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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

JULY AUG 2018 Vol. 59 No. 04

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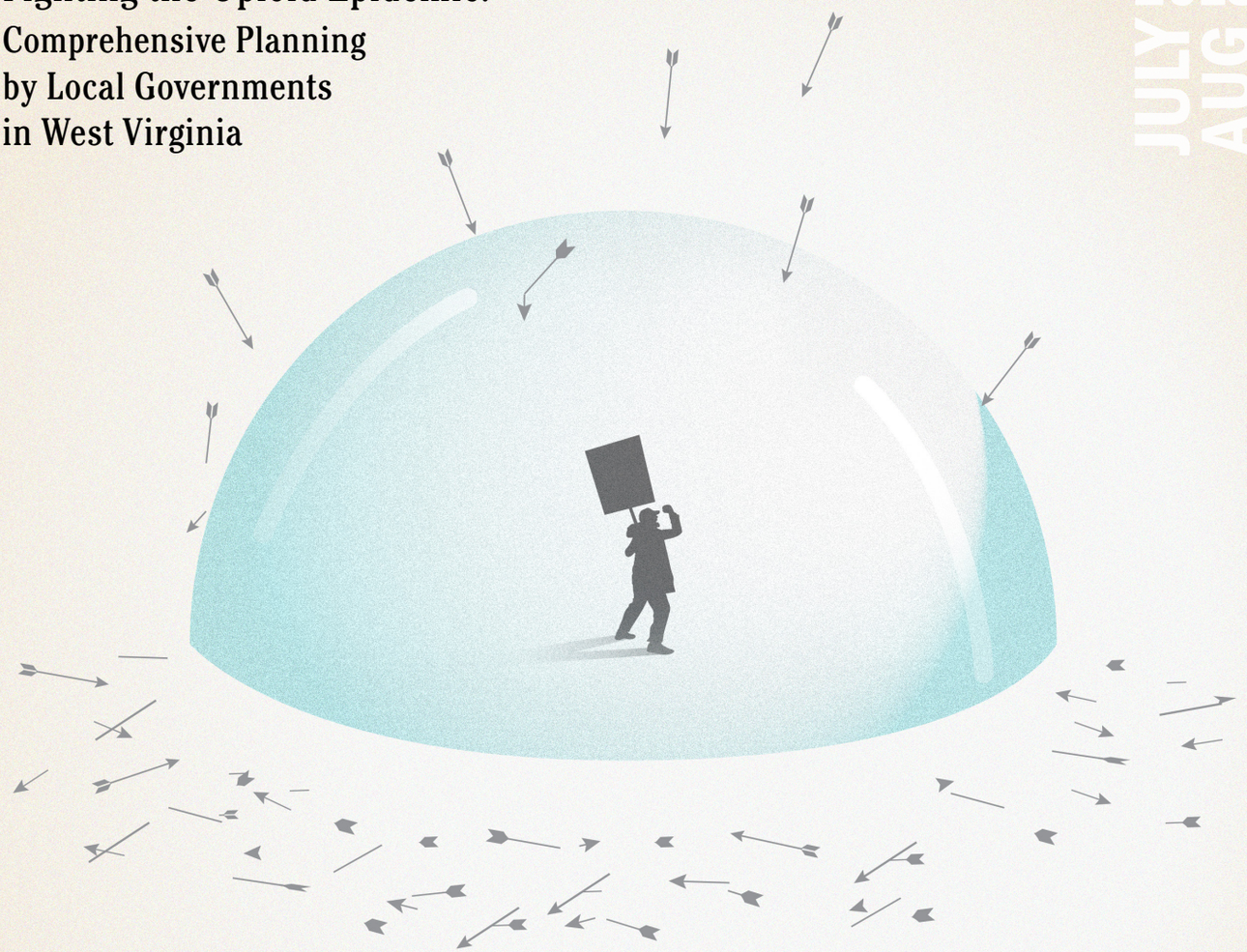
Fighting the Opioid Epidemic: Comprehensive Planning by Local Governments in West Virginia



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LEAD STORY

Unpopular Speech and the Heckler's Veto

By: Robert W. Higgason, Senior Assistant City Attorney, Houston, Texas

Academic institutions sometimes make headlines by disinviting speakers to avoid hostile listeners–but municipalities may also inadvertently squelch unpopular speech in more subtle ways.

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Fighting the Opioid Epidemic: Comprehensive Planning by Local Governments in West Virginia

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Happy Fourth. And First.*

As this digital edition of the July-August 2018 Municipal Lawyer goes to publication, Americans celebrate our two hundred and forty-second year together under one roof. It is a remarkable union, the envy of many similar partnerships around the globe, and well deserving of pyrotechnic recognition in night skies across the land. Like an old married couple, we are now well beyond seeking divorce; the benefits of remaining in our union far outweigh the detriments of breaking up. We are not moving out anytime soon.

But that doesn't mean we don't regularly fight, often loud enough for the neighbors to hear.

Many of our recurring arguments arise from a specific vow we made on the day we first joined hands: that we would allow one another to freely express our thoughts and practice our religious beliefs (it was implicit that this promise covered times of sickness and health). As with some of the other commitments we made in the glow of a new relationship, this one has generated more than its share of friction over our years together. Today it is as contentious as ever.

We keep saying to one another that we don't want to be told what to think or how to act. Unfortunately, as with many marital issues, this is somewhat of a zero-sum game. We can't both have exactly what we want--but we keep trying. After much squabbling, we have agreed (in an uneasy compromise certain to lead to more late-night yelling), that we won't subordinate our own private religious beliefs, sincere as they are, for the sanguinity of a more inclusive union. We have even exercised our right to remove from our environs a person whose political affiliation offends us—because we can.

As ML's lead article describes, we are now routinely preventing opposing thoughts from being voiced, drowning them out by speaking even louder—and sometimes threatening violence. In one way or the other, we have all been complicit. To be honest, we are tired of hearing messages that offend us, and would rather not even entertain one another's perspectives.

It's time for some serious counseling. On this Fourth of July, let's remember why we got together to begin with.

Best regards-
Erich Eiselt
IMLA Assistant General Counsel and Editor

*Yes, the title is intended to reference, in one literary flourish, America's most important Amendment and July 1—Canada Day. It goes without saying that we also celebrate the union of our most loyal and deeply-appreciated neighbor to the North. Happy Anniversary.

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Unpopular Speech and the Heckler's Veto

By Robert W. Higgason, Senior Assistant City Attorney, Houston, Texas



One of our fundamental values is freedom of speech, and the First Amendment protects us against the government abridging that freedom. But that leaves the door open for speech that is offensive or unpopular, perhaps harmful. Should we look for a way to restrict unpopular speech?

It has long been widely held that the solution to objectionable speech is not to have less speech, but to have more speech providing alternative perspectives on a subject. Almost a century ago, Justice Holmes acknowledged the principle of ideas competing in the market, which later came to be expressed as the "marketplace of ideas," in his dissenting opinion in *Abrams v. United States*:

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[1]

As municipal lawyers seeking to understand the parameters of constitutional constraints, we typically focus on case law that analyzes government action. Of course, the government is not the only actor that can inhibit speech; private actors can also restrict speech, but their restrictions do not violate constitutional protections.[2] This is more obviously so when those who would inhibit speech are acting as individuals or as a group of protestors. Nonetheless, such private action provides a stage upon which constitutional lessons may be taught.

Rather than participate in the marketplace of ideas, many create noise to drown out unwanted speech. Protestors may seek to silence someone else's speech and remove it from the marketplace, effectively destroying competing ideas. An objector's attempt to use this de facto power to cancel objectionable speech has become known as the "heckler's veto."

Some recent examples of attempts to silence unpopular speech

On its face, the idea of popularity or the lack thereof might seem to be statistically determinable, but it really depends on the universe being polled. Any discussion of "unpopular speech" requires a reference point; speech that is popular with some is unpopular with others, and vice versa.

In recent years, speakers have been subjected to protests by opponents who, at times, are highly vocal and disruptive. A few high-profile examples are briefly discussed below. (These do not directly implicate municipalities but they do illustrate the heckler's veto mechanism.)

Jim Webb declines to accept an award from his alma mater because of protests over his comments in a 38-year-old magazine article.

In March 2017, former U. S. Senator Jim Webb was to be honored by his alma mater, the U.S. Naval Academy, with the Distinguished Graduate Award. However, his selection for the award was met with protests, in response to which he declined to accept the award. In his words from a press release, the Academy's decision to honor him "has been protested by a small but vociferous group of women graduates based on a magazine article that I wrote 38 years ago."[3] In a 1979 article, he had written that women should not be in combat.[4]

Condoleezza Rice withdraws from Rutgers University commencement after protests.

Former Secretary of State Condoleezza had been invited to give the commencement address at Rutgers University on May 18, 2014. Some students and faculty members protested that choice because they did not agree with the Iraq war during the Bush administration. [5] The university did not rescind the invitation, but Ms. Rice decided to withdraw, releasing a statement that "'Commencement should be a time of joyous celebration for the graduates and their families. Rutgers' invitation to me to speak has become a distraction for the university community at this very special time.'" [6]

Rioters at UC Berkeley force cancellation of Milo Yiannopolous' speech.

On February 21, 2017, Milo Yiannopoulous was scheduled to speak at the University of California, Bekeley, as "the last stop of a tour aimed at defying what he calls an epidemic of political correctness on college campuses." [7] But, as reported by a San Francisco local news outlet, his speech did not take place. The protestors went well beyond shouting and engaged in violent conduct:

> As the gathered crowd [of protesters] got more agitated, masked "black bloc" activists began hurling projectiles including bricks, lit fireworks and rocks at the building and police.
>
> Some used police barriers as battering

rams to attack the doors of the venue, breaching at least one of the doors and entering the venue on the first floor.

In addition to fireworks being thrown up onto the second-floor balcony, fires were lit outside the venue, including one that engulfed a gas-powered portable floodlight.

The area on Upper Sproul Plaza grew thick with smoke, and later tear gas, as the protest intensified.

At about 6:20 p.m., UC campus police announced that the event had been cancelled. Officers ordered the crowd to disperse, calling it an unlawful assembly. [8]

From this report, it is unclear whether the event was cancelled by the university or by Yiannopolous, but it is clear the cancellation was forced by the violent actions of those who did not like his views. [9]

Just two months later, protestors again forced the cancellation of a speech at UC Berkeley. This time, the coercive act was not violence, but simply the threat of violence, as we see in the next example.

After threats of violence, UC Berkeley cancels Ann Coulter's speech.

Students who belonged to the Young America's Foundation (YAF) at the University of California, Berkeley, invited Ann Coulter to speak on April 27, 2017. However, because there were threats of violence, the university cancelled the event. The YAF sued, claiming that the school applies its "High-Profile Speaker Policy" unfairly in such a way that it "prevent[s] speakers with certain viewpoints." "The 'High-Profile Speaker Policy' required that events be held during normal class hours, in locations that were not convenient for the majority of Berkeley students. Groups were also subject to exorbitant security fees for certain students. The complaint also alleges that Berkeley offered to have Coulter speak during the 'dead week' between the end of classes and examinations where many students would be off campus and unable to attend." [12]

The University of Alabama imposes such high security fees that a Yiannopoulus speech is almost cancelled, but then drops the fee.

The College Republicans at the University of Alabama sponsored an appearance by Milo Yiannopolous on October 10, 2016. The initial estimate of security costs was $800 - $1,200, but after protests, the costs were increased to $4,600 - $4,800. The costs later rose to almost $7,000. After the College Republicans challenged the increased security, the university eliminated the fee entirely. [13]

Parade organizers cancel the annual Rose Festival Parade in Portland, Oregon in 2017 because of threats.

Since 2007, a coalition of local businesses and community organizations in Portland, Oregon, has held a Rose Festival Parade on 82nd Avenue to help improve the perception of that area of the city. What would have been the 11th annual parade, scheduled for Saturday, April 29, 2017, was cancelled following an anonymous email threat to disrupt the event because members of the Multnomah County Republican Party were to be marching in the parade's 67th spot. [14] To show the simplicity of effort that led to the cancellation of a parade, that email is copied in full below (bold print added): [15]

-----Original Message-----
From: thegiver@riseup.net [mailto:thegiver@riseup.net]
Sent: Saturday, April 22, 2017 7:29 PM
Subject: Don't make us shutdown the parade
Importance: High

Greetings,

Trump supporters and 3% militia are encouraging people to bring signs that bring hateful rhetoric to the parade and appears you allowed them to register and have a place in the march!

You have two options:

1. Let them march (Here is their event page
https://www.facebook.com/events/1863379970571888/)
2. Cancel their registration and ensure they do not march

If you choose option 1 then we will have **two hundred or more people rush into the parade into the middle and drag and push those people out** as we will not give one inch to **groups who espouse hatred toward lgbt, immigrants, people of color or others.** In case the message was not clear to you this is a sanctuary city and state and we will **not allow these people to spread their views** in East Portland. You have seen how much power we have downtown and that the **police cannot stop** us from shutting down roads so please consider your decision wisely. Let us know your decision by tuesday by emailing back. We will also wheatpaste fliers across the march route naming sponsors and holding them accountable for backing an event with this type of rhetoric which may endanger future parades ability to get sponsors. We will also begin emailing groups who are participating in the march to inform them you are allowing a group of bigots to march in the parade.

This is non-negotiable we already have two events setup ourselves and we will have enough people tools and tactics to shut down a parade in fact this is a walk in the park for us:

https://www.facebook.com/events/942770902532416/
https://www.facebook.com/events/1901987176708736/

We promise there will be **no harm to anyone but we will shut this down and prevent them from marching using non-violent passive blocking** of their movement.

Notice that the explicit threat is to use "two hundred or more [protesting] people" to "drag and push those [objectionable] people out." It is a threat to be taken seriously, despite the closing promise not to harm anyone. There might well have been two hundred or more protestors available and ready to carry out the threat, but the threat itself—even without any crowd of protestors behind it—was sufficient to achieve the goal. This was an extremely effective heckler's veto that came simply by way of an anonymous email.

Government involvement in suppressing protected speech

All the above incidents were either at public universities (USNA, Rutgers, UC Berkeley, Alabama) or on public streets (Portland). The venues were public, but for the most part the speech was not silenced by acts of public officials. Senator Webb and Secretary Rice voluntary withdrew following protests. The Portland

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parade organizers voluntarily (albeit reluctantly) cancelled the parade following threats. The University of Alabama took (public) action to raise the security fee, but upon challenge, dropped the fee altogether. In one of the remaining instances, the University of California, Berkeley, took (public) action to cancel the speech by Ann Coulter, while the other report is unclear about who cancelled the speech by Milo Yiannopolous.

None of those incidents appeared to involve municipalities, yet they illustrate some problems facing municipalities. Cities must exercise caution in responding to these situations or in passing regulatory ordinances: "When a government official is complicit in suppressing protected speech, it undermines the 1st Amendment by silencing the very political discourse the Amendment is meant to protect."[16]

Municipal involvement by police response

The term "heckler's veto" has been recognized in court opinions since at least 1966 in *Brown v. State of Louisiana*,[17] although the concept has deeper roots.[18] The 1951 case of *Feiner v. New York*,[19] for example, provides a helpful introduction to the framework for analyzing the heckler's veto, even though that term was not used.

Arresting the speaker

Irving Feiner was convicted of disorderly conduct arising from his 1949 open-air address in the City of Syracuse, New York. During that address, the "[t]he crowd was restless and there was some pushing, shoving and milling around."[20] Feiner "was speaking in a 'loud, high-pitched voice.' He gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights."[21] The Supreme Court described the crowd's response to the speaker, and the police response to the situation:

> The statements before such a mixed audience '**stirred up a little excitement.'** Some of the onlookers made remarks to the police about their inability to handle the crowd and **at least one threatened violence if the police did not act.** There were others who appeared to be favoring petitioner's arguments. Because of the feeling that existed in the crowd both for and against the speaker, **the officers finally 'stepped in to prevent it from resulting in a fight.'** One of the officers approached the petitioner, not for the purpose of arresting him, but to get him to break up the crowd. He asked petitioner to get down off the box, but the latter refused to accede to his request and continued talking. The officer waited for a minute and then **demanded that he cease talking.** Although the officer had thus twice requested petitioner to stop over the course of several minutes, petitioner not only ignored him but **continued talking. During all this time, the crowd was pressing closer around petitioner and the officer.** Finally, the officer told petitioner he was **under arrest** and ordered him to get down from the box, reaching up to grab him. Petitioner stepped down, announcing over the microphone that 'the law has arrived, and I suppose they will take over now.' In all, the officer had asked petitioner to get down off the box three times over a space of four or five minutes. Petitioner had been speaking for over a half hour.[22]

The Supreme Court affirmed Feiner's conviction, agreeing with the "trial judge[']s . . . conclusion that the police officers were justified in taking action to prevent a breach of the peace."[23] The majority opinion noted that Feiner "was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered."[24]

In the first of two dissenting opinions in *Feiner*, Justice Black begins by characterizing Feiner's speech as "unpopular" (a term that typically does not suggest a breach of the peace): "The record before us convinces me that petitioner, a young college student, has been sentenced to the penitentiary for the **unpopular views** he expressed on matters of public interest while lawfully making a street-corner speech in Syracuse, New York."[25] Justice Black went on to assert that the majority's opinion approves what later came to be called the heckler's veto: "Here petitioner was 'asked' then 'told' then 'commanded' to stop speaking, but a man making a lawful address is certainly not required to be silent merely because an officer directs it. . . . In my judgment, today's holding means that as a practical matter, **minority speakers can be silenced in any city.**"[26]

Silencing the speaker by threat of arrest

Police officers are sworn to protect the peace, and cities and states can prosecute offenders for breaches of the peace and disorderly conduct. While the arrest of the speaker passed Supreme Court muster in *Feiner* in 1951, each speaker's conduct and each official response must be evaluated on its own. And even the threat of an arrest can silence a speaker.

In Zachary, Louisiana, mid-November 2006, street preacher John T. Netherland positioned himself in a grassy public easement between the street and the parking lot of a restaurant, the Sidelines Grill, and he began:

> . . . quoting Biblical scripture in a loud voice, including I Corinthians 5:9, saying "Know ye not that the unrighteous shall not inherit the Kingdom of God? Neither fornicators, idolaters, adulterers, effeminate, abusers of themselves with mankind, covetous, thieves, revelers, none of these shall enter into the Kingdom of God." He states that he was speaking from a grassy public easement between the Sidelines parking lot and the road. The City claims that Netherland was standing in the parking lot yelling at Sidelines customers that they were fornicators and whores and they were condemned to Hell for going inside the establishment.
>
> The police were called and Netherland was eventually threatened with arrest if he did not stop. He left the scene and later sued for damages, declaratory relief, and injunctive relief . . . .[27]
>
> The basis for police action was Netherland's alleged disturbing of the peace, in violation of the City's disturbing the peace ordinance, quoted here in part:
>
> (a) Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:
> ...

> (2) Addressing any offensive, derisive, or annoying words to any other person who is lawfully in any street, or other public place; or call him by any offensive or derisive name, or make any noise or exclamation in his presence and hearing with the intent to deride, offend, or annoy him, or to prevent him from pursuing his lawful business, occupation, or duty....[28]

The district court found that the ordinance was unconstitutional on its face, and it granted a preliminary injunction against the City's enforcement of the provision. On the City's appeal, however, the Fifth Circuit vacated the injunction and remanded for reconsideration "[b]ecause the district court did not consider any limiting construction of the Ordinance before finding it facially unconstitutional . . . ."[29]

Mr. Netherland was more compliant than Mr. Feiner had been and left before being arrested. This time, the threat of arrest was enough to silence the speaker. And since the threat of arrest came in response to complaints, it might be characterized as a heckler's veto. The Fifth Circuit did not do so, but there was no need to address it from that perspective because the court was able to dispose of the case on other grounds. Courts must focus on what constitutes disturbing the peace under a given ordinance or statute. And municipalities should focus on that in the first instance, before a matter ever gets to court.

Prohibitions against disturbing the peace are supposed to be content neutral, but there is an ambiguity: what disturbs the peace in some settings will not do so in others. In particular, if a crowd does not want to hear what a speaker has to say, then the crowd may get unruly, and we return to *Feiner*. The Supreme Court did not accommodate crowd reaction in *Forsyth County v. Nationalist Movement* when addressing an ordinance that authorizes security fees: "Listeners' reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[30] The Seventh Circuit, likewise, applied content neutrality in *Ovadal v. City of Madison,* in the context of maintaining order: "The police must preserve order when unpopular speech disrupts it; '[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.'"[31]

Cities must strike a balance in using their police power so that they do not violate the rights that they are obligated to protect. "Indeed, the protection against hecklers' vetoes even forbids statutory schemes that would allow a disapproving citizen to silence a disagreeable speaker by complaining on other, apparently neutral, grounds."

Cities must strike a balance in using their police power so that they do not violate the rights that they are obligated to protect. "Indeed, the protection against hecklers' vetoes even forbids statutory schemes that would allow a disapproving citizen to silence a disagreeable speaker by complaining on other, apparently neutral, grounds."[32] But if the speaker is disturbing the peace or creating a danger without reference to the content of his speech, police may stop his speech without violating his constitutionally protected rights. Such was the case when street preacher Ralph Ovadal took his message to pedestrian sidewalks that were on overpasses above a freeway. His demonstrations there "had a noticeable effect on traffic below[,]" and police "forced Ovadal to move from the overpasses on the grounds that his activities were causing a traffic hazard for the motorists below him."[33] Mr. Ovadal argued that he was being subjected to a heckler's veto, but the Seventh Circuit held that his removal from the overpasses was content-neutral and constitutional.[34]

In another recent case, a group of street preachers calling themselves "Bible Believers" attended a festival in Dearborn, Michigan, a festival that is known to draw a very large crowd of Muslims. The preachers mixed with the crowd and spoke a message directed at Islam, which many found to be offensive. The crowd became violent, and the sheriff's deputies determined that the Bible Believers were causing the problem. A deputy chief informed one of the leaders of the Bible Believers that the group "would be cited for disorderly conduct if they did not immediately leave the Festival. . . . [The preacher] complied, and the Bible Believers were escorted out of the Festival by more than a dozen officers."[35]

Municipal involvement by anti-harassment policies

Efforts to silence what some consider objectionable has become institutionalized through speech codes and the rise of "safe spaces" and so-called "free speech zones" on college campuses. In some instances, unpopular speech has been characterized as "hate speech" or harassment and legal restrictions have been imposed or attempted on that basis.[36] This content-based restriction on speech is an attempt to use the "fighting words" concept from *Chaplinsky v. New Hampshire*[37] and expand it into a challenge to the "marketplace of ideas" concept.[38] Scholars with the Newseum Institute's First Amendment Center have explained:

> Many speech codes sought to end hate speech, which code proponents said should receive limited or no First Amendment protection. Supporting this view were many academics who subscribed to so-called "critical race" theory. Critical-race theorists contend that existing First Amendment jurisprudence must be changed because the marketplace of ideas does not adequately protect minorities. They charge that hate speech subjugates minority voices and prevents them from exercising their own First Amendment rights.[39]

Although the Newseum scholars talk about campus speech codes in the past tense in the above excerpt, they later suggest that speech codes might have been reborn in the form of anti-harassment policies: "Some universities dropped their broad, wide-ranging policies . . . in favor of more narrowly crafted anti-harassment or code-of-conduct policies. Whatever the terminology used, many universities still regulate various forms of hate speech."[40] They further note that "Many of the provisions that used to be

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called speech codes are being wrapped into anti-harassment policies[.]"[41] As tempting as it might be to want to protect people from harassment, local governments should be cautious about following that lead.

Consider this poster on the side of D.C. Metro cars and on the walls of Metro stations.

The text reads:

> You have the right to be safe waiting for and riding Metro. You don't have to put up with inappropriate comments, touching, gestures, or actions. Help Metro protect you and other passengers. If you witness or experience harassment, report it to the nearest Metro employee.[42]

Most of us might agree with the quoted text about having "the right to be safe waiting for and riding Metro." D.C. Metro is within its authority to use signs to promote safety, a proper public policy that does not violate constitutional protections. But this poster goes further, asserting that we "don't have to put up with inappropriate comments, touching, gestures, or actions."

We might wish we didn't have to put up with those things, but we probably do—at least to some extent. Like the train it's posted on, the text on this poster begins to move down the track toward a destination—namely, insulation not only against unwanted touching, but also against unwanted comments, gestures, or other actions. If anyone doubts that this is where the policy is headed, it is exclaimed in big letters, all caps, bold, red-on-yellow:



IF IT'S UNWANTED, IT'S HARASSMENT.

Imagine that a Metro passenger witnesses some of the following in a Metro car or station:

- three people praying and reading the Bible
- a man reciting Islamic prayers on a prayer rug in the aisle
- a man wearing a shirt that says "Black Lives Matter"
- a man wearing a shirt that says "Blue Lives Matter"
- a man wearing a shirt that says "White Lives Matter"
- a woman wearing a shirt promoting abortion rights
- a man wearing a shirt that says "Abortion is Murder!"
- a woman wearing a shirt promoting legalization of prostitution
- a woman actually soliciting sex
- a man and a woman kissing
- a man handing out tracts about Jesus dying for our sins
- a person wearing a shirt promoting "trans" rights
- a man wearing a shirt that says "You don't have to stay gay."
- a man wearing a shirt promoting the right to die
- a teenage girl wearing a shirt that says "TRUMP: MAKE AMERICA GREAT AGAIN!"
- a woman breast-feeding
- a man wearing a shirt with a Nazi swastika
- two men kissing
- a man wearing a shirt with a Hindu swastika
- a man staring at a woman who appears not to know him
- a man handing out tracts about Islam having the answers
- a woman patting apparent strangers on their shoulders
- a man making repeated thrusting hand gestures while saying "F*** [Trump or Obama or fill-in-the-blank]"

It's easy to believe that some Metro passengers could be offended by one or more of these actions or expressions. Based on the Metro sign, a person who is offended and doesn't want to see, hear, or feel any of those can consider it harassment and "report it to the nearest Metro employee." This invitation to report perceived harassment appears to tilt the balance toward the person who takes offense. But the constitutional implications arise in the context of Metro's response to those reports. If Metro responds by asking the "offending" person to stop the behavior or leave, that might violate constitutional protections (depending, of course, on the exact nature of the action).[43]

A local government's attempt to protect people from harassment can easily go too far. Municipalities must remember that "[p]rotected speech is not transformed into 'fighting words' by the peculiar sensibilities of the listener[,]" and that free speech rights are not to be "subject to a middle schooler's 'heckler's veto[.]'"[44]

Municipal involvement by denial of parade permits

The anticipation of violence might prompt some cities to deny parade permits. If an ordinance permits a law enforcement authority the discretion to deny a permit for "any reason" that "raises public safety concerns[,]" that ordinance would likely be held unconstitutional for granting a heckler's veto, as the Eleventh Circuit held in *Burk v. Augusta-Richmond County*.[45]

Similar to *Burk*, the Fifth Circuit held in *Beckerman v. City of Tupelo* that an ordinance was unconstitutional that authorized the chief of police to deny a parade permit if he determined that issuing the permit would probably "provoke disorderly conduct" or create a disturbance. The court characterized that provision as sanctioning the heckler's veto.[46]

However, the Fourth Circuit, in *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Stuart*, upheld an ordinance of the Town of Pelion, South Carolina, that prohibited the Klan from participating in a Christmas parade because of fear of violence. Critical to that decision was this observation: "Under the facts presented in this case, a 'heckler's veto' is not involved, because the real threat was believed to be presented by Klan members rather than by spectators."[47]

The issue of prospective violence was ultimately overruled in *Iranian Muslim Org. v. City of San Antonio,* where city officials had decided to deny parade permits to Iranian students—who had sought to protest the Shah of Iran—out of fear of violence toward the demonstrators. The lower courts upheld the decision to deny the permit, but the Supreme Court reversed, noting that it constituted a heckler's veto, and holding: "Such fears are not a constitutionally permissible factor to be considered in regulating demonstrations."[48]

As the District of Columbia Circuit has stated: "The First Amendment forbids government to silence speech based on the reaction of a hostile audience, unless there is a 'clear and present danger' of grave and imminent harm. . . . Otherwise, a vocal

minority (or even majority) could prevent the expression of disfavored viewpoints—a result contrary to the central purpose of the First Amendment's guarantee of free expression."[49]

Municipal involvement by imposing fees for security

In some situations, local governments can charge for the cost of providing security, but it must be imposed on a content-neutral basis. In *Forsyth County v. Nationalist Movement*, the Supreme Court addressed an "assembly and parade ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order." In a rural Georgia county with a "troubled racial history[,]" a civil rights "March Against Fear and Intimidation" was held on January 17, 1987, consisting of some 90 civil rights demonstrators. The marchers were met by about 400 counterdemonstrators affiliated with the Ku Klux Klan, greatly outnumbering police officers. The counterdemonstrators shouted racial slurs and threw rocks and beer bottles, "forc[ing] the parade to a premature halt[.]" The civil rights parade organizers returned the following weekend, January 24, and the parade "developed into the largest civil rights demonstration in the South since the 1960's[,]" involving some 20,000 civil rights marchers, about 1,000 counterdemonstrators, and "more than 3,000 state and local police and National Guardsmen. . . . The demonstration cost over $670,000 in police protection, of which Forsyth County apparently paid a small portion."[52]

As a result of those two demonstrations, Forsyth County enacted an ordinance that "required the [parade] permit applicant to defray these [security] costs by paying a fee, the amount of which was to be fixed 'from time to time' by the Board."[53]

Two years later, the Nationalist Movement sought a permit for a demonstration on Martin Luther King, Jr. Day in Forsyth County, and the county imposed a $100 fee. The group did not pay the fee, and it did not hold the rally, instead filing suit seeking an injunction against the ordinance as unconstitutional. The Supreme Court described the constitutional problem with the ordinance:

> The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.[55]

> In a 5-4 decision, the Court held: "[T]he provision of the Forsyth County ordinance relating to fees is invalid because it unconstitutionally ties the amount of the fee to the content of the speech and lacks adequate procedural safeguards; no limit on such a fee can remedy these constitutional violations."[56]

The Connecticut Supreme Court reached a different outcome, on different grounds, in *Morascini v. Comm'r of Pub. Safety*, holding as constitutional a Connecticut statute requiring an event operator to pay a fee to cover the cost of police protection for events where the police chief determines that such protection is necessary, reasoning that it is not a heckler's veto.[57]

Aside from the issue of security fees that are exorbitant or that are arbitrarily imposed, municipalities should be cautious about high profile speakers policies like that of U.C. Berkeley above. If a municipality adopts such a policy, it should take care that it does not implement that policy in any manner that would favor one view over another.

In a 5-4 decision, the Court held: "[T]he provision of the Forsyth County ordinance relating to fees is invalid because it unconstitutionally ties the amount of the fee to the content of the speech and lacks adequate procedural safeguards; no limit on such a fee can remedy these constitutional violations."

Conclusion

As noted at the outset, speech that is popular with some is unpopular with others. While many high-profile cases of the heckler's veto occur between private parties, there are several ways that local governments might become involved, including arrests or threat of arrests, denial of parade permits, imposition of security fees, and adoption of anti-harassment policies. Municipalities must proceed with care in balancing the interests of speakers with those of protestors, and must maintain the peace while avoiding an inadvertent endorsement of the heckler's veto.

Notes

1. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
2. Hudgens v. N.L.*R.B.*, 424 U.S. 517, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by the government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.") (internal citation omitted).
3. Jim Webb, Press Release, Mar. 28, 2017, http://www.jameswebb.com/news/webb-declines-usna-distinguished-graduate-award (last accessed Mar. 30, 2017).
4. Daniel Chaitin, "Jim Webb declines Naval Academy alumni award amid controversy," Washington Examiner, March 28, 2017, https://www.washingtonexaminer.com/jim-webb-declines-naval-academy-alumni-award-amid-controversy (last accessed April 09, 2018);
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Meredith Newman, "After protest, Jim Webb declines to accept Naval Academy alumni association award," Capital Gazette, March

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Fighting the Opioid Epidemic: Comprehensive Planning by Local Governments in West Virginia

By: Claire Swauger, Jared B. Anderson, and Jesse J. Richardson, Jr.



Introduction

On October 26, 2017, President Trump announced that his administration would declare the opioid crisis a National Public Health Emergency.[1] Only a few days later the President's Commission on Combating Drug Addiction and the Opioid Crisis issued a final report, and the Administration started implementing some of the recommendations.[2] Although the federal government and some state governments have taken steps to address the epidemic, local governments are, in many ways, best positioned to act. However, the specific actions municipalities can take, and how to implement those actions, remain in question.

This article summarizes the nature and effects of the opioid epidemic, describing federal and state responses. Next, using the National Association of Counties and National League of Cities' 2016 joint report, *A Prescription for Action* as the framework, the authors outline the recommendations of that report for local government action.

The article then describes how the Land Use and Sustainable Development Law Clinic at West Virginia University College of Law, at the insistence of local government clients, uses the local comprehensive plan as the vehicle to implement the recommendations of *A Prescription for Action*. The article concludes that the local comprehensive plan process provides an ideal platform for communities to strategically and effectively address the opioid epidemic.

The Opioid Epidemic

"Opioids are a class of drugs that include the illicit drug heroin, synthetic opioids such as fentanyl, and pain relievers available legally by prescription, such as oxycodone (OxyContin®) hydrocodone (Vicodin®), codeine, morphine, and many others."[3] Over 2.4 million Americans reporting an opioid-use disorder in 2016.[4] The opioid epidemic has imposed enormous losses in the United States.[5] The toll on human life has been devastating, with 33,000 opioid-related overdose deaths in 2015, [6] doubling in 2016 to 64,000 opioid-related overdose fatalities in the United States.[7] America's Appalachian region has been particularly ravaged by the epidemic.[8]

West Virginia, the only state that lies completely within Appalachia, exhibits the highest overdose rate in the nation.[9] In 2016, West Virginia's overdose rate was 52 per 100,000 people, over four times the national average.[10] West Virginia's overdose rate outpaced the second-highest reported rate, measured by state, by approximately 25%.[11]

Opioids are the leading drug overdose agent in West Virginia. Beginning in 2001, when the West Virginia Department of Health and Human Resources (DHHR) began reporting agents contributing to overdose deaths, prescription opioid pharmaceuticals were the leading cause ofsuch fatalities.[12] However, most overdose deaths involve multiple substances, both prescribed and illicit. Since 2001, the number of substances involved in fatal overdoses averaged between 2.3 and 3.5 substances according to toxicology reports.[13]

Until 2011, oxycodone and hydrocodone were the leading drugs contributing to overdose deaths in the state, peaking with 224 fatalities in 2011.[14] With Purdue Pharma's introduction of tamper-resistant OxyContin, a popular source of oxycodone, oxycodone-related overdoses decreased nationwide.[15] West Virginia followed national trends in 2012, as overdose agents shifted from prescription drugs to illicit drugs.[16] In 2009, oxycodone and hydrocodone were related to 24.3% and 35.3% of fatalities respectively. By 2017, oxycodone and hydrocodone were related to just 13.2% and 9% of deaths, respectively, in West Virginia.[17]

While prescription-related overdoses declined, heroin-related and synthetic opioid-related overdose deaths increased. New forms of synthetic opioids, largely manufactured in China, also began to overtake the drug market. In 2014, overdose deaths related to fentanyl and fentanyl analogues such as carfentanil spiked. [18] Fentanyl is an opioid that is 30-50 times more potent than heroin; [19] between 2-5 milligrams of fentanyl in humans constitutes a lethal dose.[20] Carfentanil, a fentanyl analogue, is traditionally used as an elephant tranquilizer and is 5,000 times more potent than heroin.[21]

From 2010 to 2016, synthetic opioid overdose deaths quadrupled in West Virginia, from 102 to 435, and overdose deaths related to heroin skyrocketed, from 28 to 259.[22] In 2016, the vast majority of synthetic opioid overdoses were attributed to fentanyl, and fentanyl-related overdoses continue to climb, resulting in 529 fatalities in 2017, accounting for 58% of all overdose-related deaths.[23] Between 2016 and 2017, West Virginia also experienced an increase in illicit drug-related overdose fatalities related to methamphetamine and cocaine. [24] Although accounting for 27% of fatal overdoses, heroin-related overdoses experienced a slight decrease, falling from 257 deaths in 2016 to 246 in 2017.[25]

Opioid Epidemic Impacts

In addition to the enormous toll on human life, the opioid epidemic imposes a huge economic and health cost on the nation and the state of West Virginia. The U.S. Council of

Economic Advisors estimated that in 2015, the opioid epidemic cost the United States $504 billion or 2.8% of GDP.[26] West Virginia's economy has been hit particularly hard. Accounting for spending on addiction treatment, health care, criminal justice costs, and losses in worker productivity, the epidemic costs the state of West Virginia an estimated $8.8 billion annually or 12% of the state's GDP. [27] The largest impacts to the state's GDP consist of health care costs at $262.8 million, lost economic productivity due to substance abuse at $206.1 million, criminal justice costs accounting for $77 million, and addiction treatment at $28.43 million.[28]

Many costs of the opioid epidemic are difficult to quantify. There are social costs related to the epidemic, including the enormous impact on families. The Director of DHHR, Bill Crouch, has reported that 83% of all foster care placements come from homes where there is drugaddiction.[29] In 2017, West Virginia increased the number of children taken into custody by 46%.[30]

The effects of the opioid epidemic on children can begin in the womb. Babies born in West Virginia are five times more likely to experience opioid withdrawal symptoms.[31] In 2017, the incidence rate of Neonatal Abstinence Syndrome (NAS) was 5.06% of live births for West Virginia residents, with some counties reporting NAS rates as high as 10% compared to a national average of less than 1%.[32] NAS can be characterized as a group of problems that occur in a newborn who has been exposed to addictive opiate drugs while in the mother's womb.[33] Symptoms include fever, irritability, diarrhea, seizures, sleep problems, and vomiting.[34] Among the health risks and costs of the opioid epidemic is the spread bloodborne pathogens such as HIV, hepatitis B virus (HBV), and hepatitis C virus (HCV), due to needle-sharing. According to the Centers for Disease Control (CDC), one in four drug users reuse needles and do not regularly test for infectious diseases.[35] In addition, many individuals who contract HBV and HCV do not display symptoms and can remain asymptomatic for up to 30 years.[36] Acute symptoms of HBV and HCV infection are often flulike, while long-term infection can result in health complications including liver failure, liver damage, and liver cancer.[37]

West Virginia leads the nation in HBV infection rates, which is 14 times the national average.[38] West Virginia has the second highest HCV infection rates at nine times the national average.[39] The greatest risk factor for contracting HCV and HBV is through intravenous drug use, and the DHHR reports that infection rates continue to climb as intravenous drug use continues.[40] Treatment of hepatitis C (HCV) is often not covered by health insurance and can cost between $26,400 and $95,000 to treat due to high patent pricing.[41] Between 2014 and 2016, Medicaid costs for treating HCV cases in West Virginia totaled $27 million, while HBV treatment costs totaled $152,000.[42]

In West Virginia, between 1989-2016, intravenous drug use accounted for 17% of HIV infections, sexual intercourse accounted for 65% of infections, and 13% were infected through unknown means. West Virginia experienced an HIV outbreak in 2017 that was attributed to sexual contact, but the CDC Surveillance Report issued an observation that counties did not maintain clean needle exchange programs, which could prevent future HIV transmissions.[43] National fears of intravenous drug use proliferating the spread of HIV outbreaks have heightened since a 2015 HIV outbreak in Scott County, Indiana.[44] Almost 200 people were infected with HIV, largely through needle sharing.[45] At the time, there was no needle exchange program in Scott County. The costs of an HIV outbreak can be enormous, with lifetime treatments ranging from $230,000 and $350,000.[46] The state of Indiana has spent between upwards of $2 million in its response to the Scott County outbreak, but lifetime costs of the infection could reach an estimated $58 million.[47]

The United States Drug Enforcement Administration (DEA) has attributed high levels of opioid misuse, in part, to the prevalence of heavy manual labor in industries such as mining, timbering, manufacturing, and construction.[48] Jobs that require high amounts of manual labor are more likely have workers with higher rates of physical ailments. In order to cope with ailments, those workers have been given pain relief medication that has addictive qualities.

Additionally, West Virginia residents report poor mental and physical health conditions, which could potentially contribute to a desire to misuse opioids as a coping mechanism. According to the 2016 WV Behavioral Risk Factor Surveillance System Report (BRFSSR), West Virginia reported having the highest prevalence "poor physical health, mental health, and activity limitations due to poor physical or mental health."[49] West Virginia leads the United States in prevalence of obesity, arthritis, cardiovascular disease, heart attacks, adult arthritis, and depression.[50] In a recent study, it also led the nation in respondents that reported "difficulty concentrating, remembering, or making decisions at a rate of 16%, compared to the national rate of 10.8%."[51] West Virginians exhibited high levels of inability to complete errands, difficulty climbing stairs, and difficulty dressing and bathing.[52] The opioid epidemic has imposed enormous costs on the state in overdose deaths, quality of life, and economic losses by both taxing public systems and viability of the state's labor force.

The Federal and State Response to the Epidemic

The federal government recently responded to the opioid epidemic both legislatively and through executive order. In 2016, Congress made its first substantial move to appropriate resources to address opioid epidemic treatment and research in the form of the "21st Century Cures Act."[53] High rates of prescription prompted a Congressional investigation into pill dumping in West Virginia.[54] The following year, the federal government made several policy changes to address the opioid epidemic. In addition to forming of the Commission on Combatting Drug Addiction and the Opioid Crisis, the Acting Secretary of Health and Human Services (HHS) extended President Trump's emergency orders declaring the opioid crisis a national public health emergency.[55] HHS's five specific strategies include, "strengthening public health surveillance, advancing the practice of pain management, improving access to treatment and recovery services, targeting availability and distribution of overdose-reversing drugs, and supporting cutting-edge research."[56]

The 2019 Congressional Budget proposes $1 billion in spending on opioid mitigation efforts, maintaining the 21st Century Cures Act allocation of $625 million, and continued allocation of the State Targeted Response Grants to Combat the Opioid Crisis (Opioid STR grants). Opioid STR grants are a critical funding stream

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for state responses to the opioid epidemic.

Opioid STR grant allocations are formulated based on unmet need for opioid use disorder treatment collected from the National Survey on Drug Use and Health's (NSDUH) reported drug poisoning deaths. Grants for FY2017-2018 benefitted large population states that reported high numbers of opioid related overdoses and gaps in treatment. Despite high rates of overdoses, West Virginia's small population corresponds with relatively small numbers of overdose deaths compared to higher population states. Additionally, the NSDUH survey data reported low gaps in treatment West Virginia. As a result, West Virginia has received relatively small allocations of Opioid STR grants. For the 2017-2018 grant period, West Virginia received $11.8 million, comprising 1.2% of the Opioid STR grant allocations.[57] Allocations to states, Puerto Rico, and the District of Columbia for the 2017-2018 period totaled $966.5 million, with an average allocation of $18.6 million and a median allocation of $13.14 million. However, the impact of the epidemic on the economy and the resources available within the West Virginia has necessitated an extraordinary response. As a result, in 2018, the Substance Abuse and Mental Health Services Administration (SAMHSA) presented an additional grant opportunity for states highly impacted by the opioid crisis. Opioid State Targeted Response Supplement grants (STR Supplement Grants) became available to states with the highest CDC-reported overdose death rates for 2015. States eligible to receive the one-year grant of $333,000 included Kentucky, Massachusetts, New Hampshire, New Mexico, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, and West Virginia.

The state of West Virginia has also responded to the opioid crisis. In 2018, DHHR introduced an Opioid Response Plan. The state plan includes early intervention, treatment, overdose reversal, supporting families with substance use disorder, and recovery, which includes twelve high- priority recommendations for the state. The state legislature has followed suit on some of the recommendations, including passing legislation limiting the duration of opioid prescriptions.

Other measures recommend increased education, arrest diversion, requiring all first responders to carry and be trained in the administration of naloxone, requiring hospital emergency departments to notify the DHHR of nonfatal drug overdoses, and expanding the provision of long-lasting contraceptive services to drug-addicted men and women. This plan, and opioid response plans promulgated across the country, can and should be referenced to guide communities with policy decisions.

Local Government Response

The 2016 joint report by the National League of Cities (NLC) and National Association of Counties (NACO), titled *A Prescription for Action* (Report) provides recommendations for local leaders to address the opioid crisis.[58] The framework developed in the Report includes four general recommendations: 1) Leading in a Crisis, 2) Focusing on Prevention and Education, 3) Expanding Treatment, and 4) Reassessing Safety and Law Enforcement Approaches. Each general recommendation includes five specific recommendations.

Local leaders must first assume roles of leadership in local efforts to combat the opioid crisis. The Report's five specific recommendations urge local leaders to:

1. Set the Tone in the Local Conversation on Opioids
2. Convene Community Leaders
3. Foster Regional Cooperation
4. Educate and Advocate to State and Federal Partners
5. Ensure Progress for All in Formulating Responses to Addiction

Second, local governments must concentrate efforts on prevention and education as opposed to law enforcement. The Report recommendations that localities:

1. Increase Public Awareness by All Available Means
2. Reach Children Early, In and Outside of Schools
3. Advocate for Opioid Training in Higher Education
4. Embrace the Power of Data and Technology
5. Facilitate Safe Disposal Sites and Take-Back Days

Third, the Report posits that local leaders should seek to institute policies that expand treatment opportunities for individuals addicted to opioids. Specifically, local governments should:

1. Make Naloxone Widely Available
2. Intervene to Advance Disease Control by Implementing a Clean Syringe Program
3. Increase Availability of Medication-Assisted Treatments
4. Expand Insurance Coverage of Addiction Treatments
5. Employ Telemedicine Solutions

Finally, public safety and law enforcement approaches must be reassessed. Law enforcement officials should focus on reducing the supply of opioids in the community and divert individuals struggling with addition from the justice system to treatment. This approach includes policies to:

1. Reduce the Illicit Supply of Opioids
2. Consider Alternatives to Arrest
3. Divert from the Criminal Justice System
4. Facilitate Treatment in Jails
5. Support "Ban the Box"

The Local Response: Comprehensive Planning for the Opioid Epidemic

Local governments in West Virginia face significant challenges addressing the opioid epidemic. Limited resources and declining populations often hinder localities, and some community leaders have expressed skepticism that local government planning efforts can address an epidemic of such magnitude. Municipal governments need to know where to start and how to approach the issue.

While there are often numerous programs, organizations, activities, and policies in place to address the opioid epidemic, one aspect of local governance that has not been thoroughly utilized is local comprehensive planning.

The comprehensive plan is a community's blueprint for the future and typically addresses land use and development, infrastructure, housing needs, education, and public services. In West Virginia, communities are realizing that the comprehensive plan is not only an acceptable vehicle to address the opioid epidemic, but provides a prioritized and strategic template that can outline the who, what, when, where, and why of addressing the opioid epidemic.

Using the Comprehensive Plan to Address the Opioid Epidemic

The NLC and NACO do not suggest a specific mechanism for implementing and advancing the goals in their Report. At first glance, the local comprehensive plan does not seem an obvious mechanism for implementing recommendations in the Report. *The Prescription for Action*. However, many of the actions suggested by the Report fit well within the comprehensive plan.

The Growing Smart Legislative Guidebook defines the local comprehensive plan as "the adopted official statement of a legislative body of a local government that sets forth (in words, maps, illustrations, and/or tables) goals, policies, and guidelines intended to direct the present and future physical, social, and economic development that occurs within its planning jurisdiction and that includes a uni-

fied physical design for the public and private development of land and water."[59] The West Virginia Code defines a comprehensive plan as "a process through which citizen participation and thorough analysis are used" to determine the "best and most appropriate development of the area"[60] The plan aids in "adapting to future changes of use of an economic, physical or social nature."[61] A plan must "promote the health, safety, morals, order, convenience, prosperity, and general welfare of the inhabitants."[62] Purposes include the creation of "conditions favorable to health, safety… [and]prosperity."[63] Studies to be undertaken when preparing a comprehensive plan include factors such as health and general welfare.[64]

The comprehensive plan often includes provisions that seek to achieve patterns of land use that protect the public health.[65] For example, separating industrial uses from residential uses prevents the health hazards presented by having such uses in close proximity.[66] John M. Levy, author of *Contemporary Urban Planning,* sets out the eight common goals of comprehensive plans:

1. Health;
2. Public Safety;
3. Circulation;
4. Provision of services and facilities;
5. Fiscal health;
6. Economic goals;
7. Environmental protection; and
8. Redistributive goals.[67]

Although the opioid epidemic arguably impacts all eight of these goals, comprehensive plans generally do not address issues such as opioid abuse. However, some insist that local governments must plan in order to combat the opioid crisis, or at the very least account for the losses it causes–and prepare to become a more sustainable community. One West Virginia planning commissioner stated that components of the community's comprehensive plan such as economic development, transportation, infrastructure, and housing could not be fully realized until the community addresses the opioid problem, which permeates all aspects of community life.[68]

State enabling statutes generally list required and optional elements of the comprehensive plan. For example, comprehensive plans in West Virginia must include, *inter alia*, components addressing public services and economic development.[69] Public services should ensure public safety and meet medical and social needs of present and future residents.[70] Economic development must consider the strengths and weaknesses of the area's workforce.[71] These elements include consideration of, and action steps to address, the effects of the opioid epidemic.

> Local governments in West Virginia face significant challenges addressing the opioid epidemic. Limited resources and declining populations often hinder localities, and some community leaders have expressed skepticism that local government planning efforts can address an epidemic of such magnitude. Municipal governments need to know where to start and how to approach the issue.

Incorporating Local Efforts to Combat the Opioid Epidemic Into West Virginia Comprehensive Plans

The Land Use and Sustainable Development Land Use Law Clinic at the West Virginia University College of Law (Clinic or Land Use Clinic) was established in 2011 to provide land use planning, land conservation, and wastewater education and technical assistance in West Virginia. The Land Use Clinic has assisted in the protection of thousands of acres of land in West Virginia. The Clinic has also worked with over 50 communities to develop comprehensive plans, zoning ordinances, subdivision regulations, and has provided legal assistance to address abandoned and dilapidated structures throughout West Virginia.

Many communities in West Virginia either have no comprehensive plan or a plan was completed in the 1950s or 1960s and has not been updated. The Clinic has been careful and deliberate in working through the comprehensive plan process with these small, rural Appalachian communities. Many communities needed to gain an understanding of what a comprehensive plan is, the utility of creating a plan, and how public input was a central part of the comprehensive plan process.

Early in the planning process, staff at the Land Use Clinic would typically assist the community in completing a Strengths, Weaknesses, Opportunities, and Threats (SWOT) exercise. Community members often identified "drugs," "opioids," and "substance abuse" as weaknesses and threats during these exercises. Initially, Clinic staff responded that addressing opioids was generally outside the scope of the comprehensive plan and irrelevant to the comprehensive plan's underlying purposes. Feasibility also played a factor: how could local planners, attorneys, planning commissioners, and elected officials provide relevant recommendations regarding substance abuse in their communities?

However, one community insisted that the components of its comprehensive plan such as economic development, transportation, infrastructure, and housing could not be fully realized until the community addressed the opioid problem, which, in their minds, permeated all aspects of community life. This insistence resonated with the Clinic and forced it to reevaluate how small communities in West Virginia could deal with substance abuse within the comprehensive plan framework.

The Clinic first attempted to obtain a better understanding of the substance abuse issue. Talking to leaders in the field proved vital towards understanding whether addressing opioid abuse in the comprehensive plan was appropriate and, if so, how to incorporate recommendations in the planning process.

Interviews were completed with stakeholders from the medical field, public health, and non-profit leaders in substance abuse prevention. This group of experts later reviewed and commented on draft comprehensive plan language relating to substance abuse.

The Clinic and its local government clients initially struggled to develop appropriate language for inclusion into the comprehensive plan. Examples from other communities were difficult to find, and examples that fit rural Appalachia proved even more elusive. At the same time, it became clear that identifying substance abuse as an issue in the comprehensive plan and working with experts to develop community-specific recommendations was essential.

Mercer County, West Virginia: The Guinea Pig

Mercer County is located in southernmost West Virginia and is the eighth-most populous county in the state with slightly more than 60,000 residents. It shares a significant part of its border with the State of Virginia. While it was

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20. Feiner v. New York, 340 U.S. 315, 317 (1951).
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37. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.")

38. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

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43. If Metro were an entirely private entity, then it could ask the offending person to stop the behavior or leave without implicating the constitution.

44. People in Interest of R.C., 411 P.3d 1105, 1109 n.3 (Colo. Ct. App. 2016) (juvenile disorderly conduct case).

45. 365 F.3d 1247, 1257 (11th Cir. 2004). (Note Judge Barker's concurring opinion at 1258-59, contending that ordinance requiring permit for public demonstrations in groups of five or more, and granting Sheriff discretion to deny a permit "for 'any reason' that in his own mind raises public safety concerns[,]" effectively "grants the Sheriff the authority to enforce a 'heckler's veto.'").

46. 664 F.2d 502, 509 (5th Cir. 1981).

47. 934 F.2d 318 (Table) at *2 (4th Cir. 1991).

48. 615 S.W.2d 202, 206-07 (Tex. 1981).

49. Steffan v. Aspin, 8 F.3d 57, 69 (D.C. Cir. 1993) (describing prohibition of heckler's veto).

50. 505 U.S. 123, 124 (1992).

51. *Id.* at 125.

52. *Id.* at 125-26.

53. *Id.* at 126.

54. *Id.* at 127.

55. *Id.* at 133 (internal footnotes omitted).

56. *Id.* at 137.

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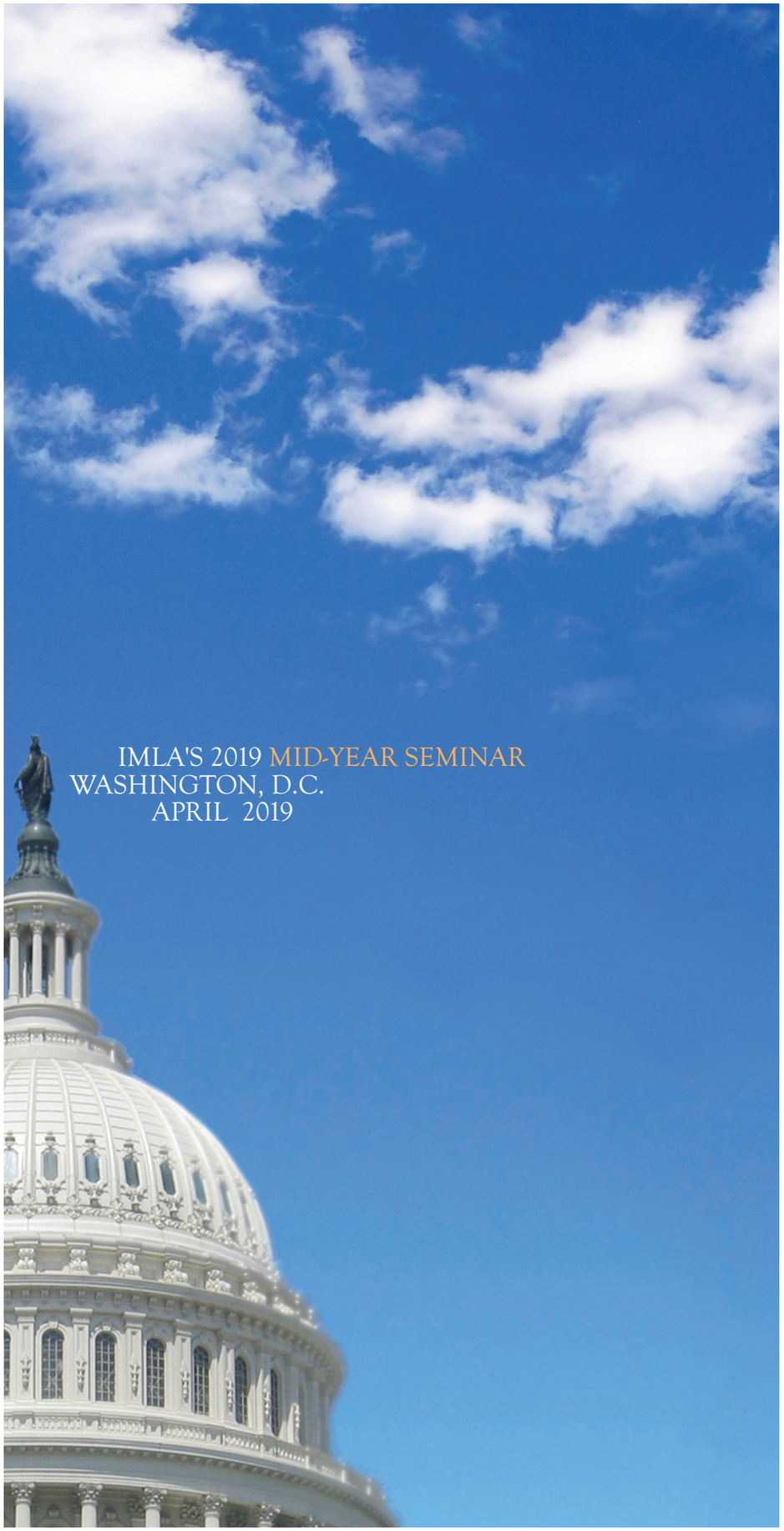



Our Listserv– A Group with Many Talents

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

As summer rolls around and we ship my daughter off to her annual job as a summer camp counselor, my thoughts drift back to my first job and the jobs I performed during summers between colleges. I hope she has as much fun as I did!

My very first job was washing golf clubs and parking carts at a private country club. I would report to work around 2:00pm, after having ridden my bicycle on the two mile trek from home. These were the good ole days growing up in a small mountain town in North Carolina, when folks would think nothing of a 14-year old leaving on his bike after breakfast and not coming home until dark. If I was needed, the folks knew where to find me. There was no cell phone, and no electronic leash.

I worked the golf course job for a few years, and also picked up odd jobs valet parking at various parties, either at the country club or one of the swanky homes of the club members. In one instance, at the home of a wealthy "summer resident," I was working a party and an "emergency" arose. "We are out of tonic water," shrieked the party host. She begged me to run to the store for a few bottles, handed me a $10 tip and sent me out the door. Eager to make her $10 worth it, I dashed out the door only to realize my car was blocked in and couldn't be moved. For a split second, I thought "Gee, I can't go. Guess I'll have to give the $10 tip back...." Quickly, however I recovered, realizing I had the keys to about 100 various automobiles. After careful deliberation, I decided on a Mercedes as my transportation of choice. With *Carry on My Wayward Son* (by Kansas) blaring on the radio, I took off like the two guys in Ferris Bueller's Ferrari.... Fortunately, I returned without incident or without anyone finding out. Yes, I was a little loco in those days. The lawyer in me now shutters at the behavior of my youthful days.

On another summer job, perhaps my most "gross" job, I had to clean out the waste disposal bins at a manufacturing facility. The company made cellophane, and the by-product was a gooey jello-like substance the smell of which would offend even our wastewater treatment plant operator. I had to scrub this "stuff" off the inside of the garbage cans daily, and dump it into a cesspool of sorts, where it was treated and neutralized. It was this job which made me determined to graduate from college...

After my own reminiscing, I put out a survey on the listserve regarding first jobs, odd jobs, gross jobs and the like. Some of the responses I received include:

My first job was order packer in a parts warehouse. Started at age 16 and continued every summer and holiday through college. Odd Job? One summer I drove a yellow cab on evenings and weekends when not at the warehouse job. I have stories...

My first paid job was working for a local salvage yard removing auto parts from cars. I never really did odd jobs but worked on a grounds crew at a school during my summers mostly driving tractors with large mowers. The manager loved to hire farm kids because he said city kids just tore up large equipment. I suppose some would consider delivering calves and removing afterbirth as gross. I just considered it part of running a cow-calf operation which I did with my father before I went to law school...

My first job was in a gas station. It was owned by a woman who only hired girls. I was 16 and got robbed a few months after I started – by a woman. I never had a job I considered gross, although I worked at both a day care for young children and a convalescent home at one time. So, I did have some moments where the job duties were less than pleasant...

My first paying job (other than babysitting) was at yogurt shop in a mall. Samples were free for workers, and I took them up on that quite liberally. The best flavor was a swirl of the Strawberry and Cheesecake flavors – I remember that taste vividly! Surprising job? I was a telemarketer selling magazine subscriptions. I quit on Day 2 after they pressured me to close a sale with an elderly gentlemen who clearly didn't understand what was going on. I've felt bad for that man for 25 years. My most gross job? Well, the telemarketer one was pretty slimy. Otherwise, nothing on the job that's come anywhere near as close to the gross kind of things I've had to do in my job as a mother...

I was an elevator operator for a manual freight elevator in a downtown department store. The elevator operator had to manually line up the floor of the elevator with the floor of the building in order to allow heavy hampers to be rolled on and off. The elevator was controlled with a handle that could be pushed up and down to control the speed of travel up and down. The inside of the elevator shaft had been decorated sometime in the sixties by an "artist" that seemed to be channeling Peter Max. I could see all this because the elevator was just a mesh cage with no door on the front of it, so the shaft itself was literally speeding by your face as you went up and down. Odd Job? It had to be selling vacuum cleaners door to door. This particular vacuum used a spinning water bath to filter the air and dirt being picked up so that it also doubled as a humidifier and an air filter. I never really had a gross job, but the hardest job I ever had was working with a concrete crew building a local high school. I remember we were expected to drive a wooden stake into black clay that

had been baking in the sun for 60 days straight with no rain and a high every day of 102 degrees. Picture hammering a toothpick into the side of your coffee cup and you'll have a pretty good idea of the process...

My first job was sweeping floors at the Army-Navy Surplus Store for 20 cents an hour... Child labor... My Dad had the auto repair shop next door...

First "paying" job was at a camp where I sold ice cream, snacks, and handicraft materials as well as soft drinks (premix fountain dispenser if you know what that is). My first job as an adult was cashier in a department store which lead to selling men's clothing. The oddest job I ever had was during college I installed draperies as an independent contractor on behalf of a couple of local stores. The most gross job was one summer during college when I worked as a laborer in a lube oil and grease plant. We scrubbed asphalt/tar spills under furnaces using push brooms, TSP, and hot water generated by connecting a steam hose and water hose

First job was babysitting. Most unusual job was three to four years of commercial salmon fishing in Alaska. The most gross job was also commercial salmon fishing...

I delivered the local newspaper as my first job. The oddest job was when I cut the round corners of the materials used in 3 ring binders. Most gross job – varnish cook...

I delivered the local newspaper. As an unusual job, I also prepared fencing, posts and hardware by chemically treating all the items to make them weather resistant (dipping the items in soar, lye, nitric acid and the chemical treatment)...

Sweeping and cleaning up at a local pharmacy was my first job. As an unusual job, I was a Fuller Brush Man – lasted about 2 weeks. Can't say I have had a "gross" job, but there is this one opposing counsel . . . feel like I need to shower after . . .

When I was 10 years old and for every summer until I was 17, my mom told all of her friends that I would cut their grass for $5.00 – no matter how big their yard was. Believe me, we lived in a rural community and people had very large yards. I also worked at a race horse stable and drove a tractor. Cleaning out the stalls at the horse race stable was the most gross job I ever had...

I wrote a column for the local newspaper called "Jr. High Chatter." I was paid 10 cents per column inch. I was 13. It probably wouldn't surprise anyone that I worked in my dad's law office, but it might surprise people that I took live dictation using shorthand, or that I once retyped an entire 4 page document in Italian...

There you have it folks...A testament to the versatility of this talented group. And, in many cases (like mine), an incentive to finish school! Looks like we have all come out on top!

Technology seems to be advancing on an almost daily basis, and one advancement is creating an interesting dilemma for local governments. By now I am sure everyone has heard of "driverless cars." My first reaction to this idea is to ask why? If you don't need to go somewhere, why does the car need to do so? I am sure there are answers somewhere, but I am curious about several issues involved in this phenomenon. Chiefly, what if something goes wrong?

Case in point – consider this CNN story about an event in California:

"A police officer pulled over one of Google's self-driving cars Thursday in Mountain View, California. The car wasn't speeding. On the contrary, it was driving too slowly ~ 24 miles per hour in a 35 mph zone, according to the Mountain View Police Department ~ with traffic apparently backing up behind it.

"As the officer approached the slow moving car he realized it was a Google Autonomous Vehicle," a police department post said. Which is to say that no one was driving the thing. There was, however, a passenger. After a brief discussion, "the officer determined the car had broken no law. No harm, no foul and no ticket. For its part, the Google Self-Driving Car Project seemed proud of the whole affair."

I repeat my question – why? What is the purpose? And what if something goes wrong such as the case of the driverless car in Arizona that hit and killed a woman? Who is held accountable? Who do we ticket and summon to municipal court? Stay tuned...

The prosecution rests, your honor... ML



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Op-Ed

The Academic Attack on Qualified Immunity

By: Lisa Soronen, State and Local Legal Center, Washington D.C.

In 2018 the *Notre Dame Law Review* will publish nine articles on qualified immunity. At the time of this writing only three of these articles are available, but from their titles it appears only one will (mostly) defend qualified immunity.

Academics have long criticized qualified immunity (and many other legal doctrines), so why are these articles noteworthy? First, states and local governments have experienced a winning streak with qualified immunity like no other.[1] Sheer longevity may presage that this winning streak is likely to come to an end very soon, especially with the help of academics. Second, Justices Thomas and Sotomayor,[2] who often reside at polar opposite ends of the ideological spectrum, have recently cited to a 2018 academic article entitled *Is Qualified Immunity Unlawful?* by William Baude. In short, as of late, at least two Supreme Court Justices are interested in what at least one academic has to say about qualified immunity. Third, in March 2018 the CATO Institute held a forum on qualified immunity (featuring Mr. Baude as a speaker) where it announced that it was beginning an "amicus campaign" in lower courts to alert them to the "variety of problems" with the doctrine.[3] Likewise, CATO has recently filed an amicus brief supporting a certiorari petition asking the Supreme Court to overrule qualified immunity.[4]

This article discusses what the three available articles say about qualified immunity and whether the Court is likely to be persuaded by them.

The Case Against Qualified Immunity, Joanna C. Schwartz[5]

Schwartz makes four arguments in this article, which provides a comprehensive attack on qualified immunity. She claims, as Baude has, that qualified immunity has no basis in common law.[6] She also argues that qualified immunity "renders the Constitutional hollow" because Supreme Court decisions have "made it increasingly difficult for plaintiffs to show that defendants have violated clearly established law, and increasingly easy for courts to avoid defining the contours of constitutional rights."[7]

Building on previous writings she argues that qualified immunity does not achieve any of its three intended policy goals. In *Police Indemnification*,[8] Schwartz took on the Court's justification that qualified immunity protects government officials from financial liability. Her findings were that local police departments usually indemnify police officers for money damages owed. In How *Qualified Immunity Fails*,[9] Schwartz notes that one of the reasons the Supreme Court has stated it grants government officials qualified immunity is to save them from the hassle and expense of going through discovery and a trial. But her research reveals that qualified immunity rarely accomplishes this goal because it is more often raised and granted after discovery has begun.

In *The Case Against Qualified Immunity*, Schwartz examines for the first time the third policy goal which the Supreme Court has stated supports qualified immunity. The "overdeterrence" justification posits that damages actions may "deter[] . . . able citizens from acceptance of public office" and "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." Schwartz claims there are three reasons qualified immunity doesn't deter government actors. First, "available evidence" (mostly from the 1990s) doesn't support the concern that the threat of litigation discourages public officials from acting unflinchingly in discharging their duties. Second, even if people are deterred from becoming police officers and officers are deterred from vigorously enforcing the law, "available evidence suggests the threat of civil liability is not the cause." Finally, even if the threat of liability deters officers, "it is far from clear that qualified immunity could mitigate those deterrent effects."[13]

Finally, Schwartz examines and rejects other policy justifications for qualified immunity. She asserts that protecting government budgets can't justify qualified immunity,[14] qualified immunity doesn't actually encourage constitutional innovation (where a court announces a new or expanded constitutional right but shields the defendants in the case from damages liability),[15] and it doesn't lead to the quick dismissal of filed cases.[16]

Schwartz's bottom line is the Supreme Court should "do away with or dramatically limit qualified immunity."[17]

A Qualified Defense of Qualified Immunity, Aaron L. Nielson & Christopher J. Walker[18]

This article is divided into two part. The authors critique Baude's argument that qualified immunity is unlawful and Schwartz's argument that it is "ineffective."

According to Baude, the Supreme Court has articulated three legal justifications for qualified immunity, but all are flawed. The most well-known is that qualified immunity "derives from a putative common-law rule that existed when Section 1983 was adopted" in 1871.[19] But Baude claims "there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted."[20] After defending qualified immunity on stare decisis grounds, Neilson and Walker opine that the "truth is that the history is murky" ("from the earliest days of the republic, American law has sometimes shied away from holding government officials liable for reasonable mistakes").[21]

Baude rejects a second justification for a broad interpretation of qualified immunity: that Section 1983 also has been read too broadly so qualified immunity properly mitigates that error.[22] In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court interpreted "under color" of any statute, ordinance, regulation, etc. to cover constitutional violations without statutory, ordinance, regulatory, etc. authority. Baude thinks Monroe v. Pape was decided correctly--and that even if it wasn't two wrongs don't make a right.[23] Neilson and Walker suggest that Monroe was in fact decided incorrectly, citing the

work of Sam Glucksberg, a linguistics expert. Glucksberg asked lay citizens to identify what the phrase "under color of law" means. [25] "In his study of a dozen subjects, no one thought the language means what Monroe holds; indeed, eleven thought it means the exact opposite and one was uncertain."[26]

The Court's oldest justification for qualified immunity is lenity—the idea that government officials should be given fair warning before being found liable for a violation of the law. Baude rejects lenity because it comes come from another Reconstruction-era statute that enforces constitutional rights against state officials.[27] But that statute prohibits criminal conduct while Section 1983 prohibits civil conduct.[28] And the Supreme Court currently rarely applies lenity in criminal cases.[29] Neilson and Walker argue that lenity makes more sense in the civil context where "acts taken with a credible claim of benefiting the public potentially will not trigger the same alarms [as acts in the criminal context with no "obvious offsetting benefit"], even though such acts [in the civil context], in fact, sometimes may also turn out to be unlawful."[30]

Regarding Schwartz's look at the policy justifications for qualified immunity Neilson and Walker point out that policy concerns don't "undermine statutory stare decisis."[31] So even if the Supreme Court has been wrong about the benefits of qualified immunity—this should not matter. Neilson and Walker then discuss the "methodological limitations" of Schwartz's study in *How Qualified Immunity Fails* (regarding whether qualified immunity saves officers from the hassle and expense of going through discovery and a trial).[32] For example, they agree with her that the fact her study only covers two years and five federal district courts indicates it "may not represent the full range of court and litigant behavior nationwide." [33]

Additionally, the authors question how much Schwartz's findings "actually inform [the] inquiry" that qualified immunity is ineffective.[34] "After all, the findings only shed light on qualified immunity's formal role in the disposition of cases actually filed in federal district court. They tell us very little about qualified immunity's functional effect in narrowing potential monetary liability in civil rights actions, in encouraging cases to settle, or in otherwise disposing of civil actions under section 1983."[35] Finally, the authors point out that from their own empirical research "an arguably different picture emerges regarding the effectiveness of qualified immunity."[36]

Nielson and Walker remain unpersuaded that Baude's and Schwartz's arguments "call for the Supreme Court to abandon qualified immunity."[37] Their conclusion "rests heavily on statutory stare decisis, but also on questions about the historical and empirical evidence presented to date."[38]

The Intractability of Qualified Immunity, Alan K. Chen [39]

According to Chen his article offers an "internal critique" of qualified immunity that explains why problems with the doctrine "remain intractable" and "why, unfortunately, there is little hope for resolution of the doctrine's central dilemmas short of either abandoning immunity or making it absolute."[40]

First, Chen discusses what he states can "best be described as qualified immunity's foundational jurisprudential tensions."[41] The first tension is that qualified immunity is a standard and not a bright-line rule.[42] Chen acknowledges that standards have advantages (like deliberation, fairness, and accountability) but claims these advantages may be lost when qualified immunity is applied to contexts like the Fourth Amendment which also rely on standards.[43] Second, Chen asserts that the Supreme Court's "unbending insistence" that qualified immunity is a pure question of law is rarely correct; applying qualified immunity usually involves resolving questions of fact and law.[44] Finally, Chen examines the fact that the "level of generality at which that right is stated will materially alter the qualified immunity determination."[45] Chen criticizes the Supreme Court for doing "little to clarify the appropriate level of generality at which the clearly established right must be articulated."[46]

Chen next looks at qualified immunity's administrability problems describing the doctrine as a "nightmare for litigators and judges who confront its implementation on a routine basis."[47] Chen points out that the Supreme Court has said that trial judges should easily be able to dispose of most cases at summary judgment, but most cases are fact-driven so some discovery is required.[48] Chen criticizes the Court for failing to clarify which party bears the burden of persuasion, which has been identified for decades as one of qualified immunity's unanswered questions.[49] Finally, Chen asserts it is difficult to know if qualified immunity actually reduces costs as the Supreme Court claims it does.[50]

Chen concludes his article by stating that qualified immunity needs "serious reconsideration" but assesses the prospects for reform as "dim."[51] In short, Chen suggests that the Supreme Court is likely to reject, ignore, or misconstrue empirical research that indicates qualified immunity should be reformed.[52] And Congress likely lacks the political will to pass civil rights legislation.[53]

Other Articles

At the time of this writing we don't know what the other Notre Dame Law Review articles will say. But we do know their titles and authors: Alexander A. Reinert, *Qualified Immunity at Trial*; Karen M. Blum, *Qualified Immunity: Time to Change the Message*; Scott Michelman, *The Branch Best Qualified to Abolish Immunity*; John F. Preis, *Qualified Immunity and Fault*; David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*; and Fred O. Smith, Jr., *Formalism, Fragmentation, and the Future of Qualified Immunity*.[54]

How will the Court Likely React to These Articles?

It is difficult to say whether and how the Supreme Court Justices will react to these articles, if for no other reason that all of them are not yet published.

On one hand, Supreme Court Justices are more than used to ignoring academics who tell them they got something wrong and should do it another way. And it would be much more concerning if the Court's more centrist Justices (like Chief Justice Roberts and Justice Kennedy) or even the Court's youngest Justices (Gorsuch and Kagan) had cited to Baude's article.

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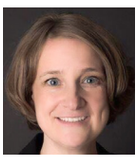

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Amicus Corner

Betting on Sanctuary Jurisdictions

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

What do sports wagering and sanctuary jurisdictions have in common? The Tenth Amendment, of course! And in a huge victory for state and local governments, the Supreme Court held on May 14th, 2018 in *Murphy v. National Collegiate Athletic Assn.* that the Professional and Amateur Sports Protection Act (PASPA) unconstitutionally violated anti-commandeering principles under the Tenth Amendment, concluding that a "more direct affront to state sovereignty is not easy to imagine." 584 U.S. __ (2018) (slip. op., at 18). This case is about the legalization of sports gambling in New Jersey (and elsewhere). But at its core, it is about our constitutional system of dual sovereignty, issues of preemption, and anti-commandeering. And while the issue of sanctuary jurisdictions is fraught with political tension, it has these same issues at its core as well. As explained below, the decision in Murphy may end up carrying the day for at least part of the sanctuary jurisdiction issue.

Murphy v. NCAA has to do with PASPA, which does not directly prohibit sports betting under federal law. Instead, PASPA prohibits state-sanctioned sports gambling, a distinction which ultimately was decisive in this case. PASPA made it "unlawful" for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. 28 U.S.C. § 3702(1). There was a provision in PASPA, which was enacted in 1992, which essentially grandfathered in any then-current state laws that authorized sports wagering~ which is why Nevada's laws authorizing sports gambling remained legal. Congress gave New Jersey one year to enact a law to allow sports gambling in its casinos when it enacted PASPA, but New Jersey declined to do so at that time.

Times change, and 20 years later, New Jersey amended its constitution to allow some sports gambling. Unsurprisingly, the state was sued by the NFL and other sports leagues for violating PASPA. New Jersey argued PASPA is unconstitutional under the anti-commandeering doctrine because it requires the states "to affirmatively keep a prohibition against sports wagering on their books, lest they be found to have authorized sports gambling by law by repealing the prohibition." The Third Circuit responded in *Christie I* that New Jersey's position "'rest[ed] on a false equivalence between repeal and authorization,' implying that a repeal is not an authorization." New Jersey then petitioned the Supreme Court for certiorari and the United States submitted an amicus in opposition, arguing that under the Third Circuit's construction of PASPA, states were free to repeal their prohibitions on sports wagering "in whole or in part."

After losing at the Third Circuit, in 2014 New Jersey passed a law repealing restrictions on sports gambling (as opposed to affirmatively allowing it and setting up a state regulatory scheme). The repeal was partial and essentially amounted to a reprieve for the Atlantic City casinos, but it retained the existing state prohibition everywhere else (because the casinos were already heavily regulated). New Jersey was sued again by many of the same parties, and in *Christie II,* New Jersey again argued that PASPA unconstitutionally commandeers states, this time by not allowing New Jersey to repeal its own laws. The Third Circuit again rejected the state's anti-commandeering argument.

The issue before the Supreme Court was whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of *New York v. United States.*

Justice Alito and at least six other justices concluded that PASPA amounts to an unlawful commandeering of New Jersey's legislature because it is ordering the States to act (or not act) in a certain way, as opposed to regulating individuals directly. *Murphy,* 584 U.S. __ (2018) (slip. op., at 18). In concluding that PASPA amounts to a direct affront to state sovereignty, the Court notes that "[i]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals." *Id.* The Court explained that "[t]he anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States." *Id.* at 14. Put another way, "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Id.* at 15.

The majority explained that the rationales for the anti-commandeering principle include: 1) it protects liberty as a "healthy balance of power between the States and the Federal Government and [reduces] the risk of tyranny and abuse from either front"; 2) it promotes political accountability; and 3) it prevents Congress from shifting costs of regulations onto States. *Id.* at 17-18.

In rejecting the Respondents' and the United States' argument that PASPA was preempting state law (and thus not an unlawful commandeering), the Court concluded that it is not enough to point to the Supremacy Clause ~ preemption is a principle that is based on a federal law that regulates the conduct of private actors, not the States. *Id.* at 21. Thus, the Court concluded that "the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors." *Murphy,* 584 U.S. __ (2018) (slip. op., at 24). After it concluded that the provision at issue was unconstitutional, the majority concluded that provision was not severable from the entire statute and struck down PASPA in its entirety. *Id.* at 25-30.

Justice Ginsburg dissented, joined by Justice Sotomayor and by Justice Breyer in

part. Interestingly, in her dissent, Justice Ginsburg was silent on the commandeering issue (though in theory she disagreed with the majority on this point, given that she had dissented in *Printz v. United States*). Instead, she noted "assuming arguendo" that PASPA unconstitutionally commandeers the regulatory power of the States, she would not have "deploy[ed] a wrecking ball" to destroy the statute in its entirety. *Murphy,* 584 U.S. __ (2018) (Ginsburg, J. dissenting, at 1). In other words, the primary criticism in the dissent is aimed at the majority's severability analysis. Even if the provision of PASPA in question violated the Tenth Amendment, the dissent did not think the majority was correct in striking down the entire statute.

What's that got to do with Sanctuary Jurisdictions?

Immediately after the *Murphy* decision, briefs were filed in at least three sanctuary jurisdiction cases, asking the courts in those cases to consider the constitutionality of 8 U.S.C. § 1373 (Section 1373) in light of the Supreme Court's decision.

Section 1373 is titled "Communication between government agencies and the Immigration and Naturalization Service" and provides as follows:

> (a) In General. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

On June 6, 2018, the district court in *City of Philadelphia v. Sessions* held that "[b]ecause Section 1373 directly tells states and state actors that they must refrain from enacting certain state laws, it is unconstitutional under the Tenth Amendment." No. 17-3894, 2018 U.S. Dist. LEXIS 94709, at *99 (E.D. Pa. June 6, 2018).

The bottom line of *Murphy* is that Congress can only regulate private individuals and the Constitution prohibits Congress from issuing direct orders to the governments of the States. There is no way to read Section 1373 other than as a directive to state and local governments. As the district court explained in *City of Philadelphia v. Sessions,* "the PASPA provision violated the Tenth Amendment because it 'unequivocally dictates what a state legislature may and may not do.' Murphy, 138 S.Ct. at 1478. Sections 1373(a) and (b) do the same, by prohibiting certain conduct of government entities or officials." *City of Philadelphia v. Sessions*, No. 17-3894, 2018 U.S. Dist. LEXIS 94709, at *96 (E.D. Pa. June 6, 2018).

The Department of Justice sees *Murphy* differently. First, the DOJ argues that Section 1373 is constitutional because the Constitution gives the federal government sole province over immigration matters and 1373 is merely "an information-sharing component of the overall removal scheme, in which the federal government takes full responsibility for regulation of and enforcement against individuals." *See Id.* at *97 *quoting* Def. Post-Trial Br., at 6. The district court in *City of Philadelphia* rejected this argument, which it characterized as a preemption argument, noting that *Murphy* "made clear that, for a statute to preempt state law, it must not only represent the exercise of a power conferred on Congress by the Constitution, but also be best read as [a provision] that regulates private actors, rather than governmental entities or officials." *Id.* (internal quotations omitted).

The DOJ's second argument in support of the constitutionality of Section 1373 comes from *Reno v. Condon*, 528 U.S. 141 (2000). The DOJ argues that under *Reno*, Section 1373 is constitutional because it does not "regulate States in their sovereign capacity" but rather it regulates "the States as the owners of data bases." *Id.* at *98 (E.D. Pa. June 6, 2018), *quoting Reno* 528 U.S. at 151. The district court again rejected this argument, concluding that *Reno* does not support the constitutionality of 1373 because the Drivers Privacy Protection Act (which was at issue in *Reno*), does not "require [state legislatures] to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* *98-99. Conversely, the court explained that under *Murphy*, a law that restricts state legislatures from enacting certain laws is the same as requiring state legislatures to enact a law, and because Section 1373 directly tells states that they cannot enact certain state laws, it is unconstitutional under the Tenth Amendment. *Id.* *99.

While the Philadelphia district court is the only one to rule on the constitutionality of Section 1373 as of this writing, it seems likely that the district court in Chicago will agree with its analysis. That is because before the *Murphy* decision was rendered, Judge Leinenweber, the district court judge handling the *City of Chicago v. Sessions* case, ruled at the preliminary injunction stage that because commandeering requires some sort of affirmative mandate by Congress on the states, Chicago was unlikely to prevail on its arguments that Section 1373 was unconstitutional. *See City of Chicago v. Sessions,* no. 1:17-cv-05720 (N.D. Ill. Sept. 15, 2017). This is similar to what the sports leagues argued in *Murphy,* claiming that commandeering occurs "only when Congress goes beyond precluding state action and affirmatively commands it." *Murphy*, slip. op. at 18. In *Murphy*, Justice Alito called this distinction - affirmatively commanding state action versus preventing states from acting - empty. *Id.* at 19. "It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded 'affirmative' action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." *Id.*

Judge Leinenweber summarized the issue of the constitutionality thusly: "At its core, this case boils down to whether state and local governments can restrict their officials from voluntarily cooperating with a federal scheme. The Court has not been presented with, nor could it uncover, any case holding that the scope of state sovereignty includes the power to forbid state or local employees from voluntarily complying with a federal program." *City of Chicago,* at *33. Since he wrote that, the Supreme Court has answered this question, providing Judge Leinenweber with a precedent squarely on point.

Section 1373 is at the heart of the litigation involving sanctuary jurisdictions. If Section 1373 is unconstitutional, then the Department of Justice's entire sanctuary cities house of cards will likely come crashing down. After the Supreme Court's decision in *Murphy*, that seems like a safe bet.

Notes

1. The case was formerly *Christie v. NCAA*, but because it was decided after New Jersey elected a new governor, the name of the case as it was decided is *Murphy v. NCAA*.
2. Five Justices joined Justice Alito's majority opinion in full, while Justice Breyer only joined the anti-commandeering portion

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Inside Canada

Recent Cases of Interest

By: Monica Ciriello, Assistant Barrister and Solicitor, Middlesex County, Ontario

City Obtains Second Dismissal of Dog Owner Claim

Oh v City of Coquitlam, 2018 BCSC 986 (CanLII) http://canlii.ca/t/hskqr

Mr. Oh, a resident and former dog owner, was granted an appeal. The City of Coquitlam (City) was initially successful in obtaining an order from the Chamber's Judge and Mr. Oh's claim was dismissed pursuant to *Court Rules Act* Rule 9-5(1)(a) on the basis that his assertions disclosed no reasonable claim. Mr. Oh appealed. The City went before the same Chamber's Judge to clarify that the matter had been dismissed under Rule 9-6(5)(a) finding that there was no genuine issue for trial. As a result, the Court of Appeal held that the Chamber's Judge erred, and Mr. Oh's appeal was allowed. The City filed an application to dismiss Mr. Oh's claim for the second time relying on two new affidavits and Rule 9-5(1)(b) and Rule 9-6(4). Mr. Oh argued that this application should be dismissed as it had already been ruled on by the Court of Appeal.

HELD: Claim dismissed.

DISCUSSION: The evidence presented by the City included affidavits from two City staff in the licensing department. One affidavit confirmed that the City records stated that Mr. Oh and his mother were co-owners of two dogs and the address was registered to Mr. Oh's parents' home. The other affidavit was from a City staff person that had received and approved the documentation to relinquish animal ownership of the dogs from Mr. Oh's mother. The definition of "owner" in the City's Animal Bylaw states:

> Owner, in relation to an animal, means a person:
> i. to whom a *dog license* has been issued under this Bylaw;
> ii. ...
> iii. who owns, is in possession of, or has the care or control of an animal, temporarily or permanently;
> iv. who harbours, shelters, permits or allows an *animal* to remain on or about that person's land or premises;

Upon receiving the two dogs from Mr. Oh's mother, the City ultimately put the dogs up for adoption. Relying on Rule 9-5(1)(b) which permits a Court to strike out any part of a pleading, petition, or other document before the court at any stage of a proceeding the Court deems to be unnecessary, the Court struck out the majority of Mr. Oh's claim. The remainder of Mr. Oh's claim is not positioned in negligence but rather in the tort of detinue. The elements for a potential claim in detinue involves the wrongly detention of another's good and the failure or refusal to deliver them without a lawful excuse (*Schaffner v. Insurance Corporation of British Columbia*, 2016 BCSC 1186). The City is awarded a complete defense to a detinue claim if the City had reasonable grounds to retain the goods despite Mr. Oh's demand for their return. The Court held that the City acted in accordance with its municipal bylaw to accept the dogs, and the City had no duty to return the dogs to Mr. Oh when he sought them, not only because the dogs were jointly owned, but also because the City was concerned for the dog's welfare. The remainder of the claim that was not struck under Rule 9-5(1)(b) is dismissed in its entirety under Rule 9-6(4).

Not All City Committees Are "Local Boards"

Ontario Ombudsman v. Hamilton (City), 2018 ONCA 502 (CanLII) http://canlii.ca/t/hsb9j

The Ombudsman of Ontario (Ombudsman) received a complaint that the Election Compliance Audit Committee and the Property Standards Committee (Committees) at the City of Hamilton (City) were conducting private deliberations. The Ombudsman proceeded with an investigation as permitted under section 14.1 of the *Ombudsman Act*, R.S.O. 1990, c.O.6. and s. 239 of the *Municipal Act* (*Act*) under the premise that private deliberations were prohibited as all meetings of local boards are to be open to the public. In Divisional Court, the City successfully challenged the Ombudsman's jurisdiction to investigate either Committee under the *Act's* open meeting requirements as neither Committee was a 'local board' as defined by the *Act*. The Ombudsman appealed the decision. The City submitted that the interpretation of 'local board' by the Divisional Court is correct, but in the alternative if the Committees are held to be a 'local board' the deliberations that took place were not 'meetings' within the meaning of s.239(1) of the *Act*.

HELD: Appeal dismissed.

DISCUSSION: The *Act* requires that a municipality ensure all municipal council, local board and committee meetings are open to the public and if they are closed, in the absence of an appointed investigator, the Ombudsman has the jurisdiction under s. 239(1)(b) of the *Act* together with s.14.1 of the *Ombudsman Act* to investigate a complaint. The Ombudsman makes a determination if there has been a failure to comply with the public meetings requirement of the *Act*. The prerequisite for the Ombudsman's jurisdiction to conduct an investigation is that it must be a municipality or a local board of a municipality at issue. The Divisional Court reviewed the definition of local board in s.1(1) of the *Act*:

> 'local board' means a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority.

The Divisional Court concluded that based on this definition the Committees were not local boards. The Ombudsman argued that the Divisional Court erred because the Committees exercise power 'with respect to the affairs or purposes of one or more municipalities" and thereby fits explicitly into

the definition of 'local board.' In applying *ejusdem generis* the Court found that the language at the end of the 'local board' definition does not include entities which cannot be said to carry on the operations of the municipality. As a result, the Court disagreed with the Ombudsman, and upheld the decision of the Divisional Court that the Ombudsman does not have jurisdiction over the Election and Compliance Audit Committee or the Property Standards Committee as neither are local boards. Therefore the ruling did not allow the Ombudsman to investigate.

Interim Remedy not Granted where Later Remedies Available

Maitland v. Toronto (City), 2018 HRTO 657 (CanLII) http://canlii.ca/t/hs3ch

The Applicant, a current employee at the City of Toronto (City) filed an application with the Human Rights Tribunal of Ontario (HRTO) alleging discrimination and sexual harassment by her Supervisor at the City contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19 (*Code*). While awaiting the outcome of the application, the Applicant requested an interim remedy from the HRTO to prevent the City from terminating her employment and disciplining her for overpayment while she was off on sick leave. The City submitted that it had no intention to terminate the Applicant or seek reimbursement for any payment made to the Applicant.

HELD: Interim remedy denied.

DISCUSSION: The HRTO states that granting an interim remedy is an extraordinary step, because it would order the City to take, or in this case to not take, certain actions prior to a hearing on the merits of the Applicant's application and before any violation of the *Code* has been proven. As a result, the HRTO proceeds with caution and has held that an Applicant seeking an interim remedy has 'significant onus' or burden to demonstrate that the request meets the elements of s. 23 of the HRTO's Rules of Procedure (*TA v. 60 Montclair,* 2009 HRTO 369). Section 23 states that the HRTO may grant an interim remedy, before a full hearing of the application has taken place, where it is satisfied that:

23.2 a. the application appears to have merit;
b. the balance of harm or con vnience favours granting the interim remedy requested; and
c. it is just and appropriate in the circu stances to do so.

Further, a request for an interim remedy must include:

23.3. a. a detailed description of the order sought;
b. one or more declarations signed by persons with direct first-hand knowledge detailing all of the facts upon which the Applicant relies; and
c. submissions with respect to the merits of the Application, the balance of harm or convenience and why an interim remedy would be just and appropriate in the circumstances.

The HRTO found that the interim remedy was not necessary, given that the Applicant was unable to demonstrate that such a remedy was required, for two reasons: First, the Applicant did not meet s.23.3(b) and failed to provide facts to be relied on in the signed declaration. Second, if there was a finding of discrimination contrary to the *Code* and the Applicant had been terminated or disciplined for overpayment, the HRTO could address it at the conclusion of the hearing. The HRTO denied the Applicant's interim remedy request.

Town May Pass Expropriation Bylaw Before Conforming with Official Plan

9616837 Canada Ltd. v. Town of Wasaga Beach, 2018 ONSC 3048 (CanLII) http://canlii.ca/t/hs22s

The Applicant owns a downtown property in the Town of Wasaga Beach (Town). The Town created a Downtown Development Master Plan (DDMP) to create a more vibrant downtown core. To achieve the outcomes of the DDMP, the Town would require the Applicant's property. Although the Town's official plan did not yet incorporate the provisions of the DDMP, the Town passed a by-law to approve expropriating the Applicant's property and to provide the Applicant proper notice. The Applicant brought forward an application to quash the Town's by-law under s.273 of the *Municipal Act*, 2001, R.S.O. 2001, c.25, arguing that the by-law is in contravention of s s.24 of the *Planning Act*, R.S.O. 1990, c. P.13 (*Act*) because the DDMP did not confirm with the Town's official plan. The Town's response relied on s.24(3) of the *Act*.

HELD: Application dismissed.

DISCUSSION: Before turning to the statutory interpretation of s.24(3) *Act*, the Court highlighted that the Town has the power to expropriate the Applicant's land and cited *Dell Holdings Ltd. V. Toronto Area Transit Operating Authority,* 1997 CanLII 400 (SCC): "the expropriation of property is one of the ultimate exercises of governmental authority."

To lay the foundation for the statutory interpretation of s.24(3) of the *Act*, the Court cited *Driedger's,* the leading authority of statutory interpretation that rejects plain meaning, and has become the interpretation approach used by the Supreme Court of Canada:

> Today there is only one principle or approach ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Section 24(3) of the *Act* permits:

> a municipality to take into consideration the undertaking of a public work that does not conform with the official plan and for that purpose the council may apply for any approval that may be required for the work, carry out any investigations, obtain any reports or take other preliminary steps incidental to and reasonably necessary for the undertaking of the work, but nothing in this subsection authorizes the actual undertaking of any public work that does not conform with an official plan.

The Applicant argued the plain language of s.24(3) does not permit the Town's Council to pass a by-law to accomplish the objectives of the section. Rather, the section only permits the Town to undertake matters pertaining to public works that do not require a by-law to be enacted. The Court disagreed. By applying the statutory interpretation of s.24 in its entirety, the Court determined that the purpose of the section was to allow the Town to take preliminary steps including applying for approvals that do not conform with the official plan while making changes to the official plan. This would ultimately allow the Town to move forward on two concurrent fronts, while ensuring that no public work is undertaken until the official plan is amended. The Court concluded that s.24(3) must be interpreted to provide the Town with the authority to take these preliminary steps by enacting by-laws. The steps taken by the Town were well within its authority under s. 24(3), therefore the by-law is a valid exercise of the Town's authority.

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IMLA NOMINATING COMMITTEE

2018 ELECTIONS

Pursuant to the IMLA By-Laws, IMLA is announcing the 2018 Nominating Committee. The Committee encourages people interested in being nominated for Vacant Positions on the IMLA Board of Directors and for IMLA Regional Vice Presidents to make their interest known to the Committee. In addition to filling vacancies, the Committee is charged with nominating the Board's officers: including Treasurer and President-elect. Some members of the Board will be term limited and cannot seek reelection. As a result there will be a vacancy or vacancies. It is IMLA's goal to have a Board that represents the organization's diversity of region, gender, race, age and ethnicity and the Board welcomes all who wish to serve. Unlike other non-profit boards, IMLA does not require Board members to contribute financially to the organization, but does seek persons who are interested in advancing its mission, increasing its membership and attendance at its programs.

THIS YEAR the nominating process will be similar to last year's. The Nominating Committee will be conducting phone interviews PRIOR to the Annual Conference and will introduce its slate of nominees at its meeting at the Conference. It is important to hear of your interest as soon as possible to allow for phone interviews to be scheduled. Our hope is to reduce the amount of time members must spend away from our educational programming and to thoroughly consider each applicant. In applying, the Committee hopes that you can offer the Committee an explanation about how you can advance the mission of IMLA and increase its membership and attendance and offer innovative ideas for advancing the interests of our membership.

Please contact the Committee members below for consideration and please copy jenny ruhe at jruhe@imla.org

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The Nominating Committee is charged with trying to find candidates that will work to increase the value of IMLA to its members, strengthen the organization and ensure the diversity of the Board.

IMLA Regional Vice Presidents are also selected by the Nominating Committee and it has been our practice in the past to nominate the current Regional Vice Presidents unless there is a vacancy.

The current copy of the amended By-Laws can be found on IMLA's web site at www.imla.org and the By-Laws describe the qualifications for service on the board or other office.

The Board of Directors hopes that all interested members will apply.

IMLA MID-YEAR SEMINAR









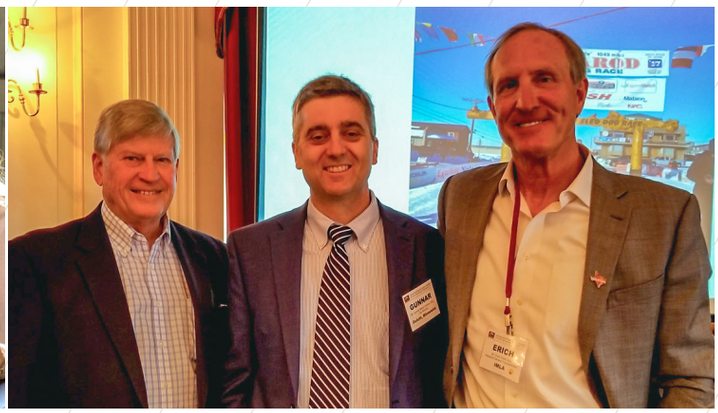




IMLA's Mid-Year Seminar was again hosted at Washington DC's iconic Omni Shoreham Hotel over four days of spectacular spring weather. Thanks again to our speakers, our sponsors, our Amicus winners—and above all, our members—for helping to make our event such a great success!

























Opioid Epidemic Cont'd from page 15

never a large coal producer, the county was tied to the coal industry as a major transportation (rail) hub for southern West Virginia's coalfields. As coal production decreased over the years Mercer County's economy was impacted significantly. High unemployment and poverty rates, coupled with significant substance abuse had a crippling effect on the county and its prospects.

Recognizing the importance of providing the community with a positive sense of direction, Mercer County officials decided to reinstitute the defunct planning commission in addition to updating the community's comprehensive plan–which had not been updated since the late 1990s. County officials called on the Land Use Clinic to assist in the process.

County officials were particularly interested in the safety of its citizens and in supporting community members needing assistance due to substance abuse. Quickly recognizing that there was no "silver bullet" solution to the opioid crisis, the planning commission suggested a multifaceted, cross-jurisdictional approach in its draft comprehensive plan. The Mercer County comprehensive plan draft section on substance abuse was modeled after the NLC and NACO Report, referenced above.[72] The county's draft comprehensive plan features a chapter organized around the four central recommendations of the Report: (1) Leading in a crisis; (2) prevention and education; (3) expanding treatment; and (4) reassessing public safety and law enforcement. The recommendations for addressing the opioid crisis in Mercer County are being replicated in other comprehensive plans in West Virginia and can stand as a model for local governments also seeking to address the opioid epidemic.

While the framework of the Mercer County comprehensive plan section on substance abuse is generally modeled after *A Prescription for Action,* county officials ensured that each recommendation was appropriate for their community. Planning commissioners, citizens, and field experts helped create a prioritized list of goals, objectives, and action steps to address substance abuse in the county. These goals, objectives and action steps were developed by communities in West Virginia; they enhance and provide substance to the goals in *A Prescription for Action.*

The following section summarizes the Mercer County, West Virginia comprehensive plan draft section on substance abuse:

Leading in a Crisis

Mercer County's draft comprehensive plan calls on officials to lead conversations on opioids and help overturn the stigma attached to addiction. Community leaders, particularly those who are elected and hold positions of trust, are encouraged to initiate candid, respectful, and compassionate discussions. Confronting the "elephant in the room" and admitting that a problem exists is the first step in finding solutions. Efforts to increase recognition of the problem could include hosting "town hall" discussions and conducting public outreach through county health departments, health care providers, and local law enforcement departments. Including individuals affected by addiction in the public input process can help identify needed resources or gaps in resources for opioid-addicted individuals. The absence of formal programs for prevention or treatment can be spearheaded by local officials.

Local officials can also bring positivity to the conversation and motivate the public to reach out to friends and family to offer support. Communities can often find backing in non-profits, local associations, service organizations, and religious groups. Additionally, officials should foster regional cooperation to help gather data, ideas, and resources. Because the opioid epidemic is so pervasive throughout the country it makes little sense to address the crisis in small community "silos."

Prevention and Education

Increasing community awareness and educating the public about the dangers of opioid misuse at an early age are essential to curbing the proliferation of addiction. Many individuals unknowingly become addicted after being prescribed pain-management opioids following an injury or surgery. Educating individuals before receiving prescription medication or obtaining illegal opioids is essential.

Communities should increase education and recreational opportunities to school-aged children to curb addiction. Local law enforcement and health professionals can host programs during school hours to educate on the dangers of opioids.

Substance abuse education should not end in high school but should continue in institutions of higher education. Additionally, local colleges and universities can help train adult volunteers in the community to identify at-risk youths and individuals before addiction sets in.

Programs like the Herren Project-Project Purple Initiative or Shatter Proof (national nonprofit groups that offer prevention and education programs targeted at youths) [73] can provide additional after-school programs aimed at substance abuse prevention. [74] Rather than focusing on a "don't do drugs" model, these programs offer healthy alternatives to drug use through life skills training.[75] Local government officials can also supplement efforts by advocating for recreational opportunities at schools, parks, religious centers, community centers, fire halls, or anywhere that a child can be engaged in a productive and meaningful activity.

Mercer County's draft comprehensive plan calls for significant future investment in county recreation. One particular recommendation calls for county and school officials to work together so that school facilities, when not being utilized for official purposes, can be open to the public. This would include school basketball courts, cross country trails, and other facilities not normally be open to the public. The county is also looking to develop a water trail system along a National Designated Scenic River (the Bluestone), and to utilize an abandoned rail line for a rails-to-trails project.

In addition to preventing opioid abuse, opioid mitigation efforts should include prevention of the spread of diseases commonly contracted by sharing needles. Although clean needle exchange programs can be controversial due to what some consider the utilization of tax funds to aid illegal drug use, these programs have produced significant cost-savings and life-saving prevention.[76]

The State of New York has implemented a statewide needle-sharing program and experienced a dramatic reduction in HIV diagnoses among intravenous drug users.[77] In 1992, the state reported 52% of new HIV diagnoses were among intravenous drug users. By 2012, just 3% of newly HIV diagnoses were among intravenous drug users.[78] In addition to health benefits, New York recouped health care costs by implementing the needle exchange program. [79] The state reported that with each HIV infection prevented by the syringe exchange program, the state saved $37,969. Local officials in partnership with clinics and health departments should explore establishing clean needle exchange programs to promote healthy living and reduce the incidence of blood-borne pathogens.[80]

(3) Expanding Treatment

Local governments should expand availability and diversity of addiction treatment options. Communities should consider and evaluate medication-assisted therapies that can range from methadone, suboxone, buprenorphine, to long-release Naltrexone programs.[81]

Additionally, local officials should promote and encourage home-based counselors, outpatient centers, and inpatient centers, including providing adequate access to needed resources and enabling qualified professionals to work through the community. Additionally, local governments can encourage no-cost treatment by opening up buildings for Narcotics Anonymous (NA) groups for use without charge,[82] facilitating free, addict-led meetings that meet weekly or nightly to promote sobriety and a culture of sobriety through sponsorship programs.[83]

Telemedicine or telehealth is aimed at improving health care, especially in rural areas, by allowing providers to consult and treat patients remotely, enabling people in rural areas to access health care services that might not otherwise be available.[84] As one study concluded, "the more sessions patients attended via telemedicine, the more likely they were to stay in an opioid treatment program." [85]

Telemedicine has limitations, given that the provider can only see or hear the patient, which may not be enough to conduct a full examination.[86] It is is most effective with reliable high-speed broadband technology;[87] another high priority recommendation in the Mercer County draft comprehensive plan is the development of broadband infrastructure throughout the county. While development of reliable broadband will help with telemedicine, it is also an important tool for local schools and economic development initiatives, also outlined in the comprehensive plan draft.

(4) Reassessing Public Safety and Law Enforcement

Compassionate practices in public safety and law enforcement is essential to communities recovering from opioid addiction. The road to recovery often begins by acquiring livable conditions and meeting basic needs. Local officials should collaborate with local service providers to ensure families affected by substance abuse have adequate food, housing, and mental health services.

Deferring arrest is one strategy successfully employed by several local governments across the United States.[88] For example, the ANGEL program in Gloucester, Massachusetts allows for street-level law enforcement officers to make decisions about drug-related arrests. Instead of sending a drug offender to jail, the offender may instead begin mandatory work with a case manager or social worker.[89] After a little more than a year since the program's inception, overdose rates in Gloucester had decreased and drug-related crimes had fallen by 27%.[90]

One tool to reduce opioid overdose deaths is Naloxone, a medication that can reverse an opioid overdose and prevent fatalities. Like needle exchange programs, Naloxone is controversial. The price of Naloxone can be costly for local governments and some individuals are revived multiple times through the course of his or her substance abuse disorder without seeking treatment. However, Naloxone has been deemed a non-abusive substance approved by the FDA and is covered by Medicaid with very low copay. Additionally, West Virginia, like many states, implements a statewide Naloxone distribution program.[91] Naloxone manufacturers have negotiated public interest pricing rates for governments and non-profit entities. Many state block grant funds were allocated to purchase Naloxone.[92] Local governments should seek Naloxone resources and provide training and supplies to first responders.

Local government officials and law enforcement should collaborate with local business to participate in "drug take back days." The National Prescription Drug Take Back Day aims to provide a safe, convenient, and responsible means of disposing of prescription drugs, while educating the public about potential medication abuse.[93]

Conclusions

A comprehensive plan has often been referred to as a "blueprint" for communities. The plan provides a canvas for the community to outline how it envisions itself in 10 to 20 years. In the past, communities have been reticent to include strategies

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Opioid Epidemic Cont'd from page 31

in the comprehensive plan to deal with substance abuse issues. However, acknowledging the opioid epidemic and identifying ways to remedy the crisis can go a long way towards addressing other components of the community's comprehensive plan including economic development, land use, housing, public services, education, and infrastructure.

Addressing the opioid epidemic in a local comprehensive plan can be an important way to provide a roadmap for the community to move forward despite overwhelming challenges. The comprehensive plan is a long-range vision and many of its recommendations will take years to achieve. Therefore, providing incremental, near-term action items to complement longer-term goals and objectives can put the community in a better position to be successful.

Because the opioid epidemic impacts communities, large and small, across the country, local governments must work with each other and with state and federal officials in addressing the issues. The sharing of ideas and of resources can go a long way in slowly chipping away at the crisis. While no single strategy will solve the problem, action steps can be identified in a local comprehensive plan that if implemented can provide a roadmap to a better future.

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Supreme Court

Partisan Gerrymandering Decisions Delayed

By: Benjamin E. Griffith, Griffith Law Firm, Oxford, Mississippi

A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable 'general interest common to all members of the public.'

~Chief Justice John Roberts *in Gill v. Whitford (June 18, 2018)*

Decades of partisan gerrymandering have contributed to an unprecedented gridlock and lack of political accountability in our nation's electoral process. *Gill v. Whitford* and *Benisek v. Lamone* initially gave hope that the Court may finally decide the issue of partisan gerrymandering's constitutionality on the merits, and provide guidance for the electoral process at the federal, state and local levels.

Near the end of the term ending in June 2018, the United States Supreme Court delayed decisions on the merits in two partisan gerrymandering challenges originating in Wisconsin and Maryland. Although the Court has struggled for over three decades to develop a judicially manageable standing for deciding such claims, its punt in *Gill* and *Benisek* made it clear that a majority of the Court is not ready to address the justiciability and merits of partisan gerrymandering claims. At the very least, the Court's procedural decisions in both cases have moved the ball closer to the goal line, but a final resolution of this constitutional issue remains beyond reach for now as the lower courts grapple with the Court's remand instructions in both cases.

Gill v. Whitford

Chief Justice Roberts wrote the 9-0 opinion for the Court in *Gill* on June 18, 2018, vacating the three-judge district court's decision invalidating the Wisconsin legislative redistricting plan as an unconstitutional political gerrymander based on a theory of vote dilution. The Court held that the plaintiffs had not made the requisite showing for Article III standing, and remanded the case to provide the plaintiffs an opportunity to prove concrete and particularized injuries using evidence demonstrating a burden on their individual votes. *Gill v. Whitford*, 585 U.S.___ (2018), https://www.supremecourt.gov/opinions/17pdf/16-1161_dc8f.pdf

Key issues before the Court in *Gill* were (1) whether the lower court erred in holding that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, rather than a district-by-district analysis; (2) whether the lower court erroneously held the state's redistricting plan was an impermissible partisan gerrymander despite complying with traditional redistricting principles; (3) whether the lower court erroneously adopted an incorrect standard for assessing partisan gerrymanders; (4) whether the proponents of the challenged plan should have been allowed to present additional evidence that they would have prevailed under that test; and (5) whether the challengers' partisan-gerrymandering claims were justiciable.

Oral argument provided some measure of insight into the Court's ultimate ruling on standing.

The Court declined to direct the dismissal of the plaintiffs' claims, noting that in the "usual case" where a plaintiff fails to demonstrate Article III standing it usually directs dismissal of those claims. Chief Justice Roberts reasoned that "This is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs' allegations that [specific plaintiffs] live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal."

In her concurring opinion, Justice Kagan characterized the Court's holding, stating that "a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district in order to establish standing, ... and that none of the plaintiffs here have yet made that required showing."

Benisek v. Lamone

The Court also handed down an unsigned per curiam order that same day in *Benisek v. Lamone*, 585 U. S. ____ (2018), at https://www.supremecourt.gov/opinions/17pdf/17-333_b97c.pdf. The order contained no recorded dissents.

The challengers in *Benisek* had sought to invalidate the partisan gerrymandered 6th Congressional District of Maryland on the ground that the state gerrymandered this district in 2011 in retaliation for the challengers' support for Republican candidates. They argued in the lower court that even though election officials only had to adjust the district by approximately 11,000 votes to account for the most recent census results, what they created was "more than a 90,000-voter swing in favor of registered Democrats." When the elections were held under the new 6th Congressional District map in 2012, the incumbent Republican who two years earlier had been re-elected by a margin of nearly 30 percent lost to a Democrat by over 20 percent. In the summer of 2017, the challengers in *Benisek* sought and were denied a preliminary injunction by the lower court to block state officials from holding congressional elections under the 2011 map. The Supreme Court had before it an appeal by the *Benisek* challengers from the lower court's denial of that motion for preliminary injunction.

In a per curiam ruling, the Court upheld the lower court's denial of injunctive relief and remanded to the lower court for further proceedings. While their constitutional challenge to the congressional district can and will go forward in the lower court, Maryland's 2018 elections, including primaries scheduled for late June 2018, will use the current map. The Supreme Court explained in its per curiam ruling that the lower court's denial of a preliminary injunction was not an abuse of discretion, reasoning that the challengers had waited six years after the map

was adopted to raise their First Amendment retaliation claim, and that granting their request would have been disruptive to the 2018 elections. The Court also noted that the lower court's order denying injunctive relief had been issued after the Supreme Court announced that it would review *Gill v. Whitford*, and that the lower court could have believed that it might be better off waiting for guidance from the Supreme Court, rather than "charging ahead."

Gill v. Whitford has now been remanded to the three-judge district court in Wisconsin and *Benisek v. Lamone* is going back to the lower court for further proceedings following its denial of injunctive relief. But there is still another case on the Court's docket that may address partisan gerrymandering.

League of Women Voters v. Rucho

Rucho is a partisan gerrymandering challenge to the First and Twelfth Congressional Districts under North Carolina's 2016 congressional map. Admittedly drawn by a Republican-dominated legislature to reflect a pro-Republican tilt and give Republicans a large majority, the N.C. map was struck down by the lower court as an unconstitutional partisan gerrymander.

The lower court ordered the state legislature to draft and submit a new plan before the end of January 2018, but the Supreme Court stayed the lower court's order on January 18, 2018. That stay order in *Rucho* placed the N.C. Republicans' appeal on hold for several months, presumably waiting for the Court to rule in *Gill* and *Benisek*, both of which were remanded on June 18, 2018 for further proceedings, *Gill* for lack of Article III standing and *Benisek* because the lower court had not erred when it decided not to require the state to redraw the challenged Maryland Congressional District map in time for the 2018 election.

On June 25, 2018, the Court vacated the judgment in the consolidated *Rucho* cases and remanded to the United States District Court for the Middle District of North Carolina for further consideration in light of *Gill*.

The core issue of whether, when and under what judicially manageable standard, if any, the Court can or will decide any of these partisan gerrymandering cases has yet to be resolved, but the machinery is in place to push toward a resolution possibly during the October 2018 term. The ball is in the challengers' court, and the stakes can potentially be as high as which party ultimately commands even a razor-thin majority in the U.S. House of Representatives. ML

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of his opinion. Justice Breyer wrote separately to explain that he dissented as to the majority's severability analysis. Interestingly, although Justice Ginsburg, joined by Justice Sotomayor, dissented in full, she provided no analysis in her dissent as to the anti-commandeering argument and instead noted even assuming arguendo that the challenged portion of PASPA was unconstitutional, she also disagreed with the Court's severability analysis.

3. IMLA joined an amicus brief filed by the State and Local Legal Center in this case, arguing that PASPA not only violates the Tenth Amendment, but the issue in the case implicates a host of other critically important state and local laws. Specifically, to allow Congress to "freeze" into place state gambling laws through PASPA, would also allow Congress to do the same thing in areas like state authorization of medical marijuana, autonomous vehicles, physician assisted suicide, etc.

4. Chicago filed a brief in *City of Chicago v. Sessions,* No. 1:17-cv-05720, the State of California filed a brief in *United States v. State of California,* No. 2:18-cv-00490, and Philadelphia cited to *Murphy* in its post-trial briefing in *City of Philadelphia v. Sessions,* No. 17-3894.

5. While Philadelphia was not directly challenging the constitutionality of Section 1373 in its lawsuit, the court nonetheless held that the statute was unconstitutional because the DOJ had placed a certification condition on the Byrne JAG Grant and was thus requiring the City to certify compliance with an unconstitutional statute. *See City of Philadelphia v. Sessions*, No. 17-3894, 2018 U.S. Dist. LEXIS 94709, at *95-96 (E.D. Pa. June 6, 2018).

6. The primary basis of Judge Leinenweber's decision was *City of New York v. United States,* 179 F.3d 29 (2d Cir. 1999), decided by the only circuit court to assess the constitutionality of Section 1373 so far. In that case, the Second Circuit found that the Tenth Amendment, normally a shield from federal power, could not be turned into "a sword allowing states and localities to engage in passive resistance that frustrates federal programs." The Second Circuit concluded that Section 1373 was constitutional on its face and did not run afoul of the Tenth Amendment. That ruling is now highly suspect in light of *Murphy*. ML

Inside Canada Cont'd from page 25

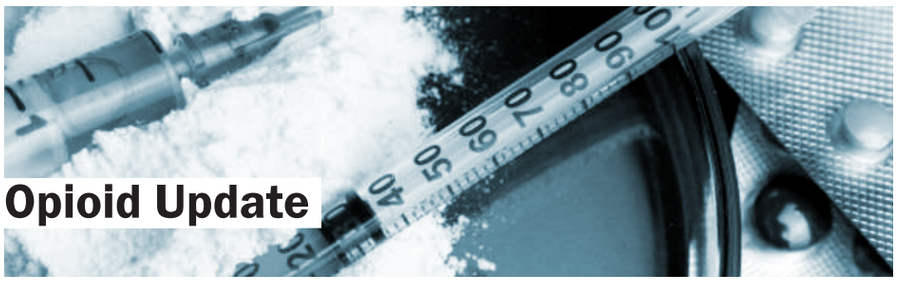
County Council Expropriation Satisfies Reasonableness Standard

Woodward v Cardston (County), 2018 ABQB 460 (CanLII) http://canlii.ca/t/hshzv

The Applicant, a resident of Cardston County (County) owned a private road that he used to access his property. The County decided to expropriate the private road lands to create a public road and provided appropriate notice to the Applicant. The Applicant objected, and the matter was sent before a hearing officer. The hearing officer held that the County's intention to expropriate was to further a municipal purpose and it was within its authority under the *Municipal Government Act,* RSA 2000, c M-26 (MGA). The Applicant did not challenge the hearing officer's decision. As a result, County Council approved the expropriation. The Applicant sought judicial review of the decision by Council's decision.

HELD: Application dismissed.

DISCUSSION: To determine the standard of review, the Court relied on *Dunsmuir v. New Brunswick,* 2008 SCC 9 and noted that deference to elected officials is well established law. When the Court is faced with judicial review of a decision made by any elected officials, including Council it must determine first if the Council acted legally. If the court can determine that Council has, then the Court can review its decision with the standard of reasonableness. (*Northland Material Handling Inc. v. Parkland (County)* 2012 ABQB 407). The Court applied the first requirement to the issue before it, finding that s.14 of the MGA authorized the County to acquire lands within its jurisdiction by expropriation for a municipal purpose. The Court proceeded to review Council's decision on a reasonableness standard. Section 3 of the MGA outlines the municipal purposes for expropriation. The County relied on s.3(b): to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality. The Court held that the County's decision was reasonable and was made for a proper municipal purpose and dismissed the Applicant's application. ML



Opioid Update

The Opioid Wars—Battling Over Remand

By: Erich Eiselt, IMLA Assistant General Counsel

Most observers are familiar enough with the main plot of the opioid litigation: over the past two decades, pharmaceutical manufacturers, distributors, prescribers and retailers flooded America with highly addictive narcotics, failing to provide adequate warnings and ignoring suspicious distribution patterns. Today, states, municipalities, unions, tribes and others demand recourse in the courts, armed with a robust arsenal of claims and seeking billions in compensation.

Against that backdrop, numerous subplots have emerged—battles among law firms vying for clients and for primacy at the bargaining table, internecine friction between localities and Attorneys General about who should lead the charge, and objections by under-represented plaintiff groups, to name but a few.

One of the more interesting side shows, at least for legal practitioners, involves the basic question of whether these actions will be heard in state or federal courts. Almost without fail, the opioid defendants prefer to litigate in a federal forum. This tactic deprives municipal plaintiffs of potentially sympathetic local juries and can drastically reduce the number of actions being simultaneously defended—because removal of a local opioid case to one of the nation's 94 federal district courts virtually guarantees that the action will be transferred further, to *In re: National Prescription Opiate Litigation*, the Multi-District Litigation (MDL) in the Northern District of Ohio. There, it will join nearly 900 federal opioid suits which have already been transferred to the Cleveland courtroom of MDL Judge Dan Polster, who has green-lighted a small subset of roughly 20 representative cases to move ahead rapidly.

As a consequence, fights over in-state jurisdiction are vociferous. They showcase inventiveness—both by plaintiffs and defendants—and expose inconsistent applications of the law.

The Quest for Complete Diversity: An obvious route for some opioid defendants seeking federal removal is to assert **"complete diversity."** Under 28 U.S.C. § 1332 (enacted to avoid excessive "home court" prejudice against out-of-state litigants), Congress gave federal courts original jurisdiction over civil actions between "citizens of different States" where the amount in dispute is more than $75,000. Contrarily, if at least one defendant is from the same state as a plaintiff, concerns about in-state bias are lessened; diversity is **"incomplete"** and removal under § 1332 cannot occur. Accordingly, plaintiffs in the dozen or so states where major defendants are "citizens" (by virtue of having a home office in the state or being incorporated there) should be immune to § 1332 federal removal, because "complete diversity" is absent. This includes municipalities in New York (home to Purdue Pharma L.P.), Pennsylvania (Endo), California (McKesson), or Actavis (New Jersey), to name a few.

Plaintiffs in states where no major corporate defendant is a citizen must cast a wider net. Under Federal Rule 20, and many states' analogues to the Rule, claims may be properly joined if they (1) arise out of the same transaction or occurrence, and (2) present a question of law or fact common to all defendants. Therefore, less high-profile local entities who arguably played material roles in the opioid crisis-- including pain clinics, pharmacies, prescribers and others--become fair game. Adding these in-state names to the complaint can defeat diversity.

The Joinder/Misjoinder Argument: Plaintiffs' attempts to add local parties are vigorously resisted by the primary opioid defendants. They can object based on two companion doctrines emanating from Federal Rule of Civil Procedure 21:

"Fraudulent joinder" asserts that the plaintiff has added a party from whom there is no possibility whatsoever of recovery, or, at its most pejorative, that the added party is so inapposite as to render the complaint fraudulent.

"Fraudulent misjoinder," the more common objection, merely avers that the principal action can be fully determined without considering the additional in-state actor(s)—whose wrongdoing, even if provable, is entirely separable from the main defendants, and who have been added to defeat diversity. In the opioid context, a typical misjoinder debate is whether a distributor's dissemination of millions of doses can be properly evaluated without simultaneously assessing the culpabilty of local clinics, physicians and retailers who effectuated delivery to the end-user.

Practitioners looking for clarity and consistency in opioid joinder/misjoinder remand cases may be frustrated. While the Fifth and Ninth Circuits have acknowledged the doctrines, the Fourth Circuit has not; similar fact patterns in Fourth Circuit jurisdictions have produced divergent results. For example, the Southern District of West Virginia denied remand when McDowell County tried to defeat diversity by adding a local prescriber. The judge found that statutory notice and pleading requirements to join the doctor had not been met—but also added that the case against the doctor was separable from the action against the manufacturers and distributors:

> Dr. Cofer, it is charged, provided written opioid prescriptions for patients, knowing that the drugs were likely to be abused, diverted or misused.
>
> *[T]he court finds no common questions of law or fact in plaintiff's claims against the*

> *corporate defendants and the claims against Dr. Cofer. The cases against each are separate and distinct. Accordingly, Dr. Cofer has also been fraudulently misjoined.* The Motion to Remand is therefore DENIED. (*County Commission of McDowell County v. McKesson Corp*., No. 1:17-00946 (S.D. W.Va. July 3, 2017) (emphasis added).

A judge in West Virginia's Northern District saw similar facts differently. In an opioid case brought by eight counties which added local salespeople to the roster of defendants, the court found:

> *There are common issues of fact and the claims against the Manufacturing Defendants, the Distributor Defendants and the Sales Rep Defendants are intertwined and arise out of the same series of transactions or occurrences.* With respect to these defendants, there is no fraudulent joinder or misjoinder. Accordingly, there is not complete diversity among the properly joined parties, and this Court lacks jurisdiction to consider any further issues in this case. (*Brooke County Commission v. Purdue Pharma L.P.*, no. 5:18 cv 09 (N.D. W.Va., Feb. 23, 2018) (emphasis added).

Shortly thereafter, the Southern District of West Virginia again sided with the defendants and denied remand. The suit in *City of Huntington v. Express Scripts Holding Company,* no. 2:18-cv-00580 (S.D. W.Va. Apr. 25, 2018) was filed by four municipalities against 14 pharmacies (mostly local) and Express Scripts Inc., a national "pension benefits manager" (PBM) responsible for deciding which drugs are included in formularies available to health insurance participants. The municipalities alleged that the West Virginia Public Employees Insurance Agency (PEIA) requested Express Scripts to require prior authorization for OxyContin prescriptions, but Express Scripts did not do so, further facilitating the flood of opioids into West Virginia.

The PBMs and pharmacies argued that their actions were severable from the larger litigation: "Plaintiffs' claims against Express Scripts are premised on an alleged collusion with Purdue to deny PEIA's request for prior authorization of OxyContin in exchange for incentive payments," the removal noticed stated. "In contrast, Plaintiffs' claims against the Pharmacy Defendants are premised on generalized allegations that they dispensed addictive opioids." The case was removed.

That result was not be mirrored in neighboring Maryland—another Fourth Circuit jurisdiction. There, Baltimore officials argued that two local doctors and their pain clinic were instrumental to the opioid defendants' damaging actions. The Maryland District Court agreed:

> Further, the City alleges that the Manufacturer Defendants' false and misleading statements about the nature of opioids caused the Rosen-Hoffberg Defendants to supply City employees with massive quantities of prescription opioids. *. . . Because the City's claims against the Rosen-Hoffberg Defendants are logically related to its claims against the Manufacturer and Distributor Defendants, the Court concludes that the claims arise from the "same transaction or occurrence."*. . . [T]he issue of whether the Manufacturer Defendants violated the Maryland False Claims Act turns, in part, on whether the Manufacturer Defendants caused the Rosen-Hoffberg Defendants to present "false or fraudulent claims" or use "false statements to get false or fraudulent claims paid or approved by the City." . . . In sum, the Rosen-Hoffberg Defendants are not severable under Rule 21 and are properly joined. *Mayor and City Council of Baltimore v. Purdue Pharma L.P.*, No. GLR 18-800 (D. Md. Apr. 25, 2018). (emphasis added).

Notwithstanding this lack of uniformity (which the *Baltimore* judge referenced in his memorandum), a review of recent opioid remand cases suggests that a "well-pled" addition of local defendants should generally preserve remand to state court.

The Class Action/Attorney General Shuffle:

Another tactic occasionally employed by opioid defendants seeking refuge in a federal forum is to characterize the municipal lawsuit as a "class action." The impetus for this move is the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), 453, and 1711–1715. Passed to prevent perceived class action lawsuit abuse, CAFA gives federal courts jurisdiction where the aggregate amount in controversy exceeds $5 million, where the class comprises at least "100 or more persons" and where there is at least "minimal diversity" between the parties (i.e., at least one plaintiff class member is diverse from at least one defendant). Although various municipalities have joined in actual state-wide class actions and filed in federal court (Georgia, Maine and Missouri, for example), other groups of cities and counties have filed in state court and desire to remain there. For these plaintiffs, characterization as a "class action" could result in removal.

A mechanism exists to keep these broad-based opioid cases in state court--although it requires municipalities to cede authority to a sometimes quixotic torch- bearer: the state's Attorney General. A 2014 Supreme Court decision (*Mississippi ex rel. Hood v. AU Optronics Corp,* 571 U.S. _____ 2014) clarified that Attorney General *parens patriae* actions, even if brought on behalf of more than 100 unnamed plaintiffs (for example, all residents and local governments in the state), are not subject to CAFA's jurisdictional pull. Thus, numerous state AGs (in Florida, Texas, Nevada, Arkansas, North Dakota, New Mexico, Oklahoma and others) have filed opioid actions in in state court, ostensibly avoiding federal courts and the MDL.

The "Federal Question" and "Federal Officer" Obstacles:

Even where actions appear to be safely ensconced in state court, whether through incomplete diversity or where the Attorney General brings the case, further dangers lurk for opioid plaintiffs--specifically, the "Federal Question" and "Federal Officer" hurdles.

Federal Question jurisdiction arises under 28 U.S.C. § 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." In the opioid context, defendants argue that plaintiff's characterization of their wrongdoing inextricably implicates federal laws. An extreme version of this strategy is playing out in Oklahoma as this issue goes to print. There, Attorney General Mike Hunter filed an action against Purdue and other manufacturers in state court over a year ago, and the case was among the most rapidly-moving of state opioid actions, with a trial date

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projected for May 2019.

AG Hunter's complaint references only violations of state law–Oklahoma's False Claims Act, Medicaid Program Integrity Act, Consumer Protection Act—and common law public nuisance, fraud and unjust enrichment. Regardless, defendants recently sought removal to federal court on the basis that, during a deposition, an Oklahoma official referred to the federal Controlled Substances Act. The state court action has been stayed as a federal judge now carefully considers whether the case should be removed.

Other courts to assess similar scenarios have found that federal law is not integral to the opioid complaint and have held for the plaintiffs. A case in point: on June 12, 2018, the District Court in New Mexico rebuffed pharma distributor McKesson's attempt to remove. McKesson argued that, because the New Mexico Attorney General's complaint stated that the distributors had violated their duties under the federal Controlled Substances Act that distributors report "suspicious orders," the case implicated a "Federal Question." But as the court noted, New Mexico's own state laws also require drug distributors to report "diversion" of any controlled substance:

> Thus, contrary to McKesson's claim that Plaintiff can prevail only by showing that Defendants violated the FCSA, it appears that Plaintiff could show that Defendants violated state law duties to control, report and guard against the diversion of prescription drug orders, meaning that the federal statute is not necessarily raised. *State of New Mexico v. Purdue Pharma L.P.*, no. 1:18-cv-00386 (D.N.M. June 2, 2018).

The case was remanded to the First Judicial Court of Santa Fe County, where it had been first filed; the New Mexico district court also referenced two similar AG opioid decisions, in West Virginia and Delaware. In each, removal was denied on substantially similar grounds—both judges found that, despite the AG's reference to defendant's violation of federal statutes, there were ample state law grounds to refuse removal to a federal forum.

"Federal Officer" removal arises under 28 U.S.C. § 1442(a)(1), which provides for federal jurisdiction over any case against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office."

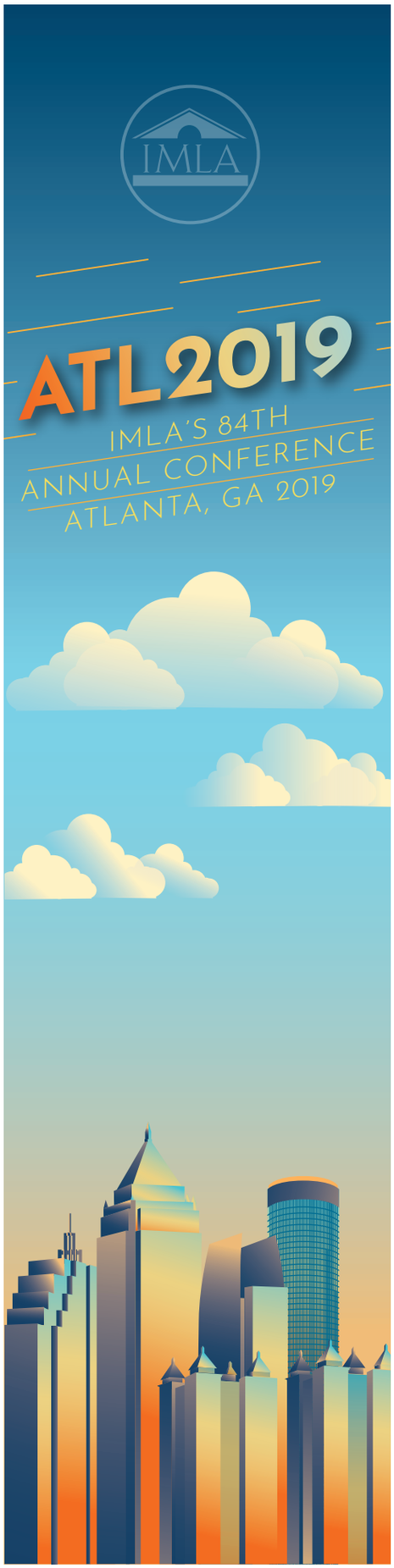
One beneficiary of the language is federal contractors who have acted pursuant to directives issued by the federal government; they can remove in-state cases brought by third parties to a preferred federal forum. Caselaw establishes that government contractors who are involved in "an effort to assist, or help carry out, the duties or tasks of the federal superior" are "acting under" a federal officer. Thus, the manufacturer and distributor defendants have successfully removed numerous opioid actions brought by tribes, on the grounds that the damage complained of arose pursuant to supply contracts with the (federal) Indian Health Service.

And at least one defense has made more expansive use of the Federal Officer provision. In a case brought by a San Francisco health care provider that incurred substantial unreimbursed costs for opioid treatment, McKesson argues that the plaintiff did not expressly exclude governmental actors:

> Because the Plaintiff seeks recovery for harms caused by any and all prescription opioids that were allegedly diverted from the legitimate supply chain in and around the geographic area served by the Plaintiff, without regard to whether or not the customer at the end of that chain was the Indian Health Service, the Department of Veterans Affairs, or another federal agency, its claims necessarily encompass the prescription opioids that McKesson supplied to tribal and federal facilities through the PPV Contract. (Notice of Removal, *Center Point v. McKesson Corp.*, no. 3:18-cv-2535 (N.D. Cal. Apr. 27, 2018).

McKesson, a California corporation, has thus far succeeded in staying the California plaintiff's remand efforts, and *Center Point* could well be removed to federal court and to Judge Polster's MDL on Federal Officer grounds.

The Bottom Line: These jurisdictional sparring matches are only the first battles in what promises to be an all-encompassing legal war. The opioid defendants' initial motions to dismiss are now beginning to arrive, and it is amply evident that municipalities will face even more inventive arguments and tactics as they fight for proper redress. ML



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On the other hand, when all of the Notre Dame Law Review articles are complete it seems likely the academics will have done a thorough and competent job of criticizing every angle of qualified immunity. And more simply, perhaps every winning streak must come to an end.

That said, completely changing course on any major legal doctrine, especially one like qualified immunity, which the liberal and conservative Justices mostly agree on, with some notable exceptions,[55] is unlikely without a number of changes in personnel. Changes to the doctrine at the margins are more likely. For example, in the next few terms maybe the Supreme Court will rule that a lower court improperly granted a state or local government official qualified immunity.[56] Regardless, it seems safe to say that the doctrine as currently configured is destined to meet continuing scrutiny and challenge.

Notes

1. In only two cases since 1982 has the Supreme Court held that police officers have violated clearly established law. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 82 (2018).
2. In *Ziglar v. Abbasi*, 582 U.S. ___ (2017), Justices Kennedy, Roberts, Thomas, and Alito granted qualified immunity to a number of high level federal executive agency officials related to a claim they conspired to violate the equal protection rights of persons held on suspicion of a connection to terrorism after September 11, 2001. Justice Thomas cited to Baude's article stating that the Court needs to focus in qualified immunity cases on whether the immunity existed at common law in 1871. *Ziglar*, 582 U.S. at *5 (Thomas, J., concurring). In *Kisela v. Hughes*, 584 U.S. ___, *6 (2018) (per curiam), a majority of the Supreme Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer in an excessive force case. Justices Sotomayor and Ginsburg criticized the majority opinion, citing to Baude's article for the proposition that the Supreme Court "routinely display[ing] an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.'" *Kisela*, 582 U.S. at *14 (Sotomayor, J., dissenting).
3. Transcript of Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability, CATO Institute, Mar. 1, 2018. *See* Brief for CATO as Amici Curiae Supporting Petitioner, Williams v. Cline (2018) (No. 17-2603).
4. *See* Brief for CATO as Amici Curiae Supporting Petitioner, Allah v. Milling (2018) (No. 17-8654).
5. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 101 (2018) (working draft
6. *See id.* at 104-7.
7. *Id.* at 119, *citing* Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).
8. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014).
9. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127:2 Yale L. J. 1 (2017), *available at* https://www.yalelawjournal.org/pdf/Schwartz_1ki1sac4.pdf.
10. Schwartz, *supra* note 5, at 115.
11. *See id.* at 116-17.
12. *Id.* at 117-18. According to Schwartz "departments' difficulty recruiting law enforcement has been attributed to high-profile shootings, negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits."
13. *Id.* at 118-19.
14. *See id.* at 126-31.
15. *See id.* at 131-37.
16. *See id.* at 137-39.
17. *Id.* at 139.
18. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1 (2018) (working draft.
19. Baude, *supra*, note 1, at 51.
20. *Id.* at 55.
21. Neilson & Walker, *supra* note 18, at 13.
22. *See* Baude, *supra*, note 1, at 62-69.
23. *See id.* at 62-69.
24. *See* Neilson & Walker, *supra* note 18, at 19.
25. *See id.*
26. *Id.*
27. *See* Baude, *supra*, note 1, at 69.
28. *See id.* at 70.
29. *See id.* at 71-72.
30. Neilson & Walker, *supra* note 18, at 24.
31. *See id.* at 26.
32. *See id.* at 27-31.
33. *See id.* at 27.
34. *Id.* at 31.
35. *Id.*
36. *Id.* at 33.
37. *Id.* at 34.
38. *Id.* at 34. Neilson and Walker think the Supreme Court should focus its attention on the "unintended effects of the Court's 2009 decision *Pearson v. Callahan*." In that case the Court rejected a rigid requirement that courts must first address whether a constitutional right was violated and, if so, only then address whether that right was clearly established.
Alan K. Chen, *The Intractability of Qualified Immunity*, 93 Notre Dame L. Rev. 1 (2018) (working draft.
40. *Id.* at 1.
41. *Id.* at 1-2.
42. *See id.* at 7-10.
43. *See id.* at 9-10.
44. *See id.* 10-12.
45. *Id.* at 12.
46. *Id.* at 13.
47. *Id.* at 15.
48. *See id.* at 16.
49. *See id.* at 18-22.
50. *See id.* at 23. "While there is no single, systematic statistical account of the amount of qualified immunity litigation, attempts to measure its frequency suggest that it consumes an enormous amount of resources from parties, courts, and society. It is certainly possible that, on balance, more defendants still prevail on summary judgment, thus saving substantial trial costs, but it is equally likely that the administration of the immunity defense itself imposes substantial costs on the parties, the courts, and society."
51. *See id.* at 24.
52. *See id.* at 29-30.
53. *See id.* at 32.
54. Samuel L. Bray, *Foreword: The Future of Qualified Immunity*, 93 Notre Dame L. Rev. 1, 2 n.9 (2018) (working draft.
55. *See, e.g.,* Justice Sotomayor's solo dissent in *Mullenix v. Luna*, 577 U.S. ___ (2015).
56. At the time of this writing the Supreme Court has repeatedly relisted a *certiorari* petition in *Sause v. Bauer*, 859. F.3d 1270 (10th Cir. 2017), *petition for cert. filed* (U.S. Nov. 17. 2017) (No. 17-__) where the Tenth Circuit granted qualified immunity to police officers who stopped the petitioner from praying silently in her home because there was no prior case law involving similar facts. Summary reversal against the officers seems likely in this case. ML

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