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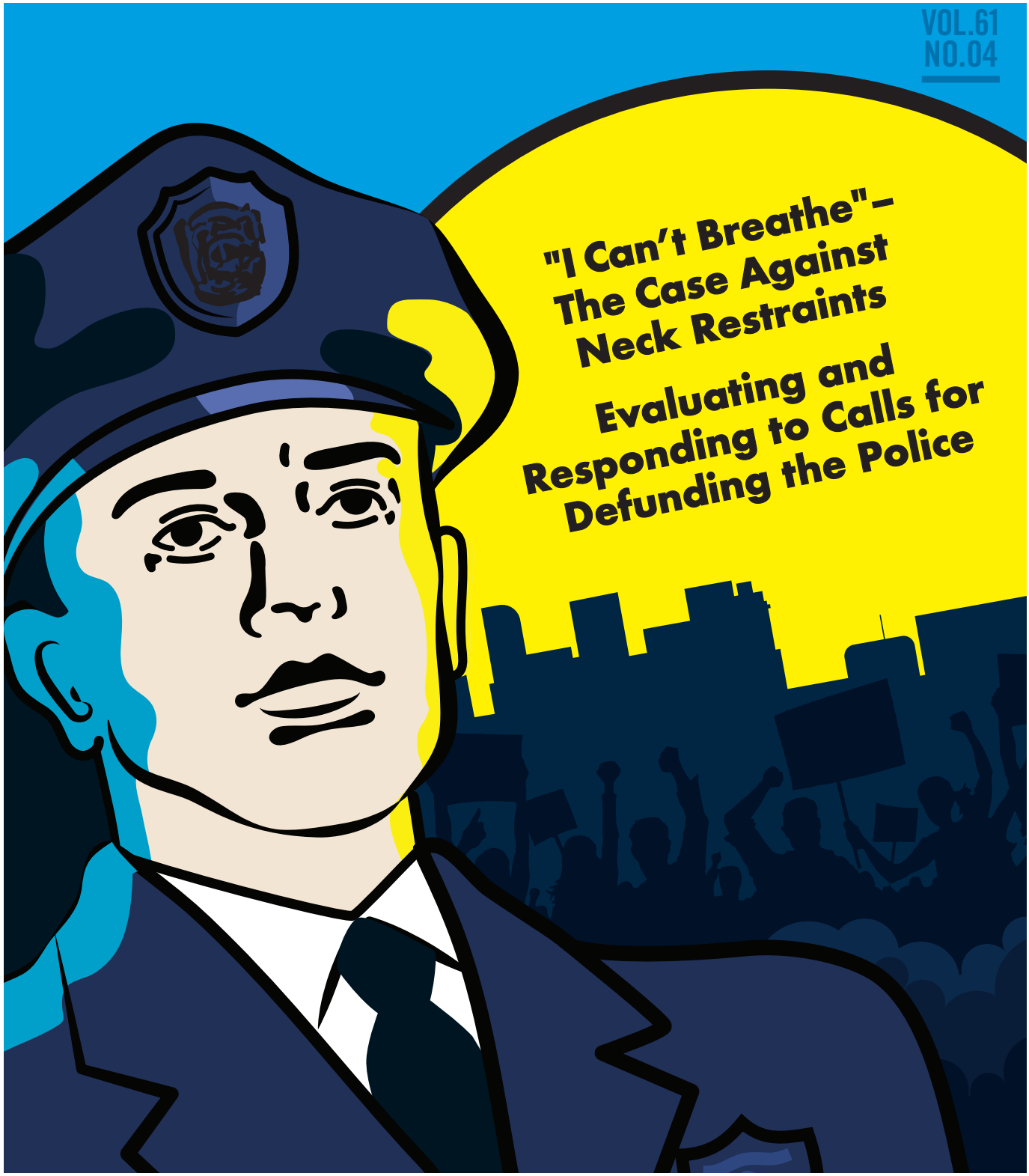

"I Can't Breathe"– The Case Against Neck Restraints

Evaluating and Responding to Calls for Defunding the Police

IMLA Nominating Committee for 2020 Elections

As required by our By-Laws, IMLA is announcing our 2020 Nominating Committee. In addition to filling vacancies on IMLA's Board of Directors (we anticipate one open seat this year), the Nominating Committee is charged with nominating IMLA officers, including the Treasurer and President-elect. The Committee encourages all those interested in being nominated for vacant positions on the IMLA Board of Directors or for IMLA Regional Vice Presidents to make their interest known to the Committee. It is IMLA's goal to have a Board of Directors that represents the organization's diversity of gender, race, age, ethnicity, and region. Unlike some 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 IMLA's mission and in increasing IMLA membership and attendance at IMLA programs.

The Nominating Committee will be conducting phone interviews of interested candidates prior to IMLA's Annual Conference and will introduce its slate of nominees during or prior to the IMLA business meeting. It is important to hear of your interest as soon as possible to allow for phone interviews to be conducted. The Nominating Committee hopes that you will offer an explanation about how you can advance the mission of IMLA and increase its membership and attendance as well as describe any innovative ideas you may have for advancing the interests of IMLA members.

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The current copy of IMLA's amended By-Laws, which describe the qualifications for service on the IMLA Board of Directors or other IMLA office, can be found at **www.imla.org.**

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CONTENTS

JULY-AUGUST 2020

"I CAN'T BREATHE"-THE CASE AGAINST NECK RESTRAINTS
By: Jack Ryan, Legal & Liability Risk Management Institute, Indianapolis, Indiana
Earlier caselaw created ambiguity about the potential lethality of neck restraints. The law is increasingly clear that such tactics to subdue prone arrestees can have deadly consequences.
PAGE 6



ROSE MARY KNICK AND THE STORY OF CHICKEN LITTLE
By: Dwight Merriam, Weatogue, Connecticut
Detractors predicted havoc in the wake of *Knick v. Township of Scott*—local officials would be immediately liable for unconstitutional takings and federal courts would be overrun. So far, the mayhem has not transpired.
PAGE 12

EVALUATING AND RESPONDING TO CALLS FOR DEFUNDING THE POLICE
By: Eugene Ramirez, Missy O'Linn, and Morgan Trenary, Manning & Kass LLP, Los Angeles, California
Communities are not likely to benefit from radical reductions to police department budgets. But a targeted reallocation of resources can result in more engaged, more effective, and less adversarial law enforcement.
PAGE 18

ILLUSTRATIONS BY:TRUJILLO DESIGN

DEPARTMENTS

24 SUPREME COURT
Voting Wars Reach the Court: Disenfranchisement Ahead?
By: John Young, Elizabeth Yang, and Benjamin Griffith
The High Court's decision in Wisconsin portends further voter turmoil.

28 OP-ED
"We Can't Breathe"- Police / Community Relations and the Local Government Attorney
By: Amanda Kellar, IMLA Deputy General Counsel and Director of Legal Advocacy
Thoughts on mechanisms to instill better policing in America's municipalities.

31 LISTSERV
Community Policing: Building Positive Relationships
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
One police chief's commitment to developing rapport and trust.

34 INSIDE CANADA
Allergic Employees, Distant Bus Stops, and Animal-Unfriendly Ads
By: Monica Ciriello, Ontario 2015
Recent cases of interest.

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EDITOR'S NOTE



BY **ERICH EISELT**
IMLA Assistant General Counsel

Qualified Immunity, Qualified.

On June 25, 2020, the House passed H.R. 7120, "The George Floyd Reform in Policing Act of 2020." The Democrat-initiated measure received only 3 Republican votes, but some might argue that even such modest crossover is tantamount to bipartisanship in the current climate. While the George Floyd Act proposes reforms across a broad spectrum of police activities, its most impactful provisions, if enacted, would be to eviscerate qualified immunity. That result would derive from two primary provisions; first, the requirement in Section 1983 that the defendant act "willfully" to deprive a plaintiff of constitutionally protected rights would be downgraded to "knowingly or recklessly." More significantly for IMLA purposes, a Section 1983 law enforcement defendant could no longer rely on either of the following defenses:

> "(1) the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when the conduct was committed; or
> (2) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of their deprivation by the defendant, or that at such time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful."

It is virtually certain that H.R. 7120 will not survive Senate scrutiny, and the George Floyd Act will not be the death knell to qualified immunity. But it is equally certain that the recurring pressure to rein in a mechanism that allows "all but the plainly incompetent" to escape personal liability will not diminish until reform occurs, and qualified immunity will be further qualified. That shift is already underway as state legislatures move to limit defenses to excessive force.

In the midst of an ascendant Black Lives Matter movement, the national calls for review of law enforcement policies and budgets are at the heart of this issue of *Municipal Lawyer*. Our July-August authors provide varying perspectives on the best way forward, scrutinizing the caselaw which has previously allowed ambiguity in the use of lethal neck restraints, assessing the merits of defunding police departments, and offering observations on various mechanisms to reform law enforcement. We also hear directly from a police chief who is forging a path to better community relations.

Our other articles discuss the fallout, actual and predicted, from the groundbreaking *Knick* decision, offer a somber look at the Supreme Court's recent Wisconsin election law holding, and provide a trio of topical Canadian decisions.

As we celebrate the Canadian and American national days of independence in this transformational summer of 2020, the challenges to local government lawyers—legal, medical, fiscal, political and more—are larger than ever. IMLA will continue to support you, regardless of the obstacles ahead, as you provide critical services to your constituents.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



BY: **PATRICK BAKER,**
IMLA President and City Attorney, Charlotte, North Carolina

The Call for Leadership

I have reached that age where I really value and cherish those peaceful moments that allow me to briefly escape the trials and tribulations of daily life. Over the last few years, my wife and I have become quite fond of starting off our week watching *Sunday Morning on CBS*. In a world that seems to produce one bad news story after another, for 90 minutes every week *Sunday Morning* highlights what's good in our world. It's a show where the unsung hero gets the spotlight; where we learn more about the inspirational stories of celebrities and average folks alike; and the breadth of human decency and compassion are showcased. It is a 90-minute reminder that there are plenty of good people in our world today. If it is not a part of your morning routine, I would encourage you to tune in to your local CBS station around 9:30 am and give it a try.

The first six months of 2020 have put a premium on finding those sources of inspiration. It seems that we are inundated with negative news stemming primarily from the continuing devastation to our society from the COVID-19 pandemic and the tragic, senseless death of George Floyd. Regardless of which side of the political aisle you inhabit, 2020 has put a spotlight on leadership. It is in the difficult times that we can truly evaluate the mettle of political leaders. It is easy to overlook the societal impact of our own leadership actions as individual citizens and the significant role we play to overcome challenges and effectuate needed societal change. On the COVID-19 front, how seriously we heed the advice of the medical professionals in taking the proper precautions to protect ourselves from contracting and passing on the virus is directly related to our ability to contain the pandemic and fully and safely reopen our economy. The death of George Floyd has yet again forced us as Americans to reexamine our notions of social justice, race relations and police reform. Communities all over the country have the opportunity turn one man's shocking death into needed crucial conversations and action in areas of police reform and social justice. In these uncertain times, history will judge the level of effectiveness of our collective leadership on these matters.

As lawyers generally and municipal lawyers in particular, we continue to play a leading role in all of these conversations. Our communities are counting on us to answer the call for leadership. I would venture to guess that the overwhelming majority of us have had substantial involvement in developing local stay at home orders. Our law enforcement community looks to us to advise them as they seek to responsibly enforce these new measures. We are providing much needed legal guidance about constitutionally acceptable proactive measures to allow our essential coworkers to performing their duties in a safe environment and to protect the public. Our elected officials rely on our counsel to continue to do the work of the people in the midst of a pandemic in a manner that fully respects our open meetings laws. On the police reform and social justice front, the value we bring to our respective communities' discourse may be even more valuable. As defense counsel for our local law enforcement agencies, we have a unique perspective that must be strategically articulated in the community discourse as our local elected officials attempt to identify logical reforms that avoid unintended and unacceptable consequences. Our natural mediation skills will be called upon to assist in the creation of an environment that is conducive to an engaged and informed crucial conversation about policing in our community.

On all of those fronts, IMLA is here to help you in your efforts to provide effective leadership in your community. Our Disaster Relief listservs and COVID-19 conference calls provide a free-flowing exchange of information across our states and provinces on all matters related to the coronavirus. Our Police Advisor listserv is very active on police reform efforts across our membership. Look for additional topical programs soon. We are all in this together and the benefits of IMLA membership in these challenging times will enhance our efforts to provide much needed leadership to our communities.

If you are unfamiliar with *Sunday Morning* and decide to give it a try, make sure you watch all 90 minutes or at least the last two. You are left with a peaceful and usually quiet nature scene. Finding those moments of serenity has become a challenge lately but if we all pull together to do our part to address these challenges, better days will surely await. ML

"I Can't Breathe" – The Case Against Neck Restraints

BY: JACK RYAN
Attorney, Legal & Liability Risk Management Institute, Indianapolis, Indiana



Over the last month, law enforcement has been faced with the aftermath of the death of George Floyd in Minneapolis which was captured on video and showed an officer putting pressure on Floyd's neck for more than eight minutes, while Floyd remained in a prone position and handcuffed. On the video, prior to becoming non-responsive, Floyd can be heard telling officers that he could not breathe.

It is important to note that not a single police officer that we are aware of has come out in support of the Minneapolis officers. In fact, there is widespread agreement that the actions of the officers amounted to unreasonable force and the failure to intervene. In the course of interviews of law enforcement trainers it became apparent that a number of trainers misunderstand the issues related to positional asphyxia and prone restraint. At least one trainer from the State of Washington reported that the science indicating that positional asphyxia may compromise breathing and thereby cause serious harm or death had been debunked.

This is a dangerous position for a law enforcement trainer to take as it might be interpreted that, leaving a restrained subject prone or prone while in a compromised position or with pressure on their back is acceptable.

The purpose of this article dealing with restraint of is to identify the competing studies and to recognize that the courts accept the fact that positional asphyxia, compression asphyxia, mechanical asphyxia, and prone restraint may impair breathing and cause death.

While accepting that there is a scientific or medical debate in these cases between competing doctors or scientists, it is a debate law enforcement should stay out of, while training instead on reasonable force, reasonable restraint, and immediate movement of arrestees to a position that facilitates breathing.

The idea that positional asphyxia in restraint cases was debunked rests on the findings in a single case that many in law enforcement training heralded. In *Price v. County of San Diego*, (990 F.Supp. 1230 (S.D. Cal. 1998), two doctors faced off on the issue of positional asphyxia: Dr. Reay, who was one of the pioneers that studied positional asphyxia, and Dr. Neuman, who was hired by San Diego County to conduct a study on positional asphyxia and the "hogtie" method of restraint. In the *Price* case Neuman refuted Reay's initial conclusions that the level of oxygen decreases after exertion and that hogtying significantly impairs the arrestee's ability to breathe such that the body cannot properly exhale carbon dioxide and also cannot replenish oxygen. Dr. Reay conceded that Neuman's research was sound. As a result, in this case, the district court concluded that use of a hogtie was physiologically neutral.

From a legal perspective it should be recognized that decisions by Federal District Courts do not create any binding precedents. Thus, one should look to the United States Court of Appeals for the Ninth Circuit to determine if that court, which does create binding precedent for officers in California, had determined that positional asphyxia, hog-tying or pressure on a prone subject's back was not problematic.

One of the Ninth Circuit's lead cases in this area came just five years after the *Price* case. *Drummond v. Anaheim*, 343 F.3d 1052 (9th Cir. 2003), examined the following law enforcement conduct:

> On March 25, 1999, Brian Drummond's fiancee Olivia Graves called the Anaheim police. Drummond, who had a history of mental illness

> The officers -- indeed, any reasonable person -- should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable. In this case, it is even more striking that the officers had been specifically warned of the extreme danger of this sort of force.

(bipolar disorder and schizophrenia), had run out of medication and was hallucinating and paranoid. Graves asked the police to help her take Drummond to the hospital to receive medical assistance.

Four Anaheim police officers responded to Graves's call; among them were Kristi Valentine, a rookie, and Christopher Ned, her training officer. The officers determined that Drummond was not a danger to himself or others -- the criteria for an involuntary psychiatric detention under CAL. WELF. & INST. CODE § 5150. The officers therefore refused to take him into custody, for transport or otherwise. Graves alleges that the officers were "not very professional," and were "joking around" throughout the encounter. Later, Drummond voluntarily accompanied Graves to a medical facility to obtain the lithium that had been prescribed for him, but he had neither medical insurance nor enough money with him to obtain the drugs and left without them.

The next night, the Anaheim police were again called to help protect Drummond; his neighbor, David Kimbrough, called the police because he was afraid that Drummond was going to hurt himself by darting into traffic. Officers Ned, Valentine, and Brian McElhaney, responding to the call, found Drummond in a 7-Eleven parking lot; Ned and Valentine recognized him as the subject of the call from the night before. Drummond, who was unarmed, was hallucinating and in an agitated state, and the officers called for an ambulance to transport him to a medical facility, pursuant to § 5150. Before the ambulance arrived, however, the three officers decided to take him into custody, "for his own safety."

Independent eyewitnesses saw Officer Ned "knock Drummond to the ground[,] where the officers cuffed his arms behind his back as Mr. Drummond lay on his stomach." Although Drummond offered no resistance, McElhaney "put his knees into Mr. Drummond's back and placed the weight of his body on him. [Ned] also put his knees and placed the weight of his body on him, except that he had one knee on Mr. Drummond's neck."

Drummond weighed only 160 pounds at the time of the incident; although there is no indication of McElhaney's weight in the record, Ned weighed approximately 225 pounds at the time. With the two officers leaning on his neck and upper torso, Drummond soon fell into respiratory distress. Two eyewitnesses verified that "Mr. Drummond repeatedly told the officers that he could not breathe and that they were choking him. He also told them that he was thirsty and needed a glass of water. The officers however continued to put their weight upon Mr. Drummond[']s back and neck." One of these eyewitnesses, Victor Calleja, stated that although McElhaney and Ned were "obviously causing [Drummond] to have trouble breathing," "the officers were laughing during the course of these events."

Approximately 20 minutes after Drummond was taken down, Officer Gregory Sawyer arrived at the parking lot. The officers then obtained a "hobble restraint," which they used to bind Drummond's ankles. One minute after the restraint was applied, Drummond went limp, and the officers realized that he had lost consciousness. They checked his pulse, and then removed the handcuffs and hobble restraint and turned him over, onto his back. The officers attempted to perform CPR on Drummond until the paramedics finally arrived.

Although Drummond was revived approximately seven minutes after losing consciousness, he sustained brain damage and fell into a coma. He is now in a "permanent vegetative state."

Drummond's medical expert, Dr. Sunil Arora, is the Medical Director of the Neurological Care Unit at the Community Hospital

continued on page 8



Jack Ryan is a co-director of the Legal & Liability Risk Management Institute which provides law enforcement training, high risk/critical task policy review, policy development, improved supervision, audits, risk assessments, and expert witness services. He served for 20 years as a police officer with the Providence, Rhode Island, Police Department, and holds a JD from the Suffolk University Law School. Jack has conducted numerous training sessions around the country for LLRMI including such courses as "Arrest, Search & Seizure;" "Use of Force and Documentation;" and "Legal & Liability Issues in SWAT Operations," and has been retained in over 900 cases as an expert witness. He is a frequent speaker at IMLA conferences.

> of San Bernadino, and one of Drummond's treating physicians. Arora submitted a declaration stating that, to a reasonable medical probability, Drummond "suffered a cardiopulmonary arrest caused by lack of oxygen to his heart. The lack of oxygen . . . was caused by his inability to breathe caused by mechanical compression of his chest wall such that he could not inhale and exhale in a normal manner. [Arora believes] that this occurred when [Drummond] was face[-] down on the ground and the police officers set upon his back preventing the anterior wall of his chest from expanding."

The United States Court of Appeals for the Ninth Circuit rejected the officers' reliance on the holding in *Price* and concluded:

> The officers -- indeed, any reasonable person -- should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable. In this case, it is even more striking that the officers had been specifically warned of the extreme danger of this sort of force. Not only was there ample publicity in Southern California regarding similar instances of asphyxiation as a result of the use of similar force in the months before the incident, *see $650,000 Settlement OKd in Inmate Death*, L.A. Times, Feb. 24, 1999, at B4; *Supervisors Asked to OK $ 2.5 Million to Settle Suits*, L.A. Times, Feb. 2, 1999, at B1; but, more important, the Anaheim police department had issued a training bulletin in April of 1998 *specifically* warning officers that "when one or more [officers] are kneeling on a subject's back or neck to restrain him, compression asphyxia [**19] can result ['t]hat may be a precipitating factor in causing death.' " Anaheim Training Bulletin # 98-14 (Apr. 1998). Although such training materials are not dispositive, we may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable.

While the medical/scientific experts continue to testify and debate this issue, the cases continue to pile up. Consider the following two cases where experts, one of whom takes the position that weight on an arrestee's back and prone restraint is not dangerous and one who takes the position that it is dangerous are both allowed to testify. If positional asphyxia had been legally "debunked," presumably only the former would be allowed to testify.

***Carlock v. Williamson*, 2012 U.S. Dist. Lexis 2817 (C.D. Ill. Jan. 10, 2012).**

Amon Carlock was a pre-trial detainee who was housed at the Sangamon County Illinois Jail from October 9, 2007 until November 16, 2007. The plaintiffs in the case moved to exclude portions of the expert testimony of Mark Kroll and specifically Kroll's testimony that there is no risk to face-down restraint even if weight is applied to an individual's back. The court denied the motion to exclude and held that Kroll was sufficiently qualified, his testimony was sufficiently reliable, and his testimony was sufficiently relevant. With respect to the reliability of Kroll's testimony about prone restraint, the court explained Kroll's testimony relied on peer reviewed articles and authorities related to positional asphyxia, restraint position, and prone restraint. The court noted that the effects of prone restraint on respiration had been tested and subjected to peer review, and that Kroll was qualified to rely on those studies and extrapolate upon them. The court also noted that while the scientific evidence on positional asphyxia was divided, the evidentiary rules regarding expert testimony were broad enough to permit testimony that was the product of competing principles or methods. Thus, Kroll could provide testimony about prone restraint.

***Goode v. City of Southaven*, 2018 U.S. Dist. Lexis 166479 (N.D. Miss. Sep. 27, 2018).**

Plaintiff Kelli Goode brought a complaint against a number of police and medical defendants which alleged that her husband Troy Williams' death was caused by positional asphyxia and his placement in a prone maximal restraint. One of the medical defendants, Dr. Oliver, filed a motion to exclude plaintiff's expert testimony. Within the motion, defendant Oliver made a blanket objection that that there is no scientific basis for the assertion that prone maximal restraint causes positional asphyxia. The court disagreed with Oliver's position for a number of reasons. The court noted that a 2007 study upon which Oliver relied did not include subjects like Troy Williams who had a history of cardiac and pulmonary problems. The court then explained that none of the studies on which Oliver relied "replicated the conditions in the field, including psychological and physical stressors associated with pursuit by a law enforcement official, struggle or trauma." The court next stated that none of the studies involved restraints lasting longer than 15 minutes, whereas Williams was placed in prone maximal restraint for approximately an hour and a half. Then explained that Troy Williams was under the influence of drugs, which would have disqualified him from participating in any of the studies on which Oliver relied.

Law enforcement should remove itself from the debate of science and medicine with respect to the physiological impact that prone restraint and weighted prone restraint have on an arrestee and instead should analyze the reasonableness of any restraint mechanism, particularly once the subject is handcuffed.

Lastly, plaintiff had cited to numerous texts which established a connection between prone maximal restraint and positional asphyxiation. For these reasons the court stated, "the conclusion that PMR [prone maximal restraint] can cause positional asphyxia is reliable within the meaning of *Daubert*."

Author's Note: Law enforcement should remove itself from the debate of science and medicine with respect to the physiological impact that prone restraint and weighted prone restraint have on an arrestee and instead should analyze the reasonableness of any restraint mechanism, particularly once the subject is handcuffed.

Consider the following group of cases where various courts have reached conclusions on restraint asphyxia and the actions of officers:

***McCue v. City of Bangor*, 838 F. 3d 55 (1st Cir. 2016).**
Bangor Police attempted to place Philip McCue into protective custody after McCue was exhibiting erratic behavior which was believed to have been caused by McCue's ingestion of bath salts. Officers apprehended McCue and struggled to get McCue to give up his hands which were underneath his body. After being tased, McCue gave up his arm and hands and officers then went about securing McCue's legs. After further struggle, McCue's ankles were eventually secured with flex-cuffs and the officers then tied the ankle and wrist cuffs together with a police dog leash in position known as a five-point restraint or hog tie. Between the time the officers secured the ankles and then completed the hog tie, two large officers continually put pressure on McCue's neck and upper body by kneeling and sitting on his back. When McCue was ultimately lifted off the ground, his body was limp. Thereafter, McCue was observed to be unresponsive and emergency medical responders could not resuscitate McCue.

In its analysis, the court stated that it was clearly established at the time of the incident "that exerting significant, continued force on a person's back 'while that person is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.'" (quoting *Weigel v. Broad*, 544 F. 3d 1143, 1155 (10th Cir. 2008). The court explained that abundant prior case law made clear that, "a jury could find that a reasonable officer would know or should have known about the dangers or exerting significant pressure on the back of a prone person, regardless of any lack of formal training." Ultimately, the court stated that disputed factual issues regarding when McCue stopped resisting and for how long officers continued to apply pressure to his back were material to the question of whether qualified immunity was proper.

***Martin v. City of Broadview Heights*, 712 F.3d 951 (6th Cir. 2013).**
William Martin died in the early morning hours of August 16, 2007, after officers physically restrained and arrested him. When the officers originally encountered Martin, he was naked and speaking quickly and nonsensically. Officer Tieber caught up with Martin and fell on top of Martin's back. Officer Semanco then arrived and dropped his knee into Martin's side to keep him on the ground. Officers Tieber and Semanco then delivered a number of knee and hand strikes to Martin; Officer Tieber also folded his legs around Martin's hips and thighs and gripped Martin's chin with his right arm. Officer Zimmerman then arrived and kneeled on Martin's calves to prevent him from kicking while the officers attempted to handcuff Martin. After Martin was secured, Officers Zimmerman and Tieber continued to hold Martin in a face-down position. Thereafter, the officers heard Martin make a gurgling sound and when they rolled Martin over he was unresponsive and exhibited no signs of life. Martin was pronounced dead at 3:06 a.m.

In considering whether the officers were entitled to qualified immunity the court analyzed whether there was a constitutional violation and whether the law was clearly established as of the date of incident. With respect to whether there was a constitutional violation, the court stated that a jury could find that the officers' conduct was unreasonable. The court explained the following: "The officers used their weight to compress Martin, struck his head and body multiple times, restrained his neck or chin, and placed him in a torso lock. These tactics were not justified by Martin's possible crime, the threat he posed to anyone's safety, or his resistance." Accordingly, the court stated that the amount of force used was constitutionally excessive.

The court next considered whether the law was clearly established as of August 16, 2007. In this regard, the court pronounced that in light of prior cases and the police department's own policies, "[a] reasonable officer should have known that subduing an

Continued on page 10

I Can't Breathe *cont'd from page 9*

unarmed, minimally dangerous, and mentally unstable individual with compressive body weight, head and body strikes, neck or chin restraints, and torso locks would violate that person's clearly established right to be free from excessive force." For these reasons, the Court denied qualified immunity for the officers.

***Burch v. City of New York*, 2016 U.S. Dist. LEXIS 195623 (E.D.N.Y. Apr. 22, 2016).**

Stanley Streeter was behaving unusually and was voluntarily taken to Richmond University Medical Center (RUMC) and then to a psychiatric facility. While at this facility, EMTs were assigned to transport Streeter back to RUMC because Streeter had a highly-elevated blood pressure. During transport, Streeter exited the ambulance, and NYPD officers were called to assist the EMTs with an emotionally disturbed person. Under the plaintiff's version of the facts, when NYPD officers arrived Streeter was already on the ground and was successfully handcuffed in less than one minute. According to plaintiff, Streeter was then forcefully restrained face down in the dirt for a prolonged period of time and Streeter struggled to breathe. Streeter was being held down by a male officer who had a knee on back and a female officer who had a knee on Streeter's neck. During this time, Streeter was handcuffed and held face-down. While Streeter was on the ground, a non-party witness heard Streeter say "I can't breathe" two to three times. Streeter struggled for five minutes after being handcuffed and then stopped moving and screaming for 20 minutes before Emergency Services Unit officers arrived. After ESU officers arrived and Streeter was turned over, was already in cardiac arrest.

In its analysis, the Court stated that the officers would not be entitled to qualified immunity. The Court explained that, "[a] reasonable officer would have known that forcefully restraining an EDP suffering from dangerously high blood pressure facedown and chestdown for 30 minutes (with two officers on top of the individual, kneeling on his neck and back), while pressing his face into the dirt so forcefully that dirt became lodged in his teeth, throat, and eyeballs and caused his nose to bleed, all while ignoring his pleas that he could not breathe did not comport with the constitution."

The Court also addressed plaintiff's claim that officers failed to intervene. The Court explained that police officers have an affirmative duty to intervene to protect the constitutional



rights of citizens from infringement by other officers. The court stated that plaintiff raised a triable fact issue as to whether the officers failed to intervene in order to protect infringement on Streeter's constitutional rights. The court highlighted that plaintiff and defendants had presented vigorously contested facts regarding the altercation between Streeter and the officers. Summary judgment was therefore inappropriate and the failure to intervene claim would not be dismissed.

***Dyksma v. Pierson*, 2018 U.S. Dist. LEXIS 117503 (M.D. Ga. July 16, 2018).**

Nicholas Dyksma died after Sheriff's Deputy Tommy Pierson pinned him to the pavement and used his knee to apply compression to Dyksma's neck. Pierson applied the compression once for a period of 20 seconds as Dyksma was being handcuffed and searched, and then applied the compression again for a period of 17 seconds after Dyksma was handcuffed, physically incapacitated and no longer resisting. Officers had originally received a call about a person (Dyksma) slumped over the wheel of a pickup truck at a Circle K. When officers arrived he took off and led the responding officers in a pursuit, which ultimately ended with Dyksma being forced off the road. Dyksma was forcibly removed from the vehicle and placed face down on the shoulder of the road. While another deputy was handcuffing Dyksma, Deputy Pierson restrained Dyksma's upper body by placing his knee on Dyksma's neck for approximately 20 seconds. After Dyksma had been handcuffed and searched, Pierson and another deputy put Dyksma back in a prone position and Pierson again used his knee to press Dyksma's neck into the ground for another 17 seconds. After these events, Dyksma was transported to a medical center but could not be revived.

In its analysis, the court considered whether Deputy Pierson was entitled to qualified immunity from suit. The court determined that it was not clear that the first 20 seconds of neck compression—while Dyksma was being handcuffed and searched—constituted excessive force under clearly established law. However, the court then stated, "[b]y August 2015, it had long been clearly established that after a suspect is arrested, handcuffed, and completely secured, and after the risks of danger and flight have passed, significant force that is 'wholly unnecessary to any legitimate law enforcement purpose' is excessive." Therefore, the court found "that on the date of Nicholas's death, it was beyond debate that a law enforcement officer who jams his knee onto the neck of a helpless and incapacitated arrestee violates that arrestee's Fourth Amendment right to be free from excessive force." Consequently, Pierson was denied qualified immunity.

The court also considered whether the other officers who were present at the scene were entitled to qualified immunity on plaintiff's claim for failure to intervene. The court explained that although Pierson's second neck compression of 17 seconds constituted excessive force, it was administered without warning. The court found that given the limited duration of Pierson's actions and the unforeseeability of Pierson reapplying his knee to Dyksma's neck, it did not violate clearly established law when the other officers did not intervene. Thus, the other officers were entitled to qualified immunity on this claim.

A number of law enforcement trainers have adopted the non-binding precedent of *Price* and disregarded all of the cases where courts have determined that compression asphyxia, positional asphyxia, and prone restraint may lead to serious injury or death and may constitute excessive force. As previously noted, training officers, based on *Price*, that assert that issues related to restraint asphyxia have been debunked may lead officers to the conclusion that the use of such tactics are not dangerous and are therefore reasonable. As documented, cases from around the country do not support the proposition that positional and compression asphyxia have been debunked.

The mission for law enforcement should be to delineate clearly in its training the significant risks posed by prone positioning, and to minimize the practice whenever possible:

- **Training should emphasize that restraint mechanisms must be reasonable and that while a subject, in cases where resistance occurs, may be placed in a prone position and stabilized with body weight, the head, the neck and the center of the back should always be avoided.**
- **Prone positioning and any weight pressure applied to the subject should only last as long as necessary to accomplish restraint.**
- **As soon as restraint is accomplished, officers should immediately release any pressure on the subject and move the subject to a position that facilitates breathing such as their side; an upright seated position or a standing position.**

This brief review of neck restraint jurisprudence is intended to assist law enforcement organizations nationally as they adopt policies which reduce the risk of injury or death to detainees. ML

Rose Mary Knick and the Story of Chicken Little

BY: DWIGHT MERRIAM, *Weatogue, Connecticut*

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INTRODUCTION

The case of *Knick v. Township of Scott*[1] risks becoming a fairy tale of the frightening kind if we fail to put it into perspective. With *Knick*, the U.S. Supreme Court cast aside the second prong of the ripeness test, overruling a 34-year-old precedent that a takings claimant had to first seek compensation in the state courts under state law before going to federal court. One perspective on the decision was that "*Knick* may result in the crowding of federal courts, through which myriad takings claims stemming from local regulations of zoning and land use may now pass unencumbered."[2] Whether that will hold true is yet to be seen. In establishing a foundation on which to analyze *Knick's* likely impacts on local governments (including inundation of the federal courts) — my self-assigned task — it is necessary to establish a certain gravitas. I start with the story of Chicken Little.

I. LEARNING FROM A FABLE

If you want to get technical about it, believe it or not, there is a formal typology of fables[3] in which the story of Chicken Little is categorized: the Aarne-Thompson-Uther type 20C (including former type 2033).[4] It is one of a class of folktales where the lesson is that we should not overreact or be led into hysteria over the littlest thing. It is the hapless Chicken Little, as you will fondly recall, who is hit on the head with an acorn and, believing the sky is falling, becomes hysterical and decides that he must tell the King.[5] Along the way, Chicken Little runs into a string of characters, all with delightfully rhyming names, such as Henny Penny, Ducky Lucky, Drakey Lakey, Turkey Lurkey, Goosey Loosey a.k.a. Loosey Goosey,[6] and Foxey Loxey, among others. Chicken Little recruits them all, one after another, and they join him in the quest to tell the King, allowing the storyteller an opportunity to repeat all of the names each time a character joins them, as they troop along. The cumulative or chain tale[7] dates back to long before it was first written down, probably by the Brothers Grimm in 1812.[8]

You see, the law can be fun; you are smiling already, and we have not yet arrived at the serious business at hand. Most interesting is how the tale ends. In one version, the fox eats them all. In another, one character survives long enough to warn and save Chicken Little. And in yet a third version, they are all saved. With *Knick*, the end of the story is likely to be happy enough: the sky will not fall, and all can be saved. Why? Because, as we shall see, in all of the other landmark direct and indirect condemnation cases, the consequences have proved mostly unremarkable. Even so, it is essential to know the path forward in light of the new precedent in *Knick*.

II. WE HAVE BEEN HERE BEFORE

After each successive Supreme Court decision on property rights, we have imagined a parade of horribles that ultimately never appeared. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the Court held that property owners must be compensated with money damages

for their lost property from the time of the taking, even when the taking is temporary.[9] The report of the decision, the day after it was handed down, was mostly doom and gloom: "The decision will chill the zeal of local, state, and Federal regulators of land use around the nation and encourage property owners to seek damages when they feel they have been unduly burdened by regulations . . . ."[10] A *New York Times* article less than two weeks after the decision reported on the concern of local and state planners and suggested trouble ahead:

> Under the Court's ruling, governmental agencies could be made to pay potentially huge amounts rather than simply amending a regulation after it is struck down by a court. The action not only raises sharply the financial stakes involved in zoning and other land-use decisions, but has also caused many experts to agree that it could lead to a new era of caution in the imposition of controls on private property.[11]

Looking back at *First English* over 30 years later, it is impossible to see any measurable, adverse impact on governmental decision-making, planning, and land-use regulation arising from the decision. Most certainly, there have been more cases brought for compensation for temporary takings,[12] more money damages paid in California that otherwise would not have been paid,[13] and more favorable settlements for property owners,[14] but nowhere is there any report or evidence of any dramatic change. Indeed, decisions applying *First English* impose serious limitations on its application in those instances where permits are not quickly forthcoming, requiring that claimants allege and prove that their temporary akings are "extraordinary" and not merely the result of normal delays.[15]

The Supreme Court's decision in *Lucas v. South Carolina Coastal Council*,[16] five years after *First English*, was subject to the same initial overreaction. Norman Williams, Jr., one of the great land-use law scholars in my lifetime, authored a two-part analysis of the decision, calling it the "culmination of a trend" that would end the presumption of validity established in the state courts.[17] That did not happen. A recent study of the 1700 post-*Lucas* decisions citing *Lucas* revealed that in only a minuscule 1.6% of the cases (just 27 of them) was the plaintiff property owner victorious.[18] The *Lucas* decision never even made a tremendous makeweight argument. And then there is the notorious *Kelo v. City of New London*[19] eminent domain decision from 2005, legally doing nothing more than restating settled law, but causing such enormous angst. The decision galvanized the masses into action when they saw how draconian eminent domain could be. The result was that 44 states changed their constitutions or statutes to address issues of what was a public use or purpose, what properties might be protected from being taken, and what compensation was fair.[20] Call it "losing the battle and winning the war."[21] If anything, *Kelo* is exemplary of how politics can be profoundly affected by a decision, even though the law has not changed.[22]

III. FIRST REACTIONS TO *KNICK*

As to *Knick v. Township of Scott*, it appears we have more of the same: overreaction, hyperbole, prognostications without foundation, and idle speculation. For instance, shortly after the decision, U.S. Senator Sheldon Whitehouse saw *Knick* as part of a 73-case campaign by the "Roberts Five," as he labels them, supported by "dark money" intent on "seeking control of our courts."[23] As Rhode Island Attorney General in 2001, Senator Whitehouse had lost a seemingly consequential Supreme Court takings case, *Palazzolo v. Rhode Island*.[24] *Palazzolo* was yet another case where the decision eliminating the notice defense in takings seemed momentous at the time,[25] yet proved to have no real effect. The doctrine of investment-backed expectations slid in, for the most part, to take its place.[26] It appears Senator Whitehouse cannot put the loss behind him: "Front groups funded by anonymous money manufacture legal controversies, like the Pacific Legal Foundation, which handpicked the plaintiff in *Knick* and shepherded the litigation to the high court. I happen to know a thing or two about them. They led the litigation in *Palazzolo*."[27] The involvement of the Pacific Legal Foundation in both *Knick* and *Palazzolo* is probably indicative of nothing more than it being a large nonprofit legal organization that defends private property rights, with 73 lawyers and staff and 170 active cases in 2018.[28]

As I noted in my response to Senator Whitehouse's commentary, some pro-regulation, government planning, and land-use control advocates, such as Professor Daniel R. Mandelker of Washington University School of Law, had strongly advocated overruling the second prong of ripeness in *Williamson County*.[29] In his commentary, Senator Whitehouse also disparaged the Chief Justice and the rest of the "Roberts



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Continued on page 14

Five": "The chief justice likes to say his court isn't partisan; that's because people believing that helps him be partisan. But it's actually worse. The Roberts Five have become virtual delivery boys for big Republican donor interests, almost daring us to point out the obvious pattern."[30] As with his attack on the Pacific Legal Foundation and indirectly on Professor Mandelker, Senator Whitehouse's claim that Republican donors have turned the "Roberts Five" into "virtual delivery boys" is unsubstantiated and misses the mark.

Cogent, yet probably exaggerated, speculation on the impacts of *Knick* was made the day of the decision by the dissenters, in an opinion written by Justice Kagan and joined by Justices Ginsburg, Breyer, and Sotomayor. They identify three adverse impacts of the decision. First, they believe that "it will inevitably turn even well-meaning government officials into lawbreakers" who "will almost inescapably become constitutional malefactors."[31] What they mean is that because takings are now deemed to occur at the moment the property is unconstitutionally encumbered and before a court may render a decision on whether it is a taking or not, the public official is put in an untenable position. However, is this not essentially the same situation a police officer is in when making a stop or a zoning enforcement officer when issuing a cease and desist order to remove a sign? The civil rights violation occurs at the moment of action.

Second, the dissenters argue, correctly, that it is "more important" that the federal courts may be overwhelmed with run-of-the-mill local land-use controversies. They write that "the majority's ruling channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts — where *Williamson County* put them."[32] Furthermore, the dissenters state: "Today's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes. It betrays judicial federalism."[33] This may well prove to be true, to some limited extent.

Finally, the dissenters express concerns about the apparent disregard for the doctrine of stare decisis in overturning precedent dating back years.[34] One could argue that it is not an issue of stare decisis to overturn a wrongly-decided case. Regardless, the question of whether setting aside *Williamson County's* second prong of ripeness violates the principle of stare decisis and portends decisions to overturn other precedent is not central to the decision's impact on local governments.[35] The reality is that *Williamson County* had already been weakened and was identified by some as wrongly-decided, or at least proven to be ill-considered and impractical in its application.

The Court first weakened the precedent in 1997 in *Suitum v. Tahoe Regional Planning Agency*, where it characterized the compensation prong in *Williamson County* as merely prudential, not a jurisdictional rule.[36] Then, in 2005 in *San Remo Hotel, L. P. v. City and County of San Francisco*, then-Chief Justice Rehnquist questioned *Williamson County's* compensation prong in a concurring opinion joined by Justices O'Connor, Kennedy, and Thomas:

> It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court . . . . I joined the opinion of the Court in Williamson County. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. Here, no court below has addressed the correctness of Williamson County, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners. In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.[37]

Some see the recent *Knick* decision as part of a larger and longer process of moving the Court to the right.[38] Some people say that the recent overturning of precedent is a lead up to overturning *Roe v. Wade*.[39] However, how could one possibly know that, or even imagine some sort of silent conspiracy among a group of justices?

IV. The Likely Impacts of *Knick* on Local Governments

Thinking through the implications of *Knick*, with only a little case law so far applying it, and with a measure of caution about the risk of over-reaching, below are the likely impacts on local government. None are greatly adverse, and some are helpful for the government. Is it possible that the *Knick* decision in some respects will be a win-win for all the stakeholders?

More Takings Cases Will Be Brought to Federal Court

It is easy to predict that more takings cases will be brought to federal court. The question is, how many? Since everyone can now go to federal court,[40] some claimants who otherwise would have felt compelled to start in state court will start in federal court. Some people who see *Knick* as generally a "pro-property rights" case will be encouraged to commence an action. Some practitioners have said they will still likely go to state court with their constitutionality issues under 42 U.S.C. § 1983 simply because they believe in

some cases the state forum will be more favorable.[41] As Professor John Echeverria of Vermont Law School sees it:

> In terms of practical implications for future takings litigation, the Knick decision unquestionably gives property owners significant new tactical advantages. In particular, the option to select either a federal or state forum will allow claimants to forum shop based on which one offers the most favorable precedent or is more likely to provide a probable plaintiff-friendly judge.[42]

I doubt there will be a "flood" of cases to federal court. Nothing in the case reports suggests this, at least thus far, five months after the Knick decision. Professor Ilya Somin of George Mason University Scalia Law School has speculated on whether there will be a "flood" of new cases. He concludes that the idea there will be a "flood" of new cases is overstated and that if there are many new cases in federal court it "would indicate that state courts (at least in some parts of the country) have been severely underprotecting property owners' constitutional rights, taking advantage of the Williamson County regime to deny takings claims that federal courts would have upheld."[43] At this early time after the Knick decision, the extent to which there may be a "flood" or even a "spurt" of new cases is speculative.

A Wider Range of Takings Claims May Be Seen

Beyond an increase in the number of takings claims brought, the range of governmental activities claimed to effect a taking may widen, particularly with facial claims that do not require a federal court to apply decision-making criteria on site-specific challenges.[44]

The Pleading Process Will Become More Complicated: Can You Say "Twiqbal "?

If "Twiqbal "[45] is a foreign term to you and you cannot pronounce it, you are not alone (I confess to both until I was forced into it by *Knick*).[46] The holdings in *Bell Atlantic Corp. v. Twombly*[47] and *Ashcroft v. Iqbal* have been colloquially referred to as "Twiqbal."[48] Through these cases, the U.S. Supreme Court created a "plausibility standard" for courts to use in evaluating factual allegations at the pleading stage.[49] It is plain that claimants are now going to have to be more specific, and government lawyers need to be prepared to know what they can demand in pleading. For over four decades I have said to my clients, "We must never fear the facts. They are what they are." If someone does not have a good takings claim, they should not bring it. If the government cannot defend its actions, it should settle. The pleading process can help both sides know where they are vulnerable and hopefully lead to resolutions short of trial. "Twiqbal" pleading may be able to help us get there.

More Problems with Pendent Jurisdiction Are Inevitable

As federal courts increasingly hear local land-use cases with state law issues, more argument will be had on whether the court will take pendent jurisdiction of the state claims.[50] A federal district court recently described ancillary and pendent jurisdiction principles in an inverse condemnation case:

> Federal courts follow the principles of ancillary and pendent jurisdiction, under which a court's original jurisdiction over a federal claim "carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact,' such that the relationship between the federal claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" These principles have been codified under a single "supplemental jurisdiction" statute at 28 U.S.C. § 1367. Under that statute, "in any civil action of which the district courts have original jurisdiction," district courts have supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy" under Article III of the Constitution. Supplemental jurisdiction is discretionary, however, and § 1367 reflects this discretion. Accordingly, a federal court may decline to exercise supplemental jurisdiction over a claim if 1) "the claim raises a novel or complex issue of State law," 2) "the claim substantially predominates over the claim or claims" subject to the district court's original jurisdiction, 3) "the district court has dismissed all claims over 50. See, e.g., E&B Nat. Res. Mgmt. Corp. v. Cty. of Alameda, No. 18-CV-05857-YGR, 2019 WL 5697912 (N.D. Cal. Nov. 4, 2019); Little v. Mayor & City Council of Ocean City, No. CV ELH-18-360, 2019 WL 4689238 (D. Md. Sept. 26, 2019) (declining to exercise pendent jurisdiction where all federal claims were dismissed). See generally Marianist Province of United States v. City of Kirkwood, 944 F.3d 996 (8th Cir. 2019) (declining to exercise pendent jurisdiction where all federal claims were resolved before trial considering judicial economy, convenience, fairness, and comity). which it has original jurisdiction," or 4) "in exceptional circumstances, there are other compelling reasons for declining jurisdiction."[51]

A post-*Knick* case in federal court with a takings claim concluded with the court ruling against the taking claim and finding itself left with only state

Continued on page 16

claims, over which it then chose to decline to exercise its supplemental jurisdiction.[52] There will be more like this and plaintiffs will find themselves headed ultimately to state court, wiping out any efficiency that may have been gained in going first to federal court.

Knick May Only Mean that Takings Plaintiffs Will Be Able to Lose Their Cases More Quickly

This is glib, but glib can be true. There are few good takings cases because the *Penn Central*[53] three-part test is so difficult, and most takings claims are added to routine zoning appeals to make the action appear more serious.[54] As Robert Thomas, author of "Sublimating Municipal Home Rule and Separation of Powers in Knick v. Township of Scott"[55] has said in conversations with me and others: "Now we get to go to federal court and lose because *Penn Central* is still the standard."

Abstention Will Be an Issue More Often

This is the other side of pendent jurisdiction. The dissent in *Knick* cited the Court's promotion of "practices of certification and abstention to put difficult state-law issues in state judges' hands" and then said that "[w]e may as well not have bothered" because the "decision sends a flood of complex state-law issues to federal courts."[56] This remains to be seen. Certification and abstention are powerful tools of federalism, and we should hope that *Knick* will usher in a new era of cooperative federal and state court efforts to divvy up those interesting property rights issues that straddle federal and state law.

There Is No Change in the Tests for a Taking

Because the tests for a taking are unchanged, there should be no noticeable change in the proportion of wins and losses, except to the extent that the types of cases brought are different. As suggested above, perhaps more takings cases that are less likely to be winners will be brought and, ultimately, lost.[57]

The Length of Time to Get to a Final Judgment May Not Be Shorter

It may take takings claimants just as long as it did before, or longer, to get a final judgment.[58] For example, take the recent case of *First State Bank v. City of Elkins*[59] in the federal district court in the Western District of Arkansas and decided shortly before *Knick*. There was an alleged Fifth Amendment taking wrapped up with other state and federal claims. It became a procedural quagmire, with an obviously frustrated judge trying to straighten it out:

> Thus began a now two-year procedural saga during which the parties have completely reversed their original positions on litigating these issues in federal court. Along the way, all concerned — certainly including this Court — have endeavored to pursue a prudent and judicially efficient path forward. Unfortunately, and with much regret in hindsight, the Court now concludes that it is without jurisdiction, and therefore the journey in this forum must end.[60]

Availability of Compensation Will Preclude an Injunction to Invalidate a Regulation

The *Knick* Court said that "[g]overnments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional."[61] "As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin government's action effecting a taking."[62] Professor Echeverria describes this as the "most interesting and consequential question going forward":

> The most interesting and consequential question going forward is what Knick portends for the ability of property owners to sue to enjoin alleged takings that, in the Court's new terminology, "violate" the U.S. Constitution. The Court's opinion contains absolute statements that takings claimants will be limited to compensatory relief, and other statements that are more nebulous. For example, the Court said, "As long as just compensation remedies are available . . . injunctive relief will be foreclosed," but the Court also said, "Given the availability of post-taking compensation, barring the government from acting will ordinarily not be appropriate." To add to the uncertainty, Justice Thomas filed a concurring opinion arguing that injunctive relief should sometimes be available in takings litigation; he read the opinion of the Court, which he joined, as not foreclosing the application of "ordinary remedial principles."[63]

This will be a considerable benefit to local governments in most circumstances. For example, local governments can choose to regulate at the cutting edge, requiring developers to use only green energy and prohibiting use of any fossil fuels in the interest of slowing global climate change. If the developer sued claiming a taking and a court found a taking by over-regulation, the government unilaterally would have the choice of abandoning the energy requirement or paying just compensation to overcome the taking. The court would not have the power to enjoin the government from its program.

We are likely to see statements from the decision, such as "[s]o long

Actions applying *Knick* include the greater threat of successful plaintiffs recovering their attorney's fees under Section 1988. This threat will have a chilling effect on local government initiatives, particularly those novel programs where the defensibility of public regulation has been untested.

as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities,"[64] quoted along with citation to the Court's discussion of *Ruckelshaus v. Monsanto Co.*[65] for the proposition that courts cannot invalidate a government action or program so long as the government pays for the property rights. It seems likely that once it is determined that a taking is for public use or purpose, injunctive relief will be foreclosed. However, again, as we have seen with other precedents, there is much yet to be learned as to how the courts will decide claims for injunctive relief.

More Section 1983 Actions Will Be Brought

Federal constitutional and statutory claims are typically brought as Section 1983 claims, but with the Court's reference to the statute in Knick as the way to bring these claims, litigants will likely make more use of it. In 1871, Congress enacted Section 1983 to provide an additional means of redress of Fourteenth Amendment violations. Section 1983 provides that an action may be brought in federal court against any "person," which includes local governments, "who, under color of" state law:

> [S]ubjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[66]

Claims for Attorney's Fees Under Section 1988 Will Be Front and Center

Actions applying *Knick* include the greater threat of successful plaintiffs recovering their attorney's fees under Section 1988.[67] This threat will have a chilling effect on local government initiatives, particularly those novel programs where the defensibility of public regulation has been untested. The potential for having to pay attorney's fees has had a profound effect on local government decision making in matters where there have been threatened and actual claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[68]

Local Adjudicatory Review Could Protect Local Governments

A local adjudicatory process above and beyond the usual variance and enforcement appeals available with existing boards of appeal would enable the government to grant relief in the form of program changes or permit modifications and to award partial compensation as an alternative to abandoning what the government wants to achieve. It could save everyone from ending up in court. Also, the finality prong of *Williamson County* is unaffected and must be met. A takings claimant would have to exhaust the local adjudicatory process to reach finality, and that process with the potential for a negotiated settlement could result in an accommodation for both the property owner and the government.

Ombudsmen and Special Land Use Courts May Be Considered

Another alternative is to create federal and state takings courts to streamline adjudication. Such courts have proven useful in resolving takings claims short of trial because they bring to the conflict resolution a level of expertise in land-use matters not found in courts of general jurisdiction. The decision in *Knick*, if it does result in increased litigation or is even perceived that it will do so, may encourage claimants and governments to find ways to resolve claims early on. By way of illustration, Utah has a Property Rights Ombudsman authorized to mediate takings claims.[69] Connecticut is an example of a state that has specialized land-use courts.[70]

Mediation May Be More Favored

Most lawyers and planners involved in local land-use disputes will agree that mediation is underutilized.[71] The threat of attorney's fees with the Section 1983 claims and the direct path to federal court may incentivize consideration of mediation.

Governments May Give More Consideration to Buying Their Way Out of the Problem

The *Knick* case could have been avoided if the township negotiated the voluntary sale and purchase of an easement with definitive metes and bounds, restrictions on the terms of access, and the government holding the property owner harmless. Knick had a reasonable concern that visitors could be injured walking across the property and that she would be liable.[72] Eminent domain, even as unpopular as it is after *Kelo*, could be used if Knick refused to sell. The cost of the easement, either in a voluntary sale or under eminent domain, would have been far less than the cost of the litigation. In the 1994 Supreme Court case of *Dolan v. City of Tigard*,

Continued on page 36

Evaluating and Responding to Calls for Defunding the Police

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INTRODUCTION

Public entities across the nation are facing demands to "Defund the Police." To respond properly to such proposals it is important to ask: What exactly does it mean to defund law enforcement? Evaluation of just what such proposals entail and their potential impact on American policing and community safety is critical in addressing such demands.

In the wake of George Floyd's death, various groups across the country have called for police reforms to be instituted. Activists are demanding an end to perceived systemic racism in the criminal justice system.[1] Their call to defund the police [2] is among the movement's most extreme proposals.[3]

Concept Behind the Movement

The specifics of the defunding the police proposals vary among supporters. The common principal is that police budgets should be downsized, taking some or large amounts of money away from police and prisons, and reallocating it toward another purpose—like social programs.[4]

The movement claims this is the best approach since prior attempts at police reform have failed, using George Floyd's death as an example.[5] Leaders within cities support plans that "reimagine public safety tactics" in ways unlike traditional police forces.[6] The movement is advancing a shift away from the traditional conception of public safety which relies on policing and punishment—proposing instead the investment in community programs.[7] Rather than what they characterize as overspending in funding police departments, supporters demand that government funding prioritize housing, employment, community health, mental health services, and education.[8]

Certain police functions would be theoretically offloaded to other municipal departments and community groups—fire departments, mental health professionals, and trained community members.[9] Presence of police in nonviolent situations would be minimized, "allowing medical and social service workers to take the lead."[10]

Defunding v. Disbanding

Disputed among advocates of this movement is the issue of whether police should be defunded altogether—essentially disbanding police departments.[11]

Some supporters merely want to reduce the budget allotted to police agencies, rather than eliminate funding completely.[12] These advocates insist on minimizing the scope of police responsibilities to public safety, changing the methods used by law enforcement agencies.[13] Available funds would be redirected to other community organizations, supporting social services.[14] These proposals seek drastic budget cuts and demand a fundamental reduction of law enforcement scale and size.[15]

Others argue that police forces should be eliminated entirely.[16] After the death of George Floyd, the Minneapolis City Council overwhelmingly voted to dismantle its police department and replace it with a new system of public safety built from the ground up.[17] In practice, activists in this school of thought seek to completely restructure police agencies, transforming public safety.[18]

Prior instances of police departments being completely disbanded have been reported; however, they fail to provide the full picture.[19] In 2000, the city of Compton, California disbanded its police agency, shifting its policing to Los Angeles County.[20] Camden, New Jersey followed this model in 2012, replacing its police department with a new force that covered Camden County.[21] These cases have been cited as examples of full-scale disbanding of police departments.[22] In reality, there was no elimination of police presence within the cities.[23] In both instances, the municipal police force was contracted out to the county.[24] Police simply changed their uniforms and added a different name— rather than being disbanded.[25] It is impossible to know the impact wholesale dismantling of police agencies would have on the entire country.

The Costs of Police Funding

Because an estimated 90% of law enforcement budgets are spent directly on personnel costs, staffing cuts proposed by defunding proponents are premised on the assumption that police services are unnecessary or will be transferred elsewhere,[26] but unless services are adequately replicated or eliminated their costs will be paid at overtime rates. As more work is imposed on an overworked and understaffed police department, that increased workload will likely lead to more errors, more overreaction and a need for mental health support for those officers.

Government Officials' Response

In response to public demands, government officials across the country are pledging to make budget cuts to police funding.[27] Mayor de Blasio of New York City promised to shift funding around to provide more support to community services, such as youth programming.[28] Mayor Garcetti of Los Angeles followed suit by announcing his plan to spend $250 million, using $150 million of LAPD's budget, on community health programs and youth jobs.[29] Even with these promises, activists are demanding more, claiming these budget cuts are not drastic enough.[30] In June 2020 Mayor Breed of San Francisco announced reforms to policing, introducing four main policies: (1) demilitarize police; (2) end use of police as a response to non-criminal activity; (3) address police bias and strengthen accountability; and (4) redirect funding for racial equity.[31] These new policies form a part of the city's ongoing police reforms, seeking to change the nature of policing in San Francisco.[32]

Other state officials refuse conceding to budget cuts, warning that defunding the police will result in chaos.[33] Some assert that more funding for training is actually the solution.[34] Others point to recently enacted California legislation addressing the use of force and related provisions that go into effect in January 2021 to argue that these measures should be given a chance before other wholesale reforms are adopted.

These legislative enactments, in conjunction with a multitude of crisis intervention and de-escalation training programs, and a focus on programs dealing with the mentally ill and the homeless that have been instituted at the local and state level by law enforcement simply need time to work and manifest results.

Risk Management

Both the public and their governments need to evaluate the risks that may result from defunding law enforcement or implementing policies that significantly reduce the role of police in public safety. As indicated above, there are no modern day examples of any city defunding their police force and failing to replace it with coverage from the county.[35] Within the movement, protesters argue the police have become too militarized. Yet, the use of armored vehicles in rescue operations during an active shooter event or in officer down scenarios supports the demonstrated need for amored vehicles as a tool for law enforcement. Having the right equipment available in such highly volatile situations saves lives. Not having those resources available results in tragic losses.

continued on page 20



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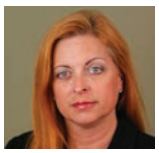

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The Occupational Safety and Health Administration (OSHA) has yet to weigh in; however, both state and federal OSHA will hold employers responsible for knowingly exposing employees to hazards without proper protective equipment. Failing to provide this protective equipment, such as ballistic vests, armored protection, etc. will likely expose municipalities to additional civil exposure by their own employees.

Additionally, some advocates of police reform suggest that law enforcement should no longer respond to non-criminal activity. Many agencies have already taken this step—not answering check-the-welfare calls or declining to send officers to non-criminal incidents. These procedures can avoid confrontations and diminish risk management concerns for the governmental entity. But unless sufficient alternate personnel are made available to address such incidents, the risk is that people of the community may be left to fend for themselves. And it is always possible that nonviolent scenarios can rapidly evolve into life-threatening situations, requiring ongoing coordination between the unarmed non-law enforcement professionals and the police, who remain the last line of protection. Therefore, it may be unrealistic to expect that these policies will result in radical near-term change as to how law enforcement is used.

Racial equity is a major issue in the current political climate, and numerous communities are re-directing funds to rectify socioeconomic issues. Implementing these policies has many benefits; however, directing money away from law enforcement to achieve this goal may end up reducing critical services to the people who need them the most.[36]

It is difficult to predict with certainty the impact less policing would have on crime rates.[37] On one hand, fewer police may arguably equate to less crime.[38] Decreasing police may result in a perceived decrease in crime because less is reported, less is investigated, and less is acknowledged. For example, in 2014 and 2015, New York officers protested Mayor de Blasio by decreasing police work.[39] As a result of officers no longer patrolling low-level offenses, the city experienced a statistical drop in crime.[40]

On the other hand, some conclude that there is a direct correlation between a strong police presence and a reduction in the rate of homicide. In one jurisdiction where homicides increased following the reduction of police presence in the wake of riots,[41] a community activist claimed that the lack of law enforcement created "a community of emboldened criminals."[42] Notably, deaths in African American communities tend to increase when police pull out of cities.[43] Obviously, statistics can be manipulated in many ways, yet taken in context statistics can provide analytical insight in forming the foundation for reforms and weighing the risks associated with change

With the economic divide that exists throughout our country, limiting police resources may result in affluent communities hiring private security guards as people with money simply buy their own protection.[44] Instead of publicly-supported police, cities may employ their own private police force.[45] Neither of these scenarios address the socio-economic issues that underpin calls to defund the police.[46]

Several communities have started removing Student Resource Officers from schools, requesting to reallocate the funds to conflict resolution training for teachers.[47] These officers serve as a liaison and conduit for school counselors, assisting in mediation and providing effective solutions.[48] The purpose of Student Resource Officers is not to be a security guard, but rather provide students an opportunity to have positive learning experiences with the criminal justice system.[49] Removal of these officers will not only leave these schools unprotected and vulnerable to criminal activity, but will also hinder students' ability to create positive relationships with law enforcement.[50]

While these risks are plausible, it is difficult to predict, with any level of certainty, what will happen if law enforcement is defunded. Therefore, it is important that police agencies prepare for a wide array of outcomes if communities choose to reallocate police budgets.

How Should Law Enforcement Respond to the Defund Proposal?

Defunding the police is not the answer to resolving the current societal disputes. Similarly, a complete dismantling of law enforcement is unrealistic and will likely cause irreparable harm to any community where such an experiment is implemented. Basic police services will always be needed in order to address violent crimes and handle various services.[51] So the question is, where does law enforcement go from here? How do police move forward in this political climate?

Improving law enforcement agencies requires the work of officers and the community.[52] Both law enforcement and the community have a role in police reform—it is not one-sided.[53] Promoting community policing—embracing reform and improving police hiring, training and discipline—requires the cooperation of police leaders, community members, and elected representatives.[54] Law enforcement has been and should continue to seek to adopt programs that encourage collaboration with community organizations.

Collaborative programs between law enforcement and community organizations produce a more effective system for public safety. One exam-

> Defunding the police is not the answer to resolving the current societal disputes. Similarly, a complete dismantling of law enforcement is unrealistic and will likely cause irreparable harm to any community where such an experiment is implemented. Basic police services will always be needed in order to address violent crimes and handle various services.

ple of the many efforts of this type occurred in 2011 when the Kern County Sheriff's Office announced a partnership with Kern County Mental Health. This program strives to provide training that equips officers with additional skills to adequately handle calls involving mentally ill individuals in crisis situations.[55] Its goal is to "minimize the use of force, increase the safety of the officer and the individual on the street, and learn about available resources as needed in community policing."[56]

The Dallas Police Department formed a similar partnership with RIGHT Care.[57] Since 2018, when the program was established, the city has experienced a decline in arrests and ambulance calls for individuals suffering from mental illness.[58] This has allowed officers to utilize resources on other calls.[59] Programs such as these across the country are examples of an innovative approach that enables a successful relationship between law enforcement, mentally ill individuals, and mental health agencies.[60]

Police agencies have historically been required to handle matters that fall outside the scope of law enforcement, as a result of the defunding of other social programs like mental health services and social welfare.[61] Relieving police officers from acting as mental health or social service workers will undoubtedly lead to fewer interactions between armed officers and unstable people, but the protective shield the police provide cannot be eliminated.[62] History has shown that embedding social workers and creating mental health response units still necessitates the need for law enforcement to keep the peace. Diverting law enforcement resources fails to solve the problem. Rather, additional resources should be given to these areas.[63]

Notably the International Association of Chiefs of Police (IACP) recently introduced a policy framework for improving community-police engagement.[64] The framework suggests several reforms including: mandating participation in the National Use of Force Database, developing national standards for discipline and termination of officers, enhancing police leadership, improving officer training practices, and enhancing the ability of agencies to implement effective discipline.[65] The IACP encourages implementing meaningful policies that will positively impact policing—enhancing the public's trust and faith in law enforcement.[66] The IACP calls for "a comprehensive, nuanced, determined, and informed policy effort that will involve all aspects of society" in order to effectively address the challenges faced.[67]

Conclusion

Most of the country can agree at a minimum that we need to address concerns about systematic racism in the criminal justice system. How this will be achieved is the bigger question. Defunding the police has become the cry for some and, while the prospect of that actually happening may seem a far stretch for most, ignoring this movement is naive. Defunding the police raises numerous concerns and issues, with an uncertain outcome. Moving forward, law enforcement should continue to push for the implementation of community-based policing policies while encouraging positive reform and communicating these efforts to their constituents—without dismantling the police.

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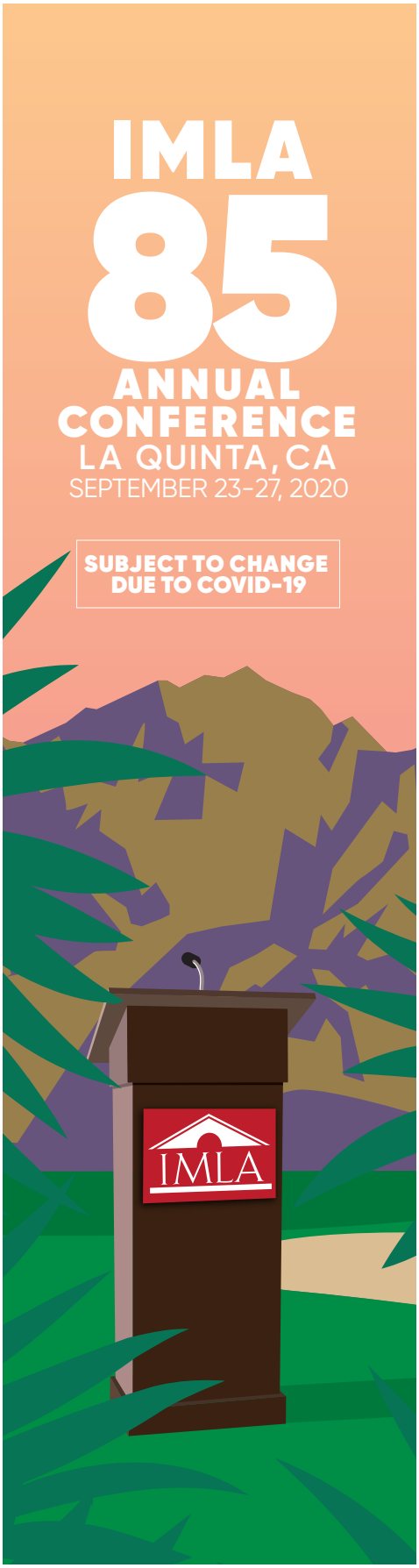

SUPREME COURT

BY: JOHN H. YOUNG, ELIZABETH YANG AND BENJAMIN GRIFFITH

Voting Wars Reach the Supreme Court: Disenfranchisement Ahead?

The Supreme Court has waded into a state election controversy and, through a majority, has rendered its decision based on the time-honored principle that lower federal courts should ordinarily not alter the election rules on the eve of an election. This is an early effort to take a frank look at the Supreme Court's latest entry into last minute interference with state electoral processes.

In this case the Court overturned a district court decision, affirmed by the Court of Appeals for the Seventh Circuit, which preserved the right to vote during the pandemic crisis. The net effect of the Supreme Court's decision was to force voters to choose between protecting their health or exercising the right to vote.

On March 24, 2020, Wisconsin Governor Tony Evers issued an executive order that all Wisconsinites should stay home until at least April 24, 2020 to slow the spread of the COVID-19 virus. During that period, the state had a previously scheduled April 7th election which included a presidential primary, a seat on the state Supreme Court, three seats on the Court of Appeals, over 100 other judgeships, over 500 school board members, and several thousand other offices.

COURSE OF PROCEEDINGS:
Unlike other states faced with a similar election during the height of the pandemic, Wisconsin had been reluctant to postpone the April 7th election. The Democratic National Committee, the Democratic Party of Wisconsin, and League of Women Voters, among others, requested the intervention of U.S. District Court Judge William Conley to postpone the state election. They argued that by allowing the April 7th election to proceed as scheduled, hundreds of thousands of Wisconsin voters would be disenfranchised. Plaintiffs observed that Wisconsin residents would face "the extreme burden of literally risking their health and lives in order to cast a vote," and for those voters attempting to vote in person, many polling places would either be closed or have long lines because of limited available poll workers during the pandemic.

DISTRICT COURT'S EXTENSION:
The District Court denied the petition to postpone the election. On April 2nd, however, Judge Conley issued a preliminary injunction extending the deadline for election officials to receive absentee ballots from April 7 (election day) to April 13 in order for voters to cast an absentee ballot. This changed the rule from requiring that an absentee ballot be received or postmarked by the close of voting on April 7. As Justice Ginsburg would later observe in her dissent to the U.S. Supreme Court's *per curiam* decision, the pandemic had caused a surge in absentee ballot requests that overwhelmed election officials. *RNC* v. *DNC*, 589 U.S.___, Slip Op. at 4 (Ginsburg, J. dissent) ("A voter cannot deliver for postmarking a ballot she has not received." Id. at 3). In addition, the District Court issued a subsequent order enjoining the public release of any election results for six days after election day. The Seventh Circuit denied a stay of the District Court's order.

Outside of the litigation, on Monday, April 6, Governor Evers, a Democrat, issued an executive order moving the election to June 9. Republicans in the state legislature attacked the Governor's order as "constitutional overreach," and immediately challenged it in state court. They also asked the Supreme Court to block the District Court order extending the deadline for absentee ballots. The legislators asserted that the extension fundamentally altered the nature of the election. Democrats urged the justices of the Supreme Court to stay out of the dispute and allow the District Court ruling to stay in place. Blocking the District Court's order, they warned, "could exacerbate the unfolding COVID-19 public health disaster."

Hours after the executive order was issued, the state Supreme Court, at the request of the Republican-controlled legislature, overturned the Governor. Later, on the same day, the U.S. Supreme Court stayed the District Court's order extending the period to cast an absentee ballot.

ARGUMENTS IN THE SUPREME COURT:

Arguing that the District Court's order should remain in effect and voters should be allowed to return their absentee ballots through April 13, 2020, Wisconsin Democrats asserted that if voters were "not confident their absentee ballots will be counted," more people would be driven to vote in-person on election day, "increasing the risks of community spread through polling places in cities and towns throughout Wisconsin." The District Court's order was narrowly tailored to dramatically reduce "the need for person-to-person contact."

The Republican National Committee and the Republican Party of Wisconsin asked the justices of the Supreme Court to block the District Court's order and instead make clear that the deadline was extended only for ballots that were postmarked (or otherwise delivered) by April 7. The petition focused on the narrow question of whether absentee ballots must be mailed and postmarked by election day, or whether they may be mailed and postmarked after election day, so long as they were received by Monday, April 13. The Court granted the application for stay.

SUPREME COURT'S GRANT OF A STAY:

In a 5-4 decision, released on the eve of the April 7th election, a majority of the Court stayed the District Court's order granting a preliminary injunction to the extent that it required the State of Wisconsin to count absentee ballots postmarked after April 7, 2020. In its decision, the Court said that the sole question before it was whether absentee ballots must be mailed and postmarked by election day, April 7, as required by state law, rather than being mailed and postmarked after election day, as long as they were received by Monday, April 13, 2020.

The Supreme Court majority, citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006), found that the District Court's order suppressing disclosure of election results and allowing absentee ballots mailed and postmarked *after* election day to be counted, was unusual so close to the election: "All of that further underscores the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion." Slip Op. at 3. Further, the Supreme Court majority noted that the District Court's ordering of an additional extension, which would allow voters to mail their ballots after election day, was "extraordinary relief and would fundamentally alter the nature of the election by allowing voting for six additional days after the election." Slip Op. at 4.

Confining its ruling to what it perceived to be the "narrow, technical" question before it, the Court held that subject to any further alterations "that the State

continued on page 26



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Supreme Court *cont'd from page 25*

may make to state law, in order to be counted in this election a voter's absentee ballot must be either (i) postmarked by election day, April 7, 2020, and received by April 13, 2020 at 4:00 pm, or (ii) hand-delivered as provided under state law by April 7, 2020 at 8:00 pm." Slip Op. at 4.

Justice Ruth Bader Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan issued a dissenting opinion in which they would not disturb the District Court's order. This is the heart of Justice Ginsburg's dissent:

First, the District Court held an evidentiary hearing in which it "concluded the existing deadlines for absentee voting would unconstitutionally burden Wisconsin citizen's right to vote." citing *Burdick* v. *Takushi,* 504 U.S. 428, 434(1992); *Anderson* v. *Celebrezze* 460 U.S. 780, 789 (1983). (Under the *Anderson-Burdick* balancing tests the court balances the injury to voting rights under the First and Fourteenth Amendments against the interests put forward by the state. This balancing is not mentioned by the majority).

Second, the Supreme Court majority's intervention at this late hour was ill advised, since election officials had spent the last few days establishing procedures and informing voters in accordance with the District Court's deadline; moreover, the Supreme Court's upending of that process, a day before the April 7th postmark deadline, was sure to confound election officials. The Supreme Court majority's invocation of *Purcell* suggested that it was skeptical of the District Court's intervention shortly before an election. If proximity to the election was really a basis for hesitation, when the District Court had acted several days earlier, then the Supreme Court's intervention on the day before the elections was all the more inappropriate.

Third, the concerns expressed by the majority and the Republican Party stay applicants were "election-distorting gamesmanship might occur if ballots could be cast after initial results are published. But, obviating that harm, the District Court enjoined the publication of election results before April 13, the deadline for returning absentee ballots, and the Wisconsin Elections Commission directed election officials not to publish results before that date." Justice Ginsburg found that those concerns "pale in comparison to the risk that tens of thousands of voters will be disenfranchised," when the paramount concern should be ensuring an opportunity for the people of Wisconsin to exercise their right to vote. Slip Op. at 6.

Finally, rather than presenting a "narrow, technical question" as characterized by the majority, "[t]he question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic."

> With the majority's stay in place, that will not be possible. Either they will have to brave the polls, endangering their own and others' safety. Or they lose their right to vote, through no fault of their own. That is matter of utmost importance—to the constitutional rights of Wisconsin's citizens, the integrity of the State's election process, and in this extraordinary time, the health of the Nation. *Id.*

Conclusion

Voter suppression comes in many forms and can sometimes be obscured, by "necessary" adherence to technicalities, with no consideration of changes to current and normal circumstances, as it is playing out in Wisconsin. The choice given by the Supreme Court majority to Wisconsin voters – brave the polls in the midst of a deadly pandemic or forfeit their right to vote – is an unimaginable choice. It presents a callous disregard for human life and democracy. The District Court provided a remedy, after an evidentiary hearing, which constitutionally balanced voting rights and the burden on the state. The Supreme Court majority destroyed that balance. Moreover, as another court recently observed, when a court is confronted with a pending election, "there is also a public interest in the Court promoting certainty with elections and not entering orders that create voter confusion and consequent incentive to remain away from the polls." *Gwinnet County NAACP v. Gwinnett County Board of Registration* (N.D. Ga. March 3, 2020) citing *Purcell,* 549 U.S. at 5., accessible online at https://public.fastcase.com/ppbqSQpNDaJE%2F8PlIk0b-8MR0yZhIhyzeSLNTiBs34RMc97luAVz2qjcnImgyFZb%2F.

In our opinion, it is unreasonable to conclude, as the Supreme Court majority's did, that granting a stay one day before Wisconsin's primary election day would not create voter confusion and a further public health hazard during the state of a current stay-at- home order for all Wisconsinites.

Rather than grounding its decision on a pragmatic assessment of reasonable efforts by state election officials to ameliorate the tremendous risks to safety and health during the COVID-19 pandemic, the majority retreated to a favorite trick in election cases of important immediate concern, which is to say that the decision involves a "narrow, technical question." This is a repeat of the 2000 Supreme Court's avoidance of the right of Florida voters to have all the votes counted by saying the

decision only applies to that case. This does a great disservice to our democracy which is grounded in respect for the fundamental right to vote and the rule of law.

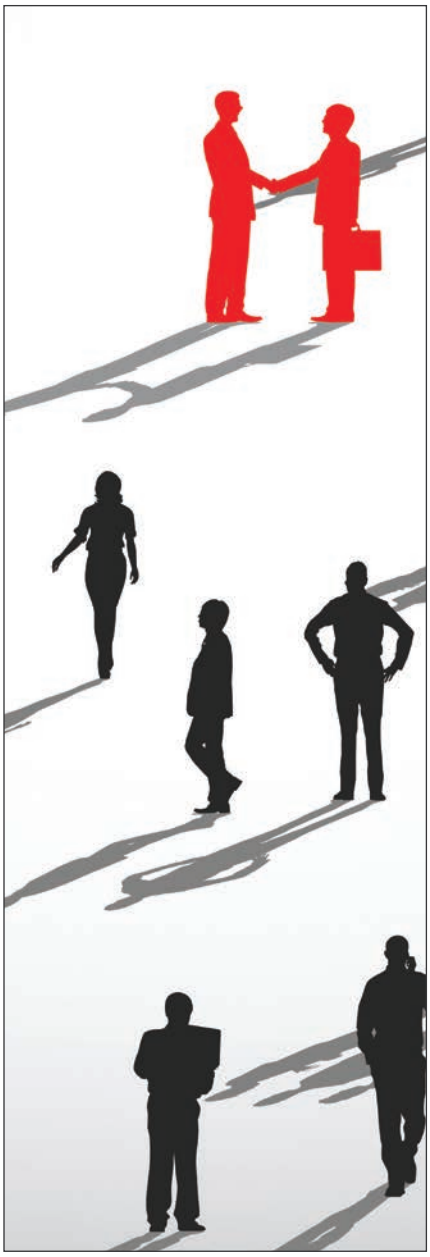
Wisconsin has been correctly identified as the first test case in what the Republican and Democratic national parties expect to be a long, protracted fight over changing election laws and the rules governing the right to vote during the pandemic. One commentator sees the majority decision as heralding "potentially the biggest voting rights battle since the passage of the Voting Rights Act of 1965." Astead W. Herndon and Jim Rutenberg, *Wisconsin Election Fight Heralds a National Battle Over Virus-Era Voting* (New York Times, April 6, 2020), accessible online at https://www.nytimes.com/2020/04/06/us/politics/wisconsin-primary-voting-coronavirus.html.

Many Democrats, including the Speaker of the House, are advocating for a universal vote-by-mail system in November, at least as it applies to federal offices. That movement has become stronger as the COVID-19 pandemic has increasingly forced jurisdictions throughout the nation to issue stay-at-home or shelter-in-place orders. At the opposite end of the political spectrum, Republicans, in several states and President Trump himself, have pushed for as much in-person voting as possible, a move consistent with efforts to tighten voting restrictions.

We can no longer afford to be driven by politics as usual. We must come together and work to ensure that our electoral process is unassailable. Voting serves as a cornerstone of our democracy and is a core component of the rule of law in a democratic society. We know that states and localities are tasked with an almost insurmountable challenge, to change long-established processes, in a matter of days, weeks, or even months, in order to ensure that elections are conducted in the safest manner possible, for both the public and those administering our electoral process. Our democracy is at its most successful when our citizens can participate freely and without fear. We understand that postponing an election is always the course of last resort and that any decision to postpone an election is borne of a desire to ensure maximum participation and safety for all involved.

We must throw partisanship to the wind and truly consider all sides of any solution. As an example, though all mail voting could be a solution during this national pandemic, there must be an acknowledgement that, historically, vote by mail has not been practical for all segments of the population. Elections are not always a one-size fits all situation. We should always consider methods of voting that will not serve to further disenfranchise our most vulnerable populations, such as individuals with disabilities or lower income minority communities. Most importantly, we must ensure that any changes to our electoral process afford ample opportunities for communication, through timely and comprehensive education drives, from all media platforms to inform all voters of any changes and the options that are available to them.

As noted in the above *New York Times* article, with which we agree, it is becoming clearer by the day that the warning voiced by former Attorney General Eric Holder will have to be answered: "It's a test of our democracy. And the question is, 'Are we up to passing that test?'" ML



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OP-ED

BY: AMANDA KELLAR
IMLA Deputy General Counsel and Director of Legal Advocacy

"We Can't Breathe"— Police / Community Relations and the Local Government Attorney

As lawyers, the ABA model rules of professional conduct tell us that we "should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."[1] Further, as lawyers we are instructed to:

> further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice ….[2]

In this same vein, IMLA's founder, Charles Rhyne, created Law Day, a national holiday to recognize the rule of law. It was no coincidence that May 1st was chosen, as it was this day when authoritarian governments like Russia celebrated their military might with parades and use of force. President Eisenhower issued a presidential proclamation on May 1, 1958, that "guaranteed fundamental rights of individuals under the law is the heart and sinew of our Nation."[3] In a 1958 publication, Mr. Rhyne explained the importance of Law Day and why he created it, stating in part:

> Let us pledge each other, here and now, to rededicate ourselves to our most solemn responsibility, the responsibility of preserving and passing on to the generations which will follow us as citizens of the United States of America the heritage of individual human freedom and equal justice under the law which has been ours and rightfully must be theirs…Such a rededication and such a pledge must be the meaning to the legal profession of "Law Day – U.S.A."[4]

Let me start by stating the obvious. We know better than most, that the vast majority of police officers are people who are not only law abiding, but entered their profession with the desire to help their communities and selflessly are willing to put their lives on the line to do so. That said, Mr. Rhyne's words come into stark focus as we think about how far short of "equal justice under the law" we are coming in some areas, particularly with regard to racism and how people of color are treated in our justice system, beginning with the police and ending with mass incarceration.

As we watch pain boil over after centuries of racism in this country and as we watch that pain and anger channeled into condemnation of excessive force by police officers and frustration over police / community relations, as community leaders, we all need to consider what we can do to be a part of the solution to achieve equal justice under the law. George Floyd's death was a horrible tragedy for so many reasons: the police officer who put his knee on Mr. Floyd's neck for more than eight minutes, slowly and callously extinguishing his life; the other officers standing idly by watching the events unfold without upholding their sworn duty to serve and protect; the knowledge that without cell phone videos and modern technology, this act would have likely gone unpunished; and the knowledge that deaths like this have been happening in this country for hundreds of years. As cities are literally and figuratively burning around this country, it is past time that, as Mr. Rhyne said more than 60 years ago, we, as local government attorneys and leaders in our communities, "rededicate ourselves to our most solemn responsibility" to bring all members of our communities "equal justice under the law."

Possible Recommendations to Improve Police / Community Relations

The U.S. Commission on Civil Rights (USCCR) offered a number of suggestions to improve police practices, particularly with regard to use of force, in a 200-plus page November 2018 report entitled "Police Use of Force: An Examination of Modern Policing Practices."[5] The USCCR's recommendations, include (but are not limited to): funding for police departments in de-escalation and implicit bias training; transparency regarding allegations of police use of force, including the number of allegations, type of force, and

mitigation efforts by the department; increased police accountability by requiring body worn cameras; training on duty to intervene when officers see other officers engaging in excessive force; and external oversight in the form of civilian review boards or Department of Justice consent decrees.[6]

As of this writing, some local governments are already contemplating changes to their policies and practices and I imagine many more will be examining them going forward. For example, Columbus City Attorney Zach Klein outlined the actions the city planned to take to immediately start improving police-community relations, including specific actions related to protest response and crowd control procedures as well as systemic changes within the city to improve police-community relations.[7] The changes listed in the latter category included, among others:

1. The creation of a civilian review board while acknowledging that existing collective bargaining agreements with police officers may pose a challenge in implementing this change; and

2. Requiring the City Attorney's Office to review all alleged misdemeanor criminal offenses before charges are brought and noting that in the case of most non-violent offenses, citizens will receive a summons rather than being incarcerated prior to trial.[8]

In terms of the use of civilian review boards, while IMLA has taken the position that conclusions and findings from these review boards should not be used in civil litigation for section 1983 cases (and we maintain that position), their utility in forming policy, providing transparency, and helping to assure accountability is something else entirely. Advocates for these review boards argue they "can help build trust with the community, aid in transparency, and hold law enforcement accountable."[10] And while law enforcement has historically resisted these boards, that may be changing in some places. Writing for the *International Association of Chiefs of Police Magazine*, Pamela Seyffert, a Captain with the Sacramento, California Police Department notes: "policing has changed, and professional civilian oversight could be exactly what is needed to regain legitimacy, boost morale, increase the hiring of diverse candidates and improve public safety."[11] Captain Seyffert provides suggestions on how professional civilian review boards can be effectively implemented:

> The officers on the street need to know that the civilian review boards are educated in police work, and are knowledgeable of equipment capabilities, police procedures, and law. Continued education and frequent ride-a-longs with the agencies they serve will be critical to help legitimize these boards with the sworn personnel. If civilian review is professionalized, law enforcement agencies will gain legitimacy and increase trust in the communities that they serve.[12]

Training may provide another path toward improvement. One of the solutions mentioned by the USCCR report was additional training on implicit bias.[13] Implicit bias "describes the automatic association people make between groups of people and stereotypes about those groups."[14] The USCCR report notes the following on implicit bias:

> Studies show that law enforcement officers hold many of the same biases as the general public, and in implicit bias tests, patterns are nearly universal. Black people (especially black men) are more often associated or quickly paired with being "threatening," and this tends to hold true regardless of the race or ethnicity of the person taking the test. For instance, Plant and Peruche found that by utilizing "shoot-don't shoot" simulations, officers were initially more likely to mistakenly shoot unarmed black suspects compared to unarmed white suspects. However, Plant and Peruche also found that after repeated exposure with the program and extensive training—in which race was unrelated to the presence of a gun—this bias could be eliminated.[15]

In addition to implicit bias and de-escalation training (which is also discussed in the USCCR report), Jack Ryan, who authors an article in this issue of *Municipal Lawyer* and is a frequent lecturer at IMLA events, noted in a recent training video that police officers owe a duty of care to individuals in their custody.[16] This duty begins as soon as an individual is in police custody. As Jack explains in the video, "as soon as the person is subdued or restrained, then get off them and get them into a rescue position. Get them into an upright position or on their side to facilitate breathing."[17]

More training on duty of care for those in an officer's custody may not have helped prevent the officer from placing his knee on Mr. Floyd's neck given that it should be obvious to anyone that placing a knee on a handcuffed, prone, and completely subdued person's neck for eight minutes would be excessive force. However, as Jack notes, additional training could have perhaps served to remind the officers standing around watching, that they owed a duty to Mr. Floyd to intervene when they witnessed their fellow officer's excessive force. *See e.g., Mick by & Through Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996) (concluding police officer who witnessed fellow officer's use of excessive force was not entitled to qualified immunity because the law was clearly established that the officer had a duty to intervene to

continued on page 30

OP-ED *cont'd from page 29*

prevent another official's use of excessive force); *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988) ("A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers"); *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983) (concluding officer was liable for failing to intervene and prevent excessive force even where officers who engaged in that force was the officer's superior).

Providing this training to our police officers could help serve as a reminder that they too violate the Constitution by failing to intervene when they witness excessive force and indeed, these other officers have now been charged with aiding and abetting second degree murder, and that no blue wall of silence should be worth such a failure in their duty.[18]

In addition to civilian review boards and additional training, local government officials may want to consider whether legislative reform is necessary to help address the issues involving excessive force. In August 2019, California enacted Assembly Bill 392 that prohibits police officers from using deadly force unless such deadly force is "necessary in defense of human life."[19] The "necessary" standard in California sets a higher bar and replaces the "objectively reasonable standard." A.B. 392 was enacted in part in response to the killing of Stephon Clark, the unarmed black man shot by police in his grandmother's back yard when they thought his cell phone was a gun.[20]

Another reform to consider is the use of body worn cameras, which offer additional transparency and accountability. Unfortunately, body worn cameras come at a high price (not just the upfront costs, but the data storage costs can be extremely high) and there are also privacy concerns. That said, they may help de-escalate tense situations between officers and members of the communities when everyone knows the cameras are on, though the department's policy may make a difference here. According to randomized controlled research of use of force incidents, where a policy required officers to activate their cameras when they arrived at a scene, researchers found decreased incidents of use of force versus an increase in use of force incidents where the officer with the body worn cameras has discretion as to when to activate the camera.[21]

Conclusion

IMLA does not specifically endorse any of these suggestions as the solutions will need to be tailored to each local government and its police force, particularly where some communities may already be engaged in these endeavors. There is not going to be a one-size fits all solution and local leaders will need to determine what will help improve police / community relations in their community and how we can help heal the collective pain of racism in this country.

Notes

1. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/
2. *Id.*
3. https://www.abajournal.com/magazine/article/law_day_14th_amendment_klein
5. Charles S. Rhyne, Law Day - U.S.A.: Emphasizing the Supremacy of Law, 44 American Bar Association Journal 313 (1958).
5. https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf
6. https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf
7. https://abc6onyourside.com/news/local/community-leaders-announce-reform-recommendations-in-columbus
8. *Id.*
9. Of course, disciplinary matters remain within the command structure of the police, but review boards can offer suggestions to that command structure.
10. https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf
11. https://www.policechiefmagazine.org/can-professional-civilian-oversight-improve-community-police-relations/
12. https://www.policechiefmagazine.org/can-professional-civilian-oversight-improve-community-police-relations/
13. It is worth noting that the implicit bias theory is not without its critics in academic literature and some argue that it undermines efforts to ameliorate systemic racism nor is this author suggesting that it is the sole solution or that intentional racism and systemic racism do not also play their parts in police excessive force cases. Further, as employers, municipalities should weigh risks associated with possible creation of evidence if it utilizes any implicit bias tests should an employee later bring a discrimination claim and the results of implicit bias tests show tendencies toward bias for the employee accused of discrimination.
14. https://trustandjustice.org/resources/intervention/implicit-bias
15. https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf
16. https://www.youtube.com/watch?v=p6BdxW7paik&feature=youtu.be
17. *Id.*
18. https://www.cnn.com/2020/06/03/us/george-floyd-officers-charges/index.html
19. http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB392
20. https://www.npr.org/2019/08/19/752364459/new-california-law-says-police-should-kill-only-when-necessary
21. https://nij.ojp.gov/topics/articles/body-worn-cameras-what-evidence-tells-us

LISTSERV

BY: BRAD CUNNINGHAM
Municipal Attorney, Lexington, South Carolina

Community Policing: Building Positive Relationships

It is a difficult and changing world we live in today. Because of recent tragic events in the news, there are calls across the country for defunding police, reforming police departments and a move toward "community oriented" policing.

So, just exactly what does this idea of "community policing" mean? Here is one man's definition which pretty much sums it up. " **Community policing**, or **community-oriented policing** (**COP**), is a *strategy of policing* that focuses on building ties and working closely with members of the communities. The main idea is to allow police to feel like the public can trust them. A formal definition states:

"Community policing is a philosophy of full-service personalized policing, where the same officer patrols and works in the same area on a permanent basis, from a decentralized place, working in a proactive partnership with citizens to identify and solve problems." (Ferreira Bertus, *The Use and Effectiveness of Community Policing in a Democracy,* National Institute of Justice. Washington, D.C.).

The primary goal of community policing is for the police force to build positive relationships with the community through interactions with local agencies and members of the public, creating partnerships and strategies for reducing crime and disorder. In general, the overall assessment of community-oriented policing seems positive, as both officers and community members attest to its effectiveness in reducing crime and raising the sense of security in a community. Community members report having more trust in a system of which they can participate in and be a component of to help things along the way.

As an example of "community policing" efforts, I'm taking this opportunity to familiarize readers with our own Town of Lexington Chief of Police and the Town of Lexington Police Department, one of relatively few nationally-accredited police departments in the State of South Carolina.

First, meet our Chief. He is Terrence Green, 50 years of age, and a native of the tiny town of Plantersville, SC. Chief Green began his law enforcement career with the University of South Carolina Police Department as a reserve police officer while studying at the University of South Carolina. He joined the Lexington Police Department in 1993 as police officer, rising through the ranks from patrolman to Assistant Chief of Police. Chief Green received a Bachelor's Degree in Criminal Justice from the University of South Carolina and a Master's Degree in Public Administration from Strayer University. He is a graduate of the 217th session of the Federal Bureau of Investigation National Academy and the Federal Bureau of Investigation Law Enforcement Executive Development Program.

Having risen through the ranks, Chief Green understands virtually every role of the police in the community. After the recent uprising, he began to anticipate a series of questions from the community regarding training, etc., that the department goes through. Our law enforcement leader responded to the residents of Lexington as follows:

A Message From Chief Terrence Green
The death of George Floyd earlier this week has brought the words of Martin Luther King Jr. to mind that "Injustice anywhere is a threat to justice everywhere." I, like so many of you, have felt grief, anger and can see how the actions of a few can overshadow the work our officers do each day throughout the Town of Lexington, SC community.

Our officers take an oath to enforce the law but to do so while never employing unnecessary force or violence. What we have seen in the videos involving George Floyd was not that and I have faith that justice will be served. Over the last several days I've had many ask about our officers, the training they receive and what our expectations are in handling situations where force is used. I want to take a moment to talk about what I feel is most important in the public trust that is placed on each of our officers.

Training
We put a tremendous focus on training and in my mind, it's the foundation of a law enforcement professional. While the South Carolina Criminal Justice Academy mandate is 40 hours of training every three years to maintain certification, on average our officers attend over 100 hours of training each year.

As an example, in 2019 our officers attended over 6,500 hours of training

continued on page 32

which included annual re-certifications and advanced training in include verbal de-escalation cultural diversity, response to resistance, mental health, ethics, among others both hands on and in the classroom.

We work to equip our officers with the knowledge base through training, and annual re-training, to perform their jobs to the highest levels of expectations.

Accountability

As an internationally accredited police department through the Commission on Accreditation for Law Enforcement Agencies (CALEA), we are constantly making sure that our policies and procedures are up to date and reflect best practices within law enforcement. We have a number of ways to review the actions of our officers, which start with both in-car and body worn cameras but also include early warning systems to identify and correct issues seen as well as officers working in small teams within every division with multiple levels of supervision.

Verbal de-escalation techniques are used whenever possible and the response to resistance or the use of force to effect an arrest are always evaluated to ensure that the actions of officers are within policy, procedure and were necessary. We are accountable to our community and proper follow up is done within our Office of Professional Standards anytime a complaint or issue is brought forward.

Partnerships

I learned a long time ago that our work as a department benefits greatly by investing time and effort into meaningful networking with an ever-growing connection with our community partners. These partnerships have brought greater value to the many programs, events and forums that we do or participate in and provide resources of all sorts for those in the Town of Lexington community. We've also found that these collaborations create common ground and break down the many misconceptions about law enforcement. We can do a lot more by working together which benefits everyone.



Terrence Green, Lexington, South Carolina Chief of Police

Strategic Planning

As Chief, I want to make sure that the Lexington Police Department is ready for the challenges of today while also preparing for the future as the Town of Lexington continues to grow. In the fall of 2014, myself along with division commanders, supervisors and officers from each division participated in a two-day retreat where we worked together in creating a strategic plan which has become the blueprint for our officers to follow with actionable work to be done.

These goals which are focused on reducing crime, improving response times, improving community relations and traffic safety are a work in progress. We meet twice each year to evaluate, reassess and ensure that officers in each division are working together to reach these common goals.

We are six years into this strategic planning process, and I can say without a doubt that we're a more professional department because this plan.

Our mission statement is "To Provide Exceptional Police Service While Building a Partnership with the Community We Serve" and if you ever have questions or concerns, please give me a call at 803-359-6260 or email me. -Chief Terrence Green

In the Town of Lexington, citizens are given numerous chances to interact with, learn from and learn about the operations of the police department. And, you can still come into the office and talk to the Chief if you want. I realize this is a function of a "small town" that may not be available in larger cities.

But why not? Perhaps it can be established on a neighborhood level or precinct level? Every neighborhood in the Town of Lexington has its own liaison with the Town of Lexington Police Department, and folks from that neighborhood do not have to worry about who to call for any police issues. They know who their liaison is, and that is who they call.

One of the most popular programs offered for community involvement is the Lexington Police Department Citizens Academy. The Citizen's Police Academy was started in 2004 and provides an opportunity for the Town of Lexington community to learn firsthand about the various operations of the Lexington Police Department. Through a series of presentations, field trips, and simulated activities, attendees are provided an experience to gain a better understanding of the role of local law enforcement in their community. The course instruction is administered by police department personnel. The curriculum includes an overview of police operations and organization, introduction to community-oriented policing, patrol functions, criminal investigations, narcotics and many other aspects of the department.

The program is mutually beneficial to the attendees and the Lexington Police Department as it builds rela-

tionships and creates a cadre of citizens who are better informed about the many realities of police work and the work that officers do each day in their community.

The Citizen's Police Academy is an annual program that typically begins in early March with meetings on Tuesday evenings from 6:30 p.m. to 8:30 p.m. over the course of 10 weeks with one week taken off for Spring Break. The program ends with a graduation ceremony and catered dinner for attendees and their families. Participants who successfully graduate may then apply to be part of the Volunteers In Police Services (V.I.P.S.). VIP members assist at various police functions throughout the year and volunteer for ministerial jobs that may assist the department.

Another feature of the Town's Police Department is the Community Action Team.

At its heart, community-oriented policing is a philosophy under which enforcement, prevention, problem solving, and community involvement are used simultaneously to attack crime and its root causes. Because community-oriented policing requires a proactive approach to be successful, the police and community must work together as partners in identifying and addressing issues and problems. There are two key elements to the program.

First, there is public involvement. Citizens as groups or individuals work with police to identify priorities and implementing responses. Without input from the community, the Lexington Police Department cannot hope to effectively or efficiently serve the citizens and business owners of Lexington.

Next, there is proactive enforcement. Instead of adhering to the reactive, traditional approach to law enforcement (where police become involved only after a crime has been committed), community-oriented policing is based upon citizens and police identifying needs so that crime can be prevented. Once needs are identified under the partnership model described above, police and the public work together to deter crime by making potential targets less inviting. This may involve other departments within Town Hall or civic groups cooperating with the police to bring about a lasting solution.

Several officers within the department form the(Community Action Team (CAT). Within the Town of Lexington Police Department, the CAT is the unit primarily responsible for community-oriented policing. CAT officers receive special training in community relations, crime prevention, and gang trends. Working with the patrol and criminal investigations divisions, CAT officers ensure that community input is part of the action plans patrol officers and detectives work under.

Other functions sponsored by the police department include block parties, and the annual Fall Festival for kids. It is a safe alternative to Halloween and brings hundreds of people to Town Hall to taste local food, have fun on the rides and participate in the costume contest. I personally have cooked as many as 1,200 hot dogs in one night in support of this annual event. The community is involved through food and prize donations, and merchants get a chance to showcase their wares while the kids all just have a grand time!

Folks in the Town of Lexington are learning that police are people just like the rest of us. The have families and send their kids to school in Town. They can be a great asset to the community once the community learns the police are a part of it and are there to help.

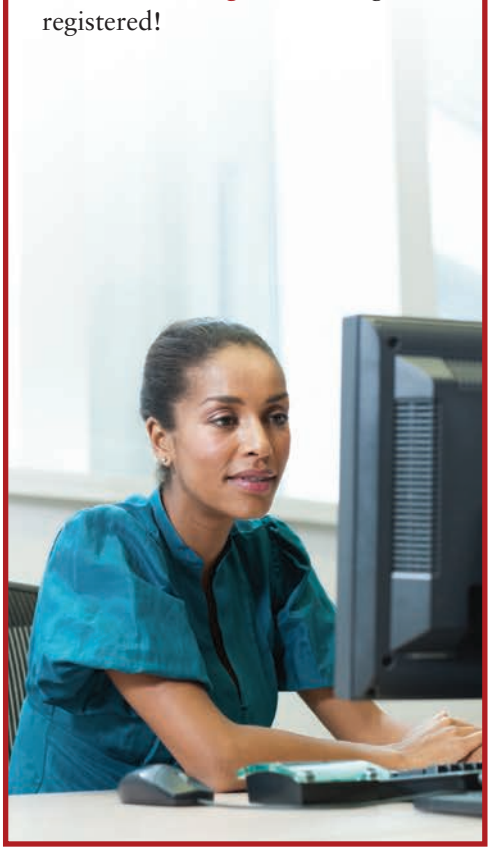
Hey folks! Listen up! Small towns have a lot to offer and I present our Town of Lexington Police Department as right up there with the finest of them all. Perhaps folks can learn something from our little old town after all? I know I am very proud to represent my Chief and my police department.

The prosecution rests, your honor. ML

With 2020 half-way over and proving the importance of distance learning opportunities, IMLA has opened registration for our 2021 Kitchen Sink Distance Learning Subscription early!

One Kitchen Sink subscription will provide your entire office with at least **30 distance learning programs**, for all of its CLE needs. These 30 programs are in addition to the **10 free webinars** IMLA offers to all members. Kitchen Sink subscribers will continue to receive at least **40 distance learning programs** for one small price!

Please visit the Kitchen Sink page on the **IMLA.org** website to get registered!



INSIDE CANADA

BY: MONICA CIRIELLO
Ontario 2015

Allergic Employees, Distant Bus Stops, and Animal-Unfriendly Ads

Accommodating Allergic City Employees

Klewchuk v. City of Burnaby (No. 2), 2020 BCHRT 97 http://canlii.ca/t/j6lvt

The Complainant, an auxiliary employee in the recreation department at the City of Burnaby (City) alleged that the City violated s. 13 of the *Human Rights Code*, RSBC 1996, c. 210 (*Code*) when it failed to accommodate her allergies in the workplace. The Complainant has severe allergies to common items such as onions, garlic and latex and if exposed is required to leave the area immediately. Although she was qualified to work independently as an after-school Program Leader for school-age children, the City restricted her from working alone or required her to work as an Assistant Program Leader, under a Program Leader in case allergens were present and she had to leave the area. The City argued that its approach was to limit its risk liability which would arise if school-aged children were left unsupervised. The City applied under the *Code* to dismiss the complaint because it had no reasonable prospect of success at a hearing.

HELD: City's application dismissed.

DISCUSSION: To dismiss the City's application the Complainant only had to provide some evidence that she had a *Code* protected disability, that her employment was adversely impacted and that her disability was the factor in the adverse impact. *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 4. Both parties agreed that the Complainant had a *Code* protected disability. Parties disagreed thereafter; the City argued that the Complainant could not prove she experienced an adverse impact to her employment. The City submitted that any financial adverse impact could be avoided by increasing her availability to work in other areas of the City, an option available to auxiliary employees. The Tribunal disagreed, finding that any restriction in a job opportunity could amount to an adverse impact, sufficient to bring this portion of the complaint out of conjecture. The City further submitted that it could establish a bona fide defense, having reasonably accommodated the Complainant's disability, and highlighting that the standard goal of accommodation is reasonableness not perfection. The City provided evidence of steps taken to accommodate the Complainant, including working with the City's occupational health and safety manager to create a tailored plan for managing the allergies as well as supporting and receiving advice from an independent medical examination. The City submitted that the approach, which limited the Complainant to Assistant Program Leader--or a Program Leader if another person was present--was a reasonable one as it minimized the risk of leaving children alone.

The Complainant provided evidence that another Program Leader had a peanut allergy and was permitted to work independently as a Program Leader. The Tribunal took issue with this discrepancy, finding that the City's approach for the Complainant should arguably apply to any employee with an allergy that could be triggered while alone with school-aged children. The Tribunal was not satisfied with the evidence presented by the City's argument that no other steps could have been taken to reduce the impact on the Complainant, and the City's application to dismiss the Complainant's application was denied.

Bus Shelter Advertising: Governed by Public Law or Private Contract?

People for the Ethical Treatment of Animals, Inc. v. City of Toronto, 2020 ONSC 2356 http://canlii.ca/t/j6l52

Astral Media Outdoors L.P. (Astral) leases bus shelter advertisement space from the City of Toronto (City) and pays 8.5% of its bus shelter advertising revenues to the City. In September 2018, People for the Ethical Treatment of Animals, Inc. (PETA) contracted with Astral to display four ads targeting coat manufacturer Canada Goose. One ad depicted a goose saying, "I'm a living being, not a jacket filling," and a second showed a wolf with the caption "I'm a living being, not a piece of fur trim." Both ads stated, "Boycott Canada Goose."

The day the ads were posted, Astral advised PETA it had received numerous complaints that the message disparaged

another organization and Astral would be removing the ads immediately. PETA sued, naming both Astral and the City as Respondents, claiming that by removing the ads, and the City's decision not to redirect Astral to repost the ads, both parties breached their duty of procedural fairness and PETA's freedom of expression under s. 2(b) of the *Charter*. The City and Astral argued that the issue before the Court was not subject to judicial review because it emerged from a private contract between PETA and Astral, and no *Charter* rights were violated.

HELD: Application for judicial review dismissed.

DISCUSSION: The Court assessed whether this case could proceed as an application for judicial review: Section 2(1) of *Judicial Review Procedures Act,* R.S.O. 1990, c.J.1 (*Act*) outlines the Court's jurisdiction to grant relief on a judicial review application. The *Act* does not specify when the relief is available; it is common law that provides guidance *Trost v. Conservative Party of Canada*, 2018 ONSC 2733. The Federal Court of Appeal in *Air Canada v. Toronto Port Authority and Porter Airlines Inc.,* 2011 FCA 347, outlines factors that are relevant to determine if a dispute falls in scope of public law permitting it to be subject to judicial review. In *Air Canada,* factors included: the character of the matter, whether it is private or has broader importance to the public, the extent to which a decision is founded in law opposed to private discretion, and whether public law remedies are suitable.

In reviewing the factors, the Court found that Astral's decision to remove the ads did not have a sufficient public character to make it open to judicial review. The Court found the character of the matter was a contractual dispute between PETA and Astral, and as held in *Air Canada,* administrative law principles should not be used to resolve a private a commercial law matter. The Court noted that PETA willingly entered the contract with Astral and as such agreed to the terms.

PETA relied on case law decisions such as *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31 which dealt with advertising on municipal property to demonstrate both public law character and public importance. The Court distinguished those precedents, because in this case, PETA was not challenging a municipal policy decision made by the City; instead it was challenging the decision made under a private contract. Since Astral is a private corporation, not a public body, it is expected that the decisions made would be shaped by private contract not by law. Lastly, the City had no authority to intervene in the contractual dispute and no authority to compel Astral to repost the ads. The Court held that this was a private law matter, and not suited for judicial review or a *Charter* argument.

Transit Service Stuck between an Island and a Hard Place

Belusic obo Canadian Federation of the Blind v. City of Victoria and another, 2020 BCHRT 115 (CanLII) http://canlii.ca/t/j7x18

A series of bus stops along Pandora Avenue in the City of Victoria (City) were relocated from the curb to islands in the middle of the road (Floating Stops), which required passengers to cross a bike lane to access the bus. Oriano Belusic brought suit on behalf of members of the Canadian Federation of the Blind (CFB) against the British Columbia Transit (BC Transit) and the City. The complaint alleged that the City and BC Transit knowingly increased safety risks and discriminated against blind people by operating bus service at the Floating Stops in violation of s. 8 of the *Human Rights Code*, RSBC 1996, c. 210 (*Code*). The City and BC Transit denied discrimination, and BC Transit applied under the *Code* to dismiss the complaint against it because the action had no reasonable prospect of success at a hearing.

HELD: BC Transit's application to dismiss denied.

DISCUSSION: The Tribunal has authority under s. 27 of the *Code* to dismiss complaints that have no reasonable prospect of success and that do not justify the time and resources of a full hearing. *Berezoutskaia v. British Columbia (Human Rights Tribunal),* 2006 BCCA. The onus was on BC Transit to establish a basis to dismiss the CFB complaint, while the CFB merely had to provide evidence that took the complaint out of the realm of conjecture. *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49. To demonstrate discrimination, the CFB had to provide evidence that a person experienced an adverse impact with respect to a service available to the public and that the *Code*-protected disability was a factor in the adverse impact. Once discrimination was established the burden fell to BC Transit to justify its conduct. *Moore v. British Columbia (Education),* 2012 SCC 61.
All parties agreed that blindness is a protected disability. The CFB argued it experienced an adverse impact as the Floating Stops effectively prevented blind people from accessing the bus, because a "significant minority" of cyclists travelled down the bike lane at speeds too great to stop for a blind pedestrian. Because BC Transit does not provide assistance for people to safely cross the bike lane to get to the Floating Stops, the CFB argued it is effectively denying bus service to blind people along Pandora Avenue. The Tribunal was satisfied that the CFB was adversely impacted by the Floating Stops. The CFB argued that the BC Transit did not

Continued on page 39

where dedication of a bicycle path along an undevelopable floodway was imposed as a condition on the approval of the expansion of a hardware and plumbing supply store, the easement was valued at $8000, a tiny fraction of what the litigation cost and about 1% of what the case ultimately settled for.[73]

Incentives Will Likely Be Considered
Governments can incentivize the voluntary dedication, in this case, of an access easement, by providing some type of relief from development restrictions — such as a density bonus or by providing tax relief.

Jury Trials Will Be Had in Section 1983 Cases
The Court in *Monterey v. Del Monte Dunes at Monterey, Ltd.*, made clear that there is a right to a jury trial in federal court in these Section 1983 cases if there is a claim in excess of $20 or more in compensation, but not if only equitable relief is sought.[74] The U.S. Supreme Court in *Knick* made clear that in eliminating the state compensation prong of the ripeness test it expected claimants to proceed under Section 1983.[75]

Conclusion

It will be interesting in so many respects to watch how takings negotiations and litigation evolve post-*Knick*. We must recognize that a decision like *Knick* cannot foretell with any great certainty how it will be more fully developed. That, indeed, is the lesson we have learned from other takings decisions, where there has also been an overreaction, on all sides. Former Secretary of Defense Donald Rumsfeld made an observation that may be apt here as we enter the post-*Knick* phase of "known unknowns" and "unknown unknowns":

> The message is that there are no "knowns." There are things we know that we know. There are known unknowns. That is to say there are thing [sic] that we now know we don't know. But there are also unknown unknowns. There are things we don't know we don't know. So when we do the best we can and we pull all this information together, and we then say well that's basically what we see as the situation, that is really only the known knowns and the known unknowns. And each year, we discover a few more of those unknown unknowns.[76]

This may be a turning point, not great in its impacts, but still a time to reconsider how all of the stakeholders conduct themselves. Would it not be good if property owners, developers, neighbors, advocacy groups, planners, and government officials took this opportunity to find new ways to avoid conflict and to embrace alternative dispute resolution?

Notes

1. 139 S. Ct. 2162 (2019).
2. Fifth Amendment — Takings Clause — State Litigation Requirement — Knick v. Township of Scott, 133 Harv. L. Rev. 322, 330 (2019).
3. *See* Cara Giaimo, The ATU Fable Index: Like the Dewey Decimal System, But with More Ogres, Child. Literature Wk. (June 14, 2017), https://www.atlasobscura.com/articles/aarne-thompson-uther-tale-type-index-fablesfairy-tales [https://perma.cc/H9AQ-7DDP].
4. D.L. Ashliman, The End of the World, Univ. Pitt.: Folklore & Mythology: Electronic Texts, ttp://www.pitt.edu/~dash/type2033.html [https://perma.cc/UU3U-ZX64].
5. An average acorn weighs 4.0–9.5 grams. See Jerry Tecklin & Douglas McCreary, Acorn Size as a Factor in Early Seedling Growth of Blue Oaks, in U.S.Dep't Of Agric., Proceedings Of The Symposium On Oak Woodlands And Hardwood Rangeland Management 48 (1991), http://citeseerx.ist.psu.edu/viewdoc/download?-doi=10.1.1.584.8359&rep=rep1&-type=pdf [https://perma.cc/786U-B6BA].
6. "Loosey Goosey" is defined in Merriam-Webster as an adjective, "notably loose or relaxed: not tense." Merriam-Webster, https://www.merriamwebster. r. com/dictionary/loosey-goosey [https://perma.cc/3FZL-JND5] (last visited Feb. 9, 2020).
7. Old MacDonald Had a Farm is another example of the chain or cumulative tale that repeats itself and is iterative. Old MacDonald Had a Farm, Secondhandsongs, https://secondhandsongs.com/work/171732 [https://perma.cc/EKH9-D2J2] (last visited Feb. 20, 2020).
8. *See* Jacob Grimm & Wilhelm Grimm, Children's And Household Tales (1812). A second volume was published in 1815.
See Mari Ness, The Sky Is Falling! Maybe! "Henny Penny" or "Chicken Little", TOR.COM (May 5, 2016, 2:00 P.M.), https://www.tor.com/2016/05/05/the-sky-is-falling-maybe-henny-penny-or-chickenlittle/ [https://perma.cc/KB5M-GDDG].
9. 482 U.S. 304, 320 (1987).
10. Stuart Taylor Jr., *High Court Backs Rights of Owners in Land-Use Suits*, N.Y. Times (June 10, 1987), https://www.nytimes.com/1987/06/10/us/high-court-backsrights-of-owners-in-land-use-suits.html [https://perma.cc/SBZ9-LYLV].
11. Robert A. Hamilton, *U.S. Land-Use Ruling Causing Concern*, N.Y. Times (June 21, 1987), https://www.nytimes.com/1987/06/21/nyregion/us-land-use-rulingcausing-concern.html [https://perma.cc/SY73-QS9T].
12. *See, e.g.,* Caquelin v. United States, 140 Fed. Cl. 564 (2018) (tem-

porary taking for interim trail use).
13. *See, e.g.*, Rossco Holdings Inc. v. California, 260 Cal. Rptr. 736 (Ct. App. 1989).
14. *See* Michelle Casady, Long Road Remains Ahead After Hurricane Taking Ruling, Law360 (Dec. 18, 2019), https://www.law360.com/articles/1229587/long-roadremains-ahead-after-hurricane-takings-ruling [https://perma.cc/S9Q8-SVJE] (more favorable settlements likely following favorable court ruling). The temporary taking caused by a moratorium led to a year-long negotiation in an attempt to settle the claim, but it ultimately failed. *See* Tedra Fox, Lake Tahoe's Temporary Development Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim, 28 Ecology L.Q. 399 (2011).
15. *See, e.g.*, Landgate v. Cal. Coastal Comm'n, 953 P.2d 1188 (Cal. 1998) (two-year delay not a taking); LXR RS V, LLC v. Municipality of Norristown, No. 2: 19-cv-01397-JDW, 2019 WL 4930157 at *3 (E.D. Pa. Oct. 7, 2019) ("The Supreme Court, however, has ruled that decreases in the value of property during governmental deliberations, absent an extraordinary delay, are mere incidents of ownership and do not constitute a regulatory taking." (citing Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980))).
16. 505 U.S. 1003 (1992).
17. *See* Dwight Merriam, No, Norman, The Sky Is Not Falling, Zoning & Plan. L. Rep., Jul.–Aug. 1993.
18. *See* Carol Necole Brown & Dwight H. Merriam, On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim, 102 Iowa L. Rev. 103, 116 (2016).
19. 545 U.S. 469 (2005). See generally Dwight Merriam & Mary Massaron, Eminent Domain Use And Abuse: Kelo In Context (2006).
20. 50 State Report Card: Tracking Eminent Domain Reform Legislation since Kelo, Castle Coalition, http://castlecoalition.org/50-state-report-card [https://perma.cc/W8K3-NZX6] (last visited Mar. 4, 2020).
21. Adam Liptak, Case Won on Appeal (to Public), N.Y. Times (July 30, 2006), https://www.nytimes.com/2006/07/30/weekinreview/the-nation-case-won-on-appealto-public.html [https://perma.cc/GZ4L-YVV8].
22. It has been argued that some state courts have ignored *Kelo* and continued a trend toward greater protection of private property owners. See Ilya Somin, The Judicial Reaction to Kelo, 4 Alb. Gov't L. Rev. 1, 3 (2011) (introduction to the Symposium on Eminent Domain in the United States); *see also* Patricia E. Salkin, The Kelo-Effect in New York, New Jersey and Pennsylvania: Assessing the Impact of Kelo in the Tri-State Region (Albany Law Sch., Working Paper No. 09-06, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028893 [https://perma.cc/W3DY-CSZU].
23. Sheldon Whitehouse, 'Knick'-Picking: Why a Recent SCOTUS Ruling Signals a New Day, Nat'l L.J. (July 1, 2019), https://www.law.com/nationallawjournal/2019/07/01/knick-picking-why-a-recentscotus-ruling-signals-a-new-day/ [https://perma.cc/7TJM-ZGQB].
24. 533 U.S. 606 (2001).
25. *See id*. The Court ruled five to four that the owner of 20 acres of Rhode Island waterfront property had the right to go to court to challenge development restrictions even though the restrictions were in place when he acquired the property. Advocates of property rights hailed the decision as a substantial victory. See also Linda Greenhouse, Justices Rein in Local Regulation of Tobacco Ads, N.Y. Times (June 29, 2001) https://www.nytimes.com/2001/06/29/us/supreme-court-supreme-courtroundup-justices-rein-local-regulation-tobacco-ads.html [https://perma.cc/GT5T-GEDY].
26. *See, e.g.*, Wilkie v. City of Boiling Spring Lakes, 821 S.E.2d 901 (N.C. Ct. App. 2018) (reasonable investment-backed expectations).
27. *See* Whitehouse, *supra* note 23. See my reply at Dwight Merriam, Viewpoint: Senator Is Wrong About 'Knick' Ruling, Conn. L. Trib. (July 2, 2019), https://www.law.com/ctlawtribune/2019/07/02/viewpoint-senator-is-wrong-aboutknick-ruling/ [https://perma.cc/R2D5-UFFH]; see also James Burling, Sen. Whitehouse Is Wrong About Public Interest Law, Nat'l L.J. (Oct. 4, 2019), https://www.law.com/nationallawjournal/2019/10/04/sen-whitehouse-is-wrongabout-public-interest-law/?slreturn=20190929134733 [https://perma.cc/JQY9-J2NU]. Anthony Palazzolo became my friend. I came to know him in interviewing him for my writings. He was a junk and scrap dealer who studied the law. He knew more about the leading takings cases and the line-up of the justices and their views than I will ever know. He was a wonderful man.
28. Pac. Legal Found., https://pacificlegal.org [https://perma.cc/NY7R-CVEH] (last visited Mar. 4, 2020).
29. *See* Merriam, *supra* note 27; see also Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). *Williamson County* established the two-prong test for determining the ripeness of a federal takings claim, requiring (1) a final decision by the entity enacting the regulation (the finality prong); and (2) that the plaintiff sought compensation first from the state (the compensation prong). *Id*.
30. *See* Whitehouse, *supra* note 23. In my response, I addressed some of the issues I saw in Whitehouse's commentary, pointing out that pro-government types like Professor Daniel R. Mandelker have supported overturning

Continued on page 38

Williamson County for decades. *See* Merriam, *supra* note 27.
31. Knick v. Township of Scott, 139 S. Ct. 2162, 2187 (2019) (Kagan, J., dissenting).
32. *Id*.
33. *Id*. at 2189.
34. *See id*. at 2181–90.
35. *See id*. at 2190.
36. 520 U.S. 725, 733–34 (1997); see also J. David Breemer, The Rebirth of Federal Takings Review: The Courts' "Prudential" Answer to Williamson County's Flawed State Litigation Ripeness Requirement, 30 Touro L. Rev. 319, 320 (2014); Thomas Roberts, Fifth Amendment Takings Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata, 24 Urb. Law. 479, 482–83 (1992).
37. 545 U.S. 323, 349, 352 (2005).
38. *See* Jimmy Hoover, Inside the Supreme Court's Playbook on Precedent, LAW360 (Oct. 6, 2019), https://www.law360.com/articles/1206353/inside-the-supremecourt-s-playbook-on-precedent [https://perma.cc/8URV-68ZM].
39. *See* Precedent and the Roberts Court in 4 Charts, LAW360 (Oct. 7, 2019), https://www.law360.com/articles/1207062/precedent-and-the-roberts-court-in-4-charts [https://perma.cc/E8VY-THLJ].
40. *See Knick*, 139 S. Ct. at 2177, 2179.
41. This is the collective view of the many lawyers with whom I have discussed the impacts, particularly those fellow members of Owners' Counsel of America. See Owners' Couns. Am., www.ownerscounsel.com [https://perma.cc/HW44-8NVH] (last visited Mar. 4, 2020). It is believed that, in some instances, federal courts will be less interested in what may be characterized as issues of local land use, and state courts may be more sympathetic to property owners. The decision on whether to bring the action in state or federal court will vary from state to state depending upon the culture and common law.
42. John Echeverria, Knick v. Township of Scott: A Procedural Boost for Takings Claimants, 2020 A.B.A. Sec. Env't, Energy & Resources 51.
43. *See* Ilya Somin, Knick v. Township of Scott: Ending a "Catch 22" that Barred Takings Cases from Federal Court, 2018–2019 Cato Sup. Ct. Rev. 153, 153, 183–84 (2019).
44. Before the decision in *Knick*, courts were split on whether facial claims wereexempt under the state-litigation requirements of Williamson County, but now both as-applied and facial claims are clearly exempt. See Petworth Holdings, LLC v. Bowser, No. CV 18-3 (JEB), 2019 WL 4889274, at *2 (D.D.C. Oct. 3, 2019).
45. Christine P. Bartholomew, Twiqbal in Context, 65 J. Legal Educ. 744 (2016).
46. My license plate "number" is "ZONING" (really), not "COMPLEXFEDERALCIVILPROCEDURE."
47. 550 U.S. 544 (2007).
48. 556 U.S. 662 (2009).
49. *See generally* Bartholomew, *supra* note 45.
50. See, e.g., E&B Nat. Res. Mgmt. Corp. v. Cty. of Alameda, No. 18-CV-05857-YGR, 2019 WL 5697912 (N.D. Cal. Nov. 4, 2019); Little v. Mayor & City Council of Ocean City, No. CV ELH-18-360, 2019 WL 4689238 (D. Md. Sept. 26, 2019) (declining
to exercise pendent jurisdiction where all federal claims were dismissed).
51. Clark v. City of Williamsburg, No. 17-2002, slip op. at 5–6 (D. Kan. Feb. 14, 2018) (granting jurisdiction over pendent inverse condemnation claim upon amendment of the complaint) (internal citations omitted).
52. *See* Funderburk v. S.C. Elec. & Gas Co., No. 3: 15-cv-04660-JMC, 2019 WL 3504232, at *7 (D.S.C. Aug. 1, 2019).
53. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
54. This is the point made to me and others by Michael M. Berger, who has argued four takings cases in the U.S. Supreme Court. He laments that local zoning lawyers often toss in a takings claim in their routine appeals. One might guess it is done to impress clients or maybe intimidate the government. In the end, it usually does neither. Most are not good claims, they do not go anywhere, and they are often abandoned along the way.
55. Robert Thomas, Sublimating Municipal Home Rule and Separation of Powers in Knick v. Township of Scott, 47 Fordham Urb. L.J. 509 (2020).
56. *See* Knick v. Township of Scott, 139 S. Ct. 2162, 2188–89 (2019); *see also* Nimer v. Litchfield Twp. Bd. of Tr., 707 F.3d 699, 701 (6th Cir. 2013) ("A district court may abstain under the Younger doctrine if three conditions exist: there are state proceedings that are (1) currently pending; (2) involve an important state interest; and (3) will provide the federal plaintiff with an adequate opportunity to raise his or her constitutional claims."); Pae v. City of Lawton, No. CIV-16-1198-M, 2017 WL 168910, at *1 (W.D. Okla. Jan. 17, 2017) (Pullman abstention rejected in Section 1983 inverse condemnation case: "plaintiff has not shown that there is an uncertain issue of state law underlying his § 1983 claim, that the state issues are amenable to interpretation and such interpretation obviates the need for or substantially narrows the scope of his § 1983 claim, or that an incorrect decision of state law would hinder important state law policies. The Court further finds that the unresolved state law issue cited by plaintiff — whether defendant's actions are governed by the Oklahoma Governmental Tort Claims Act — is an issue routinely addressed by the courts in the Tenth Circuit exercising supplemental jurisdiction over state tort claims."). *See generally* R.J. Potvin, III Inv. Tr.

v. Auburn Water Dist., No. 2:18-CV-00046-NT, 2018 WL 2425926 (D. Me. May 25, 2018) (Burford abstention not appropriate in a takings case because relief is not discretionary). England reservations will become more important as abstentions increase. *See* Lumbard v. City of Ann Arbor, 913 F.3d 585 (6th Cir. 2019).
57. *See* note 55 *supra* and accompanying text.
58. How about those self-checkout lines at the grocery? Is it faster for you? Not always.
59. No. 5:17-CV-5084, 2019 WL 2150388 (W.D. Ark. May 16, 2019).
60. *Id*. at *1.
61. *Knick*, 139 S. Ct. at 2179.
62. *Id*. However, Justice Thomas in his concurrence rejected the argument that regulators should be free of the threat of injunctive relief. Id. at 2180 (Thomas, J., concurring).
63. Echeverria, *supra* note 42 (quoting *Knick*, 139 S. Ct. at 2180 (Thomas, J., concurring)).
64. *Knick*, 139 S. Ct. at 2168.
65. 467 U.S. 986 (1984).
66. 42 U.S.C. § 1983 (1996).
67. 42 U.S.C. § 1988 (2000).
68. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc (2000); *see also* Patricia E. Salkin & Amy Lavine, The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and
Its Impact on Local Government, 40 Urb. L. 195, 255 (2008) ("RLUIPA has had a chilling effect on local government's ability to exercise the police power through zoning to ensure that community character is preserved and that the public health, safety, and welfare is protected.").
69. Utah Code Ann. § 13-43-204 (1953).
70. John Martinez, A Proposal for Establishing Specialized Federal and State "Takings Courts", 61 Me. L. Rev. 467, 489 n.159 (2009).
71. Sara Bronin & Dwight Merriam, Rathkopf's Law Of Zoning & Planning § 31.8 (4th ed. 2019). In addition to necessary program modifications to encourage greater participation, a change in mindset by all stakeholders involved must develop. Despite the increased use of dispute resolution in land use matters, in some localities, there is still hesitation on the part of all parties: the public, the developers, the planners, the lawyers, the local boards and the courts, to participate in a program that is a change from the traditional system. In the traditional system, commissioners feel pressure to make decisions quickly, and a collaborative approach is viewed as time consuming. Because all parties may lack an understanding of how the program works, they are hesitant to embrace mediation as an option. *Id.*
72. Jessica Gresko, Cemetery Case Puts Property Rights Issue Before the High Court, Associated Press (Oct. 4, 2018), https://apnews.com/86ec9d89d4d34579b528845f5f8c1642/Cemetery-case-putsproperty-rights-issue-before-high-court [https://perma.cc/5G42-XGBK] ("Knick, 69, says her town's ordinance wouldn't protect her if people injure themselves on her land and sue.").
73. Dolan v. City of Tigard, 512 U.S. 374 (1994); E-mail from Jill Gelineau, Shareholder, Schwabe, Williamson & Wyatt PC, to Dwight Merriam (Mar. 8, 2020, 17:13 EST) (on file with author).
74. *See* 526 U.S. 687 (1999); see also Martin Schwartz, Section 1983 Litigation 5 (3d ed. 2014).
75. Knick v. Township of Scott, 139 S. Ct. 2168 (2019).
76. Donald Rumsfeld, U.S. Secretary of Defense, Press Conference at NATO Headquarters, Brussels, Belgium (June 6, 2002) (official transcript from U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs)), https://www.nato.int/docu/speech/2002/s020606g.htm [https://perma.cc/4K2C-U5B4]. ML

Inside Canada *cont'd from page 35*

take reasonable steps to accommodate the CFB to provide them with the same access to bus service as a person without a disability.
BC Transit argued that its authority is limited through the *British Columbia Transit Act* (the *Act*) and it has no jurisdiction to make decisions regarding roadways throughout the City nor any authority as to the location or construction of new bus stops, including the Floating Stops in question. BC Transit argued that it did not have a duty to accommodate the CFB, such as providing safe access to and from the island. Although acknowledging that BC Transit's authority was limited under the *Act*, the Tribunal found that BC Transit, by continuing to service Floating Stops which are not reasonably accessible by blind users, arguably contributed to the adverse impact already created by the City's location of the Floating Stops, contrary to s. 8 of the *Code*:

> When Transit serviced the Floating Stops, which appear to be a disability-related barrier to Class members' ability to safely access its bus service, Transit arguably discriminated against the Class in its own right. The evidence suggests that, in doing so, Transit arguably contributed to the adverse impact created by the Floating Stops. The evidence further suggests that there is a nexus between the Class members' disability and their inability to access or depart Transit's buses at the Floating Stops. In these circumstances, I am unable to find that the complaint as against Transit has no reasonable prospect of success.

The burden thus fell on BC Transit to provide further justification for its decision to utilize the Floating Stops in question. No such justification was advanced, and the Tribunal dismissed BC Transit's application to dismiss. ML

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