Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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NCBA Virtual Holiday Celebration

THURSDAY, DECEMBER 3, 2020

6:00 PM via Zoom

See pg. 6

WHAT'S INSIDE

OF NOTE

NCBA Member Benefit - I.D. Card Photo

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, December 3, 2020 at 12:45 PM

Thursday, January 7, 2021 at 12:45 PM

Growing your firm's business and reach has never been easier with the help of the Nassau County Bar Association's Lawyer Referral Service and Arbitration and Mediation panels. Members can receive new potential client referrals and join panels which handle cases at the most efficient rates—benefits exclusively offered to active NCBA Members only.

Lawyer Referral Service (LRS)

"I have been a member of Lawyer referral for 25 years. In that time, I have received a number of lucrative clients. The return on investment has been fantastic," said NCBA President-Elect Gregory S. Lisi.

Each year, the Nassau County Bar Association (NCBA) receives an influx of calls from members of the community regarding personal legal matters. Callers who are looking for an experienced and knowledgeable attorney to work with them on a legal issue are forwarded to the Lawyer Referral Service (LRS) Program by an NCBA staff member. These new potential clients are then introduced to members of the LRS Panel, comprised of active NCBA Member attorneys looking to cultivate business opportunities.

"Being affiliated with the NCBA Lawyer Referral Service has provided an additional means of meeting prospective clients. The firm likely also experiences enhanced reputational status from its long affiliation with, and referrals by, an institution as widely respected as NCBA," said NCBA Member Matthew S. Seidner.

Membership on the LRS panel is open as an exclusive benefit to active NCBA Members. To join the panel, Members are asked to fill out the application form located on our website at www.nassaubar.org. The application form allows the applicant to choose the panels he/she wishes to be on. Once signed, the application, copy of current professional insurance coverage, and check or credit card information must be mailed to: Nassau County Bar Association, Lawyer Referral Information Service, 15th and West Streets, Mineola, NY 11501.

"The Lawyer Referral Service has been a great resource for my practice for many years. I have received a consistent flow of business opportunities. It's an opportunity for me to gain a new client. People appreciate the fact that I take the time to try and help them. It's a chance for me to get my name out there and expand my network." said NCBA Member George Merritts.

Additional information and can be found at www.nassaubar.org under the "Join the Lawyer Referral Service Information Panel" tab.

Alternative Dispute Resolution (ADR)

Are you looking for expeditious, timesaving, and cost-effective solutions to resolve disputes that might otherwise be litigated in court? Lower cost mediation and arbitration through the NCBA is available to the public and all legal professionals who are looking for reasonable fees that are less expensive than other alternative dispute resolution providers. Mediators and arbitrators are highly skilled attorneys who have been admitted to the New York Bar for a minimum of 10 years as well as screened and approved by the NCBA Judiciary Committee.

The the NCBA Mediation and Arbitration Panels have a long-standing history at Domus. Understanding that alternative dispute resolution, or as our Members like to call it, "appropriate dispute resolution," affords clients a more economical alternative to resolve their disputes, a roster of arbitrators and mediators was established in the 1980s. The initial goal was to provide a roster of top-quality neutrals at what was considered to be community service rates. Although the panels' original focus were labor and employment disputes, over the years, the panels expanded to include arbitrators and mediators trained and experienced in a wide variety of practice areas.

Requirements to join the NCBA panels as a mediator or arbitrator are quite stringent, and the majority of panel members sit on a wide variety of other private and court-based panels. In addition to a minimum training requirement of 40 hours of Part 146-compliant training for mediators, with similar training requirements for arbitrators, applicants must demonstrate relevant experience, must be in practice at least ten years, and must be NCBA Members in good standing. Applicants who meet those requirements are then screened by NCBA Judiciary Committee, which reviews and must approve all applicants before they may serve on a panel.

On account of the commitment of the NCBA to its members, as well as the courts and the community, the fee charged for either mediation or arbitration is just $300 an hour, with a flat administrative fee of only $500 for each case. In the time of both presumptive ADR, coupled with a pandemic which has limited access to the courthouse, the NCBA Arbitration and Mediation Panels offers attorneys an exceptional tool to assist their clients resolve their disputes and move forward with their lives and their businesses.

Special thanks to Marilyn Genoa and Jess Bunshaft for their contribution to the ADR section of this article. Marilyn Genoa and Jess Bunshaft are Co-Chairs of the Nassau County Bar Association's ADR Committee, overseeing the Bar Association's arbitration and mediation panels as well as serving on the mediation panels themselves. They're also independent mediators and arbitrators.

Attorney Grievance & Disciplinary Defense

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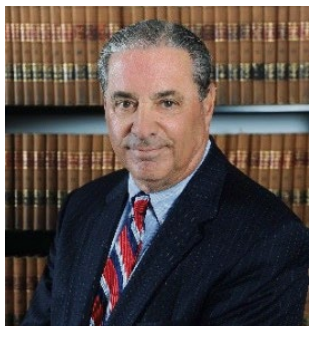

David H. Besso, past Chairman of the Grievance Committee for the 10th Judicial District and past President of the Suffolk County Bar Association, has been representing attorneys for more than twenty years.

Michelle Aulivola has defended attorneys involved in attorney disciplinary matters and grievance investigations for the past fifteen years.

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- Mediators and arbitrators are highly skilled attorneys admitted to the New York Bar for a minimum of 10 years, as well as screened and approved by the NCBA Judiciary Committee.

For rules, applications, and additional information, please call (516) 747-4126.

LAP VIRTUAL WELLNESS SERIES

CO-SPONSORED BY NYSBA LAWYER ASSISTANCE PROGRAM

Thursday, November 5, 2020 | Healthy Body, Healthy Mind
12:30 PM

Presented by Chiropractor and Personal Trainer, Dr. Benjamin Carlow.
Dr. Carlow will discuss how healthy living and eating increases well-being.

Thursday, November 12, 2020 | Leading a Meaningful Life
6:00 PM

Presented by Libby Coreno, Esq., Co-Chair of the NYSBA Lawyer Well-Being Task Force.
Libby will share strategies on how to live a full and meaningful life.

Thursday, November 19, 2020 | Strategies to Recognize and Manage Burn Out
6:00 PM

Dr. Kerry Murray O'Hara, Psy.D. will discuss ways to prevent, recognize and manage burnout.

To register for the virtual LAP Wellness Series, contact Beth Eckhardt at eeckhardt@nassaubar.org or call (516) 294-6022.
Support LAP! Visit www.nassaubar.org/lawyer-assistance-program-3/ today to make a $25 suggested donation.

Criminal Law

New Repeal of Old Law Provides Insight Into Law Enforcement Disciplinary Records

This past June saw an important piece of legislation concerning the public's right of access to law enforcement disciplinary records pass through the State Legislature with what might be considered uncustomary record speed for New York's legislative bodies. The Senate introduced and filed bill number S8496 on June 6, it passed both houses on June 9 and was delivered to the Governor on June 11, and on June 12 it was signed into law as Chapter 96 of the laws of 2020. This legislation had two important components: (1) it repealed section 50-a of New York's Civil Rights Law that shielded police officer records from wholesale disclosure, and (2) it made access to these records available to ordinary members of the public through a simple request pursuant to New York's Freedom of Information Laws. In less than a week, decades-old principles of privacy shielding the personnel and disciplinary records of law enforcement officers was abolished to further the goals of regaining the public's trust in law enforcement and to help make police officers more accountable for their misconduct.

Repeal of Civil Rights Law § 50-a

Civil Rights Law Section 50-a was one piece of legislation well-known to all police and other law enforcement and public officers in New York.[1] This law prevented members of the public, including defense attorneys and those who may have felt victimized by police officer misconduct, from learning about the results of complaints filed against the officers, and other disciplinary actions taken against them or refused to be taken against them by their departments. Anything less than criminal charges was generally deemed to be confidential and not subject to inspection or review. Two exceptions to this rule of confidentiality were when the officer expressly consented to such review, or when a court issued a lawful order allowing for such inspection. In short, officer personnel records became virtually sacrosanct, and were generally shielded from review.

The law was adopted in 1976, and since its adoption has made it very difficult for defense attorneys to obtain information about testifying police officers in pending cases that might be good fodder for cross-examination. The fairly recent widespread reporting of police-involved killings by law enforcement officers has led to a heightened concern about the prior histories of these officers and an increased desire to know about similar incidences of misconduct by these same officers. Thus, amid the protests throughout the country and the rise of the "Black Lives Matter" movement, New York's legislators expeditiously repealed this half-century-old provision in approximately six days to be sure that those law enforcement officers who commit misconduct will no longer have their records shielded, and those who evaluate complaints against such officers will know that their decisions will now be subject to public scrutiny.

Availability of Law Enforcement Records under the Freedom of Information Law

The legislation that brought the repeal of § 50-a also brought important changes to the Freedom of Information Law ("FOIL"). It created a statutory scheme to enable members of the public to easily obtain the previously unavailable disciplinary records of a wide class of law enforcement and other public officers.

In a report issued in 2014, New York's Committee on Open Government ("COOG") set forth that the § 50-a exemption—which was created in 1976 for the "narrow" purpose of "preventing criminal defense lawyers from rifling through police personnel folders in search of undocumented information to use in cross examination of police witnesses during criminal prosecutions"—had been expanded by courts to allow police departments to withhold from the public "virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer."[2] In other words, COOG explained, § 50-a "creates a legal shield that prohibits disclosure, even when it is known that misconduct has occurred," and urged that the Legislature and Governor make it a "top priority" to remove secrecy that "surrounds some activities of police departments across this State."[3]

Andrea DiGregorio

Tammy J. Smiley

This year, the Governor and Legislature acted in accordance with COOG's urging, and have generally made available, pursuant to a FOIL request, the "law enforcement disciplinary records" of New York police officers, fire fighters, corrections officers, and other law enforcement personnel, as discussed in Public Officers Law § 86(8). However, not all the information contained within such disciplinary records is subject to disclosure.[4] Some information is mandated to be redacted before disclosure of the disciplinary records, while other information is permitted—although not mandated—to be withheld.

For example, social security numbers are required to be redacted from the disciplinary records before the records are disclosed. In addition—with certain exceptions related to information obtained during a misconduct/disciplinary proceeding—a law enforcement employee's medical history, as well as the employee's use of an employee assistance program, mental health service, or substance abuse assistance service, must be redacted prior to disclosure of the disciplinary records. Also to be redacted (with narrow exceptions) are home addresses, personal phone numbers, and personal e-mail addresses. Disclosure of the employee's title, salary, and dates of employment is allowed.[5]

Some information *may* be redacted by the agency responding to the FOIL request. Permissible—albeit not mandatory—redactions include records pertaining to "technical infractions."[6] A technical infraction is defined as a "minor violation" committed by the law enforcement employee that relates "solely" to the enforcement of administrative departmental rules and which (a) does not involve interaction with the public, (b) is not of public concern, and (c) is not otherwise connected to the employee's investigative, enforcement, training, supervision, or reporting responsibilities.[7]

And, although not part of the recent FOIL amendment, Public Officers Law § 89(2) permits an agency to deny access to records if disclosure would constitute "an unwarranted invasion of personal privacy." The new FOIL provisions did not make changes to that statute, as noted by COOG earlier this year.[8]

Moreover, in a July 27, 2020 Advisory Opinion, COOG provided examples of what may constitute an unwarranted invasion of personal privacy, if disclosed.[9] The Committee on Open Government explained that a record of an "unsubstantiated or unfounded complaint" (even in redacted form) may be withheld under FOIL where an agency determines that such a complaint would constitute an unwarranted invasion of personal privacy. The committee also noted that records pertaining to charges that were dismissed or found to be without merit could also be withheld if an agency determines that disclosure of such records would result in an unwarranted invasion of personal privacy. But, COOG remarked, withholding such information was discretionary, and, as a general matter, FOIL is based upon a presumption of public access.

In reaching its July determination, COOG noted that—at that time—no court had issued an opinion that formally answered the question whether unsubstantiated complaints against law enforcement personnel must be disclosed pursuant to FOIL, and at least two courts had temporarily enjoined the disclosure of such complaints.[10] However, that backdrop has changed. In *Uniformed Fire Officers Association v. DeBlasio*, a federal court permitted release of records that contained unsubstantiated or non-final allegations concerning conduct of the plaintiffs.[11] As of the writing of this article, the decision is the subject of ongoing litigation.

Impact on Criminal Trials

These two new sections of law—the repeal of § 50-a and the availability of police personnel records via FOIL—are likely to have a substantial impact on criminal trials in New York. For one thing, under well-established constitutional principles, these records might well contain impeachment material that is required to be disclosed to the defense pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny. The information might also be discoverable pursuant to Criminal Procedure Law § 245.20(1)(k)(iv). It remains to be seen what information will be required to be disclosed, and the impact upon this responsibility where the information is equally available to both the prosecution and the defense. Courts will no doubt be tackling this matter when they will review such personnel records in camera, and whether complaints and allegations that were marked unfounded or unsubstantiated will have any relevance in a criminal trial where the officer will be taking the stand and his or her credibility will be placed into issue. Surely upon the discovery of voluminous records, motion in limine practice will develop as a way to sort out in advance of trial what sorts of allegations and specific assertions in the personnel records might be relevant to the issues at trial, and which will just be too far afield to be worthy of cross-examination lest the trial become a mini trial on all sorts of previously confidential matters. What was created in six days will surely take substantially longer multipliers in real time for criminal practitioners and judges to interpret and understand its far-reaching import.

Andrea DiGregorio and Tammy J. Smiley both work in the Appeals Bureau of the Nassau County District Attorney's Office. Andrea serves as Senior Appellate Counsel and is the Office's FOIL Appeals Officer. Tammy serves as Chief of the Appeals Bureau and is the Office's FOIL Records Access Officer.

1. Although § 50-a was generally thought of as being applicable to police officers, it also applied to those under the control of a sheriff's department, the department of correction, paid firefighters or paramedics, and peace officers. CRL § 50-a(1).
2. *Annual Report To The Governor And State Legislature*, State Of New York, Committee On Open Government at 3 (December 2014).
3. *Id.*
4. Pub. Off. L. §§ 86(6)-9; 87(4-a), (4-b); 89(2-b), (2-c).
5. Pub. Off. L. §§ 87(4-a); 89(2-b).
6. Pub. Off. L. §§ 87(4-b); 89(2-c).
7. Pub. Off. L. § 86(9).
8. State of New York, Committee on Open Government, FOIL Advisory Opinion 19775 at 2 (July 27, 2020).
9. *Id.*
10. *Id.*; *see generally Uniformed Fire Officers Ass'n v. DeBlasio*, No. 154982/2020, 2020 WL 4003596, at *2 (Sup. Ct. N.Y. Co. July 15, 2020).
11. *Uniformed Fire Officers Ass'n v. DeBlasio*, 20 Civ. 5441 (KPF) (SDNY July 29, 2020) (order modifying TRO such that it does not apply to NYCLU). *See generally Uniformed Fire Officers Ass'n v. DeBlasio*, No. 154982/2020, 2020 WL 4003596, at *2 (N.Y. Sup. Ct. July 15, 2020).

President's Column

Savor the Best in Life

FROM THE PRESIDENT

Dorian R. Glover

While settling a matter in Suffolk Supreme this week, the attorney on the other side suggested we go to the cafeteria for a cup of coffee to write up a memorandum of understanding. As we sat safely distanced, he removed his mask and took a sip of coffee and I remarked, "You know, I have never seen your face." He asked jokingly, "Is my face offensive, do you want me to cover it?"

We laughed! It was a reminder to me how so very much life has changed. My experience is not unique; I am sure you too can attest that you have new clients since the pandemic who you have not met in person. Yet, the obligations and responsibilities we have in our professional lives continue. In times such as these, it is important to count your blessings and give thanks!

Here are few things at Domus I miss most and will not take for granted again:

- Seeing a colleague and receiving a warm smile or strong friendly handshake
- Lunch with the Bench, Bar and students
- Learning together at our CLE programs at Domus
- Volunteering with our Access to Justice Program and assisting persons who may not be able to afford consultation fees
- Attending the Lawyers Assistance Program (LAP) Retreat and being with people who are open and honest with the challenges of the profession as tools are provided for meeting the challenges
- Sitting with my mentee in a class and listening to his/her cares and concerns face-to-face
- Serving as a legal advisor or judging in the NYS Moot Court Competition and seeing our future attorneys litigate with proper respect and professionalism while advocating their side
- Attending WE CARE's meeting at 8:00 AM and saying to myself, "This is way too early, but these bagels are delicious and look at the stars of this advisory board work for the common good"

I have realized how much a blessing not only joining the Nassau County Bar Association has been, but how much becoming an active member of the Association has been to my personal and professional life.

Thanksgiving is a time to count our blessings and savor all of the experiences we had. When we think of savor, we often think of food. When I think of savor, I think of the other definition—to give oneself to the enjoyment of, to savor the best in life.

Let us count our blessings that through innovation and commitment, in recent months, WE have:

- Seen our colleagues and received warm smiles during our Drive-By BBQ at the Bar.
- Learned together at record numbers with our online CLE
- Provided access to justice to Nassau County residents through our Virtual Open House
- Shared and learned lessons at the virtual LAP retreat
- We plan begin the virtual Elementary-Middle School Mentoring program with the introduction of the Mock Trial instruction of the People vs. Goldilocks hypothetical

WE CARE's meetings are still way too early and its Advisory Board remains hard at work. This month, they are delivering 200 Thanksgiving dinners to deserving families in our community.

Greg, Rosalia, Sandy, Dan, Rick, and Liz—along with our Board of Directors, Committee Chairs, Members and staff of our Association—have worked tirelessly to see that we stay connected with our membership. Whether for leadership or life, connections are vital.

We have reconfigured and redesigned our Association to stay connected while being apart through the use of technology and have now moved to a hybrid of in-person and online, including the Nassau Academy of Law's recent hybrid Bridge the Gap Weekend. The same can be said with our court system.

The Next Phase: Return to In-Person Operations in Nassau County

The Nassau County Bar Association recognizes the task at hand and values the extraordinary effort our Administrative Judge, Hon. Norman St. George, as he and his staff are slowly and deliberately increasing in-person courthouse proceedings. The monthly reports from Justice St. George to our Supreme Court Coronavirus Task Force have provided the steps of forward progress. On October 15, the Task Force was invited to the Supreme Court and were given an opportunity to ask questions and observe the court's readiness.

Some of the protective safety measures and protocols implemented include layout changes with clear partitions erected on two sides of the judge's bench and the relocation of juror seating to courtroom rows where spectators previously sat. Now, witnesses will testify from the jury box and the tables where attorneys sit with their clients have been rotated in the courtroom to provide for more distancing. Attorneys will only deliver remarks from a podium. Spectators will be seated in another courtroom and will be able to view the proceedings with state-of-the-art technology.

As I take the time to count my blessings and savor all the experiences, I want you to know individually and collectively that I am grateful you are one of them. Happy Thanksgiving!

Nassau Lawyer welcomes articles written by members of the Nassau County Bar Association that are of substantive and procedural legal interest to our membership. Views expressed in published articles or letters are those of the authors alone and are not to be attributed to *Nassau Lawyer*, its editors, or NCBA, unless expressly so stated. Article/letter authors are responsible for the correctness of all information, citations, and quotations.

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Criminal Law

Recent New York State Chokehold Law: Meaningful Reform or Cruel Hoax?

"You can fool all of the people part of the time, or you can fool some people all the time, but you cannot fool all people all the time."

—Hon William J. Groo, complaining about New York state politicians.

On May 25, 2020, Memorial Day, most of us were spending the day honoring our veterans or just trying to relax and stay healthy under the threat of the COVID-19 pandemic. Not so George Floyd. In the process of being arrested for allegedly using a $20 counterfeit bill and, without offering any resistance and being unarmed, he was handcuffed, placed prone on the ground with the knee of a Minneapolis Police Officer firmly pressing against his neck for over 8 minutes, despite Mr. Floyd repeatedly pleading that he "could not breathe." As a result of this neck restraint, George Floyd died. Unlike most police civilian encounters, however, most of this one was recorded by cell phone and police body cameras providing us with a more reliable description of the encounter.

This scenario is eerily familiar to New Yorkers. In 1991, unarmed Frederico Pereira of Queens died from a police chokehold[1] during an arrest. The officer involved was acquitted of Criminally Negligent Homicide after a bench trial. In 1994, unarmed Anthony Baez of The Bronx died from a police chokehold during an arrest. Although the officer involved was acquitted of Criminally Negligent Homicide after a bench trial, he was subsequently convicted of Federal civil rights crimes and sentenced to 7½ years in prison. From 2009 to 2013, the New York Citizen Complaint Review Board recorded receiving more than 1,000 complaints about police officers using chokeholds on civilians.[2] More recently, in 2014, unarmed Eric Garner of Staten Island, while being arrested by New York City police officers for a minor, nonviolent offense, was killed by a police officer using a chokehold, despite repeatedly pleading that he "could not breathe." A grand jury declined to issue any charges against the officer and the United States Department of Justice declined to bring criminal civil rights charges. The officer was subsequently fired by the city.

As a result of the death of George Floyd from the police-administered neck restraint, four members of the Minneapolis Police Department have been charged with felony murder. Immediately after the videos of Mr. Floyd's death were publicly released, people took to the streets in protest, mostly peaceful but occasionally resorting to looting and violence. These protests continued for days, weeks, and then months after Mr. Floyd's death. The protests have grown to include other recent deaths of African Americans killed by police action. They have expanded beyond Minneapolis to New York, the entire United States, and even internationally.

The protesters have demanded substantial changes to law enforcement to deal with institutional racism. These demands have included more police accountability and transparency, a reallocation of resources from law enforcement to social programs, and, particularly, a "ban" on chokeholds as a police technique to restrain suspects. As a direct result of these protests, the New York State legislature passed, with only three dissents, and Governor Cuomo signed, the "Eric Garner Anti-Chokehold Act" entitled Aggravated Strangulation.[3] This law went into effect less than three weeks after Mr. Floyd was killed. Perhaps the legislators should have spent more time discussing the provisions of this new law rather than rushing to enact "something."

This new law has been proudly described by the legislature, the Governor, law enforcement, and the media as a "ban" on the police use of chokeholds. This is the way it is being portrayed to the public. In fact, the legislature stated that the purpose of the law is to "establish criminal penalties for the use of a chokehold."[4] The problem is that none of these descriptions of this new law are accurate. As a reading of Aggravated Strangulation shows, the law neither bans nor criminalizes all chokeholds. More significantly, the police use of chokeholds had already been criminalized in New York State a decade before the death of George Floyd. This new legislation adds nothing to crimes that were already on the books at the time of George Floyd's, and even Eric Garner's, deaths. It is, at best, a pointless exercise, and, at worst, a cruel hoax.

Fred Klein

Before analyzing the new statute, however, it is important to define exactly what is meant by a police "chokehold." In an effort to subdue suspects without resorting to the use of weapons, police training has previously included the use of some sort of neck restraint to obtain compliance. These neck restraints involve two separate techniques. One involves placing the officer's arm around the center of a suspect's neck in an effort to compress the windpipe and cut off breathing. This can cause extreme distress by depriving the lungs and brain of oxygen. It can also cause fractures to the larynx, trachea, or thyroid bones. This is referred to as a "choke" or "strangle" hold. The second technique involves placing the officer's arm around the sides of a suspect's neck in an effort to squeeze the arteries leading to the brain and thereby cutting off blood flow. This is referred to as a lateral vascular or carotid hold and can also result in extreme distress to the suspect.

These two techniques are aimed at obtaining compliance by rendering the suspect incapable of resisting. If the pressure is maintained too long, however, or the vascular restraint becomes a chokehold by purposely or inadvertently shifting the location of pressure on the suspect's neck to the front during a struggle, it can result in unconsciousness or even death. A suspect may also involuntarily react violently to the loss of blood flow or oxygen which could, in turn, be misinterpreted by the officer as willful resistance that must be overcome by prolonging the chokehold and/or increasing the force applied. The risk of serious injury or death is also increased by the poor state of health of the suspect, something unknown to the officer.

In recognition of the extreme risks involved with the police use of neck restraints to subdue uncooperative suspects, some police departments have stopped including them in training and others have labelled them an unauthorized technique which should be avoided. However, these administrative efforts have failed to deter their usage as internal discipline is often lenient or nonexistent. Moreover, their use by the police has also resulted in serious injury and death disproportionately to African-Americans.[5]

In immediate response to the protests stemming from the death of George Floyd, New York State enacted several forms of criminal justice reform, including "The Eric Garner Anti-Chokehold Act" labelled Aggravated Strangulation, a Class C violent felony, punishable by up to 15 years in prison. This legislation prohibits a police or peace officer from intentionally obstructing breathing or blood flow by using a chokehold or similar restraint but only when it causes serious physical injury or death to another person.[6] Obviously, this law does not ban all chokeholds as its proponents announced. Only when the chokehold results in death or serious physical injury, a tragic but infrequent occurrence, does the officer commit a crime. This is far from a ban on all chokeholds.

More importantly, this law was completely unnecessary. New York State had already criminalized chokeholds and similar restraints utilized by "any person," not just law enforcement, for a decade. In 2010 the following laws were enacted: Criminal Obstruction of Breathing or Blood Circulation makes it a Class A misdemeanor to apply pressure to the throat or neck or block the mouth or nose of another with intent to impede breathing or blood flow, even without causing injury.[7] Strangulation in the Second Degree makes it a Class E felony to engage in the above conduct where it causes "stupor, loss of consciousness for any period of time, or any other physical injury or impairment."[8] Finally, Strangulation in the First Degree already made it a Class C violent felony to engage in the above conduct where it causes "serious physical injury" to another person,[9] exactly the same conduct and result with the same 15-year maximum punishment as the newly enacted Aggravated Strangulation. None of these existing crimes exclude law enforcement officers from their prohibitions.

Therefore, it is obvious that Aggravated Strangulation neither bans all chokeholds (limited to when serious physical injury or death is caused) nor was it a necessary reform because already long-existing statutes actually went much further in criminalizing the use of neck restraints than this new law did (not requiring any injury or only physical injury).

Additionally, as all criminal law practitioners know, chokeholds cannot be banned under all circumstances given the law of justification. Civilians are justified in using deadly physical force on another person if it is reasonably believed that the other person is about to use deadly physical force on them or to prevent or terminate the commission of certain violent crimes.[10] Furthermore, police officers are permitted to use deadly physical force under the above circumstances as well as to effect an arrest or prevent escape from a violent felony.[11] The law of justification does not distinguish between permissible forms of deadly physical force and impermissible forms, once the use of deadly physical force is authorized.

Deadly physical force is defined as physical force which is "readily capable of causing death or other serious physical injury."[12] Based on the potentially lethal and unintended consequences flowing from the use of chokeholds, one court in New York State has already determined that their use by a civilian constitutes deadly physical force.[13] Therefore, it is misleading if not an outright lie to declare that Aggravated Strangulation "bans" the use of chokeholds. The legislature actually expressly conceded this. In the Sponsor Memo accompanying the bill, the legislature specifically acknowledged that the "bill does not bar any affirmative defenses or justifications for the use of force in making an arrest or in preventing an escape as outlined in Section 35.30 of the Penal Law."[14] Therefore, in circumstances where deadly physical force is necessary, a police officer can still lawfully use a chokehold even under this new Aggravated Strangulation statute.

If the statute by its own terms does not ban all chokeholds, if existing law already criminalizes all unjustified chokeholds, and if the law of justification permits them under appropriate circumstances, why is the legislature, Governor, law enforcement, media, and public under the mistaken impression that this new legislation is a critical reform banning all chokeholds in response to the death of George Floyd? Is this meaningful reform, a pointless exercise, or a cruel hoax on those striving for real criminal justice reform and seeking to emphasize that Black Lives Matter? In this era of distrust in the truthfulness of what the government says, it seems counterproductive to proclaim something as a reform when it is not.

If the legislature wanted to engage in meaningful reform that would make police conduct more accountable, instead of adding duplicative laws to what has already been made criminal, it would amend the justification statutes to specify that the use of any form of neck restraint amounts to deadly physical force.[15] At least this would notify police officers that the lawful use of chokeholds is strictly limited to situations where deadly physical force is permitted, not to restrain every suspect who fails to comply with verbal requests or who resists physically. This would clarify for the police when a chokehold is illegal, limit their use to when it is necessary to save lives, and be a meaningful reform to avoid needless injury and death to suspects.

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1. A chokehold is a form of neck restraint used by the police to subdue an uncooperative suspect. For a thorough description of various neck restraints and their effects on people, see *City of Los Angeles v Lyons*, 461 US 95, 97 n.1 (majority opinion) and 114-17, 117 n.7, 119 (Marshall dissenting).
2. Swanson, Revisiting *Garner* With Garner, 57 South Texas Law Review 401, 440 (2016).
3. Penal Law § 121.13-a. This should be distinguished from legislation enacted by the New York City Council and signed by the Mayor on July 15, 2020, which makes it a misdemeanor for a police officer to restrain a person by any means which restricts the flow of air or blood, including compressing the diaphragm, without any intent or injury. NYC Adm. Code § 10-181.
4. Senate Bill S 6670 B "Purpose."
5. *Lyons*, supra at 116 n.3.
6. Penal Law § 121.13-a
7. Penal §121.11.
8. Penal Law § 121.12.
9. Penal Law §121.13.
10. Penal Law § 35.15.
11. Penal Law § 35.30.
12. Penal Law§ 10.00(1).
13. *People v Pietoso*, 168 AD 3d 1276 (3rd Dept 2019); *see also Tuuamalemalo v Greene*, 946 F3d 471 (9th Cir. 2019).
14. Senate Bill S6670 B "Sponsor Memo."
15. Swanson, Revisiting *Garner* With Garner, supra at 442-43.

Criminal Law

Cannabis and COVID-19: A Hazy 2020 Vision


Elizabeth Kase

The United States of America faces a once-in-a-lifetime calamity. The country is in the midst of a devastating economic crisis—confronting a rise in unemployment rates, permanent job loss, and an approaching presidential election in which a major party candidate for President is accused of leading the country down the path of socialism.[1] Demands come from across the political spectrum for new sources of tax revenue to solve the financial crisis. To provide much-needed financial relief to escalating budget shortfalls, the federal government enacts a measure to create new revenue by legalizing a substance viewed by a portion of the American public as dangerous and a cause of rising crime rates. America in 2020? Nope. It is the repeal of the Prohibition in 1933.

But history tends to repeat itself and the United States once again faces a significant economic crisis and a need for new tax revenue and job creation. The COVID-19 pandemic has thrown every aspect of American life into disarray. Work, play, education, travel… the impacts and effects of the pandemic have reverberated within every level of American society. Economists, politicians, and activists are advocating for the legalization of adult-use cannabis in Washington, D.C. and Albany, New York to help solve staggering unemployment and a shrunken GDP, and infuse tax dollars into the dwindling national and state economies. In 2020, is it high time to legalize adult-use cannabis? Lessons from history may not clear away the haze.

2020 Economic Landscape

As of August 2020, the unemployment rate in the United States stood at 8.4%, reflecting 13.6 million Americans out of work.[2] Although a considerable number of Americans have been re-employed since the beginning of the pandemic, unemployment rates are more than double the steady average of 4% experienced in 2018. New York State, which bore the brunt of the COVID-19 pandemic in its early days, has seen its unemployment rate skyrocket to 15.9%. As of July 2020, over 1.5 million New Yorkers remain unemployed.[3]

The economic shutdown and high rates of unemployment have necessitated a marked surge in federal and state spending, resulting in a staggering increase to the federal deficit. In January 2020, the Congressional Budget Office (CBO) projected the deficit to be at an already alarming $1.0 trillion.[4] Now, subsequent to the COVID-19 pandemic and resulting economic impact, the CBO revised its deficit projection upward to $3.3 trillion. For the first time since World War II, the federal debt will be close to the size of the entire national economy.[5]

Similarly, New York is experiencing a new dire economic reality caused by the COVID-19 pandemic. After years of budget surpluses, New York now faces a nearly $15 billion budget deficit in 2020, with a projected $16 billion budget deficit in 2021.[6] Adding to the financial crisis is a shortfall in New York's sales tax collections, down $1.2 billion for the first half of 2020.[7]

New York State has limited options to address its current fiscal woes. One possibility to close the budget gap is through direct federal aid. For months, Governor Cuomo has sought more than $60 billion from President Trump and Congress.[8] Such aid is neither forthcoming nor predicted to solve the greater issues facing New York's budget crisis.[9] Alternatively, New York can cut spending. However, eliminating the deficit solely by billions of dollars in spending reductions does not appear feasible, when increases in spending are more likely than not. Finally, New York State can increase current taxes and/or impose new taxes to secure the revenue necessary to close the 2020 budget deficit. Many elected officials and progressive policy makers are advocating increasing income taxes as well as the imposition of new types of taxes on wealthy New Yorkers, something Governor Cuomo has been hesitant to do.[10] One should expect a combination of two or more of these options, but with respect to additional tax revenue, the general issue is what more can be taxed and by how much?

Adult-Use Legalization of Cannabis: New York's Hail Mary?

The COVID-19 pandemic has provided a watershed moment for the cannabis industry as evidenced in governmental acceptance of cannabis as an "essential business" during shelter-in-place orders. Of the eleven states that legalized adult-use cannabis, eight states immediately deemed recreational cannabis essential, thus keeping open those business when other types of businesses were forced to temporarily close. [11] Furthermore, states with medical marijuana programs also deemed dispensaries as essential and those businesses remained open during the pandemic shutdown. Like sales of alcoholic beverages, sales of cannabis surged during the spring, providing economists and politicians with crucial insight into the desire for cannabis as a mainstream product.[12]

Moreover, current civic unrest and the Black Lives Movement underscore the critical need for programs and economic pathways for equitable industry access for people of color. States that have enacted cannabis programs also established revenue reinvestment streams in minority communities as well as MWBE opportunities and fast-track applications processes for licensing.[13] In its mission statement, Massachusetts' Cannabis Control Commission states that it is "committed to an industry that encourages and enables full participation by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement."[14] Nationwide, the cannabis industry currently employs approximately 250,000 full time jobs and is the fastest growing job sector in the country.[15]

Although Governor Cuomo had publicly prioritized legalization of adult-use cannabis in New York's 2020 legislative session ahead of the pandemic,[16] Governor Cuomo and the Democratic-controlled Legislature failed to reach an agreement, let alone a vote, on adult-use. It is unclear whether the parties will reach an agreement on cannabis legalization in 2020, notwithstanding the fact that the Governor and State Legislature will need to return to Albany and reach an agreement on how to reduce the State's budget deficit. Added to New York's incentive to act quickly is the expected passage of New Jersey's November ballot initiative legalizing adult use. With New Jersey providing a possible marketplace for New York consumers, one should expect Governor Cuomo and the State Legislature to take up this issue in 2021, if not sooner.

New York should look to Illinois' recently developed program for guidance and compelling evidence of immediate financial

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Criminal Law

Acknowledging the Realities of Transgender People in the Criminal-Legal System

People from all walks of life may end up in situations where they become incarcerated. For some, their mere existence makes it much more likely that they will become involved with the penal system whether they break the law or not. For the approximately 1.4% of the US population they make up, transgender people are wildly overrepresented in the incarcerated population.

"[O]ne in six (16%) respondents in the 2008-2009 National Transgender Discrimination Survey had been incarcerated at any point during their lives, with the rate skyrocketing to 47% among Black transgender people."[1] Many factors contribute to this reality, but whatever the reason for any particular transgender person, their transgender status inevitably colors their experience behind bars.

The word "transgender"—an adjective—means a person whose gender identity does not match the sex they were assigned at birth. The word "cisgender"—also an adjective—means a person whose gender identity does match the sex they were assigned at birth. A transgender woman is a woman who was assigned male at birth. A transgender man is a man who was assigned female at birth. A nonbinary person is someone who does not identify as squarely male or female. People who fall into any of these categories may be gender conforming or gender nonconforming, which is about their expression of gender (the clothing they wear, their hair, their accessories, etc.) rather than how they feel internally.

The Law as It Stands

Charlie Arrowood

Both New York state and federal law purportedly protect incarcerated transgender people from being housed incorrectly, discriminated against, or otherwise denied equal access to care and commissary items (undergarments, hair products, etc.). In practice, however, every jurisdiction is basically left to its own devices, with barely any enforcement, save for the infrequent circumstances when a transgender person happens to have access to legal assistance.

Often, people are housed according to the name and gender designation on their documents. Because standards for changing those documents differ depending on jurisdiction, whether a person is housed correctly and given the attendant access to care and services is arbitrary and based on where they happen to be born, convicted, or incarcerated.

Safety Considerations

Safety is inherently difficult to ensure in confinement facilities. Jails and prisons are often close quarters, there exists a power imbalance between the staff and the people who are detained, a hierarchy among residents, and a scarcity of resources. Sexual assault both at the hands of staff and between incarcerated people is not uncommon. This risk is exacerbated nearly ten-fold for incarcerated transgender people, approximately 40% of whom reported a sexual assault in the past year.[2] Nearly 1/3 of respondents to the U.S. Transgender Survey (2015) who were incarcerated report that they were "physically and/or sexually assaulted by facility staff and/or another inmate in the past year."[3] Whether someone is housed in a facility that accords with their gender identity—as the law requires the option for—is a deeply personal decision based on individual considerations.

Imagine, for a moment, that you are the only woman in a men's prison facility. It is not hard to recognize that in a hyper-masculinized environment with a dearth of women, you would likely be at increased risk for sexual assault or harassment. Now imagine that you are a transgender man in a men's facility. By all outward appearances, you are no different from your cisgender peers…until you have to use a communal bathroom or shower, or until you are subject to a strip search. Inevitably, the news of your anatomy makes its way around the facility and suddenly you are a target. In many cases, the determining factor is not whether the facility affirms your gender (as cisgender people may assume it would be), but whether you will be subject to increased risk because of your transgender status.

Medical Care in Custody

Some transgender people choose to undergo medical intervention as part of their transition. This can include hormone therapy, surgical intervention, and voice training, among other things. Ordinarily, when a medical professional determines that an incarcerated person needs medical treatment (say, for diabetes or cancer), they are (in theory) provided with access to that treatment and the cost of that treatment is covered by the state. The person is in the custody of the corrections department and thus, the department of corrections is constitutionally obligated to provide them with medically necessary care.

Due to historical and current discrimination and a lack of experienced providers, transgender care is often effectively exempted from this rule in practice. Sometimes the argument is cost-based even though transition-related care is less costly than many other medical treatments and decreases future costs for comorbidities related to healthy living and mental health. Sometimes the argument is thinly veiled transphobia masquerading as concern—making arguments such as the person does not have the capacity to make their own decisions about their healthcare and they want to make sure the person is not doing something irreversible that they will regret later. Sometimes it's not so thinly veiled transphobia that flies in the face of all available medical evidence—this care is cosmetic under all circumstances. These same arguments are also used outside the penal system to deny transgender people

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Criminal Law

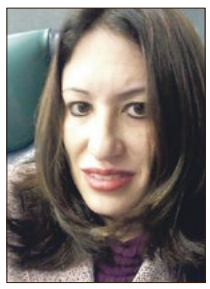
Autistic Victims and Defendants Need More Robust Protections Under the Law

Autistic people face unique challenges that place them at a disadvantage in the criminal justice system as victims and as defendants alike. Society's rigid intolerance for social ineptitude and misunderstanding of autism translates to biased complainants, biased police, and consequently, an already biased jury even before the prosecution and the defense present their opening arguments.

Likewise, the very characteristics of those with autism prompt hardened criminals to disproportionately target them for victimization. As such, the law needs to go a step further to protect them than they would the average person.

The CDC website defines autism spectrum disorder (ASD) as "a developmental disability that can cause significant social, communication and behavioral challenges" and states that people with ASD "often have problems with social, emotional and communication skills." Those with ASD have different ways of reacting to things, which is how they may find themselves on the other side of the law. The CDC states that, among other issues, children or adults with ASD might:

- have trouble relating to others or not have an interest in other people at all
- have trouble understanding other people's feelings or talking about their own feelings
- appear to be unaware when people talk to them, but respond to other sounds
- be very interested in people, but not know how to talk, play, or relate to them
- repeat or echo words or phrases said to them, or repeat words or phrases in place of normal language
- have trouble expressing their needs using typical words or motions
- repeat actions over and over again
- have trouble adapting when a routine changes[1]



Frances Catapano

According to a recent CDC report, 1 in 54 eight-year-old children will be diagnosed with some form of autism.[2]

Mental Condition and Mental State

Suppose a young man meets for drinks a young woman he met on a dating site. She does not feel any chemistry and does not want another date. As she walks back to her car at the end of the night, she is giving him polite one-word answers as he drones on about the history of every building they walk past. There is clearly no interest on her part, but it is not apparent to her date. He notices her cold shoulder but does not know what to make of it. Before quickly climbing into her car, she says thank you and good night. She texts him to say thank you but that she doesn't think they are compatible and wishes him luck in his search before driving home.

As the young woman heads home, the young man is dumbfounded and overanalyzing his date's cold shoulder. He completely ignores her farewell and good luck text as if it never happened and instead proceeds to inundate her with texts demanding that she explain her body language to him because he has "never experienced something like (it) before."

Throughout the drive, she is not checking her phone, but he is persistent for nearly a half hour demanding an explicit answer from her. She finally gets to the parking lot of her complex, grabs her phone and scrolls down the multitude of texts to find him explicitly asking her an inappropriate question about characteristic traits. When she answers "no," he begins arguing with her that the answer is "yes" and that she is just embarrassed to admit it and that this is perhaps why she is acting disinterested in him. He further claims that many people within her ethnic group possess those traits to back his argument and even utters an ethnic slur. She naturally becomes hurt and voices that she is offended. He responds that there is nothing wrong with what he said and actually believes this to be true. He is unable to grasp the social convention that it is taboo to make generalizations about someone's ethnicity and to utter an ethnic slur.

He cannot understand her feelings due to his impairment. Because of his failure to pick up on her non-verbal cues indicating disinterest, he keeps texting and calling her for days demanding an explanation for her cold shoulder. He is then charged in New York with aggravated harassment in the second degree under Penal Law § 240.30(1)(a). The prosecution would deduce that the inarguably bigoted statements he texted to the woman prior to inundating her with phone calls would satisfy the "intent to harass" or "annoy" element required to charge him.

Applying a reasonable person standard, he could not claim the standard affirmative defense as there is no legitimate purpose for texting someone unequivocally racist remarks. Given the racist, inappropriate nature of his words in the texts, common sense presumes an intent to annoy as defined by the penal code for aggravated harassment in New York, and he could theoretically face criminal charges. Generalizations about one's ethnicity along with the utterance of a racial slur are "likely to cause annoyance" if not "alarm."

While people do recognize a difference in autistic individuals when they exhibit odd, eccentric behaviors, they nevertheless judge them by the standards set for non-autistic people. This bias carries on into jury deliberation at criminal trials. The jury of non-autistic citizens sees the man's odd demeanor and does not like him before they even know what he texted to her. And then they see his racist texts. They don't care that the autistic man means no malice and is unable to grasp the offensiveness of his words. He's just a weirdo they love to hate notwithstanding his bigoted words. They convict him of aggravated harassment.

The Consequences of Misunderstanding Autism

In *United States v. Cottrell*,[3] the defendant Mr. Cottrell was convicted of conspiracy and arson. The Court of Appeals affirmed the conspiracy conviction but overturned the arson conviction and remanded it to the lower court to instruct the jury on autism. The court held that "[t]o the extent that the Asperger's evidence was aimed at defeating an inference of Cottrell's intent from the circumstances, it was relevant and could have assisted the jury's determination of whether Cottrell had the specific intent required for aiding and abetting" in relation to the arson charge.

Black Lives Matter and Autistic Rights activists have petitioned Governor Ralph Northam to pardon Matthew Rushin, a young autistic African American man serving fifty years in prison in Virginia after pleading guilty to two counts of malicious wounding and felony leaving the scene of an accident.[4] The prosecution originally charged Mr. Rushin with attempted murder. On a rainy night, Mr. Rushin experienced an accident in a parking lot, panicked and drove away crying. He then realized he had to stay at the scene, so he attempted a U-turn, but instead of applying the brake he hit the accelerator, causing a head on collision and seriously injuring the elderly driver of the other vehicle.

Afterwards, a bystander got out of the car and asked if Mr. Rushin was trying to kill himself. He then mimicked the bystander's words, which is a manifestation of an autism symptom known as echolalia (the meaningless repetition of another person's words).[5] To add insult to injury, when being interrogated by police, Mr. Rushin was in so much distress that he told them he wished he were dead. These words combined with his display of echolalia at the scene provided the basis to satisfy the intent element of the attempted murder charge.

Complicating matters even further, Matthew Rushin's poor social cognition skills that accompany an autism diagnosis meant he did not understand what he was doing when he pleaded guilty to lesser charges. Had the case gone to trial and the *Cottrell* standard been applied, the defense may have convinced a jury that Mr. Rushin's condition negated the intent element for attempted murder. In New York, Mr. Rushin might have only faced a misdemeanor charge of leaving the scene of an accident and a motor vehicle lawsuit.

In addition, criminals disproportionately target autistic people due to their inherent vulnerability. Here in New York, police officer Michael Valva and his fiancee Angela Pollina face charges of second-degree murder in regard to the death of the officer's autistic eight-year-old 6son Thomas Valva, and four misdemeanor counts related to the alleged abuse of Thomas and his older brother Anthony Valva, who is also autistic. Between the couple, there were six children living in the mixed family household. News reports indicate that the couple allegedly singled out Thomas and Anthony for most of the abuse. In addition to contending that the couple physically abused and starved Thomas and Anthony, the prosecution alleged that the couple forced the boys to sleep in the garage. On January 17, 2020, Thomas died in that garage from hypothermia in the frigid winter weather.

The indictment in *People v. Valva* and *Pollina* alleges that Thomas and Anthony were deprived of breakfast as punishment for failing to "use their words." Given their autism diagnoses, the boys struggled to communicate, so they were essentially punished for being who they are. Since Valva and Pollina specifically targeted these boys for exhibiting symptoms of autism, they should face the more serious felony charges of endangering the welfare of an incompetent or physically disabled person in the first degree under Penal Law § 260.25.

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Criminal Law

Use of Acquitted Conduct in Sentencing: Is the Tide Turning?

Assume a defendant is charged with both murder and illegal possession of the gun used to shoot the victim; he is later acquitted of the murder but convicted of possessing the gun. Can the sentencing court nevertheless consider the acquitted murder in sentencing the defendant for the gun?

Federal law permits such consideration, under certain circumstances. The New York Court of Appeals has yet to address this issue under the New York State Constitution.[1] A recent state court decision from Michigan, however, may guide our own courts.

Federal and State Approaches to Acquitted Conduct

Under federal law, acquitted conduct can be the basis for an enhanced sentence on the crime of conviction (up to the statutory maximum for the offense of conviction) if the district court finds (de novo) the defendant guilty of the acquitted conduct by a preponderance of the evidence. In *Watts v. United States*, the U.S. Supreme Court held that a "not guilty" verdict was a finding of reasonable doubt, not actual innocence.[2] Since the preponderance of the evidence standard governs admissibility of sentencing evidence, the Court held, acquitted conduct may be considered at sentencing provided it meets the preponderance standard of reliability.

However, in *People v. Beck*, the Supreme Court of Michigan flatly repudiated *Watts*—on *federal constitutional* grounds.[3] Beck was convicted at trial of being a felon in possession of a firearm during the commission of a felony murder. Beck was acquitted of the murder, but the sentencing court nevertheless sentenced him as if he had been convicted of that offense, based on a preponderance of the evidence finding. Reversing, the Michigan Supreme Court held that *federal* "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted" and "sentence[ing] the defendant as if he committed that very same crime."[4]

The *ratio decidendi* of the Michigan Supreme Court majority's holding was the solemnity and importance of the jury's verdict of "Not Guilty" in our Federal Constitution and its inextricable connection to the "presumption of innocence." Historically, juries had the dual responsibility of determining *punishment* as well as guilt or innocence. And the punishment for most crimes during the common law era was the death penalty. Thus, an acquittal could arise from a finding of factual innocence, or simply because the jury did not want to punish the offender based on the peculiarities of the case. What the law requires and justice desires may diverge; but we should not tolerate when they are an ocean's breadth apart.

Beck recognized and embraced "jury nullification" as part of the common law tradition. Blackstone and many of his contemporaries were "natural law" theorists who believed in the superiority of Justice (reflecting eternal ethical values) over manmade Law.[5] The United States Supreme Court's rationale for "retroactivity" was once predicated on natural law notions of immutable first principles, i.e., that judges merely discover the eternal ethical rules that inform the values-choices that underlie judicial decision-making.[6]

Inconsistent verdicts are generally upheld because of the "unreviewable power of a jury to return a verdict of not guilty for impermissible reasons."[7] As a corollary, the law has long regarded equitable rights as superior to legal rights; indeed, equitable principles are the impetus underlying the constitutional right to present mitigation evidence in Capital cases.[8] Simply stated, due to the influence of the ecclesiastical courts on the common law, even the King had to bend a knee to God.

Richard M. Langone

Indeed, absent a belief in the superiority of Justice over the Law, there would have been no excuse for the American Revolution—the Founders were all traitors under British law. Dr. Martin Luther King's 1963 letter from the Birmingham City Jail would be whimsical if we did not believe in the superiority of natural law over racially biased manmade laws. So-called "sanctuary cities" would be considered rogue but for the *volksgeist* of the citizenry that our immigration laws are immoral and unjust.

Asaro: Acquitted Conduct in New York Courts

New York courts have long disapproved of jury nullification but grudgingly recognize that it exists.[9] So, while defense counsel may ask a jury to acquit for equitable reasons in summation, courts typically will preclude any defense effort to present evidence in support of a jury nullification defense, and will never instruct the jury that they may acquit if they found sufficiently compelling counter-veiling equitable reasons not to convict. But is that what the Framers intended? Doubtful, since the Framers, believing that power corrupts, distrusted all forms of governmental power over its citizens.

On the federal level, the precedential vitality of Watts was recently challenged in *United States v. Gotti (Asaro).*[10] The appeal involved Vincent Asaro, an alleged capo in the Bonanno La Cosa Nostra ("LCN"), who was previously charged in a RICO indictment in the Eastern District of New York with participating in the infamous 1978 Lufthansa heist (that led to the book and movie "Goodfellas"), and in the 1969 murder of Paul Katz. In 2015, a jury acquitted Asaro of those charges. However, two years later (in 2017), Asaro was again arrested by the feds, this time charged with arson. The allegation was that while Asaro was driving around the neighborhood (Howard Beach), another motorist cut him off, which led to a verbal altercation at a traffic light. Asaro wrote down the license plate number of his antagonist and had someone torch the motorist's car in the middle of the night.

The government "lucked out" (if you believe in luck) when the EDNY Court Clerk spun the wheel and picked the same judge who presided at Asaro's 2015 RICO trial to handle his 2017 automobile arson charge. Asaro ultimately pled guilty to the arson. His Sentencing Guidelines range was 33 to 41 months. However, the court sentenced Asaro to 96 months—almost three times above the Guidelines recommendation—based on the judge's personal belief that the jury at the 2015 RICO trial got it wrong, and that Asaro was guilty of the forty-years old Lufthansa heist and the fifty-years old murder of Paul Katz.

On appeal, Asaro challenged the continued vitality of *Watts* in light of intervening Supreme Court precedents. *Watts* was a 5-4 per curium decision, decided based on the Certiorari Petition and Opposition, *i.e.*, without full briefing or oral argument. The only issue raised in *Watts* was double jeopardy.[11] While the precedential vitality of summary decisions is supposed to be limited to the precise issue presented and decided,[12] every Circuit court in the Nation has followed Watts. But this practice has not been without its critics, including many federal circuit court judges, and several Supreme Court Justices, including the late Justice Scalia, and recently appointed Justices Kavanaugh and Gorsuch.[13]

Unlike the other (failed) attempts to distinguish or overrule *Watts*, which were all predicated on double jeopardy, *Asaro* framed the question presented differently; namely, whether reliance on acquitted conduct violated the "presumption of innocence," a corollary of the reasonable doubt standard. Specifically, *Asaro* argued that a jury's verdict of "Not Guilty" is a solemn act that ripens the "presumption of innocence" into an established fact forever more—at least in the eyes of the law. And that due process prohibits use of a ripened presumption of innocence—vis-à-vis acquitted conduct—for sentencing enhancement purposes.[14]

Shortly after *Asaro* was denied (based on *Watts*), the Washington, DC, law firm Williams & Connolly, LLP, reached out to assist Asaro's counsel in preparing a certiorari petition. They thought the question presented in *Asaro* warranted the Supreme Court revisiting its holding in *Watts*. However, after requiring the government to respond to *Asaro's* petition, and after two postponements of the Quorum Vote on his Certiorari petition in light of *Beck*, the Supreme Court denied it.[15]

Watts v. Beck: New York at A Crossroads

Those of us who were intimately involved in the *Asaro* certiorari petition believe the loss resulted from decades of reliance on *Watts* by federal sentencing courts. Nevertheless, that should not prevent State courts from granting greater due process protections under our State Constitutions.[16] *Beck* is a great new authoritative starting point to future challenges to the use of acquitted conduct at sentencing, and for defense counsel to raise the "jury nullification" defense in an appropriate case.

Richard M. Langone is past Chair of the NCBA Appellate Practice Committee. His bio can be found at rlangone.com, and he can be contacted at (516) 795-2400. Mr. Langone represented Mr. Asaro on appeal and the initial certiorari petition.

1. *Compare People v. Anonymous*, 34 N.Y.3d 631, 642 (2020) (prohibiting use of acquitted conduct that is "sealed" under CPL § 160.50 to enhance sentence) *with People v. Zowaski*, 31 Misc.3d 242 (Middletown City Ct. 2011) (permitting use of unsealed acquitted conduct to enhance sentence but employing "clear and convincing evidence" test). A word of advice: Don't waive the client's right to "seal" a record if you don't have to.)
2. 519 U.S. 148 (1997).
3. 939 N.W.2d 213 (2019).
4. *Id.* at 216.
5. W. Blackstone Commentaries *38-41 ("For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former… . This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other").
6. *Linkletter v. Walker*, 381 U.S. 618, 623 (1965) ("The judge rather than being the creator of the law was but its discoverer… . In the case of the overruled decision,… , it was thought to be only a failure at true discovery and was consequently never the true law").
7. *United States v. Powell*, 469 U.S. 57, 63 (1984).
8. *Roberts v. Louisiana*, 428 U.S. 325 (1976).
9. *See, e.g., People v. Goetz*, 73 N.Y.2d 751, 752 (1988) ("While there is nothing to prevent a petit jury from acquitting although finding that the prosecution has proven its case, this so-called mercy-dispensing power… is not a legally sanctioned function of the jury and should not be encouraged by the court"); *United States v. Thomas*, 116 F.3d 606, 615 (2d Cir. 1997)); *but see People v. Mendoza*, 33 N.Y.3d 414, 418 (2019) (recognizing jury nullification as "an inevitable consequence of the jury system and the system's features designed to protect the jury's power to acquit").
10. 767 F.3d 173 (2d Cir. 2019).
11. *See United States v. Booker*, 543 U.S. 220, 240 & n.4 (2005) (noting that since *Watts* did not "even have the benefit of full briefing or oral argument," "[i]t is unsurprising that [the Court] failed to consider fully the issues presented… .").
12. *See, e.g., Mandel v. Bradley*, 432 U.S. 173 (1977).
13. *See Jones v. United States*, 135 S. Ct. 8 (2014); *United States v. Sabillon-Umana*, 772 F.3d 1328, 1313 (10th Cir. 2014); *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015).
14. *See Nelson v. Colorado*, 137 S. Ct. 1249 (2017) (holding when a conviction is reversed, the "presumption of innocence" is restored; and, absent a valid conviction, a penalty of any type [fine or incarceration] is strictly prohibited).
15. *Asaro v. United States*, 140 S.Ct. 1104 (Mem), 206 L.Ed.2d 178 (2020).
16. *See generally People v. Taylor*, 9 N.Y.3d 129 (2006).

Committee Reports

District Court

Meeting Date: 10/16/2020

Co-Chairs: S. Robert Kroll and Roberta D. Scoll

Michael J. Langer

A District Court Committee meeting was held on October 16, 2020 with 38 Members in attendance. The discussion was centered on the comfort level of returning to District Court and took a turn towards the question of electronically filing documents in District Court, the procedures, and why landlord-tenant cases cannot be started by filing electronically like NYC. Judge Muscarella was on the Zoom call as well and was proactive in answering many of the participants questions as well as offering suggestions on how to file documents.

Worker's Compensation Law and Plaintiff's Personal Injury Law

Meeting Date: 10/20/20

Chair, Workers' Compensation Law: Adam L. Rosen

Chair, Plaintiff's Personal Injury: Ira S. Slavit

A joint meeting of the Workers' Compensation Law and Plaintiff's Personal Injury Law Committees was held on October 20, 2020. The meeting featured a CLE presentation on the pitfalls and special concerns that plaintiff's personal injury attorneys need to be aware of so as not to jeopardize, even inadvertently, the rights of their clients who also have a workers' compensation claim. The speakers were Adam L. Rosen of Polsky, Shouldice and Rosen, P.C., and Brian P. O'Keefe and Robert Grey of Grey & Grey, LLC. Many attendees at the Zoom session wish that they could stop "meeting" like this.

The Committee Reports column is compiled by Michael J. Langer, a partner in the Law Offices of Michael J. Langer, P.C. Mr. Langer is a former law clerk in the United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Mr. Langer's practice focuses on matrimonial and family law, estate and commercial litigation, and criminal defense.

PROGRAM

Pre-registration is REQUIRED for all Academy programs. Go to nassaubar.org and click on
CLE material, forms, and zoom link will be sent to pre-registered attendees 24
All programs will be offered via ZOOM unless otherwise no

NOVEMBER 5

Battle for Blessed Fulton Sheen's Body: A Discussion of the Matter of *Cunningham v. Trustees* of St. Patrick's Cathedral
With the Catholic Lawyers' Guild
6:00—7:00PM via ZOOM
1 credit in professional practice

NOVEMBER 6

Dean's Hour: Social Media Ethics Issues
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30—1:30PM via ZOOM
1 credit in ethics

NOVEMBER 9

United States Supreme Court: Where Pop Art, Culture and Law Meet
5:15—7:00PM via ZOOM
1 credit in diversity, inclusion and elimination of bias; 1 credit in professional practice

NOVEMBER 10

Dean's Hour: Settlement of Discrimination Cases—Tax Considerations
Program sponsored by NCBA Corporate Partner Champion Office Suites
11:00AM—12:00PM via ZOOM
1 credit in professional practice
Skills credits are also available for newly admitted attorneys

NOVEMBER 12

Dean's Hour: Mission Continues—Nassau County Veteran's Treatment Court
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:00—1:00PM via ZOOM
1 credit in professional practice
Skills credits are also available for newly admitted attorneys

NOVEMBER 13

Dean's Hour: What Happens to Your Debt When You Die?
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:15—1:15PM via ZOOM
1 credit in professional practice
Skills credits are also available for newly admitted attorneys

NOVEMBER 16

Cold Noses and Warm Hearts: Laws th
5:30—8:30PM via ZOOM
3 credits in professional practice
****Program is open to the general publ**
Skills credits are also available for new

NOVEMBER 17

Business of Law Lecture Series Presen
Dean's Hour: Marketing Your Practice
Program sponsored by NCBA Corpora Office Suites
12:30—1:30PM via ZOOM
1 credit in professional practice
Skills credits are also available for new
****Zoom networking precedes prograr**

DECEMBER 2

Dean's Hour: FDR and the Courts—The Legacy of Franklin Delano Roosevelt
Program sponsored by NCBA Corpora
12:30—1:30PM via ZOOM
1 credit in professional practice

DECEMBER 2

Why Civility in the Practice of Law Mat
Personal Injury Law
5:30—7:30PM via ZOOM
2 credits in ethics

CALENDAR

CALENDAR OF EVENTS to register.
4 hours before program.
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Please allow 10-14 business days for receipt of CLE credit from the Academy due to high volume of programming. Please submit all CLE forms to academy@nassaubar.org for credit. Thank you. We look forward to "seeing" you soon.

—Jen and Patti

Criminal Law

U.S. Department of Education Issues New Rules Protecting Due Process Rights in Student Disciplinary Hearings

In 2011, without much notice or public comment, the due process rights of students accused of sexual misconduct were severely curtailed at the nation's colleges and universities. Educational institutions did so out of fear of losing federal funding for actually affording students a fair hearing. In case after case, colleges and universities assumed that accusations were true without providing a meaningful opportunity for the accused to present a defense.

This denial of due process came in response to the Department of Education's 2011 Dear Colleague Letter which threatened to withhold federal funding from educational institutions that applied traditional procedural safeguards.[1] In the years that followed its 2011 Dear Colleague Letter, the Department of Education experienced significant pushback from law professors, parents, civil libertarians, educators, politicians, and the courts.[2]

An escalating pattern of due process violations has motivated various courts to abandon their prior deferential attitude toward student disciplinary proceedings. Federal judges, aghast at the blatant bias against accused students that characterized these disciplinary hearings, began overturning suspensions and expulsions when schools failed to respect due process rights.

The Department of Education then reversed course in 2017, but only recently has it announced new rules that schools must follow as a condition for accepting federal funding.[3] These new rules are a victory for all students, who are now entitled to a fair hearing when they are accused of sexual misconduct on campus.

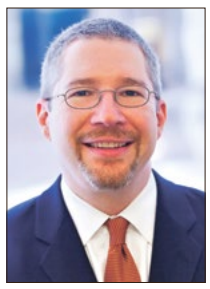
New Rules

The Department's new rules address sex discrimination, sexual harassment of employees, and other acts that do not necessarily give rise to student discipline.[4] As the rules affect complaints of sexual misconduct by one student against another, the rules add several important safeguards to protect the due process rights of accused students.

Jurisdiction

Some schools have disciplined students for off-campus acts that are best addressed by the criminal justice system. The new rules state that Title IX is implicated only if the act occurred as part of the school's education program. To be so considered, the conduct must generally occur on campus or on property over which the school exercises substantial control. Also included are buildings controlled by a student organization that the school has recognized (such as a fraternity or sorority house), or during a school activity (such as a field trip) if the school had control over the accused individual at the time. [5]

While a school can provide supportive measures to a student who alleges that she was subjected to off-campus sexual misconduct, Title IX does not require the school to impose discipline for conduct that was not part of the school's education program. Whether the school chooses to adopt these rules governing student's behavior outside of the educational program is up to the school, but schools are not required to do so under Title IX.



Scott J. Limmer

Complaints

Schools must designate a Title IX Coordinator to receive reports about conduct that would violate Title IX. The reports need not be made by the alleged victim. The Title IX Coordinator must be neutral, not an advocate who sides with either the accuser or the accused.[6]

The Coordinator must respond whenever the school learns of a potential Title IX violation. That response must include a confidential conversation with the alleged victim that outlines the supportive measure the school can provide.[7] The school is not required to decide whether the accusations are true before offering such supportive measures.

Supportive measures are non-punitive actions that would permit the accuser to receive the full benefit of an education without unduly burdening the accused.[8] Supportive measures might include counseling or a change of class schedule that would allow the accuser to avoid the accused. Disciplinary proceedings against the accused are not regarded as supportive measures. Discipline may only follow the filing of a formal complaint, a neutral investigation of the facts, and a fair hearing.

The Coordinator must give the accuser an opportunity to make a formal complaint. No disciplinary action may be pursued against the accused in the absence of a formal complaint.[9] A complaint may only be filed if the accuser is still participating or attempting to participate in the education program.

The Coordinator must consider the accuser's wishes and should generally respect the accuser's desire not to make a formal complaint. However, the Coordinator is authorized to file a formal complaint on behalf of the school against the accuser's wishes unless filing the complaint and initiating an investigation would clearly be unreasonable.

The Department's 2011 Dear Colleague Letter was widely perceived as prohibiting informal resolutions of sexual misconduct allegations. The new rules allow students to agree upon a non-adversarial approach, such as mediation, to arrive at an outcome that will resolve the allegations without disciplinary proceedings. That change permits accusers to avoid formal proceedings which they may not wish to participate in.

Investigations

When a complaint is filed, the school must send written notice of the allegations to both the accuser and the accused. The school must then gather evidence in an investigation. Neither the accuser nor the accused is required to conduct an investigation, but the school may not interfere with the accused's opportunity to conduct an independent investigation. For example, the school cannot impose a "gag order" that prevents the accused from discussing the accusations with potential witnesses.[10]

The school's investigators, like the Title IX Coordinator, must be neutral. The investigation must be objective and cannot favor either the accuser or the accused because of preconceived notions that sexual misconduct accusations are usually true or usually false.

The school cannot prevent the accused from being represented by an attorney. If the accused hires an attorney, all documents that must be provided to the accused must also be provided to the accused's attorney.[11] The accused has the right to submit evidence to investigators throughout the investigation. Whether the accused should do so is a strategic decision. Students will likely benefit from legal advice in these circumstances.

Documents resulting from the school's investigation must be furnished to the accused and their attorney at least ten days before a disciplinary hearing.[12] Those documents include investigative interviews, witness statements, and other evidence (photographs and police reports). The school must also provide an investigative report that fairly summarizes the evidence. This requirement is meant to change the practice of slanting evidence to favor the accuser while concealing any evidence that might cast doubt on the accusations.

A school may choose to discontinue an investigation if the accuser wishes to withdraw the complaint. Schools typically regarded the 2011 Dear Colleague Letter as requiring them to proceed with an investigation and disciplinary proceeding whether or not the accuser wanted to continue.[13]

Hearings

The new rules prohibit the school from restricting a student's constitutional rights during a hearing. For example, it cannot require an accused student to surrender the right to remain silent. The new rules expressly require the school to presume the innocence of the accused. This represents a significant change from earlier procedures that tacitly encouraged schools to assume that all accusations of sexual misconduct are true.

The new rules also allow schools to use a "clear and convincing evidence" standard of proof.[14] The former guidance demanded that schools use the lower preponderance of the evidence standard that is traditionally used to resolve civil disputes.

Required procedures for disciplinary hearings involving Title IX charges are designed to respect an accused student's constitutional right to due process.[15] Those procedures include:

- Written notice of the allegations in advance of the hearing
- The right to select an advisor of the student's choice, who may be an attorney
- A "live" hearing rather than a decision based on a review of documents
- The opportunity to present evidence
- The opportunity for the accused's advisor to cross-examine the accuser
- A written decision that explains the decisionmaker's conclusions

In addition, the new rules require that the decisionmaker cannot also be the investigator. The common practice of having an investigator decide guilt—a practice that predetermined guilt, since the investigator typically acted as an advocate for the accuser—must be replaced with a system that assures the decisionmaker be free from bias and neutral.

Change of Emphasis

The approach that the Department initiated in 2011 made schools fear that they would lose federal funding if they did not accept every accusation as true and expel or suspend the accused, whether or not the evidence was credible. This new approach makes clear that schools may now face a loss of funding if they fail to provide supportive services to students who report sexual harassment or sexual assault. The new emphasis is on helping students who feel they are victims while at the same time assuring that accused students are given a fair hearing.

In addition, the rules make clear that the Department will not second-guess a school's disciplinary decisions unless the school's approach to an accusation is clearly unreasonable. A disciplinary process that respects the due process rights of accused students should be regarded as reasonable, even if accusers or their advocates disagree with the result of a given hearing.

Scott J. Limmer concentrates his practice in the areas of criminal defense and college discipline defense. He is also the co-host of the podcast "Reboot Your Law Practice." Scott can be reached at Scott@Limmerlaw.com.

1. U.S. Dep't of Educ., Dear Colleague Letter (Apr. 4, 2011),. https://bit.ly/30QLIIm
2. *Colleges push back against Title IX guidelines on investigating sex abuse*, TribLive, Sept. 14, 2016, / https://bit.ly/33HzELc; Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault (May 16, 2016), https://bit.ly/36MHHs2
3. U.S. Dep't of Educ., Dear Colleague Letter (Sept. 22, 2017),. https://bit.ly/3deBlD2
4. U.S. Dep't of Educ., Title IX: U.S. Dep't of Educ. Title IX Final Rule Overview (May 6, 2020), https://bit.ly/33H9yIh
5. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 86 Fed. Reg. 30026, 30094 (May 19, 2020) (codified at 34 C.F.R. §§ 106).
6. *Id.* at 30112.
7. *Id.* at 30113.
8. *Id.* at 30308.
9. *Id.* at 30245.
10. *Id.* at 30295.
11. *Id.* at 30298.
12. *Id.* at 30306.
13. *Id.* at 30290.
14. *Id.*,at 30373–74
15. U.S. Dep't of Educ., Title IX Final Rule Overview.

Criminal Law

Virtual Testimony in Criminal Trials

The COVID-19 pandemic has fundamentally altered the operations of courts across the state and the country. Courts have heavily relied upon virtual proceedings in lieu of in-person proceedings to facilitate the essential functions of the criminal justice system while protecting public health and safety. Courts across the state are now dealing with the challenges of conducting trials without jeopardizing the health and safety of judges, jurors, attorneys, court staff, court officers, corrections officers, police officers, defendants, and witnesses. These challenges are significant.

Fortunately, the use of virtual testimony, when necessary and required by exceptional circumstances, can protect the health of all of the participants in a trial, preserve the integrity of the proceedings, and safeguard the rights of the accused.

Courts Have Permitted Virtual Testimony Before COVID-19

This use of virtual testimony at a criminal trial is not a novel concept. There is precedent for taking virtual testimony via two-way television or remote video-conferencing in lieu of in-person testimony at criminal trials.

The United States Supreme Court paved the way for the use of virtual testimony in criminal trials back in 1990. In *Maryland v. Craig*, the Supreme Court held that a Maryland statute that permitted the use of one-way closed-circuit television to take testimony from children allegedly abused by the defendant did not violate the defendant's rights under the Confrontation Clause.[1] In reaching its holding, the Court reasoned that the Confrontation Clause does not guarantee criminal defendants the absolute right to face their accusers in-person in the courtroom.[2]

In *People v. Wrotten*, the New York Court of Appeals upheld a trial court's decision to permit a witness for the prosecution to testify at trial via live two-way television from a remote location.[3] Although there is no statute that expressly authorizes the use of virtual testimony, the Court of Appeals reasoned that Judiciary Law § 2-b(3) empowers courts to use innovative procedures, including permitting witnesses to testify virtually, when necessary.[4] In upholding the use of virtual testimony, the Court of Appeals held that "the public policy of justly resolving criminal cases while at the same time protecting the well-being of a witness can require live two-way video testimony in the rare case where a key witness cannot physically travel to court in New York and where…defendant's confrontation rights have been minimally impaired."[5]

New York courts have relied upon *Wrotten* when permitting witnesses to testify virtually. For example, in *People v. Beltran*, the Second Department upheld the trial court's decision to allow a vulnerable child victim to testify via two-way closed-circuit television.[6] In addition, in *People v. Giurdanella*, the First Department upheld the trial court's decision to allow the victim to testify virtually where the victim was unavailable to testify at trial because he had travelled to Egypt and was prevented by the Egyptian government from returning to the United States.[7] Moreover, in *State v. Robert F.,* the Court of Appeals affirmed its holding in *Wrotten* that courts have the discretion to use virtual testimony, but reiterated that courts must first make a specific finding of necessity, because taking virtual testimony is "an exceptional procedure to be used only in exceptional circumstances."[8]

Courts around the country have permitted witnesses to testify remotely. As the *Wrotten* court noted, Wyoming,[9] Minnesota,[10] and Florida,[11] have all permitted witnesses to testify virtually or remotely.[12] Moreover, courts in New Jersey, California, and Florida have permitted the use of virtual testimony at trial for child victims and expert witnesses.[13]

In addition, in *United States v. Gigante*, the Second Circuit upheld the trial court's use of two-way closed-circuit television to permit a terminally ill witness in the Federal Witness Protection Program to testify from a remote location.[14] The Second Circuit held that it was appropriate to allow the witness to testify remotely for two reasons. First, the witness's poor health rendered him unable to come to court.[15] Second, the procedure used to receive the remote testimony preserved the central characteristics of the face-to-face confrontation that would have occurred had the witness testified in person, and therefore the defendant's Confrontation Clause rights were sufficiently protected.[16] Specifically, the witness was sworn, was subjected to a full and complete cross-examination, and testified in full view of the jury, the court, and the accused.[17]

The requirements for taking virtual testimony established in *Wrotten* are consistent with the requirements articulated by the United States Supreme Court in *Craig* and by the Second Circuit in *Gigante*.[18] Accordingly, compliance with *Wrotten* ensures that the use of virtual testimony at a criminal trial does not violate a defendant's right to a fair trial, even if the defendant objects.

The *Wrotten* Two-Prong Test

The *Wrotten* Court established a two-prong test for the use of virtual testimony in a criminal trial. First, since virtual testimony is "an exceptional procedure to be used only in exceptional circumstances," there must be a "case-specific finding of necessity."[19] Second, the virtual testimony must be taken in a way that ensures its reliability and does not violate the Confrontation Clauses of the Constitutions of the United States or of New York State. [20]

To establish that the use of virtual testimony is necessary in a particular case, the court must find that the witness's testimony would be material and that it would be impossible for the witness to testify in-person. In *Wrotten*, the Court found that the prosecution's expert witness satisfied this standard because he was "85 years old, frail, unsteady on his feet, and had a history of coronary disease [such that he] could not travel to New York without endangering his health, and was therefore unavailable."[21] In *Giurdanella*, the court found that the victim satisfied this standard because a foreign government was preventing him from returning to the United States.[22] Accordingly, this prong of the test can be satisfied if the trial court makes a finding that a witness's testimony is material and the witness is physically unable to come to court or cannot come to court without significantly endangering his health.

To ensure the reliability of virtual testimony and not run afoul of the Confrontation Clauses, witness testimony must meet the following qualifications: (1) the testimony must be live, (2) the testimony must be given under oath, (3) the witness must be subjected to contemporaneous cross-examination, and (4) the witness must be displayed in such a manner that the judge, jury, attorneys, and defendant can clearly see and hear the witness and have the opportunity to assess the credibility of that witness.[23]

Video-conferencing technology can easily facilitate the taking of virtual testimony in a way that satisfies all of these requirements. Video-conferencing applications—such as Zoom, Skype, or Microsoft Teams—are commonplace and are already used to conduct virtual court proceedings in New York. These applications can quickly be downloaded onto computers, phones, and other devices at little to no cost. To testify virtually, all a witness needs is internet access and a phone or computer with video-conferencing software. All the courtroom needs is internet access, a computer with the same video-conferencing software, and a screen or screens that can clearly project the witness and their testimony to the trial participants.

Christopher M. Casa

The taking of virtual testimony using such video-conferencing software would afford defendants the same opportunities to cross-examine witnesses as they would if the witnesses were present in the courtroom. The prosecutor would ask questions of the witness and the witness would answer those questions. The defense attorney would then ask questions of the witness and the witness would answer those questions. The defendant, the judge, the attorneys, and the jurors would all have the opportunity to see, hear, and evaluate the witness. All of this would transpire just as it would if the witness was physically present in the courtroom.

The use of video-conferencing software to admit virtual testimony into evidence at a criminal trial is not without precedent. In *People v. Novak*, the trial court, applying the *Wrotten* test, permitted a witness to testify virtually via Skype video-conferencing software because requiring the witness to appear in person would have imposed a substantial hardship on the witness and because the court found that Skype was sufficiently "reliable, accurate, and widely used."[24]

Benefits of Virtual Testimony During a Pandemic

There are substantial benefits to the use of virtual testimony during a pandemic. The COVID-19 pandemic requires that persons, including witnesses, cover or shield at least part of their face using a clear plastic face shield or cloth face mask. In addition, courtrooms will likely erect plexiglass dividers and barriers to prevent the transmission of the virus from one person to another in the courtroom. None of these safeguards is necessary for a witness who testifies virtually. Accordingly, all of the participants in a trial will have a better opportunity to observe and hear a witness who testifies virtually and is displayed on a screen than they would a witness who is in-person but shielded by any number of barriers and coverings.

The use of virtual testimony will allow witnesses to testify even if they are unable to come to court. A witness cannot even enter a courthouse if that witness recently tested positive for COVID-19, recently experienced symptoms of COVID-19, recently came into contact with a person who has recently tested positive for or experienced symptoms of COVID-19, or recently travelled to or from one of an ever-changing list of restricted states and countries.[25] If any of these conditions are present for a witness then that witness is unable to testify in-person but might be able to testify virtually.

See TESTIMONY, Page 19

Criminal Law

The Lawyer as Comic Book Crime Fighter

"I love Daredevil! You know he went to Columbia Law School! First of all, he has a very good-looking girlfriend, Elektra—and he's a man without fear. He doesn't have many powers either—but he has a kind of courage to expose what's wrong and keep fighting against the odds and somehow that appealed to me. You know it's one thing if you're Superman, and you're not afraid of getting shot. Daredevil got beat up every single comic book, but he limped home with a victory."

—Professor Tim Wu, Columbia Law School

Within the realm of the Marvel Universe, no lawyer is more highly regarded or in greater demand than Matt Murdock, aka Daredevil—the Man without Fear. Ranked the #1 Lawyer in Comics in the ABA Journal, Murdock is "the go-to lawyer for the whole stable of Marvel characters—from Spider-Man to the Hulk."[1]

Created by Stan Lee and Bill Everett in 1964,[2] Daredevil explores themes that transcend traditional comic book fare. The character is an enigmatic and engagingly complex distillation of the American lawyer. A superhero in tights by night, Murdoch is a button-down, practicing attorney by day.

Operating a two-lawyer firm in Hell's Kitchen with his Columbia Law School classmate Foggy Nelson, Matt represents working-class New Yorkers in the city's court rooms. Bound by legal strictures during business hours, Matt assumes the mantle of conflicted vigilante when he dons his red mask. The inherent tension between the letter of the law and attaining justice is at the heart of the comic.

Unlike Superman with his x-ray vision, Daredevil is distinguished from his fellow superheroes by virtue of being blind. Ironically, he was blinded by saving the life of a sightless man who was about to be struck by an oncoming truck. The resulting accident saw radioactive waste spilled over Matt, robbing him of his vision. But as this window closed, quite literally another opened.

For the incident hyper-accentuated his other senses. His newfound capabilities more than augment his loss of sight. He now possesses an innate extra-sensory radar and such acute hearing that he can gauge the beating of the human heart, a skill which functions much like an ingrained polygraph machine.

Beyond these attributes, Daredevil has no discernable superpowers other than his acrobatic skill and athletic prowess. His walking cane contains a grappling hook which he uses to scale city buildings. He is also very good with his fists. But like many lawyers, he is all too human.

Co-creator Stan Lee was initially concerned about the public reaction to his character's disability, particularly those who are themselves blind. He needn't have worried. The response was overwhelmingly positive as blind people enjoyed having the stories read to them and were "pleased to have a superhero who was sightless."[3]

Lee had Matt defend in court many of the criminals that Daredevil apprehended the night before.[4] The sixties were the heyday of the Warren Court, with its emphasis on protecting the rights of the accused. The need to reconcile the character's dual nature—the lawyer working responsibly within the legal system and the vigilante working outside the law—has been ever constant.[5]

Rudy Carmenaty

The comic took a quantum leap forward when Frank Miller became associated with the title in 1979.[6] Miller's contributions to the Daredevil saga are incalculable. During the early Eighties, he refashioned the character's backstory and crafted gripping neo-noir stories that explored themes of violence and retribution. His setting was the dark urban landscape of pre-Giuliani New York.

Miller's inspired storytelling and his graphic artwork were both "cinematic and atmospheric."[7] Miller transformed Daredevil from essentially a second-tier "Spiderman" to a cultural icon with his own devoted following. His most indelible contribution was the creation of Elektra Natchios, Matt's deadly nemesis and a former lover, who became a fan phenomenon in her own right.

Most telling of all, Miller never lost sight of the fact that Matt/Daredevil was a lawyer blessed with a keen legal mind. In the character's own words:

> *"We are only human ... We can be weak. We can be evil. The only way to stop us from killing each other is to make rules, laws. And to stick to them. They don't always work. But mostly, they do. And they're all we got."*[8]

Miller's Daredevil was a revelation, heralding a new direction in the world of comics. It would also prove to be a harbinger of things to come as Miller's conception provided the paradigm for all subsequent depictions of the character in print and on film.

In 2015, Daredevil came to television on the streaming service Netflix.[9] Starring British actor Charlie Cox, *Marvel's Daredevil* spanned three seasons consisting of thirty-nine episodes in total. The show is dark, the characters are three-dimensional, and the depictions of violence realistically harrowing. This series is a far cry from the camp *Batman* tv-show made popular in the 1960's.

Though this may sound outlandish at first blush, the series is one of the most thought-provoking, adult depictions of the legal profession ever presented on the small screen. For *Marvel's Daredevil* is as much a legal/crime drama, as it is a costume epic. There, court room scenes are portrayed with realistic detail and the program takes its representation of the bar rather seriously.

Cox portrays the character as a man of integrity, with an extensive knowledge of the law. Cox is perfectly cast as a young, idealistic lawyer dedicated to representing those on the margins of society. Inspired by Thurgood Marshall, the actor's depiction of Matt Murdock can well serve as a role model for aspiring lawyers who envision a career in the public interest.

Matt and his partner Foggy (Elden Hansen) passed on an offer from a prestigious, white-shoe Manhattan law firm. Instead they devote their efforts to representing the downtrodden: criminals accused of assorted crimes, struggling immigrants, and tenants who are being driven from their rent-stabilized apartments in Hell's Kitchen.

Theirs is a rather ecumenical law practice. One of their first clients is Karen Page (Deborah Ann Woll), a young woman framed for murder who subsequently joins the office as a paralegal. The firm of Nelson & Murdock is an oasis of high-mindedness in service to those who are genuinely underserved.

The product of considerable study, Cox's characterization of Matt's blindness is sincere and accurate. The actor is also sensitive when conveying the character's other now-enhanced senses, so the audience is confronted with a character who is both handicapped yet extraordinary at the very same time.

Cox as Daredevil operates in a nefarious world of sin and violence, wherein his convictions as an attorney are continuously challenged by harsh inequities. The program offers a haunting portrait of a man at odds with himself, as Daredevil tends to meet out in an alley a truer measure of justice than that which Matt is often able to achieve before a judge. After all, he is the "Devil of Hell's Kitchen."

Adding further texture to Cox's performance, Matt is a Roman Catholic. Not only are the character's professional ideals tested, but so are the dictates of his conscience. By any measure, the Catholicism of *Marvel's Daredevil* is "gritty, complex and heroic" as "Daredevil demonstrates what a real Catholic does in the face of adversity. He fights, he struggles, and he fights some more."[10]

Taking its cue from Miller's interpretation of the character from the1980's, the religious dimension of Matt's nature is one of the program's most provocative facets. Daredevil stands at the crossroads between right and wrong, guilt and absolution. As Frank Miller himself observed: "I figured Daredevil must be Catholic because only a Catholic could be both an attorney and a vigilante."[11]

In one episode, Matt unburdens himself in the confessional. He tells his confessor Father Lantom (Peter McRobbie), *"I'm not seeking forgiveness for what I've done, Father. I'm asking forgiveness for what I'm about to do."*[12] To truly appreciate this, one needs to understand the Irish Catholic milieu Matt was raised in and which forms the core of his identity.

Matt was raised by his boxer father—a pug-fighter named Battlin' Jack Murdock. His father was murdered for double-crossing the mob and winning a fight he was paid to throw. Just as he became a lawyer to fulfill his working-class father's ambitions, Matt sacrifices his body each night battling evil as a "way of dealing with the guilt he feels about the murder of his father."[13]

As portrayed by Cox, Matt/Daredevil is a latter-day Saint Sebastian, the early Catholic martyr traditionally depicted as being shot from head to toe with arrows. Every night he takes a terrific mauling. At the same time, Matt is consumed by Catholic-inspired guilt over his own propensity for violence. He also assumes the guise of the devil. The arc of the series is rife with religious symbolism.

He nevertheless stands in stark contrast to his arch foil, Wilson Fisk, aka Kingpin (Vincent D'Onofrio) or the even more maniacal vigilante Frank Castle/The Punisher (Jon Bernthal). Neither of these characters has any grounding in faith, finding direction in their own worldly obsessions.

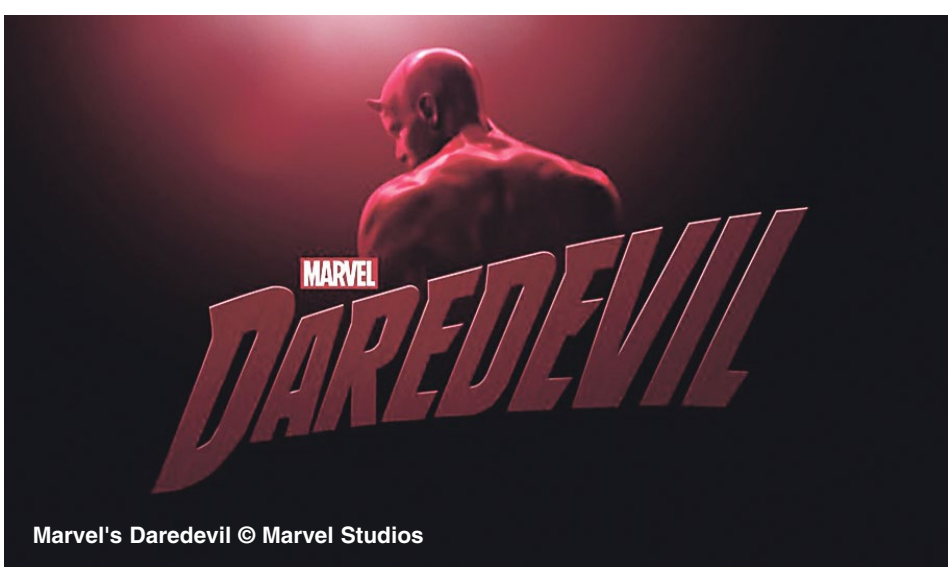
Fisk is motivated by his unquenchable thirst for power and haunted by his abusive childhood. Castle is spurred on by a compulsion for vengeance after his family was killed following his return from military service. Ultimately, Daredevil will bring Fisk to justice for his crimes in Season Three while in Season Two Matt serves as Castle's defense counsel.

Matt is compelled to "use his gifts to protect the city when the law fails them, but he does not feel above the laws of God."[14] The Fifth Commandment—"Thou shall not Kill"—is at the heart of Matt/Daredevil's moral dilemma. Murder is for him perpetually a bridge too far. Matt's abiding Catholic faith prevents him from going to the murderous lengths that either his adversaries or his compatriots routinely undertake without a moment's hesitation.

Miller's tales from the 1980's may have provided the source material for the series, but it is the acting, writing, direction, and production values that bring the show vividly to life. Unfortunately, *Marvel's Daredevil* was cancelled in 2018, but the episodes are still available on Netflix. They are well worth watching, serving as both an exciting legal drama and a gritty tale of super heroics.

Matt/Daredevil is obviously a fictional character, a figment of pop culture. Yet in countless ways, human beings are shaped by both fact and fiction, reality and inspiration. The law finds itself in expected as well as unexpected places, from statutes to scripture, from codes to comics.

Myths, religious traditions, and the laws society enacts all play their part in fashioning our perceptions of the law. For more than half-a-century, Daredevil has been a tantalizing character on the periphery of the legal profession. Thanks to Stan Lee, Frank Miller, Charlie Cox, and others, the character will continue to fascinate readers, entertain audiences, and maybe even encourage an appreciation for the law.



Marvel's Daredevil © Marvel Studios

Rudy Carmenaty serves as a Bureau Chief in the Office of the Nassau County Attorney, is the Director of Legal Services for the Nassau County Department of Social Services, and the Language Access Coordinator for the Nassau County Executive. He is also Vice-Chair of the NCBA Publications Committee.

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3. Roy Thomas, *"Stan Lee's Amazing Marvel Interview"*, Alter Ego #104 (Aug. 2011).
4. Peter Sanderson, *Marvel Universe*, (1st ed. 1996) at 182.
5. *Id.*
6. Gina Misiroglu with David A. Roach, *The Superhero Book*, (1st ed. 2004)at 162.
7. *Id.*
8. Sanderson, supra at 188.
9. In 2003, the character was transferred to the movie screen in the film *Daredevil* starring Ben Affleck and Jennifer Garner; it was written and directed by Mark Steven Johnson.
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13. *Id.*
14. Meghan O'Keefe, *"What Happened in Daredevil Season 1? Your Catch-Up Guide for Season 2"*, May 17, 20176 at https://dedider.com.

Hazy 2020 ...

Continued From Page 6

impact. Illinois, like New York State, first introduced the concept of cannabis legalization via medical marijuana when it enacted the Compassionate Use of Medical Cannabis Pilot Program Act in 2013. In 2019, Illinois became the first state to enact legalization of adult-use marijuana via state legislation, as opposed to a state-wide ballot initiative. Within the first six months of its adult-use cannabis program, Illinois collected more than $52 million in state tax revenue and provided employment for more than 9,000 in the space, resulting in additional income and other related tax revenue to Illinois' coffers.[17] Pre-pandemic economic predictions suggested that the Illinois program may see employment gains by as much as 63,000 jobs by 2025.[18] Other state-wide adult-use programs, such as Massachusetts, saw slower financial returns, as compared to Colorado and California, though the long-term outlook is extremely positive for both increased job creation, tax revenue, and minority business opportunities.

Will the Feds Beat New York to Legalize?

The House of Representatives has begun to take major steps towards legalizing cannabis. To address the extreme conflicts and legal uncertainty that govern the cannabis industry, the House passed the Secure and Fair Enforcement (SAFE) Banking Act of 2019 last September.[19] The SAFE Banking Act prohibits a federal banking regulator from penalizing a financial institution from providing banking services to legitimate marijuana-related businesses, though marijuana remains federally illegal. The legislation was passed with over 300 votes and had significant bipartisan support. The House vote was historic as it was the first time a stand-alone bill that would legalize some aspect of marijuana policy passed a house in Congress. The SAFE Banking Act has yet to be considered by the United States Senate.

In 2020, the House seems poised to pass the Marijuana Opportunity Reinvestment and Expungement (MORE) Act, a more aggressive attempt at marijuana reform. This bill would clearly and definitively de-criminalize cannabis and thus enable interstate commerce and pave the way to a green rush. The MORE Act is sponsored in the House by New York Congressman Jerry Nadler[20] and in the Senate by California Senator (and now Democratic nominee for Vice President) Kamala Harris.[21] While the House is expected to pass the MORE Act sometime this fall, the bill is unlikely to move forward in the Republican-controlled Senate in this hotly contested general election cycle.

The MORE Act specifically seeks to remove marijuana from the list of scheduled substances under the Controlled Substances Act and eliminates criminal penalties for an individual who manufactures, distributes, or possesses marijuana.[22] In the parlance of marijuana law, this would be its own revolution reckoning the bizarre landscape of marijuana law as a controlled substance, illegal federally while states legalize its use. The states' adult-use programs have been operating with the tacit permission of the federal government. But with clear delineation of a re-classification of cannabis, it would be federally regulated, allowing for interstate trade. Although the clearer lines of legality would assist attorneys, businesses, financial institutions, and consumers, the federalization of cannabis will greatly impact small-business job growth in states, such as New York, that have not yet legalized adult use. Existing state-run programs that successfully regulate and promote their own local/statewide businesses could be priced out of the marketplace by larger conglomerates ready to create interstate platforms.

Conclusion

Winston Churchill once said "Never waste a good crisis"—advice that should now be heeded by Governor Cuomo and New York State lawmakers. Legalization of cannabis will bring in much-needed revenue to New York, both through sales taxes on the purchase of marijuana as well as income taxes based on the employment opportunities created by a New York State green rush. But now is the time for action by state elected officials. Depending on the outcome of the 2020 elections, the federal government could step up its efforts to legalize marijuana throughout the United States in 2021. But while de-criminalizing marijuana would have significant practical legal effects and provide marijuana consumers and businesses streamlined regulations and protections, states lagging in the establishment of adult-use programs may not reap the maximum financial benefit. New York needs to see through the haze and recognize that now may be the most opportune time to legalize adult-use marijuana for the benefit of the state, its businesses, and its residents.

Elizabeth Kase is a Partner and Chair of the Criminal Law Department and Co-Chair of the Medical Marijuana Law Group at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP.

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10. *Id*.
11. The states deeming recreational use to be essential are Alaska, Oregon, California, Nevada, Colorado, Alabama, Illinois, Washington, and Michigan. By late spring, Massachusetts, Vermont, Maine, and the District of Columbia allowed for the re-opening of cannabis businesses.
12. Alicia Cohn, " Marijuana Sales Surge Amid Coronavirus Outbreak." The Hill, March 20, 2020, https://bit.ly/34K0phD
13. "Equity Programs," Cannabis Control Commission, Commonwealth of Massachusetts, https://bit.ly/2FiPfaQ
14. *Id*.
15. "Leafly Jobs Report: Cannabis is the fastest-growing American industry, surpassing 240,000 jobs," Businesswire, Feb. 7, 2020, https://bwnews.pr/2FelSpZ
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19. H.R. 1595, 116th Cong. (1st Sess. 2019).
20. H.R. 3884, 116th Cong. (2nd Sess. 2020, https://bit.ly/30OQgis
21. S2227, 116th Cong. (2nd Sess. 2020https://bit.ly/34JX9m8
22. In addition to de-scheduling marijuana from the Controlled Substance Act, the MORE Act proposes additional changes to our country's approach towards marijuana and its usage, as follows:
    - replacing statutory references to marijuana and marihuana with cannabis;
    - requiring the Bureau of Labor Statistics to regularly publish demographic data on cannabis business owners and employees;
    - establishing a trust fund to support various programs and services for individuals and businesses in communities impacted by the war on drugs;
    - imposing a 5% tax on cannabis products and requiring revenues to be deposited into the trust fund,
    - making Small Business Administration loans and services available to entities that are cannabis-related legitimate businesses or service providers;
    - prohibiting the denial of federal public benefits to a person on the basis of certain cannabis-related conduct or convictions;
    - prohibiting the denial of benefits and protections under immigration laws on the basis of a cannabis-related event (e.g., conduct or a conviction), and
    - establishing a process to expunge convictions and conduct sentencing review hearings related to federal cannabis offenses. See n.11, supra.

National Pro Bono Week Means Another Successful (Virtual) Open House

Gale D. Berg

For the last eight years, during National Pro Bono week, the Nassau County Bar Association (NCBA) has hosted an Open House jointly with Nassau Suffolk Law Services and The Safe Center L.I. Due to the COVID-19 Pandemic, that was not possible. However, the NCBA was not to be deterred. The Chairs of the NCBA Access to Justice Committee, Rosalia Baiamonte, NCBA Vice-President, and Kevin McDonough, with Vice-Chair Sheryl Channer, thought that in order to assure that the event wasn't cancelled (having had to cancel in June,) it could be held virtually. Now that the event would be held online as opposed to in-person, it was decided that it could be held for a full week. Nearly 60 volunteer attorneys signed up to return calls and answer the questions of 123 Nassau County residents and counting who registered to speak with an attorney one-on-one to obtain advice and answers to any legal question.

The areas of law ranged from family law, real estate, labor, credit counseling, mortgage foreclosure, and questions involving COVID-19 and its ramifications to employment, health, education, and housing. Volunteer attorneys spoke one-on-one with residents to explain complicated legal issues and provide guidance, counsel, and referrals. "Given the protracted and serious consequences facing our communities by reason of a global pandemic and financial crisis, there is an increased need for pro bono services during these uncertain times. The enthusiastic collaboration of the NCBA, Nassau Suffolk Law Services and The Safe Center L.I., has demonstrated the unwavering commitment of attorneys to meet this demand for pro bono services. This year's Virtual Open House provides a crucial and invaluable service to our communities, our system of justice and the clients they serve," said NCBA Vice-President Rosalia Baiamonte.

Thanks to the Hon. Norman St George, Nassau County Administrative Judge, court personnel Neil Doherty and Mary Gallagher recorded an informational session on how the court can help answer questions from the public who are not represented by an attorney and need help, which has been added to the NCBA website at www.nassaubar.org.

When asked, many NCBA volunteer attorneys will say that it is a rewarding experience. Pro Bono is volunteering and if you never have, you are truly missing out. Too often as attorneys, we do not see the results of our efforts immediately, but through volunteering, you can. "It's been a rewarding experience hearing all the appreciation our clients have for the NCBA pro bono program. Opportunities such as Open House are the reason I keep my NCBA membership active. I'm overjoyed to be able to give back to the association which provides its members with so much," said NCBA Member Matthew Weinick. Both the volunteer attorneys and the public were satisfied with the outcome. One resident stated, "Thank you so much for organizing this. It was a pleasure to meet with this attorney and I am grateful for the opportunity. They were tremendously comprehensive and very generous with their time."

NCBA Members can volunteer for any Mortgage Foreclosure or Bankruptcy clinic, which are usually held twice a month, or to attend a mandatory conference, morning, or afternoon for a few hours only, on behalf of a resident facing foreclosure. Volunteer attorneys are always needed, and do not follow a case. Please volunteer if you have not already done so. You can also become a member of the Access to Justice Committee to help recruit volunteers. Contact NCBA Pro Bono Director Gale D. Berg at gberg@nassaubar.org for more information.

Thank You To The October 2020 Virtual Open House Volunteer Attorneys

Anand Ahuja	George Frooks	Elizabeth Schulman Kranz	Ashley Kristen Pulito	William J.A. Sparks
Charlie Arrowood	Domingo R. Gallardo	Christina Lamm	Barton R. Resnicoff	Sandra Stines
Rachel Baskin	John Graffeo	Bryce R. Levine	Kenneth L. Robinson	Andrew M. Thaler
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In Brief

Ronald Fatoullah of Ronald Fatoullah & Associates received his fourteenth-year inclusion as Super Lawyer© for New York Metro 2020 which was announced in the *New York Times* magazine. In addition, he presented "Legal and Financial Planning for Caregivers" for the Alzheimer's Association LI Chapter Symposium. Throughout these unprecedented times, he has been continuing to provide educational webinars to the community as well as to professionals regarding the upcoming changes to community Medicaid in New York and the importance of early planning. **Adam D. Solomon** was also honored by his selection to Super Lawyer© for New York Metro 2020 as a "Rising Star."

Tax attorney **Karen Tenenbaum**, Tenenbaum Law, PC, has published an article in the *Journal of Financial Planning* on the topic of "COVID-19 Sheltering in Place May Lead to Tax Liability for Clients." She was featured on *Long Island Business News* Now about "What To Do If You Cannot Pay Your IRS and NYS Taxes," and was also a guest on the *Law You Should Know* radio show with Ken Landau, and discussed COVID-19 and residency issues.

Troy Rosasco and **Daniel Hansen** of Hansen & Rosasco, LLP are pleased to announce the opening of the firm's new Nassau office located at 666 Old Country Road, 9th Floor, Garden City, NY 11530, (516) 350-0789. They also have offices in Manhattan and Islandia. In addition, they are both proud to have been recently recognized as 2020 Metro-New York Super Lawyers. Mr. Rosasco was interviewed last month by the Editor of *Long Island Business News* on their livestream show discussing the impact of COVID on 9/11 Victim Compensation Fund claims.

For the eighth consecutive year, **Richard K. Zuckerman** of Lamb & Barnosky, LLP has been selected by his peers for recognition in the 2021 27th edition of The Best Lawyers in America© in the practice areas of Education Law, Employment Law—Management, Labor Law—Management, and Litigation—Labor and Employment. Mr. Zuckerman was also a co-speaker on the topic "Free Speech in the Public Sector: What Employees Can and Cannot Say" at the New York State Bar Association's virtual "Bridging the Gap" CLE Program. **Sharon N. Berlin** has been selected by her peers for recognition in the 2021 27th edition of The Best Lawyers in America© in the practice areas of Labor Law—Management. Sharon was also named Best Lawyers' "Lawyer of the Year" for Labor Law-Management (Long Island) for 2020. Ms. Berlin delivered her message from the Chair and together with Mr. Zuckerman, authored the article, "10 Top Public Sector Labor and Employment Law Things to Do in 2020," which appeared in the New York State Bar Association Local and State Government Law Section's publication, Municipal Lawyer, 2020, Volume 34, No. 1 issue. **Mara N. Harvey** will speak on the topic entitled "School Elections: A Looming New Horizon?" at NYSSBA 2020, the first Virtual Convention & Education Expo co-sponsored by the NYS School Boards Association and NYS Association of School Attorneys. **Eugene R. Barnosky** will a speaker/facilitator on the topic entitled "Collective Bargaining—More than COVID-19" at the virtual 24th Annual Pre-Convention School Law Seminar co-sponsored by the NYS School Boards Association and NYS Association of School Attorneys. **Lauren Schnitzer** presented on the topic "IEP Evaluations and Eligibility" at the National Business Institute Virtual Seminar entitled "IEPs and 504 Plans." **Adam S. Ross** was interviewed by the Buffalo NBC news station on the topic "Analysis: Legal Rights When it Comes to Returning to the Classroom."

Marian C. Rice

For the seventh consecutive year, **Douglas M. Lieberman**, a partner at Markotsis & Lieberman, P.C., a general practice firm located in Hicksville, has been named a 2020 Metro New York Super Lawyer in Business Litigation.

Jacqueline Harounian, a partner in Wisselman Harounian & Associates, will present the topic of "Pitfalls of Divorce Mediation in Matters with Domestic Violence" for the American Bar Association.

Stephen J. Silverberg, a long-standing member of the Estate Planning Council of Nassau County, has been named as a member of the Executive Committee of the Council. He received the Accredited Estate Planner© (AEP©) designation issued by the National Association of Estate Planners & Councils to estate planning professionals who meet special requirements of education, experience, knowledge, professional reputation, and character.

Mark E. Alter, senior partner in the Law Offices of Mark E. Alter, previously nominated and named to the 2013 through 2019 Super Lawyers' List, has again been nominated and now named to the 2020 Super Lawyers List. Mr. Alter was selected in the category of Personal Injury Litigation (Plaintiffs).

Vishnick McGovern Milizio LLP (VMM) partner **Andrew Kimler**, head of the Employment Law, Commercial Litigation, and Alternative Dispute Resolution Practices and key member of the LGBTQ Representation Practice, conducted a live webinar and Q&A on October 1, 2020 with the Home Fashion Products Association (HFPA), titled "Returning to Work During a Pandemic: What You Need to Know." Partner **Joseph Trotti**, head of the firm's Matrimonial & Family Law Practice and a leader of the Surrogacy, Adoption, and Assisted Reproduction, LGBTQ Representation, and COVID-19 Legal Assistance Practices, will be leading a CLE at St. John's University School of Law on January 27, 2021 covering recent developments in family law.

Capell Barnett Matalon & Schoenfeld LLP Partners **Robert Barnett**, **Gregory Matalon**, **Stuart Schoenfeld** and **Yvonne Cort** are presenting multiple lectures at the 18th Annual Accounting and Tax Symposium, organized by the National Conference of CPA Practitioners. The firm is proud to acknowledge its attorneys selected to Thompson Reuters' New York Metro Super Lawyers, including partners Gregory Matalon & Yvonne Cort, and associate **Monica Ruela**, who has been selected to Super Lawyers Rising Stars.

Forchelli Deegan Terrana LLP warmly congratulates **Michael A. Berger**, an attorney in the firm's Employment & Labor practice group, on recently being virtually installed as Treasurer of the Theodore Roosevelt American Inn of Court. Litigation attorneys **Russell G. Tisman** and **Michael A. Ciaffa** will continue to serve as Directors on the Executive Committee. These are one-year terms.

Four Pegalis Law Group attorneys have once again been selected for the highly regarded list, *The Best Lawyers in America*© for 2021. The four attorneys recognized for Plaintiffs Medical Malpractice are: **Steven Pegalis**, a Great Neck resident; **Annamarie Bondi-Stoddard**, a Port Washington resident; **Sanford Nagrotsky**, a Mineola resident; and **Robert Fallarino**, an East Williston resident.

Ellen G. Makofsky of Makofsky Law Group, P.C. was named a 2020 SuperLawyer and received recognition for the sixth time as one of the Top 50 Women SuperLawyers in the New York Metropolitan area which encompasses Long Island, New York and Westchester. Ms. Makofsky is a frequent lecturer and recently presented a webinar entitled "Impending Changes to the New York State Home Care Medicaid Program" on behalf of The Estate Planning Council of Nassau. **Deidre M. Baker**, an associate with Makofsky Law Group, P.C., was named on the 2020 SuperLawyers Rising Stars list in the Elder Law category.

The In Brief column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP, where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

Please email your submissions to nassaulawyer@nassaubar.org with subject line: IN BRIEF

The *Nassau Lawyer* welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content.

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

NCBA Coronavirus Task Force Takes Safety Tour of Supreme Court Building

Photo by Dan Bagnuola

The Hon. Norman St. George, Administrative Judge of Nassau County recently invited NCBA President Dorian R. Glover and members of the Bar's Coronavirus Task Force to tour the Supreme Court to see the protective safety measures and protocols implemented as a result of the COVID-19 pandemic. Task Force members were given an opportunity to ask questions and observe the court's readiness as in-person courthouse proceedings are slowly and deliberately increased.

The tour began at the courthouse doors, moved to the jury assembly area and concluded in the courtrooms, all of which have been reconfigured for jury trials to protect the health and safety of attorneys, litigants, jurors and all court users. The tour demonstrated the essential collaboration and constant communication between the Bench and Bar as they work to provide Access to Justice for one and all.

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To make a donation, contact Bridget Ryan at (516) 747-4070 ext. 1226 or BRyan@nassaubar.org.

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Questions? Contact Stephanie Pagano at (516) 666-4850 or spagano@nassaubar.org for more information.

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Provides a forum for attorneys practicing commercial litigation, including interaction with justices and support staff of Nassau County's Commercial Part. Works with other related committees and NCBA Officers and Directors on issues of corporate law affecting both litigated and non-litigated matters.
Chair: Matthew F. Didora
Vice Chairs: Jeffrey A. Miller and Christopher J. Clarke

COMMUNITY RELATIONS & PUBLIC EDUCATION
Provides speakers to schools, libraries and community organizations; conducts mock trial competition for high school students; promotes Law Day; and plans public education seminars on current topics.
Chair: Joshua D. Brookstein
Vice Chair: Ingrid J. Villagran

CONCILIATION
Provides an alternative voluntary process through which fee disputes between clients and attorneys are arbitrated.
Chair: M. Kathryn Meng
Vice Chair: Steven L. Keats

CONDEMNATION LAW & TAX CERTIORARI
Focuses on issues related to real property valuation and litigation.
Chair: Richard P. Cronin
Vice Chair: Michael P. Guerriero

CONSTRUCTION LAW
Provides a forum for discussion on topics related to construction law.
Chair: Raymond A. Castronovo

CRIMINAL COURT LAW & PROCEDURE
Reviews legislation related to the field of criminal law and procedure, and discusses problems, questions and issues pertinent to attorneys practicing in this field.
Chair: Dana L. Grossblatt
Vice Chair: Diane T. Clarke

DEFENDANT'S PERSONAL INJURY
Discusses new developments and changes in the law that affect defendants' lawyers and their clients.
Chair: Matthew A. Lampert
Vice Chair: Melissa Manna

DISTRICT COURT
Discusses issues arising from practice in District Court, and promotes dialogue between the bench and the bar with respect to issues of common concern.
Co-Chairs: S. Robert Kroll and Roberta D. Scoll

DIVERSITY AND INCLUSION
Encourages more diverse membership participation at the Bar and promotes discussion of issues related to diversity in the practice of law.
Chair: Hon. Maxine S. Broderick
Vice Chair: Rudy Carmenaty

DOMUS (HOUSE)
Oversees repairs and refurbishing of the NCBA headquarters.
Chair: Maureen Dougherty

EDUCATION LAW
Discusses topics related to the legal aspects of school systems.
Co-Chairs: John P. Sheahan and Rebecca Sassouni
Vice Chair: Abigail Hoglund-Shen

ELDER LAW, SOCIAL SERVICES & HEALTH ADVOCACY
Addresses legal issues related to health, mental hygiene and social services for the public and special population groups, including the poor, the aged and the disabled.
Co-Chairs: Katie A. Barbieri and Patricia A. Craig
Vice Chairs: Marianne Anooshian and Suzanne Levy

ENVIRONMENTAL LAW
Establishes a forum for the exchange of information regarding substantive and procedural law in the burgeoning field of environmental matters.
Chair: Nicholas C. Rigano

ETHICS
Responds to member inquiries relating to ethics and propriety of all facets of practicing law, including advertising, conflict of interest and confidential relationships.
Chair: Matthew K. Flanagan
Vice Chairs: Avigael C. Fyman and Mili Makhijani

FAMILY COURT LAW & PROCEDURE
Addresses issues that relate to the practice of law in Family Court.
Chair: Susan G. Mintz
Vice Chair: Lisa Daniels

FEDERAL COURTS
Monitors developments in federal practice and interfaces with federal judges and court personnel.
Chair: David Shargel
Vice Chair: Matthew C. McCann

GENERAL/SOLO/SMALL FIRM PRACTICE MANAGEMENT
Provides networking opportunities for general, solo and small-firm practitioners, and explores ways to maximize efficient law practice management with limited resources. Encompasses a variety of areas of practice.
Chair: Scott J. Limmer

HOSPITAL & HEALTH LAW
Considers legal issues impacting health care, hospitals, nursing homes, physicians, other providers and consumers.
Chair: Leonard M. Rosenberg
Vice Chair: Colleen C. McMahon

IMMIGRATION LAW
Discusses problem areas in immigration law.
Chair: George A. Terezakis
Vice Chair: Lorena E. Alfaro

IN-HOUSE COUNSEL
Shares information and support to assist in-house counsel and new subject matter skills.
Chair: Tagiana Souza-Tortorella

INSURANCE LAW
Reviews insurance claim procedures, insurance policies, substantive insurance law and related issues.

INTELLECTUAL PROPERTY LAW
Provides a source of information to practicing attorneys whose interests relate to patents, trademarks, copyright and other intellectual property matters.
Chair: Frederick J. Dorchak
Vice Chair: Sara M. Dorchak

LABOR & EMPLOYMENT LAW
Analyzes proposed federal and state legislation, administrative regulations, and current judicial decisions relating to employer-employee relations, pension, health and other employee benefit plans, Social Security and other matters in the field of labor and employment law.
Chair: Matthew B. Weinick
Vice Chair: Michael H. Masri

***LAWYER ASSISTANCE PROGRAM**
Provides confidential assistance to attorneys struggling with alcohol, drug, gambling and other addictions & mental health issues that affect one's professional conduct.
** Application & Presidential approval required*
Chair: Jacqueline A. Cara

***LAWYER REFERRAL**
Advises the NCBA Lawyer Referral Service; addresses policy questions regarding fees, law categories and membership. **Presidential approval required*

LEGAL ADMINISTRATORS
Provides a forum for legal administrators to share information, learn about updates to HR and labor law, gain knowledge about topics relevant to their position, and network with other administrators, while at the same time increasing visibility and understanding related to the administrator's role within law firms.
Co-Chairs: Dede S. Unger and Virginia Kawochka

LGBTQ
Addresses equality in the law and the legal concerns of the LGBTQ community.
Co-Chairs: Charlie Arrowood and Byron Chou
Vice Chair: Barrie E. Bazarsky

MATRIMONIAL LAW
Promotes the standards and improves the practice of matrimonial law.
Chair: Samuel J. Ferrara
Vice Chairs: Jeffrey L. Catterson and Karen L. Bodner

MEDICAL LEGAL
Reviews issues relating to medical malpractice litigation for plaintiffs and defendants.
Co-Chairs: Mary Anne Walling and Susan W. Darlington
Vice Chair: Christopher J. DelliCarpini

MENTAL HEALTH LAW
Provides programs on legal issues concerning mental illness and developmental disabilities, including but not limited to, capacity, civil rights, access to treatment and dual diagnosis, as well as discusses relevant statutes, case law and legislation.
Chair: Saundra M. Gumerove
Vice Chair: Suanne Linder Chiacchiaro

MUNICIPAL LAW
Reviews trends and developments concerning zoning and planning, elections, employee relations, open meetings law, and preparation and enforcement of ordinances and local laws.
Co-Chairs: John C. Farrell and Chris J. Coschignano

NEW LAWYERS
Structured events and activities of benefit and interest to newer attorneys (within ten years of admission) and law students, including social and professional activities. Establishes support network for new lawyers.
Co-Chairs: Steven V. Dalton and Glenn R. Jersey, III

PARALEGAL
Promotes the exchange of information between paralegals and attorneys and provides and establishes a networking opportunity between paralegals and attorneys.
Co-Chairs: Maureen Dougherty and Cheryl Cardona

PLAINTIFF'S PERSONAL INJURY
Discusses new developments and changes in the law that affect plaintiff's lawyers and their clients.
Chair: Ira S. Slavit
Vice Chair: David J. Barry

PUBLICATIONS
Solicits and develops articles for the monthly Nassau Lawyer publication; advises and supports efforts of the Nassau Lawyer editor.
Co-Chairs: Christopher J. DelliCarpini and Andrea M. DiGregorio
Vice Chair: Rudy Carmenaty

REAL PROPERTY LAW
Considers current developments relating to the practice of real estate law.
Chair: Alan J. Schwartz
Vice Chair: Jon Michael Probstein

SENIOR ATTORNEYS
Members approximately 65 and older meet to discuss pertinent issues in their personal and professional lives.
Chair: Charles E. Lapp, III

SPORTS, ENTERTAINMENT & MEDIA LAW
Considers topics and factors specifically related to practice in the field of sports, entertainment and media law.
Chair: Seth L. Berman

SUPREME COURT
Provides a forum for dialogue among bar members and the judiciary on topics related to Supreme Court practice.
Chair: William Croutier, Jr.
Vice Chair: Steven Cohn

SURROGATE'S COURT ESTATES AND TRUSTS
Deals with estate planning, administration and litigation; reviews pending relevant New York State legislation; and maintains an interchange of ideas with the Nassau County Surrogate and staff on matters of mutual interest.
Chair: Brian P. Corrigan
Vice Chair: Joseph L. Hunsberger

VETERANS & MILITARY LAW
Reviews legislation and regulations associated with military law and veterans' affairs, in particular, the needs of reservists and National Guard called to active duty.
Chair: C. William Gaylor, III

WOMEN IN THE LAW
Examines current trends regarding women in the court system, and seeks to protect their rights to equal treatment.
Chair: Edith Reinhardt
Vice Chair: Sherwin Figueroa Safir

WORKERS' COMPENSATION
Discusses current legislation related to Workers' Compensation regulations and benefits.
Chair: Adam L. Rosen
Vice Chair: Brian P. O'Keefe

Transgender...

Continued From Page 7

health care.

The bottom line is that there are standards of care for the transgender community that clearly state under what circumstances medical care may be appropriate for a transgender person. Insurance companies are held to those standards of care; Medicaid programs are held to those standards of care. Yet state actors in the penal system often are not. The result is that transgender incarcerated people go without medically necessary care despite a diagnosis that should result in them receiving that care. This can be detrimental to their mental health and physical health—it can be unsafe to abruptly stop hormone therapy without the supervision of a medical professional —and it can also subject them to harassment and discrimination if, for example, the results of their hormone treatment reverse or they have not yet undergone needed surgical intervention and are required to undress or shower in front of neighbors.

Recent Settlements

It is not yet common for states or municipalities to be adequately trained regarding the transgender population. Oftentimes, jurisdictions address questions that arise from housing a transgender person only because they are compelled to.

This summer, the Transgender Legal Defense & Education Fund secured a settlement from the Steuben County Sheriff wherein the County agreed to a variety of new policies and safeguards to ensure transgender people under their supervision are treated with the same care and respect as their cisgender peers.[4] The agreement sets out standards for employee conduct, names and pronouns, commissary and programming, searches, housing, and access to medical and mental health care that serve as a helpful roadmap for other corrections departments seeking to avoid litigation regarding treatment of transgender detainees.

New York City also reached a $5.9 million settlement with the family of a transgender woman, Layleen Polanco, who died while in solitary confinement in 2019 after she suffered an epileptic seizure and jail staff failed to seek medical assistance. She was in jail for a $500 misdemeanor charge. It is common for transgender people to be put in solitary confinement "for their own safety," since being in the general population poses its own risks. Not only does this unfairly punish transgender people further, but it is detrimental to their mental health. While Layleen's death was the result of a medical condition, there is evidence that being perpetually singled out and, for example, being held in segregated housing because of gender could contribute to increased risk of suicide.[5]

Next Steps

While many people think New York is the gold standard for transgender rights, there are many ways in which we are behind the curve or could at least do better. This article began with a statistic that should alarm you: 47% of Black transgender people have been incarcerated at some point in their lives. This is not because Black transgender people are inherently more likely to violate the law. Instead, it is the result of a system that criminalizes the alternative economies transgender people—in particular, transgender women of color—are forced to engage with and a society that assumes that transgender people are necessarily defrauding others and/or involved in devious behavior.

Due to employment and housing discrimination, many transgender people must engage in sex work for survival. Even for those who do not, the New York state penal law contains an anti-loitering provision that allows law enforcement to stop a person on suspicion of being a sex worker. In reality, the reason is allegedly that the person is "loitering for purposes of committing a prostitution offense," but the law leaves it within an officer's discretion to make that assessment based on how long the person has been standing somewhere, what they are wearing, with whom they are associating, etc.[6] Although the state claims to prioritize ending the HIV epidemic, the fact that you are in possession of a condom can actually be used against you to bolster that charge.

S2253/A654 (Hoylman/Paulin)[7] is pending in the New York State Legislature and would repeal what advocates call the "Walking While Trans Ban," which effectively criminalizes existing in New York (especially New York City) as a transgender woman. The Governor has voiced his support, and the bill has majority support in both the State Senate and Assembly, but it has yet to come up for a vote.

Society is not set up in a way that allows transgender people to flourish and thrive. Systems do not assume transgender people exist. Being transgender can complicate every facet of life, and that reality is especially true for justice-involved persons. Broader awareness of these issues is an important first step towards addressing them and prioritizing greater equity in an inherently inequitable system.

Charlie is the Chair of the LGBTQ Committee of the Nassau County Bar Association and a member of the National Trans Bar Association. They are Of Counsel to the Transgender Legal Defense & Education Fund's Name Change Project, and in their private practice they provide transition-related direct services to transgender individuals. Charlie is a parent of two and graduate of Tulane University (B.A. History, 2009) and New York Law School (2013). They are accessible via email at charlie@arrowood.law.

1. National Center for Transgender Equality. (2018). LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights at 5. Available at: https://transequality.org/trans-peoplebehindbars.
2. *Id.* at 6.
3. S. E. James, J.L. Herman, S. Rankin, M. Keisling, L. Mottet & M. Anafi, The Report of the 2015 U.S. Transgender Survey 13 (2016) at 190. http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf
4. https://transgenderlegal.org/stay-informed/tldef-reaches-landmark-settlement-protect-transgender-inmates/.
5. U.S. Trans Survey, *supra* at 10 (40% of transgender respondents attempted suicide in their lifetime).
6. Penal Law § 240.37
7. New York Senate Bill S2253/Assembly Bill A654, 2019-2020 Legislative Session.

Protections ...

Continued From Page 8

Last year, Anthony Lanier, a school bus aide, pled guilty to attempted endangering the welfare of an incompetent person for striking an autistic boy on the bus in the face with the child's shoe.[7] Unlike the case of Mr. Lanier, there were several more alleged instances of abuse of both boys in the Valva case over the course of a few years before Thomas Valva died. Their autism diagnoses render them incompetent for purposes of 260.25. These defendants allegedly punished them for failure to communicate – a symptom of autism. If the statute that exists is inadequate to tack on additional charges against Michael Valva and Angela Pollina, then perhaps the legislature should pass additional endangerment laws that specifically punish defendants who target autistic victims.

Need for Education

In the hypothetical of the dejected date, justice would require the law to judge him through the lens of a man affected by autism—a very subjective one. Since the aggravated harassment statute requires "intent to annoy or harass," the prosecution would have to prove that the man wanted to annoy his disinterested date. Aggravated harassment is a specific-intent crime, whereby he would have to intend for her to be annoyed. However, her annoyance caught him by surprise. Subjectively, he did not know that his words were offensive as indicated by his rationalizations.

The autistic man thought he was asking a perfectly legitimate question. He wanted her to explain her cold shoulder because he lacks the ability to interpret non-verbal social cues, and the only logical way for him to do that was to text her. A fair result would be for the man's conviction to be overturned on appeal because his lack of understanding would negate the intent element as he did not know that what he said would annoy the woman. He did not even realize she was just not interested in him to begin with.

With increasing prevalence of autism, the law needs to adapt to serve this fast-growing population. A greater understanding of the disorder would aid prosecuting attorneys in applying proper discretion in all criminal cases involving those on the spectrum.

Frances Catapano is an attorney whose practice focuses on personal injury, complex litigation, and civil rights. In her spare time, she is a parent and an autism rights advocate.

1. Centers for Disease Contorl and Prevention, *What Is Autism Spectrum Disorder?,* available at https://bit.ly/3dbosd7.
2. Autism Society, *CDC Releases New Prevalence Rates of People with Autism Spectrum Disorder*, available at https://bit.ly/2Fesyo4.
3. *U.S. v. Cottrell*, 333 Fed. Appx. 213 (9th Cir. 2009).
4. RationalWiki, *Matthew Rushin*, available at https://bit.ly/3nxNxn4.
5. Lowry, Lauren, *3 Things You Should Know About Echolalia*, available at https://bit.ly/2FfuUDb
6. Finn, Lisa, *Boy, 8, Froze In "House of Horrors"; Dad Pleads Not Guilty:* DA, Patch.com (Feb. 6, 2020), available at https://bit.ly/3dfKJpS.
7. Reyes, Anthony, *Buffalo Bus Aide Admits to Striking Child With Autism With Shoe*, WKBWcom (Apr. 25, 2019), available at https://bit.ly/33JnMZe.

Testimony ...

Continued From Page 13

Moreover, the use of virtual testimony will allow witnesses to testify in situations where coming to court would pose a significant danger to the health of that witness. Persons are at an increased risk of severe illness or death from COVID-19 if they have pre-existing conditions such as cancer, chronic kidney disease, chronic obstructive pulmonary disease, are immunocompromised, are obese, have a serious heart condition, or are diabetic.[26] In addition, older persons are at an increased risk of severe illness or death from COVID-19, and the risk increases with age.[27] If a witness's age or existing medical condition would make it especially dangerous for them to testify in person then the trial court should consider allowing that witness to testify virtually using video-conferencing software.

The pandemic is not over. To date, in the United States, there have been more than 7 million confirmed COVID-19 cases, more than 200,000 confirmed COVID-19 deaths, and over 300,000 new confirmed COVID-19 cases in just the last week of September 2020.[28] To date, in New York, there have been more than 460,000 confirmed COVID-19 cases, more than 32,000 confirmed COVID-19 deaths, and over 5,000 new confirmed COVID-19 cases in just the last week of September 2020.[29] Therefore, there is a substantial likelihood that a material witness will be physically unable to come to court or unable do so without endangering their health due to the COVID-19 pandemic.

Fortunately, the use of video-conferencing software to present virtual testimony in criminal trials is convenient, effective, and safe. It ensures that both prosecutors and defense attorneys can present material testimony even if a witness is physically unable to come to court. It protects the rights of defendants under the Confrontation Clauses and helps ensure a fair and speedy trial. And, it reduces the risk that a witness could receive or transmit a dangerous viral infection to or from a judge, juror, attorney, court officer, police officer, court staff member, or the defendant.

Christopher M. Casa is a Senior Assistant District Attorney in the Vehicular Crimes Bureau of the Nassau County District Attorney's Office.

1. 497 U.S. 836 (1990).
2. *Id.* at 837.
3. 14 N.Y.3d 33 (2009).
4. *Wrotten*, 14 N.Y.3d at 37.
5. *Wrotten*, 14 N.Y.3d at 40.
6. 110 A.D.3d 153 (2d Dept. 2013).
7. 144 A.D.3d 479, 480-481 (1st Dept. 2016).
8. 25 N.Y.3d 448, 454 (2015).
9. *Bush v. State*, 193 P.3d 203, 215-216, 2008 WY 108 (2008).
10. *State v. Sewell*, 595 N.W.2d 207, 210 (Minn. Ct. App. 1999).
11. *Harrell v. State*, 709 So.2d 1364, 1368-1371 (1998).
12. *Wrotten*, 14 N.Y.3d at 40, n.3.
13. Study of State Trial Courts Use of Remote Technology, State Justice Institute, Apr. 2016 (https://bit.ly/2S9cfvA).
14. 166 F.3d 75, 80-82 (2d Cir. 1999).
15. *Id.*
16. *Id.*
17. *Id.*
18. *See Craig*, 497 U.S. at 845-846; *Gigante*, 166 F.3d at 80.
19. *Wrotten*, 14 N.Y.3d at 40.
20. *Wrotten*, 14 N.Y.3d at 38-39.
21. *Wrotten*, 14 N.Y.3d at 37.
22. 144 A.D.3d at 480-481.
23. *See Craig*, 497 U.S. at 845-846; *Wrotten*, 14 N.Y.3d. at 39; *Gigante*, 166 F.3d at 80.
24. 41 Misc.3d 733, 735 (County Cot., Sullivan County 2013).
25. COVID-19 Travel Advisory, New York State Department of Health, September 22, 2020 (https://on.ny.gov/3jLSE0O).
26. People with Certain Medical Conditions, Centers for Disease Control and Prevention, Sept. 28, 2020 (https://bit.ly/34E20Fr).
27. Older Adults, Centers for Disease Control and Prevention, Sept. 28, 2020 (https://bit.ly/34IDDq3).
28. Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, Sept. 28, 2020 (https://bit.ly/3depRPX).
29. *Id.*

We Welcome the following New Members

Victoria A. Curran
Akilah Folami
Alexander Ross Gilbert
Jonathan A. Moskowitz
James P. Rosenzweig

Students

Mary Diana Fatscher

NCBA Committee Meeting Calendar
Nov. 5—Dec. 9, 2020

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change. Check www.nassaubar.org for updated information.

LEGAL ADMINISTRATORS
Dede S. Unger/Virginia Kawochka
Thursday, November 5
12:30 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, November 5
12:45 p.m.

PUBLICATIONS
Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, November 5
12:45 p.m.

CIVIL RIGHTS
Bernadette K. Ford
Thursday, November 12
12:30 p.m.

MATRIMONIAL LAW
Samuel J. Ferrara
Thursday, November 12
5:30 p.m.

INTELLECTUAL PROPERTY
Frederick J. Dorchak/Sara M. Dorchak
Monday, November 16
12:30 p.m.

LABOR & EMPLOYMENT LAW
Matthew B. Weinick
Monday, November 16
12:30 p.m.

LGBTQ
Charlie Arrowood/Byron Chou
Tuesday, November 17
9:00 a.m.

BUSINESS LAW, TAX AND ACCOUNTING
Jennifer A. Koo/Scott L. Kestenbaum
Tuesday, November 17
11:00 a.m.

GENERAL SOLO SMALL PRACTICE MANAGEMENT
Scott J. Limmer
Tuesday, November 17
12:30 p.m

PLAINTIFF'S PERSONAL INJURY
Ira S. Slavit
Tuesday, November 17
12:30 p.m.

MUNICIPAL LAW
Chris J. Coschignano/John C. Farrell
Tuesday, November 17
3:00 p.m.

ELDER LAW SOCIAL SERVICES HEALTH ADVOCACY
Katie A. Barbieri/Patricia A. Craig
Tuesday, November 17
5:30 p.m.

DIVERSITY & INCLUSION
Hon. Maxine Broderick
Tuesday, November 17
6:00 p.m.

WOMEN IN THE LAW
Edith Reinhardt
Wednesday, November 18
8:30 a.m.

APPELLATE PRACTICE
Jackie L. Gross
Wednesday, November 18
12:30 p.m.

ASSOCIATION MEMBERSHIP
Michael DiFalco
Wednesday, November 18
12:30 p.m.

EDUCATION LAW
John P. Sheahan/Rebecca Sassouni
Thursday, November 19
12:30 p.m.

HOSPITAL & HEALTH LAW
Leonard M. Rosenberg
Thursday, November 19
12:30 p.m.

SURROGATE'S COURT ESTATES & TRUSTS
Brian P. Corrigan
Thursday, November 19
5:30 p.m.

DISTRICT COURT
Roberta D. Scoll/S. Robert Kroll
Friday, November 20
12:30 p.m.

CRIMINAL COURT LAW & PROCEDURE
Dana L. Grossblatt
Tuesday, November 24
12:30 p.m.

REAL PROPERTY LAW
Alan J. Schwartz
Wednesday, December 2
12:30 p.m.

PUBLICATIONS
Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, December 3
12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, December 3
12:45 p.m.

CIVIL RIGHTS
Bernadette K. Ford
Tuesday, December 8
12:30 p.m.

LABOR & EMPLOYMENT LAW
Matthew B. Weinick
Tuesday, December 8
12:30 p.m.

WOMEN IN THE LAW
Edith Reinhardt
Wednesday, December 9
12:30 p.m.

MATRIMONIAL LAW
Samuel J. Ferrara
Wednesday, December 9
5:30 p.m.

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