamilton Cnty. Bd. of Comm'rs*, No. 16-4045 (6th Cir. Sept. 5, 2017).

Ronald Roell, who suffered from schizoaffective disorder and paranoid delusions, stopped taking his medication in June 2013. Predictably, he began exhibiting signs of mental decompensation which culminated in a condition known as excited delirium. In his frenzied state, Roell damaged his own condominium and then threw a flower pot through the window of his neighbor. The latter called 911 and reported that Roell appeared angry, his face red and his eyes bulging, as he muttered unintelligible things, while pacing in front of the broken window, peering into her residence.

Deputies arrived and found Roell, half-naked and brandishing a garden hose with a metal nozzle in one hand and a basket in the other. According to the officers, Roell was swinging the hose around as if trying to hit someone. Roell approached the deputies, and was warned to stop and lie on the ground or he would be tased. Roell twice ignored the deputies' demands and kept moving towards the officers.

While attempting to subdue Roell, the officers struggled with him unsuccessfully, tasing him multiple times. Roell stopped breathing during the encounter and was pronounced dead shortly thereafter. His death was documented by the coroner as natural, resulting from his excited delirium. Included with the Death Record was a report drafted by the coroner stating that Roell had a history of "physical altercation with police officers" and that the "use of a conducted energy device against decedent" had occurred. Also noted were Roell's various abrasions and contusions, injuries from the taser barbs, and four broken ribs—but the report did not find that any of these injuries contributed to Roell's death.

In applying the three *Graham* factors (severity of crime, presence of immediate threat, and active resistance of arrest) the court concluded that the deputies' use of force was lawful. Within this context, Roell's demeanor, when combined with the fact that he had thrown a potted plant through his neighbor's window, supported the finding that he had committed a series of crimes that could escalate. Further, and most importantly for our purposes, Roell's use of a garden hose and garden basket amid a scene of property destruction provided deputies with a reasonable basis to believe Roell presented an immediate threat to himself and others.

In other words—menacing your neighbors with a gardening basket and metal hose nozzle can lawfully get you tased.

The Stick: *In re Fortney*, 832 N.E. 2d 1257 (Oh. Ct. App. 2005).

Zachariah Mugrage and John Fortney, both aged 15, spent the evening with a third teenager, during which time Mugrage punched Fortney for making unwanted sexual advances towards him. The following day, Fortney made threats to come to Murgrage's residence to assault him. Mugrage began walking down the street towards Fortney's home and encountered Fortney, who was wielding a large stick.

Fortney swung the stick at Mugrage several times. Mugrage ordered him to put it down and "fight like a man" and then grabbed a baseball bat from a friend. A fracas ensued. Undeterred by the bat, Fortney swung his stick again. Mugrage blocked the blow with his left arm, sustaining a hairline fracture.

Under Ohio R.C. 2923.11(A), a deadly weapon is "any instrument, device, or thing capable of inflicting death, and designed or specially adaptable for use as a weapon, or possessed, carried, or used as a weapon." The state must therefore meet a two-pronged test to prove an object is, in fact, a deadly weapon. First, the weapon must be an "instrument, device, or thing capable of inflicting death."[1] Second, the weapon must be "designed or specially adaptable for use as a weapon, or possessed, carried, or used as a weapon."[2] Whether a weapon constitutes a deadly weapon (and thus a threat to others) depends on the facts and circumstances of each case.[3]

In this scenario, Fortney's stick, unsurprisingly, qualified as a deadly weapon under Ohio law.

Given the injuries involved, perhaps this case best validates the first part of the old adage "sticks and stones may break my bones. . . ."

The Stone: *Faircloth v. State*, No. 3-12-00133 -CR (Tex. App. May 30, 2013).

It is only appropriate that a case implicating sticks should be followed one involving stones.

Billy Gene Faircloth attacked Kathy McWilliams from behind as she exited her vehicle on the lowest level of a five-story underground parking garage in Austin. The weapon was a smooth river rock "a little bigger than a softball."[4]

The stone used in the assault was determined to be a "deadly weapon," within the meaning of Tex. Penal Code Ann. § 1.07(a)(17)(B): The evidence showed that McWilliams sustained injuries from multiple blows to the head, and she was attacked from behind. Thus the jury could infer close proximity and that the rock was capable of inflicting death or serious injury.[5]

The Pencil: The below cases support the notion that the pen (or pencil) is, in fact, *at least* as mighty as the sword.

People v. Page, 123 Cal. App. 4th 1466 (2004).

Craig Lucas was walking home from his job at Taco Bell one evening when he came across a half-dozen people standing outside his building. Two of these individuals—a man and a woman—approached Lucas and asked him in a hostile manner what he was looking at. The woman then started emptying out a petrified Lucas's pockets

The woman took his wallet, which contained about $ 32.00, and a case he was holding, containing a CD player and some

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PRACTICE TIPS

Workplace Accommodation Checklist: Responding to an Employee's Request for Accommodation

By: Brian Wasyliw, Sherrard Kuzz LLP, Toronto, Ontario

Introduction

Under the *Human Rights Code* (Ontario), the duty to accommodate consists of two discrete components:

1. The ***substantive*** **or** ***practical*** component requires an employer to provide an employee an appropriate form of accommodation, where required.
2. The ***procedural*** component focuses on the steps an employer takes to consider and assess an employee's accommodation request.

Each request for accommodation must be addressed on an individualized, case-by-case, basis recognizing the employee's unique issues and needs.

This checklist offers general tips and steps that can be followed in an effort to ensure both the *substantive* and *procedural* components of the duty to accommodate are met.

The Checklist

1. An employee makes a request for accommodation OR the employer reasonably suspects the employee requires accommodation:

• Note: It is not necessary that an employee actively *request* accommodation. Where an employer knows or reasonably ought to know an employee requires accommodation, the employer has an obligation to make appropriate inquiries.

2. Determine whether there is a link between the request/need for accommodation and a prohibited ground under the *Human Rights Code* (*i.e.*, does the request for accommodation relate to: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability). Where no link exists, the duty to accommodate will not be triggered.

• Consult with the employee to understand the nature and basis of the request, as well as any suggestions or recommendations he/she may have regarding accommodation.

• Note: Human rights jurisprudence requires the accommodation process to be collaborative; employer and employee (as well as the union, where one exists) all participate.

• Request and review supporting information and/or documentation to substantiate the request for accommodation (*e.g.*, doctor's note, hospital records, treatment plan, *etc.*). Wherever possible, a request for information and documentation should be in writing so they are documented and the employee cannot later claim he/she was never asked to provide additional information.

• Note: An employer is typically not entitled to ask for an employee's medical *diagnosis*. However, in most circumstances, it is reasonable to request the provision of information about: (i) the general nature of the illness or disability; (ii) the prognosis; (iii) limitations or medical restrictions; (iv) whether limitations prevent the employee from performing his/her regular job duties and responsibilities; (v) what, if any, modifications and/or accommodations can be implemented in order to return the employee to work; and (vi) when it is anticipated the employee will be capable of returning to work, either with or without accommodation.

• Where inappropriate, insufficient, or contradictory information is provided, an employer has the right, and should exercise the right, to require further information and/or clarification.

• Note: Ordinarily, an employer will ***not*** be permitted to contact an employee's physician or health care provider directly without the employee's consent. As such, the best practice when seeking additional medical information or documentation is to provide an employee with a letter to bring to his/her physician, outlining the request.

3. Once it has been determined the employee's request for accommodation: (i) relates to a prohibited ground; and (ii) legitimately requires accommodation in the workplace, assess available accommodation. This includes reviewing the following factors, and recording and documenting steps taken, factors considered and reasons why a conclusion was reached:

The Employee's Regular Position:

• Can the employee perform his/her existing job?

• If the answer is 'no', can the employee perform the job in a modified form (*e.g.*, modified scheduling, use of supportive devices, *etc.*)?

• If the answer is 'no', the employer must proceed to the second stage of the assessment process - looking at other available positions in the workplace.

Other Positions in the Workplace:

• A thorough review of the workplace should be undertaken to determine whether there is an existing, available position the employee is able to perform. The duty to accommodate will generally not require an employer to "bump" an incumbent employee from a position in order to accommodate an employee who requires accommodation.

• In a unionized workplace, the union's obligation to participate in the accommodation process may include permitting the employee to post into a position into which he or she may not otherwise have been entitled on a seniority basis under the collective agreement.

• If the employee is a member of a bargaining unit, the employer should first review positions within the bargaining unit. If there are no positions in the bargaining unit suitable for the employee, only then should the employer consider positions outside of the unit.

• If the employee cannot perform any other existing position in the workplace, the employer must considered "bundling" of duties.

"Bundling" of Duties:

• Can the employee perform tasks and responsibilities from various positions across the organization which can be "bundled" together to provide an opportunity to perform a productive and useful job?

• It may be prudent to consider whether it is possible, absent undue hardship, to "create" a position by re-bundling duties and responsibilities.

4. Where required, consult with the employee (and union, if any), as well as with the employee's healthcare provider, to ascertain the suitability of accommodation options.

5. **Communicate the decision in writing and in a timely manner.**

• Note: An employee is not entitled to his/her *preferred* accommodation. Rather, the duty to accommodate requires the employer provide *reasonable* accommodation, up to the point of undue hardship. While an employee (and union, if any) and the employee's healthcare provider may have input into the accommodation process, **the ultimate decision rests with the employer**.

• Where an employee cannot be accommodated because no suitable work is available, or because to do so would cause the employer undue hardship, objective evidence should be gathered and recorded in support of such a conclusion.

• If the employer employs 50 or more employees, it should ensure a written individualized accommodation plan is developed for the employee, in accordance with the requirements of the *Accessibility for Ontarians with Disabilities Act.*

6. Where appropriate accommodation has been identified, implement as soon as practicable in a matter that respects the employee's privacy. This usually means the accommodation plan should only be discussed with those in the organization who *need to know* to facilitate the accommodation.

7. Once implemented, accommodation should be monitored regularly to ensure it continues to meet the needs of the employee.

• Remember: **The duty to accommodate is an ongoing duty** which requires the employer to periodically revisit whether accommodation is possible and/or should be changed, either because of changes in the workplace or the employee's restrictions. This includes discontinuing accommodation where it is no longer required.

• Throughout the accommodation process, the **lines of communication** between employer and employee (and union, if any) should be kept open. This free-flowing dialogue facilitates the accommodation process and assists in ensuring all parties meet their obligations. ML





Can Reasonable Use of Force Be Unreasonable?

By: Adam C. Falco, Senior Assistant City Attorney and Police Legal Advisor, City of College Station, Texas

Can you imagine, after a court found a police officer's use of force reasonable under *Graham*,[1] that the otherwise *reasonable* use of force would be deemed *unreasonable* because of a separate Fourth Amendment violation? In other words, the officer's reasonable use of force would become, as a matter of law, unreasonable if (1) *the officer intentionally or recklessly provokes a violent confrontation*; and (2) *the provocation is an independent Fourth Amendment violation.*[2] This is not from an alternative universe. After a forcible seizure is found reasonable under *Graham*, the so-called "provocation rule" has required the court to ask whether a police officer violated the Fourth Amendment in some other way during the events leading up to the seizure.[3]

Under a recent Supreme Court ruling, the "provocation rule"—a Ninth Circuit construct which had been sharply criticized outside the Circuit–is now abrogated.[4]

In *County of Los Angeles v. Mendez*,[5] the Supreme Court settles this issue and reaffirms that the Fourth Amendment provides no basis for such a "provocation rule." A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure.[6] More specifically, once a use of force is deemed reasonable under *Graham*, it may not be found unreasonable by reference to some separate constitutional violation.[7]

The *Mendez* Case.

In *Mendez*, the Los Angeles County Sheriff's Department obtained an arrest warrant for Ronnie O'Dell, an armed and dangerous parolee-at-large. A confidential informant told deputies that O'Dell was at the Hughes residence in Lancaster, California. At a briefing before leaving to arrest O'Dell, deputies learned that a man named Angel Mendez was living in Hughes' backyard with his pregnant girlfriend (now wife), Jennifer Garcia.[8]

During the search for O'Dell, while other deputies searched the Hughes residence, Deputies Conley and Pederson searched the rear of the property where they found three metal storage sheds, a single-door plywood shack, and scattered debris. They checked the sheds and found nothing. Mendez and Garcia were living in the plywood shack, where Mendez kept a BB gun for use in shooting rats. It resembled a small caliber rifle.

The deputies were unaware Mendez and Garcia were sleeping on a futon in the shack.[9] Conley and Pederson approached the shack's door with no search warrant, without knocking and without announcing their presence.

Conley opened the wooden door that was covered with a blanket. Mendez awoke from the futon, and thinking the visitor was Hughes (the homeowner), he picked up the BB gun so he could get out of bed and place the weapon on the ground. Deputy Conley saw Mendez pointing the BB gun in his direction. Conley shouted "gun" and the deputies opened fire. In total, 15 rounds were fired at Mendez and Garcia, both of whom were shot multiple times and suffered serious injuries. Mendez's right leg required amputation as a result.

Deputies never found O'Dell at the Hughes' residence.[10] Asserting three Fourth Amendment claims,[11] Mendez and Garcia filed suit under 42 U.S.C. § 1983 against Los Angeles County and Deputies Conley and Pederson.[12]

The Graham Factors Revisited.

The framework for analyzing excessive force claims has long been laid out in *Graham*. If there is no excessive force claim under *Graham*, there is no excessive force claim at all.[13] Reasonableness has always been the touchstone of any Fourth Amendment analysis.[14] The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with hindsight's 20/20 vision. The Fourth Amendment reasonableness test is not capable of precise definition or mechanical application; however, its proper application requires careful attention to the facts and circumstances of each particular case. The *Graham* factors include (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[15] The Fourth Amendment reasonableness test requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. The question of a seizure in regards to reasonableness is whether the totality of the circumstances justifies a particular sort of seizure.[16]

The Provocation Rule was Wrong.

The fundamental problem with the Ninth Circuit's "provocation rule" was that it did not eliminate use of the *Graham* factors; in fact it added an extra step to the analysis. In *Mendez*, the lower court, contrary to Fourth Amendment jurisprudence, had held that although the use of force was determined to be reasonable under *Graham*, the "provocation rule" undid that reasonableness. This provided a novel and unsupported path to liability in cases where the use of force was reasonable.[17] The District Court, without dispute from the Ninth Circuit, had found the use of force by Deputies Conley and Pederson was reasonable under *Graham*; however, according to the lower courts, Mendez and Garcia were still able to recover damages because the deputies committed a separate constitutional violation by entering the shack without a warrant. This conflated analysis led to finding a separate, reasonable use of force now unreasonable, which conflicted with *Graham*.[18]

The "provocation rule" included a vague causal standard. It looked to the *subjective* intent of the officers carrying out the seizure. Officers cannot be asked to go back in time and be judged solely on a purported Fourth Amendment violation that would render unreasonable

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Supreme Court Cont'd from page 25

any once reasonable use of force. The "provocation rule" required that split-second decisions of officers be measured against a vexatious rule that created a second guessing, all-or-nothing type standard.

The advice to officers today is to continue conducting police work without fear of being second-guessed by a court for a reasonable use of force. After on *Mendez*, the good news is that the "provocation rule" will no longer expand the scope of the Fourth Amendment against a police officer's sound judgment.



Adam C. Falco is a Senior Assistant City Attorney and Police Legal Advisor for the College Station City Attorney's Office, focusing on public safety, litigation, prosecution, contracts and land use issues. He graduated from Texas A&M University in 2003 with a degree in Political Science and in 2006 earned a law degree from Oklahoma City University School of Law. He is also Vice Chair of the State Bar of Texas Law Focused Education Committee.

Notes

1. Graham v. O'Connor, 490 U.S. 386, 109 (1989).
2. Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002).
3. County of Los Angeles v. Mendez, 137 S. Ct. 1546 (2017).
4. *See* Woodward v. Tucson, ~ F.3d ~, 6, (9th Cir. 2017).
5. *Mendez* at 1539.
6. *Id* at 1544.
7. *Id* at 1547.
8. *Id.*
9. *Id.*
10. *Id* at 1544 – 45.
11. Mendez and Garcia claimed a warrantless entry when the deputies searched by entering the shack without a warrant, a knock-and-announce claim when the deputies searched because they failed to announce their presence before entering the shack; and third, an excessive force claim when the Deputies effected seizure by deploying excessive force in opening fire after entering the shack. The Supreme Court did not analyze the other two Fourth Amendment claims.
12. *Id.*
13. *Id* at 1547.
14. Birchfield v. North Dakota, 136 S. Ct. 2160, 2186, (2016).
15. *Graham* at 396 – 97.
16. Tennessee v. Garner, 471 U.S. 1, 8 – 9, (1985).
17. *Mendez* at 1547.
18. *Id.*

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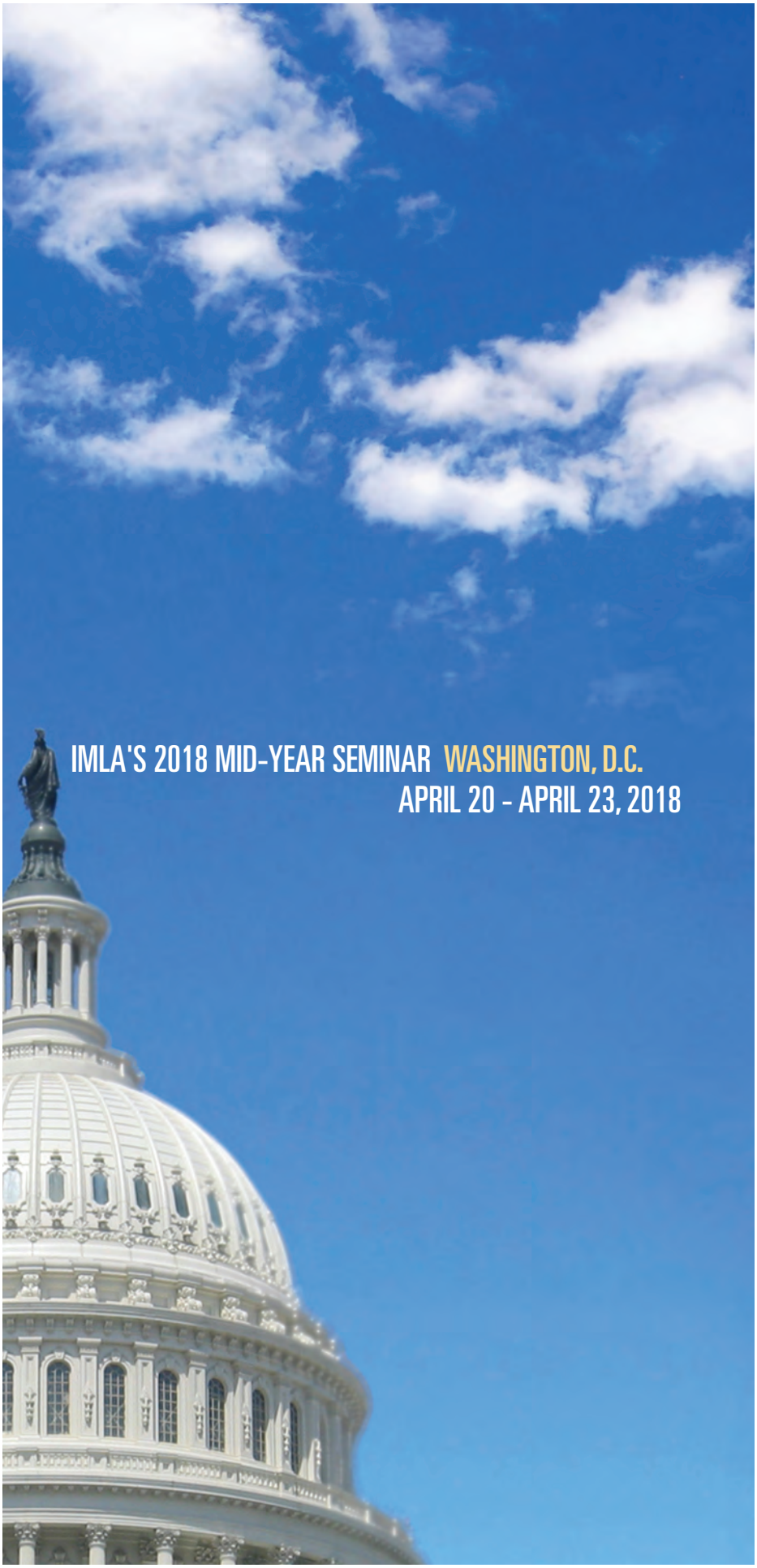

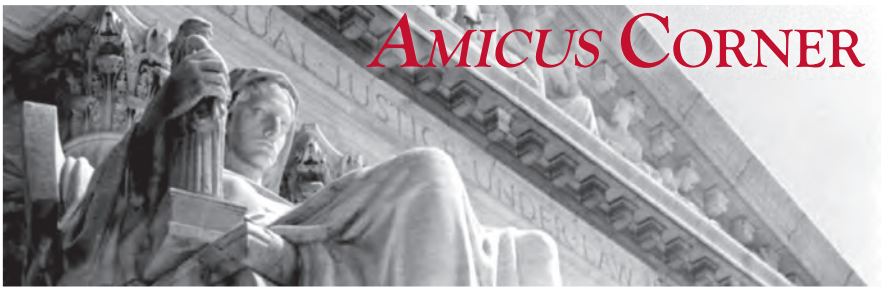

Section 1983 Litigation - How the Summary Judgment Hurdle is Getting Higher and Higher

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

Section 1983 cases can present a number of challenges for local government attorneys, including sympathetic plaintiffs and courts stumbling over the standards for summary judgment and qualified immunity. Interestingly, the question of how the summary judgment and qualified immunity standards overlap came up during the oral argument (though only briefly) in a recent Supreme Court case: *District of Columbia v. Wesby*. In that case (which we have previously highlighted in this column), Justice Kagan asked the Solicitor General for the District of Columbia: how does "the summary judgment standard fit with the probable cause standard [the primary issue in that case] and also with the qualified immunity standard? How do those three things work together here?" And while the Justices were subsequently diverted from that line of questioning into procedural issues pertaining to the Respondent's filings in that case, the fact that the question was asked shows that courts are still not clear on how to apply these standards in conjunction.

One concerning trend that we have observed in relation to this open question is that courts are increasingly denying qualified immunity in Section 1983 cases, particularly where deadly force was utilized, claiming that factual issues preclude the court's ability to afford the officers with the defense. The Ninth Circuit has even noted that in deadly force cases, summary judgment should be granted sparingly as the officer defendant is often the only surviving witness. *See Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014). But, the idea that an officer's testimony should be looked on with skepticism, and qualified immunity therefore rarely granted, goes far beyond the requirement that courts must draw all inferences in favor of a non-moving party at summary judgment.

IMLA is currently involved as an amicus in two Section 1983 cases out of the Ninth Circuit that involve the foregoing problem: *Silva v. City and County of Honolulu* and *Estate of Lopez v. Gelhaus*. While the individual with whom the police were interacting ultimately died in both cases, the facts and circumstances in each were quite different. What the cases have in common is each court's decision to use non-material disputed facts or really the existence of any disputed facts to deny the officers qualified immunity.

Silva v. City and County of Honolulu

Silva involved an erratic individual who was dressed in all black and walking down the middle of a busy six-lane roadway at 8 pm during the end of rush hour. After refusing officers' commands and evading arrest while remaining in the middle of the street, the officers pepper sprayed him and when that did not work, attempted to Tase him three times (it was disputed as to whether the Taser probes actually made contact with him, but for the purposes of appeal that point is conceded). The individual ultimately died after this interaction with the police. It turns out that he was on methamphetamine and had an enlarged heart, both of which were found to be the likely causes of his death, though the cause of death is largely irrelevant for the purposes of summary judgment and qualified immunity.

The court claimed the disputes as to how busy the road was at that time (8 pm on a weekday) and whether the Taser probe actually made contact with the deceased precluded the court's ability to grant qualified immunity. The court simply noted "with disputed facts as to the use of force in this case, summary judgment is inappropriate." On the second question in the qualified immunity analysis, i.e., whether the law was clearly established, the court held that that question also turned on disputed facts; specifically, the effectiveness of the Taser and whether the deceased posed a threat to the officers or others (presumably based on how busy the street was) precluded the officers from receiving qualified immunity. Citing to the Ninth Circuit case *Ortega v. San Diego Police Dept.*, 669 Fed. Appx. 922, 923 (9th Cir. 2016), the court concluded that "police officers are not entitled to summary judgment on the basis of qualified immunity when there are disputes of fact that could lead a jury to find in favor of the plaintiff." Notably, the court even refused to find that the officers' use of pepper spray was reasonable or that they were entitled to qualified immunity for their use of the pepper spray.

But that begs the question: what were the officers supposed to do in

this situation? The individual was putting his life and the life of motorists traveling on a six-lane highway (regardless of how busy it was at that time) at risk by refusing to get out of the middle of the road. The officers tried verbal commands and pepper spraying him to no avail (which according to the court was at least arguably unconstitutional). They next deployed intermediate force, the use of the Taser. And this is where the court makes a fundamental error. Yes, the parties disputed whether the Taser made contact with the individual, but so what? Even if you take the facts in the light most favorable to the deceased, as you must on a motion for summary judgment, it is hard to imagine what else these officers could have done under the circumstances short of throwing their hands up in the air and abandoning their duty to protect the public. It is therefore hard to believe that their conduct violated this individual's Fourth Amendment rights or that if it did, the law was clearly established at the time such that every reasonable officer in their position would have known they could not have deployed the Taser. In fact, the district court noted that the cases the plaintiffs relied on in the Taser context are distinguishable from the current case and "do not assist" them when discussing whether the law was clearly established, but nonetheless declared that the material disputes of fact precluded the entry of summary judgment.

Estate of Lopez v. Gelhaus

Estate of Lopez involved a tragic set of facts that likely swayed the judges' sympathies in this decision. Specifically, the officers saw an individual, whom they believed was an older teen, walking down the street in the afternoon with what appeared to be an AK-47 assault-rifle. The officers drove toward the teen and flipped on the car's emergency lights, "chirped" the siren, and parked about 40 feet from the teen.

One of the officers got out of the vehicle and drew his pistol and positioned himself in the V of his open door and knelt on the ground for cover. He yelled loudly at the teen, who had continued walking and was now about 60 feet away, "Drop the gun!" The parties do not dispute that the teen did not drop the gun, and instead started to rotate his body toward the officers while continuing to hold the weapon. As the gun began to rise (just how much it was rising is disputed, but the district court did find it was "beginning to rise"), the officers shot and killed him. It turns out he was just a 13-year-old boy with a toy gun that had the orange tip removed, so the officers could not have determined that it was a fake from their vantage point.

The district court denied the officers' qualified immunity. Noting that it grants summary judgment "sparingly" in excessive force cases, particularly where the "only witness other than the officers was killed during the encounter," a divided panel for the Ninth Circuit upheld the denial of qualified immunity. In so holding, the Ninth Circuit relied on a number of immaterial facts in coming to the conclusion that the teen was not an immediate threat to the officers' safety and therefore under the *Graham* factors, qualified immunity was inappropriate. These factual disputes included: 1) whether the teen looked over his shoulder when the officers "chirped" the police siren; 2) how many times Gelhaus, one of the officers, shouted to drop the gun (the court accepted there was at least one shout); 3) which hand the teen was holding the gun in; and 4) the movement of the teen's gun. On this last point, the Ninth Circuit noted that it must accept the facts the district court assumed in denying summary judgment, and here the district court had made an express factual finding that "the rifle barrel was beginning to rise; and given that it started in a position where it was pointed down at the ground, it could have been raised to a slightly-higher level without posing any threat to the officers."

The majority also strangely discusses a witness' earlier observation of the teen and the belief of this particular witness (who did not see the interaction with the police) that the gun the teen was holding looked "fake" and that it was probably a BB gun. The dissent points out that the majority likely discussed this witness so as to attempt to create a genuine dispute of material fact. But as the dissent properly notes, this witness' "perception was based largely on facts and circumstances unique to him...so it should play no part in the analysis."

The dissent sums up the problem with the majority's opinion as follows: "The majority opinion exhaustively recounts the facts of the case, but for me, they are largely irrelevant. One critical fact—the upward motion of the fake gun—resolves the qualified immunity issue in [the officer's] favor. ...I agree with the majority, therefore, that the precise angle at which [the teen] pointed the gun is a disputed fact, but as I explain below, that is not material to the qualified immunity analysis."

The dissent goes on to explain that the majority incorrectly characterized the situation as the teen merely standing on the sidewalk holding a gun that was pointed down on the ground, which is qualitatively different than what the undisputed facts showed – i.e., the gun was rising. Finally, the dissent criticizes the majority for creating a "novel rule—that we must accept as true all facts not conclusively disproved by evidence in the record even if those facts have no evidentiary support of their own—"and notes that such a rule "is plainly wrong."

While the facts of *Silva* and *Estate of Lopez* are quite distinct, what they have in common is that both courts went to great lengths to find disputed facts and regardless of their materiality, they used those facts to deny summary judgment and qualified immunity to the officers in these cases. This results in an erosion of the policy rationales behind qualified immunity – specifically, that it is immunity from suit, not immunity from damages. Officers who

Continued on next page

are entitled to the defense should have their cases dismissed at the earliest possible time. Moreover, these types of cases undermine officer safety, as police officers will be less likely to defend themselves or others from valid threats when they are worried about crippling litigation down the line.

Until the Supreme Court weighs in on this precise issue, the trend of conflating the qualified immunity and summary judgment standards is likely to continue, at least in some circuits.

Other Current 1983 Cases

In addition to the foregoing cases, IMLA has submitted (or will shortly submit) amicus briefs in a number of other pending Section 1983 litigations, including a Supreme Court merits case and two Supreme Court petition stage cases. *City of Hays v. Vogt*, a Supreme Court merits case, involves the question of whether a "compelled" statement that is used at a probable cause hearing (as opposed to at a criminal trial) violates a person's Fifth Amendment rights, thereby allowing the person to sue a local government under Section 1983. This case has important implications for municipalities both in terms of law enforcement liability and liability for local governments and their officials in the employment context. As of this writing, oral argument has not been scheduled for *City of Hays*, but the case will be heard this term.

IMLA filed an amicus brief in support of the City of Phoenix and one of its police officers in *Hanlon v. Atencio*, a Supreme Court petition stage case. This case involved the question of the continued vitality of the Ninth Circuit's integral participation rule, which holds officials vicariously liable for arguably unforeseeable acts of excessive force by other defendants. In their petition for certiorari, the officers argued that the integral participant doctrine "allows an end run around the prohibition against vicarious § 1983 liability, substitutes 'but-for' causation for proximate causation, and undermines the purpose of qualified immunity." The Court denied certiorari in this case in mid-October, but this is an issue that is sure to make its way back to the Court in the near future.

IMLA also filed an amicus brief in another Supreme Court petition stage Section 1983 case, *Park v. Thompson*. *Park* involves the question of whether a §1983 claim exists for an alleged violation of compulsory process / fair trial where a person is acquitted at trial, claims no damages for malicious prosecution or incarceration, but rather for "emotional distress" because her defense was impeded by alleged unconstitutional acts of the police. This case presents a host of practical issues for local governments. For instance, how are damages calculated if someone is acquitted, but nonetheless claims that one avenue of defense was denied to her? Someone may believe that a particular witness would be uniquely beneficial at trial, but how does she know? The witness may in fact be someone who testifies poorly.

It is also impossible to say how much of a person's emotional distress was derived from her inability to present certain evidence or testimony as opposed to the emotional distress involved in defending oneself in a criminal case to begin with. The damages the plaintiff sought in the *Park* case underscores these practical issues as she was out on bail pending trial and was acquitted so her only avenue of damages was emotional distress, claiming the jury would have returned a verdict in her favor sooner than it actually did. As the foregoing demonstrates, allowing these claims to go forward leaves too much room for speculation and conjecture and summary judgment would be almost impossible.

If you need help with amicus assistance or would like more information about IMLA's legal advocacy program, contact Amanda Kellar at akellar@imla.org. ML

IN MEMORIAM





Cameron Robinson

IMLA remembers Cameron Robinson, a 28-year old staff member at the Las Vegas Law Department, who was among the 58 victims of the senseless carnage in that city on October 1. We were fortunate to meet Cameron as a host committee volunteer at our 80th Annual Conference in 2015. IMLA joins Las Vegas City Attorney Brad Jerbic and his colleagues in honoring Cameron's memory.



Tasers under Scrutiny

By: IMLA Editorial Board

Excessive Force: Summary Judgment Reversed where Officer Repeatedly Applied Taser without Allowing Plaintiff Time to Comply

***Smith v. City of Troy*, No. 16-4719 (6th Cir. Nov. 1, 2017).**

Reversing the lower court in part, the Sixth Circuit has found that knocking an epileptic man to the ground and tasing him for 48 seconds without allowing him an opportunity to comply is not protected by qualified immunity.

Victor Smith (Smith), an epileptic, began experiencing a seizure in February 2014 while driving in Troy, Ohio (City). He steered his car into a yard, exited, and walked a few houses away. A neighbor called the police. Deputy Sheriff Phillip Osting (Osting) arrived to find Smith grasping a waist-high chain-link fence, swaying back and forth; his pants were down around his knees, revealing his white longjohns, and he was yelling out, "Baby." Smith did not respond when Osting asked him to return to his car, and Osting thought Smith was under the influence of drugs or intoxicants. Osting tried to peel Smith's fingers from the fence, but Smith pulled his arm away. Osting then delivered a leg sweep, knocking Smith to the ground, face down.

As Osting was wrestling to secure Osting's arms behind his back, Officer Scott Gates (Gates) arrived on the scene. Gates drew his taser and ordered Smith to comply, but Smith merely looked blankly and did cooperate. Gates applied his taser to Smith's upper-back and lower-neck area. By then, two other officers arrived and succeeded in controlling Smith. The data recorder on Gates's taser showed that he had deployed it eight times, for a total of 48 seconds, during an encounter with Smith that lasted less than two minutes. None of the officers informed Smith that he was under arrest.

Smith filed a complaint under the ADA and § 1983 against the City, Miami County, Osting, Gates and the other officers. He claimed that the individuals violated his Fourth Amendment rights by using excessive force against him and by failing to intervene to protect him against the excessive force employed by the other officers. Smith claimed that the City and Miami County were responsible for their respective officers' allegedly unconstitutional conduct under theories of ratification, negligent hiring and retention, and failure to train, and that they failed to educate their officers properly on confronting and attending to persons with disabilities, in violation of Title II of the ADA. Finally, Smith asserted state-law claims against the defendants for assault and battery and for intentional infliction of emotional distress.

The district court granted summary judgment to the defendants on Smith's federal civil rights claims, concluding that the officers used measured force in response to Smith's defiance of their orders and reaching where the officers could not see his hands. The court concluded further that even if the individual officers did use excessive force, they were entitled to qualified immunity under the facts of the case. The court also held that the municipal defendants could not be liable under § 1983 because Smith did not produce evidence of a pattern of constitutional violations by their law enforcement officers, and it granted the defendants summary judgment on Smith's ADA claim because officers had acted due to his disability. Smith's state-law claims were dismissed without prejudice.

The Sixth Circuit viewed the case differently. It concluded that Osting violated Smith's right to be free from excessive force when he took Smith to the ground with a leg sweep and landed on top of him; there was little in the record to suggest that Smith had committed even a minor crime. In his incident report, Osting conceded that Smith was holding the fence to maintain his balance; Osting did not state, either in his report or in his deposition testimony, that he believed Smith presented a safety threat. Viewing the record in the light most favorable to Smith, a reasonable officer in Osting's position would have known that he would violate Smith's right to be free from excessive force by using a leg sweep to force him to the ground. Osting was not entitled to qualified immunity for this use of force.

Osting was also not entitled to qualified immunity for his actions in attempting to handcuff Smith, given the absence of an offense.

However, Osting was not liable for failing to intervene in the tasing. A plaintiff making such a claim must prove that the officer observed or had reason to know that excessive force was being used by another and that the officer had the opportunity and the means to prevent the harm from occurring. Here, Osting was occupied trying to gain control of Smith's arms while Gates deployed the taser; therefore, no reasonable juror could find that Osting had the opportunity and the means to prevent Gates from tasing Smith excessively.

Gates was also found susceptible to suit. Although he arrived after Osting had already taken Smith down, so could not have prevented Osting's initial use of force against Smith--and was justified in initially tasing Smith because Smith appeared to be resisting being handcuffed--Gates did not allow Smith time to comply with his requests before tasing him for a total of 48 seconds in less than two minutes. Viewing the record in the light most favorable to Smith, the Circuit found that such repeated deployment of the taser on Smith was unreasonable, and Gates was not entitled to qualified immunity on that issue.

Because the remaining officers arrived late in the action and were occupied trying to control Smith's legs, they had no reasonable opportunity to stop Gates from deploying his taser; therefore the district court correctly granted them summary judgment.

The Circuit upheld the lower court's denial of municipal liability. Smith's failure-to-

train theory failed because he did not show that the municipal defendants "ignored a history of abuse and [were] clearly on notice that [their] training [in the deployment of tasers and the proper use of force] was deficient and likely to cause injury." He could not identify a pattern of inadequately investigating excessive force claims or toleration of excessive force by municipal officers, nor could he demonstrate negligence in the hiring and retaining of those officers.

Smith's ADA claims failed because he had not shown that the defendants intentionally discriminated against him *because of* his disability. However, the court left open the possibility that pendent state law claims might require further examination, given the Circuit's reinstatement of a number of federal claims raised in Smith's complaint.

In sum, the Sixth Circuit reversed the grant of summary judgment to Osting on Smith's claims of excessive force regarding the leg sweep and forcible handcuffing and reversed summary judgment for Gates on Smith's claim that the officer excessively deployed his taser.

http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0247p-06.pdf

Pleadings: Parents of Unarmed, Non-resisting Decedent Tased for 90 Seconds May Substitute Proper Party and Proceed with Excessive Force Claim

***Jones v. Las Vegas Metropolitan Police Department,* No. 14-17388 (9th Cir. Oct. 20, 2017).**

Reversing the lower court, Judge Kozinski and a Ninth Circuit panel have held that parents of a Las Vegas driver who died after being tased for 90 seconds should be allowed to substitute a correct party plaintiff and to assert Fourth Amendment claims, given that such action toward an unarmed, non-resistant arrestee was clearly improper under then-existing precedent.

In December 2010, a lone Las Vegas Metropolitan Police Department (LVMPD) officer pulled over Anthony Jones (Jones) for a routine traffic stop. Jones exited his vehicle as ordered but when the officer drew his weapon due to Jones' much larger size, Jones ran away.

The officer called for backup and caught up with Jones. Believing that Jones did not have a weapon, the officer avoided use of deadly force, instead using his taser to subdue the larger man, who fell to the ground. The officer knelt on Jones' back, keeping his taser pressed to Jones's thigh and repeatedly pulling the trigger. The officer continued to tase Jones for 90 seconds, even after four backup officers arrived and handcuffed Jones. For ten seconds, another officer simultaneously applied a taser to Jones' upper back.

Once the officers stopped tasing Jones, his body went limp and he was nonresponsive. The officers tried and failed to resuscitate him but he was pronounced dead shortly thereafter. The coroner's report concluded that "police restraining procedures"—including the tasings—contributed to his death.

Jones's parents sued the LVMPD and the officers involved, alleging Fourth and Fourteenth Amendment violations as well as various state law torts. The district court granted summary judgment for defendants on all claims, determining that plaintiffs failed to assert their Fourth Amendment claims as executor or administrator of Jones's estate, as required by the Nevada survival statute, and thus lacked standing. On appeal, the plaintiffs dropped their *Monnell* claims and proceeded solely against the two officers who had applied their tasers.

The Ninth Circuit panel affirmed in part and reversed in part. It held that under the wording of Fed. R. Civ. P. 17 and Circuit precedent, the lower court had abused its discretion by failing to give plaintiffs a reasonable opportunity cure their defective complaint by substituting a proper party. Although Fourth Amendment claims are "personal" and may not be "vicariously asserted," Section 1983 actions may be brought by "the survivors of an individual killed as a result of an officer's excessive use of force," provided state law authorizes a survival action. Nevada law authorized such action by the "executor or administrator" of a decedent's estate. Admittedly, Plaintiffs had not made such an assertion; however, courts "may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action."

Plaintiffs' mistake was "reasonable" and "honest" under the circumstances and the public interest in having cases heard on their merits required reversal of the lower court on this issue.

The panel held that whether the officers were reasonable in the degree of force used was a triable question of fact; evidence presented at summary judgment would support a finding that the officers' continuous and overlapping use of tasers for more than 90 seconds was unreasonable, and a jury could reasonably conclude that the officers knew or should have known that they were creating a substantial risk of serious injury or death. The Circuit found that any reasonable officer would have known that such lengthy and simultaneous tasings could only be justified by an immediate risk of serious injury or death to officers or the public. Such force generally cannot be used on a prone suspect who is not suspected of a violent crime, has no weapon, is not resisting and is surrounded by officers. Because there was clearly established Fourth Amendment precedent on the issue, and a jury could reasonably conclude that the officers used excessive force, the question of qualified immunity must proceed to trial.

Summary judgment denying plaintiffs' Fourteenth Amendment claims was affirmed.

DISSENT: Concurring in part and dissenting in part, Judge N.R. Smith would have affirmed the district court's decision to dismiss the Fourth Amendment claims pursuant to Fed. R. Civ. P. 17. He did not find that the district court abused its discretion in dismissing plaintiffs' Fourth Amendment claims because they failed to name the proper party in interest.

http://cdn.ca9.uscourts.gov/datastore/opinions/2017/10/20/14-17388.pdf

Qualified Immunity: Tasing is Justified Against Knife-Wielder in Close Quarters and is Not "Provocation"

***Frederick v. Motsinger,* No. 16-3523 (8th Cir. Oct. 17, 2017).**

Where officers initially attempted tasing a woman who was brandishing a knife–after which the woman tried attacking the officers, who then shot and killed her–the tasing could not be characterized as a provocation which improperly amplified the confrontation, particularly given the Court's recent *Mendez* ruling.

Officers from the Rogers, Arkansas Police Department were called to a local convenience store in August 2011. They confronted Fallon Frederick (Frederick) holding a four-inch knife, acting erratically, speaking incoherently, and pacing by the restroom. After Frederick failed to comply with repeated

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Landslides, Marijuana, Hazardous Sidewalks and More

By: Monica Ciriello, Ontario 2015

City Looking to Win by a Landslide

Clark v Moose Jaw (City), 2017 SKQB 283 (CanLII) http://canlii.ca/t/h6fsm

The Applicants, homeowners who reside in Moose Jaw Saskatchewan (City) received correspondence from the City in May 2017 to vacate and demolish their residences by July 31, 2017. The City sent this request because the Applicants' homes were in an area that was prone to landslide or "slumping," which the City defined as "a condition when valley sides fall or slide down, and is a natural geological process that happens over time due to weak layers in the soil, impacted by moisture, erosion, freeze/thaw cycles and loads on land." The City followed up with an Order to Comply. The Applicants appealed to the Building and Accessibility Standards Appeal Board. The Board dismissed the City's requirement for the Applicants to vacate and demolish their residences, from the fixed date of July 31, 2017 to a flexible requirement at the owner's earliest convenience. The Board found that the City erred in the review of a geotechnical report. The Applicants sought a preservation order for their residence in the form of an injunction.

HELD: Adjourned.

DISCUSSION: In light of the Applicant's request for an injunction, the Court highlighted that it must consider whether the Applicants or visitors of the Applicants' residences were in imminent danger as suggested by the City. The Court outlined the test for an injunction as stated in the Supreme Court of Canada decision *RJR- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC). The onus is on the movant to establish: a serious question to be tried; the suffering of irreparable harm if the injunction is not granted; and the balance of convenience favours the granting of the injunction.

Not disputing the underlying injunctive injunctive test, it was appropriate to apply the test to the matter at issue, given that it was a safety risk, not just a monetary issue. Relying on *Willis v. O'Reilly* (1986), 1986 CanLII 3391 (SK QB) which states "if irreparable harm to the public would ensue from the granting of an injunction then there ought to be no injunction in the face of such danger." The Court held that it could not make an injunctive order, based on the lack of evidence before it. The Court stated that there may not be a sense of urgency as described by the City and so adjourning the decision to allow both the Applicants and the City to obtain further evidence of the actual risk of harm to the occupants and homes was required. The Court left it up to the Applicants to stay or leave until the matter was to be heard on October 10, 2017, but the City could not evict the Applicants.

Regulating These Joints: Zoning and Marijuana Dispensaries in Toronto

Toronto (City) v. Lanova Outsourcing Corp., 2017 ONSC 5743 http://canlii.ca/t/h6mhv

The City of Toronto (City) filed an application seeking an injunction to prohibit the operation of seven marijuana dispensaries in the City. The City argued that the marijuana dispensary storefronts were operating in contravention to the City's Zoning Bylaw. The dispensary operators (Operators) filed an application alleging that the Zoning Bylaw, the *Controlled Drug and Substances Act* (*CDSA*), S.C. 1996 c.19, and the *Access to Cannabis for Medical Purposes Regulations* (*ACMPR*), SOR/2016-230 was unconstitutional as the legislation violated the *Canadian Charter of Rights and Freedoms* and the *Constitution Act, 1982*, by not providing reasonable access to medical marijuana for patients that require it. In the interim, both parties brought a motion for an interlocutory injunction to prohibit the other party from their actions until the application is decided in December, 2018.

HELD: Interlocutory injunction granted in favour of the City.

DISCUSSION: In applying the three-prong test for interlocutory injunction set out in *RJR MacDonald (Attorney General)*, 1994 CanLII 117 (SCC), the Court looked to the moving parties to prove: a serious question to be tried; the suffering of irreparable harm if the injunction is not granted; and the balance of convenience favours the granting of the injunction. Both parties agreed that the first prong was met and this was a serious and unique question to be tried. Turning to the second prong, *RJR-MacDonald* has created a caveat for public authorities, allowing for a lower threshold than that required of a private application to establish irreparable harm. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. The City argued that the Zoning Bylaw was enacted to promote and protect the public in the City, and the City was draining considerable resources as a direct result of the Operators' business in order to fulfill its protection obligation to the public. The Court agreed with the City, and determined the second prong was met.

The crux of the matter fell to the third prong and required the Court to determine where the balance of convenience fell. The City began by relying on *RJR- MacDonald* and *Harper v. Canada (Attorney General)*, 2000 SCC 57, and argued that the Operators had a high burden of proof to meet as there is a presumption that when a law is enacted it is to serve a public good. The City

together with the Attorney General argued that current laws provide safeguards and controls to protect patients and the public. The City claimed Operators were putting the public at risk as their products were being sold without adequate labelling, created without regulatory oversight, not inspected and are too easily accessible for minors. Furthermore, the City presented data which linked an increase in the incidence of armed robberies at dispensaries putting employees, customers and the public at risk. In an attempt to rebut the presumption that the legislation promoted the public interest, the Operators unsuccessfully relied on *Allard v. Canada,* 2016 FC 236 (CanLII) which discussed storefront marijuana stores providing reasonable access to medical marijuana. The Court found this argument unconvincing and not applicable to the current issue, and held that the City successfully met the test for the interlocutory injunction.

Planning for Marijuana Production: Temporary Use Bylaw Approved

Hurley v Brock (Township), 2017 CanLII 68089 (ON OMB) http://canlii.ca/t/h6p2f

The Applicant, a corporation, applied to the Township of Brock (Township) for a temporary use bylaw. The temporary bylaw would amend the Township Zoning Bylaw to allow the establishment of a medical marijuana production facility on four separate properties in the Township. There would be no retail facility on site, and all products would be shipped from the site by a secure courier. The Applicant intended on using the existing industrial buildings temporarily until it could locate a larger facility in the area. The Township approved the temporary use bylaw. The Appellant, a resident in the Township, appealed the Township's decision. The Appellant alleged concerns regarding consistency between the temporary use bylaw and the Regional and Township Official Plans.

HELD: Appellant no longer opposed Township's decision.

DISCUSSION: The Township Board framed the issue and outlined the relevant portions of the *Planning Act (Act)*, particularly section 24(1) which requires a temporary use bylaw to comply with the Official Plan as well as section 39 that permits a temporary use bylaw for a period of only three years. The Appellant relied on the testimony of Mr. Wellings, a planner retained by the Township to provide the recommendation report to deny the temporary use bylaw from the Applicants application. Wellings expressed concerns about the compatibility of the application with the surrounding area, and the lack of compliance with the Ministry of Environment and Climate Change (MOECC) guidelines. Two other planners were retained on behalf of the Applicant and the Township, each opposing the current appeal. Both testified that the proposed facility met the requirements of the MOECC guidelines, the Greenbelt Plan, that the proposal was compatible with both the Regional Official Plan and the Township Official Plan, and the facility would be utilizing underused land. Prior to the conclusion of the hearing, the Appellant indicated that his concerns were resolved and he no longer opposed the Township's decision to approve the temporary use bylaw.

Despite this the Board still had to still ensure that the temporary bylaw complied with the *Act*. The Board held that the potential impacts of the application were addressed and the proposal was consistent and complied with all relevant policies. The Board permitted the temporary use bylaw for a period of three years.

Bylaw Hierarchy: The Impact of Direct Cross Reference

McCann v Edmonton (City), 2017 ABCA 323 (CanLII) http://canlii.ca/t/h6jw6

The City of Edmonton (City) received an application that proposed converting a single detached home to a child care service. Upon review of the City's current Zoning Bylaw, a development officer granted a variance for on-site drop off spaces and issued the development permit to the corporation. The Appellants, neighbours of the proposed child care service, appealed the issuance of the permit to the City's Subdivision and Development Appeal Board (Board). They alleged that despite the Zoning Bylaw currently being in effect, the development officer should have applied the Land Use Bylaw. The appeal was dismissed, and Appellants received leave to appeal.

HELD: Appeal dismissed.

DISCUSSION: The question before the Court was whether the Board and/or the development officer erred in applying the City's current Zoning Bylaw rather than the Land Use Bylaw when issuing the permit, and if so, whether it had any effect on the issuance of the development permit. The Zoning Bylaw contained a transitional provision to deal with any statements that made direct reference to the Land Use Bylaw: to stay true to the original intent, the Land Use Bylaw would apply. In comparing the Zoning Bylaw and the Land Use Bylaw in the context of child care services in single detached homes, the variations were minimal and were simply around parking requirements.

The Court had previously ruled on the application of the transitional provision in *Parkdale-Cromdale Community League Association v. Edmonton (City)* 2007 ABCA 309 (CanLII) and *Cameron Corporation v. Edmonton (Subdivision and Development Appeal Board)*, 2012 ABCA 254 (CanLII) holding that if there is a direct express cross reference to the old Land Use Bylaw, then the provisions of the Land Use Bylaw would apply. Absent any explicit cross reference, the Zoning Bylaw would apply. In the current appeal, the child care service or parking requirements do not have any express cross reference to the Land Use Bylaw. The Court found the references to be generic and thereby directly transferable to the Zoning Bylaw. Therefore, the Court held that neither the development officer nor the Board erred in applying the Zoning Bylaw. In addition, the Court stated had the development officer were to apply the provisions in the Land Use Bylaw, the development permit would have still been permitted.

Municipal Snow Removal and Winter Footwear: Enough Negligence to Share

Costerus v. Kitchener (City), 2017 ONSC 6030 (CanLII) http://canlii.ca/t/hmr0f

In late January 2010, the Plaintiff sustained injuries after she slipped and fell on a City of Kitchener (City) sidewalk. The question before the Court was whether the City was grossly negligent in failing to meet its obligations as outlined in section 44 of the *Municipal Act*, 2001 (*Act*), and whether the Plaintiff was contributorily negligent

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CD's. She also took his glasses off and stomped on them. Next, the young man patted Lucas down, took other things from his pockets, and asked "if [he] had anything else on [him]."

"[A]fter they took everything," the woman held "a sharp[,] pointy object" up to the side of Lucas's neck, touching him, and told him not to involve the police. She said that if he did, she knew where he lived. Defendant laughed. The two then walked off together. When Lucas got home, he called the police.

The court held that there was sufficient evidence of an assault with a deadly weapon. In particular, the court noted the pencil qualified as a deadly weapon because the woman did not threaten to break it or write a note with it but, instead threatened to stab Lucas in the neck with it. The court added that, while the accomplice was threatening the victim, defendant went through his pockets; therefore, the jury could have reasonably found that the accomplice continued to hold the pencil to the victim's neck as a present conditional threat, so that defendant could accomplish the robbery.

People v Molnar, 234 A.D.2d 988 (N.Y. App. Div. 4th Dep't 1996).

New York has also weighed in on this important issue. In *Molnar*, a pen constituted a dangerous instrument under CLS Penal § 120.05(2) where the defendant used it in menacing manner and tried to stab police officer with one.[6]

The Dog: *People v. Kay*, 328 N.W.2d 424, 424, 121 Mich. App. 438, 439, 1982 Mich. App. LEXIS 3666, *1;

Defendant commanded his German shepherd to attack a store employee that had accused defendant of larceny. On appeal, defendant argued that because only inanimate objects had been found to be dangerous weapons in Michigan, a dog could not fit that category under Mich. Comp. Laws § 750.82. This happened to be an issue of first impression before the court. The court affirmed the conviction and rejected defendant's claim that § 750.82 per se excluded animate objects from being a dangerous weapon. The test was whether the instrumentality was used as a weapon and, when so employed in an assault, whether it was dangerous. The legal character of a "dangerous weapon" attached by adoption when the instrumentality was applied against another in furtherance of an assault. In other words, the court reasoned, because the dog had been trained to attack people, it could be considered a dangerous weapon.

People v Garraway, 187 A.D.2d 761 (N.Y. App. Div. 3d Dep't 1992).

Meanwhile, in New York. a pit bull terrier weighing 65 to 75 pounds was also found by a court to constitute a "dangerous instrument," this time within meaning of CLS Penal § 10.00(13). Defendant was holding his leashed but agitated animal when police, in response to complaint, came to ask defendant to turn down the music in his apartment. As the officers backed away from the threatening animal, they drew their service revolvers and pointed them at dog, whereupon defendant stated "It will take you at least six of those to stop him."[7]

So much for a "bullet proof" defense. . .

The Snake: *State v. Roullier*, 977 P2d 970 (MT. 1999).

In September 1996, Officer John Stevens of the Polson, Montana Police Department responded to a domestic disturbance report. Defendant Michael Roullier had broken a window and an aquarium during a dispute with his girlfriend, and then left the apartment prior to Stevens' arrival. Stevens noted the damage, and in the process also noticed a number of snake cages to which were attached "Caution: Venomous snake" warnings. No charges were filed at that time.

A short time after Stevens left, Roullier returned to the apartment, where he broke a door and appeared very upset; his girlfriend testified that she thought he was suicidal. Roullier grabbed a snake from a cage and left the apartment, at which point the girlfriend again called the police. Stevens and his partner, Officer Tina Schlalie, returned to the apartment building and chased Roullier back inside. .

The officers found Roullier holding the snake, with one hand on the reptile's head. Stevens, who was approximately six feet away from Roullier, told him to put the snake down, but Roullier refused. Roullier told the officers to get out of his way because he wanted to leave the apartment. He advanced toward the officers while motioning with the snake's head, telling them "if this snake bites you, you're dead." The officers backed up, but refused to let Roullier leave.

Schlalie prepared to hit the snake's head with her baton, but the defendant drew the reptile close to his body. Stevens then threatened to use his pepper spray, whereupon Roullier yelled, "If you spray me, then I will let it bite me and I will be dead." He continued to hold the snake's head to his arm as if he was going to let it bite him, while the officers repeated their requests that he put the snake down. Roullier eventually relented and was handcuffed by the officers. He told them how to handle the snake and how to return it to its cage; the officers later learned that the animal was a Rhinoceros Viper, an extremely toxic African species.

Roullier was convicted of felony assault, and the district court ordered him to serve an additional, consecutive two-year sentence for using a dangerous weapon under Mont. Code Ann. § 46-18-221(1).[8] The appellate court agreed that Roullier's behavior amounted to more than mere possession of a deadly weapon since, during his encounter with the officers, the defendant not only refused to put the snake down, but also moved towards the officers while warning them that the snake was venomous.

The Telephone: *State v. Lindsey*, 755 N.W.2d 752 (Minn. 2008).

Given the above examples of ordinary household items being used to induce blunt force trauma, it's no surprised that telephones also fall into this category. *Lindsay* is also useful, however, in that it stands for the proposition that you as an attorney are with the bounds of ethical and professional conduct to assert this in court—at least in Minnesota.

Ultimately in *Lindsey*, the court held that no prosecutorial misconduct had occurred as a result of the prosecutor arguing that the telephone was a deadly weapon within the meaning of Minn. Stat. 609.02 subd. 6(2004).

The Saliva: *State v. Price*, 834 N.E.2d 847, (Ohio Ct. App., 2005).

In April 2003, Tommy Price, an HIV and Hepatitis C positive hemophiliac, made numerous harassing and nonsensical phone calls to the police. Eventually two officers were dispatched to Price's home to investigate. During the course of the investigation, Price became agitated and swore at the officers. Eventually this exchange escalated, with Price spitting into the officer's mouth and biting one of the officers, causing abrasions.

At trial, Price was found guilty of felonious assault, attempted felonious assault, and assault of a peace officer and was sentenced to six years in prison. On appeal, he argued that his convictions for

felonious assault and attempted assault weren't supported by sufficient evidence. The court disagreed, affirming the trial court's ruling and holding that Price had been properly convicted given that he was afflicted with HIV and Hepatitis C and had spit on and bit an officer, knowing that his saliva was a deadly weapon capable of inflicting physical harm to another. His expectorant thus fulfilled the provisions of R.C. 2903.11(A)(2), "[n]o person shall knowingly cause or attempt to cause physical harm to another. . . by means of a deadly weapon. . . ."

The Body Parts: *State v. Kuperus*, 241 Ore. App. 605, 251 P.3d 235, 2011 Ore. App. LEXIS 396 (2011).

Note that in Oregon, teeth do not qualify as a deadly or dangerous weapon. Why? Because you can't "arm" yourself with your teeth... they are already in your mouth of course! The big question now is whether this analysis would also apply to dentures.

Conclusion

If it is not already apparent, courts often resist being bound by a concrete list of objects that may qualify as a "deadly weapon." As an example, California courts recognize that "[a]n instrumentality is a deadly weapon if it is capable of being used to inflict death or great bodily injury, and if its possessor intends to use it as a weapon should the circumstances require it," however, whether an object is a threat to others remains a question of fact that must be decided by a jury on a case-by-case basis.[9]

As this brief essay demonstrates, the consideration of what constitutes a deadly weapon, and under what circumstances, would seem to be excellent subject matter for presentation to enterprising law students around the country in their law school examinations.

Notes

1. Ohio R.C. 2923.11(A).
2. *Id.*
3. Fortney, 832 N.E. at 1268.
4. Faircloth, 2013 Tex. App. LEXIS 6513 *4.
5. *Id.*
6. 1996 N.Y. App. Div. LEXIS 13764 (N.Y. App. Div. 4th Dep't 1996).
7. 187 A.D.2d 761, 589 N.Y.S.2d 942, 1992 N.Y. App. Div. LEXIS 12678 (N.Y. App. Div. 3d Dep't 1992).
8. State v. Roullier, 1999 Mont. LEXIS 37, *1.
9. *Legal Censure of Unconventional Expressions of Love and Sexuality; Finding a Place in the Law for BDSM*, 28 Hastings Women's L.J. 25, 27 (2017). ML

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commands to drop the knife, an officer discharged a taser at Frederick, which she blocked with her purse and then followed up with charging the officers. At that point an officer shot and killed Frederick, prompting her estate to file suit alleging, among other things, excessive force Fourth Amendment claims under § 1983. The district court performed an analysis with the *Graham* factors and granted summary judgment to the police and associated municipality, leading the estate to appeal the dismissal. In focusing on the excessive force claim the estate argued the district court erred under the Ninth Circuit's "provocation rule," which holds that "[w]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." The Eighth Circuit noted first that during the pendency of this appeal the Supreme Court rejected the provocation rule in *Mendez*, deeming it fundamentally flawed because it "uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." The Supreme Court further clarified in *Mendez* that the "objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional." Applying these clarifications to the facts at hand, the Eighth Circuit found that it was objectively reasonable for an officer to use deadly force against an individual wielding a knife and charging another police officer.

The estate did not contest this, but instead argued the tasing was a distinct Fourth Amendment violation (from the latter deadly force applied), thus requiring the Circuit to follow Supreme Court guidance and assess this alleged violation of Frederick's Fourth Amendment rights independently. In doing so the Circuit found this non-lethal application of force was objectively reasonable as well because when it was applied the officers faced Frederick in a "small commercial space, in front of restrooms that might have been occupied, and brandishing a weapon that posed a danger to the officers and store customers." It affirmed the lower court.

http://media.ca8.uscourts.gov/opndir/17/10/163523P.pdf ML

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by choosing to wear running shoes despite observing the icy sidewalk conditions.

HELD: City is grossly negligent, and the Plaintiff is contributorily negligent.

DISCUSSION: The Court began by laying out the City's responsibility under section 44 to keep highways (which includes sidewalks) in a state of reasonable repair and highlighted section 44(9) which indicates that a City will not be liable for personal injury caused by snow or ice on the sidewalk unless the City is grossly negligent. To clarify the definition of grossly negligent, the Court looked to *Crinson v. City of Toronto* 2010 ONCA 44 that found that it does not require proof of misconduct that is willful, wanton or flagrant. The weather reports that were available to the City confirmed a significant wind chill which would contribute to the freezing of the precipitation in an overnight thaw-freeze cycle. In addition, upon further evidence it became clear that the City did not have a minimum winter maintenance standards policy which means there was no indicator which would determine when it was necessary for the snow removal operator to remove snow or ice from high pedestrian areas on sidewalks. Lastly, the Court accepted the evidence of the Plaintiff that there was significant ice and snow on the sidewalk.

The Court held that the plaintiff had established on a balance of probabilities that the City was grossly negligent in its failure to maintain its sidewalks at the time of the fall. The Court concluded that the City must have been aware of the weather reports and conditions and should have responded accordingly. Relying on past case law, the Court found this to be unreasonable; the Ontario Court of Appeal in *Dorschell v. Cambridge (City)* (1980) 1980 CanLII 1743 (ONCA) confirmed that the lack of a policy by a municipality or a policy of not taking any systematic or regular action to remedy snow or ice conditions was evidence of serious negligence. The Court further held that the Plaintiff's actions for choosing to wear running shoes, instead of winter boots despite observing the sidewalk conditions before she left her residence, constitute negligence and contributed to her injuries. The Court assessed the contributory negligence at 50%. ML

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